IN THE
SUPREME COURT OF MISSOURI
No. SC93855

STATE OF MISSOURI,

Respondent,

vs.

DAVID RUSSELL HOSIER,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
19TH JUDICIAL CIRCUIT, COLE CO. NO. 09AC-CR02972-01
THE HONORABLE PATRICIA S. JOYCE, JUDGE

APPELLANT'S REPLY BRIEF

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INDEX

TABLE OF AUTHORITIES

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

***STATUTES*:**

ARGUMENT

I.

The trial court erred in overruling David's Motion to Suppress Physical Evidence and in admitting into evidence items seized from his car, and all testimony concerning that evidence, because this violated David's right to be free from unreasonable searches and seizures as guaranteed by the 4th Amendment to the U.S. Constitution and Article I, § 15 of the Missouri Constitution, in that the Missouri ping order that was obtained to locate David, which resulted in officers finding, stopping, and arresting David in Oklahoma, was not based upon probable cause because the affidavit supporting the application for that order merely asserted that David had "been identified as the primary suspect in the homicide investigation" without any factual support for that conclusory assertion; and all evidence seized as a result of the ping order and David's subsequent detention were fruits of this poisonous tree. Further, the good faith exception is inapplicable because the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.

Introduction

The central issue here is: Were law enforcement officers required to get a search warrant supported by probable cause before they searched for and tracked David's cell phone location by "pinging" his cell phone?

If a warrant supported by probable cause was required, then David is entitled to a new trial because the affidavit supporting the ping order obtained by the officers did not show probable cause; it only alleged the conclusory statement that "David R. Hosier has been identified as the primary suspect in the homicide investigation" (Motion Exhibit No. 1), which was insufficient to satisfy a probable cause standard. *See*, *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 564-65 (1971), holding that an affiant must present more than the affiant's conclusion that the individual named perpetrated the offense described in the affidavit.

David had an expectation of privacy in not being tracked through his cell phone

Clearly, tracking a person's movements through a cell phone implicates privacy concerns. The United States Supreme Court recently, and unanimously, recognized that "[m]odern cell phones are not just another technological convenience. With all they contain and all they may reveal they hold for many Americans 'the privacies of life.'[*Boyd v. United States*, 116 U.S. 616, 630 (1886).] The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought." *Riley v. California*, -- U.S.. --, 134 S.Ct. 2473, 2494-95 (2014) (holding that the police must get a warrant before searching a cell phone seized incident to an arrest).

Data on a cell phone can reveal where a person has been. Many smart phones can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building. *See, U.S. v. Jones*, 565 U.S. --, 132 S.Ct. 945, 955 (2012) (Sotomayor, J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious and sexual associations.").

To determine whether a search occurs when law enforcement uses tracking technology to which a physical trespass on a defendant's property does not apply,[1] the courts apply the test set forth in *Katz v. U.S.*, 389 U.S. 347 (1967), which asks

[1] David's opening brief asserted that the cell phone pinging involved a trespassory intrusion (App.Br. at 48-50). Pinging is an active, outside interference with and control over a phone's function without the owner's consent. *In Re Application of U.S. for an Order Authorizing Disclosure of Location Information of a Specified Wireless Telephone*, 849 F.Supp.2d 526, 538 (D.Md. 2011). There was a trespass to chattels since by pinging the cell phone, authorities sent unwanted signals that forced David's phone to do something that he did not know about or want. Justice Alito's concurring opinion in *Jones* noted that while, traditionally, trespass to chattels has required a physical touching of the property, recently courts have applied this old tort in cases involving unwanted electronic contact with computer systems. *Jones*, 132 S.Ct. at 962 (Alito, J., concurring).

whether the government violates a subjective expectation of privacy that society recognizes as reasonable. *Jones*, 132 S.Ct. at 954-55. "[T]he same technological advances that have made possible nontrespassory surveillance techniques … also affect the *Katz* test by shaping the evolutions of societal privacy expectations." *Jones*, 132 S.Ct. at 955 (Sotomayor, J., concurring); *Jones*, 132 S.Ct. at 963 (Alito, J., concurring ("phone-location-tracking services [that] are offered as 'social' tools … shape the average person's expectations about the privacy of his or her daily movements").

