COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

SUFFOLK, ss. NO. SJ-2023-0343

NORFOLK SUPERIOR COURT
NO. 2282-CR-00117

KAREN READ,

Petitioner

v.

THE COMMONWEALTH OF MASSACHUSETTS,

Respondent

PETITIONER'S REPLY TO THE COMMONWEALTH'S OPPOSITION TO DEFENDANT'S PETITION AND BRIEF SEEKING RELIEF PURSUANT TO G. L. c. 211, § 3 AND INTERVENOR BRIAN ALBERT'S MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S REQUEST FOR RELIEF PURSUANT TO G.L. C. 211, § 3

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On September 1, 2023, Petitioner Karen Read ("Ms. Read") filed a Petition and Brief Seeking Relief Pursuant to G. L. c. 211, § 3 ("Petitioner's Brief") challenging the trial court's denial of Defendant's Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T (hereafter "Defendant's Rule 17 Motion"). On September 13, 2023, Respondent filed the Commonwealth's Opposition to Defendant's "Petition and Brief Seeking Relief Pursuant to G. L. c. 211, § 3" (hereafter

"Respondent's Opposition"). On September 18, 2023, third-party in interest Brian Albert filed a Motion to Intervene and Memorandum of Law in Opposition to Petitioner's Request for Relief Pursuant to G.L. c. 211, § 3 (hereafter "Intervenor's Opposition"). Ms. Read herein replies to Respondent's Opposition and Intervenor's Opposition. This Reply Brief is confined to responding to matters addressed in the respective Oppositions that Petitioner believes would be helpful to this Court.[1]

I. NUMEROUS FACTUAL ASSERTIONS SET FORTH IN THE COMMONWEALTH'S AND INTERVENOR'S OPPOSITIONS ARE PROCEDURALLY DEFECTIVE, FACTUALLY INACCURATE, AND FIND NO BASIS IN THE RECORD

Massachusetts Rule of Appellate Procedure, 16(e), provides, "No statement of a fact of the case shall be made in any part of the brief without an appropriate and accurate record reference." Mass. R.A.P. 16(e), as amended, 378 Mass. 940 (1979). The Commonwealth's "Statement of Facts" fails to include a single citation to the record, and thus, is fatally procedurally defective. *See* Respondent's Opposition (hereafter "R.O.") at 8-39. As explained by the Supreme Judicial Court:

> The requirement that a party provide "an appropriate and accurate record reference" for each

[1] Petitioner's failure to address a particular point or argument should not be considered a concession, abandonment, or forfeiture of the point.

> and every fact set forth in the brief...is not an idle technical requirement. Among other things, it prevents parties from exaggerating or distorting the facts presented [in the case], or from inserting into the analysis on appeal facts that are simply nonexistent.

City of Lynn v. Thompson, 435 Mass. 54, 56 n. 4 (2001). Those protections are sorely needed here. Respondent's Opposition is rife with inaccuracies, outright false statements, and claims meant to deceive this Court regarding the strength of the Commonwealth's case.[2]

For example, the Commonwealth claims in its Statement of Facts that a "small hair was noted on the rear passenger side quarter panel of Ms. Read's vehicle" and that "[t]he apparent hair has subsequently been forensically tested and confirmed as human hair." *See* R.O. at 30. That is a lie. In

[2] The unsupported and procedurally defective factual averments set forth in the Commonwealth's Opposition are particularly shocking and problematic here because the Commonwealth has made certain representations that are provably false based on information that is in the possession of the Commonwealth but is simply not part of the record on appeal. To the extent that this Court determines to consider any of the claims alleged by the Commonwealth that are not supported by the record, Petitioner requests the opportunity to file a supplemental brief as to those issues and bring in outside evidence, which is not presently in the record before this Court. *See Thorneal v. Cape Pond Ice, Co.*, 321 Mass. 528, 535 (1947) (finding statements in briefs not supported by the record must be ignored); *Swerling-Ginsberg-Lynn Adjusters, Inc. v. D&E Realty Co., Inc.*, 15 Mass. App. Ct. 908, 908(1982) (finding assertions in appellate brief are unavailing unless supported by record).

a DNA Testing report dated August 25, 2023, which was in the Commonwealth's possession *prior* to filing Respondent's Opposition, the MSP Crime Laboratory confirmed that the "root end" of the "small hair" purportedly recovered from Ms. Read's vehicle was tested for the presence of DNA and "no human DNA [was] detected". Supplemental Record Appendix (hereafter "S.R.A."), at 10.

