NORFOLK **SJ-2023-0343**
NORFOLK SUPERIOR COURT
NO. 2282CR00117

COMMONWEALTH

v.

KAREN READ

COMMONWEALTH'S OPPOSITION TO DEFENDANT'S "PETITION AND BRIEF SEEKING RELIEF PURSUANT TO G. L. c. 211, §3"

The Commonwealth opposes the defendant's petition for extraordinary relief under G. L. c. 211, §3 pertaining to the denial of a discovery request, pursuant to Mass. R. Crim. P. 17 (a) (2) for cell phone records of witnesses, Brian Albert and Jennifer McCabe and for the production of Brian Albert's cell phone and data contained within. The defendant has not established that her request was made in good faith nor has she offered anything more than speculation in an improper attempt to use Mass. R. Crim. P. 17 as a discovery tool. The defendant's motion is a back-door attempt to obtain discovery consisting of highly personal cell phone records and testimony of tangentially involved witnesses, solely to attempt to locate material for a sensationalized and unsupported third-party culprit defense. As such, where the trial court did not err, the

defendant failed to raise a substantial claim, and where adequate appellate remedies exist, the defendant has not demonstrated exceptional circumstances to warrant the Court's supervisory power.[1]

STATEMENT OF THE CASE

On June 9, 2022 the defendant was indicted by a Norfolk grand jury for second degree murder, in violation of G. L. c. 265, §1; manslaughter while operating under the influence, in violation of G. L. c. 265, s. 13 ½; and leaving the scene of personal injury/death in violation, of G. L. c. 90, s. 24,(2)(a ½)(2). The defendant was arraigned in Norfolk Superior Court on June 10, 2022 (R. 6). The defendant posted a cash bail and is not presently in custody.

Relevant to this petition, on April 12, 2023 the defendant filed "Defendant's motion for order pursuant to Mass. R. Crim. P. 17 direct to Brian Albert, Verizon, and AT&T" (R. 9; 12-35). The defendant's broad request was for "all cell phone(s) in the possession of and/or used by Brian Albert between January 28, 2022 and present" and to permit the defendant's hired forensic examiner to recover

[1] The defendant seeks for the Single Justice to vacate the denial of her Mass. R. Crim. P. 17 motion. The defendant has not raised a broader legal issue, nor has she requested an appeal or reservation and report to the full bench.

"incoming and outgoing text messages, voice calls, voicemails, emails, location data, web searches, photographs, and/or other communications sent and/or received by Brian Albert on any other messaging platforms between January 28, 2022 and February 5, 2022". The defendant further requested access and passcodes to any cloud-based storage accounts as well as call detail records, cell tower location information, and subscriber account information for Brian Albert and Jennifer McCabe (R. 12-35; A. 60 at n. 2).

In support of the defendant's motion she relied on a report from her hired forensic examiner to suggest that the victim's cell phone data put him inside Brian Albert's home and that a different witness, Jennifer McCabe made an internet search questioning how long it would take to die in the cold at 2:27 a.m. (R. 31-38). The defendant's expert's report was provided to the Commonwealth as an exhibit to her Mass. R. Crim. 17 motion on April 12, 2023.

On April 27, 2023, the Commonwealth alerted the defendant that the case was not scheduled for evidentiary hearing but if the court was to permit an evidentiary hearing, the Commonwealth would respond and contest the motion accordingly (R. 275-277).

On May 2, 2023 the Commonwealth filed "Commonwealth's Memorandum in Opposition to Defendant's Motion Pursuant to Rule 17 of Criminal Procedure – Directed to Brian Albert, Verizon, and AT&T" (A. 63-96). The Commonwealth objected on the grounds that the overbroad request lacked any credible or reliable evidence and failed to satisfy the standards set forth in Commonwealth v. Lampron, 441 Mass. 265, 269 (2004).

On May 23, 2023, as supplemental exhibits to the May 2, 2023 opposition, the Commonwealth produced reports of two experts in cell phone forensics, who determined that the victim never entered Brian Albert's home and that the internet searches on Jennifer McCabe's phone happened at 6:23 a.m. and 6:24 a.m. (A. 123-152).

On May 19, 2023, the defendant summonsed civilian witnesses Brian Albert, Jennifer McCabe, and Massachusetts State Troopers Michael Proctor and Nicholas Guarino to appear at the Mass. R. Crim. P. 17 (a) (2) motion hearing (R. 5).[2] On May 22, 2023 the Commonwealth filed

[2] Attorney Greg Henning on behalf of Brian Albert reported he received apparent notice on Friday May 19, 2023 that the defendant sought to call Brian Albert at the Mass. R. Crim. P. 17 hearing. Attorney Greg Henning did not receive the defendant's summons for Brian Albert's appearance until Sunday May 21, 2023, two days prior to the hearing (R. 361).

"Commonwealth's Opposition to Defendant's Request for Evidentiary Hearing on Mass. R. Crim. P. 17," arguing that the defendant was using Mass. R. Crim. P. 17 as a disguised attempt to undermine the rules of discovery by launching an improper fishing expedition where she intended to call her forensic examiner to testify to a review of the victim and other witness' cell phone data and to seek testimony from two law enforcement officers and two civilian witnesses (A. 97-101). The court, on its own accord moved the hearing to May 24, 2023 (R. 11).

During the May 24, 2023 hearing, the court (Beverly J. Cannone, J.) denied the defendant's request for an evidentiary hearing, finding no legal authority to conduct such a hearing in a request for third party records and the court further stated that even if the Commonwealth and defendant agreed to proceed with an evidentiary hearing, there was no basis for one (R. 373). Pursuant to Mass. R. Crim. P. 17, the court heard argument from attorney Gregory Henning, on behalf of record holder, Brian Albert in opposition to the production of his cell phone and records. The court also heard from attorney Kevin Reddington, on behalf of Jennifer McCabe, in opposition to the production

of her cell phone provider records.[3] The court allowed defense counsel sufficient time to argue the merits of their motion (R. 357-433).

On June 20, 2023, the court denied the defendant's Mass. R. Crim. P. 17 motion directed to Brian Albert, Verizon, and AT&T (A. XX). In her decision, the court found that the "defendant has not shown with credible evidence that relevant, admissible evidence will be found on [Brian] Albert's cell phone or in his cell phone records. The single, unanswered phone call from [Jennifer] McCabe to [Brian] Albert shortly after O'Keefe's body was discovered is insufficient to establish any meaningful connection between [Brian] Albert's cell phone and this case." Further, the defendant failed to provide "a sufficient factual basis that the cell phone records [of Jennifer McCabe] may be relevant to her defense." (A. 61). The court also emphasized "where allowing her Rule 17 request would significantly intrude on [Brian] Albert's and [Jennifer] McCabe's privacy interests in a manner that far outweighs the defendant's desire for the materials requested, the court will not issue a summons for [Brian] Albert's cell

[3] Both attorney Henning and attorney Reddington also filed written motions to quash the subpoenas on behalf of Brian Albert and Jennifer McCabe (R. 5-6).

phone, his cell phone records, or [Jennifer] McCabe's cell phone records." (A. 62).

On September 1, 2023, seventy-four days after the court denied the motion, the defendant filed a petition seeking relief pursuant to G. L. c. 211, §3. In the interim, the defendant moved for the recusal and disqualification of the motion judge, Justice Beverly J. Cannone, premising her motion on similar claims, suggesting a perceived impropriety because the judge denied the defendant's Mass. R. Crim. P. 17 motion and request for an evidentiary hearing (A. 153-180).[4] The judge denied and disavowed the defendant's motion from the bench on July 25, 2023.

The defendant has since filed additional Mass. R. Crim. P. 17 motions, a motion to amend her conditions of release, and a motion to compel discovery, set for hearing on Friday September 15, 2023.

[4] Appended is the docket current as of September 11, 2023, (A. 182-188), which includes the extensive procedural history that has occurred since June 21, 2023, the last docket entry shown in the docket submitted by the defendant (R. 3-11).

STATEMENT OF FACTS[5]

On January 29, 2022, at approximately 6:04 a.m., the Canton Police Department received a 911 call from a woman reporting a male party, subsequently identified as the victim, John O'Keefe, was found in the snow outside 34 Fairview Road. At the time of the 911 call, there was an active blizzard occurring with heavy snow and the temperature in the teens. Officers Saraf and Mullaney of the Canton Police Department, were dispatched to the scene along with Canton Fire and EMS. Officer Saraf was the first officer to arrive on scene where he observed three females waving at him from the front yard area of the residence. Officer Saraf's cruiser camera footage captured his arrival to the scene. The footage depicts the weather and visibility conditions during the officer's transit and arrival to the scene shortly after the body of the victim was discovered and the 911 call was placed. In the video, Officer Saraf can be seen utilizing the spotlight attached to the driver's side of his cruiser as he attempts to locate the calling parties in the darkness and blizzard conditions.

[5] As summarized from the Commonwealth's Statement of the case and memorandum in opposition to defendant's motion pursuant to Rule 17 of Criminal Procedure – directed to Brian Albert, Verizon, and AT&T (A.).

Looking at the residence of 34 Fairview Road from the street, the three females were in the left corner of the property, in the area of a flagpole and fire hydrant. Officer Saraf observed the victim lying on the ground as two of the females were performing CPR on him. The three females on scene were identified as the defendant, Karen Read, Jennifer McCabe, and Kerry Roberts. Officer Saraf further observed the victim to be cold to the touch and not breathing. He returned to his cruiser to retrieve his AED device, however, at this time Canton Fire and EMS arrived on scene and took over resuscitative efforts. Paramedics transported Mr. O'Keefe to the Good Samaritan Medical Center in Brockton where he was subsequently determined to be deceased by Dr. Justin Rice.

Lt. Paul Gallagher, Detective Sergeant Michael Lank, and Sergeant Sean Goode, also of the Canton Police, arrived on scene moments after the 911 call had been received. Following the victim's transport from the scene, they began to search for any evidence in the immediate area around where Mr. O'Keefe had been discovered, in the mounds of snow on the front lawn of the residence adjacent to the roadway. They located pieces of a broken cocktail style glass and multiple patches of red that appeared to be blood in the vicinity of where the body had been located. The

Canton officers secured the glass and six blood samples from the snow as evidence.

Later that morning, the Massachusetts State Police Detective Unit of the Norfolk District Attorney's Office was notified and responded to the Canton Police Department. Trooper Michael Proctor and Sergeant Yuriy Bukhenik were among the troopers who responded and began interviewing witnesses. After leaving the Canton Police Department, they first spoke with Ms. McCabe at her home. Ms. McCabe indicated that she and some friends were at the Waterfall Bar and Grille during the evening of January 28. She arrived with her husband Matthew at approximately 9:00 p.m. At approximately 11:00 p.m., Mr. O'Keefe and Ms. Read arrived at the Waterfall together. Ms. McCabe stated that Mr. O'Keefe and Ms. Read have been in a dating relationship for approximately two years and that Ms. Read stayed at Mr. O'Keefe's house most nights. Ms. McCabe observed Ms. Read walk into the bar holding a glass cup from C.F. McCarthy's with a clear liquid inside that she believed was a vodka soda drink. Ms. Read had entered the Waterfall with the glass inside her coat. Mr. O'Keefe and Ms. Read had been at C.F. McCarthy's, a bar across the street from the Waterfall, prior to coming to the Waterfall. Ms. McCabe observed Mr. O'Keefe to be wearing a baseball hat, jeans

and sneakers. She stated that the defendant and the victim appeared to be in a good mood and did not observe any arguing between the two throughout the course of the evening. She further described the atmosphere within the bar as friendly with no arguments amongst any of the patrons. This description of the group and the atmosphere within the bar and between the defendant and the victim was consistent with each of the witnesses present that the troopers interviewed throughout the course of their investigation. As the bar began to close, everyone within their group was invited back to 34 Fairview Road, the residence of Ms. McCabe's sister, Nicole Albert and her husband, Brian. She observed Mr. O'Keefe and Ms. Read to leave the Waterfall together.

As Ms. McCabe was arriving at her vehicle, she received a text message from Mr. O'Keefe asking "Where to" at 12:14 a.m. Ms. McCabe replied with the address of 34 Fairview Road. At 12:18 a.m., Mr. O'Keefe called Ms. McCabe to ask more specifically, where the house was located on Fairview. While inside the residence following her arrival there, Ms. McCabe observed a black SUV, consistent with Ms. Read's vehicle, a 2021 black Lexus SUV, arrive in front of the residence, from her vantage point at the front door of the home. Ms. McCabe texted Mr. O'Keefe at 12:31 a.m.,

stating “Hello” and again at 12:40 a.m., “Pull up behind me.”; referencing her vehicle’s parking spot within the driveway to the home, located on the right side of the property if looking at the residence from the street. Ms. McCabe then observed the black SUV move from its initial place where it had stopped on the street, near the driveway, and proceed to the left side of the property, where Mr. O’Keefe’s body was subsequently discovered later in the morning. At 12:45 a.m., Ms. McCabe texted Mr. O’Keefe again, “Hello”, and then observed the black SUV drive away from the home.

At approximately 4:53 a.m., Ms. McCabe received a phone call from the victim’s juvenile niece at the defendant’s direction. Ms. McCabe answered the call from the victim’s niece, spoke to her briefly, and the niece then handed the phone to the defendant. The defendant sounded distraught over the phone and drove over to Ms. McCabe’s home. The defendant told Ms. McCabe that she last remembered seeing the victim at the Waterfall Bar. Ms. McCabe informed the defendant that she observed the defendant and the victim leave the bar together. Ms. McCabe also later informed the defendant she had seen the defendant’s vehicle in front of the home on Fairview. The defendant informed Ms. McCabe that she and the victim had

gotten into an argument the last time that she had seen him. The defendant arrived at Ms. McCabe's home around 5:30 a.m. Shortly after the defendant arrived at Ms. McCabe's home, Ms. Kerry Roberts arrived there as she had also received phone calls from the defendant early in the morning looking for the victim. Ms. McCabe then drove Ms. Read's vehicle from her house back to Mr. O'Keefe's house as she was too hysterical, and Ms. Roberts followed along in her own vehicle.

While driving to Mr. O'Keefe's house, the defendant stated to Ms. McCabe, "Could I have hit him", "Did I hit him". Ms. McCabe stated that the defendant also told her about a cracked taillight on her vehicle. Once they arrived at the victim's home, the defendant had Ms. McCabe look at the cracked taillight, which Ms. McCabe described as the passenger side, right rear tail light as cracked and missing pieces. Ms. McCabe and the defendant then entered Ms. Roberts's vehicle to go looking for the victim. The defendant was seated within the back passenger's side, while Ms. Roberts drove and Ms. McCabe was seated within the front passenger's seat. Ms. McCabe stated that they turned onto Fairview Road from Chapman Street and at that time, it was snowing heavily with the wind blowing, creating poor visibility. Ms. McCabe stated that just prior

to 34 Fairview, there is a cluster of trees and immediately the defendant stated that she saw the victim. This statement initially confused Ms. McCabe and Ms. Roberts, as they were unable to see Mr. O'Keefe's body lying in the snow. Ms. McCabe stated that the defendant screamed to open the door and ran directly over to the body, near that cluster of trees, and laid on top of him for warmth and began CPR. Ms. McCabe stated that the victim was lying on his back covered with approximately six inches of snow, with his phone later discovered on the ground underneath him, after being removed by emergency medical personnel. The defendant then yelled at Ms. McCabe twice to Google, "How long do you have to be left outside to die from hypothermia?", or something to that effect.

On January 29, the troopers interviewed Mr. Matthew McCabe, separately from his wife. Mr. McCabe indicated that he has known Mr. O'Keefe for approximately eight years and had met Ms. Read a handful of times. He stated that he was at the Waterfall Bar on Saturday night and observed the victim and the defendant enter together. He observed the victim to be wearing a baseball hat with a curved visor and Ms. Read to be drinking a clear liquid drink, possibly vodka. Mr. McCabe stated that he left the bar last from his group and was heading to his in-laws home at 34 Fairview

Road. He entered his vehicle and his wife, Jennifer, was on the phone with the victim telling him to go to 34 Fairview. While at the Fairview residence, he observed a large dark SUV pull up in front of the house on the street. He had been looking out the opened front door, through the glass storm door, and described the SUV's positioning as initially parked in front of the house. Mr. McCabe looked out the window some minutes later and observed the same vehicle had moved toward the left side of the property. Minutes following that, he observed the same vehicle driving off down Fairview, heading in the same direction it had been facing while parked.

Troopers also interviewed the homeowners of 34 Fairview Road, Brian and Nicole Albert. Both confirmed that they had been at the Waterfall Bar the previous evening with family and friends and had left around closing and returned to their home. Throughout the evening, they both indicated that the victim and defendant, neither of whom they knew particularly well, entered the bar and joined their group. They indicated that several people from the group had been invited back to their home following the bar, and several arrived staying for approximately one hour. Both indicated in their sworn testimony before the Grand Jury in this matter, that their nephew, Colin Albert,

while present at the home upon their arrival, had left their home well before any of the guests' arrival from the Waterfall. Several other witnesses called before the Grand Jury similarly confirmed this. Neither were aware that the defendant and victim had planned on coming over, although they would have had no issue if they had been aware. Neither heard nor saw anything outside of their home over the course of the morning until Ms. McCabe awoke them.

Troopers also interviewed Mr. Ryan Nagel. Mr. Nagel's sister, Julie, had been at 34 Fairview the evening of January 28, visiting with the Alberts' son for his birthday. Mr. Nagel stated that he had been contacted by his sister asking for a ride home. His friend drove, with Mr. Nagel in the front passenger's seat and his girlfriend in the rear cab, of his friend's Ford F-150 pickup truck to Fairview. As the truck was driving down Cedarcrest Road, he observed a set of headlights of a mid-size black SUV coming from the opposite direction on Cedarcrest, and the truck he was traveling in yielded to the SUV making a right turn onto Fairview and then followed behind it after executing its left turn onto Fairview. Mr. Nagel stated that the truck stopped directly in front of the driveway to the home and remembered the black SUV stopping along the right hand curb toward the left side of the property. He remained

within the truck while his sister exited the home and asked them to come inside. He declined the invitation and his sister eventually decided to stay at the home and make other transportation arrangements. As his sister returned to the house, Mr. Nagel observed the black SUV pull up an approximate one to one and a half car lengths to the far left edge of the home's property, where the flagpole was located along with some bushes. He stated that the SUV's driver did not appear to place the vehicle in park at any point he observed it, as the rear brake lights were illuminated throughout his observations to include the third top center light. Mr. Nagel reported hearing no noises coming from the interior of the SUV. Mr. Nagel indicated that as his friend pulled away from the side of the road when they were leaving, they drove past the black SUV, he observed the interior light on within the vehicle, and a Caucasian female operator seated inside the vehicle holding the steering wheel at 10 and 2, staring straight ahead of her.

Troopers also later interviewed Mr. Nagel's sister, Ms. Juliana Nagel, as well as her friend, Ms. Sara Levinson, both of whom had been present at the home on Fairview on January 28-29, and both of whom had been given a ride home by the McCabes. Both indicated that they had

been at the home on Fairview for Brian Albert Jr.'s birthday that evening. Both provided a list of other individuals there. Both indicated that Brian and Nicole Albert, arrived later in the evening from the Waterfall and listed those in that group to include the Alberts, the McCabes, and Mr. Higgins. Both women indicated that no one else entered the home while they were there and that they left and got a ride home from the McCabes. Ms. Levinson recalled Ms. McCabe saying that someone else was coming, however, that person never arrived.

Juliana Nagel further stated that she had called her brother, Ryan, for a ride home, at approximately 12:00 a.m. While waiting for him to arrive, she was looking out the kitchen window and observed an SUV stopped by the mailbox, with the front of the SUV facing Chapman Street. She stated that she further observed the SUV travel along the front of the house and stop between the mailbox and the flagpole. She observed the SUV further pull up closer to the flagpole and stop again. She went outside to speak with her brother and noticed that it was lightly snowing at this time. After her brother declined her offer to come inside, she indicated to him that she would arrange an alternative way home, she went back inside the home with the SUV still parked in the aforementioned position. Ms. Nagel stated

that she left the residence in the McCabe's vehicle sometime between 1:30 and 2:00 a.m., with Mr. McCabe driving, Ms. McCabe in the front passenger seat, her behind the driver in the backseat, and Ms. Levinson seated next to her behind Ms. McCabe. Mr. McCabe reversed out of the driveway and as they traveled past the house, Ms. Nagel indicated that she thought she saw something, she described as a dark object, in the snow by the flagpole, but could not determine what it was.

Later the day of January 29, Troopers Mathew Dunne and David Dicicco interviewed Ms. Kerry Roberts. Ms. Roberts stated to them that at approximately 5:00 a.m., she received a call from the defendant stating that John did not come home, it was snowing, and that she was worried. The defendant further stated to Ms. Roberts "John's dead. Kerry, Kerry, I wonder if he's dead. It's snowing, he got hit by a plow." Ms. Roberts got dressed and left in her vehicle, eventually meeting the defendant at Ms. McCabe's home where she observed the defendant to be hysterical. Ms. Roberts stated that she believed the defendant was still intoxicated in the morning and had told her that she did not remember last night. Ms. Roberts reported the defendant as stating: "I was so drunk I don't even remember going to your sister's last night", referring to Ms. McCabe's

sister, the homeowner of 34 Fairview Road. Ms. Roberts followed the defendant's black Lexus SUV back to Mr. O'Keefe's house. They went inside the home for a period of time looking for him to no avail and checking on the victim's niece. While at the victim's home, Ms. Roberts stated that the defendant had told her and Ms. McCabe about a cracked rear passenger taillight and showed both of them that area of her vehicle. Ms. Roberts then drove her vehicle, with Ms. McCabe in the front passenger's seat and the defendant in the rear passenger's side, to 34 Fairview Road. She and Ms. McCabe were scanning the sides of the roadway along the drive looking for the victim, while the defendant periodically screamed and texted on her phone as they drove. Ms. Roberts described the weather as white out conditions as they were driving.

As they arrived in the area of 34 Fairview, Ms. Roberts stated that the defendant screamed, "There he is, I see him" from inside the vehicle and screamed to be let out. Even after initially exiting the vehicle, Ms. Roberts stated that she still could not see the victim in the conditions and further stated that his body was covered in snow. She stated that the victim's body was approximately twelve feet from the roadway. Ms. Roberts stated that they immediately began CPR and Ms. McCabe called 911. Ms.

Roberts observed the victim to be lying on his back with his arms by his side. She noticed that his right eye was swollen shut and blood coming from his nose and mouth. When the paramedics arrived and lifted the victim's body onto the stretcher, Ms. Roberts observed the grass underneath the victim's back, not covered in snow as the remainder of the area was. The defendant repeatedly asked Ms. Roberts, Ms. McCabe, and the officers and paramedics on scene "is he dead?" repeating that phraseology numerous times to each. The defendant further grabbed Ms. Roberts by the arm at one point and asked her if they were really working on John or was he already dead.

In addition, Trooper Bukhenik interviewed Nicholas and Karina Kolokithas. Both were present with the group at the Waterfall on the evening of January 28. They arrived there at approximately 9:00 and 9:30 p.m., respectively; as they came in separate cars. They had known the victim for approximately 5-6 years and had met the defendant a handful of times. They stated that the victim and the defendant arrived at the Waterfall together at approximately 11:00 p.m., arriving from C.F. McCarthy's across the street. Mrs. Kolokithas spoke for a period of time with the defendant and observed her to be drinking vodka soda cocktails while at the bar. She also recalled the defendant "pushing quite

a bit" for a member of the group, Christopher Albert, the owner of a local pizza shop, to go across the street after leaving the bar to keep partying while he made pies for everyone. When it was time to leave, Mrs. Kolokithas indicated that she walked outside with Ms. McCabe and observed the victim and the defendant to walk out together and proceed to the left of the driveway, and up Washington Street, where their vehicle was parked along the curb, facing back up toward the Waterfall. Mrs. Kolokithas indicated that her vehicle was also parked along Washington Street, but further down and facing the opposite direction. From there, she observed the defendant walking toward the driver's side door of her black Lexus SUV. She further indicated that during the course of her conversation that evening with the defendant, the defendant complained about the victim's mother and the lack of private time the couple had for vacations, because of the children, their activities and responsibilities. She also described her as fine and did not believe the defendant to be overly intoxicated.

On January 30, Troopers Bukhenik and Proctor interviewed Canton Firefighter Katie McLaughlin. She had been assigned to Station One on the 29th and indicated that at approximately 6:00 a.m., Canton Fire and EMS had been

dispatched to 34 Fairview Road for a male party in the snow and unresponsive. Upon arrival, Ms. McLaughlin observed the victim to have trauma to his face and eye area and vomit in his mouth. She observed the victim to be dressed in jeans, socks and one black Nike sneaker. The victim's shirts were cut and his chest was exposed for chest compressions. Ms. McLaughlin had exited the ambulance to speak with the defendant as to the victim's identity and medical history. The defendant provided the victim's name and date of birth. Ms. McLaughlin asked the defendant if she knew where the victim had suffered the trauma to his face/eye and the defendant turned to her friend and stated repeatedly, "I hit him, I hit him, I hit him."; in response to the paramedic's question.

Following their initial witness interviews on January 29, Troopers Bukhenik and Proctor proceeded to the Good Samaritan Hospital to view the victim. They observed six bloodied lacerations varying in length on the victim's right arm. The cuts extended from his forearm to his bicep. Both of the victim's eyes were swollen shut and black and blue in color. The troopers observed a cut to the right eyelid area of the victim. The victim's clothing, consisting of blue jeans, an orange t-shirt, long sleeve grey shirt, and boxer shorts were soaking wet and saturated

with blood and vomit. The victim was also observed to have one black Nike sneaker with a white Nike logo on the side.

The victim's medical records, attested to by the attending physician and medical personnel indicate that the victim sustained a right superior orbital ridge region approx. 7mm laceration + surrounding soft tissue swelling/contusion; +breath sounds bilaterally; pulseless; +superficial abrasions right forearm. The time of the victim's death was noted as 7:50 a.m.

On January 31, Dr. Irini Scordi-Bello from the Office of the Chief Medical Examiner conducted an autopsy of Mr. O'Keefe. The doctor advised the troopers that she observed several abrasions to the victim's right forearm, two swollen black eyes, a small cut above the right eye, a cut to the left side of his nose, an approximately two inch laceration to the back right of his head, and multiple skull fractures that resulted in bleeding of the brain. Dr. Scordi-Bello further advised the troopers that the victim's pancreas was a dark red color indicating hypothermia was a contributing factor to his death. Dr. Scordi-Bello opined from her examination that significant blunt force trauma injuries occurred prior to Mr. O'Keefe becoming hypothermic, as evidenced by hemorrhaging in his pancreas and stomach. Mr. O'Keefe had arrived at the Good Samaritan

Medical Center with a body temperature reading in the low 80's. The doctor opined that the extensive injuries to his head likely rendered Mr. O'Keefe incapacitated. The doctor further opined that upon viewing Mr. O'Keefe's injuries and her examination of the body, she observed no signs of Mr. O'Keefe being involved in any type of physical altercation or fight.

In addition, Dr. Scordi-Bello testified extensively before the Grand Jury regarding her examination and findings. In her testimony, the doctor described the medical definitions of a laceration, a contusion, and an abrasion; as well as the differences between the three. The doctor testified that the victim had abrasions on his right arm. She described abrasions as "scratches caused by a blunt object, contact with a blunt object." She went on to describe them as a cluster of them on his right upper arm and on his right forearm; mostly linear, and ranging in size from a few millimeters to up to seven centimeters. Dr. Scordi-Bello testified that throughout her thorough external examination of the victim's body she observed no signs of an altercation or fight. The doctor also testified extensively to the injuries or swelling of the victim's eyes. Dr. Scordi-Bello testified that, from her examination of the victim, both external and internal, that the

bleeding and subsequent swelling around his eyes was related to very small fractures in the skull. She testified specifically that "the injury initiated or started in the back of the head, caused all the fractures in the skull, and then the eyes got red, or black, or purple because of the seepage of blood from the small blood vessels." The neuropathology report completed by Dr. Renee Stonebridge, also of the Office of the Chief Medical Examiner, are consistent with Dr. Scordi-Bello's findings.

At approximately 3:30 p.m., on January 29, Troopers Bukhenik and Proctor arrived at a residence in Dighton, MA, the home of the defendant's parents.[6] Upon their arrival, they observed a large black Lexus SUV, bearing MA Reg. #: 3GC684, registered to the defendant, parked outside the garage door in the driveway to the home. The troopers observed the rear right passenger side taillight to be shattered and a large red piece of plastic to be missing from the taillight.[7] The troopers were invited into the home

[6] Trooper Proctor's report contains a scrivener's error that he arrived at the Dighton residence at approximately 5:30 p.m. This was an unintentional mistake, clearly rectified by other evidence, including Dighton police reports that were authored on January 29, 2022.

[7] In her petition, the defendant relies on security footage from her parents' home (Def. Pet. at 16). The defendant provided this footage to Boston 25 News, however no video footage has been provided to the Commonwealth. The Commonwealth has sought a court order production of all

and observed the defendant seated on the living room couch. The defendant agreed to speak with the troopers. The defendant indicated to the troopers that she had met the victim at C.F. McCarthy's bar in Canton at approximately 9:00 p.m., the evening prior. The victim had been there with friends prior to her arrival. She stated that the victim was drinking beers and she was drinking vodka sodas. She described the glassware she was drinking out of as a vase style. The defendant stated that she and the victim left C.F. McCarthy's and went to the Waterfall, but denied that she had taken any drink from one bar to the next. She stated that they were at the Waterfall for approximately an hour and during that time; there were no arguments amongst anyone present there. When she and the victim were leaving the Waterfall, she stated they were invited to a house on Fairview Road.

The defendant stated that she had dropped the victim at the house on Fairview and went home since she was having stomach issues at the previous bar. The defendant stated that she dropped the victim off, then made a three point turn in the street and left. She stated that she did not

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exterior surveillance video from the defendant's parents' home on January 29, 2022 and alternatively has filed a Mass. R. Crim. P. 17 motion to the keeper of the security video records.

see the victim enter the residence. The defendant indicated that she first observed the broken taillight in the morning and did not know how she had broken it the previous evening. The victim was uninjured when she dropped him off at the house, however, when she discovered him the next morning, she observed him lying face up, snow on his legs, his eyes swollen, and blood coming from his nose and mouth. She stated that she began providing him mouth to mouth. The defendant further stated that she had attempted to contact the victim throughout the night, calling and texting him numerous times with no response. She stated that they had a verbal argument that morning over what the defendant fed the victim's niece for breakfast.

The black Lexus SUV was seized from the driveway of the defendant's parents' home in Dighton on January 29. The vehicle was then transported via a tow truck to the Canton Police Department. On February 1, members of the Massachusetts State Police Crime Scene Services Section, a Crime Lab chemist, and Trooper Joseph Paul, of the Massachusetts State Police Collision Analysis and Reconstruction Section (CARS), responded to the department. They observed fragments of broken glass on the rear bumper of the vehicle. The rear right passenger side taillight was shattered and pieces were missing from the red and clear

areas. On the right side of the rear tailgate, a deep scratch and minor dent were observed. On the right side of the rear bumper, above a small red light, two scratches were observed as well as one area where the paint was chipped off. Troopers from the CARS Unit performed a rapid acceleration, forward and reverse tests with the vehicle and noted no deficiencies with the vehicle's braking system or other operations. The troopers placed a training figure resembling a human, approximately six feet in height behind the Lexus. The vehicle was operated by a CARS trooper and documented with video from Crime Scene. The vehicle was placed in reverse and started to travel toward the training figure. The rearview camera within the vehicle was operating properly, displayed on a screen in the center of the dashboard, and provided a 360-degree overhead visual. As the Lexus traveled closer to the figure, both auditory and visual ques within the vehicle sounded off, indicating an obstruction to the rear.

Subsequently, an extensive collision reconstruction was conducted, which included the retrieval and review of data created and stored by the Lexus Safety System, including data of the vehicle's speed, distance of travel, triggering events, and the opening angle of the accelerator pedal. Based on a review of this data and other factors,

the crash reconstructionist opined that the defendant's vehicle traveled in reverse for approximately 62 feet before striking the victim at a possible impact speed of 24.2 mph. Post impact with the victim, the defendant's vehicle continued in reverse before leaving the scene.

In addition, forensic scientist Maureen Hartnett took samples from the defendant's Lexus. She observed damage to the rear of the vehicle on the passenger side including a dent with chipped paint in the trunk door, a broken taillight, and scratches on the bumper. A small hair was noted on the rear passenger side quarter panel. The apparent hair has subsequently been forensically tested and confirmed as human hair. Apparent glass was also noted on the rear bumper.

On January 29, the Massachusetts State Police Special Emergency Response Team (SERT) was activated to assist in searching for possible evidence outside of 34 Fairview Road. Members from the SERT team located a black Nike sneaker with a white Nike logo along the side, matching the one worn by the victim at the time his body was discovered. In the same area, where the body had been recovered, two red plastic pieces of a taillight were located, consistent to the pieces missing from the defendant's black Lexus. One piece of clear plastic taillight was located in the same

area as well, also consistent with the broken taillight of the Lexus. The SERT team discovered these items after digging through the still falling snow.[8]

On January 31, investigators observed video from the Ring cameras affixed to One Meadows Avenue, the residence of Mr. O'Keefe. The video was observed by utilizing the Ring application on the victim's cell phone. The data in the application showed that two cameras are connected on the victim's account under his email. The two cameras cover the front door and the driveway to his home. From 6:00 p.m. on January 28 through 6:00 a.m. on January 29, the Ring application showed approximately fifteen events between the two cameras at the residence. Investigators observed on the Ring video from the driveway camera, the defendant's SUV leaving the right garage door and traveling out of the driveway, onto Meadows Avenue, and turning left onto Pleasant Street at approximately 5:08 a.m. on January 29. The victim's Chevrolet Traverse SUV was parked in the far right corner of the driveway, and as the defendant's SUV

[8] Through trace analysis and forensic testing, the Massachusetts State Police Crime Laboratory has recently discovered the victim's DNA present on the broken taillight and microscopic pieces of red and clear apparent plastic located in the victim's clothing; these pieces are undergoing further comparison testing to the plastic from the victim's taillight.

exited in reverse from the garage, it come close to the victim's SUV. However the Commonwealth disputes that the victim's vehicle was struck with significant force to cause the shattering of her vehicle's taillight. On February 3, 2022 Trooper Evan Brandt from Crime Scene Services arrived with Trooper Proctor at the home and documented all sides of the Traverse and the garage doors. No damage was observed anywhere on either the vehicle or the doors. No fragments or pieces of a broken taillight were discovered in the victim's driveway, nor are any observed on the ground or anywhere in the driveway when the defendant's vehicle is seen leaving the driveway at 5:08 a.m. Noticeably absent from the available Ring video footage that investigators diligently sought for, was any video of the defendant's vehicle arriving at the victim's home in the early morning hours of January 29th after leaving the 34 Fairview residence.

On February 1, Troopers Bukhenik and Keefe traveled to C.F. McCarthy's bar and spoke with the manager of the bar. They reviewed and secured video from inside the establishment from January 28 and receipts. From the interior surveillance video, the troopers observed Mr. O'Keefe walk into the establishment, wearing jeans, black Nike sneakers, a gray and dark gray long sleeve shirt, and

a dark baseball hat with an American flag on the front, at approximately 7:37 p.m., along with his friend Michel Camerano. Approximately an hour later, at 8:51 p.m., the defendant enters the bar, wearing a black jacket, black boots, black pants, a handbag/small purse, and a white shirt underneath her jacket. Seven minutes later, at approximately 8:58 p.m., the bartender hands the defendant a tall cylinder style glass containing a clear liquid with a lime in it. At approximately 9:15 p.m., the victim hands the defendant a cylinder style glass, with a clear liquid and a lime in it. At the following times, the troopers observed in the video the defendant receiving a shot glass with a clear liquid in it, which she subsequently pours into her cylinder glass: 9:20; 9:33; 10:22 and 10:29 p.m. At approximately 9:57 p.m., the bartender is observed handing the defendant a tall cylinder style glass with a clear liquid in it and a shot glass with a clear liquid in it, for a total of seven drinks the defendant receives and consumes during her time at this bar. At approximately 10:40 p.m., the victim and the defendant are observed leaving the bar, with the defendant holding her last drink in her right hand as they exit.

On February 1, troopers traveled to the Waterfall Bar, reviewed, and secured both interior and exterior

surveillance camera footage, as well as receipts, from that establishment. From the interior camera, the troopers observed the victim and the defendant enter the bar at approximately 10:54 p.m. At approximately 12:10 a.m., the defendant walks out with two females, leaving through the front door. Moments later, the victim standing alone at the table, takes a sip from a short cocktail glass and walks out the front door holding the glass in his right hand. From the exterior camera, the troopers observed the victim walk out at approximately 12:11 a.m., carrying a short cocktail glass in his right hand, meet up with the defendant, and then the two walk together toward Washington Street. The troopers also observed from this exterior camera that it appeared to have just begun snowing with a light coating on the ground.