Respondent asserts that David was not entitled to protection under the Fourth Amendment because: 1) David was on a public highway when officers located him and he had no reasonable expectation of privacy in cell location signals on a public highway (Resp.Br. at 40-45); and, 2) David had "[n]o reasonable expectation of privacy in third-party business records" (Resp.Br. at 45-53).

David had a reasonable expectation of privacy of not being tracked through his cell phone even though he was ultimately located on a public highway

Relying upon *U.S. v. Knotts*, 460 U.S. 276 (1983), Respondent asserts that David "had no reasonable expectation of privacy in his location along public thoroughfares or in the cell location data which a cell phone that he voluntarily purchased and chose to accompany him emitted as a proxy for that location." (Resp.Br. at 40-45). Respondent's argument is basically that because all of the cell

phone pinging in this case may have taken place while David was in a motor vehicle on a public highway,[2] he cannot be said to have a subjective expectation of privacy because his location was in fact public.

Decisions that have applied *Knotts* to cellular site location information (CSLI) are divided, with some courts finding that the Fourth Amendment requires that police get a warrant to obtain CSLI and some finding that the government's use of CSLI to get a general location does not violate the Fourth Amendment. *See State v. Earls*, 214 N.J. 564, 70 A.3d 630, 639-40 (2013) (collecting cases).

The problem with Respondent's "public place" argument is twofold. First, modern cell phones blur the historical distinction between public and private areas because cell phones emit signals from both places. *Earls*, 70 A.3d at 642. The information in question would have been transmitted to law enforcement by the pinging regardless of David's location – at his home, at some business, or on a public highway. Thus, unlike a beeper placed in a container loaded on a motor vehicle, *Knotts*, David's location was not derived in any respect *because* he was in a motor vehicle and thus had voluntarily exposed his location to the public. Unlike the beeper used in *Knotts*, CSLI does more than simply aid visual surveillance in public areas. *Earls*, 70 A.3d at 642-43. It is like using a tracking device and can

[2] Undoubtedly there were times when he was not driving; the record is unclear where, if anywhere, David stopped. The ping order was for 60 days and did not limit the pinging to times when David was in a public place.

function as a substitute for 24/7 surveillance without police having to confront the limits of their resources. *Id*. at 642. Thus, it involves an intrusion that a reasonable person would not anticipate. *Id*., citing *Jones*, 132 S.Ct. at 964 (Alito, J., concurring).

Second, because law enforcement did not know David's actual location or path of travel, there was no means of tracking his movements using traditional surveillance methods and publicly available technology. Officers had no way of knowing in advance whether his cell phone was being monitored in a public or private space. *Earls*, 70 A.3d at 642. Instead, his location was obtained *solely* through the use of nonpublic technology that could have revealed his presence in his own home even if that fact was not evident from visual surveillance. *See Kyllo v. U.S.*, 533 U.S. 27, 40 (2001) ("Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant.").

Thus, the distinction between tracking in public and private spaces is eroded in the case of CSLI, which can be used to track movements across both public and private spaces. A Fourth Amendment analysis entirely dependent upon the fortuity of an accused entering his or her own home during the pinging process is unworkable. *Earls*, 70 A.3d at 642.

When law enforcement contemplates tracking a cell phone, they may not know whether the phone is located in a private residence, which stands at the

"very core" of the Fourth Amendment, or is traveling down a public highway, in which case a defendant may have no expectation of privacy in its movement. Contrast *Kyllo* with *Knotts*. But even movements in public areas can reveal highly personal information such as "familial, political, professional, religious, and sexual associations," which if monitored too closely, may "chill[]associational and expressive freedoms." *Jones*, 132 S.Ct. at 955-56 (Sotomayor, J., concurring).

In *Jones*, 132 S.Ct. at 955, 964, five Justices of the United States Supreme Court concluded that GPS tracking of a vehicle, at least for more than a short period of time, intruded on the defendants' reasonable expectation of privacy. Because of the nature of cell phone use and technology, however, cell phone tracking raises even greater privacy concerns than a GPS tracking device. *Commonwealth v. Augustine*, 467 Mass. 230, 4 N.E.3d 846, 861 (2014). The expectation that a cell phone will not be tracked is even more acute than the expectation that cars will not be tracked because people are only in their cars for discrete periods of time, but they carry their cell phones with them practically everywhere. Modern cell phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley*, 134 S.Ct. at 2484.