Similarly, the following inaccurate factual statements were inserted into Respondent's Opposition notwithstanding that they are completely absent from the record: (1) a new claim that "defendant's vehicle traveled in reverse for approximately 62 feet before striking the victim at a possible impact speed of 24 mph"; and (2) a new claim that MSP Lieutenant Brian Tully examined Ms. Read's cell records and determined that she drove "in the direction of the Waterfall" and "in the direction of" Fairview after leaving home at 5:08 a.m. on January 29, 2022, before driving to Ms. McCabe's. *See* R.O. at 63-86. Given that these facts find no support in the record, they should be disregarded.[3] *See Cape Pond Ice, Co.*, *supra*, 321 Mass. at 535.

[3] In the Intervenor's Opposition, Brian Albert has similarly included facts that have no basis in the record. For example, Mr. Albert claims that he "has already suffered substantial harm and harassment as a result of the petitioner's relentless and defamatory attempt to try her case in the press: he is photographed when he leaves his

Notwithstanding the procedural deficiencies discussed above, Ms. Read herein seeks to briefly clarify and correct additional glaring factual errors set forth in Respondent's Opposition.

A. Misrepresentations Regarding the Nature of the Commonwealth's Computer Forensics Experts' Reports

In Respondent's Opposition, the Commonwealth correctly asserts that on May 23, 2023, the day before the Court heard argument on Defendant's Rule 17 Motion, the Commonwealth filed two substantively new reports by purported computer forensics experts, Trooper Guarino and Jessica Hyde, in an effort to refute certain findings set forth in Defendant's Rule 17 Motion. Commonwealth's Appendix (hereafter "C.A."), at 123-152. In Respondent's Opposition, the Commonwealth writes that both experts conclusively "determined that the victim never entered Brian Albert's home and that the internet searches on Jennifer McCabe's cell phone happened at 6:23 a.m. and 6:24 a.m." *See* R.O. at 4. However, this conclusory statement is

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home, accosted should he patronize a local business, and forced to question his family's safety as a result of the petitioner's baseless third-party culprit defense." Intervenor's Opposition (hereafter "I.O.") at 2. These claims find no support in the record and should similarly be ignored. *See Cape Pond Ice, Co.*, *supra*, 321 Mass. at 535.

contradicted by the reports of the Commonwealth's own experts. *See* C.A. at 123-152. First, Ms. Hyde never examined any of the location data in this case or made any determinations as to whether O'Keefe entered the Albert residence that night. *See* C.A. at 146-152. Trooper Guarino was the only Commonwealth expert to perform any analysis of the location data obtained from O'Keefe's cell phone. *See* C.A. at 123-152. Thus, the Commonwealth's suggestion that two separate experts even reviewed the location data is false.

Moreover, Trooper Guarino's analysis is riddled with inaccuracies, which cannot be reconciled with the data extracted from O'Keefe's cell phone. For example, Trooper Guarino states that O'Keefe's health data shows O'Keefe ascending/descending three (3) flights of stairs at 12:22:14 a.m., a time when O'Keefe's phone location is in front of 36 Oakdale Road and is not at the Albert residence. C.A. at 127. This is a straw man argument. In point of fact, a review of O'Keefe's exported Apple Health data clearly shows him climbing three flights of stairs at some unspecified time between 12:21:14 a.m. and 12:24:37 a.m., not at the arbitrary time Trooper Guarino chose for purposes of his argument. R.A. at 36, 65. Thus, when the proper time-frame is examined, Trooper Guarino's own data

shows O'Keefe's phone location pinging at 34 Fairview Road at 12:24 a.m., which (as noted above) is within the time-frame recorded in Apple Health and is consistent with O'Keefe climbing stairs at the Albert residence. *See* C.A. at 126. Moreover, Trooper Guarino claims to have conducted his own analysis and determined that, "O'Keefe could have been inside the residence of 34 Fairview Road for no more than 3 seconds." C.A. at 127. In support of this argument, Trooper Guarino attaches PowerPoint slides, which purport to depict O'Keefe's cell phone location over the course of six seconds between 12:25:30 and 12:25:36. C.A. at 132-145. Ironically, those slides show O'Keefe's phone location is consistent with being inside Brian Albert's residence over the course of a four-second period between 12:25:00 and 12:25:34. *Id.* Furthermore, although Trooper Guarino claims the phone stopped showing any movement at 12:25:36 a.m. (C.A. at 126), O'Keefe's Apple Health data recorded 36 steps (25.46 meters) between 12:31:56 a.m. and 12:32:16 a.m. (R.A. at 36-37, 65-66).