On February 2, Troopers Dunne and Moore were canvassing for video footage in relation to this investigation. They proceeded to the Edward J. Lynch, Jr. House at Pequitside Farm on Pleasant Street in Canton. There they were able to retrieve video footage from the town's IT director who confirmed that the date and timestamps on the video were correct. The troopers also viewed and recovered video from the Canton Town Library external cameras, and on February 3, from the Temple Beth

Abraham (B'Nai Tikyah). Both the Library and the Temple's cameras overlook Washington Street in Canton. The distance between these two buildings is approximately one mile. From the Library video, at approximately 12:15 a.m., the troopers observed a large black SUV, consistent with the defendant's Lexus, traveling on Washington Street and continue toward the Temple, four minutes after the victim and the defendant exited the Waterfall. At approximately 12:17 a.m., from the Temple video, the troopers observed, a large black SUV traveling by the building toward the intersection of Washington and Dedham Streets, in the direction of Fairview Road.

From the Library video, at approximately 5:11 a.m., the troopers observed a large black SUV traveling down Sherman Street, take a left onto Washington and travel in the direction of the Waterfall. At approximately 5:15 a.m., the troopers observed a large black SUV traveling away from the area of the Waterfall on Washington Street, crossing over Sherman and continue on Washington toward the Temple. From the Temple video, at approximately, 5:18 a.m., the troopers observed a large black SUV traveling by the front of the building toward the intersection of Washington Street and Dedham Streets. In addition, the troopers received via a search warrant, the defendant's Verizon cell

phone records. Lieutenant Brian Tully, of the Massachusetts State Police, examined the records and was able to plot the defendant's movements, while the phone was in use for various periods of time. The phone's movements coincided with the directions of travel of the black SUV observed on the videos from the Library and the Temple, during both time frames. These videos and phone records on the morning of January 29, occur after the defendant spoke with Ms. McCabe on the phone after directing the victim's niece to call Ms. McCabe, and after the defendant is seen on the victim's residence's Ring video leaving that home at 5:08 a.m. Furthermore, they evince the defendant traveling in the direction of the home on Fairview, prior to going to Ms. McCabe's home that morning.

On February 22, both the victim's ten-year-old nephew, C.F., and the fourteen-year-old niece, K.F. were interviewed at the Norfolk Advocates for Children Center in Foxboro, MA. The children indicated that they had lived with their uncle, the victim, for approximately eight years following the passing of both of their parents. Both children indicated that the victim and the defendant had started dating approximately two years ago, after having dated some time before in the distant past. They both

indicated that the defendant would stay over their house on Meadows Avenue several nights a week.

P.F. stated that the defendant and victim argued "a decent amount of time." P.F. recalled a recent argument over groceries and the victim expressing needing a break from the defendant. After that particular argument, the victim wanted the defendant to leave their house, however she refused. P.F. indicated that he had left the home on January 28 at approximately 8:00 p.m. for a sleepover at a friend's house, and was not present at the home overnight. P.F. indicated that neither he nor his sister had access to the Ring System, but believed that the defendant did from the family computer within the home.

K.F. indicated during her interview that the defendant and the victim had argued a lot toward the end, approximately two to three times a week. She further stated that approximately a week prior to January 29, she was sitting on the stairway inside the house while the victim and the defendant were arguing. K.F. stated that she heard the victim tell the defendant that their relationship had run its course and that it isn't healthy. She stated that the defendant did not want the relationship to end and refused to leave their house. K.F. stated that she had gone to bed at approximately 11:00 p.m., on January 28, after

her friend had left and was awoken by the defendant at approximately 4:30 a.m., with the defendant screaming and acting frantic. The defendant ran into the victim's bedroom to retrieve K.F.'s cell phone and K.F. then began texting and calling the victim with no response. The defendant then had K.F. call Ms. McCabe and put the defendant on the phone with her. After speaking with Ms. McCabe, the defendant left the house and told K.F. to call Mr. Camerano to come and pick her up. K.F. indicated during her interview that the defendant changed her story several times while speaking to Ms. McCabe on the phone, with initially the defendant stating that she and the victim got into an argument and she dropped him off.

On January 29, the troopers also recovered Mr. O'Keefe's cell phone and were subsequently able to forensically extract the data from said phone. Their forensic extraction of the call logs, voicemails and text messages between the victim and the defendant, including the date of January 28-29, detailed strains within their relationship, the victim's desire to end their relationship and the defendant's description of their relationship with them and the two children together as "toxic". The troopers recovered several voicemails from the victim's phone from the defendant; following the time period they were in front

of the residence at 34 Fairview, in which the defendant screamed to the victim that she hated him.

On January 29, the defendant was transported from the scene to the Good Samaritan Medical Center. While there, blood was drawn pursuant to her medical diagnosis and treatment at that facility. The ethanol results from said records indicate that at 9:08 a.m., on the 29th, her blood had a reading of 93 mg/dl. Nicholas Roberts, a forensic toxicologist from the Massachusetts State Police Crime Laboratory performed both a serum conversion and retrograde extrapolation of said result, opining that Ms. Read's BAC at that time on the 29th was .07-.08%. From his retrograde extrapolation analysis, he opined that her BAC around the time period of 12:45 a.m., would have been between .13% - .29%.

In regards to the cell phone data voluntarily provided to the Commonwealth by Ms. McCabe and the cell phone data on the victim's cell phone, the Commonwealth's experts opined, on an assessment of the totality of the data, that Ms. McCabe did not make deletions of calls, rather the technical data showed the calls being stored in a different file. Additionally, two experts opined based on testing, artifact knowledge, and the most accurate timestamps, that the google searches for "how long ti die in cild" and at

"hos long ti die in cold" occurred at approximately 6:23 a.m. and 6:24 a.m. (A. 123-152; R. 201-208).

Moreover, based on the GPS coordinates of the victim's phone, the victim could only have been inside the 34 Fairview residence for no more than 3 seconds. The data showing the victim allegedly ascending and descending stairs occurred at 12:22:14 a.m., a time when witness accounts and GPS coordinates from the victim's cell phone place him in the defendant's vehicle, a little over a half mile from 34 Fairview Road (A. 126-145).

ARGUMENT

I. THE DEFENDANT'S CLAIM IS NOT MERITORIOUS BECAUSE SHE HAS NOT DEMONSTRATED THAT THE TRIAL COURT ERRED IN DENYING HER MASS. R. CRIM. P. 17 MOTION WHICH FAILED TO OFFER A SUFFICIENT BASIS FOR HIGHLY PERSONAL CELL PHONE RECORDS OF A TANGENTIALLY INVOLVED WITNESS AND CALL DETAIL RECORDS OR THAT SHE WAS ENTITLED TO AN ALL-ENCOMPASSING EVIDENTIARY HEARING REQUIRING CIVILIAN WITNESSES TO TESTIFY.

The defendant's application for interlocutory appeal should be denied. "Parties seeking review under c. 211, § 3, must 'demonstrate both a substantial claim of violation of [their] substantive rights and error that cannot be remedied under the ordinary review process.'" Planned Parenthood League of Massachusetts, Inc., v. Operation Rescue, 406 Mass. 701, 706 (1990), quoting Dunbrack v. Commonwealth, 398 Mass. 502, 504 (1986). Defendants who are aggrieved by the denial of a discovery motion may seek review under G. L. c. 211, § 3, however this Court should use its supervisory power sparingly and only in the most exceptional circumstances. Quinones v. Commonwealth, 486 Mass. 1019, 1021 (2021); MacDougall v. Commonwealth, 447 Mass. 505, 510 (2006).

The defendant's petition does not warrant a finding of exceptional circumstances nor is she prejudiced by the denial of her motion. "While a single justice might be warranted in finding exceptional circumstances when ... [a] petition raises a novel or systemic issue ... the single

justice is not compelled to do so every time one of those criteria is present. Each case must be examined by the single justice on its own, to determine whether general superintendence intervention is necessary in that particular case." Quinones v. Commonwealth, 486 Mass. at 1021, citing Commonwealth v. Dilworth, 485 Mass. 1001, 1003 (2020). The fact that discovery requests pursuant to Mass. R. Crim. P. 17 arise with some regularity in the trial court is not in and of itself extraordinary. See Quinones, 486 Mass. at 1020 (single justice did not abuse discretion in denying the defendant's interlocutory appeal, where the trial court properly denied the defendant's request for evidentiary hearing under Mass. R. Crim. P. 17 and request for records from Department of Correction). Further, neither are the facts of this case exceptional or extraordinary. The "high-profile" nature of this case is due solely to the defendant bombarding the media with false, inconsistent, and speculative claims, as well as the purported interest surrounding the victim's profession as a Boston police officer.

Under Mass. R. Crim. P. 17 (a) (2) the court may issue a summons ordering a third-party to produce "books, papers, documents, or other objects" upon a good cause showing that the requested records are relevant and have evidentiary

value. Commonwealth v. Lampron, 441 Mass. 265, 269 (2004). The defendant bears the burden to establish: "(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition'." Id. (internal citation omitted).

This Court has repeatedly emphasized that Mass. R. Crim. P. 17 (a) (2) is not a discovery tool to be "invoked merely for the exploration of potential evidence." Commonwealth. v. Sealy, 467 Mass. 617, 627 (2014); Lampron, 441 Mass. at 268. The four requirements of Mass. R. Crim. P. 17: relevance, admissibility, necessity, and specificity, are intended to "guard against intimidation, harassment, and fishing expeditions for possibly relevant information." Commonwealth v. Dwyer, 448 Mass. 122, 145 (2006). The purpose of Mass. R. Crim. P. 17 is solely to prevent undue delay of the trial occasioned by multiple, or lengthy, requests for documents. See Commonwealth v. Mitchell, 444 Mass. 786, 792 (2005); RC v. Chilcoff, SJ-

2020-0081, 2020 WL 8079734 (December 15, 2020) ("It is also important to remember that the rule is a rule of production, not a rule of discovery") (A. 103-108).

As found by the trial court "the defendant has not shown with credible evidence that relevant, admissible evidence will be found on [Brian] Albert's cell phone or in his cell phone records" nor has the defendant "provided a sufficient factual basis that the cell phone records [of Jennifer McCabe] may be relevant to her defense." (A. 61)

The defendant's Mass. R. Crim. P. 17 motion and supporting affidavit, instead, contained only speculative claims that are without factual support or identifiable sources that form the basis for "good faith belief[s]" that Mr. Brian Albert has "destroyed evidence" or is a third-party culprit, responsible for the victim's death. See "Affidavit of Alan J. Jackson, Esq. in support of motion for order pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T." (R. 68-77). As found by the trial court, a single phone call between Jennifer McCabe to her brother-in-law Brian Albert, after discovering the victim's body outside of his home, was "insufficient to establish any meaningful connection "between [Brian] Albert's cell phone and this case (A. 61).

Similarly, the defendant asserts, without any factual support, that the cell phone records will "undoubtedly reveal text messages and calls that Ms. McCabe deleted from her phone in an effort to interfere with the investigation" and "substantive communications that are missing and/or were deleted from Brian Albert's and/or Jennifer McCabe's cell phones." (R. 10-23; A. 61).

These requests are the epitome of a fishing expedition; a thinly veiled attempt to obtain discovery of highly personal cell phone records, to garner support for a third-party culprit defense that defies common sense. See Lampron, 441 Mass. at 269-270 (defendant must show that the documentary evidence sought has a rational tendency to prove or disprove an issue in the case; Mass. R. Crim. P. 17 is not for exploration of potential evidence); Commonwealth v. Jones, 478 Mass. 65, 68-69 (2017) (defendant must make factual showing that the documentary evidence has rational tendency to prove or disprove issue in case; potential relevance and conclusory statements regarding relevance are insufficient). As found by the trial court, the defendant was "improperly attempting to use Rule 17 as a vehicle for the exploration of potential evidence" (A. 61) (internal citation omitted).

The defendant's proffer, including her forensic examiner's affidavit, embellishes or misinterprets the evidence to fit her third-party culprit narrative and conveniently ignores the compelling and corroborated evidence that while extremely intoxicated the defendant operated her motor vehicle in reverse for a period of time, before striking the victim at a high rate of speed. See Commonwealth v. Lam, 444 Mass. 224 229 (2005) ("The Commonwealth, charged with prosecuting the case, will often be able to assist a judge in determining whether a motion under rule 17(a)(2) involves an improper "fishing expedition.'")

It is evident that the Commonwealth and defendant have divergent theories and interpretations of the evidence. That is not uncommon in an adversarial criminal justice system. Courts across the Commonwealth hear conflicting civilian and expert testimony on a daily basis, however the proper forum for a "battle of the experts" is a trial, where it is the fact finder's role to accept one reasonable opinion and reject the other. See Delta Materials Corp. v. Bagdon, 59 Mass. App. Ct. 439, 441 (2003); Commonwealth v. AdonSoto, 475 Mass. 497, 510 (2016) ("assessment of the weight and credibility of the evidence [is] properly left to the jury.")

Furthermore, a request for a Mass. R. Crim. P. 17 (a) (2) summons is "to balance the defendant's right to mount a defense with the Commonwealth's right to prevent unnecessary delay of the trial and unwarranted harassment of witnesses and third parties". Mitchell, 444 Mass. at 792. The Commonwealth has a compelling interest in protecting witnesses from unnecessary harassment, caused by burdensome, frivolous, or otherwise improper discovery requests; particularly where the "defendant's motion constitutes a disguised attempt to undermine [Mass. R. Crim. P.] Rule 14 by launching an improper "fishing expedition'" Id.

As properly found by the trial court, Brian Albert and Jennifer McCabe's compelling privacy interests in the contents of their cell phones and cell phone records, "far outweighs the defendant's desire for the materials requested." (A. 62) The trial court's decision was informed by this Court's ruling in RC v. Chilcoff, SJ-2020-0081, 2020 WL 8079734 (December 15, 2020) (A. 103-108; R. 373).[9] As demonstrated by the procedural history of RC v. Chilcoff, similar to the defense strategy employed here, the defendant filed two Mass. R. Crim. P. 17 (a) (2)

[9] In RC v. Chilcoff, the defendant was also represented by Alan Jackson, pro hac vice.

motions. The first was for "a variety of records and information" maintained by Apple related to a rape victim's cell phone records. That motion was denied as the defendant failed to satisfy Lampron. The second motion, again consistent with the defendant's request here, sought the "victim-witness to produce her cellular telephone to a defense expert for a forensic examination to recover information from the victim-witness's cell phone from December 8, 2017 to December 19, 2017 relating to her electronic communications . . . ." (A. 104-105).

The single justice (Elspeth P. Cypher, J.), ruled that the defendant's requests "contravene[d] the principle that Rule 17 is not a discovery tool" and emphasized that where the defendant's request offered nothing more than speculation that there may be relevant evidence in the records sought, the defendant's motion fails to satisfy Lampron. See RC v. Chilcoff, SJ-2020-0081 (A. 105-107).

In her ruling, Justice Cypher highlighted similar cases from the Federal court and state courts.[10] In United

[10] Consistent with other state's rules of criminal procedure, Mass. R. Crim. P. 17 is modeled after the federal rule. See Lampron, 441 Mass at 270 ("Because our rule was modeled after Fed. R. Crim. P. 17(c) and is intended to address the same circumstances, we adopt the standards articulated by the Federal courts regarding the issuance of a subpoena for production of documentary evidence.")

States v. Murray, U.S. Dist. Ct., No. 3:18-cr-30018-MGM-1 (D. Mass. May 6, 2019) (A. 108-122), the District Court of Massachusetts denied the defendant's Rule 17 request to perform a forensic inspection and analysis of a cell phone belonging to a "critical government witness whose impeachment will be important to the defense", finding that Rule 17 was "not intended to provide an additional means of discovery" and the defendant's request was overbroad and lacked specificity. (A. 108-122) Similarly, in Minnesota, the state court concluded that because "'[c]ell phones differ in both a quantitative and a qualitative sense from other objects' that a person might possess," a suggestion that a cell phone could contain exculpatory information was insufficient to order its production for examination. State v. Yildirim, (In re B.H.), 946 N. W. 2d. 860, 865, 870-871 (2020); quoting from Riley v. California, 573 U.S. 373, 393 (2014). The Colorado Supreme Court made a similar ruling, concluding that an order to permit a forensic expert to access a victim's parents' computer to search for email communications "improperly converted the [R. 17] subpoenas into the functional equivalent of search warrants" that were not authorized by the rules of criminal procedure and

that the defendant had failed to make showings of relevance or specificity, which were "underscored by the lack of supporting evidence that relevant materials even existed." People v. Spykstra, 234 P.3d 662 (Col. 2010).

This Court has recognized the significant privacy interests one has in their cell phone and location information and has stated that "[a] victim-witness does not surrender [ ] privacy rights by filing a complaint or by cooperating with a police investigation." RC v. Chilcoff, SJ-2020-0081 (A. 106). See Commonwealth v. Augustine, 467 Mass. 230, 252 (2014) (cell phone users have a reasonable expectation of privacy in cell phone location data maintained by third-party telephone records).

In ruling that the defendant's request "would significantly intrude on [Brian] Albert's and [Jennifer] McCabe's privacy interests in a manner that far outweighs the defendant's desire for the materials requested" the trial court expressly considered the command set forth in RC v. Chilcof ("when ruling on a request under Rule 17 for a victim-witness's cell phone or cell phone records, the judge must include a consideration of these inherent privacy concerns."). SJ-2020-0081; Commonwealth v. Fulgiam, 477 Mass. 20, 32 (2017) ("modern cellular telephones contain vast quantities of [digital] personal information"

[quotations omitted]); Commonwealth v. Dorelas, 473 Mass. 496, 502 n. 11 (2016) ("privacy interests implicated in smartphone searches 'dwarf' those in cases in which a limited information is contained in a finite space, given the volume, variety, and sensitivity of the information either stored in a smartphone or stored remotely and accessed through a smartphone.")

Furthermore, the defendant has proffered no support to warrant a belief that she was entitled to an evidentiary hearing beyond the parameters of Mass. R. Crim. P. 17. At a Mass. R. Crim. P. 17, Lampron hearing, "the judge shall hear from all parties, the record holder, and the third-party subject, if present. The record holder and third-party subject shall be heard on whether the records sought are relevant or statutorily privileged." Dwyer, 448 Mass. 122, 145-146 (2006). In regard to the defendant's motion, the opportunity to be heard extended only to the parties, Verizon, AT&T, and third-party subjects, Brian Albert and Jennifer McCabe. Commonwealth v. Dwyer, 448 Mass. 122 (2006). Both Brian Albert and Jennifer McCabe, through counsel appeared and objected to the production of their cell phone and records, under Mass. R. Crim. P. 17 (a) (1)

and (2). [11] See Lam, 444 Mass. at 229 ("A complainant or witness should be forced neither to retain counsel nor to appear before a court in order to challenge, on the basis of a partial view of the case, potentially impermissible examination of her personal effects and the records of her personal interactions.")

The trial court ruled there was "no authority" under Massachusetts law, nor has the defendant cited any legal authority, to permit expanding Mass. R. Crim. P. 17 into a discovery tool, in which the court conducts far-reaching evidentiary hearings of civilian or expert witnesses, in a circular attempt to establish any indicia of relevance of which the defendant was supposed to proffer in the first instance so that the production of records itself is not a discovery tool (R. 373). See Lampron, 441 Mass. 269 (potential relevance and conclusory statements regarding relevance are insufficient" to satisfy the rule); Commonwealth v. Alcantara, 471 Mass. 550, 564 (2015) (relevance "is not established by rank speculation.")

It is incorrect that the Commonwealth agreed to an evidentiary hearing on the defendant's motion. While tone

[11] Brian Albert is represented by attorney Greg Henning. Jennifer McCabe is represented by attorney Kevin Reddington.

is difficult to decipher from email correspondence, the exchange between Assistant District Attorney Adam Lally and defense counsel Elizabeth Little more accurately depicts the Commonwealth's understanding that for any criminal motion, neither party is entitled to an evidentiary hearing. A moving party must make the proper showing and the court must grant the request. See generally Vazquez Diaz v. Commonwealth, 487 Mass. 336, 347 (2021) ("A hearing on a motion to suppress differs significantly from a pretrial hearing on discovery or even a hearing to establish probable cause. Suppression hearings typically involve important issues that require the taking of evidence and often lead to the resolution of a case.") The Commonwealth made no representation that it would not object to the defendant's proffered testimony, rather if the court was to permit an evidentiary hearing, the Commonwealth indicated that it would respond and contest the motion accordingly.

The defendant was granted a hearing and full opportunity to argue the relevance, admissibility, and proclaimed necessity for both Brian Albert's cell phone and cell phone records and Jennifer McCabe's cell phone records under Mass. R. Crim. P. 17. The defendant's motion and argument lacked any credible support or factual showing

that either Brian Albert's cell phone and cell phone records or Jennifer McCabe's cell phone records contain evidentiary and relevant material that would have a rational tendency to prove or disprove a contested issue in this case and failed to make an adequate showing that the request was not a fishing expedition for the mere exploration of highly personal cell phone records. Lampron, 441 Mass. 269-270.

The defendant has also failed to show any prejudice. If qualified, the defendant's expert may be permitted to testify at trial regarding his forensic examination of the victim's and Jennifer McCabe's cell phone data and any perceived errors or inconsistences in the Commonwealth's experts' reports. Furthermore, at trial the defendant would be permitted to cross-examine Brian Albert, Jennifer McCabe, or any of the other witnesses about their actions, whereabouts, or motive. The defendant is also permitted to seek review of any prejudice or perceived error, after trial, in the normal appellate process. Quinones, 486 Mass. 1020 (defendant has "quintessential adequate appellate remedy" to contest the denial of her Mass. R. Crim. P. 17 discovery motion.)

The denial of a discovery motion is a routine trial court ruling. Commonwealth v. Richardson, 453 Mass. 1005,

1006 (2009) (single justice properly declined to employ power of superintendence to review "relatively routine" trial court order that permitted defendant's brother to review photographs of jurors to assess whether there was credible information suggest juror was affected by extraneous influences). The defendant is not entitled to interlocutory relief, solely because the trial court made an adverse evidentiary ruling. See Commonwealth v. Hernandez, 471 Mass. 1005, 1006-1007 (2015) (Commonwealth failed to show exceptional circumstances to warrant relief based on trial judge denying Commonwealth's motion in limine in a "high profile" murder case). Relief pursuant to G. L. c. 211, §3 "is not a means for second guessing" a trial court's evidentiary rulings. See Commonwealth v. Yelle, 390 Mass. 678, 687 (1984); Hernandez, 471 Mass. at 1007. Trial courts throughout the Commonwealth assess the four requirements of Mass. R. Crim. P. 17; relevance, admissibility, necessity, and specificity, every day and make the type of routine rulings, the defendant claims to be prejudiced by. "The extraordinary power of general superintendence under the statute is meant for truly extraordinary situations" and where the defendant has failed to show irremediable error or prejudice, her petition should be denied. Hernandez, 471 Mass. at 1007.

CONCLUSION

In sum, the defendant's petition for relief under G.L. C. 211, §3 should be DENIED as the defendant's claim does not warrant extraordinary relief. Furthermore, where the defendant's claim does not raise a substantial issue, the single justice should act within its discretion to decide the petition on the papers, without a hearing.

Respectfully submitted
for the Commonwealth,

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2023 I served the Commonwealth's opposition to the defendant's petition for relief ppursuant to G. L. c. 211, §3 and attached addendum through the Electronic Filing Service Provider for electronic service to all registered users and courtesy copies to all four defense counsels and the attorneys for the interested parties.

/s/ *Laura A. McLaughlin*
Laura A. McLaughlin
Assistant District Attorney

ADDENDUM

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
22-00117

COMMONWEALTH

vs.

KAREN READ

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR ORDER PURSUANT TO MASS. R. CRIM. P. 17 DIRECTED TO BRIAN ALBERT, VERIZON, AND AT&T

The defendant, Karen Read, is charged with murder in the second degree in violation of G. L. c. 265, § 1, manslaughter while operating under the influence of alcohol in violation of G. L. c. 265, § 13 ½, and leaving the scene of personal injury and death in violation of G. L. c. 90, § 24(2)(a½)(2). The charges arise from the death of her boyfriend, Boston Police Officer John O'Keefe, who was found unresponsive in the snow outside a residence in Canton on the morning of January 29, 2022. The case is before the court on the Defendant's Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T. After a hearing on May 24, 2023 and review of written arguments submitted, the defendant's motion is **DENIED**.

BACKGROUND

On the evening of January 28, 2022, John O'Keefe ("O'Keefe") and the defendant met with a group of people including Boston Police Officer Brian Albert ("Albert") and Albert's sister-in-law, Jennifer McCabe ("McCabe"), at a bar in Canton. As the bar was closing, the group was invited to Albert's residence. O'Keefe and the defendant left the bar together in the defendant's vehicle and proceeded to the residence as heavy snow was falling. The defense maintains that the defendant dropped off O'Keefe at the residence and left under the impression

that he went inside. Others present at the time, however, have reported that O'Keefe never entered the residence.

O'Keefe did not return home. Early in the morning, a distraught defendant called McCabe and a friend of O'Keefe's to meet her and look for him together. Shortly after 6:00 a.m., they arrived at Albert's residence where only the defendant saw O'Keefe lying in the front yard in the snow, unresponsive. O'Keefe was transported to the hospital and pronounced dead.

The defendant is charged with O'Keefe's murder. The Commonwealth's case is largely premised on the theory that she struck O'Keefe with her vehicle outside Albert's residence and left him there.

The defendant is pursuing a third-party culprit defense, arguing that Albert and McCabe are responsible for O'Keefe's death and that they, along with others, are engaged in a coverup. She maintains that they have tampered with and attempted to conceal evidence on their cell phones that incriminates them. Specifically, she points to the fact that after O'Keefe's body was found, McCabe called Albert once and his wife twice. No one answered the call to Albert, but someone answered the calls to his wife. All three calls, and a screenshot of Albert's contact information, were deleted from McCabe's cell phone.

The defendant also points to the fact that shortly after O'Keefe's body was found, McCabe searched on her cell phone "how long ti die in cikd" and then "hos long to die in cold." The defendant asserts that earlier that morning at 2:27 a.m., before O'Keefe's body was found, McCabe searched on her cell phone "hos long to die in cold" and that she attempted to delete this search from her cell phone.[1]

The defendant now seeks a summons for Albert's cell phone, as well as his and

[1] The Commonwealth disputes that McCabe did so. The court assumes that she did only for purposes of this motion.

McCabe's cell phone records.[2]

DISCUSSION

Under Mass. R. Crim. P. 17(a)(2), the court may issue a summons ordering a third-party to produce "books, papers, documents, or other objects" prior to trial. The purpose of the rule is "to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials." *Commonwealth* v. *Dwyer*, 448 Mass. 122, 142 (2006), quoting *United States* v. *Nixon*, 418 U.S. 683, 698-699 (1974). In deciding a defendant's motion pursuant to Rule 17(a)(2), the court must "balance the defendant's right to mount a defense with the Commonwealth's right to prevent unnecessary delay of the trial and unwarranted harassment of witnesses and third parties." *Commonwealth* v. *Lam*, 444 Mass. 224, 229-230 (2005). To succeed, the defendant must establish good cause by showing:

> "(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.'"

Commonwealth v. *Lampron*, 441 Mass. 265, 269-270 (2004), quoting *Nixon*, 418 U.S. at 699-700. See *Matter of an Impounded Case*, 491 Mass. 109, 117 (2022). The defendant here has not met that standard.

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[2] Specifically, the defendant seeks a summons for "all cell phone(s) in the possession of and/or used by Brian Albert between January 28, 2022 and present" for forensic examination to recover "incoming and outgoing text messages, voice calls, voicemails, emails, location data, web searches, photographs, and/or other communications sent and/or received by Brian Albert on any other messaging platforms between January 28, 2022, and February 5, 2022," in addition to information contained on any cloud-based accounts used to store such information and any passwords necessary to access the cell phones and/or cloud-based information. The defendant also seeks summonses for (1) call records, call detail records, SMS text and MMS records, and data records for Albert's and McCabe's cell phone numbers between January 28, 2022 and February 5, 2022 from Verizon and/or AT&T; (2) cell tower and cell phone location information for Albert's cell phone numbers between January 28, 2022 and February 5, 2022 from Verizon and AT&T; and (3) subscriber information associated with Albert's and McCabe's cell phone numbers from Verizon and/or AT&T.

The defendant has not shown with credible evidence that relevant, admissible evidence will be found on Albert's cell phone or in his cell phone records. The single, unanswered phone call from McCabe to Albert shortly after O'Keefe's body was discovered is insufficient to establish any meaningful connection between Albert's cell phone and this case.[3] The defendant has not pointed to any other evidence that does so. The defendant therefore, has not shown that the cell phone or records have "a 'rational tendency to prove [or disprove] an issue in the case'" as is required to satisfy the mandate of Rule 17. *Commonwealth* v. *Jones*, 478 Mass. 65, 68 (2017), quoting *Lampron*, 441 Mass. at 269-270. Rather, the defendant is improperly attempting to use Rule 17 as a vehicle "for the exploration of potential evidence . . . ." *Lampron*, 441 Mass. at 269.

The defendant also has not shown that her request for McCabe's cell phone records satisfies the Rule 17 standard. The defendant asserts that the records "will undoubtedly reveal text messages and calls that Ms. McCabe deleted from her phone in an effort to interfere with the investigation" and "will establish whether there are additional, substantive communications that are missing and/or were deleted from Brian Albert's and/or Jennifer McCabe's cell phones from the period in question." Defendant's Motion at 18, 20. Here, the defendant is seeking to use Rule 17 as "a discovery tool," which is impermissible. *Lampron*, 441 Mass. at 269. In addition, the defendant has not provided a sufficient factual basis that the cell phone records may be relevant to her defense. See *Jones*, 478 Mass. at 68 (relevance "is not established by rank speculation," and "[p]otential relevance and conclusory statements regarding relevance" do not satisfy *Lampron*'s requirements [citations and quotations omitted]).

[3] At the hearing, defense counsel noted that Albert and McCabe communicated via their cell phones later that day. This does not, however, persuade the court that Albert's phone or the corresponding phone records contain evidence that is evidentiary and relevant in this case.

Electronic devices such as the cell phone that the defendant seeks here "are the repositories of a 'vast store of sensitive information' that can provide 'an intimate window into a person's life.'" *Commonwealth* v. *Feliz*, 486 Mass. 510, 516 (2020), quoting *Carpenter* v. *United States*, 138 S. Ct. 2206, 2214, 2217 (2018). An individual therefore "has a compelling privacy interest in the contents of his or her electronic devices." *Feliz*, 486 Mass. at 516. Where, for the reasons stated, the defendant has not satisfied the requirements for a Rule 17 summons, and where allowing her Rule 17 request would significantly intrude on Albert's and McCabe's privacy interests in a manner that far outweighs the defendant's desire for the materials requested, the court will not issue a summons for Albert's cell phone, his cell phone records, or McCabe's cell phone records.

ORDER

For the foregoing reasons, the defendant's Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T is **DENIED**.

Date: June 20, 2023

Beverly J. Cannone
Justice of the Superior Court

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

NORFOLK SUPERIOR COURT
DOCKET NOS. 2282CR0117

COMMONWEALTH

v.

KAREN READ

COMMONWEALTH'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION PURSUANT TO RULE 17 OF CRIMINAL PROCEDURE – DIREECTED TO BRIAN ALBERT, VERIZON, AND AT&T

I. ` Introduction

Now comes the Commonwealth and respectfully requests that this Honorable Court DENY the Defendant's Rule 17(a)(2) Motion for Order Directed to Brian Albert. The Defendant's motion should be denied. Furthermore, the portion of the defendant's motion addressed to the production of Mr. Albert's cellular phone should more appropriately be framed as a Motion for Reconsideration, whereas the same motion was previously heard and denied by this Court. (see attached Court Paper #27, dated October 5, 2022). Regardless, this motion should be denied because the Defendant has failed to demonstrate that the requested cellular telephone is evidentiary and relevant and the application is not made in good faith, but rather is a "fishing expedition", for evidence of a purported conspiracy amongst these witnesses supported merely by speculation and conjecture.

II. Facts

On January 29, 2022, at approximately 6:04 a.m., the Canton Police Department received a 911 call from a woman reporting a male party, subsequently identified as the victim, John O'Keefe, found in the snow outside 34 Fairview Road. At the time of the 911 call, there was an active blizzard occurring with heavy snow and the temperature in the teens. Officers Saraf and Mullaney, both of the Canton Police Department, were dispatched to the scene along with Canton Fire and EMS. Officer Saraf was the first officer to arrive on scene where he observed three females waving at him from the front yard area of the residence. Officer Saraf's cruiser camera footage was viewed by the Grand Jury in this matter and admitted as Grand Jury Exhibit #56. (see attached). The footage depicts the weather and visibility conditions during the officer's transit and arrival to the scene shortly after the body of the victim was discovered and the 911 call was placed. In the video, Officer Saraf can be seen utilizing the spotlight attached to the driver's side of his cruiser as he attempts to locate the calling parties in the darkness and blizzard conditions.

Looking at the residence of 34 Fairview Road from the street, the three females were in the left corner of the property, in the area of a flagpole and fire hydrant. Officer Saraf observed the victim lying on the ground as two of the females were performing CPR on him. The three females on scene were identified as the defendant, Karen Read, Jennifer McCabe, and Kerry Roberts. Officer Saraf further observed the victim to be cold to the touch and not breathing. He returned to his cruiser to retrieve his AED device, however, at this time Canton Fire and EMS arrived on scene and took over resuscitative efforts. Paramedics transported Mr. O'Keefe to the Good Samaritan Medical Center in

Brockton where he was subsequently determined to be deceased by Dr. Justin Rice, hours later.

Lt. Paul Gallagher, Detective Sergeant Michael Lank, and Sergeant Sean Goode, also of the Canton Police, arrived on scene moments after the 911 call had been received. Following the victim's transport from the scene, they began to search for any evidence around where Mr. O'Keefe had been discovered, in the mounds of snow on the front lawn of the residence adjacent to the roadway. They located a broken cocktail style glass and multiple patches of red that appeared to be blood in the vicinity of where the body had been located. The Canton officers secured the glass and six blood samples from the snow as evidence.

Later that morning, the Massachusetts State Police Detective Unit of the Norfolk District Attorney's Office was notified and responded to the scene as well. Trooper Michael Proctor and Sergeant Yuriy Bukhenik were among the troopers who responded and began interviewing witnesses. They first spoke with Ms. McCabe. Ms. McCabe indicated that she and some friends were at the Waterfall Bar and Grille during the evening of January 28. She arrived with her husband Matthew at approximately 9:00 p.m., following one of their children's high school basketball games earlier in the evening. At approximately 11:00 p.m., Mr. O'Keefe and Ms. Read arrived at the Waterfall together. Ms. McCabe stated that Mr. O'Keefe and Ms. Read have been in a dating relationship for approximately two years and that Ms. Read stayed at Mr. O'Keefe's house most nights. Ms. McCabe observed Ms. Read walk into the bar holding a glass cup from C.F. McCarthy's with a clear liquid inside that she believed was a vodka soda drink. Ms. Read had entered the Waterfall with the glass inside her coat. Mr.

O'Keefe and Ms. Read had been at C.F. McCarthy's, a bar across the street from the Waterfall, prior to coming to the Waterfall. Ms. McCabe observed Mr. O'Keefe to be wearing a baseball hat, jeans and sneakers. She stated that the defendant and the victim appeared to be in a good mood and did not observe any arguing between the two throughout the course of the evening. She further described the atmosphere within the bar as friendly with no arguments amongst any of the patrons. This description of the group and the atmosphere within the bar and between the defendant and the victim was consistent with each of the witnesses present that the troopers interviewed throughout the course of their investigation. As the bar began to close, everyone within their group was invited back to 34 Fairview Road, the residence of Ms. McCabe's sister, Nicole Albert and her husband, Brian. She observed Mr. O'Keefe and Ms. Read to leave the Waterfall together.

As Ms. McCabe was arriving at her vehicle, she received a text message from Mr. O'Keefe asking "Where to" at 12:14 a.m. Ms. McCabe replied with the address of 34 Fairview Road. At 12:18 a.m., Mr. O'Keefe called Ms. McCabe to ask more specifically, where the house was located on Fairview. While inside the residence following her arrival there, Ms. McCabe observed a black SUV, consistent with Ms. Read's vehicle, a 2021 black Lexus SUV, arrive in front of the residence, from her vantage point at the front door of the home. Ms. McCabe texted Mr. O'Keefe at 12:31 a.m., stating "Hello" and again at 12:40 a.m., "Pull up behind me."; referencing her vehicle's parking spot within the driveway to the home, located on the right side of the property if looking at the residence from the street. Ms. McCabe then observed the black SUV move from its initial place where it had stopped on the street, near the driveway, and proceed to the left side of

the property, where Mr. O'Keefe's body was subsequently discovered later in the morning. At 12:45 a.m., Ms. McCabe texted Mr. O'Keefe again, "Hello", and then observed the black SUV drive away from the home.