In contrast to a GPS device attached to a vehicle, because a cell phone is carried on the person of its user, it tracks the user's location far beyond the limitations of where a car can travel. *See, U.S. v. Powell*, 943 F.Supp.2d 759 (E.D. Mich.2013) ("There are practical limits on where a GPS tracking device attached

[to] a person's vehicle may go. A [cell phone], on the other hand, is usually carried with a person *wherever* they go").Thus, cell phone tracking has the potential to track a cell phone user's location in constitutionally protected areas. *Augustine*, 4 N.E.3d at 861-62, 864; *Earls*, 70 A.3d at 642-43; *Powell*, 943 F.Supp.2d at 759.

Because of this concern, this Court should hold that a person has a privacy interest in not being tracked by law enforcement through his or her cell phone unless officers secure a warrant supported by probable cause. "Having a clear set of rules serves two key goals. It protects legitimate privacy interests and also gives guidance to law enforcement officials who carry out important public safety responsibilities." *Earls*, 70 A.3d at 632. *Also see*, *In Re Application of U.S. for an Order Authorizing Disclosure of Location Information of a Specified Wireless Telephone*, 849 F.Supp.2d 526, 538 (D. Md. 2011) ("[I]t is impossible for law enforcement agents to determine prior to obtaining real-time location data whether doing so infringers upon the subject's reasonable expectation of privacy and therefore constitutes a Fourth Amendment search.").

As Justice Alito noted in his concurring opinion in *Riley*, the nature of a cell phone "calls for a new balancing of law enforcement and privacy interests." *Id*. at 2496-97. This Court should strike that balance toward requiring law enforcement officers to secure a search warrant supported by probable cause before they track a person by having the cellular service provider ping the person's phone. If the officers do not have probable cause, then the person's privacy interests should be protected. On the other hand, if the officers have probable

cause, then the individual's privacy interests must yield to law enforcement. Without this bright line, uncertainty would exist until after the suspect was located; the constitutionality of the search might depend upon where the suspect was located by the pinging – in a public area or a private area. But this would not be known at the time the pinging commenced.

Third-party business records

"Privacy comes at a cost." *Riley*, 134 S.Ct. at 2493. "Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." *Id*. at 2488-89.

Respondent argues that David was not entitled to Fourth Amendment protection for his cell phone location because there is no reasonable expectation of privacy in "third-party business records" (Resp.Br. at 45-53). But as Justice Sotomayor observed in her concurring opinion in *U.S. v. Jones*, --- U.S. --, 132 S.Ct. 945 (2012), an approach premised on a belief that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties, e.g., *Smith v. Maryland*, 442 U.S. 735, 742 (1979), *U.S. v. Miller*, 425 U.S. 435, 443 (1976), "is ill suited to the digital age, in which people reveal a great deal of information about themselves to their parties in the course of carrying out mundane talks." *Jones*, 132 S.Ct. at 957 (Sotomayor, concurring). Justice Sotomayor elaborated:

> People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers…. I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.

Id.

People do not buy cell phones to have them serve as government tracking devices. They do not expect the government to track them by using location information the government gets from cell phones. Cell site data transmitted during the registration process are not dialed or otherwise controlled by the cell phone user. *In re Application for Pen Register & Trap/Trace Device with Cell Site Location Auth.*, 396 F. Supp. 2d 747, 751 (S.D. Tex. 2005). This registration process automatically occurs even while the cell phone is idle. *Id.* Moving from one service area to another triggers the registration process anew. *Id*. The cell site can even initiate registration on its own by sending a signal to the cell phone

causing the phone to transmit and identify itself, *id*., which is what occurs when the phone is pinged.

Thus, the Third and Eleventh Circuits have concluded that a cell phone customer does not voluntarily share his or her location information with a cellular provider in any meaningful way.

In *U.S. v. Davis*, 754 F.3d 1205, 1217 (11th Cir. 2014),[3] the Eleventh Circuit Court of Appeals rejected the use of the third-party doctrine in evaluating whether government access to CSLI was a search, reasoning that because the defendant probably had no idea that he was allowing the cell phone provider to follow his movements, he had "not voluntarily disclosed his cell site location information to the provider in such a fashion as to lose his reasonable expectation of privacy." *Davis*, 754 F.3d at 1217. The court noted that "it is unlikely that cell phone customers are aware that their cell phone providers collect and store historical location information." *Id.*

Similarly, the Third Circuit also rejected the use of the third-party doctrine in evaluating whether government access to CSLI was a search:

> A cell phone customer has not "voluntarily" shared his location information with a cellular provide in any meaningful way….[I]t is unlikely that cell

[3] On September 4, 2014, the panel's opinion in *Davis* was vacated after the Eleventh Circuit granted petitions for rehearing and ordered that the case be reheard en banc. *U.S. v. Davis*, 2014 WL 4358411.

> phone customers are aware that their cell phone providers *collect* and store historical location information. Therefore, "[w]hen a cell phone user makes a call, the only information that is voluntarily and knowingly conveyed to the phone company is the number that is dialed and there is no indication to the user that making that call will also locate the caller; when a cell phone user receives a call, he has not voluntarily exposed anything at all.

In re Application of U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose to Gov't, 620 F.3d 304, 317-18 (3d. Cir. 2010).

The Supreme Judicial Court of Massachusetts has also refused to apply the third-party doctrine concerning compelled disclosure of CSLI. In *Augustine*, the court held that "the nature of cellular telephone technology and CSLI and the character of cell phone use in our current society render the third-party doctrine of *Miller* and *Smith* inapposite; the digital age has altered dramatically the societal landscape form the 1970s, when *Miller* and *Smith* were written." *Augustine*, 4 N.E.3d at 859.

In distinguishing *Smith*, which involved law enforcement's installation of a pen-register on the defendant's phone – a mechanical device that records the telephone numbers dialed on the telephone – the *Augustine* court found a significant difference between the pen-register in *Smith* and the location information found in CSLI records:

> the record of telephone numbers dialed [*Smith*], was exactly the same information that the telephone subscriber had knowingly provided to the

> telephone company when he took the affirmative step of dialing the calls. The information conveyed also was central to the subscriber's primary purpose of owning and using the cellular telephone; to communicate with others. No cellular telephone user, however, voluntarily conveys CSLI to his or her cellular service provider in the sense that he or she first identifies a discrete item of information or data point like a telephone number … and then transmits it to the provider.

Id. at 862.

It is especially appropriate not to apply the third-party doctrine in this case because the disclosure of David's cell phone data location did not occur in the ordinary course of providing cellular phone service. Rather, it occurred pursuant to a special procedure not available to the general public, initiated solely by law enforcement, without notice or any volitional activity by David other than having his phone turned on. Cell phone users do not expect their cell phones to be pinged in the ordinary course of business. Thus, David's case is distinguishable from *Smith* and *Miller* as pinging simply is not part and parcel of the provision of cell phone service. *See Augustine*, 4 N.E.3d at 863 ("Moreover, the government here is not seeking to obtain information provided to the cellular service provider by the defendant. Rather it is looking on for the location-identifying by-product of the cellular telephone technology …"). Other courts have refused to apply the third-party doctrine in cases involving CSLI. *Earls*, 70 A.3d at 641-42 (on State constitutional grounds); *In re U.S. for an Order Authorizing the Release of*

Historical Cell-Site Info., 809 F.Supp.2d 113, 120-126 (E.D.N.Y. 2011). This Court should follow these cases and protect the important privacy issues involved in this case, which will impact future cases as well.

State failed to make a probable-cause showing to get real-time CSLI

The affidavit supporting the ping order alleged that David "has been identified as the primary suspect in the homicide investigation," and that the establishment of a trap and trace precision locator was "essential to the ongoing investigation as it is crucial that David Hosier is apprehended as expeditiously as possibly (sic) to obtain key evidence relevant to the ongoing criminal investigation" (Motion Exhibit No. 1). The affidavit failed to set forth facts or circumstances from which a judge could find probable cause. Nothing supported the conclusory statement that David was "the primary suspect." Thus, the affidavit was deficient. *Whiteley*, 401 U.S. at 564-65.

Respondent points to other evidence present in this case to argue that probable cause existed (Resp.Br. at 62-64). But that evidence *cannot* be considered because it was not included in the application for the ping order. Probable cause must be within the four corners of the application and/or supporting affidavits. *State v. Neher*, 213 S.W.3d 44, 49 (Mo.banc 2007).