At approximately 4:53 a.m., Ms. McCabe stated that she received a phone call from Ms. Read looking for Mr. O'Keefe. The phone call was placed by the victim's juvenile niece at the defendant's direction to Ms. McCabe's cellular phone. Ms. McCabe answered the call from the victim's niece, spoke to her briefly and the niece then handed the phone to the defendant. The defendant sounded distraught over the phone and drove over to Ms. McCabe's home. The defendant told Ms. McCabe that she last remembered seeing the victim at the Waterfall Bar. Ms. McCabe then informed the defendant that she observed the defendant and the victim leave the bar together. Ms. McCabe also later informed the defendant she had seen them in Ms. Read's vehicle in front of the home on Fairview. The defendant also informed Ms. McCabe that she and the victim had gotten into an argument the last time that she had seen him. The defendant arrived at Ms. McCabe's home around 5:30 a.m. Shortly after the defendant arrived at Ms. McCabe's home, Ms. Kerry Roberts arrived there as well as she had also received phone calls from the defendant that early morning looking for the victim. Ms. McCabe then drove Ms. Read's vehicle from her house back to Mr. O'Keefe's house as she was too hysterical, and Ms. Roberts followed along in her own vehicle.

While driving to Mr. O'Keefe's house, the defendant stated to Ms. McCabe, "Could I have hit him", "Did I hit him". Ms. McCabe stated that the defendant also told her about a cracked taillight on her vehicle. Once they arrived at the victim's home, the defendant had Ms. McCabe look at the cracked taillight, which Ms. McCabe described as

the passenger side, right rear tail light as cracked and missing pieces. Ms. McCabe and the defendant then entered Ms. Roberts's vehicle to go looking for the victim. The defendant was seated within the back passenger's side, while Ms. Roberts drove and Ms. McCabe was seated within the front passenger's seat. Ms. McCabe stated that they turned onto Fairview Road from Chapman Street and at that time, it was snowing heavily with the wind blowing, creating poor visibility. Ms. McCabe stated that just prior to 34 Fairview, there is a cluster of trees and immediately the defendant stated that she saw the victim. This statement initially confused Ms. McCabe and Ms. Roberts, as they were unable to see Mr. O'Keefe's body lying in the snow. Ms. McCabe stated that the defendant screamed to open the door and ran directly over to the body, near that cluster of trees, and laid on top of him for warmth and began CPR. Ms. McCabe stated that the victim was lying on his back covered with approximately six inches of snow, with his phone on the ground underneath him. The defendant yelled at Ms. McCabe twice to Google, "How long do you have to be left outside to die from hypothermia?", or something to that effect.

On January 29, the troopers interviewed Mr. Matthew McCabe, separately from his wife. Mr. McCabe indicated that he has known Mr. O'Keefe for approximately eight years and had met Ms. Read a handful of times. He stated that he was at the Waterfall Bar on Saturday night and observed the victim and the defendant enter together. He observed the victim to be wearing a baseball hat with a curved visor and Ms. Read to be drinking a clear liquid drink, possibly vodka. Mr. McCabe stated that he left the bar last from his group and was heading to his in-laws home at 34 Fairview Road. He entered his vehicle and his wife, Jennifer, was on the phone with the victim telling him to go to 34 Fairview.

While at the Fairview residence, he observed a large dark SUV pull up in front of the house on the street. He had been looking out the opened front door, through the glass storm door, and described the SUV's positioning as initially parked in front of the house. Mr. McCabe looked out the window some minutes later and observed the same vehicle had moved toward the left side of the property. Minutes following that, he observed the same vehicle driving off down Fairview, heading in the same direction it had been facing while parked.

Troopers also interviewed the homeowners of 34 Fairview Road, Brian and Nicole Albert. Both confirmed that they had been at the Waterfall Bar the previous evening with family and friends and had left around closing and returned to their home. Throughout the evening, they both indicated that the victim and defendant, neither of whom they knew particularly well, entered the bar and joined their group. They indicated that several people from the group had been invited back to their home following the bar, and several arrived staying for approximately one hour. Both indicated in their sworn testimony before the Grand Jury in this matter, that their nephew, Colin Albert, while present at the home upon their arrival, had left their home well before any of the guests' arrival from the Waterfall. Several other witnesses called before the Grand Jury similarly confirmed this. Neither were aware that the defendant and victim had planned on coming over, although they would have had no issue if they had been aware. Neither heard nor saw anything outside of their home over the course of the morning until Ms. McCabe awaked them.

Prior to Ms. McCabe entering their home and waking them up in their bedroom, Ms. McCabe's cellular phone, which was downloaded by members of the Massachusetts

State Police following her signed consent, shows phone calls from Ms. McCabe's phone to both Nicole and Brian Albert's phones. The first call to Nicole Albert occurs at 6:07:42, and while listed as answered, lasts for a duration of 9 seconds. The second call to Nicole Albert occurs at 6:08:17, and while also listed as answered, lasts for a duration of 7 seconds. The call to Brian Albert occurs at 6:23:00, and is listed as unanswered.

Troopers also interviewed Mr. Ryan Nagel. Mr. Nagel's sister, Julie, had been at 34 Fairview the evening of January 28, visiting with the Alberts' son for his birthday. Mr. Nagel stated that he had been contacted by his sister asking for a ride home. His friend drove, with Mr. Nagel in the front passenger's seat and his girlfriend in the rear cab, of his friend's Ford F-150 pickup truck to Fairview. As the truck was driving down Cedarcrest Road, he observed a set of headlights of a mid-size black SUV coming from the opposite direction on Cedarcrest, and the truck he was traveling in yielded to the SUV making a right turn onto Fairview and then followed behind it after executing its left turn onto Fairview. Mr. Nagel stated that the truck stopped directly in front of the driveway to the home and remembered the black SUV stopping along the right hand curb toward the left side of the property. He remained within the truck while his sister exited the home and asked them to come inside. He declined the invitation and his sister eventually decided to stay at the home and make other transportation arrangements. As his sister returned to the house, Mr. Nagel observed the black SUV pull up an approximate one to one and a half car lengths to the far left edge of the home's property, where the flagpole was located along with some bushes. He stated that the SUV's driver did not appear to place the vehicle in park at any point he observed it, as the rear brake lights were illuminated throughout his observations to include the third top center light. Mr. Nagel

reported hearing no noises coming from the interior of the SUV. Mr. Nagel indicated that as his friend pulled away from the side of the road when they were leaving, they drove past the black SUV, he observed the interior light on within the vehicle, and a Caucasian female operator seated inside the vehicle holding the steering wheel at 10 and 2, staring straight ahead of her.

Troopers also later interviewed Mr. Nagel's sister, Ms. Juliana Nagel, as well as her friend, Ms. Sara Levinson, both of whom had been present at the home on Fairview on January 28-29, and both of whom had been given a ride home by the McCabes. Both indicated that they had been at the home on Fairview for Brian Albert Jr.'s birthday on that evening. Both provided a list of other individuals there. Both indicated that the Alberts, Brian and Nicole, arrived later in the evening from the Waterfall and listed those in that group to include the Alberts, the McCabes and Mr. Higgins. Both indicated that no one else entered the home while they were there and that they left and got a ride home from the McCabes. Ms. Levinson recalled Ms. McCabe saying that someone else was coming, however, that person never arrived.

Juliana Nagel stated that she had called her brother, Ryan, for a ride home, at approximately 12:00 a.m. While waiting for him to arrive, she was looking out the kitchen window and observed an SUV stopped by the mailbox, with the front of the SUV facing Chapman Street. She stated that she further observed the SUV travel along the front of the house and stop between the mailbox and the flagpole where it came to a stop. She observed the SUV further pull up closer to the flagpole and stop again. She went outside to speak with her brother and noticed that it was lightly snowing at this time. After her brother declined her offer to come inside and she indicated to him that she

would arrange an alternative way home, she went back inside the home with the SUV still parked in the aforementioned position. Ms. Nagel stated that she left the residence in the McCabe's vehicle sometime between 1:30 and 2:00 a.m., with Mr. McCabe driving, Ms. McCabe in the front passenger seat, her behind the driver in the backseat, and Ms. Levinson seated next to her behind Ms. McCabe. Mr. McCabe reversed out of the driveway and as they traveled past the house, Ms. Nagel indicated that she thought she saw something, she described as a dark object, in the snow by the flagpole, but could not determine what it was.

Later that day, January 29, Troopers Mathew Dunne and David Dicicco interviewed Ms. Kerry Roberts. Ms. Roberts stated to them that at approximately 5:00 a.m., she received a call from the defendant stating that John did not come home, it was snowing and she was worried. The defendant further stated to Ms. Roberts "John's dead. Kerry, Kerry, I wonder if he's dead. It's snowing, he got hit by a plow." Ms. Roberts got dressed and left in her vehicle, eventually meeting the defendant at Ms. McCabe's home where she observed the defendant to be hysterical. Ms. Roberts stated that she believed the defendant was still intoxicated in the morning and had told her that she did not remember last night. Ms. Roberts reported the defendant as stating to her "I was so drunk I don't even remember going to your sister's last night", referring to Ms. McCabe's sister, the homeowner of 34 Fairview Road. Ms. Roberts followed the defendant's black Lexus SUV back to Mr. O'Keefe's house. They went inside the home for a period of time looking for him to no avail and checking on the victim's niece. While at the victim's home, Ms. Roberts stated that the defendant had told her and Ms. McCabe about a cracked rear passenger taillight and showed the both of them that area of her vehicle. Ms.

Roberts then drove her vehicle, with Ms. McCabe in the front passenger's seat and the defendant in the rear passenger's side, to 34 Fairview Road. She and Ms. McCabe were scanning the sides of the roadway along the drive looking for the victim, while the defendant periodically screamed and texted on her phone as they drove. Ms. Roberts described the weather as white out conditions as they were driving around.

As they arrived in the area of 34 Fairview, Ms. Roberts stated that the defendant screamed, "There he is, I see him" from inside the vehicle and screamed to be let out. Even after initially exiting the vehicle, Ms. Roberts stated that she still could not see the victim in the conditions and further stated that his body was covered in snow. She stated that the victim's body was approximately twelve feet from the roadway. She observed him to have a swollen right eye with a laceration above it and blood around his nose and mouth. Ms. Roberts stated that they immediately began CPR and Ms. McCabe called 911. Ms. Roberts stated that she observed the victim to be lying on his back with his arms by his side. She noticed that his right eye was swollen shut and that there was blood coming from his nose and mouth. When the paramedics arrived and lifted the victim's body onto the stretcher, Ms. Roberts observed the grass underneath the victim's back, not covered in snow as the remainder of the area was. The defendant repeatedly asked Ms. Roberts, Ms. McCabe, and the officers and paramedics on scene "is he dead?" repeating that phraseology numerous times to each. The defendant further grabbed Ms. Roberts by the arm at one point and asked her if they were really working on John or was he already dead.

In addition, Trooper Bukhenik interviewed Nicholas and Karina Kolokithas. Both were present with the group at the Waterfall on the evening of January 28. They arrived

there at approximately 9:00 and 9:30 p.m., respectively; as they came in separate cars following their daughter's high school basketball game. They had known the victim for approximately 5-6 years and had met the defendant a handful of times. They stated that the victim and the defendant arrived at the Waterfall together at approximately 11:00 p.m., arriving from C.F. McCarthy's across the street. Mrs. Kolokithas spoke for a period of time with the defendant and observed her to be drinking vodka soda cocktails while at the bar. She also recalled the defendant "pushing quite a bit" for a member of the group, Christopher Albert, the owner of a local pizza shop, to go across the street after leaving the bar to keep partying while he made pies for everyone. When it was time to leave, Mrs. Kolokithas indicated that she walked outside with Ms. McCabe and observed the victim and the defendant to walk out together and proceed to the left of the driveway, and up Washington Street, where their vehicle was parked along the curb, facing back up toward the Waterfall. Mrs. Kolokithas indicated that her vehicle was also parked along Washington Street, but further down and facing the opposite direction. From there, she observed the defendant walking toward the driver's side door of her black Lexus SUV. She further indicated that during the course of her conversation that evening with the defendant, the defendant complained about the victim's mother and the lack of private time the couple had for vacations, because of the children, their activities and responsibilities. She also described her as fine and did not believe the defendant to be overly intoxicated.

On January 30, Troopers Bukhenik and Proctor interviewed Canton Firefighter Katie McLaughlin. She had been assigned to Station One on the 29th and indicated that at approximately 6:00 a.m., Canton Fire and EMS had been dispatched to 34 Fairview Road

for a male party in the snow and unresponsive. Upon arrival, Ms. McLaughlin observed the victim to have trauma to his face and eye area and vomit in his mouth. She observed the victim to be dressed in jeans, socks and one black Nike sneaker. The victim's shirts were cut and his chest exposed for chest compressions. Ms. McLaughlin had exited the ambulance to speak with the defendant as to the victim's identity and medical history. The defendant provided the victim's name and date of birth. Ms. McLaughlin asked the defendant if she knew where the victim had suffered the trauma to his face/eye and the defendant turned to her friend and stated repeatedly, "I hit him, I hit him, I hit him."; in response to the paramedic's question.

Following their initial witness interviews on January 29, Troopers Bukhenik and Proctor then proceeded to the Good Samaritan to view the victim. They observed six bloodied lacerations varying in length on his right arm. The cuts extended from his forearm to his bicep. Both of the victim's eyes were swollen shut and black and blue in color. The troopers observed a cut to the right eyelid area of the victim. The victim's clothing, consisting of blue jeans, an orange t-shirt, long sleeve grey shirt, and boxer shorts were soaking wet and saturated with blood and vomit. The victim was also observed to have one black Nike sneaker with a white Nike logo on the side.

The victim's medical records were admitted as an exhibit before the Grand Jury in this matter as well. (see attached Grand Jury Exhibit #25). Throughout said medical records, the attending physician and medical personnel describe the victim's injuries at length. Said description of his injuries and medical conditions include: right superior orbital ridge region approx. 7mm laceration +surrounding soft tissue swelling/contusion;

+breath sounds bilaterally; pulseless; +superficial abrasions right forearm. Time of death is noted as 7:50 a.m.

On January 31, Dr. Irini Scordi-Bellow from the Office of the Chief Medical Examiner conducted the autopsy of Mr. O'Keefe. The doctor advised the troopers that she observed several abrasions to the victim's right forearm, two swollen black eyes, a small cut above the right eye, a cut to the left side of his nose, an approximately two inch laceration to the back right of his head, and multiple skull fractures that resulted in bleeding of the brain. Dr. Scordi-Bello further advised the troopers that the victim's pancreas was a dark red color indicating hypothermia was a contributing factor to his death. Dr. Scordi-Bello opined from her examination that the significant blunt force trauma injuries occurred prior to Mr. O'Keefe becoming hypothermic, as evidenced by hemorrhaging in his pancreas and stomach. Mr. O'Keefe had arrived at the Good Samaritan Medical Center with a body temperature reading in the low 80's. The doctor opined that the extensive injuries to his head likely rendered Mr. O'Keefe incapacitated. The doctor further opined that upon viewing Mr. O'Keefe's injuries and her examination of the body, she observed no signs of Mr. O'Keefe being involved in any type of physical altercation or fight.

In addition, Dr. Scordi-Bello testified extensively regarding her examination and findings before this Grand Jury. (see attached Grand Jury Minutes dated May 19, 2022; as well Grand Jury Exhibits #: 24, 26, and 27; as well as Dr. Scordi-Bello's Report of Autopsy, OCME File #: 2022-1697). In her testimony, the doctor described the medical definitions of a laceration, a contusion, and an abrasion; as well as the differences between the three. (Tr. 11). The doctor testified that the victim had abrasions on his right

arm. She described abrasions as "scratches caused by a blunt object, contact with a blunt object." (Tr. 12). She went on to describe them as a cluster of them on his right upper arm and on his right forearm; mostly linear, and ranging in size from a few millimeters to up to seven centimeters. (Tr. 12). Dr. Scordi-Bello testified that throughout her thorough external examination of the victim's body she observed no signs of an altercation or fight. (Tr. 35). The doctor also testified extensively to the injuries or swelling of the victim's eyes. Dr. Scordi-Bello testified that, from her examination of the victim, both external and internal, that the bleeding and subsequent swelling around his eyes was related to the very small fractures in the skull. (Tr. 39). She testified specifically that "the injury initiated or started in the back of the head, caused all the fractures in the skull, and then the eyes got red, or black, or purple because of the seepage of blood from the small blood vessels." (Tr. 39). The neuropathology report completed by Dr. Renee Stonebridge, also of the Office of the Chief Medical Examiner, (and attached hereto as Grand Jury Exhibit #27), are consistent with Dr. Scordi-Bello's findings.

At approximately 4:30 p.m., on January 29, Troopers Bukhenik and Proctor arrived at a residence in Dighton, MA, the home of the defendant's parents. Upon their arrival, they observed a large black Lexus SUV, bearing MA Reg. #: 3GC684, registered to the defendant, parked outside the garage door in the driveway to the home. The troopers observed the rear right passenger side taillight to be shattered and a large red piece of plastic to be missing from the taillight. The troopers were invited into the home and observed the defendant seated on the living room couch. The defendant agreed to speak with the troopers. The defendant indicated to the troopers that she had met the victim at C.F. McCarthy's bar in Canton at approximately 9:00 p.m., the evening prior.

The victim had been there with friends prior to her arrival. She stated that the victim was drinking beers and she was drinking vodka sodas. She described the glassware she was drinking out of as a vase style. The defendant stated that she and the victim left C.F. McCarthy's and went to the Waterfall, but denied that she had taken any drink from one bar to the next. She stated that they were at the Waterfall for approximately an hour and during that time; there were no arguments amongst anyone present there. When she and the victim were leaving the Waterfall, she stated they were invited to a house on Fairview Road.

The defendant stated that she had dropped the victim at the house on Fairview and went home since she was having stomach issues at the previous bar. The defendant stated that she dropped the victim off, then made a three point turn in the street and left. She stated that she did not see the victim enter the residence. The defendant indicated that she first observed the broken taillight in the morning and did not know how she had broken it the previous evening. The victim was uninjured when she dropped him off at the house, however, when she discovered him the next morning, she observed him lying face up, snow on his legs, his eyes swollen, and blood coming from his nose and mouth. She stated that she began providing him mouth to mouth. The defendant further stated that she had attempted to contact the victim throughout the night, calling and texting him numerous times with no response. She stated that they had a verbal argument that morning over what the defendant fed the victim's niece for breakfast. The troopers further asked the defendant for contact information relating to the people she had indicated were present at the bars. The defendant obliged, and prior to providing said

information, the troopers observed the defendant to enter a numerical passcode into her phone to unlock it, prior to retrieving said data.

The black Lexus SUV was seized from the driveway of the defendant's parents' home in Dighton on January 29. The vehicle was then transported via tow to the Canton Police Department. On February 1, members of the Massachusetts State Police Crime Scene Services Section, a Crime Lab chemist, and Trooper Joseph Paul, of the Massachusetts State Police Collision Analysis and Reconstruction Section (CARS), responded to the department. They observed fragments of broken glass on the rear bumper of the vehicle. The rear right passenger side taillight was shattered and pieces were observed missing from the red and clear areas. On the right side of the rear tailgate, a deep scratch and minor dent were observed. On the right side of the rear bumper, above a small red light, two scratches were observed as well as one area where the paint was chipped off. Troopers from the CARS Unit performed a rapid acceleration, forward and reverse tests with the vehicle and noted no deficiencies with the vehicle's braking system or other operations. The troopers placed a training figure resembling a human, approximately six feet in height behind the Lexus. The vehicle was operated by a CARS trooper and documented with video from Crime Scene. The vehicle was placed in reverse and started to travel toward the training figure. The rearview camera within the vehicle was operating properly, displayed on a screen in the center of the dashboard, and provided a 360-degree overhead visual. As the Lexus traveled closer to the figure, both auditory and visual ques within the vehicle sounded off, indicating an obstruction to the rear.

In addition, Forensic Scientist Maureen Hartnett responded to the Canton Police Department that date and took samples from the Lexus. She observed damage to the rear of the vehicle on the passenger side including a dent with chipped paint in the trunk door, a broken tail light, and scratches on the bumper. An apparent hair was noted on the rear passenger side quarter panel. Said apparent hair has subsequently been forensically tested and confirmed as human hair. (see attached Massachusetts State Police Crime Laboratory Report). Apparent glass was also noted on the rear bumper.

Also on January 29, the Massachusetts State Police Special Emergency Response Team (SERT) was activated to assist in searching for possible evidence outside of 34 Fairview Road. Members from the SERT team located a black Nike sneaker with a white Nike logo along the side, matching the one worn by the victim at the time his body was discovered. In the same area, where the body had been recovered, two red plastic pieces of a taillight were located, consistent to the pieces missing from the defendant's black Lexus. One piece of clear plastic taillight was located in the same area as well, also consistent with the broken taillight of the Lexus. The SERT team discovered these items after digging through the still falling snow.

On January 31, investigators observed video from the Ring cameras affixed to One Meadows Avenue, the residence of Mr. O'Keefe. The video was observed by utilizing the Ring application on the victim's cell phone. The data in the application showed that two cameras are connected on the victim's account under his email. The two cameras cover the front door and the driveway to the home. From 6:00 p.m. on January 28 through 6:00 a.m. on January 29, the Ring application showed approximately fifteen events between the two cameras at the residence. Investigators observed on the Ring

video from the driveway camera, the defendant's SUV leaving the right garage door and traveling out of the driveway, onto Meadows Avenue, and turning left onto Pleasant Street at approximately 5:08 a.m. on January 29. Investigators were not able to locate any Ring video of the same SUV arriving at the home prior to that, specifically no video of the defendant arriving at the victim's home after leaving the Fairview residence in the early morning hours of January 29 was contained within said available footage.. The victim's Chevrolet Traverse SUV was parked in the far right corner of the driveway as the defendant's SUV exited in reverse from the garage, coming close to the victim's SUV. As the defendant's vehicle exits the driveway, the troopers observed her right passenger side taillight to be broken. On February 3, Trooper Evan Brandt from Crime Scene Services arrived with Trooper Proctor at the home and documented all sides of the Traverse and the garage doors. No damage was observed anywhere on either the vehicle or the doors. No fragments or pieces of a broken taillight were discovered in the victim's driveway, nor are any observed on the ground or anywhere in the driveway when the defendant's vehicle is seen leaving the driveway at 5:08 a.m.

On February 1, Troopers Bukhenik and Keefe traveled to C.F. McCarthy's bar and spoke with the manager of the bar. They reviewed and secured video from inside the establishment from January 28 and receipts. From the interior surveillance video, the troopers observed Mr. O'Keefe walk into the establishment, wearing jeans, black Nike sneakers, a gray and dark gray long sleeve shirt, and a dark baseball hat with an American flag on the front, at approximately 7:37 p.m., along with his friend Michel Camerano. Approximately an hour later, at 8:51 p.m., the defendant enters the bar, wearing a black jacket, black boots, black pants, a handbag/small purse, and a white shirt

underneath her jacket. Seven minutes later, at approximately 8:58 p.m., the bartender hands the defendant a tall cylinder style glass containing a clear liquid with a lime in it. At approximately 9:15 p.m., the victim hands the defendant a cylinder style glass, with a clear liquid and a lime in it. At the following times, the troopers observed in the video the defendant receiving a shot glass with a clear liquid in it, which she subsequently pours into her cylinder glass: 9:20; 9:33; 10:22 and 10:29 p.m. At approximately 9:57 p.m., the bartender is observed handing the defendant a tall cylinder style glass with a clear liquid in it and a shot glass with a clear liquid in it, for a total of seven drinks the defendant receives and consumes during her time at this bar. At approximately 10:40 p.m., the victim and the defendant are observed leaving the bar, with the defendant holding her last drink in her right hand as they exit the door to the establishment.

On February 1, troopers traveled to the Waterfall Bar, reviewed, and secured both interior and exterior surveillance camera footage, as well as receipts, from that establishment. From the interior camera, the troopers observed the victim and the defendant enter the bar at approximately 10:54 p.m. At approximately 12:10 a.m., the defendant walks out with two females, leaving through the front door. Moments later, the victim standing alone at the table, takes a sip from a short cocktail glass and walks out the front door holding the glass in his right hand. From the exterior camera, the troopers observed the victim walk out at approximately 12:11 a.m., carrying a short cocktail glass in his right hand, meet up with the defendant, and then the two walk together toward Washington Street. The troopers also observed from this exterior camera that it appeared to have just begun snowing with a light coating on the ground and cars within the parking lot.

On February 2, Troopers Dunne and Moore were canvassing for video footage in relation to this investigation. They proceeded to the Edward J. Lynch, Jr. House at Pequitside Farm on Pleasant Street in Canton. There they were able to retrieve video footage from the town's IT director who confirmed that the date and timestamps on the video were correct. The troopers also viewed and recovered video from the Canton Town Library external cameras, and on February 3, from the Temple Beth Abraham (B'Nai Tikyah). Both the Library and the Temple's cameras overlook Washington Street in Canton. The distance between these two buildings is approximately one mile. From the Library video, at approximately 12:15 a.m., the troopers observed a large black SUV, consistent with the defendant's Lexus, traveling on Washington Street and continue toward the Temple, four minutes after the victim and the defendant exited the Waterfall. At approximately 12:17 a.m., from the Temple video, the troopers observed, a large black SUV traveling by the building toward the intersection of Washington and Dedham Streets, in the direction of Fairview Road.

From the Library video, at approximately 5:11 a.m., the troopers observed a large black SUV traveling down Sherman Street, take a left onto Washington and travel in the direction of the Waterfall. At approximately 5:15 a.m., the troopers observed a large black SUV traveling away from the area of the Waterfall on Washington Street, crossing over Sherman and continue on Washington toward the Temple. From the Temple video, at approximately, 5:18 a.m., the troopers observed a large black SUV traveling by the front of the building toward the intersection of Washington Street and Dedham Streets. In addition, the troopers received via a search warrant, the defendant's Verizon cell phone records. Lieutenant Brian Tully, of the Massachusetts State Police, examined said records

and was able to plot the defendant's movements, while the phone was in use for various periods of time. The phone's movements coincided with the directions of travel of the black SUV observed on the videos from the Library and the Temple, during both time frames. These videos and phone records on the morning of January 29, occur after the defendant spoke with Ms. McCabe on the phone after directing the victim's niece to call Ms. McCabe, and after the defendant is seen on the victim's residence's Ring video leaving that home at 5:08 a.m. Furthermore, they evince the defendant traveling in the direction of the home on Fairview, prior to going to Ms. McCabe's home that morning.

On February 22, both the ten-year-old nephew, C.F., and the fourteen-year-old niece, K.F., of the victim were interviewed at the Norfolk Advocates for Children Center in Foxboro, MA. The children indicated that they had lived with their uncle, the victim, for approximately eight years following the passing of both of their parents. Both children indicated that the victim and the defendant had started dating approximately two years ago, after having dated some time before in the distant past. They both indicated that the defendant would stay over their house on Meadows Avenue several nights a week.

P.F. stated that the defendant and victim argued "a decent amount of time." P.F. recalled a recent argument over groceries and the victim expressing needing a break from the defendant. After that particular argument, the victim wanted the defendant to leave their house, however she refused. P.F. indicated that he had left the home on January 28 at approximately 8:00 p.m. for a sleepover at a friend's house, and was not present at the home overnight. P.F. indicated that neither he nor his sister had access to the Ring System, but believed that the defendant did from the family computer within the home.

K.F. indicated during her interview that the defendant and the victim had argued a lot toward the end, approximately two to three times a week. She further stated that approximately a week prior to January 29, she was sitting on the stairway inside the house while the victim and the defendant were arguing. K.F. stated that she heard the victim tell the defendant that their relationship had run its course and that it isn't healthy. She stated that the defendant did not want the relationship to end and refused to leave their house. K.F. stated that she had gone to bed at approximately 11:00 p.m., on January 28, after her friend had left and was awoken by the defendant at approximately 4:30 a.m., with the defendant screaming and acting frantic. The defendant ran into the victim's bedroom to retrieve K.F.'s cell phone and K.F. then began texting and calling the victim with no response. The defendant then had K.F. call Ms. McCabe and put the defendant on the phone with her. After speaking with Ms. McCabe, the defendant left the house and told K.F. to call Mr. Camerano to come and pick her up. K.F. indicated during her interview that the defendant changed her story several times while speaking to Ms. McCabe on the phone, with initially the defendant stating that she and the victim got into an argument and she dropped him off.

On January 29, the troopers also recovered Mr. O'Keefe's cell phone and were subsequently able to forensically extract the data from said phone. Their forensic extraction of the call logs, voicemails and text messages between the victim and the defendant, including the date of January 28-29, detailed strains within their relationship, the victim's desire to end their relationship and the defendant's description of their relationship with them and the two children together as "toxic". The troopers recovered several voicemails from the victim's phone from the defendant; following the time period

they were in front of the residence at 34 Fairview, in which the defendant screamed to the victim that she hated him.

On January 29, the defendant was transported from the scene to the Good Samaritan Medical Center. While there, blood was drawn pursuant to her medical diagnosis and treatment at that facility. The ethanol results from said records indicate that at 9:08 a.m., on the 29th, her blood had a reading of 93 mg/dl. Nicholas Roberts, a forensic toxicologist from the Massachusetts State Police Crime Laboratory performed both a serum conversion and retrograde extrapolation of said result, opining that Ms. Read's BAC at that time on the 29th was .07-.08%. From his retrograde extrapolation analysis, he opined that her BAC around the time period of 12:45 a.m., would have been between .13% - .29%.

Lastly, these facts are summarized from a Grand Jury presentation that spanned several months, with at least fourteen dates of testimony, from approximately forty-two witnesses, and 1,445 pages of Grand Jury transcripts of sworn testimony from said witnesses.

III. Argument

When a defendant moves the Court to subpoena potentially privileged records or tangible objects, a defendant "must establish good cause, satisfied by a showing" of the following four criteria:

> (1) that the documents are evidentiary and relevant;
>
> (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence;
>
> (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such

inspection may tend unreasonably to delay the trial; and

(4) that the application is made in good faith and is not intended as a general "fishing expedition".

Commonwealth v. Lampron, 441 Mass. 265, 269 (2004), quoting United States v. Nixon, 418 U.S. 683, 699-700 (1974).

The defendant is required to make a factual showing that the records sought have a "rational tendency to prove [or disprove] an issue in the case." Lampron, at 269 quoting Commonwealth v. Fayerweather, 406 Mass. 78 (1989). "The evidentiary standard of relevance applies." Commonwealth v. Lam, 444 Mass. 224, 230 (2005) quoting Lampron at 269. The moving party has the burden of meeting the requirements of Rule 17, including submission of an affidavit. Lam, at 230-231. If defense counsel or the defendant serves as the affiant, the facts in the affidavit must be specific and "in the personal knowledge of counsel's sources." Lampron at 270. Mere "speculation" is insufficient to support this burden. Id. at 462. see generally Commonwealth v. Montanez, 410 Mass. 290, 297 n. 8 (1991) (detailing burden of showing materiality for "broad," "generalized" requests).

The defendant here submits a supporting affidavit by one of her counsels that is simply a reiteration of an argument bereft of any evidentiary support. The defendant posits a fanciful "facts" section to support the conspiracy that purportedly exists and forms the basis for her requests for the subject call detail records and cellular phone at issue. The defendant offers only speculative grounds for her request; her showing is, therefore, inadequate. Commonwealth v. Betances, 451 Mass. at 462. See also Commonwealth v. Durham, 446 Mass. 212, 218-9 (2006) ("Theatrics do not accord with our discovery process."). "[R]ule 17 is reserved for evidentiary materials that are likely to be admissible at hearing or at trial, [] and not invoked merely for the exploration of potential evidence." Commonwealth v. Lampron, 441 Mass. at 269. "Potential relevance and conclusory statements regarding relevance are insufficient." Id.

It is well settled that "[p]otential relevance and conclusory statements regarding relevance are insufficient to satisfy Dwyer's requirements." Commonwealth v. Labroad, 466 Mass. 1037, 1039 (2014), quoting from Lampron at 269. Instead, "a defendant must make a factual showing that the requested documents have a 'rational tendency to prove

[or disprove] an issue in the case.'" Id. at 1038. The defendant bears the burden to "set forth with particularity some factual basis indicating how the privileged records were likely to be relevant and material to an issue in the case, and that an examination of those records would disclose exculpatory information material to the defendant's guilt." Commonwealth v. Bourgeois, 68 Mass. App. Ct. 433, 438 (2007). "Generalizations and unsubstantiated statements concerning a particular victim's credibility are not enough." Id. at 436. As in Bourgeois, in the absence of any claim that the witnesses made any relevant statements in furtherance of any purported conspiracy that followed the conduct that is the subject of these indictments, the defendant's request is unreasonable. Bourgeois, supra. The current motion states nothing regarding Mr. Brian Albert which was not already submitted in the prior motion for his cellular phone, nor offers any relevant statements or new factual support. This motion should similarly be denied.

In Commonwealth v. Bourgeois, the Appeals Court held that mental health records are not relevant simply because they exist and a victim is referred to mental health services at around the time she first revealed the abuse. Id. at 437. In Commonwealth v. Olivier, 89 Mass. App. Ct. 836, 845 (2016), the Appeals Court held that a defendant's argument that the records of the victim's appointment with her therapist after the alleged rape might contain "an inconsistent account or meaningful silence" was too speculative where there was "no evidence the victim ever even spoke to her counselor about the alleged rape." Id. at 845-6. This was so there even though the victim had been encouraged by her doctor to speak to the counselor about the incident. Id. Here, the defendant can provide no factual basis to demonstrate that the materials sought are relevant or would likely be admissible at trial. Of note, counsel for the defendant, demonstrates no instance of knowledge, personal or otherwise, that any such conversations between these witnesses occurred, let alone occurred utilizing their respective cellular phones. Furthermore, several of these witnesses barely knew one another prior to this incident, let the alone the victim, let alone the defendant they were so actively purportedly conspiring to frame. Counsel for the defendant states merely in a conclusory fashion, based on his own conjecture and speculation, unsupported by evidence but rather in direct opposition to the evidence and testimony presented to the Grand Jury in this matter, that such a conspiracy between numerous civilians, Canton

Police officers, other law enforcement officers acting in a civilian capacity as witnesses, and the entire CPAC Unit of the Massachusetts State Police in Norfolk County, existed and therefore the entirety of this phone for the requested time span are: "evidentiary and relevant"; and thus he should be granted unfettered access to said phone, regardless of to whom any communications are directed. See Lam, 444 Mass. At 229-30 (The Commonwealth has a compelling interest in "preventing unnecessary harassment of a complainant and other Commonwealth witnesses caused by burdensome, frivolous, or otherwise improper discovery requests. A complainant or witness should be forced neither to retain counsel nor to appear before a court in order to challenge, on the basis of a partial view of the case, potentially impermissible examination of her personal effects and the records of her personal interactions.").

The time period the defendant is requesting access is unclear. On the first page of the defendant's motion she requests "all cell phone(s) in the possession of and/or used by Brian Albert between January 28, 2022, and present…" Later in the same motion, the defendant requests information from the phone from January 28, 2022 through February 5, 2022. The defendant's request for such unfettered access, without any evidence of materiality of said content is without support. The time-frame requested is never explained and is far too expansive. Furthermore, the content requested is similarly far too expansive, as there is seemingly no limitation as to what content is being sought. There are no limitations proposed by counsel's motion, as this request is the epitome of a fishing expedition deemed inappropriate by the Courts. The Commonwealth objects to the production of this phone; particularly in the boundless manner in which counsel suggests, as far as Mr. Albert producing his phone to counsel to be given to his expert, with no oversight by the Court.

Rule 17 contains a means and process by which a party may request from the Court either summons for witnesses or for the production of documentary evidence and/or objects. See Rule 17. Here, the defendant has filed a motion, accompanied by an affidavit of counsel, that is bereft of any reference to the relevance or anything beyond mere circumspection that materials, relevant or not, even exist, with regard to this witness' phone. Furthermore, the defendant has failed to show that anything contained within this phone, bears any remote relevance to the substance of the charges before this

Court. The defendant seeks through this Motion to obtain any and all content of the subject witness party's phone, which could contain and cross a myriad of subjects pertaining to the witness without even a shred of support that any of these materials bear even the slightest relevance to the charges that bring the defendant before this Court. The defendant's request, in this respect, is far too overbroad. The requests suffer as well an overly broad frailty in the extensive time frame from which they request said phone data. These requests are far too overbroad and overly expansive in the length of time they request. See generally, Riley v. California, 573 U.S. 373, 403 (2014) (cellphones contain the "privacies of life" and before police may search a cellphone, they must obtain a narrow, particularized warrant, supported by probable cause as general warrants and unrestrained searches were one of the driving forces behind the American Revolution and foundations of the Fourth Amendment).

This case does not, as counsel states, hinge solely upon the testimony of Ms. McCabe. The statements and testimony of other witnesses, the forensic evidence, and video evidence are conjunctively simply hard to reconcile with counsel's facts, even assuming everything averred is true and accurate. The predominant amount of statements made by the defendant to this witness, were made by the defendant in the presence of additional witnesses, which is conspicuously absent from counsel's recitation. Counsel states that the defendant "has always maintained" the purported story of her leaving Mr. O'Keefe at the Fairview residence and calling him repeatedly to ensure that he was safely within the home. The defendant stated a lot of things to a lot of witnesses, and the troopers in her interview with them, however, this version that the defendant has "consistently" maintained is one of first impression. The defendant seems to suggest that the body of Mr. O'Keefe was discovered that morning by the defendant and Ms. McCabe. However, Ms. Roberts was present with them at this time as well but remains absent from counsel's recitation of the facts. Counsel further states that Ms. McCabe "inserted" herself into the defendant's search that morning for Mr. O'Keefe. However, it was the defendant that awoke the victim's niece at 4:30 a.m., had the niece repeatedly text and call the victim, and then asked or instructed the niece to call Ms. McCabe at 4:53 a.m. Ms. McCabe answered this call from the victim's niece, not the defendant. During this call, the defendant stated to Ms. McCabe initially that she last remembered seeing the

victim at the Waterfall. When informed by Ms. McCabe that she had seen the victim and defendant leaving the Waterfall together and seen the defendant's vehicle in front of the Fairview residence, the defendant then stated that she had left the victim on Fairview after they had gotten into an argument. The statements made by the defendant to Ms. McCabe during this call were confirmed by the victim's niece in her interview.