The good faith exception does not apply

Respondent asserts that even if this Court finds that David had a reasonable expectation of privacy in his cell phone location, which was protected by the Fourth Amendment, that the "good faith" exception to the exclusionary rule applies in this case (Resp.Br. at 64-66). Respondent's assertion is based on the fact that law enforcement officers in David's case got an order from a judge pursuant to the Stored Communications Act (SCA), 18 U.S.C. § 2703, and at that time there had been no "governing decision of this Court, the Eighth Circuit, or the United States Supreme Court which held that orders issued under the SCA are unconstitutional under the Fourth Amendment" (Resp.Br. at 65).

David addressed this issue in his opening brief. As noted there, the United States Supreme Court has held that this exception to the exclusionary rule does not apply if the affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *U.S. v. Leon*, 468 U.S. 897, 923 (1984). Here, the affidavit alleged no facts; it alleged that "*David R. Hosier has been identified as the primary suspect in the homicide investigation*" (Motion Exhibit No. 1). It is difficult to conceive of an affidavit having less indicia of probable cause. If the affidavit here does not fall within the "lacking in indicia of probable cause" language of the *Leon* good-faith exception, then none would.

Further, a court order for disclosure under 18 U.S.C. § 2703(d) of the SCA "shall issue only if the governmental entity offers *specific and articulable facts shown* that there are reasonable grounds to believe that the … records or other

information sought are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d) (emphasis added).[4] There were no "specific and articulable facts" alleged in the affidavit. Again, it is so lacking in facts as to render official belief in its validity entirely unreasonable even under the lesser standard allowed under some circumstances in the SCA. *Leon*, 468 U.S. at 923. An affidavit is lacking in indicia of probable cause if it contains only "suspicions, beliefs, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge." *Powell,* 943 F.Supp.2d at 784 (citation omitted). That description perfectly fits the affidavit in this case. The good-faith exception to the exclusionary rule is not available here.

This issue is preserved for appeal

Respondent takes the extreme position that David failed to properly preserve this issue on appeal because his motion to suppress physical evidence did not use the phrase "ping order" in it (Resp.Br. at 38). Although those words are not in the motion to suppress, this issue is nonetheless preserved for appeal

[4] It also has been held that the SCA does not authorize the government to obtain prospective or "real-time" cell site data, which reveals user's physical location when the cell phone is turned on. *In re Application for Pen Register & Trap/Trace Device with Cell Site Location Auth.*, 396 F.Supp.2d 747, 758-65 (S.D.Tex 2005). Thus, a good-faith reliance on the SCA would be inappropriate.

because during the motion to suppress hearing there was both evidence presented and argument made concerning the validity of the ping order.[5]

David's motion to suppress physical evidence asserted that the stop and seizure of David, his car, and the items contained within it violated David's constitutional rights under the Fourth Amendment to the United States Constitution (LF138-41).

At a hearing on that motion to suppress, the State introduced the ping order into evidence (Motion Exhibit No. 1) and had two witnesses testify about it (Tr.63-64, 74-75, 77-79, 81-82, 84-88). Thus, the State clearly understood that David's motion challenged the ping order, among other things.

The trial court also was put on notice that the ping order was an issue. After the evidence was presented at the motion to suppress hearing, David argued to the trial court that the officers did not show that they had probable cause to get the ping order (Tr.105). David gave as a ground why the evidence seized in his car should be suppressed that the "probable cause information" was "deficient in the warrant request for the ping" (Tr. 105-106). David also argued that the court

[5] If this Court disagrees, it should grant plain error review, Rule 30.20, because David's conviction was obtained in large part as a result of the STEN submachine gun found in his car after the illegal stop, which was portrayed at trial by the State as the murder weapon; thus, a manifest injustice would have resulted from the admission of the murder weapon if it had been illegally seized.

should suppress all evidence that was the fruit of an unlawful stop because the initial information acted upon by the officers was not sufficient to justify seeking David's "personal information from the phone company" (Tr.106).

The trial court overruled the motion to suppress without giving a basis for the ruling (LF12). At trial, David renewed his objection to all the searches that occurred (Tr.751, 1055-56, 1090, 1093, 1096, 1115). In David's motion for new trial, he alleged, in part, that the trial court erred when it overruled David's continuing objection and allowed introduction of testimony, photographs, and physical evidence of items unlawfully seized from David and his car (LF432-433; claims 20 and 21).

There was no "sandbagging" as argued by Respondent (Resp.Br. at 39). A motion to suppress was filed, the State presented evidence concerning the ping order, the State and defense counsel questioned witnesses about the ping order, and defense counsel argued that the motion to suppress should be granted because the officers did not show that they had probable cause to get the ping order (Tr.105) (e.g., "probable cause information" was "deficient in the warrant request for the ping" (Tr. 105-106)). This point is properly preserved for appeal.

IV.

The trial court abused its discretion in overruling David's objections and allowing the State to parade testimony and evidence concerning numerous weapons and ammunition unrelated to the murder for which David was being tried, because this denied David his rights to due process, a fair trial, and to be tried for the offense with which he is charged, as guaranteed by the 6th and 14th Amendments to the United States Constitution and by Article I, §§ 10 and 18(a) of the Missouri Constitution, in that these weapons and ammunition were not directly connected to the murder, were inherently prejudicial, and had no probative value since they could not assist the jury in deciding any of the issues presented in the case because the evidence was uncontroverted that the murder weapon fired 9-millimeter ammunition, and thus David's possession of weapons and ammunition that could not have been involved in the murder were neither logically nor legally relevant and served only to color David's character as someone tending to possess dangerous weapons

David was indicted in Cole County, Missouri, for murder in the first degree, *§ 565.020*, armed criminal action, *§ 571.015*, the class B felony of burglary in the first degree, *§ 569.160*, and the class C felony of unlawful possession of a firearm by a felon, *§ 571.070, RSMo Supp. 2009* (LF24-26).[6]

The first-degree murder count alleged that David shot Angela Gilpin (LF 24). At trial, the State presented testimony and argument that the gun used to shoot Angela was a STEN submachine gun (Tr. 1205-12, 1406-07, 1433-35). The unlawful use of a weapon charge alleged that on the day of the murder, that David knowingly possessed that submachine gun in Cole County, Missouri, and that he had a prior felony Indiana conviction for "assault/battery" (LF25).

If the jury found that David shot Angela with the STEN submachine gun, it would necessarily find that he was a felon in possession of a firearm since one has to possess a firearm to shoot it. Thus, the only real issue at trial was whether the State proved that David shot Angela with the submachine gun later found in his possession in Oklahoma.

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[6] Although it was a double homicide, the State elected to proceed on only one charge, presumably to give them a second chance at getting a death verdict if the first jury recommended a sentence of life without probation or parole. The addition of a felon in possession count allowed the jury to hear what it normally could not hear unless David testified – that he had a prior felony battery conviction from Indiana.

Not content with showing the jury that David was stopped in Oklahoma in possession of what the State alleged to be the murder weapon – the STEN submachine gun - the State also introduced into evidence 14 other firearms and boxes of ammunition that were found in David's car; these other firearms and ammunition could not have been used during to shoot Angela (Tr. 1066-68, 1070-71, 1076, 1078, 1086-87, 1091-94, 1096, 1108, 1114-15, 1204-05).

Aside from the STEN, there were: High Standard .22 revolver; 1910 .32-calbier pistol; Smith and Wesson .38 Special; Remington model 742; Ithaca .22 lever action; Stevens model 59A; LC Smith side-by-side shotgun; SKB 12-gauge shotgun; Stevens .22; Springfield .22 automatic; unknown make rifle with scope; Mosin Nagant rifle; US Springfield model 1903; and Remington model 03-A3 (Tr. 1055-56, 1083-84; State's Exhibit Nos. 225-238). All of the weapons were loaded except for the STEN submachine gun (Tr. 1067, 1097-1101). The jury was shown enlarged photographs of the weapons on a screen in the courtroom (Tr. 1085).

Although this arsenal of firearms and ammunition could not have been used to commit the murder, Respondent argues that they were "probative" evidence concerning the felon in possession charge, which charged that David only possessed one gun in Cole County, Missouri – the submachine gun (Resp.Br. at 84). *Contrast*, *State v. Holbert*, 416 S.W.2d 129, 132-33 (Mo. 1967), where this Court found it to be reversible error to introduce in evidence two guns found in Holbert's possession when he was arrested on a charge of carrying a third gun as a concealed weapon.