The defendant then drove from the victim's home to Ms. McCabe's home, exiting the garage at 5:08 a.m., per the victim's Ring camera footage. Said Ring footage, however, does not contain any video of the defendant's arrival to the victim's home after she left the Fairview residence. The defendant arrived at the home of Ms. McCabe at approximately 5:30 a.m., shortly followed by Ms. Roberts, whom the defendant had also called that morning and provided a different story as to the victim's whereabouts than what she had earlier stated to Ms. McCabe. The video from both the Canton Town Library and the Temple, coupled with the movements of the defendant's cellular phone, detail that prior to going to Ms. McCabe's home, the defendant went in both the direction of the Waterfall and the residence on Fairview. Counsel suggests that Ms. McCabe "delayed" the defendant's return to the Fairview residence that morning, when the evidence demonstrates that she had already been there before she even went to Ms. McCabe's home. This case is simply not, as counsel misconstrues, solely and wholly reliant on the testimony of Ms. McCabe.

Counsel for the defendant states that the victim's injuries demonstrate that he was beaten severely and left for dead. The victim's medical records belie this characterization of his injuries. The medical records from Good Samaritan characterized the victim's injuries as: right superior orbital ridge region approx. 7mm laceration +surrounding soft tissue swelling/contusion; +breath sounds bilaterally; pulseless; +superficial abrasions right forearm. Dr. Scordi-Bello testified before the Grand Jury at length regarding the victim's injuries. The doctor described Mr. O'Keefe's right arm injuries as scratches caused by a blunt object. The doctor noted that they appeared in a linear pattern. The doctor detailed that she observed no signs of an altercation or fight from her examination of Mr. O'Keefe. Lastly, she testified in great detail as to the swelling of his eyes being related to the fractures in his skull and how those manifested into the observable swelling and discoloration of his face.

There are no conflicting accounts of the victim exiting the defendant's vehicle and entering the residence on Fairview as counsel states. Mr. Nagel's testimony does not demonstrate what counsel suggests. Mr. Nagel did not say that there was not a passenger in the defendant's vehicle. He stated merely that as he drove past the vehicle, he only saw the female operator. Mr. Nagel also testified that the vehicle he was a passenger within and the defendant's vehicle arrived on Fairview at the same time, pulling up to the curb in front of the residence in tandem. Mr. Nagel further stated that, at no time, did he see the defendant's vehicle without its brake lights illuminated, never saw anyone exit the vehicle, let alone enter the home, saw no footprints around the vehicle nor anyone outside of it, never observed any damage to the defendant's vehicle, and never lost sight of the vehicle from the time it pulled onto the street until the time he left in his friend's truck. Mr. Nagel's statements do not substantiate that the victim entered the home, but rather point more to evince that neither the victim, nor anyone else, had yet exited the defendant's vehicle while Mr. Nagel was in front of the home. All parties within the residence, as well as Mr. Nagel, are consistent in that they never observed anyone exit the vehicle or come into the residence. The defendant is still present in her vehicle in front of the residence when Mr. Nagel leaves, therefore he cannot account for everything the defendant did in front of the home.

The defendant states that Ms. McCabe stated to Trooper Proctor that while they were searching for Mr. O'Keefe, the defendant repeatedly asked "could I have hit him", "did I hit him." The defendant also repeated these statements when the body of the victim was discovered, as reflected in the testimony of Ms. McCabe, Ms. Roberts, and first responder Ms. McLaughlin, in response to the paramedic's questions regarding the causation of the injuries to the victim. Counsel states that Ms. McCabe "falsely" tells Trooper Proctor that the defendant began screaming to pull over because she saw the victim's body before he was actually visible. Ms. Roberts stated the same to the troopers as well as in her Grand Jury testimony.

Counsel also refers to Trooper Proctor as a close family friend of both the McCabes and the Alberts. He is not. The photograph that counsel attached to this motion, and several preceding motions, said to depict the trooper with one of the McCabe's children is simply not accurate. The McCabes have four daughters. The juvenile female

depicted is not one of them. The young child is related to Trooper Proctor and of no relation to the McCabes.

Counsel also describes the precipitation at 6:04 a.m. on January 29 as “minimal”. The Canton Police cruiser camera footage of Officer Saraf’s cruiser that morning, as well as the statements and testimony of numerous witnesses present that morning, are in direct contradiction to that. All of the things that counsel states Ms. McCabe did to “set the narrative” are corroborated by other witnesses or video or both.

As aforementioned, the current motion states little if anything in its facts as it relates to Mr. Albert. The motion spends a great deal of time attempting to discredit Ms. McCabe. As it pertains to Ms. McCabe, the defendant avers that “new revelations” have been discovered by their expert, Mr. Richard Green, from his analysis of Ms. McCabe’s phone that were previously “withheld” from the defense. Mr. Green’s analysis, however, much like the facts section of counsel’s motion, is either incorrect or incomplete in its details of the evidence. Similarly too, if taken divorced from the context of the entirety of the evidence, it too can easily be misconstrued.

The Commonwealth did not withhold the information from the defense. When the defense requested the “raw extracted data” from the Commonwealth, it was timely provided. As detailed in Trooper Nicholas Guarino’s report (see attached at Par. 5), the Commonwealth ran Ms. McCabe’s phone through a Cellebrite UFED reader (Ver. 7.53.0.29), that was created on May 4, 2022. The defense expert used Cellebrite Physical Analyzer Ver. 7.61.0.12, a newer updated version of the software utilized to download said material. The purportedly “incriminating” search in question does not appear in the downloaded material using the earlier version of the software and was therefore not in the earlier extraction. The updated version of Cellebrite, that was not in existence at the time of the trooper’s initial download, does show such a search. However, the Google search, “Hos long to die in cold”, did not occur at 2:27:40 a.m.

The file was parsed from a Write Ahead Log (WAL) file. A WAL file is a file that a Sqlite database creates to temporarily store data prior to being written into the database. WAL files can contain multiple copies of the same page, each with different data/records. (Attached at Par. 7). An iPhone user would not be able to access this WAL file through the phone to purposely delete entries placed there, as counsel purports Ms. McCabe did

here. (Attached Par. 8). In addition, at that exact same time of 2:27:40 a.m., there is a search located in the Knowledge C database for http://ozonebasketball.com/teams. This timestamp is the last interaction of the Safari tab in the iPhone to search the ozonebasketball website at 2:27:40 a.m., and not a search of "hos long to die in cold." This search would have been purged from the WAL file once the tab was closed because it would have been committed to the database. (Attached at Par. 10). At that same time period that the defendant highlights, Ms. McCabe's cellular phone shows several unrelated searches that were conducted and also show as deleted from the WAL file for Canton girl's basketball and a YouTube music video. (Attached at par. 12).

The defense expert also located a picture artifact from the Safari Cache Records with a URL pertaining to "how long does it take to digest food." When this URL is run it brings up an image of a person with a plate of food on a counter before them, cutting up said food. There is no evidence of any search being made for that query in Ms. McCabe's phone history. (Attached at Par. 13).

The defense expert also located a deleted screenshot of Brian Albert's contact information. The screenshot was created at 6:08 a.m. on January 29, 2022. A review of the call logs shows that Ms. McCabe's phone makes calls to Nicole and Brian Alberts' phones that morning. The first call to Nicole Albert occurs at 6:07:42, and while listed as answered, lasts for a duration of 9 seconds. The second call to Nicole Albert occurs at 6:08:17, and while also listed as answered, lasts for a duration of 7 seconds. Calls that go to voicemail register as answered. The call to Brian Albert occurs at 6:23:00, and is listed as unanswered. Brian Albert's contact information was not deleted from the phone and was still present within it when Ms. McCabe signed her voluntary consent to search and download it.

The defense expert also highlighted and reviewed Health and location data from both Ms. McCabe and Mr. O'Keefe's cellular phones. Counsel for the defendant states that this data unequivocally shows that Ms. McCabe was up all night pacing around second floor of her home, and that Mr. O'Keefe entered the residence on Fairview. Omitted from the defendant's motion is the fact that the same data relied upon for that supposition also reveals that Mr. O'Keefe presumably took 133 steps at 8:08 a.m., 68 steps at 8:25 a.m., 87 steps at 7:57 a.m., 81 steps at 11:06 a.m., 109 steps at 11:18 a.m.,

and 46 steps at 11:56 a.m. Mr. O'Keefe was pronounced deceased at the Good Samaritan Hospital at 7:50 a.m. The defendant's motion also highlights that Mr. O'Keefe's data indicates that between 12:21:14 a.m. and 12:24:37 a.m., his health data reads that the phone ascended/descended three floors, and therefore Mr. O'Keefe must have entered the home on Fairview. To call this data unreliable is an understatement. Trooper Guarino analyzed this health data and cross-referenced it with the Native Location in Cellebrite and the location data in Axiom belonging to John O'Keefe's phone. Trooper Guarino located a WAZE search for the 34 Fairview address conducted at 12:20:08 a.m. on January 29. The native locations then depicts Mr. O'Keefe's phone traveling on Dedham Street and arriving at the residence at 12:24:34 a.m. Therefore, Mr. O'Keefe's phone would have ascending/descending within the Fairview residence, prior to his arrival at the residence. The location data's next entry is in the vicinity of 34 Fairview Road at 12:59:25 a.m., in the same location. (Attached at Par. 18). A check of the location data in Axiom shows the last location at 34 Fairview Road and speed meters/seconds at 12:25:36 a.m. with a speed of .6346 m/s. The location data stays constant at 34 Fairview Road with no speed being registered until 6:15:36 a.m. with a speed of .0484 m/s. (Attached at Par. 19).

This overbroad request does not meet the Lampron standard. See Commonwealth v. Bourgeois, 68 Mass. App. Ct. 433, 436 (2007) (generalizations and unsubstantiated statements concerning a particular victim's credibility are not enough); Commonwealth v. Sealy, 467 Mass. 617, 628 (2014) (affidavit based on hypothetical insufficient).
As the Supreme Judicial Court made clear in Lampron, and repeated in Dwyer, "requirements three and four [of the test laid out in United States v. Nixon, 418 U.S. 683, 669-700 (1974)] both serve as a reminder that rule 17 (a) (2) is *not* a discovery tool, and that the limited purpose of rule 17 (a) (2) is to authorize a court 'to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials.'" Dwyer at 142. (citations omitted) (emphasis in original). Although relevancy is a loose term, the defendant must advance in good faith "some factual basis which indicates how the privileged records are likely to be relevant to an issue in the case." Commonwealth v. Santiago, 55 Mass. App. Ct. 1108, 1111 (2002); quoting from Bishop at 180.

Simply put, counsel's "facts" section assumes or attempts to sensationalize or misconstrue statements made by and between these witnesses. The motion merely assumes, through no evidentiary support, that such a wide-ranging conspiracy exists and that any such content indicative of said conspiracy must be found within this phone and call detail records and would be relevant. However, the motion is scant in any evidence that any such statement was ever made by the witness or that such conspiracy ever existed. The defendant's motion contains no specific, or even opaque, mention of any known statements by the witnesses to each other, let alone through the employment of the cellular device he seeks. There is nothing to demonstrate that the items sought are either evidentiary or relevant, or that this is anything but a fishing expedition.

For the foregoing reasons and those articulated by the Commonwealth at the hearing of this motion, this request should be denied.

Respectfully Submitted,
For the Commonwealth

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Dated: May 3, 2023

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. **SUPERIOR COURT DEPARTMENT**
NORFOLK SUPERIOR COURT
DOCKET NO. 2282CR0117

COMMONWEALTH

v.

KAREN READ

COMMONWEALTH'S OPPOSITION TO DEFENDANT'S REQUEST FOR EVIDENTIARY HEARING ON MASS. R. CRIM. P. 17

Now comes the Commonwealth and respectfully moves that this Honorable Court deny the defendant's request for an evidentiary hearing on "Defendant's motion for order pursuant to Mass. R. Crim. P. 17 directed to Brian Albert, Verizon, and AT&T". The Commonwealth incorporates hereinto all arguments raised in its May 1, 2023 written memorandum and May 3, 2023 argument before this Honorable Court in opposition to the merits of the defendant's motion.

Under the Massachusetts Rules of Criminal Procedure, the defendant is not entitled to an evidentiary hearing on a Mass. R. Crim. P. Rule 17 motion for the production of "books, papers, documents, or other objects designated therein." Mass. R. Crim. P. 17 (a) (2). See Commonwealth v. Lampron, 441 Mass. 265, 268 (2004). At a Lampron, hearing, "the judge shall hear from all parties, the record holder, and the third-party subject, if present. The record holder and third-party subject shall be heard on whether the records sought are relevant or statutorily privileged." See Massachusetts Practice Series Section 1108: Access to Third-Party Records Prior to Trial in Criminal Cases (Lampron-Dwyer Protocol), 20 Mass. Prac. Evidence St. 1108 (3d ed. February 2023). In regards to this motion, notice and the opportunity to be heard extends only to the parties, record holder, and third party subject. Here, the court may hear from Verizon;

AT&T; and third party, Mr. Brian Albert, as to whether or not the records are relevant or covered by a statutory privilege. Commonwealth v. Dwyer, 448 Mass. 122 (2006).

The Commonwealth is under the impression that the defendant is seeking to expand Mass. R. Crim. P. 17 (a) (2) and call witnesses, including their forensic examiner, who are neither record holders nor third-party subjects. The Commonwealth is aware that the defendant has summonsed civilian witness Jennifer McCabe and Massachusetts State Troopers Michael Proctor and Nicholas Guarino. These witnesses are not the record holders of Brian Albert's cellphone and by summonsing these witnesses, it is evident that the defendant is using Mass. R. Crim. P. 17 as "a disguised attempt to undermine [Mass. R. Crim. P.] [R]ule 14 by launching an improper fishing expedition. See Commonwealth v. Mitchell, 444 Mass. 786, 792 (2005).

The Supreme Judicial Court has repeatedly emphasized that Mass. R. Crim. P. 17 (a) (2) is not a discovery tool to be "invoked merely for the exploration of potential evidence." Commonwealth. v. Sealy, 467 Mass. 617, 627 (2014); Lampron, 441 Mass. at 268. The four requirements of Mass. R. Crim. P. 17; relevance, admissibility, necessity, and specificity are intended to "guard against intimidation, harassment, and fishing expeditions for possible relevant information." Mitchell, 444 Mass. at 792; Commonwealth v. Dwyer, 448 Mass. 122, 145 (2006). The purpose of Mass. R. Crim. P. 17 is solely to prevent undue delay of the trial occasioned by multiple, or lengthy, requests for documents. See Mitchell, 444 Mass. at 792.

The defendant's motion is simply an improper attempt to burden and harass the witnesses in this case. The Commonwealth has a compelling interest in protecting witnesses from unnecessary harassment, caused by burdensome, frivolous, or otherwise improper discovery requests. See Commonwealth v. Lam, 444 Mass. 224, 230 (2005) ("A complainant or witness should be forced neither to retain counsel nor to appear before a court in order to challenge, on the basis of a partial view of the case, potentially impermissible examination of [ ] personal effects and the records of [ ] personal interactions.")

As demonstrated by the procedural history of RC v. Chilcoff, defense counsel has previously attempted to obtain a witness' cellphone and cellphone records for an indecorously purpose. (Exhibit A). In RC v. Chilcoff, similar to the strategy employed by defense counsel here, the defendant filed two Mass. R. Crim. P. 17 (a) (2) motions. The

first was for "a variety of records and information" maintained by Apple related to a rape victim's cellphone records. That motion was denied as the defendant failed to satisfy Lampron. See RC v. Chilcoff, SJ-2020-0081. The second motion, again consistent with the defendant's request here, sought the "victim-witness to produce her cellular telephone to a defense expert for a forensic examination to recover information from the victim-witness's cell phone from December 8, 2017 to December 19, 2017 relating to her electronic communications . . . ." (Exhibit A).

Justice Cypher, sitting as the single justice, ruled that the defendant's requests "contravene[d] the principle that Rule 17 is not a discovery tool" and emphasized that where the defendant's request offered nothing more than speculation that there may be relevant evidence in the records sought, the defendant's motion fails to satisfy Lampron. See RC v. Chilcoff, SJ-2020-0081; see also Commonwealth v. Jones, 478 Mass. 65, 68–69 (2017) (defendant must make factual showing that the documentary evidence has rational tendency to prove or disprove issue in case; potential relevance and conclusory statements regarding relevance are insufficient); Commonwealth v. Caceres, 63 Mass. App. Ct. 747, 749–50 (2005) (affidavit in support of defendant's motion "may contain hearsay provided that that the *source of the hearsay is identified, the hearsay, is reliable*, and the affidavit establishes with specificity the relevance of the requested documents." (Emphasis added).

In her ruling, Justice Cypher highlighted a similar case from Minnesota, State v. Yildirim, (In re B.H.), 946 N.W.2d 860, 865 (2020) where the court there concluded that because "'[c]ell phones differ in both a quantitative and a qualitative sense from other objects' that a person might possess," a suggestion that a cell phone could contain exculpatory information was insufficient to order its production for examination. Yildirim at 870-871; quoting from Riley v. California, 573 U.S. 373, 393 (2014). Similarly, in People v. Spykstra, 234 P.3d 662 (Col. 2010), a Colorado court had ordered the victim's parents to permit a forensic expert to access their computer to search for email communications. The Colorado Supreme Court concluded that the order "improperly converted the subpoenas into the functional equivalent of search warrants" that were not authorized by the rules of criminal procedure and that the defendant had failed to make showings of relevance or specificity, which were "underscored by the lack

of supporting evidence" that relevant materials even existed, and the "lack of specificity in providing a broad date range." Id. at 671-2.[1]

The defendant's motion and supporting affidavit contain speculative claims that are without factual support or identifiable sources that form the basis for their "good faith belief[s]" that Mr. Brian Albert has "destroyed evidence" or is a third party culprit, responsible for the victim's death . See "Affidavit of Alan J. Jackson, Esq. in support of motion for order pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T."; Sealy, 467 Mass. at 627 (potential relevance and conclusory statements regarding relevance are insufficient to meet R. 17 standard). A generalized claim, supported only by a narrow and likely misinterpreted view of the evidence, does not satisfy Lampron and is more appropriately an issue left to the trier of fact whose role will be to assess the weight and credibility of the evidence. See Commonwealth v. Forte, 469 Mass. 469, 481 (2014); Commonwealth v. AdonSoto, 475 Mass. 497, 510 (2016) ("assessment of the weight and credibility of the evidence [is] properly left to the jury.")

Furthermore, supporting Justice Cypher's ruling in RC v. Chilcoff was the fact that the "Supreme Judicial Court has recognized that cell phones often contain an immense amount of personal information". See Id.; Commonwealth v. Fulgiam, 477 Mass. 20, 32 (2017) ("modern cellular telephones contain vast quantities of [digital] personal information" [quotations omitted]); Commonwealth v. White, 475 Mass. 583, 591 (2016), quoting Riley v. 573 U.S. at 395 ("many of [those] ... who own a cell phone [in effect] keep on their person a digital record of nearly every aspect of their lives"). The Court has also recognized that, as a result, individuals have significant privacy interests at stake in their cell phones. See Commonwealth v. Dorelas, 473 Mass. 496, 502 n. 11 (2016). The Court further emphasized that "it is important to remember that the rule is a rule of production, not a rule of discovery." Id.; citing from Commonwealth v. Sealy, 467 Mass. 617, 627 (2014), quoting Lampron at 269.

[1] Notably, consistent with other state's rules of criminal procedure, Mass. R. Crim. P. 17 is modeled after the federal rule. See Lampron, 441 Mass at 270 ("Because our rule was modeled after Fed. R. Crim. P. 17(c) and is intended to address the same circumstances, we adopt the standards articulated by the Federal courts regarding the issuance of a subpoena for production of documentary evidence.").

Therefore, "when ruling on a request under Rule 17 for a victim-witness's cell phone or cell phone records, the judge must include a consideration of these inherent privacy concerns." RC v. Chilcoff, SJ-2020-0081. "A victim-witness does not surrender [ ] privacy rights by filing a complaint or by cooperating with a police investigation." Id. Nor, as Rule 17 clearly states, should the hearing be allowed to proceed if it is being "used to subvert the provisions of Rule 14," as it is here.

CONCLUSION

The procedure set forth in Mass. R. Crim. P. 17 (a) (2) allows for a judge, only in the appropriate circumstances to direct a non-party to produce documentary evidence prior to trial. Lampron, 441 Mass. at 270. The Commonwealth does not dispute that the defendant is entitled to a hearing before this honorable court on the merits of her motion and to hear relevant objections, if desired to be communicated to the Court, from Verizon; AT&T; and third party, Mr. Brian Albert. The Commonwealth's objection pertains to her attempts to embark on an evidentiary hearing with expert and non-interested witnesses, in an attempt to broaden the scope and powers of Mass. R. Crim. P. 17 (a) (2) and to harass and intimidate the witnesses. Lam, 444 Mass. at 224.

Respectfully Submitted
For the Commonwealth,

MICHAEL W. MORRISSEY
DISTRICT ATTORNEY

By: _____

Date: May 19, 2023

Adam C. Lally
Assistant District Attorney

/s/ Laura A. McLaughlin
Laura A. McLaughlin
Assistant District Attorney

2020 WL 8079734
Only the Westlaw citation is currently available.
Supreme Judicial Court of Massachusetts,
Suffolk County..

R. C.

v.

Ryder CHILCOFF and the Commonwealth of Massachusetts

Docket No. SJ-2020-0081, Docket No. 1880CR00020
|
Dated: December 15, 2020

Memorandum of Decision and Judgment on Victim-Witness's Petition for Relief under G. L. c. 211, § 3

Elspeth B. Cypher, Associate Justice

***1** The victim-witness in the above-captioned matter has petitioned for relief from an order of the Hampshire Superior Court (Carey, J.). The order (1) directed the victim-witness to produce her cellular telephone (cell phone) and any potential "back-ups" to a court-appointed expert, so that the expert can conduct a forensic exam and recover incoming and outgoing texts, emails, photos, phone calls, and any other communications sent or received by the victim-witness from December 8, 2017 to December 19, 2017; (2) ordered the victim-witness to produce the names and login information of any third-party service providers that were in possession of the requested information; and (3) instructed Facebook and Instagram to provide information related to the victim-witness from December 8, 2017 to December 19, 2017. The victim-witness requests that the Superior Court order be narrowed to encompass December 8, 2017 through 10:00 a.m. on December 9, 2017 with regard to the first and third parts of the order and that the second part of the order be vacated.

Background. According to the record provided by the parties, the evidence will show that in December 2017, the defendant, Ryder Chilcoff, and the victim-witness both attended the same college in Massachusetts. They also both lived in the same dormitory on campus, with the victim-witness living in a room one floor directly below the defendant's room, with both rooms having the same layout. On the night of December 8, 2017, the victim-witness consumed alcoholic beverages with her friends at a different residential building; she became intoxicated and does not have a recollection of leaving that residential building or of anything else that occurred that night. Other sources provide a recount of what else happened to the victim-witness that night.

The victim-witness and some of her friends who were also at the other residential building attended a fraternity party. She eventually left the party. Other students from the party walked her back to her dormitory and she arrived there after midnight.

In the early morning of December 9, 2017, the defendant was in his dormitory room watching a movie with his roommate and his friend. The victim-witness entered the defendant's dormitory room, and spoke with the defendant, his roommate, and his friend. The defendant, his friend, and his roommate did not know the victim-witness. They learned that she lived on the floor below the defendant's, but the defendant's roommate was unable to locate her friends when he went downstairs. They tried to convince her to leave, and eventually she did, but she returned a short time later.

The second time she entered the defendant's room, she lay down on the defendant's bed, took off her shirt, got under the covers, and appeared to go to sleep. The defendant's friend tried to get her to put her shirt back on and the victim-witness told him that she was in her own room. He eventually left to return to his residence. As the defendant and his roommate were trying to get the victim-witness to leave the room, she took the defendant's hands and put them on her breasts. The defendant's roommate

told the defendant that this was a "gray area" and that he was going to contact the resident assistant. However, the defendant told him not to do so. The roommate later told the police the defendant heavily implied that the roommate should leave the room; when the roommate asked the defendant "what do you want me to do?" the defendant "didn't say anything and he looked at the door and he like gestured." The roommate left the room and while he was out, the defendant and the victim-witness engaged in sexual intercourse.

***2** In an interview with campus police after the incident, the defendant's roommate told the police that when the victim-witness was in the room, she was "stumbling [and] slurring her words," he and the friend told the defendant that the victim-witness was drunk and would probably throw up in his bed, and that when she started putting the defendant's hands on her body that the roommate "could tell, obviously, she was just too drunk to comply with anything."

Later that morning, the defendant left his room while the victim-witness was still sleeping, as he had to travel to another state. When the victim-witness woke up in the morning, she was not wearing pants or underwear. The victim-witness felt weird and had chest pain. The defendant's roommate and the victim-witness searched the room for her underwear but were unable to find it. They did find a used condom on the floor. She found out from the defendant's roommate who the defendant was and he showed her a photograph of the defendant. The victim-witness did not know the defendant.

After returning from his trip, the defendant returned the victim-witness's underwear and earring to her by leaving a bag containing the items outside of her dormitory room. On December 12, 2017 the victim-witness disclosed to her sister what had happened. Her sister then vandalized the defendant's dormitory room by, in part, pouring laundry detergent onto the room's entryway door and leaving a note that read "you fucked with the wrong person." The defendant alerted police about his room being vandalized, and when asked who might have done it, the defendant said it may have been a boyfriend of the victim-witness, who he had sexual relations with on December 8, 2017. He provided the victim-witness's information. Campus police left a voicemail for the victim-witness asking to speak with her about vandalism reported by the defendant. On December 13, 2017 the victim-witness went to campus health services for a sexual assault evaluation.

As part of the investigation into the vandalism and the possible sexual assault, a campus police officer took a recorded statement from the defendant. The defendant first told the officer that he met the victim-witness at a party, but then told the officer that was not what happened and to "cross all that out." He then admitted that he did not know the victim-witness, he had not been drinking alcohol in his dormitory room on the night in question, nor was he under the influence of drugs, he heard the victim-witness make statements that she thought she was in her own room, he could smell alcohol on her breath, and he engaged in sexual intercourse with the victim-witness after his roommate left the room.

The defendant was indicted on one count of rape.

As discussed below, the defendant sought to obtain certain information from the victim-witness's cell phone. During its investigation, the Commonwealth received screenshots of select messages and phone records from the victim-witness's cell phone. One message was sent by the victim-witness to a friend and stated that on the night of December 8, 2017, she had "blacked out" and did not remember what had happened. Screenshots showed that she received calls during the hours in question but did not answer. The defendant argued in his motions and in his opposition to the present petition, in part, that the victim-witness's cell phone contained communications and other information that is relevant to the case. The victim-witness reported that her cell phone was stolen at an airport in May 2018.

***3** Procedural history. a. First motion. In March 2019, the defendant filed a Mass. R. Crim. P. 17(a)(2) motion seeking the production of a variety of records and information, including a request for Apple, Incorporated (Apple) to produce all text messages sent by the victim-witness from December 8, 2017 to March 2019. A Superior Court judge denied the motion for text-related records because the motion failed to satisfy Commonwealth v. Lampron, 441 Mass. 265 (2004).

b. Second motion. In September 2019, the defendant filed a second motion pursuant to Mass. R. Crim. P. 17(a)(2) for, in part, the victim-witness to produce her cellular telephone to a defense expert for a forensic examination to recover information from the victim-witness's cell phone from December 8, 2017 to December 19, 2017 relating to her electronic communications and her use of social media, including Facebook and Instagram.

On January 27, 2020, after a hearing, a Superior Court judge ordered the victim-witness to produce her cell phone to a forensic expert designated by the court so that the expert can extract "incoming and outgoing text messages, emails, photographs, Snapchats, Facebook messages, Instagram messages, usage records, telephone calls, and/or other communications sent and/or received by [the victim-witness] between December 8, 2017 and December 19, 2017"; that if the victim-witness no longer had possession of the cell phone she used in December 2017, she must produce any electronic devices in her possession that contained a backup of the referenced information and provide the expert with any passwords required to access the information; the victim-witness to produce the names and log-in information of any third-party service providers that were in possession of the referenced information; and Facebook to produce Facebook and Instagram data associated with the victim-witness's accounts during the specified time period, including specific IP logs, content and records of messages, comments, photographs and any other communications sent and/or received by the victim-witness from December 8, 2017 to December 19, 2017. The order also stated that "[t]he Court will review all information produced to this court pursuant to [the order] and release to the defense and the Commonwealth all records it deems relevant."

Discussion. The January 27, 2020 order is the subject of this petition. The victim-witness asks me to (1) narrow the date range for her cell phone and potential back-ups and for the Facebook and Instagram data to December 8, 2017 through December 9, 2017 at 10:00 a.m., and (2) vacate that portion of the order that requires the victim-witness to provide the names and log-in information for third party service providers. The Commonwealth joined the victim-witness's petition.

a. Review under G. L. c. 211, § 3. Exercise of this court's superintendence power under G. L. c. 211, § 3 is warranted in this case because the victim-witness has asserted a substantial claim of a violation of a substantive right, namely that the trial court judge erred as a matter of law or abused his discretion by failing to properly weigh the privacy concerns or properly apply Lampron, and this error or abuse of discretion cannot be remedied through the normal appellate process, in part because the victim-witness is not a party to the case. Commonwealth v. Vega, 449 Mass. 227, 229 (2007).

***4** b. The discovery order. Mass. R. Crim. P. 17 governs the procedure a party must follow to produce material in the possession of a third party for use at trial. The Massachusetts rule is modeled after Fed. R. Crim. P. 17[1] and is generally in accord with prior Massachusetts law. Reporter's Notes to Mass. R. Crim. P. 17. "Because our rule was modeled after Fed. R. Crim. P. 17(c) and is intended to address the same circumstances, we adopt the standards articulated by the Federal courts regarding the issuance of a subpoena for production of documentary evidence." Commonwealth v. Lampron, 441 Mass. 265, 270 (2004).

A successful motion under Rule 17[2] requires that the moving party "establish good cause, satisfied by a showing: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition' " (quotation omitted). Lampron, supra at 269. The Lampron requirements are intended to serve as a "guard against intimidation, harassment, and fishing expeditions for possible relevant information." See Commonwealth v. Dwyer, 448 Mass. 122, 145 (2006). See also Commonwealth v. Lam, 444 Mass. 224, 229 (2005) (acknowledging the legitimate interest "in preventing unnecessary harassment of a complainant ... caused by burdensome, frivolous, or otherwise improper discovery requests"). These four requirements have been summarized as "relevance, admissibility, necessity, and specificity." Commonwealth v. Mitchell, 444 Mass. 786, 792 (2005).

There is no case law in Massachusetts addressing the use of Rule 17 to obtain a victim-witness's cell phone communication or third-party service providers. Nevertheless, the Supreme Judicial Court has recognized that cell phones often contain an immense amount of personal information. See Commonwealth v. Fulgiam, 477 Mass. 20, 32 (2017) ("modern cellular telephones contain

vast quantities of [digital] personal information" [quotations omitted]); Commonwealth v. White, 475 Mass. 583, 591 (2016), quoting Riley v. California, 573 U.S. 373, 395 (2014) ("many of [those] ... who own a cell phone [in effect] keep on their person a digital record of nearly every aspect of their lives"). We have also recognized that, as a result, individuals have significant privacy interests at stake in their cell phones. See Commonwealth v. Dorelas, 473 Mass. 496, 502 n.11 (2016). See also White, supra at 592 n.11 ("these interests exist even where ... the device does not appear to have all the capabilities of an upmarket 'smart phone' "). Indeed, "the privacy interests implicated in smartphone searches 'dwarf' those in cases in which a limited information is contained in a finite space." Dorelas, supra, citing Riley, supra at 392-398. In protecting this heightened privacy interest, "[i]t is not enough to simply permit a search to extend anywhere the targeted electronic objects possibly could be found." Dorelas, supra at 502. See Commonwealth v. Broom, 474 Mass. 486, 495-496 (2016). Thus, when ruling on a request under Rule 17 for a victim-witness's cell phone or cell phone records, the judge must include a consideration of these inherent privacy concerns. See Hardy vs. UPS Ground Freight, Inc., U.S. Dist. Ct., No. 3:17-cv-30162-MGM (D. Mass. July 22, 2019). A victim-witness does not surrender her privacy rights by filing a complaint or by cooperating with a police investigation.

***5** In a similar case from Minnesota, State v. Yildirim (In re B.H.), 946 N.W.2d 860, 865 (2020) the court concluded that because " '[c]ell phones differ in both a quantitative and a qualitative sense from other objects' that a person might possess," that the cell phone could contain exculpatory information was insufficient to order its production for examination. Yildirim, 946 N.W.2d at 870-871, quoting Riley, 573 U.S. at 393. Similarly, in People v. Spykstra, 234 P.3d 662 (Col. 2010), the lower court had ordered the victim's parents to allow a forensic expert to access their computer to search for certain email communications. The Colorado Supreme Court concluded that the order "improperly converted the subpoenas into the functional equivalent of search warrants" that were not authorized by the rules of criminal procedure and that the defendant had failed to make showings of relevance or specificity, which were "underscored by the lack of supporting evidence" that relevant materials even existed, and the "lack of specificity in providing a broad date range." Id. at 671-672.

Federal courts have come to the same conclusion regarding their Rule 17. See United States vs. Murray, U.S. Dist. Ct., No. 3:18-cr-30018-MGM-1 (D. Mass. May 6, 2019), quoting Bowman Dairy Co. v. United States, 341 U.S. 214, 220 (1951) (refusing request to create a forensic image of cell phone of a "critical government witness whose impeachment will be important to the defense" because "Rule 17(c) was not intended to provide an additional means of discovery"; request was overbroad, and lacked specificity); United States vs. Delay, U.S. Dist. Ct., No. CR15-175RSL (W.D. Wash. Oct 2, 2017) (denying request for Fed. R. Crim. P. 17 subpoena to obtain records and documents from social media service associated with victim witness's email addresses, including her communications with other users of service where defendant's request would sweep in great deal of irrelevant or inadmissible information); United States vs. Guild, U.S. Dist. Ct., No. 1:07cr404 (JCC) (E.D. Va. Jan. 8, 2008) (denying request for cell phone records of two minor victims where defendant stated only that emails would allow him to "investigate more detailed facts" surrounding the allegations).

It is also important to remember that the rule is a rule of production, not a rule of discovery. Commonwealth v. Sealy, 467 Mass. 617, 627 (2014), quoting Lampron, 441 Mass. at 269. The rule is "intended to expedite trial proceedings by avoiding delay caused by the often onerous task of responding to a summons of documents." Lampron, supra at 270. Here, the defendant has offered nothing more than speculation that there may be relevant evidence in the information he seeks.[3] A "generalized claim that the victim could have fabricated her account of the rape" does not satisfy the Lampron standard. Sealy, 467 Mass. at 628.[4]

The order that the victim-witness produce a list of the "the names of any third-party service providers, including Apple and/or Samsung Cloud, that are in possession of the requested information, along with the email, Apple ID, and/or other subscriber information associated with those accounts" was improper. Not only does such an order contravene the principle that Rule 17 is not a discovery tool, it is also essentially an interrogatory that the judge is requiring the victim-witness to answer. Massachusetts criminal procedure rules do not provide for this kind of discovery. Compare Mass. R. Crim. P. 14. See also Reporter's Notes to Mass. R. Crim. P. 35 (permitting depositions in limited circumstances to preserve testimony, not as a discovery tool); Commonwealth v. Tanso, 411 Mass. 640, 648 (1992).

***6** The order that Facebook produce Facebook and Instagram data associated with the victim-witness's accounts during the specified time period, including specific IP logs, content, records of messages, comments, and any other communications sent or received from December 8, 2017 to December 19, 2017 refers to data that is controlled by the Stored Communications Act (SCA).[5] 18 U.S.C. § 2701-13. The SCA creates criminal and civil liability for certain types of unauthorized access to private digital communications. See Low v. LinkedIn Corp., 900 F. Supp. 2d 1010, 1022 (N.D. Cal. 2012); Facebook, Inc. v. Wint, 199 A.3d 625, 628–629 (D.C. 2019). Generally, this liability precludes compliance with court orders otherwise requiring disclosure of private information. See Wint, supra. The SCA includes specific, enumerated exceptions when an electronic service provider may disclose private communications; a subpoena requested by a criminal defendant is not one of those exceptions. 18 U.S.C. §§ 2702-03. See Wint, supra. The SCA does not preclude a subpoena directed at the author or recipient of a message, but prevents subpoenas directed at third parties, such as Facebook, that transmit them. See Wint, supra ("[T]he SCA does not prohibit subpoenas directed at senders or recipients rather than providers"). Accordingly, any court order must comply with the SCA. The order requiring Facebook to produce Facebook and Instagram data associated with the victim-witness's accounts does not comply with the SCA.

Finally, the last statement in the order, "[t]he Court will review all information produced to this court ... and release to the defense and the Commonwealth all records it deems relevant" is not a procedure contemplated by Lampron. Rather it is a procedure that we expressly rejected in Dwyer. There, we concluded that "trial judges cannot effectively assume the role of advocate when examining records." Dwyer, 448 Mass. at 144. "Despite their best intentions and dedication, trial judges examining records before a trial lack complete information about the facts of a case or a defense to an indictment, and are all too often unable to recognize the significance, or insignificance, of a particular document to a defense." Id. Accordingly, any records produced to the court shall be inspected only by defense counsel of record who summonsed the records. Defense counsel is prohibited from "copying any record or disclosing or disseminating the contents of any record to any person, including the defendant." Dwyer, supra at 146. Disclosure of the contents of the records to any other person is permitted only if "[the] judge subsequently allows a motion for a specific, need-based written modification of the protective order." Id. The judge is permitted to review the record in camera in conjunction with a motion for modification of the protective order. See id. at 146 n.29.

Conclusion. The victim-witness is no longer in possession of the cell phone she had on the night of the alleged rape, therefore the order requiring that the victim-witness produce her cell phone is vacated. The order that the victim-witness produce any electronic devices in her possession that contain a back-up of incoming and outgoing text messages, emails, photographs, Snapchats, Facebook messages, Instagram messages, usage records, telephone calls, and other communications sent or received by the victim-witness from December 8, 2017 to December 19, 2017 and relevant passwords is narrowed to December 8 to December 9, 2017 at 10:00 a.m. The defendant's November, 2020 motion to modify the order for compliance with the SCA is denied. The order that the victim-witness disclose the names and log-in information of any third party service providers that were in possession of her incoming and outgoing text messages, emails, photographs, Snapchats, Facebook messages, Instagram messages, usage records, telephone calls, and other communications sent or received by the victim-witness is vacated. The order that Facebook produce Facebook and Instagram data associated with the victim-witness's accounts during the specified time period, including specific IP logs, content and records of messages, comments, and any other communications sent or received from December 8, 2017 to December 19, 2017 is vacated. The part of the order that states the judge will review the material for relevance is stricken. The stay entered in this Court is vacated.

***7** So ordered.

All Citations

Not Reported in N.E. Rptr., 2020 WL 8079734

Footnotes

1 The Federal rule contains a subsection concerning subpoenas "for Personal or Confidential Information About a Victim." See Fed. R. Crim. P. 17(c) (3). That provision states, in part, that "a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order." Massachusetts does not have a similar provision.

2 I refer to the Massachusetts rule as Rule 17.

3 The defendant argues that he needs the material to "effectively defend himself against these allegations." RA-0027. The defendant did not explain how his cross-examination as to the victim-witness's motive to lie would be impeded without access to the victim-witness's cell phone communications.

4 The defendant may cross-examine the victim-witness as to the timing of her disclosures to her sister and police, and he may argue that the vandalism investigation formed a motivation to lie.

5 The defendant filed a motion to modify the order stating that "the [SCA] stands as an impediment to the effective satisfaction of the Order as currently written." The defendant filed the same motion in the Superior Court. The Superior Court has not acted on that motion.

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United States v. Murray

UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

May 6, 2019

Case No. 3:18-cr-30018-MGM-1 (D. Mass. May. 6, 2019)

Case No. 3:18-cr-30018-MGM-1

05-06-2019

UNITED STATES OF AMERICA, Plaintiff, v. MATTHEW MURRAY, Defendant.

ROBERTSON, U.S.M.J.

MEMORANDUM AND ORDER REGARDING DEFENDANT'S MOTION FOR DISCOVERY
(Dkt. No. 60)

I. INTRODUCTION

Defendant Matthew Murray is charged by indictment with aiding and abetting the distribution and possession with intent to distribute 100 kilograms or more of marijuana in violation of 18 U.S.C. § 2 and 21 U.S.C. § 841(a)(1), aiding and abetting the possession of firearms in furtherance of a drug trafficking crime, in violation of 18 U.S.C. §§ 2, 924(c), and aiding and abetting money laundering, in violation of 18 U.S.C. §§ 2, 1956(a)(1)(B)(1) (Dkt. No. 2). Defendant made discovery requests by an October 18, 2018 letter (Dkt. No. 51). The government replied by letter of November 1, 2018 (Dkt. No. 54). Defendant then moved for discovery of material he alleged that the government had not produced (Dkt. No. 60) and the government responded (Dkt. No. 62). At the hearing on Defendant's motion, the court requested supplemental briefing on whether Defendant could identify legal authority supporting the proposition that the government should be required to compel a cooperating source ("CS") to produce his cellular telephone for a forensic examination by Defendant. Defendant filed a supplemental memorandum which included a motion for the issuance of a
2 subpoena under Fed. *2 R. Crim. P. 17(c) ("Rule 17(c)") ordering the CS to produce his cellular telephone for a forensic examination (Dkt. No. 71). The government opposed Defendant's request for the issuance of a subpoena *duces tecum* (Dkt. No. 74). After hearing from the parties on April 8, 2019, Defendant's motions for discovery and for the issuance of a Rule 17(c) subpoena to the CS are DENIED for the reasons that follow.

II. B ACKGROUND

In connection with the charges against Defendant, a search warrant was executed at Defendant's residence in Pittsfield, Massachusetts by members of a Drug Enforcement Administration ("DEA") task force. To establish probable cause for the search, the affidavit in support of the search warrant relied, in part, on cellular telephone communications between Defendant's cell phone and the personal cell phone of a CS, Jonathan Giedrowicz. The contents of text messages derived from screenshots from the CS's cell phone were included in the search warrant affidavit.

III. D ISCUSSION

By his discovery motion and supplemental memorandum, Defendant seeks the following: (1) "the entire informant file and all debriefings of Giedrowicz by any federal, state or local law enforcement agency" (2) "all communications between [Giedrowicz] and any investigator or prosecutor assigned to this case;" (3) assurance that the government has produced all text messages between Giedrowicz and Defendant; and (4) an order for the production of a forensic image of Giedrowicz's cell phone including an order "directing the government to preserve, obtain and produce the data and metadata essential for the analysis of text messages and any other communications allegedly between [Giedrowicz] and [D]efendant . . . that the government intends to introduce at trial" (Dkt. No. 51 ¶¶ 3, 5, 12; Dkt. No. 60; Dkt. No. 71 at 1). As an *3 alternative to the government's production of a forensic image of Giedrowicz's cell phone including the requested metadata, Defendant seeks a subpoena issued pursuant to Rule 17(c) "directing the [CS] to produce his cellular telephone for inspection and analysis by a defense forensic expert." (Dkt. No. 71 at 1). Each of Defendant's requests is addressed below. "Before making rulings on the individual requests contained in the [m]otion, some preliminary remarks are necessary to establish the discovery landscape." *United States v. Geas*, No. 08-CR-30029-MAP, 2009 WL 4430100, at *1 (D. Mass. Nov. 30, 2009).

3

A. Legal Standards

Defendant relies on *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and Fed. R. Crim. P. 16(a)(1)(E) to support his motion (Dkt. No. 60 at 1 nn.1 & 2).

1. *Brady v. Maryland* and *Giglio v. United States*

"In a line of cases beginning with *Brady*, the Supreme Court has made clear that the prosecution in a criminal case has an affirmative duty to disclose information in its possession that is favorable to the defendant and material to the question of guilt or punishment." *United States v. Tsarnaev*, Criminal Action No. 13-10200-GAO, 2013 WL 6196279, at *1 (D. Mass. Nov. 27, 2013) (citing *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995)). *See also United States v. Prochilo*, 629 F.3d 264, 268 (1st Cir. 2011). "Evidence is 'material' for these purposes only if there is a reasonable probability that it could affect the

outcome of the trial." *Tsarnaev*, 2013 WL 6196279, at *1 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). This information, otherwise known as "*Brady* material," "falls into one of two categories — that which tends to be more or less directly exculpatory in that it casts doubt on the defendant's guilt, and that which is indirectly exculpatory in that it tends to impeach the
4 reliability of other *4 prosecution evidence." *Id.* Defendant's right to the disclosure of favorable evidence, however, does not "create a broad, constitutionally required right of discovery." *Bagley*, 473 U.S. at 675 n.7. *See also United States v. Agurs*, 427 U.S. 97, 111 (1976) (the prosecutor does not have a "constitutional duty routinely to deliver his entire file to defense counsel").

"*Giglio* material" is related to *Brady* material. *Giglio* requires the government to disclose evidence affecting the credibility of a witness, such as promises, rewards, or inducements to testify, even if the evidence is not inherently exculpatory. *See Giglio*, 405 U.S. at 153-54; *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *United States v. Bulger*, 816 F.3d 137, 153 (1st Cir. 2016).

2. Fed. R. Crim. P. 16(a)(1)(E)

Federal Rule of Criminal Procedure 16(a) outlines the government's basic disclosure obligations. "[U]nlike the Government's *Brady* obligation to disclose exculpatory evidence . . . Rule 16 requires the disclosure of inculpatory and exculpatory evidence alike." *United States v. Poulin*, 592 F. Supp. 2d 137, 143 (D. Me. 2008) (citation omitted) (citing *United States v. Marshall*, 132 F.3d 63, 68 (D.C. Cir. 1998)). Federal Rule of Criminal Procedure 16(a)(1)(E) states, in relevant part:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense; [or] (ii) the government intends to use the item in its case-in-chief at trial . . . .

Fed. R. Crim. P. 16(a)(1)(E). "The defendant, as the moving party, bears the burden of showing materiality[;]" that is, "'some indication' that pretrial

disclosure of the information sought 'would . . . enable[] the defendant significantly to alter the quantum of proof in his favor.'" *United States v. Goris*, 876 F.3d 40, 44-45 (1st Cir. 2017), *cert. denied*, 138 S. Ct. 2011 (2018) (quoting *United States v. Ross*, 511 F.2d 757, 763 (5th Cir. 1975)). "If . . . a
5 defendant's discovery request is *5 grounded in a speculative theory, a district court's decision to deny that request is not an abuse of discretion." *Id.*

B. Defendant's Specific Discovery Requests

1. All notes, reports, and other documents related to Giedrowicz that are in the custody or control of any law enforcement agency.

Defendant's October 18, 2018 discovery letter included a request for "any notes or writings . . . memorializing any communications between anyone at the FBI and anyone at DEA and/or the Task Force concerning [the CS,] Giedrowicz" (Dkt. No. 51 ¶ 3). Defendant indicated that, in January 2019, he received an FBI report with attachments that disclosed potential impeachment material about Giedrowicz that previously had not been disclosed (Dkt. No. 60 at 2). Defendant now seeks all similar information regarding the CS that is in the custody or control of any federal, state, or local law enforcement agency (Dkt. No. 60 at 2). In response, the prosecutor indicated that he made additional inquiries of the DEA case agent and the FBI who reported that all material regarding Giedrowicz within the possession, custody, or control of the prosecution team had been produced (Dkt. No. 62 at 1).[1]

[1] At the first hearing on Defendant's discovery motion, the prosecutor indicated that he would produce Massachusetts State Police reports.

The prosecutor reported that the government has satisfied its discovery obligation to produce exculpatory information concerning Giedrowicz by inspecting the DEA agent's file and turning over all exculpatory evidence in "the government's possession, custody, or control" (Dkt. No. 62 at 1). Fed. R. Crim. P. 16(a)(1)(E). *See Kyles*, 514 U.S. at 437 ("the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"); *United States v. Castro*, 502 F. Supp. 2d 218, 224 (D.P.R. 2007) ("Evidence 'within [the

6 government's] possession' includes exculpatory *6 information in the possession of any agency that participated in the investigation of the crime charged.") (quoting *Kyles*, 514 U.S. at 438). Based on the prosecutor's representation, Defendant's request for additional material is denied. *See Tsarnaev*, 2013 WL 6196279, at *5 ("[The court] accept[s] [the government's] representation in the absence of any specific indication to the contrary."). To the extent Defendant seeks material that is not in the custody or control of the prosecution team, the request is denied. *See United States v. Poulin*, 592 F. Supp. 2d 137, 142 (D. Me. 2008) ("The Government has no duty to produce to [defendant] or permit him to inspect and copy 'evidence outside of its control,' nor can the Court compel it to do so.") (quoting *United States v. Hughes*, 211 F.3d 676, 688 (1st Cir. 2000)); *United States v. DeCologero*, Criminal Action No. 01-10373-RWZ, 2013 WL 3728409, at *5 (D. Mass. July 11, 2013) (the prosecution is not required to produce *Brady* material from other government agencies that are not part of the "prosecution team or any of its agents") (citing *United States v. Chalmers*, 410 F. Supp. 2d 278, 287-90 (S.D.N.Y. 2006)). However, the prosecution has an ongoing obligation to comply with Rule 16. *See* Fed. R. Crim. P. 16(c); LR 116.7.

2. Communication between Giedrowicz and law enforcement officers or agents of the prosecution team.

Defendant requested disclosure of "any and all communications between Giedrowicz, or any other [CS] or cooperating witness, and *any* federal, state, or local law enforcement agent, prosecutor or officer, including but not limited to text messages, email, voice messages, notes or any other electronically stored information stored in any medium from which information can be obtained either directly or, if necessary, after translation by the government into a reasonably usable form" (Dkt. No. 51 ¶ 5) (emphasis original). The prosecutor indicated: "[t]he government has turned over the texts. The CS did not communicate by email, and the government does not have any voice messages from the CS" (Dkt. No. 54 ¶
7 5). Notwithstanding *7 the government's representations, Defendant's supplemental brief claims, based "upon information and belief," that the government has not "turned over every text or other communication between Giedrowicz and law enforcement officers or agents of the

prosecution team" and asks that the requested material be produced "forthwith" (Dkt. No. 71 at 2).

Giedrowicz's communications with law enforcement officers and other members of the prosecution team are statements made by a "prospective government witness" under Fed. R. Crim. P. 16(a)(2), which limits the information the government is required to disclosure under Rule 16(a)(1). *See United States v. Suarez*, Criminal Action No. 09-932 (JLL), 2010 WL 4226524, at *4 (D.N.J. Oct. 21, 2010); Fed. R. Crim. P. 16(a)(2). In pertinent part, Rule 16(a)(2) says: "this rule [does not] authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500 [the Jencks Act]." Fed. R. Crim. P. 16(a)(2). "The Jencks Act ordains that '[a]fter a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.' 18 U.S.C. § 3500(b)." *United States v. Marrero-Ortiz*, 160 F.3d 768, 775-76 (1st Cir. 1998) (alteration in original). "The purpose of the Jencks Act was to preserve the defendant's right to obtain access to materials which would aid in impeaching government witnesses." *United States v. Houlihan*, 937 F. Supp. 65, 71 (D. Mass. 1996). Because the prosecutor's representations indicate that in advance of trial, he has produced the CS's communications, which would qualify as "statements" under the Jencks Act, and because Defendant does not support his claim that some statements have not been produced, his request for Giedrowicz's additional statements to the prosecution team is denied. *See United States v. Cadden*, Criminal No. 14-103630-RGS, 2015 WL
8 13683816, at *1 *8 (D. Mass. Dec. 4, 2015) (the government's pretrial disclosure of "nonexculpatory Jencks Act material" is voluntary); *Tsarnaev*, 2013 WL 6196279, at *5; 18 U.S.C. § 3500(e); Fed. R. Crim. P. 26.2(f).

3. Confirmation that the government has produced all text messages between Giedrowicz and Defendant.

In his supplemental memorandum, Defendant claimed that the government has failed "to confirm that all texts between Giedrowicz and [Defendant]

have been produced" (Dkt. No. 71 at 2). In October 2018, Defendant requested disclosure of

> copies of all statements, summaries of interviews, tape recordings, reports of statements, the agents' notes, and/or any memorialization of statements allegedly made by . . . [D]efendant to any law enforcement agency or officer at any time either before or after his arrest.

(Dkt. No. 51 ¶ 8). The government indicated that it had "already produced" this requested material (Dkt. No. 54 ¶ 8). Because Defendant did not identify a basis for a belief that the government has failed to disclose all text messages between Giedrowicz and Defendant that are in the prosecution team's possession, custody, or control, the court accepts the government's representation as satisfying this request.

4. An order directing the government to preserve, obtain, and produce a forensic image of Giedrowicz's cellular phone.

Defendant requested "a forensic image of any mobile telephone utilized by Giedrowicz during the investigation of . . . [D]efendant" (Dkt. No. 51 ¶12). The government denied the request on the ground that it would result in the production of personal information that was not relevant to the case, but indicated that it would respond to specific requests for data from Defendant (Dkt. No. 54 ¶ 12). In his discovery motion, Defendant stated that he was aware that Giedrowicz was involved in criminal activity in Chicopee while he was cooperating with the government's investigation of Defendant
9 and was seeking a forensic image of Giedrowicz's cell *9 phone in order to obtain additional impeachment evidence (Dkt. No. 60 at 6). The government's response included its representation that it did not have possession, custody, or control of Giedrowicz's personal cell phone (Dkt. No. 62 at 7). This discovery request is extraordinarily intrusive on a non-party's privacy interests. Because the phone is not in the government's possession, custody, or control (Dkt. No. 62 at 7), and because Defendant has not pointed to any case law authorizing the court to order a CS in a criminal case to turn over his personal cell phone for forensic examination by a defendant (Dkt. No. 71 at 4), the court denies Defendant's request for

an order to produce the phone for forensic imaging. *See United States v. Josleyn*, 206 F.3d 144, 154 (1st Cir. 2000) ("While prosecutors may be held accountable for information known to police investigators, we are loath to extend the analogy from police investigators to cooperating private parties who have their own set of interests." (citation omitted)); *Hughes*, 211 F.3d at 688 ("the government has no duty to produce evidence outside of its control"); Fed. R. Crim. P. 16(a)(1)(E).

5. Issuance of a Rule 17(c) subpoena for Giedrowicz's cell phone in order to obtain a forensic image including metadata concerning text messages related to Defendant's case.

a. Forensic Inspection and Analysis

Anticipating that Giedrowicz's cell phone was not in the government's possession, custody, or control, Defendant's supplemental memorandum asked the court to issue a Rule 17(c) subpoena for production of Giedrowicz's cell phone prior to trial in order for Defendant to perform a forensic "inspection and analysis," including retrieval of metadata (Dkt. No. 71 at 1, 4-5). *See* Fed. R. Crim. P. 17(c)(1). Defendant seeks a forensic image of Giedrowicz's cell phone to obtain text messages, including deleted text
10 messages, "the call history, a contact list, internet *10 browser information, and photos and videos (both present and deleted)" to determine whether Giedrowicz engaged in other criminal activity during the relevant time (Dkt. No. 71 at 3, 4).

"Rule 17(c) was not intended to provide an additional means of discovery." *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951). In order to obtain production of an object prior to trial, a defendant must show:

> (1) that the [requested object will produce material that is] evidentiary and relevant; (2) that [it is] not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."

United States v. Nixon, 418 U.S. 683, 699-700 (1974) (footnote omitted). "In short, the Court explained that the [moving party] was required to clear three hurdles: (1) relevancy; (2) admissibility; and (3) specificity." *United States v. LaRouche Campaign*, 841 F.2d 1176, 1179 (1st Cir. 1988) (citing *Nixon*, 418 U.S. at 700). *See also Stern v. United States*, 214 F.3d 4, 17 (1st Cir. 2000) (materials requested with a subpoena *duces tecum* must be relevant, admissible and specific).

A forensic copy of Giedrowicz's personal cell phone raises privacy concerns. *See Riley v. California*, 573 U.S. 373, 403 (2014) ("Modern 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.'") (citation omitted).[2] Acknowledging the privacy interests at stake in forensic imaging of personal electronic devices, courts in civil cases have denied requests similar to Defendant's. *See, e.g.*, *John B. v. Goetz*, 531 F.3d 448, 457 (6th Cir.
11 2008) ("The orders at issue *11 here compel the imaging and production of various state-owned and privately owned computers and electronic devices, and that media will almost certainly contain confidential state or private personal information that is wholly unrelated to the . . . litigation."); *Lewis v. Archer Daniels Midland Co.*, CIVIL ACTION NO. 17-14190, 2018 WL 6591999, at *2 (E.D. La. Dec. 14, 2018) ("'Courts hesitate to authorize direct access to an opposing party's electronic storage device.'") (citation omitted); *Ramos v. Hopele of Fort Lauderdale, LLC*, CASE NO. 17-62100-CIV-MORENO/SELTZER, 2018 WL 1383188, at *2-3 (S.D. Fla. Mar. 19, 2018) (plaintiff's privacy interest in her cell phone outweighed the defendant's need for a forensic examination of the phone); *John Crane Grp. Corp. v. Energy Devices of Tex., Inc.*, CIVIL ACTION NO. 6:14-CV-178, 2015 WL 11112540, at *1 (E.D. Tex. Oct. 30, 2015) (in denying the motion to reconsider the denial of plaintiff's motion to compel the forensic examination of defendants' employee's cell phones, the court found that "[t]he utility of permitting a forensic examination of personal cell phones must be weighed against inherent privacy concerns."); *Sophia & Chloe, Inc. v. Brighton Collectibles, Inc.*, No. 12cv2472-AJB (KSC), 2013 WL 5212013, at *2 (S.D. Cal. Sept. 13, 2013) ("Given the legitimate privacy and other interests at issue, absent 'specific, concrete evidence of concealment or destruction of evidence,' courts are generally cautious about granting a request for a

forensic examination of an adversary's computer.") (quoting *Advante Int'l Corp. v. Mintel Learning Tech.*, No C 05-01022 JW (RS), 2006 WL 1806151 at *2 (N.D. Cal. June 29, 2006)).

[2] The court is unaware of any authority for Defendant's apparent contention that law enforcement officers have an obligation to require a CS to use a government-issued cell phone (Dkt. No. 71 at 2, 4), and Defendant has not identified any such authority.

The government also argued that Defendant's request for a Rule 17(c) subpoena should be denied because his request for unlimited access to Giedrowicz's cell phone to obtain impeachment evidence was overbroad (Dkt. No. 74 at 2). *Nixon*, 418 U.S. at 700. "Generally, the need for evidence to impeach witnesses is insufficient to require its production in advance of
12 *12 trial." *Id.* at 701. *See United States v. Santiago-Lugo*, 904 F. Supp. 43, 46 (D.P.R. 1995) ("[T]he production of documents allowed by [Rule 17(c)] is intimately related to the attendance of the witness."). The First Circuit, however, recognizes that the pretrial disclosure of impeachment evidence by means of a Rule 17(c) subpoena is committed to "the sound discretion of the district court." *LaRouche Campaign*, 841 F.2d at 1180.

Although Giedrowicz will be a critical government witness whose impeachment will be important to the defense, Defendant's request for the issuance of a Rule 17(c) subpoena in order to obtain a forensic image of Giedrowicz's cell phone is doomed by its lack of specificity. To the extent Defendant seeks information related to Giedrowicz's alleged criminal activity in Chicopee, the information is available from another source that does not raise the same privacy concerns, that being the file of the Chicopee Police Department. The court has indicated its willingness to issue an order requiring such a disclosure by the Chicopee Police Department. "The Court cannot authorize subpoenas to reveal [hypothetical] evidence because doing so would wrongly convert Rule 17 into a discovery tool." *United States v. Pereira*, 353 F. Supp. 3d 158, 161 (D.P.R. 2019). Defendant has failed to support his contention that Giedrowicz engaged in illegal activity of which he has not been advised (Dkt. No. 71 at 3). Rather, Defendant's request for the production of Giedrowicz's cell phone in order to conduct a forensic analysis of the entire phone is akin to a request for "any and all documents,"

which suggests an "'impermissible fishing expedition.'" *United States v. Cartagena-Albaladejo*, 299 F. Supp. 3d 378, 386 (D.P.R. 2018) (quoting *United States v. Morris*, 287 F.3d 985, 991 (10th Cir. 2002)). *See United States v. Ventola*, Criminal No. 15-10356-DPW, 2017 WL 2468777, at *2 (D. Mass. June 7, 2017) (defendant's failure to seek specific evidence combined with "[t]he breadth of the subpoenas . . . establishes that defendant intended the
13 subpoenas to operate as a general fishing *13 expedition."); *United States v. Mariano*, No. CR 12-061-01-ML, 2013 WL 866907, at *2 (D.R.I. Mar. 7, 2013) ("In describing the documents sought, a subpoena must refer to specific documents or, at least, to specific kinds of documents. Requesting entire files instead of specific documents indicates a fishing expedition.") (citation omitted); *United States v. Manghis*, Criminal Action No. 08cr10090-NG, 2010 WL 349583, at * (D. Mass. Jan. 22, 2010) (defendant's request for "'any and all documents relating to the . . . interpretation and implementation of certain regulatory provisions is overbroad and amounts to little more than a fishing expedition."). Defendant's hope that a forensic image of Giedrowicz's cell phone will produce evidence favorable to the defense is insufficient to support the issuance of the requested subpoena. *See United States v. Shinderman*, 232 F.R.D. 147, 150 (D. Me. 2005) ("The 'mere hope that some exculpatory material might turn up' is insufficient.") (quoting *United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980)); *United States v. Noriega*, 764 F. Supp. 1480, 1493 (S.D. Fla. 1991) ("If the moving party cannot reasonably specify the information contained or believed to be contained in the documents sought but merely hopes that something useful will turn up, this is a sure sign that the subpoena is being misused."). Consequently, Defendant's motion for the issuance of a Rule 17(c) subpoena ordering Giedrowicz to preserve the contents of his cell phone and to produce it for forensic imaging and analysis is denied.[3]

[3] Although Defendant also sought a forensic examination of Defendant's cell phone in order to obtain communications between Giedrowicz and investigators that have not been disclosed and in order to challenge the authenticity of the text messages that were procured by the government (Dkt. No. 71 at 3, 4-5), these grounds do not satisfy the *Nixon* criteria. The government has represented that it has disclosed all communications between Giedrowicz and investigators (Dkt. No. 54 ¶ 5), and the rules of

evidence provide the means for challenging the authenticity of electronic communications, including text messages. *See* Fed. R. Evid. 901(a).

14 b. Metadata from Giedrowicz's cell phone. *14

As a subset of Defendant's request for a forensic image of Giedrowicz's cell phone, Defendant seeks the metadata associated with Giedrowicz's text messages that are related to the case (Dkt. No. 51 ¶ 12; Dkt. No. 60 at 6; Dkt. No. 71 at 3). Metadata is "embedded 'data about data,'" *United States v. Breton*, 740 F.3d 1, 7 n.8 (1st Cir. 2014), "that describes the 'history, tracking, or management of an electronic document.'" *Aguilar v. Immigration & Customs Enf't Div. of the U.S. Dep't of Homeland Sec.*, 255 F.R.D. 350, 354 (S.D.N.Y. 2008) (quoting *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 646 (D. Kan. 2005)). Without additional explication, Defendant claims that he needs the metadata to determine when text messages were sent or received, whether the messages were incoming or outgoing, the phone numbers of the sender and recipient, and the location of the phone when communicating by text message (Dkt. No. 60 at 4; Dkt. No. 71 at 3).[4] The government objected to the production of metadata on the ground that it lacked relevance (Dkt. No. 62 at 4; Dkt. No. 74 at 3).

4 The government questioned whether metadata would reveal the geolocation of the cell phone (Dkt. No. 62 at 4; Dkt. No. 74 at 3). Defendant did not provide authority for his assertion in the form of an expert's affidavit or demonstrate the relevance of the cell phone's location when it sent or received text messages. --------

"Evidence is relevant if . . . it has any tendency to make a fact more or less probable than it would be without the evidence[] and . . . that fact is of consequence in determining the action." Fed. R. Evid. 401. Defendant is charged with aiding and abetting marijuana trafficking, unlawful possession of firearms, and money laundering (Dkt. No. 2). The relevance of the content of Giedrowicz's communications that are related to Defendant's alleged criminal activity is undisputed. The prosecutor represented that he has produced the "pertinent" text messages that the government obtained from Giedrowicz's personal cell phone, which contained the sender and recipient, the contents of the messages, and their dates and times (Dkt. No.
15 54 ¶ 12; Dkt. No. *15 62 at 3, 4). Defendant fails to demonstrate a "sufficient

likelihood" that the metadata associated with those text messages is "relevant to the offenses charged in the indictment." *Nixon*, 418 U.S. at 700. Potential relevance is insufficient to warrant the issuance of a subpoena. *See United States v. Marchisio*, 344 F.2d 653, 669 (2d Cir. 1965), *overruled on other grounds by United States v. Mandanici*, 205 F.3d 519 (2d Cir. 2000); *United States v. Berger*, 773 F. Supp. 1419, 1425 (D. Kan. 1991). If Defendant is seeking the metadata to obtain additional fodder for impeachment of Giedrowicz, he fails to establish a link between the undisclosed metadata and Giedrowicz's credibility. Defendant's conclusory allegations of relevance are not sufficient to sustain his burden of demonstrating the need for the metadata that he pursues. *See United States v. Eden*, 659 F.2d 1376, 1381 (9th Cir. 1981); *Burger*, 773 F. Supp. at 1425. Accordingly, weighed against the privacy interests implicated in Defendant's request, his request for the issuance of a Rule 17(c) subpoena to gather metadata is denied.

IV. C ONCLUSION

For the above-stated reasons, Defendant's motion for discovery (Dkt. No. 60) is DENIED.

It is so ordered. Dated: May 6, 2019

/s/ Katherine A. Robertson

KATHERINE A. ROBERTSON

UNITED STATES MAGISTRATE JUDGE

MAURA HEALEY
GOVERNOR

KIMBERLY DRISCOLL
LIEUTENANT GOVERNOR

TERRENCE M. REIDY
SECRETARY

The Commonwealth of Massachusetts
Department of State Police

Division of Investigative Services
Norfolk State Police Detective Unit
45 Shawmut Road
Canton, MA 02021

JOHN E. MAWN JR.
COLONEL/SUPERINTENDENT

JOHN D. PINKHAM
DEPUTY SUPERINTENDENT

May 9, 2023

To: Detective Lieutenant Brian Tully #3520, Norfolk SPDU, Commanding Norfolk SPDU

From: Trooper Nicholas Guarino #3962

Subject: O'Keefe Homicide evidence report regarding defense expert findings: Part 2

Case: 2022-112-0033

1. My name is Nicholas Guarino, I am a Massachusetts State Police Trooper, currently assigned to the Norfolk District Attorney's Office, and have been employed as a State Trooper for the past eight (8) years. Previously I was a Patrolman with the Norwood Police Department for ten (10) years. During my time as a Trooper and Patrolman I have responded to and investigated various criminal activities to include but not limited to: narcotics sales, larceny, fraud, sexual assaults, and domestic violence. I have a Bachelor's degree in Criminal Justice and Mass Communications from Westfield State College. I have been trained by and completed the Municipal Police Training Council (Boylston) academy and Massachusetts State Police Training Academy. I have received specialized training in electronic data recovery and analysis from the National White Collar Crime Center (NW3C). I also have specialized training in the analysis and data extraction of cell phones using the Cellebrite software system. I have specialized training in X-ways forensics software, Axiom Magnet Forensic software and Autopsy Forensic software programs that analyze extracted data from digital devices. I have participated and assisted with several investigations involving the use of cell phones and computers to create, distribute and disseminate narcotics, child pornography and other offenses. I have worked with, and am currently working with, other experienced investigators of the Massachusetts State Police and local police departments. I have participated in the execution of search warrants and seized evidence of crimes

2. During the investigation into the homicide death of John O'Keefe (DOB 12/8/1975) I have imaged digital evidence of numerous people in this case including the victim, suspect and witnesses. After these items are imaged they are placed onto our server and loaded into Cellebrite Physical Analyzer and Axiom Magnet Forensic software programs for review. As part of evidence discovery I created Cellebrite UFED Reader reports of the entire contents of the cell phones to provide to the defense. After receiving the UFED Reader Reports, the defense's data forensics expert requested the raw extraction files to review. These items were copied onto USB thumb drives and supplied to ADA Adam Lally to give to the defense.

3. The following items were reviewed for evidence of the homicide:

- One (1) Apple iPhone 11 (Serial # G0NCX5RRN72W) belonging to Jennifer McCabe
- One (1) Apple iPhone 11 (Serial # F4GFRBEQN72Q) belonging to John O'Keefe

4. To perform the data extraction and analysis of these devices, I used the following equipment:

- GreyKey
- Cellebrite Physical Analyzer
- Axiom Magnet Forensics
- Windows 10
- Windows 11

Jennifer McCabe's iPhone 11 Review

5. Call Log History

The defense expert in his review of Jennifer McCabe's iPhone is alleging that the user of McCabe's cell phone "made significant deletions of call data" to the call log. I have spoken with Cellebrite Senior Technical Customer Support Engineer regarding how Cellebrite marks records deleted. He explained that "PA is marking the entry as deleted as it only appears within the Wal file and the same record is not found within the active database". Meaning that the user of the iPhone did not actively delete anything from the WAL file. I have reviewed the call log in both Cellebrite and Axiom and found the following.

6. Jennifer McCabe's iPhone has 1104 records listed in Cellebrite in the call log history that date from February 2, 2022 (when the phone was downloaded) going back to October of 2020. Upon closer inspection of these records the following items of note were found:

- Call Records 1-439 were marked as being in two (2) different locations in the phone, either the Knowledge C database and CallHistory.storedata or the Knowledge C database and the CallHistory.storedata-WAL. Each entry had approximately the same time and call length and if they did not have the same times you could see the time offsets by looking at the timestamp and the call duration.
- Call Records 1 to 48 were recorded in the phone in both the Knowledge C database and the CallHistory.storedata-WAL
- Call Records 49 to 368 were recorded in the phone in both the Knowledge C database and the CallHistory.storedata database
- Call Records 369 to 439 were recorded in the phone in both the Knowledge C database and the CallHistory.storedata-WAL
    - 2 records – 371/372 and 437/438 were marked as being in the Knowledge C database and the CallHistory.storedata database
- In the Call Records, entries 403 to 436, only the CallHistory.storedata-WAL entries were marked in the phone as "deleted" but were still showing in the Knowledge C database
    - Of the "deleted" call records only one (1), record 437/438, is marked as deleted from the CallHistory.storedata
- Call Records 439 to 841 are only recorded in the phone in the Knowledge C database unless it was a Facetime call; then it would have a record in the Knowledge C database and the CallHistory.storedata-WAL
- Call Records 842 to 885 are only located in the Biome/Streams/Public/AppIntent/Local (which is a newer storage area that has been slowly getting more and more integrated into iOS software)
- Call Records 886 to 904 are Facetime calls located only in the CallHistory.storedata-WAL
- Call Records 905 to 1104 are Facetime calls located only in the Callhistory.storedata

By looking at the totality of McCabe's Call Log it would show that the most recent calls are being written to both the Knowledge C database and either the CallHistory.storedata or the CallHistory.storedata-WAL. The WAL files are where data is initially written until the specified amount of data is reached then it is moved to the database and then purged from the WAL. McCabe's Call Log history shows that her oldest calls located in the CallHistory.storedata and the CallHistory.storedata-WAL were being purged from the phone automatically and being only stored in the Knowledge C database.

7. The CallHistory.storedata is the main database for call log history in iOS devices. The CallHistory.storedata-WAL is the temporary file that the phone writes to until such time it is committed to the database. Once committed to the database the WAL file resets and purges data without user input.

8. "The Knowledge C database tracks lots of different activity from Battery Level and Bluetooth connections to which speaker is in use and what is playing at any given time. Because the vast amount of data stored, the database is only stored for a couple of months before it appears to purge records on a first in/ first out basis. It does appear that some records are kept for longer depending on the type of data being stored." (Ian Whiffin: Doubleblak Digital Forensics website).

John O'Keefe GPS Data

9. On Monday, May 8, 2023 Tpr Proctor and I went to 34 Fairview Rd to physically measure the GPS coordinates from John O'Keefe's iPhone. I exported the GPS points from Axiom and loaded it into SARTopo, which is a GPS mapping software that can view locations via a phone App. I mapped the GPS points starting at January 29, 2022 at 12:12:04AM (location: Waterfall Bar in Canton) to January 29, 2022 at 12:25:36AM (location: Outside 34 Fairview). The points were taken from the phones Cached Locations and given in Latitude and Longitude Coordinates.

10. The initial data points put the O'Keefe's phone in the vicinity of the Waterfall Bar located at 643 Washington Street. Approximately seven (7) minutes later at 12:19:33 the phone's location is showing at the intersection of Dedham Street and Cedarcrest Road. At 12:20:08AM O'Keefe's phone searches the address of 34 Fairview Road on Waze. The corresponding location of the phone when that search is done is by 138 Dedham Street. The phone then proceeds down Dedham Street and takes a left down Maplecroft Road. The phone takes a left onto Oakdale Road from Maplecroft Road at 12:21:27AM. It then takes a right onto Cedarcrest Road at 12:22:44AM.

11. The phone continues down Cedarcrest Road going by Fairview Road at 12:23:46AM. It then stops in the area of 51 Cedarcrest Road, reverses direction and takes the right onto Fairview Road at 12:24:18AM. The phone finally stops in between 34 and 32 Fairview Road in the area of the flag pole and fire hydrant at 12:24:40AM. The final point plotted was at 12:25:36AM when the phone stops showing any movement until the morning at 6:15:36AM (as stated in my previous report).