Respondent does not elaborate on exactly how the arsenal of weapons found in David's possession in Oklahoma was probative to the submachine gun possessed in Cole County, other than to argue that the evidence suggests that those weapons were also likely possessed in Missouri (Resp.Br. at 84-85, 87).[7]

But even if this Court finds that the arsenal was minimally probative, which David contests, that does not mean that the firearms were admissible. The admissibility of evidence requires both logical and legal relevance to the offenses for which the defendant is standing trial. *State v. Anderson*, 76 S.W.3d 275, 276 (Mo.banc 2002). Logically relevant evidence is admissible only if legally relevant. *Id*. "Legal relevance weighs the probative value of the evidence against its costs - unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness." *Id*. Logically relevant evidence is excluded if its costs outweigh its benefits. *Id*. "A conviction may be reversed when a weapon admitted into evidence is unconnected to the crime and not similar to the weapon involved in the crime." *State v. Black*, 50 S.W.3d 778, 786 (Mo. banc 2001).

[7] David also had a storage shed that was located in Holts Summit, MO, which is located in Callaway County, Missouri (Tr.1110, 1153). Among the items in the shed were ammo cans, ammunition, two stocks for a STEN gun, magazines that appeared to be consistent with the STEN gun, bandoleers that contained live ammunition, and shell casings (Tr.1111, 1117-21, 1123-24, 1308-09).

The only case cited by Respondent's brief explicitly dealing with the issue of legal relevance is *State v. Edwards*, 31 S.W.3d 73 (Mo. App. W.D. 2000), where the court affirmed first-degree assault and armed criminal action convictions. That case is distinguishable on many different levels. On appeal, Edwards challenged the admission of two knives that were found at the victim's and Edwards' home after the police searched for evidence following a knifing by Edwards against the victim. *Id*. at 80-81. Edwards complained that the State failed to prove that the knives found were involved with the stabbing, although one did have blood on it and was bent. *Id*. at 80.

The Western District did not find that the admission of the knives "was prejudicial error on the facts of this case." *Id*. The court first noted that a detective was permitted to testify, without objection, how police found the weapons during a search of the home. *Id*. Defense counsel did not object to the detective's testimony about the knives; he objected only to the introduction of the knives into evidence. *Id*. at 81. Once admitted, the officers later explained that they could not determine whether or not the knives were used by Edwards to stab the victim. *Id*.

The Western District found that while neither knife was shown to have been the one used to stab the victim, both were found at the scene of the crime shortly after it occurred; one had blood on it, and the other was in a sink of water the officers reasonably could have though that it might have been used to commit the crime and been placed in the sink to wash off the blood or conceal its presence.

Id. at 82. Thus, the appellate court could not say on the facts presented that the knives had no probative value or had no connection with the crime. *Id*.

Further, the only issue raised on appeal was whether the trial court erred in admitting the weapons in evidence as exhibits, but the detective was permitted to testify about finding the knives without objection, and in fact defense counsel questioned the detective about them and argued their irrelevance, and allowed the State to argue their relevance without objection, and Edward did not claim on appeal that that was error. *Id*. Thus, even if the admission of one or both of the knives into evidence was erroneous, the Western District was convinced that it could not have been prejudicial since if evidence is improperly admitted but other evidence before the court established essentially the same facts, there is no prejudice. *Id*.

David's case does not suffer the same problems as *Edwards*. The other firearms were not found at the scene. Although the knives in *Edwards* were not proven to be used during the assault, they could have been; whereas the 14 other firearms in David's case could not have been used to shoot the victims. And no other evidence about the other firearms was admitted without objection, whereas in *Edwards*, evidence about the knives came in without objection and established essentially the same facts.

Respondent also argues that because of the "massive number of guns and the massive amount of ammunition" found in David's apartment and storage unit, the evidence was not prejudicial (Resp.Br. at 87). Although ammunition and parts

of guns were found at the apartment and storage unit, there were no firearms found in either place. Respondent has not established that the error in admitting the 14 firearms was harmless beyond a reasonable doubt.