12. Tpr Proctor and I began measuring the approximate location from where O'Keefe's body was discovered. To do this we reviewed the Canton PD dash camera video and the photos that were taken by Sgt. Goode when they were searching in the snow. The GPS coordinates for the location we used were 42.17414 Degrees North, 71.15367 Degrees West. This spot is believed to be within one (1) meter (3 Feet) of where O'Keefe's body was.

13. The degree of accuracy for O'Keefe's GPS points were all between 4-5 meters (12-15 feet) from the travel down Dedham Street to 34 Fairview Road. From the area where O'Keefe was found to the front door of 34 Fairview is approximately 21 Meters (72 feet). The only possible times shown via O'Keefe's GPS data that he could have been inside 34 Fairview Road are the following:

- At 12:25:30 the degree of accuracy is 33 meters (108 Feet) – Area encompasses 32, 34 and 31 Fairview Residences
- At 12:25:31 the degree of accuracy is 61 meters (200 Feet) – Area encompasses 31, 32, 33, 34 Fairview Residences
- At 12:25:32 the degree of accuracy is 29 meters (95 Feet) – Area encompasses 32, 34 Fairview Residences and the front yard of 31 Fairview
- At 12:25:33 the degree of accuracy is 27 meters (88 Feet) – Area encompasses 32, 34 Fairview Residences and the front yard of 31 Fairview

- At 12:25:34 the degree of accuracy is 20 meters (72 Feet) – Area of the edge of 32 Fairview, front door of 34 Fairview and front yard of 31 Fairview Residences
- At 12:25:35 the degree of accuracy is 18 meters (59 Feet) – Area of the front yards of 32, 34, 31 Fairview Residences
- At 12:25:36 the degree of accuracy is 16 meters (52 Feet) – Area of the edge of 32 Fairview, front lawn of 34 Fairview and edge of front lawn of 31 Fairview Residences

14. From my training and experience the enlargement and shrinking of degrees of accuracy of the GPS points are determined by the signal strength and connection to satellites. From these points O'Keefe could have been inside the residence of 34 Fairview for no more than 3 seconds before the GPS points go back to within a 4 meter degree of accuracy until the morning when he is discovered. See attached PowerPoint of data points.

15. Also of note is that O'Keefe's health data in Cellebrite shows him ascending/descending three (3) flights of stairs at 12:22:14AM. The native locations in Cellebrite and the Cached locations in Axiom both show O'Keefe's phone location by the intersection of Oakdale Road and Pine Cone Road, in front of 36 Oakdale Road, which is approximately a little over a half a mile away from 34 Fairview Rd. His health data also recorded 36 Steps at 12:31:56AM in Cellebrite. There are no GPS points at this time in Cellebrite or Axiom and Axiom shows no movement of the phone.

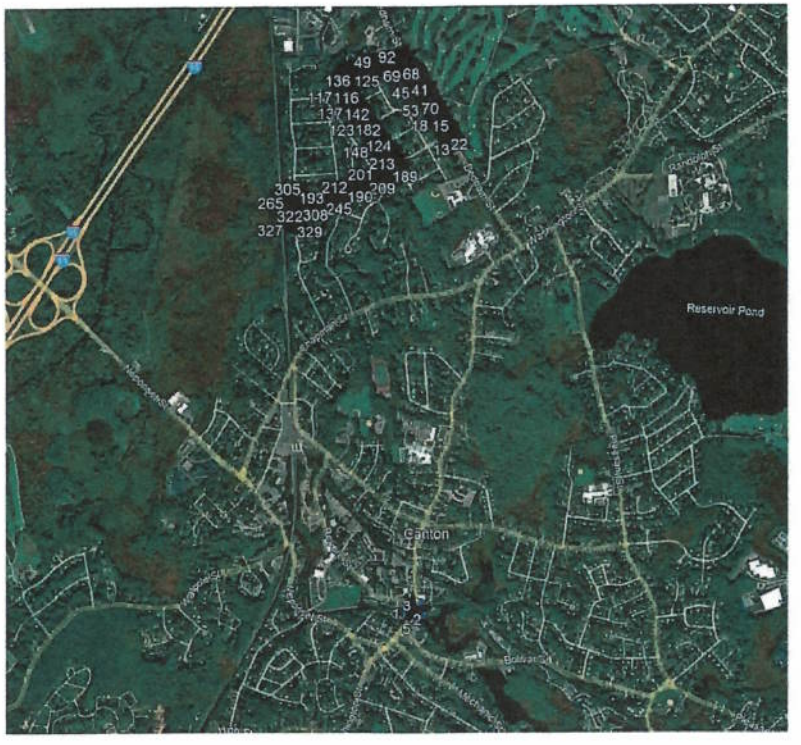
Respectfully submitted,

Trooper Nicholas Guarino #3962
Norfolk County SPDU
Massachusetts State Police

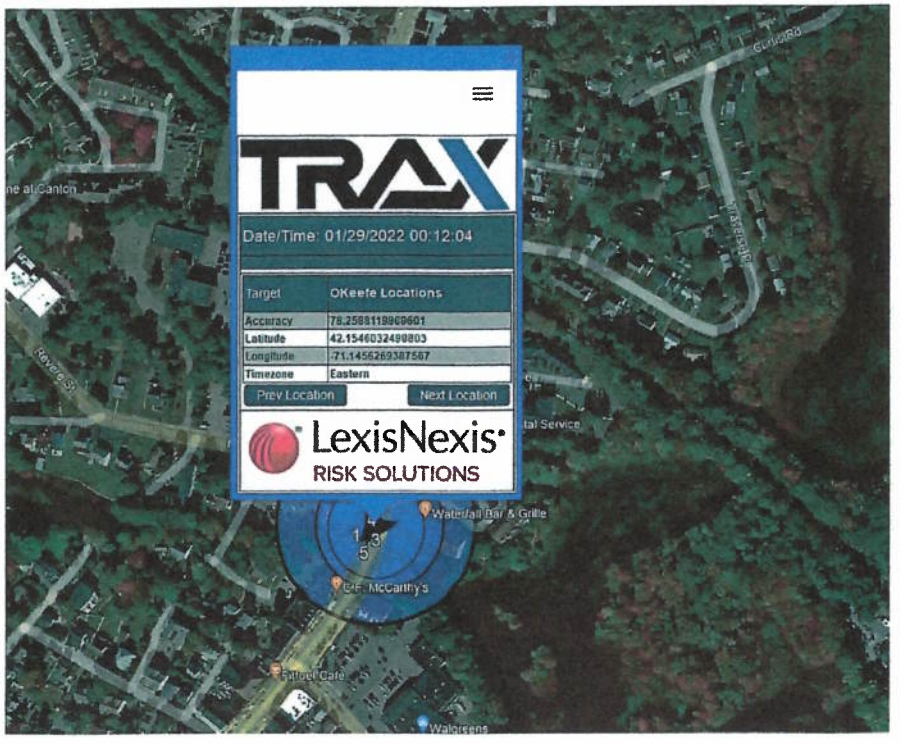
John O'Keefe GPS Points

Axiom Cache Locations

Overview of Plotted Points



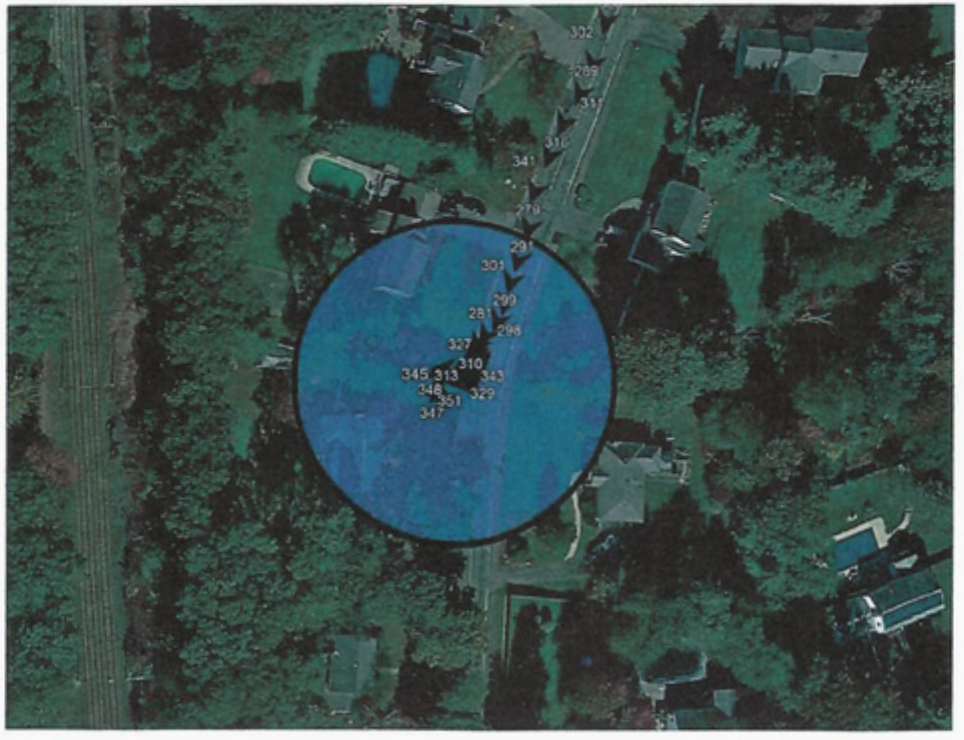
Waterfall Bar Canton, MA



Location when iPhone Registers Ascending/Descending 3 Flights of Stairs

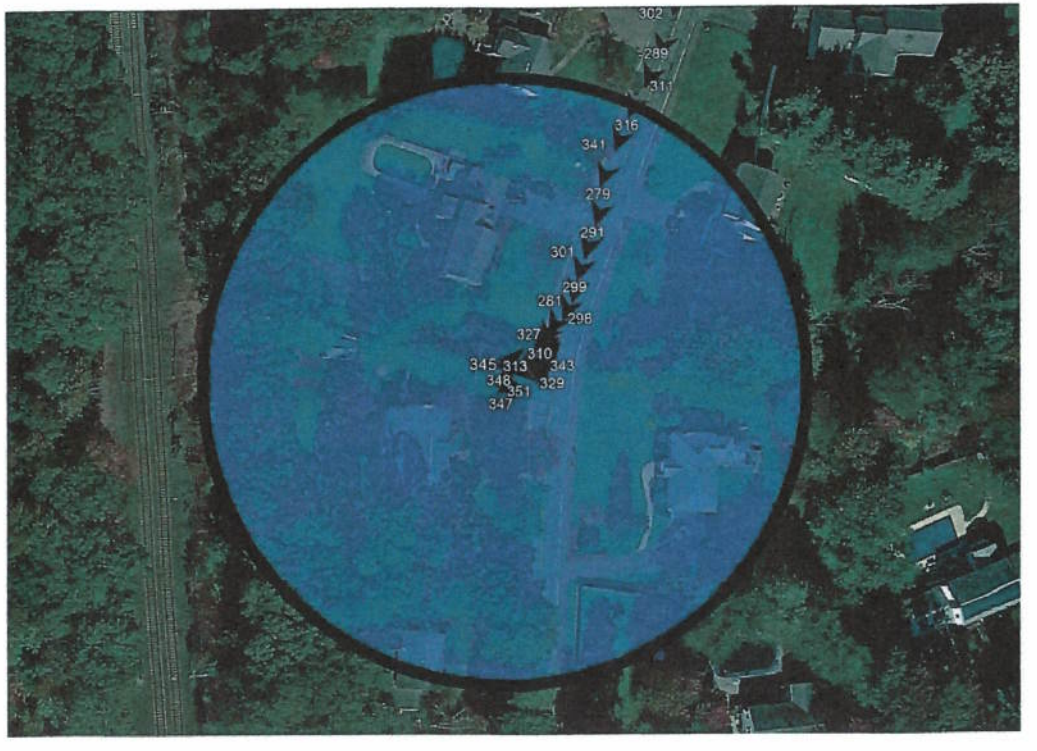
O'Keefe GPS Point# 348 at 00:25:30

O'Keefe GPS Point #348 at 00:25:30



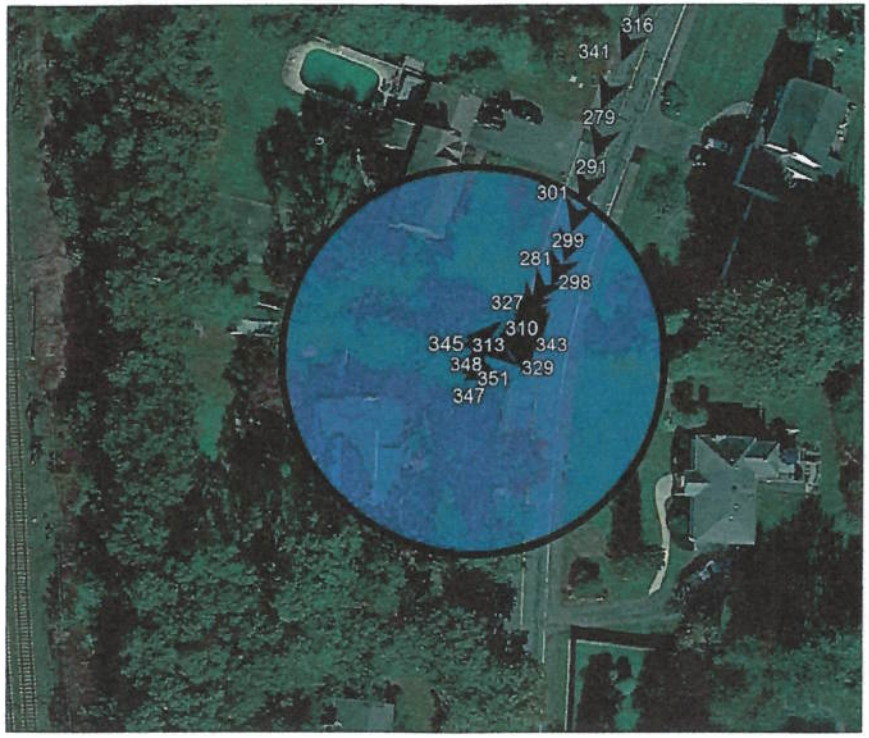
O'Keefe GPS Point# 351 at 00:25:31

O'Keefe GPS Point# 351 at 00:25:31



O'Keefe GPS Point# 349 at 00:25:32

O'Keefe GPS Point# 349 at 00:25:32



O'Keefe GPS Point# 348 at 00:25:33

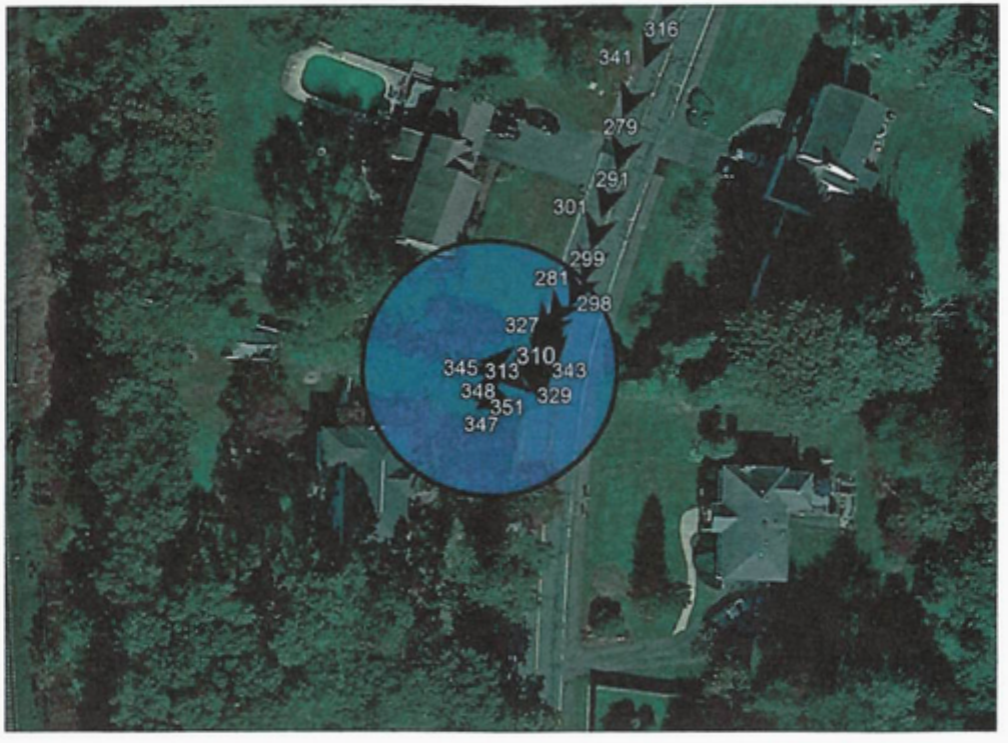
O'Keefe GPS Point#348 at 00:25:33

O'Keefe GPS Point# 350 at 00:25:34

O'Keefe GPS Point# 350 at 00:25:34

O'Keefe GPS Point#346 at 00:25:35

O'Keefe GPS Point# 346 at 00:25:35



O'Keefe GPS Point# 345 at 00:25:36

O'Keefe GPS Point# 345 at 00:25:36

HEXORDIA

Digital Forensics Analysis Report

Prepared For: Norfolk District Attorney

Prepared By: Jessica Hyde

Hexordia Case Number: HEX-NDA-230501

Contact Information:
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Table of Contents

Executive Summary

This digital forensics analysis details findings related to a request from the Norfolk District Attorney's office via Detective Lieutenant Brian Tully to review information pertaining to specific information from a device identified as belonging to Jennifer McCabe; namely, two Google searches on January 29, 2022.

Request

The request was to understand the timeline of two Google searches on January 29, 2022; "How long ti die in clkd" and "Hos long to die in cold". I was provided with copies of two documents; namely, O'Keefe Homicide evidence report regarding prosecution expert findings from Trooper Nicholas Guariano, and the Affidavit of Richard Green in Support of Defendant's Motion for Order Pursuant to Mass.R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T. A copy of the full file system extraction was provided.

Evidence Analyzed

The evidence analyzed was a Full File System forensic image provided by Massachusetts State Police of an iOS device Serial #G0NCX5RRN72W with a SHA256 hash of d4c61df2d41211749a96ec2a8f20a4384f67a0126037ff8de7ab3e00a0a6d109. The device is identified as an iPhone 11 running software version iOS 15.2.1. Since the Full File System image was a forensic image file, Hexordia utilized a forensically sound method to copy the file to a working drive for analysis.

Forensic Analysis

The full file system image received via US Postal Service was copied using ArcPoint Atrio (ver 1.1.9) to an external Destination Drive labeled HEX-NDA-230501_001 The copied FFS image was processed with Cellebrite Physical Analyzer (ver 7.6.10.12) on a Windows 11 (ver 22H2) system. Hash was verified after processing. The image was additionally processed with the following tools: AXIOM (ver 7.0.0.35443), iLEAPP (ver 1.18.6), ArtEx Beta 2.6.1.0. Additional analysis of SQLite databases was performed using Sanderson Forensics Browser for SQLite ver 3.3.0.

Hexordia searched the drive for data pertaining to Google Searches and Safari History on January 29, 2022 for the purpose of understanding the true nature of the two Google searches in question. The goal of this analysis was to understand the timeline of the specific Google searches a with regard to a user action to delete the searches.

Relevant Findings

There were two searches of interest that took place on the iOS device examined. A Google search for "how long ti die in cikd" took place at approximately 11:23 am and another search for "hos long ti die in cold" took place at 11:24. Automated tooling, including Cellebrite and AXIOM identified the Google search history in Table 1. All times in the below chart are adjusted to Eastern Standard time. These are

the tool reported times. Further analysis demonstrates that the time carved for the first entry on the chart at 2:27:40 is less reliable than the other time stamps documented.

Table 1: Web History Tool Results combined

EST on 11/29/2022	Artifact	Search Term	URL	Source
2:27:40 AM	Google Search/Safari Suspended State Tab	hos long to die in cold	https://www.google.com/search?q=hos+long+to+die+in+cold&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	\private\var\mobile\Library\Safari\BrowserState.db-wal
6:23:49 AM	iOS Safari Cache Record	APPLE SUGGESTED TERM "How long does it take to digest food"	https://cdn2.smoot.apple.com/image?.sig=tnfvltCqZD6Q_s_EQNpFag%3D%3D&domain=web_index&image_url=https%3A%2F%2Fpost.healthline.com%2Fwp-content%2Fuploads%2F2020%2F02%2F732x549_THUMBNAIL_How_long_does_it_take_to_digest_food.jpg&spec=120-180-NC-0	\private\var\mobile\Containers\Data\Application\A68A15C7-8423-421F-98C2-DD014DA8EFDD\Library\Caches\com.apple.mobilesafari\Cache.db
6:23:51 AM	Recent WebSearches	how long ti die in cikd		/private/var/mobile/Containers/data/Application/A6BA15C7-8423-421F-98C2-DD014DA8EFDD/Library/Preferences/com.apple.mobilesafari.plist
6:23:57 AM	Google Search / Application Web Usage	how long ti die in cikd	https://www.google.com/search?q=how+long+ti+die+in+cikd&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	\private\var\mobile\Library\CoreDuet\Knowledge\knowledgeC.db
6:23:56 AM	Google Search	how long ti die in cikd	https://www.google.com/search?q=how+long+ti+die+in+cikd&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	\private\var\mobile\Library\CoreDuet\Knowledge\knowledgeC.db
6:24:18 AM	Recent WebSearches	hos long to die in cold		/private/var/mobile/Containers/data/Application/A6BA15C7-8423-421F-98C2-DD014DA8EFDD/Library/Preferences/com.apple.mobilesafari.plist
6:24:47 AM	Google Search	hos long to die in cold	https://www.google.com/search?q=hos+long+to+die+in+cold&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	\private\var\mobile\Library\CoreDuet\Knowledge\knowledgeC.db

Table 2 in shows various tables where data pertaining to Google Searches may be stored and what data may exist in each. This provides a reference of which artifacts related to Google searches are available for Private browsing as compared to Non-private browsing as well as what the associated timestamps are indicative of based on testing using accepted testing methodologies as described in the NIST OSAC Guidelines for Dataset Development.

Table 2: Description of files that store Safari related data on iOS devices

File	Contains
/private/var/mobile/Library/Safari/History.db-wal	• Non-private searches • Includes closed tabs • visit_time = Time user reopened the tab. If only opened once contains time search was performed
/private/var/mobile/Library/Safari/SafariTabs.db	• Private tab and non-private tab searches • Only tabs which were not closed
/private/var/mobile/Library/Safari/BrowserState.db-wal	• Non-private searches • Includes closed tabs • last_viewed_time = When a tab was backgrounded
/private/var/mobile/Library/CoreDuet/Knowledge/KnowledgeC.db	• Non-private searches • Includes closed tabs

	• ZCREATIONDATE = Time search was queried
/private/var/mobile/Containers/Data/Application/9FBFB514-DC1D-4D02-91B2-12BB34A6A182/Library/Preferences/com.apple.mobilesafari.plist	• Non-private searches • Includes closed tabs • Date = Time search was queried

It is important to understand the storage of Web History artifacts as they pertain to Safari on iOS as well as how data is stored in SQLite databases. SQLite databases utilize a Write-Ahead Log or WAL file as a temporary data store before transactions are committed to the database. An important note is that the existence of data in a WAL file does not necessarily indicate that data was deleted. Existence in the WAL and not in the active database can also be consistent with data having not been committed to the associated database file.

This is described in the peer-reviewed paper, "Standardization of File Recovery Classification and Authentication". [Examiner Comment: The examiner preparing this report was a co-author on this peer-reviewed paper.]

> "Complexities arise in SQLite version 3.7.0 and later which use a Write Ahead Log ("WAL"'). The WAL file can contain a new row that has not yet been committed to the database. Therefore, it would be incorrect to describe this row "deleted," but some tools do just that. Furthermore, the WAL file can simultaneously contain the first instance of a row, as well as updated copies of the row, and a final copy when a row becomes non-allocated [23]. Therefore, rows in a WAL file should only be described as "deleted" (meaning non-allocated) when there is a clear progression of earlier instances, and the final state is that the row is no longer in the database."
> Source: Casey, E. , Nelson, A. and Hyde, J. (2019), Standardization of File Recovery Classification and Authentication, Digital Investigation, [online], https://doi.org/10.1016/j.diin.2019.06.004, https://tsapps.nist.gov/publication/get_pdf.cfm?pub_id=927146

In the instance of the Google search, "hos long to die in cold" that was recovered from the Write-Ahead Log associated with the exhBrowserState.db SQLite database with the timestamp of 2:27:40 AM was marked by Cellebrite as having this time stamp and being deleted. Tt is valuable to mention that while Cellebrite Physical Analyzer utilizes a marking for deleted, there is NOT a deleted flag for the existence of data in this particular database. It is possible that Cellebrite is providing the guidance that an artifact may be potentially deleted if it exists in the WAL but not in the active database, requiring further analysis by an examiner . In this instance the existence of the data in the WAL is not demonstrative that the Google search "hos long to die in cold" was deleted for multiple reasons.

1) This database stores data pertaining to browser tabs. There is no user function to specifically delete a tab.
2) The existence of an entry in the WAL file does not demonstrate deleted data but rather that the information is not current in the database, it may not yet have been committed to the database. Data is written from the WAL file to the active database on closing.

3) It is possible for a tab that was opened but closed before the WAL is committed to the database to never be committed to the database and only ever read from its active state in the WAL.
4) A user is unable to "delete" a browser state as this database is not related to clearing Internet history. Rather a user can have an open or a closed tab. BrowserState.db (including the WAL) is a depiction of the state of the tabs in the Safari browser.
5) In our testing, we opened multiple browser tabs in both Private Browsing and Non-Private tabs and conducted searches. In our testing currently open, Non-Private browsing tabs remained in the WAL and had not yet been committed to the database file demonstrating that an actively open non-private browsing tab can be in the WAL.

The time stamp for the "hos long to die in cold" search from the BrowserState.db-wal requires deeper analysis. The BrowserState.db and BrowserState.db-wal were further analyzed in SandersonForensic Browser for SQLite. There are multiple WAL entries for the search. All the records are not live in the database and are on page 2752 of the WAL. This does NOT mean the search occurred multiple times, but rather that there is much duplication as part of the normal function of records written to the WAL in SQLite databases. Each of these entries has the same Universal Unique Identifier, demonstrating that they are each the same entry. Multiple entries showing the same UUID are shown in Figure1.

USER_VISIBLE_URL	ORDER_INDEX	LAST_VIEWED_TIME	OPENED_FROM_LINK	PRIVATE_BROWSING	sfSource	sfPage	sfSalt	sfCommit	sfoffset	sfIen	sfIsLive
https://www.google.com/search?q=hos+long+to+die+in+cold&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	10	665134060.465336	0	0	WAL-345	275240044	25	1424117	311	False
https://www.google.com/search?q=hos+long+to+die+in+cold&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	10	665134060.465336	0	0	WAL-386	275240044	28	1593037	311	False
https://www.google.com/search?q=hos+long+to+die+in+cold&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	10	665134060.465336	0	0	WAL-402	275240044	31	1658957	311	False
https://www.google.com/search?q=hos+long+to+die+in+cold&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	6	665134060.465336	0	0	WAL-410	275240044	33	1691917	311	False
https://www.google.com/search?q=hos+long+to+die+in+cold&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	6	665134060.465336	0	0	WAL-419	275240044	35	1728997	311	False
https://www.google.com/search?q=hos+long+to+die+in+cold&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	6	665134060.465336	0	0	WAL-429	275240044	36	1770197	311	False
https://www.google.com/search?q=hos+long+to+die+in+cold&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	6	665134060.465336	0	0	WAL-440	275240044	38	1815517	311	False
https://www.google.com/search?q=hos+long+to+die+in+cold&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	6	665134060.465336	0	0	WAL-467	275240044	39	1926757	311	False
https://www.google.com/search?q=hos+long+to+die+in+cold&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	6	665134060.465336	0	0	WAL-478	275240044	41	1972077	311	False
https://www.google.com/search?q=hos+long+to+die+in+cold&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	6	665134060.465336	0	0	WAL-562	275240044	44	2318157	311	False
https://www.google.com/search?q=hos+long+to+die+in+cold&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	6	665134060.465336	0	0	WAL-577	275240044	47	2379952	311	False
https://www.google.com/search?q=hos+long+to+die+in+cold&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	6	665134060.465336	0	0	WAL-584	275240044	48	2408792	311	False
https://www.google.com/search?q=hos+long+to+die+in+cold&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	6	665134060.465336	0	0	WAL-588	275240044	50	2466477	311	False
https://www.google.com/search?q=hos+long+to+die+in+cold&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	6	665134060.465336	0	0	WAL-643	275240044	51	2651877	311	False
https://www.google.com/search?q=hos+long+to+die+in+cold&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	0	665134060.465336	0	0	WAL-649	275240044	52	2676927	310	False
https://www.google.com/search?q=hos+long+to+die+in+cold&ie=UTF-8&oe=UTF-8&hl=en-us&client=safari	0	665134060.465336	0	0	WAL-660	275240044	54	2722247	310	False

Figure 1 - Instances of Google search "hos long to die in cold" from BrowserState.db

With the information available to us in the Write-Ahead Log we are able to see a column called Last_Viewed_Time which contains an Apple Webkit Timestamp. It is important to note that this timestamp is NOT the time of the entry in the database. Rather this timestamp is described as the time that the tab moved to the background. Testing shows this timestamp to NOT be the time that the website was viewed but correlates instead to the movement of the tabs away from an active window. As such this timestamp is less useful in determining when a website was viewed. Since this timestamp is dependent on when the tab is moved to the background, it is possible for new searches to have occurred and the timestamp will still be associated with the previous time that tab was moved to the background. This would be logical if both searches were done in the same tab with "hos long to die in cold" being the

latest search. Testing shows great inconsistency with timestamps parsed from this file. It is however definitive that the page existed in a tab. While a definitive reason as to why the timestamp is listing the time of 02:27:40 is unknown; the time is inconsistent with the timestamps associated with the same search. Based on testing and artifact knowledge, the timestamps from com.apple.mobilesafari.plist are most accurate in observing the time searched.

Conclusion

There were two searches of interest that took place on the iOS device examined. A Google search for "how long ti die in cikd" took place at approximately 6:23 am EST on January 29, 2022 and another search for "hos long ti die in cold" took place at 6:24 am EST. These searches were non-private searches. There is no indication that they were deleted.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. SUPERIOR COURT
DEPARTMENT

NO. 2282-CR-00117

COMMONWEALTH OF MASSACHUSETTS, Plaintiff	)
V.	)
KAREN READ, Defendant	)

DEFENDANT'S MOTION FOR RECUSAL AND DISQUALIFICATION OF JUSTICE BEVERLY CANNONE

Now comes the defendant, Karen Read ("Ms. Read", or "the Defendant"), by and through her counsel of record, Werksman Jackson & Quinn LLP, and respectfully files the instant request for the recusal and/or disqualification of Justice Beverly Cannone. The defense has uncovered disturbing extrajudicial statements by family members of material witnesses in this case alluding to their family's personal connection and ability to influence Justice Cannone, which when viewed in light of recent procedural irregularities engaged in by this Court to the great detriment of Ms. Read, undermine public confidence in the outcome of these proceedings and create the appearance of partiality such that a reasonable, disinterested observer might question whether Justice Cannone can be fair and impartial in this case, and requiring her recusal and/or disqualification.

The instant Motion is based on the information set forth herein and the supporting declarations filed herewith, and is made pursuant to the due process clause of the Fourteenth Amendment of the United States Constitution, article 29 of the Massachusetts Constitution Declaration of Rights, and various provisions of the Supreme Judicial

Court's Code of Judicial Conduct, which mandate disqualification when a judge cannot be fair or impartial, *or* where her impartiality might reasonably be questioned by a disinterested third party. This Motion was timely filed pretrial upon discovery of the facts and information giving rise to this motion and in advance of any further proceedings in before this Court. (*Commonwealth v. Dane Entertainment Servs.*, 18 Mass. App. Ct. 446, 448 (1984); *Cefalu v. Globe Newspaper Co.*, 8 Mass. App. Ct. 71, 79 (1979); *Edinburg v. Cavers* (22 Mass. App. Ct. 212, 217 (1986); *see* Affidavit of Alan Jackson; ¶3.)

I.
INTRODUCTION

The protection of an accused's right to an impartial adjudicator is deeply enshrined in both the United States and Massachusetts Constitutions. (*See Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) ("It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'"); Mass. Const., Decl. of Rights, art. 29 ("It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.").) In keeping with that precept, the rules governing disqualification of judges are codified in the Code of Judicial Conduct, S.J.C. Rule 2.11, which mandates the disqualification of a judge in any proceeding in which either "the judge cannot be impartial or the judge's impartiality might reasonably be questioned[.]" (Code of Judicial Conduct, S.J.C., Rule 2.11.) "Actual impartiality alone is not enough. 'Our decisions and those of the Supreme Judicial Court have commented often and in a variety of contexts on the importance of maintaining not only fairness but also the appearance of fairness in every judicial proceeding.'" (*Com. v. Morgan RV Resorts, LLC*, 84 Mass. App. Ct. 1, 9 (2013), quoting *Adoption of Tia*, 73 Mass. App. Ct. 115, 122 (2008).) In other words, an accused's constitutional right to due process demands that "justice . . . satisfy the appearance of justice." (*Offutt v. United States*, 348 U.S. 11, 14 (1954).) Setting aside the issue of whether Justice Cannone has the ability to be fair in this case, the appearance of justice has already been irreparably compromised in this case.

Ms. Read stands charged with the following crimes arising out of the death of her late-boyfriend, John O'Keefe ("O'Keefe"): Murder in the Second Degree in violation of M.G.L. c. 265, s. 1 (Count One); Manslaughter while under the Influence of Alcohol in violation of M.G.L. c. 265, s. 13 ½ (Count Two); and Leaving the Scene of Personal Injury and Death in violation of M.G.L. c. 90, s. 24(2)(a ½)(2) (Count Three). As set forth herein, the following facts and circumstances attendant to this case provide more than a reasonable basis for a knowledgeable disinterested member of the public to doubt Justice Cannone's ability to be fair and impartial in this case, requiring her disqualification: (1) Sean McCabe, a family member of the seminal witnesses (and third party culprits) in this case whom Ms. Read has publicly accused of murdering O'Keefe, made extrajudicial statements to a local investigative reporter that his family has a relationship with Justice Cannone and the ability to influence her; (2) Justice Cannone has routinely refused to rule in a timely manner on defense motions, while advancing and prioritizing motions filed by the Commonwealth and the very witnesses who have claimed an ability to influence her; (3) Justice Cannone denied Ms. Read a full and fair opportunity to be heard on a critical discovery motion requesting records from members of the same family that claim to have a relationship with her; and (4) Justice Cannone has now indicated through the Clerk of Court, in writing, that she intends to deviate from procedure in Norfolk County Superior Court by choosing to keep this case with her so that she can rule on the Commonwealth's Motion to Prohibit Extrajudicial Statements by the Defense (in which she and the third party culprits have a personal interest) in spite of the fact that *she was reassigned to civil court* and this case is properly heard by the judicial officer currently assigned to the criminal session. As such, Ms. Read's constitutional right to due process and a fair and impartial judge require that Justice Cannone be disqualified from these proceedings.

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II.
STATEMENT OF FACTS

A. A BRIEF RECITATION OF FACTS RELATING TO THIS CASE

Ms. Read sets forth a brief recitation of the facts attendant to this case for the purpose of giving context to the disturbing extrajudicial statements made by Sean McCabe in connection with this case, which support Ms. Reads request for the disqualification of Justice Cannone.[1] At approximately 6:00 a.m. on January 29, 2022, John O'Keefe ("O'Keefe") was found dead on the front lawn of Boston Police Officer Brian Albert, a highly trained boxer and fighter with deep familial and personal ties to the Canton Police Department and the Massachusetts State Police.

The events that transpired the night before O'Keefe's death on January 29, 2022, are largely undisputed. The evidence incontrovertibly establishes that on the evening of January 28, 2022, the decedent O'Keefe, his girlfriend Karen Read, Brian Albert, Nicole Albert, Jennifer McCabe (Brian Albert's sister-in-law and friend of O'Keefe), Matthew McCabe, and several other individuals, met and enjoyed drinks at the Waterfall Bar and Grille in Canton, Massachusetts.

As the bar was closing around midnight, the parties discussed going to Nicole and Brian Albert's residence located close by at 34 Fairview Road to continue the party and celebrate their son, Brian Albert, Jr.'s, birthday. Although O'Keefe and Ms. Read were not well acquainted with the Alberts, the invite was extended to them by O'Keefe's longtime friend, Jennifer McCabe. Shortly after midnight, the Alberts (Brian, Nicole, and Caitlin), the McCabes (Jennifer and Matthew), and Brian Higgins (close friend of Brian Albert and Federal agent with the Massachusetts Bureau of Alcohol, Tobacco, Firearms and Explosives, with an office inside the Canton Police Department), left the bar in their respective vehicles and drove to the Albert Residence for the after-party.

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[1] The facts surrounding the allegations in this case are set forth more fully in Ms. Read's Rule 17 Motion for Cell Records. In the event that this or some other Court, requires additional information regarding the state of the evidence in this case, the facts set forth in Ms. Read's Rule 17 Motion for Cell Records are incorporated herein by reference.

Witnesses gave conflicting accounts regarding whether O'Keefe actually existed the vehicle and made his way into the Albert Residence on January 29, 2022. Ms. Read has maintained that she dropped O'Keefe off at Brian Albert's residence located at 34 Fairview Road ("the Albert Residence") just after midnight on January 29, 2022, and frustratedly left without him when he failed to answer any of her calls, presuming that he had proceeded into the house for the party. Conversely, the Alberts and McCabes have maintained that O'Keefe never entered the Albert Residence.

The theory advanced by the Commonwealth in support of the filing of the instant charges against Ms. Read is that she became suddenly angry with O'Keefe outside the home of Boston Police Officer Brian Albert, placed her car into reverse, struck O'Keefe with her vehicle at 27 miles per hour, and shattered the right taillight of her vehicle, before fleeing the scene. However, the photographs of O'Keefe's injuries, which are attached hereto as Exhibit A, speak for themselves and are completely inconsistent with the Commonwealth's theory of the case. (Affidavit of Alan J. Jackson at ¶6, Exhibit A.) Photographic evidence of the injuries in this case clearly suggest that O'Keefe was beaten severely and left for dead, having sustained blunt force injuries to both sides of his face as well as to the back of his head. (*See id.*)

Moreover, in addition to suffering numerous defensive wounds on his hands consistent with a brutal fight, O'Keefe also suffered a cluster of deep scratches and puncture wounds to his right upper arm and forearm, which appear to be consistent with bite and/or claw marks from an animal (and are clearly inconsistent with a vehicular homicide). (*See id.*) Indeed, significant circumstantial evidence suggests that Brian Albert's K-9 German Shepherd "Chloe" was actually responsible for the injuries to O'Keefe's right arm. Although Brian Albert's attorney made representations in Court and in filings falsely claiming that Mr. Albert's dog, "Chloe," had no history of attacking human beings, newly obtained records from Canton Animal Control and the Canton Town Clerk, establish that counsel's representations to the public and this Court were false. In fact, records obtained from the Canton Town Clerk establish that Brian Albert's K-9 German Shepherd "Chloe" escaped the Albert Residence mere months after

O'Keefe's death and attacked not one, but two, separate human beings. One woman was bitten on the arms, neck, and leg in broad daylight. The other woman was bitten on the left hand. Both individuals were taken to a hospital for treatment as a result of the German Shepherd's vicious attack.

As set forth in lengthy prior court filings, Ms. Read has also unearthed shocking evidence implicating third parties Jennifer McCabe and Brian Albert in O'Keefe's death.[2] Indeed, an analysis of the *complete* forensic image of Jennifer McCabe's cell phone by Computer Forensics Expert Richard Green—which the Massachusetts State Police and Norfolk County District Attorney's Office withheld from the defense for more than a year—establishes that **Jennifer McCabe, one of the Commonwealth's seminal witnesses, Googled, "hos [sic] long to die in cold" at 2:27 a.m. on January 29, 2022, three hours before she supposedly "discovered" O'Keefe's hypothermic body in the cold snow on her brother-in-law's front lawn.** (Affidavit of Alan J. Jackson at ¶7; Exhibit B.) Ms. McCabe subsequently took steps to purge this search from her phone before turning it over to law enforcement three days later. (*Id.*) The revelations from Jennifer McCabe's cell phone, alone, make Jennifer McCabe and Brian Albert prime suspects in this case. This is just the tip of the iceberg. Significant other evidence (too lengthy to discuss here) further implicates Jennifer McCabe and Brian Albert in O'Keefe's murder.

Regardless, Ms. Read's defense is clearly predicated on a third-party culpability defense, in which Ms. Read will (and has) presented significant evidence to establish that Jennifer McCabe and Brian Albert are implicated in O'Keefe's murder. (Affidavit of Alan J. Jackson at ¶8.) Suffice it to say, even the *appearance* of ties between Justice Cannone and the Alberts and McCabes families would undermine public confidence in

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[2] The facts and evidence supporting Ms. Read's third party culpability defense are set forth more fully in Defendant's Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T, and are incorporated herein by reference. Because the sheer volume of evidence implicating Brian Albert and Jennifer McCabe in O'Keefe's murder is overwhelming, only the most pertinent and inculpatory facts are discussed here.

the outcome of these proceedings and would violate Ms. Read's constitutional right to due process and a fair trial by an impartial judge.

B. RECENT CLAIMS BY A MEMBER OF THE MCCABE FAMILY THAT THEY ARE CONNECTED TO JUSTICE CANNONE AND CAN INFLUENCE HER DECISIONS IN THIS PROCEEDING

On May 28, 2023, Jennifer McCabe's brother-in-law, Sean McCabe, made some extremely disturbing statements to a local investigative reporter ***insinuating that he has a close-knit relationship with Justice Beverly Cannone and an alarming ability to influence her decision-making in this case***. (*See* Affidavit of Aidan Kearney at ¶5, Exhibit 1.) Aidan Kearney, also known as "Clarence Woods Emerson" and "Turtleboy," is a local investigative blogger in Boston, who much to the dismay of Brian Albert and Jennifer McCabe, has reported significantly on this case (nearly 70 blog posts to date) and published numerous articles opining that Ms. Read was framed for O'Keefe's murder by the McCabes and Alberts. (*Id.* at ¶1, 3.) A true and correct copy of Facebook messages exchanged between Mr. Kearney and Sean McCabe (Matthew McCabe's brother and Jennifer McCabe's brother-in-law) between May 26, 2023, and June 1, 2023, are attached hereto as Exhibit 1. (*Id.* at ¶5; Exhibit 1.) Throughout the exchange, Sean McCabe repeatedly threatens Mr. Kearney, for writing nearly 70 blog posts about this case, and for, *inter alia*, exposing connections between members of the McCabe and Albert family and the lead detective assigned to investigate this case, Massachusetts State Trooper Michael Proctor. (*Ibid.*)

However, on May 27, 2023, Sean McCabe took his threats and taunts a step further, and began intimating that his family has a relationship with Justice Cannone (the Justice actively assigned to Ms. Read's case in May 2023). Indeed, on May 27, 2023, Sean McCabe posted a public comment on "Clarence Woods Emerson's" Facebook page, which has nearly 30,000 followers, stating: "I just called in an order asking Judge Bev to institute a Trial By [sic] Combat order against you. They'll be coming to bring you to me any minute now Clarence." (*Id.* at ¶5; Exhibit 1, at 8.).In response, Mr. Kearney took a

screenshot of Sean McCabe's comment, and sent it to him in a private Facebook message asking, "Do you really have a line to judge cannone?" (*Id.* at ¶5; Exhibit 1, at 8.) The next day, on May 28, 2023, Sean McCabe, knowing full well that he was speaking to an investigative reporter, unabashedly responded: "***Auntie Bev??? Whose seaside cottage do you think we're going to bury your corpse under?***" (*Id.* at ¶5; Exhibit 1, at 9.) Thus, in the same breath that Sean McCabe threatened to murder a local investigative reporter because he was unhappy with the bad press coverage his family has been receiving, he refers to Justice Cannone as being part of the McCabe family and intimates personal knowledge about the location of her home that only someone close to her would know.

The mere suggestion that the judge assigned to this case is somehow related to and aligned with the same individuals, which credible evidence suggests are the actual third party culprits in this case, should be deeply disturbing to this Court, the public, and Ms. Read. To be clear, Sean McCabe is related to Jennifer McCabe and Brian Albert—the very family Ms. Read has shown, through credible evidence, is responsible for O'Keefe's murder. Moreover, Sean McCabe's insinuation that he and his family have a personal relationship with Justice Cannone is further legitimized by the fact that his threat contains accurate personal identifying information about Justice Cannone that absent some relationship would otherwise be unknown to Sean McCabe. Shockingly, it appears that the seminal witnesses in this case (i.e. the McCabes and Alberts, or at the very least, their family member) ***possess intimate knowledge about Justice Cannone, including the fact that she owns a seaside cottage on the Cape***. Indeed, as set forth in the attached Declaration of Alan Jackson, notarized deeds filed with the Barnstable Registry of Deeds confirm that both Sean McCabe and Justice Cannone own property on the Cape in Centerville, Massachusetts, **and live less than four miles apart**. (Affidavit of Alan J. Jackson at ¶9, Exhibit C.) Copies of the deeds confirming the same are filed herewith under order of impoundment. (*Ibid.*) Thus, Sean McCabe's suggestion that he has a relationship or connection with Judge Cannone appears at least facially credible, given that they both own homes in a small town on the Cape less than four miles apart.

Moreover, although McCabe's residence is located further inland, the closest beach access for both homes appears to be the very same, very small, beach. (*Ibid.*)

There are only two reasonable explanations as to why Sean McCabe would know that Justice Cannone owns a "seaside cottage": (1) Sean McCabe either knows Justice Cannone or has crossed paths with Justice Cannone on the Cape; or (2) the McCabes have taken steps to locate and obtain personal identifying information about the judge presiding over this case and communicated that knowledge publicly for the purpose of intimidation. This threat was not limited to Mr. Kearney. Rather, Sean McCabe sent this message to Mr. Kearney knowing full well that Mr. Kearney is an investigative reporter and his conversations and comments about Justice Cannone would be widely publicized on Mr. Kearney's website. In fact, at the very start of his conversation with Mr. Kearney, Mr. McCabe encouraged Mr. Kearney to publicly share their conversation on his website, writing: "So if you want to talk to me, you're gonna hear what I have to say first. Cut & paste this shit all you want sally, but you don't have the stones to look me in the eye." (See Affidavit of Aidan Kearney at ¶5, Exhibit 1, at 1-2.) Thus, Sean McCabe's threat to murder Mr. Kearney and bury him under "auntie bev's" seaside cottage was meant to suggest to Ms. Read and the public at large: Justice Cannone is family; she will back our play.

As set forth in further detail below, whether it be out of fear, intimidation, relationship, or for some other reason, significant procedural irregularities engaged in by Justice Cannone have prejudiced Ms. Read and benefitted the Alberts and McCabes, such that any disinterested third party would have to question Justice Cannone's impartiality in this case.

C. FACTS RELATING TO THE PROCEDURAL HISTORY OF THIS CASE

Ms. Read has engaged in significant pretrial litigation with the Commonwealth in an effort to obtain additional critical discovery, which will further implicate the McCabes and Alberts in O'Keefe's murder. Notwithstanding any issues relating to the substance of the Court's rulings, Justice Cannone has substantially (and increasingly) delayed her

decisions on motions filed by the defense and denied Ms. Read a full and fair opportunity to be heard. A brief summary of the procedural history in this case as it relates to those claims is detailed below.

1. MAY 3 HEARING

Ms. Read, through her counsel, timely filed three significant discovery motions in advance of the May 3, 2023, pretrial hearing scheduled in this case. All of these motions were targeted at uncovering additional evidence, which law enforcement had neglected to obtain during the course of their investigation and Ms. Read had reason to believe would exculpate her and implicate the McCabes and Alberts in O'Keefe's death. First, on February 2, 2023, Ms. Read filed a Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Canton Animal Control and the Canton Town Clerk ("Motion for Animal Control Records"), requesting records and information concerning a violent skin-piercing incident involving Brian Albert's K-9 German Shepherd and his hasty decision to rehome that dog mere months after O'Keefe's death.[3] (Affidavit of Alan J. Jackson, at ¶10, Exhibit D, Dkts. 53-55.) Subsequently, on April 12, 2023, Defendant Karen Read filed a Motion for Order Pursuant to Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T ("Rule 17 Motion for Cell Records), requesting Jennifer McCabe and Brian Albert's cell phone carrier records during the relevant period along with any cell phones belonging to Brian Albert for the same period. (Affidavit of Alan J. Jackson, at ¶10, Exhibit D, Dkts. 64-66.) Finally, on April 26, 2023, Ms. Read filed Defendant's Renewed Motion to Compel Discovery; Affidavit of David R. Yannetti in Support of Defendant's Renewed Motion to Compel Discovery with Certificate of Service; and Supporting Exhibits ("Renewed Motion to Compel"), requesting defense access to critical items of evidence that have (and continue to be) withheld by the Commonwealth and that the Court impose

[3] Notably, no reference to Brian Albert's German Shepherd was *ever* made in any of the police reports turned over in connection with this case. Information regarding the skin-piercing incident and Brian Albert's decision to rehome his dog was discovered by defense investigators after interviewing witnesses in the Town Clerk's Office.

dates by which the Commonwealth would need to comply. (Affidavit of Alan J. Jackson, at ¶10, Exhibit D, Dkts. 67-69.)

On May 2, 2023, the day before the hearing was set to take place, the Commonwealth filed its Opposition to Defendant's Motion Pursuant to Rule 17 of Criminal Procedure - Production of Records from Canton Animal Control and the Canton Clerk's Office; and its Memorandum in Opposition to Defendant's Motion Pursuant to Rule 17 of Criminal Procedure - Directed to Brian Albert, Verizon, and AT&T on May 2, 2023 ("Commonwealth's Opposition to Rule 17 Motion for Cell Records"). (Affidavit of Alan J. Jackson, at ¶10, Exhibit D, Dkt. 71.) At the hearing, Brian Albert, by and through his counsel of record Gregory Henning, also filed an Opposition to Defendant's Rule 17 Motion for Cellular Devices and Records.[4] (Affidavit of Alan J. Jackson, at ¶10, Exhibit D, Dkt. 73.)

On May 3, 2023, at 2:00 p.m., this Court held a widely publicized pretrial hearing, which was covered by national and local news media outlets. At the hearing, the Court heard argument on the Motion for Animal Control Records and the Renewed Motion to Compel, but reserved ruling on both motions. The parties agreed to defer argument on the Rule 17 Motion for Cell Records until a later hearing because the issues raised in the motion involved significant factual disputes, which would need to be resolved through an evidentiary hearing. As the Court explained on the record, "the parties have agreed for [sic] an evidentiary hearing, and [the Court] rearranged [its] schedule a bit so that we could accommodate you." (Affidavit of Alan J. Jackson, at ¶11, Exhibit E, May 3, 2023, RT at 24:21-24.) Because the Commonwealth's objections to the Defendant's Rule 17 Motion were largely borne out of *factual disputes*, this Court set an evidentiary hearing for May 25, 2023, and ordered that the parties argue the merits of the Motion for Cell Records on that day. (Affidavit of Alan J. Jackson, at ¶11, Exhibit E, May 3, 2023, RT 33:20-34:12.) The Court reserved ruling on the Defendant's Motion for Animal Control

[4] Although the title of Brian Albert's Opposition does not reflect such, Brian Albert opposed both the release of any cell records *and* the release of any records from Animal Control and the Canton Town Clerk about his dog.

Records and the Renewed Motion to Compel and clearly set this case for an evidentiary hearing on May 25, 2023, at 9:30 a.m. (Affidavit of Alan J. Jackson, at ¶11, Exhibit E, May 3, 2023, RT 51:4-7.)

In spite of the fact that the hearing on the Motion for Animal Control Records was heard and argued on May 3, 2023, it took Justice Cannone 16 days to finally issue her ruling allowing Defendant's Request for Animal Control Records.[5] (*Compare* Exhibit E, *with* Exhibit D, Dkt. 79.) Indeed, on May 19, 2023, Justice Cannone allowed the motion, and issued an order for production of records from Canton Animal Control and the Canton Town Clerk's Office. (Exhibit D, Dkt. 79.) Notably, those records contained exculpatory information, which substantiated Ms. Read's third party culpability defense and further tied Brian Albert to O'Keefe's death. Since then, Justice Cannone's rulings have become increasingly dilatory.

To date, it has been 72 days since the May 3 hearing, and in spite of reminders to the Court's Clerk, Ms. Read still does not have a decision on the Renewed Motion to Compel. (See Exhibit D.) In addition to this Court's apparent refusal to rule on properly noticed motions before the Court, Justice Cannone has denied Ms. Read the ability to be heard.

2. THE COURT'S DECISION TO COMPLETELY VACATE THE MAY 25 HEARING ON THE RULE 17 MOTION FOR CELL RECORDS WITHOUT NOTICE TO THE DEFENDANT

As detailed above, this Court and the respective parties agreed to set the instant case for an evidentiary hearing on May 25, 2023, to resolve factual disputes related to Defendant's Rule 17 Motion for Cell Records. Ms. Read expended significant funds subpoenaing witnesses in preparation for the hearing (including Brian Albert, Jennifer McCabe, and the Commonwealth's computer forensics expert Trooper Guarino), flying in an out-of-state expert to testify regarding his findings on Jennifer McCabe's cell

[5] Notably, those records contained exculpatory information, which substantiated Ms. Read's third party culpability defense and further tied Brian Albert to O'Keefe's death. Since then, Justice Cannone's rulings have become increasingly dilatory.

phone, and preparing for the examination of witnesses at the evidentiary hearing that was stipulated to by the parties and placed on calendar by this Court. (Affidavit of Alan J. Jackson, at ¶12.)

However, on May 22, 2023, three days before the scheduled hearing—without any advanced notice to Ms. Read or her counsel—the Commonwealth, Brian Albert, and Jennifer McCabe (clearly acting in concert), filed a flurry of motions requesting, *inter alia*, that the evidentiary hearing set for May 25, 2023, suddenly be cancelled. Specifically, on May 22, 2023, Brian Albert and Jennifer McCabe both filed motions to quash the subpoenas, which had been served on them by Ms. Read's counsel to testify at the evidentiary hearing. (Exhibit D, Dkts. 81-85.) That same day, the Commonwealth, in a shocking reversal of its position with respect to the evidentiary hearing *it previously asked be put on calendar*, filed an Opposition to Defendant's Request for Evidentiary hearing on Mass R. Crim. P. 17. (Exhibit D, Dkt. 83.) Shortly thereafter, Brian Albert's counsel emailed the Court's Clerk requesting that the hearing on the motions to quash be advanced to a date before the May 25 hearing. (Affidavit of Alan J. Jackson, at ¶13; Exhibit F.) After coordinating schedules, the clerk then set the case for a hearing on the Motions to Quash on May 24, 2023, and indicated that "[Justice Cannone] want[ed] to address [the Commonwealth's] motion, at least initially." (*Id.*) Thus, the Court then set a hearing on May 24, 2023, to determine whether the motions to quash should be granted and to hear "at least initially" the Commonwealth's Opposition to Defendant's Request for Evidentiary Hearing, which ironically was agreed upon by the Commonwealth in the first place.[6] Notably, the Rule 17 Motion for Cell Records *and* evidentiary hearing were still scheduled to be heard on May 25, 2023. (Exhibit D.)

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[6] The Commonwealth's complete reversal regarding its position on the evidentiary hearing (and decision to capitulate to the requests of Jennifer McCabe and Brian Albert, who were both clearly desperate to avoid testifying in connection with this case) was diametrically opposed to the position it had been taking for over a month. As set forth in the attached email correspondence between counsel for Ms. Read and Attorney Lally, the Commonwealth was well aware that our office was flying in an expert from out-of-state and would need to make arrangements in advance. Mr. Lally repeatedly and explicitly

Upon appearing in Court for the May 24 hearing, the Court heard argument regarding the motions to quash the subpoenas served on Brian Albert and Jennifer McCabe and (while still sitting on the bench), allowed both motions, precluding Ms. Read from calling them to testify at the evidentiary hearing. (Affidavit of Alan J. Jackson ¶16, Exhibit H.) The Court then heard argument with regard to the Commonwealth's opposition to cancel the evidentiary hearing in total, *which was clearly both necessary and appropriate because, as the Commonwealth argued later during that hearing, the Commonwealth disputed nearly every evidence-based assertion set forth by the defense in its Rule 17 Motion for Cell Records, including whether Jennifer McCabe googled "hos long to die in cold" at 2:27 a.m. hours before she claimed to have found O'Keefe's hypothermic body in the snow of her brother-in-law's front lawn.* (Exhibit H.) Immediately following argument, the Court quickly issued a ruling allowing the Commonwealth's motion to cancel the evidentiary hearing, adopting the Commonwealth's legally *incorrect* theory that there was "no authority for it," and effectively denied Ms. Read the ability to prove that the disputed facts set forth in her Rule 17 Motion for Cell Records were, in fact, true. (Exhibit H, RT 14:19-24.) Thereafter, the Court then announced to counsel that she would "hear argument on the Rule 17 Motion for Cell Records." (Exhibit H, RT 14:19-24.) Significantly, Ms. Read and her counsel were **never** notified that there was even a remote possibility that the Rule 17 Motion for Cell Records was going to be heard that day. (Affidavit of Alan J. Jackson,

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reaffirmed his intention to move forward with an evidentiary hearing. On April 27, 2023, he wrote: "I will certainly let you know if the information is disputed and you are free to do whatever you like as far as witnesses are concerned. [I]f it is a disputed issue, I would likely be looking to call witnesses of my own in regard to that. I'll certainly let you know as soon as possible, so both you and the Court can make whatever necessary accommodations to conduct an evidentiary hearing." (Affidavit of Alan J. Jackson, at ¶14, Exhibit G.) At the hearing on May 3, 2023, Mr. Lally indicated to us that the Commonwealth disputed the facts at issue in the Rule 17 Motion for Cell Records, and that we would need to set the case for an evidentiary hearing. (Affidavit of Alan J. Jackson, at ¶15.)

¶17.) Thus, Ms. Read's counsel was forced to argue an extraordinarily factually complex and lengthy legal motion, which was not on calendar for that day—*without any notes or advance notice*, denying her a full and fair opportunity to be heard on a motion with a very real and consequential impact on her ability to defend herself against murder charges. The Court then set the case for another pretrial hearing on July 25, 2023.

Although Justice Cannone acted with the utmost alacrity in ensuring that the May 24 hearing concluded as quickly as possible (and Ms. Read was denied the ability to call the very witnesses necessary to prove the disputed facts set forth in her motion), she was in no such hurry to rule on the motion after the proceedings concluded. ***Justice Cannone waited 27 days before ultimately denying Ms. Read's Rule 17 Motion for Cell Records on June 20, 2023.*** (*See* Exhibit D, Dkt. 97.)

3. THE COURT HAS NOW MADE THE UNILATERAL DECISION TO DEVIATE FROM PROCEDURE AND PREVENT THE CRIMINAL SESSION JUDGE FROM HEARING THE COMMONWEALTH'S MOTION TO GAG MS. READ'S ATTORNEYS

On June 9, 2023, the Commonwealth filed a Motion to Prohibit Prejudicial Extrajudicial Statements of Counsel in Compliance with Massachusetts Rule of Professional Conduct 3.6 (a) ("Motion for Gag Order"), requesting that defense counsel for Ms. Read be gagged and prohibited from making *any statements about this case whatsoever* to the press. (*See* Exhibit D, Dkt. 93.) The Commonwealth's Motion for Gag Order was noticed for July 25, 2023, and thus, was requested to be heard at the next pretrial hearing, which was already on calendar in this case.

On June 15, 2023, a mere six days after receiving the Motion for Gag Order, counsel for Ms. Read received an email from Mr. McDermott with the Norfolk Superior Court stating "[t]he Court needs a response to the Commonwealth's . . . Motion to Prohibit Extrajudicial statements." (Affidavit of Alan Jackson, ¶18, Exhibit H.) The clerk further indicated that Justice Cannone wanted to unilaterally advance the hearing on the Motion for Gag Order (which was properly noticed for July 25) to June 27 or June 28.

(*Id.*) Notably, on the same day Justice Cannone sought to advance the hearing on the Commonwealth's Motion for Gag Order, which clearly benefits Brian Albert and Jennifer McCabe, she still had not ruled on Ms. Read's Rule 17 Motion for Cell Records, which had already been under advisement for 22 days. (*See* Exhibit D.) When counsel for Ms. Read pushed back and indicated that our office would need time to respond to the Motion for Gag Order, intended to appear in person, and were unavailable on the dates proposed by the Court, Justice Cannone indicated, through the court clerk, that her efforts to advance the hearing were done because she "was looking to hear this while she was still sitting in a Criminal session." (Exhibit I.) Thus, because the defense requested to have the motion heard on the date that was already on calendar (and the date noticed on Attorney Lally's motion), the Court indicated, through her court clerk, that "She [would] hear [the Motion for Gag Order on 7/25 in [the civil] session rather than have the Criminal session hear this." Notably, the press (and court of public opinion) have not been friendly to Justice Cannone, Jennifer McCabe, or Brian Albert. (Exhibit I.) Notably, Justice Daniel J. O'Shea is currently assigned to the criminal session, and appears listed on the docket as the justice assigned to this case. (Exhibit K.)

Indeed, the public has *already* lost confidence in this Court's ability to be fair and impartial in this case. Attached hereto for the Court's review as Exhibit J, are examples of comments culled from various articles about this case published by local and national news outlets, all of which establish that the regular, disinterested people following this case are *already* questioning Justice Cannone's ability to be fair in this case. (Affidavit of Alan J. Jackson, ¶19.)

II.
ARGUMENT

"It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" (*Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (citing and quoting from *In re Murchison*, 349 U.S. 133, 136 (1933)); *Weiss v. United States*, 210 U.S. 163, 178 (1994) [same].) "Not only is a biased decisionmaker constitutionally unacceptable, but 'our system of law has always endeavored to prevent even the

probability of unfairness. . . . In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable. Among those cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him." (*Withrow v. Larkin*, 421 U.S. 35, 47 (1975).)

Moreover, as the United States Supreme Court has explained, our system has an obligation to do more than simply protect against proven bias or unfairness on the part of a judge; rather, "[j]ustice must satisfy the appearance of justice[.]" (*Offutt v. United States*, 348 U.S. 11, 14 (1954).) Therefore, "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law." (*Tumey v. Ohio*, 273 U.S. 510, 532 (1927).) So important is the appearance of fairness that it may require a judge to disqualify herself even though she has no actual bias or prejudice and would in fact do her "very best to weigh the scales of justice equally." (*Taylor v. Hayes*, 418 U.S. 488, 501 (1974).)

The same guiding principle of impartial justice is also expressly enshrined in article 29 of the Massachusetts Constitution's Declaration of Rights:

> It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.

"A rigid adherence to that principle is essential to the maintenance of free institutions. . . . It may never be relaxed." (*Thomasjanian v. Odabshian*, 272 Mass. 19, 23 (1930).) Article 29 is "at least as rigorous in exacting high standards of judicial propriety" as the due process clause of the Fourteenth Amendment. (*King v. Grace*, 293 Mass. 244, 247 (1936)). Thus, the protection of an accused's right to an impartial adjudicator is deeply enshrined in both the United States and Massachusetts Constitutions.

The Massachusetts Code of Judicial Conduct similarly recognizes that "An independent, fair, and impartial judiciary is indispensable to our system of justice." (Code of Judicial Conduct, Preamble.) In keeping with these precepts, the rules governing disqualification of judges are codified in the Code of Judicial Conduct, S.J.C. Rule 2.11. Pursuant to Canon 3(E)(1)(a) of the Code of Judicial Conduct, S.J.C. Rule 2.11, "A judge **shall disqualify** himself or herself in a proceeding in which the judge cannot be impartial or the judge's impartiality might reasonably be questioned[.]" (Code of Judicial Conduct, S.J.C., Rule 2.11.) Thus, the ethical rules provide that a judge must be disqualified unless the judge can satisfy both a subjective and objective standard of impartiality. (S.J.C., Rule 2.11, cmt. 1.)

"The subjective standard requires disqualification if the judge concludes that he or she cannot be impartial." (*Ibid.*) Conversely, "[t]he objective standard requires disqualification whenever the judge's impartiality might reasonably be questioned by a fully informed disinterested observer, regardless of whether any of the specific provisions [mandating disqualification] apply." (*Ibid.*) Thus, in reaching a determination on a motion for disqualification, judges must follow a two-prong test. First, in ruling on a motion seeking recusal, a judge must "consult first [her] own emotions and conscience" to determine whether she can be fair and impartial. (*Commonwealth v. Eddington*, 71 Mass. App. Ct. 138, 143 (2008) (quoting *Lena v. Commonwealth*, 369 Mass. 571, 575 (1976).) If she cannot satisfy this subjective standard, then the judge must recuse herself.

However, even if the judge determines she is impartial, "then she must next attempt an objective appraisal of whether this [is] a proceeding in which [her] impartiality might reasonably be questioned." (*Id.*; *Demoulas v. Demoulas Super Markets, Inc.* (1998) 428 Mass. 543, 547, n. 6.) If the judge determines that she cannot be impartial *or* that her impartiality in a case might reasonably be questioned by an objective observer, then the judge is ethically required to recuse herself. (*See id.*) Furthermore, a judge is ethically required to "disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for

disqualification, even if the judge believes there is no basis for disqualification." (S.J.C., Rule 2.11, cmt. 5.)

As set forth below, Ms. Read cannot and will not speculate as to whether Justice Beverly Cannone can be subjectively impartial in this case. However, Ms. Read is on trial for her life. The suggestion—not by Ms. Read, but by a family member of the third party culprits themselves—that they have a relationship with and the ability to influence Justice Cannone, when considered in light of the significant procedural irregularities that have inured to Ms. Read's great detriment (and to the benefit of Jennifer McCabe and Brian Albert)—cast a shadow over this case so large that *any* disinterested third party would have to question Justice Cannone's impartiality in this case. In point of fact, they already have. Thus, as set forth below, Ms. Read respectfully requests that Justice Beverly Cannone disqualify herself from these proceedings.

A. IF THIS COURT BELIEVES SHE CANNOT BE IMPARTIAL IN THIS CASE, THEN SHE MUST RECUSE HERSELF

First, as explained above, under the subjective standard of disqualification set forth in Supreme Judicial Court Rule 2.11 of the Code of Judicial Conduct, a judge is required to recuse herself if she cannot be impartial. (Code of Judicial Conduct, S.J.C., Rule 2.11.) Thus, the Court must endeavor to "consult first [her] own emotions and conscience" to determine whether she can be fair and impartial. (*Commonwealth v. Eddington*, 71 Mass. App. Ct. 138, 143 (2008) (quoting *Lena v. Commonwealth*, 369 Mass. 571, 575 (1976).) If the Court subjectively believes she can no longer be fair and impartial, she must recuse herself.

Although Ms. Read will not speculate as to whether Justice Cannone *can subjectively* be fair and impartial in this case, she requests that this Court consult her emotions and conscience to determine whether recusal is required on this ground.

B. THE FACTS AND CIRCUMSTANCES ATTENDENT TO THIS CASE CLEARLY SUGGEST THAT AN OBJECTIVE DISINTERESTED OBSERVER MIGHT REASONABLY QUESTION JUSTICE CANNONE'S IMPARTIALITY IN THIS CASE, NECESSITATING HER DISQUALIFICATION

Regardless of whether the Court subjectively believes that she can be fair and impartial, the state and federal constitutions and Massachusetts Code of Judicial Conduct require that a judge disqualify herself where her "impartiality might reasonably be questioned." (Code of Judicial Conduct, S.J.C., Rule 2.11.) "Actual impartiality alone is not enough. 'Our decisions and those of the Supreme Judicial Court have commented often and in a variety of contexts on the importance of maintaining not only fairness but also the appearance of fairness in every judicial proceeding.'" (*Com. v. Morgan RV Resorts, LLC*, 84 Mass. App. Ct. 1, 9 (2013), quoting *Adoption of Tia*, 73 Mass. App. Ct. 115, 122 (2008).) "In order to preserve and protect the integrity of the judiciary and the judicial process, and the necessary public confidence in both, even the appearance of partiality must be avoided." (*Id.*) The Code of Judicial Conduct, S.J.C. Rule 2.11, sets forth five non-exhaustive circumstances explicitly necessitating disqualification, which include the following:

> (1) The judge has a personal bias or prejudice about a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.
>
> (2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them,[7] or the spouse or domestic partner of such a person is:
>
> > (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
> >
> > (b) acting as a lawyer in the proceeding;
> >
> > (c) a person who has more than a *de minimis* financial or other interest that could be substantially affected by the proceeding; or

[7] The "third degree of relationship" includes great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece. See Code, Terminology.

(d) likely to be a material witness in the proceeding.

(3) The judge know that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or is a party to the proceeding.

(4) The judge, while a judge or a judicial applicant or judicial nominee, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(5) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) was a material witness concerning the matter; or

(d) previously presided as a judge over the matter in another court.

(Code of Judicial Conduct, S.J.C. Rule 2.11(a)(1-5).) However, this list is non-exhaustive and the objective standard mandates "disqualification whenever the judge's impartiality might reasonably be questioned by a fully-informed disinterested observer, regardless of whether" any of the five examples set forth above are at issue. (*Id.*, cmt. 1.)

1. SEAN MCCABE'S PUBLIC COMMENTS, ALONE, REQUIRE DISQUALIFICATION

As explained above, in order to protect public confidence in the judiciary, it is not enough to prevent actual bias, rather "even the appearance of partiality must be avoided." (*Com. v. Morgan RV Resorts, LLC*, 84 Mass. App. Ct. 1, 9 (2013), quoting *Adoption of Tia*, 73 Mass. App. Ct. 115, 122 (2008).) Here, the appearance of partiality cannot be

avoided because Sean McCabe—a family member of the very individuals Ms. Read's third party culpability defense is predicated on—has claimed that his family has a relationship with Justice Cannone and has the ability to influence her decision-making. Indeed, the Court's failure to disqualify herself based on Mr. McCabe's claims alone, would fly in the face of numerous rules set forth in the Code of Judicial Conduct, which are meant to protect erosion of public confidence in the impartiality of the judiciary. In addition to Rule 2.11(A) of the Code of Judicial Conduct, which requires disqualification of a judge where her impartiality might reasonably be questioned, Rule 1.2 similarly requires that "[a] judge . . . act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Similarly, Rule 2.4(C), sets forth that a judge "**shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.**"

In exceptional circumstances like this, where a third party culprit's family member is openly threatening an investigative reporter by claiming a relationship with the judge that is responsible for deciding whether their family member's privacy interests outweigh a criminal defendant's right to defend herself in a murder case, that creates the *appearance of impropriety and partiality.* Here, Sean McCabe responded to a direct question about whether he has the ability to influence Justice Cannone in reference to this case with a threat that relayed personal information about the judge, namely— "Auntie Bev?? Whose seaside cottage do you think ***we're*** going to bury your corpse under? This statement was clearly meant to convey the impression that his family knows the judge and is in a position to influence her. Moreover, this suggestion is further corroborated by the fact that the threat contains accurate personal identifying information about Justice Cannone that absent some relationship would otherwise be unknown to Sean McCabe. Significantly, the Code of Judicial Conduct comments to Rule 2.11 sets forth that "**[a] judge must also bear in mind that social relationships [or the appearance thereof] may contribute to a reasonable belief that the judge cannot be impartial.**" (S.J.C., Rule 2.11, cmt. 1.) Regardless of whether Sean McCabes claims are true or not, these

threats clearly provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting Justice Cannone's impartiality, requiring disqualification. (*Com v. Morgan RV Resorts, LLC*, 84 Mass. App. Ct. 1, 10 (2013).)

2. FAILURE TO PERFORM DUTIES FAIRLY AND DILIGENTLY ON MOTIONS MADE BY MS. READ

Canon 2 of the Supreme Judicial Court's Code of Judicial Conduct requires its judges to perform the duties of judicial office impartially, competently, and diligently. (S.J.C. Code of Judicial Conduct, Rule 2.2.) Indeed, S.J.C. Code of Judicial Conduct, Rule 2.5, subdivision (A), explicitly sets forth that a judge is required to "perform judicial and administrative duties competently, diligently, *and in a timely manner*." (S.J.C. Code of Judicial Conduct, Rule 2.5(A), emphasis added.) Indeed, "[t]imely disposition of the court's business **requires a judge to . . . [be] expeditious in determining matters under advisement**" and to "demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay." (*Id.*, cmts. 3-4.) Further, "**A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs**." (*Id.*, cmt. 4.) The failure of a judge to abide by these basic ethical requirements clearly suggests at least the appearance of partiality.

Here, without even reaching the substance of the Court's rulings in this case, there is no question that, for some reason unknown to the defense, Justice Cannone has been dilatory in issuing rulings on defense motions that are under advisement. The Court's new and escalating practice of delaying her rulings on defense motions which have already been argued and heard by this Court first by 16 days on Ms. Read's Motion for Animal Control Records; then by 27 days on Ms. Read's Rule 17 Motion for Cell Records; and in one instance 72 days on Ms. Read's Renewed Motion to Compel Discovery, even in spite of a reminder by counsel that the motion remains under advisement, does not give rise to the appearance of justice or impartiality. (*See, e.g., In re Powers*, 465 Mass. 63, 78 [finding clerk magistrate violated rules of professional

responsibility and should be removed from office for failing to issue decisions on matters for 30 to 45 days].) It would certainly make a reasonable person wonder *why* the Court is suddenly motivated to stall these proceedings and delay Ms. Read's ability to seek and obtain evidence in her case. Furthermore, this Court's significant delays in deciding defense motions under advisement (and in one instance a complete refusal to rule on Ms. Read's properly noticed Renewed Motion to Compel) clearly appears to be one-sided (i.e. partial), *as evidence by the Court's recent attempts to unilaterally advance and hasten a decision on a motion filed by the Commonwealth to gag Ms. Read's counsel.*

Moreover, by failing to rule on the Renewed Motion to Compel Discovery, Ms. Read is forced to patiently wait with the weight of false murder charges hanging over her head, in litigation purgatory, unable to access the remainder of the critical evidence she needs in order to prepare her defense, announce ready for trial, or avail herself of any remedies, should they be needed, on appeal. The objective metrics establishing recent and escalating delays in rulings as evidenced by the Court's own docket, alone, clearly provide what an impartial member of the public would find to be a reasonable basis for doubting Justice Cannone's impartiality, requiring disqualification.