This Court has long identified the unfair prejudice of introducing weapons not connected to the crime, reasoning that the sight of deadly weapons "tends to overwhelm reason and to associate the accused with the atrocity without sufficient evidence." E.g., *State v. Wynne*, 353 Mo. 276, 182 S.W.2d 294, 299-300 (1944) and *Anderson, supra* (defendant charged with robbery and armed criminal action - a brochure of a handgun found in the defendant's home was not legally relevant and unfairly prejudiced him).

In *Anderson*, this Court held that a brochure of a handgun was not as "overwhelming to the jury as introduction of a gun itself," but still found that it "unfairly prejudiced Defendant." 76 S.W.3d at 277. Here, there was far more prejudice - 14 other handguns and boxes of ammunition that were not connected to the charged crimes. This Court in *Anderson* even acknowledged that the introduction of "a gun" can be "overwhelming to the jury." *Id*. Here, there were 14 guns. In *Anderson*, this Court also noted that there were only seven questions of the Defendant and a brief identification by the detective to the brochure, and thus any references were "incidental." *Id*.at 277-78. In stark contrast, in David's case there were pages-and-pages of testimony about the other firearms and ammunition that could not have been used to commit the murders. Instead of the "inconsequential" brochure in *Anderson*, which was still found to be prejudicial,

but in a 4-3 decision found not to deprive that defendant of a fair trial, here there were nine photographs of firearms that were shown to the jury enlarged on a screen, as well as a lengthy recounting by witnesses of the weapons found in the car. The following contrasts David's case with *Anderson*:

David's case	**State v. Anderson**
Photographs of 14 firearms: High Standard .22 revolver; 1910 .32-calbier pistol; Smith and Wesson .38 Special; Remington model 742; Ithaca .22 lever action; Stevens model 59A; LC Smith side-by-side shotgun; SKB 12-gauge shotgun; Stevens .22; Springfield .22 automatic; unknown make rifle with scope; Mosin Nagant rifle; US Springfield model 1903; Remington model 03-A3 State's Exhibit Nos. 225-238).	Letter-size, advertisement of Beretta semi-automatic pistols

Pages of testimony by several witnesses: (Tr. 1055-56, 1066-71, 1073-75, 1076-78, 1083-84, 1086-89, 1091-94, 1096, 1108, 1114-15)	Seven questions of the Defendant and a brief identification by the detective (six words)
Mentioned during opening and closing statements (Tr. 754, 1433-35)	Not mentioned during opening and closing statements
Circumstantial evidence case	Defendant admitted guilt to the police and at trial, confessing to participating in the robbery
David was denied a fair trial because this Court has long identified the unfair prejudice of introducing weapons not connected to the crime, reasoning that the sight of deadly weapons "tends to overwhelm reason and to associate the accused with the atrocity without sufficient evidence." E.g., ***State v. Wynne***, 182 S.W.2d 294, 299-300 (1944)	In a 4-3 decision held that incidental references were prejudicial, but did not deny the defendant of a fair trial

David was prejudiced by the improper admission of these unrelated weapons and ammunition. The State has not overcome the presumption of prejudice. This Court should reverse David's convictions and remand for a new, fair trial.

CONCLUSION

Because the searches of David, David's car, and David's apartment, and the seizures of items found there were unconstitutional (Points I, II, and III), this Court should reverse and remand for a new trial. Because of the improper admission of firearms and ammunition that were not connected to the charged crimes, this Court should reverse and remand for a new trial (Point IV). Because of the improper admission of the victim's statements contained in a petition for an order of protection (Point V), in a letter written to her landlord and oral statements made to him (Point VI), this Court should reverse and remand for a new trial. Because there was no evidence that David entered the apartment building unlawfully, this Court must reverse his burglary conviction under Count III and order him discharged as to that count (Point VII). Because of the erroneous admission of the note found in David's car, he is entitled to a new trial (Point VIII).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, in Times New Roman size 13-point font. I hereby certify that this brief includes the information required by Rule 55.03. Excluding the cover page, the signature block, and this certificate of compliance and service, the brief contains 7,140 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

On this 29th day of September, 2014, an electronic copy of appellant's reply brief was delivered through the Missouri e-Filing System to Gregory L. Barnes, Assistant Attorney General, at greg.barnes@ago.mo.gov.

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