3. JUSTICE CANNONE'S DENIAL OF MS. READ'S ABILITY TO BE HEARD

Indeed, as set forth in S.J.C. Rule 2.6, "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard." As the Supreme Judicial Court has made clear, "The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed." (Code of Judicial Conduct, S.J.C., Rule 2.6, cmt. 1.) In keeping with that precept, a judge's decision to deny a defendant the ability to be heard suggests a lack of fairness and impartiality.

Here, as set forth in more detail above, Justice Cannone denied Ms. Read a full and fair opportunity to be heard on her Rule 17 Motion for Cell Records relating to

Jennifer McCabe and Brian Albert--whose family member (Sean McCabe) has publicly claimed to have a relationship with and the ability to influence Justice Cannone. As detailed above, this Court and the respective parties agreed to set the instant case for an evidentiary hearing on May 25, 2023, to resolve factual disputes related to Defendant's Rule 17 Motion for Cell Records. Ms. Read expended significant funds subpoenaing witnesses in preparation for the hearing (including Brian Albert, Jennifer McCabe, and the Commonwealth's computer forensics expert Trooper Guarino), flying in an out-of-state computer forensics expert to testify regarding his findings on Jennifer McCabe's cell phone, and preparing for the examination of witnesses at the evidentiary hearing that was stipulated to by the parties and placed on calendar by this Court.

The Court's decision to cancel the May 25 evidentiary hearing, adopting the Commonwealth's legally incorrect theory that there was "no authority for it," and effectively denying Ms. Read the ability to prove that the disputed facts set forth in her Rule 17 Motion for Cell Records were, in fact, true smacks of partiality *towards the McCabes and Alberts.* By advancing the Commonwealth's untimely motion (filed a mere three days before the previously scheduled May 25, 2023, hearing) to cancel a legally necessary and appropriate evidentiary hearing served only to deny Ms. Read the ability to be heard and present *evidence necessary to prove she was entitled to the records sought.* The Court's hasty decision to allow the Commonwealth's motion to cancel the evidentiary hearing, while still sitting on the bench, and adopt the Commonwealth's legally incorrect theory that there was "no authority for it," effectively denied Ms. Read the ability to be heard and prove that the disputed facts set forth in her Rule 17 Motion for Cell Records were, in fact, true.

Moreover, aside from the Court's decision to cancel, wholesale, the evidentiary hearing scheduled for the next day, the Court then forced the defense to argue an extremely complex, factually dense motion on the spot, without any advanced notice that the argument on the Rule 17 Motion for Cell Records was going to be heard on that day. Significantly, Ms. Read and her counsel were **never** notified that there was even a remote possibility that the Rule 17 Motion for Cell Records was going to be heard on May 24,

2023. Thus, Ms. Read's counsel was forced to argue an extraordinarily factually complex and lengthy legal motion, which was not on calendar for that day, *without any notes or advance notice*, denying her a full and fair opportunity to be heard on a motion with a very real and consequential impact on her ability to defend herself against murder charges. A reasonable, disinterested server would certainly question whether this was done in an effort to prevent the defense from having a full and fair opportunity to argue the Rule 17 Motion for Cell Records in a crowded courtroom the next day, where major national and local news outlets were scheduled to be present and observe the proceedings. Instead, in what *at least appears to be* an attempt to act under cover of darkness, this Court advanced the proceedings, denied Ms. Read's ability to call any witnesses in support of her motion, and forced her counsel to argue a motion that was not properly on calendar that day. The procedural gamesmanship denying Ms. Read the ability to be heard, which was facilitated by Justice Cannone on May 24, 2023, would give any disinterested member of the public a reasonable basis for doubting her impartiality, requiring disqualification.

4. JUSTICE CANNONE'S DECISION TO DEPART WITH NORFOLK COUNTY SUPERIOR COURT JUDICIAL ASSIGNMENTS, AND TAKE THIS CASE WITH HER TO CIVIL COURT

Finally, the Court's decision to deviate from typical procedure in Norfolk County Superior Court, and reassign this case to herself in spite of the fact that she was reassigned to sit on a civil session so that she can hear the Commonwealth's Motion for Gag Order, which would prohibit the defense from making extrajudicial statements to the press, clearly creates the appearance of partiality.

On June 15, 2023, a mere six days after Attorney Lally filed the Commonwealth's Motion for Gag Order, counsel for Ms. Read received an email from Mr. McDermott with the Norfolk Superior Court stating "[Justice Cannone] needs a response to the Commonwealth's . . . Motion to Prohibit Extrajudicial statements." Thus, Justice Cannone was apparently ignoring the rules of procedure governing the times required for

oppositions and was requesting that the defense hurry up and respond to the Commonwealth's Motion (which was noticed to be heard a full month later), so that she could hear the motion before she was reassigned to a different courtroom. Notably, on the same day Justice Cannone sought to advance the hearing on the Commonwealth's Motion for Gag Order, which clearly benefits Brian Albert Jennifer McCabe, she still had not ruled on Ms. Read's Rule 17 Motion for Cell Records, which had already been under advisement for 22 days. A reasonable person might infer that these actions at least appear to suggest that the judge is *partial* to one side. Moreover, when counsel for Ms. Read informed the Court that we would need time to respond to the Motion for Gag Order, intended to appear in person, and were unavailable on the dates proposed by the Court, Justice Cannone indicated, through the court clerk, that she would exercise supervisory authority to take the case with her to her reassignment in civil court, rather than have the properly assigned criminal session judge hearing the Commonwealth's Motion for Gag Order.

Clearly, the totality of the facts in this case, including the threatening statements and claims made by Sean McCabe suggesting a close-knit relationship between the third party culprits in this case and the judge, the Court's recent and escalating delays in ruling on defense motions that are under advisement, the Court's denial of Ms. Read's ability to be heard on her Rule 17 Motion for Cell Records, and her decision to deviate from procedure and keep this case so that she can decide the Commonwealth's Motion for Gag Order (in which she quite clearly has a personal interest) in spite of her reassignment to civil court, would give any disinterested member of the public a reasonable basis for doubting her impartiality. As such, Justice Cannone must be disqualified from deciding any further issues of consequence in this matter.

//

//

Respectfully Submitted,
For the Defendant,
Karen Read
By her attorney,

Alan J. Jackson, Esq., *Pro Hac Vice*
Elizabeth S. Little, Esq., *Pro Hac Vice*
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July 14, 2023

//
//

CERTIFICATE OF SERVICE

I, Attorney David Yannetti, do hereby certify that I served the "Defendant's Motion for Recusal and/or Disqualification of Justice Beverly Cannone" upon the Commonwealth by emailing a copy on July 14, 2023 to Norfolk County Assistant District Attorney Adam Lally at adam.lally@mass.gov.

July 14, 2023
Date

David Yannetti

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2282CR00117 Commonwealth vs. Read, Karen

- Case Type:
- Indictment
- Case Status:
- Open
- File Date
- 06/09/2022
- DCM Track:
- C - Most Complex
- Initiating Action:
- MURDER c265 §1
- Status Date:
- 06/10/2022
- Case Judge:
-
- Next Event:
- 09/15/2023

All Information | Party | Charge | Event | Tickler | Docket | Disposition

Party Information

Norfolk County District Attorney
- Prosecutor

Alias

Party Attorney
- Attorney
- Lally, Esq., Adam C
- Bar Code
- 664079
- Address
- Norfolk County District Attorney's Office
  45 Shawmut Rd
  Canton, MA 02021
- Phone Number
- (781)830-4800

More Party Information

Read, Karen
- Defendant

Alias

Party Attorney
- Attorney
- Henchy, Esq., Ian F
- Bar Code
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  Boston, MA 02108
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- Attorney
- Jackson, Alan
- Bar Code
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- Phone Number
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- Attorney
- Little, Elizabeth S
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More Party Information

Albert, Brian
- Other interested party

Alias

Party Attorney
- Attorney
- Henning, Esq., Gregory D
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- Phone Number
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More Party Information

McCabe, Jennifer
- Other interested party

Alias

Party Attorney
- Attorney
- Reddington, Esq., Kevin Joseph
- Bar Code
- 414160

- Address
- Attorney Kevin Reddington
  1342 Belmont St
  Suite 203
  Brockton, MA 02301
- Phone Number
- (508)583-4280

More Party Information

Party Charge Information

- **Read, Karen**
- - Defendant
  Charge # 1:
  265/1-0 - Felony MURDER c265 §1

- Original Charge
- 265/1-0 MURDER c265 §1 (Felony)
- Indicted Charge
-
- Amended Charge
-

- **Read, Karen**
- - Defendant
  Charge # 2:
  265/1312-0 - Felony MANSLAUGHTER WHILE OUI c265 §13½

- Original Charge
- 265/1312-0 MANSLAUGHTER WHILE OUI c265 §13½ (Felony)
- Indicted Charge
-
- Amended Charge
-

- **Read, Karen**
- - Defendant
  Charge # 3:
  90/24/B-0 - Felony LEAVE SCENE OF PERSONAL INJURY & DEATH c90 §24(2)(a½)(2)

- Original Charge
- 90/24/B-0 LEAVE SCENE OF PERSONAL INJURY & DEATH c90 §24(2)(a½)
  (2) (Felony)
- Indicted Charge
-
- Amended Charge
-

Events

Date	Session	Location	Type	Event Judge	Result
06/10/2022 11:00 AM	Criminal 1		Arraignment		Held as Scheduled
08/12/2022 02:00 PM	Criminal 1		Pre-Trial Conference	Krupp, Hon. Peter B	Held as Scheduled
09/22/2022 02:00 PM	Criminal 1		Pre-Trial Conference	Krupp, Hon. Peter B	Held as Scheduled
10/03/2022 02:00 PM	Criminal 1		Motion Hearing		Held as Scheduled
11/21/2022 02:00 PM	Criminal 1		Hearing RE: Discovery Motion(s)	Cannone, Hon. Beverly J	Held as Scheduled
02/03/2023 02:00 PM	Criminal 1		Conference to Review Status		Rescheduled
02/08/2023 02:00 PM	Criminal 1		Conference to Review Status	Cannone, Hon. Beverly J	Held as Scheduled
05/03/2023 02:00 PM	Criminal 1		Motion Hearing	Cannone, Hon. Beverly J	Held as Scheduled
05/24/2023 10:00 AM	Criminal 1		Motion Hearing	Cannone, Hon. Beverly J	Held as Scheduled
05/25/2023 09:30 AM	Criminal 1		Motion Hearing	Cannone, Hon. Beverly J	Canceled
07/25/2023 02:00 PM	Criminal 1		Pre-Trial Hearing	O'Shea, Hon. Daniel J.	Held as Scheduled
09/15/2023 09:00 AM	Criminal 1		Motion Hearing	O'Shea, Hon. Daniel J.	
09/15/2023 02:00 PM	Criminal 1		Conference to Review Status	O'Shea, Hon. Daniel J.	Rescheduled

Ticklers

Tickler	Start Date	Due Date	Days Due	Completed Date
Pre-Trial Hearing	06/09/2022	12/06/2022	180	07/25/2023
Final Pre-Trial Conference	06/09/2022	05/19/2023	344	
Case Disposition	06/09/2022	06/02/2023	358	

Docket Information

Docket Date	*Docket Text*	File Ref Nbr.	*Image Avail.*
06/09/2022	Case assigned to: DCM Track C - Most Complex was added on 06/09/2022		
06/09/2022	Indictment(s) returned	1	
06/09/2022	Issued: Straight Warrant issued on 06/09/2022 for Read, Karen		
06/09/2022	Attorney appearance On this date David R Yannetti, Esq. added as Private Counsel for Defendant Karen Read		
06/10/2022	Recalled: Straight Warrant cancelled on 06/10/2022 for Read, Karen		
06/10/2022	Event Result:: Arraignment scheduled on: 06/10/2022 11:00 AM Has been: Held as Scheduled Hon. Beverly J Cannone, Presiding		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
06/10/2022	Defendant arraigned before Court. Judge: Cannone, Hon. Beverly J		
06/10/2022	Defendant waives reading of indictment Judge: Cannone, Hon. Beverly J		
06/10/2022	Plea of not guilty entered on all charges. Judge: Cannone, Hon. Beverly J		
06/10/2022	Bail set at $1,000,000.00 Surety, $100,000.00 Cash. Conditions: 1) stay away/no contact with victim O'Keefe's family and their residences 2) no operation of any motor vehicle		
06/10/2022	Bail warnings read Judge: Cannone, Hon. Beverly J		
06/10/2022	Issued on this date: Mittimus in Lieu of Bail Sent On: 06/10/2022 11:50:54	2	
06/10/2022	Order for the transmittal of Bail sent to the clerk of the Stoughton District Court.	3	
06/10/2022	The following form was generated: Order for Transmittal of Bail Sent On: 06/10/2022 12:02:57		
06/13/2022	Commonwealth 's Statement of the Case	5	
06/13/2022	Commonwealth 's Notice of Discovery I	6	
06/13/2022	Commonwealth 's Motion for Protective Order Regarding Discovery of Digital Video Recordings of Sain Interview	7	
06/13/2022	Finding and Order on Bail: SEE Findings (Cannone, RAJ) dated 06/10/2022 Judge: Cannone, Hon. Beverly J	8	
06/23/2022	Financial Note: RETURN OF ASSIGNMENT OF BAIL re: surety William J. Read in the amount of $50,000.00 dated 6/23/2022 (Check #8528)		
07/28/2022	General correspondence regarding Media Request from Court TV	10	
08/12/2022	Defendant 's EMERGENCY Motion to Compel Production of Requests for Preservation of Google Geofence Data and Confirmation from Google that Geofence Data Will Be Preserved with Exhibits - ALLOWED without objection. (Krupp, J.) dated 08/12/2022	11	
08/12/2022	Affidavit of Counsel in Support of Defendant's Emergency Motion with Certificate of Service	12	
08/12/2022	Defendant 's Motion to Compel Production of Materials Listed in "Commonwealth's Notice of Discovery I" - No action taken in light of the Commonwealth's response. (Krupp, J.) dated 08/12/2022	13	
08/12/2022	Affidavit of Counsel in Support of Motion to Compel with Certificate of Service	14	
08/12/2022	Defendant 's Motion to Inspect Tail Light and Housing - ALLOWED after items are back from the lab. (Krupp, J.) dated 08/12/22	15	
08/12/2022	Affidavit of Counsel in Support of Motion to Inspect Tail Light and Housing with Certificate of Service	16	
08/12/2022	Defendant 's Motion to Inspect John O'Keefe's Clothing - ALLOWED after items are back from the lab. (Krupp, J.) dated 08/12/22	17	
08/12/2022	Affidavit of Counsel in Support of Defendant's Motion to Inspect Clothing with Certificate of Service	18	
08/12/2022	Event Result:: Pre-Trial Conference scheduled on: 08/12/2022 02:00 PM Has been: Held as Scheduled Hon. Peter B Krupp, Presiding		
08/18/2022	Commonwealth 's Notice of Discovery II (rec'd 08/12/2022)	19	
08/29/2022	Commonwealth 's Notice of Discovery III (rec'd 08/17/2022)	20	
08/31/2022	Attorney appearance On this date Ian F Henchy, Esq. added for Defendant Karen Read		
09/08/2022	General correspondence regarding Request from Bruce Conover, Court TV, to Cover the Hearing	21	
09/19/2022	Defendant 's Motion to Compel Discovery with Certificate of Service (rec'd 9/16/2022) - - ALLOWED as to #'s 1, 2, 3, 4, 5, 12 as amended, 13, & 15 , - #11 , Counsel may view original exhibits through arrangements with ADA - DENIED without prejudice as to #'s 5, 6, 7, 8, 9, 10 & 14 (Cannone, RAJ) dated 10/5/22) (copies sent -cm)	22	
09/19/2022	Defendant 's Motion for Discovery Regarding the Circumstances of Massachusetts State Trooper Michael D. Procter's Assignment to the Investigation of this Matter (rec'd 9/16/2022) - Commonwealth will provide written protocols/policies. If defendant is not satisfied that Commonwealth has responded pursuant to Mass. R. Crim. P. 14, defendant is to file a motion and supporting affidavit for the discovery - not in the form of interrogatories. (Cannone, RAJ.) dated 10/5/2022 copies sent -cm	23	
09/19/2022	Affidavit of Counsel in Support with Certificate of Service (rec'd 9/16/2022)	24	
09/19/2022	Defendant 's Motion for Preservation of Samples for Independent Forensic Testing with Affidavit in Support and with Certificate of Service (rec'd 9/16/2022) - ALLOWED without opposition. (Krupp, J.) dated 09/22/2022	25	
09/19/2022	Defendant 's Motion to Renew Motions Previously Filed in Stoughton District Court with Affidavit and with Certificate of Service (rec'd 9/16/2022) - DENIED (Cannone, RAJ) dated 10/3/22 - copies sent -cm	26	
09/19/2022	Defendant 's Motion for Order Pursuant to Mass. R. Crim. P. 17 directed to Brian Albert, Julie Albert, Colin Albert Brian Higgins and the Commonwealth and Memorandum in Support Thereof with Affidavit with Certificate of Service (rec'd 9/16/2022) (with Exhibits not Scanned) - DENIED. The defendant has not met her burden under Mass. R. Crim. P. 17 Lampron. The Court is not satisfied that the requested phones contain information that is evidentiary and relevant nor is the Court satisfied that the application is made in good faith and is not intended as a general fishing expedition. (Cannone, RAJ) dated 10/5/22 - copies sent-cm	27	
09/19/2022	Defendant 's Amended Motion to Compel Modification of Google Preservation Requests and for Production of Geofence Data and Memorandum in Support Thereof with Affidavit and with Certificate of Service (rec'd 9/16/2022) - Exhibits not scanned - After hearing, no action taken at this time. (Cannone, RAJ) dated 10/5/22	28	
09/21/2022	Defendant 's Motion for Admission Pro Hac Vice of Alan Jackson and Elizabeth Little with Certificate of Service and Exhibits - ALLOWED (Krupp, J.) dated 09/22/2022	29	
09/22/2022	Event Result:: Pre-Trial Conference scheduled on: 09/22/2022 02:00 PM Has been: Held as Scheduled Hon. Peter B Krupp, Presiding		
09/27/2022	Attorney appearance On this date Alan Jackson added as Pro Hac Vice (SJC 3:15) for Defendant Karen Read (SEE Page #29)		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
09/27/2022	Attorney appearance On this date Elizabeth S Little added as Pro Hac Vice (SJC 3:15) for Defendant Karen Read (SEE Page #29)		
09/27/2022	ORDER: RE: Preservation of Cellular Telephones (Krupp, J.) dated 9/23/2022 SEE Order	30	
10/03/2022	Event Result:: Motion Hearing scheduled on: 10/03/2022 02:00 PM Has been: Held as Scheduled Hon. Beverly J Cannone, Presiding		
10/14/2022	Commonwealth 's Notice of Discovery IV	31	
11/01/2022	Commonwealth 's Notice of Discovery V	32	
11/18/2022	Norfolk County District Attorney's Memorandum in opposition to Defendant's Motion Pursuant to Rule 17 of Criminal Procedure	33	
11/18/2022	Defendant 's Proposed Memorandum of Decision and Order on Defendant's Rule 17 Motion with Certificate of Service	34	
11/21/2022	Event Result:: Hearing RE: Discovery Motion(s) scheduled on: 11/21/2022 02:00 PM Has been: Held as Scheduled Hon. Beverly J Cannone, Presiding		
11/21/2022	Commonwealth 's Notice of Discovery VI	35	
12/19/2022	Event Result:: Conference to Review Status scheduled on: 02/08/2023 02:00 PM Has been: Rescheduled For the following reason: Request of Defendant Hon. Beverly J Cannone, Presiding		
01/23/2023	Commonwealth 's Notice of Discovery VII	36	
01/23/2023	Commonwealth 's Notice of Discovery VIII	37	
02/02/2023	Defendant 's Motion for production of original photographs complete with Metadata - filed 2/2/23	38	
02/02/2023	Affidavit of David R. Yannetti in support of motion for production of original photographs complete with Metadata - filed 2/2/2023	39	
02/02/2023	Affidavit of Richard Green in support of motion for production of original photographs complete with Metadata - filed 2/2/23	40	
02/02/2023	Defendant 's Motion for production of search warrant and missing ring video recordings from One Meadow Avenue in Canton, MA - filed 2/2/23	41	
02/02/2023	Affidavit of David R. Yannetti in support of motion for production of search warrant and missing ring video recordings from One Meadows Avenue Canton, MA - filed 2/2/23	42	
02/02/2023	Defendant 's Motion for production of Greykey supplemental filed - filed 2/2/23	43	
02/02/2023	Affidavit of Richard Green in support of motion for production of Greykey supplemental files - filed 2/2/23	44	
02/02/2023	Defendant 's Certificate of service - filed 2/2/23	45	
02/02/2023	Defendant 's Motion for inspection, access and independent forensic testing of John O'Keefe's clothing - filed 2/2/23	46	
02/02/2023	Affidavit of David R. Yannetti in support of motion for inspection, access and independent forensic testing of John O'Keefe's clothing filed 2/2/23	47	
02/02/2023	Defendant 's Certificate of service - filed 2/2/23	48	
02/02/2023	Defendant 's Motion for inspection, access and independent testing of pieces of tail light seized by the Commonwealth - filed 2/2/23	49	
02/02/2023	Affidavit of of David R. Yannetti in support of motion for inspection, access and independent testing of pieces or tail light seized by the Commonwealth filed 2/2/23	50	
02/02/2023	Defendant 's Motion to compel production on previously ordered discovery filed 2/2/23 - No Action Taken (Cannone, RAJ) dated 02/8/2023	51	
02/02/2023	Affidavit of David R. Yannetti in support of motion to compel production of previously ordered discovery filed 2/2/23	52	
02/02/2023	Defendant 's Motion for order pursuant to Mass.R.Crim.P.17 directed to Canton Animal Control and the Canton Clerk's Office - filed 2/2/23 IMPOUNDED	53	
02/02/2023	Affidavit of Elizabeth S. Little in support of motion for order pursuant to Mass.R.Crim.P.17 directed to Canton Animal Control and the Canton Town Clerk - IMPOUNDED filed 2/2/23	54	
02/02/2023	Affidavit of Forensic Pathologist Frank Sheridan, M.D.in support of motion for order pursuant to Mass.R.Crim.P.17directed to Canton Animal Control and the Canton Clerk's Office - filed 2/2/23 IMPOUNDED	55	
02/02/2023	Defendant 's Motion to modify conditions of release - filed 2/2/23 IMPOUNDED	56	
02/02/2023	Affidavit of counsel in support of Defendant's motion to modify pretrial conditions of release and certificate of service - filed 2/2/23 IMPOUNDED	57	
02/08/2023	Event Result:: Conference to Review Status scheduled on: 02/08/2023 02:00 PM Has been: Held as Scheduled Hon. Beverly J Cannone, Presiding		
02/08/2023	Bail warnings read Judge: Cannone, Hon. Beverly J		
02/08/2023	Bail set at $800,000.00 Surety, $80,000.00 Cash. $20,000 cash of posted bail may be returned to Surety		
02/09/2023	Commonwealth 's Notice of Discovery IX	58	
02/09/2023	Financial Note: RETURN OR ASSIGNMENT OF BAIL re: surety William J. Read in the amount of $20,000.00 dated 2/9/2023 (Check #8888)		
02/22/2023	Commonwealth 's Notice of Discovery X	59	
03/21/2023	Commonwealth 's Notice of Discovery XI	60	
03/24/2023	Commonwealth 's Notice of Discovery XII	61	
03/27/2023	Commonwealth 's Proposed Procedure RE: Communications Stored on Cell Phone for Examination of IPhone Pursuant to a Search Warrant Issued on February 2, 2022 ALLOWED WITHOUT OBJECTION (CANNONE,J) ATT.J.MCDERMOTT,AC (5/3/23)	62	
04/12/2023	Commonwealth 's Notice of Discovery XIII	63	
04/12/2023	Defendant 's Motion For Order Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon and AT&T	64	
04/12/2023	Affidavit of Alan J. Jackson, Esq. in support of Motion For Order Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon and AT&T	65	
04/12/2023	Affidavit of Richard Green in support of Defendant's Motion For Order Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon and AT&T	66	
04/26/2023	Defendant 's Renewed Motion to Compel Discovery	67	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
04/26/2023	Affidavit of David R. Yannetti in Support of Defendant's Renewed Motion to Compel Discovery with Certificate of Service	68	
04/26/2023	List of exhibits #1 - #6 in Support of Defendant's Renewed Motion to Compel Discovery	69	
05/02/2023	Norfolk County District Attorney's Memorandum in opposition to Defendant's Motion Pursuant to Rule 17 of Criminal Procedure - Directed to Brian Albert, Verizon, and AT&T	70	
05/02/2023	Norfolk County District Attorney's Memorandum in opposition to Defendant's Motion Pursuant to Rule 17 of Criminal Procedure - Production of Records from Canton Animal Control and the Canton Clerk's Office	71	
05/03/2023	Attorney appearance On this date Gregory D Henning, Esq. added as Private Counsel for Other interested party Brian Albert	72	
05/03/2023	Opposition to Defendant's Rule 17 Motion for Cellular Devices and Records filed by Brian Albert Applies To: Henning, Esq., Gregory D (Attorney) on behalf of Albert, Brian (Other interested party)	73	
05/03/2023	Affidavit of Support of Brian Albert's Opposition to Rule 17 Motion Applies To: Henning, Esq., Gregory D (Attorney) on behalf of Albert, Brian (Other interested party)	74	
05/03/2023	Gregory D Henning, Esq.'s Motion for Copies of Grand Jury Minutes of Brian and Nicole Albert Applies To: Henning, Esq., Gregory D (Attorney) on behalf of Albert, Brian (Other interested party)	75	
05/03/2023	Affidavit of Support of Motion for Copies of Grand Jury Minutes of Brian and Nicole Albert Applies To: Henning, Esq., Gregory D (Attorney) on behalf of Albert, Brian (Other interested party)	76	
05/03/2023	Event Result:: Motion Hearing scheduled on: 05/03/2023 02:00 PM Has been: Held as Scheduled Hon. Beverly J Cannone, Presiding		
05/04/2023	Endorsement on Motion for copies of Grand Jury Mintues of Brian and Nicole Albert, (#75.0): ALLOWED dated 5/3/23. Copies mailed Judge: Cannone, Hon. Beverly J		
05/04/2023	Commonwealth 's Notice of Discovery XV - filed 5/3/23	77	
05/11/2023	Commonwealth 's Notice of Discovery XVI - filed 5/10/23	78	
05/19/2023	MEMORANDUM & ORDER: on Defendant's Motion for an Order Pursuant to Mass. R. Crim. P. 17 Directed to Canton Animal Control and the Canton Clerk's Office. ALLOWED. (Cannone, RAJ) dated 05/19/2023 Judge: Cannone, Hon. Beverly J (copies sent to all attorneys)	79	
05/19/2023	ORDER: for Production of Records from Canton Animal Control and the Canton Clerk's Office (dated 05/19/2023)	80	
05/19/2023	The following form was generated: A Clerk's Notice was generated and sent to: Defendant, Attorney: David R Yannetti, Esq. Yannetti Criminal Defense Law Firm 44 School St Suite 1000A, Boston, MA 02108 Defendant, Attorney: Alan Jackson 888 W. 6th Street 4th Floor, Los Angeles, CA 90017 Defendant, Attorney: Ian F Henchy, Esq. Yannetti Law Firm 44 School St 1000A, Boston, MA 02108 Prosecutor, Attorney: Adam C Lally, Esq. Norfolk County District Attorney's Office 45 Shawmut Rd, Canton, MA 02021 Other interested party, Attorney: Gregory D Henning, Esq. Henning Strategies 141 Tremont St Suite 300, Boston, MA 02111		
05/22/2023	Gregory D Henning, Esq.'s Motion to Quash the Subpoena of Defendant Karen Read Applies To: Albert, Brian (Other interested party)	81	
05/22/2023	Affidavit of Gregory Henning in Opposition to Rule 17 Motion with Exhibit A Applies To: Albert, Brian (Other interested party)	82	
05/22/2023	Opposition to to Defendant's Request for Evidentiary Hearing on Mass. R. Crim. P. 17 with Exhibit A filed by Norfolk County District Attorney	83	
05/22/2023	Attorney appearance On this date Kevin Joseph Reddington, Esq. added as Private Counsel for Other interested party Jennifer McCabe		
05/22/2023	Kevin Joseph Reddington, Esq.'s Motion to Quash Subpoena	84	
05/22/2023	Jennifer McCabe's Memorandum in support of Motion to Quash Subpoena Served on Jennifer McCabe, Government Witness	85	
05/23/2023	Other Records All Records Relating to Any Animals Registered to Brian Albert received from Canton Town Hall - IMPOUNDED	86	
05/24/2023	Opposition to to Jennifer McCabe's Motion to Quash Subpoena filed by Karen Readwith Certificate of Service	87	
05/24/2023	Opposition to to Brian Albert's Motion to Quash Subpoena filed by Karen Read	88	
05/24/2023	Opposition to Commonwealth's Opposition to Defendant's Request for Evidentiary Hearing on Mass. R. Crim. P. 17 filed by Karen Read	89	
05/24/2023	Event Result:: Motion Hearing scheduled on: 05/24/2023 10:00 AM Has been: Held as Scheduled Hon. Beverly J Cannone, Presiding		
05/24/2023	Event Result:: Motion Hearing scheduled on: 05/25/2023 09:30 AM Has been: Canceled For the following reason: By Court prior to date Hon. Beverly J Cannone, Presiding		
05/25/2023	Other Records received from Canton Animal Control - IMPOUNDED	90	
06/07/2023	Defendant 's Motion for Permission to Copy and Inspect Impounded Records Pursuant to Dwyer Protocol - ALLOWED (Cannone, RAJ) dated 06/08/2023	91	
06/07/2023	Affidavit of Counsel in support of motion for permission to copy and inspect impounded Records with Certificate of Service	92	
06/09/2023	Commonwealth 's Motion to Prohibit Prejudicial Extrajudicial Statements of Counsel in Compliance with Massachusetts Rules of Professional Conduct 3.6(a) with Exhibits	93	
06/09/2023	Commonwealth 's Motion to Inspect and Copy Impounded Records from the Town of Canton	94	
06/13/2023	Commonwealth 's Notice of Discovery XVII (rec'd 5/25/23)	95	
06/13/2023	Commonwealth 's Notice of Discovery XVIII	96	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
06/20/2023	MEMORANDUM & ORDER: on Defendant's motion for order pursuant to MASS.R.CRIM.P.17 directed to Brian Albert, Verizon, and AT&T. (Cannone, RAJ) DENIED see memorandum and order. ns Judge: Cannone, Hon. Beverly J	97	
06/21/2023	Opposition to to Motion to Inspect and Copy Impounded Records from the Town of Canton with Certificate of Service (rec'd 06/20/2023) filed by Karen ReadALLOWED, only as far as allowing for inspection and copying of the records. The remainder of the Motion is reserved for hearing on 7/25. (Cannone,J) 7/18/23	98	
06/21/2023	Affidavit of Counsel in Support of Defendant's Opposition to Motion to Inspect and Copy Impounded Records from the Town of Canton (rec'd 6/20/2023)	99	
07/17/2023	Defendant 's Motion for Recusal and Disqualification of Justice Beverly Cannone with Certificate of Service	100	
07/17/2023	Affidavit of Aidan Kearney in Support of Defendant's Motion for Recusal and Disqualification of Justice Beverly Cannone	101	
07/17/2023	Affidavit of Alan J. Jackson, Esq. in Support of Defendant's Motion for Recusal and Disqualification of Justice Beverly Cannone	102	
07/18/2023	Opposition to Commonwealth's "Motion to Prohibit Prejudicial Extrajudicial Statements of Counsel in Compliance with Massachusetts Rules of Professional Conduct 3.6(a) with Certificate of Service filed by Karen Read	103	
07/18/2023	Affidavit of Counsel in Support of Opposition to Commonwealth's "Motion to Prohibit Prejudicial Extrajudicial Statements of Counsel	104	
07/19/2023	Commonwealth 's Notice of Discovery XIX	105	
07/20/2023	Defendant 's EX PARTE Confidential Privilege Log Regarding Data Obtained From Ms. Read's Cell Phone for the Court's In Camera Review - The Court does not need to review the content of the messages referenced by counsel for the defendant. Axiom ID #104589, #122346. This Court orders that the additional referenced text messages, which contain Attorney-Client privileged information, be redacted by the appointed forensic examiner prior to the information being produced to the Commonwealth. Further, this Court orders the Digital Evidence Laboratory to provide the Commonwealth with the redacted extraction report of the defendant's cellphone forthwith (Cannone, RAJ) dated 07/25/2023	106	
07/20/2023	Affidavit of Counsel in Support of Defendant's l Privilege Log Regarding Data Obtained From Ms. Read's Cell Phone for the Court's In Camera Review with Exhibit A	107	
07/24/2023	Commonwealth 's Motion to Establish Timely Protocols for Evidentiary Testing	108	
07/24/2023	Commonwealth 's Motion to Compel Defendant to Comply with the Agreed Upon Privilege Filtration Procedures Relative to the Defendant's Cellphone and to Provide the Commonwealth with the Redacted Extraction Report	109	
07/25/2023	Event Result:: Pre-Trial Hearing scheduled on: 07/25/2023 02:00 PM Has been: Held as Scheduled Comments: FTR Hon. Beverly J Cannone, Presiding		
07/25/2023	MEMORANDUM & ORDER: on Defendant's Motion for Recusal and Disqualification of Justice Beverly Cannone - - ORDER : Motion for recusal and disqualification is DENIED. (Cannone, RAJ) dated 7/25/2023 - SEE Memorandum of this Date Judge: Cannone, Hon. Beverly J	110	
07/31/2023	MEMORANDUM & ORDER: on Commonwealth's Motion to Prohibit Prejudicial Extrajudicial Statements of Counsel in Compliance with Massachusetts Rules of Professional Conduct 3.6(a) - It is ORDERED that the Commonwealth's Motion is DENIED without prejudice. (Cannone, RAJ) dated 7/31/2023 - SEE Memorandum (copies sent to all counsel -cm) Judge: Cannone, Hon. Beverly J	111	
08/11/2023	Commonwealth 's Notice of Discovery XX	112	
08/14/2023	Defendant 's Renewed Motion to Compel Discovery and Access to Evidence with Certificate of Service and Exhibits A-C	113	
08/14/2023	Affidavit of David Yannetti in Support of Defendant's Renewed Motion to Compel Discovery	114	
08/17/2023	Event Result:: Conference to Review Status scheduled on: 09/15/2023 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. Beverly J Cannone, Presiding		
08/22/2023	Commonwealth 's Notice of Discovery XXI.	115	
09/01/2023	Defendant 's Motion for Order Pursuant to Mass.R.Crim. P.17 directed to the Canton Department of Public Works and the Canton Town Clerk and Certificate of Service filed 9/1/23	116	
09/01/2023	Affidavit of Private Investigator Paul Mackowski in support of Motion for Order Pursuant to Mass.R.Crim.P.17 directed to the Canton Department of Public Works and the Canton Town Clerk filed 9/1/23	117	
09/01/2023	Affidavit of Alan J. Jackson in support of Motion for Order pursuant to Mass.R.Crim. P.17 directed to the Canton Department of Public Works and the Canton Town Clerk filed 9/1/23	118	
09/01/2023	Commonwealth 's Motion for Records: ABC News and Affidavit in support of Commonwealth's Motion for Records with Exhibits filed 9/1/23	119	
09/01/2023	Commonwealth 's Response to "Defendant's Renewed Motion to Compel Discovery and Access to Evidence" filed 9/1/23	120	
09/01/2023	Commonwealth 's Motion for Records - ALARM.COM and Affidavit in support of Commonwealth's Motion for Records filed 9/1/23	121	
09/01/2023	Commonwealth 's Motion for Records NBCU News Group Legal and Affidavit in support of Commonwealth's Motion for Records with exhibits filed 9/1/23	122	
09/07/2023	Defendant 's Motion to modify conditions of release - filed 9/7/23	123	
09/07/2023	Affidavit of counsel in support of Defendant's motion to modify conditions of release and certificate of service filed 9/7/23	124	
09/07/2023	Defendant 's Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Google, LLC. with Certificate of Service	125	
09/07/2023	Affidavit of Alan J. Jackson in Support of Motion	126	
09/08/2023	Commonwealth 's Notice of Discovery XXII	127	
09/08/2023	Commonwealth 's Notice of Discovery XXIII	128	
09/08/2023	Commonwealth 's Notice of Discovery XXIV	129	
09/08/2023	Defendant 's Supplemental Affidavit of Alan J. Jackson in Support of Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to the Canton Department of Public Works ant the Canton Town Clerk with Certificate of Service and Exhibit A	130	

Case Disposition

Disposition	Date	Case Judge
Active	06/10/2022	

Disposition	Date	Case Judge

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