Additionally, the Commonwealth's claim that both experts confirmed two searches happened on Ms. McCabe's cell phone at 6:23 a.m. and 6:24 a.m. is confusing and misleading. *See* R.O. at 4. First of all, these facts are irrelevant to the issues before this Court because the

trial court accepted that Ms. McCabe deleted an incriminating 2:27 a.m. Google search for "hos long to die in cold" as true for purposes of deciding Defendant's Rule 17 Motion. R.A. at 436, n. 1. Second, the defense has never disputed the fact that Ms. McCabe conducted two Google searches at 6:23 a.m. and 6:24 a.m. for "how long ti die in cikd" and "hos long to die in cold", respectively. R.A. at 19-20. As explained in Defendant's Rule 17 Motion, these subsequent searches were clearly performed in an effort to cover up Ms. McCabe's incriminatory 2:27 a.m. search and blame Ms. Read.[4] R.A. at 19-20. Notably, however, the Commonwealth's privately retained computer forensics expert, Ms. Hyde, actually disagreed with Trooper Guarino's

[4] Shortly after Jennifer McCabe discovered O'Keefe's body (and after opening an article in her Safari application entitled "*How Long Does It Take to Digest Food*" at 6:23:49 a.m.), Jennifer McCabe attempted to overwrite her incriminating early morning search of "hos long to die in cold" by re-entering it at a more appropriate time. R.A. at 19. However, in her haste to cover up her incriminating 2:27 a.m. search, Ms. McCabe accidentally searched "how long ti die in cikd" at 6:23:51 a.m. R.A. at 19-20. Immediately thereafter, at 6:24:18 a.m., she corrected her search to match the 2:27 a.m. misspelling, and searched: "hos long to die in cold." R.A. at 20. Notably, in case this sloppy attempt to cover up her incriminating Google search wasn't enough, and in an effort to conceal her own criminality, on February 1, 2022, days after O'Keefe's death, Ms. McCabe inexplicably told law enforcement, for the first time, that as she was sitting alone with Ms. Read in a car on scene after law enforcement arrived, Ms. Read yelled at her "two times" to Google, "How long do you have to be left outside to die from hypothermia." R.A. at 020.

analysis of Ms. McCabe's search history and ultimately concluded that she could not give a "definitive reason as to why the timestamp [of one of the searches] is listing the time of 02:27:40." C.A. at 152. Ms. Read's expert was never given a meaningful opportunity to rebut either of these reports because of the trial court's decision to cancel the evidentiary hearing.

B. Blatant Inaccuracies and Omissions in the Commonwealth's Recitation of Witness Statements

In Respondent's Opposition, the Commonwealth summarizes what it purports to be Jennifer McCabe's husband, Matthew McCabe's statement to law enforcement:

> 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 two 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.

R.O. at 14-15. That is an inaccurate recitation of Matthew McCabe's statement to law enforcement. A copy of his actual statement was attached to Defendant's Rule 17 Motion. R.A. at 88-89. In actuality, Mr. McCabe never told Trooper Proctor that he saw the vehicle "driving off down Fairview,

heading in the same direction it had been facing while parked." *See id.* He said nothing of the sort. However, he did claim to Trooper Proctor that "he observed tire tracks in the snow on the street in front of the house", which he described as being in "a wave or 'V' shape." R.A. at 89. He further stated that "the tire tracks went from the curb in front of 34 Fairview, towards the neighbor across the street and then back towards the curb" and were consistent with making a three point turn. *Id.* Finally, he stated that he did not see those tracks prior to the big black SUV arriving outside of the house. *Id.* As pointed out in prior motions before the trial court (which apparently prompted the Commonwealth to simply rewrite Matthew McCabe's witness statement), the notion that Mr. McCabe was able to see tire tracks in the snow on the road after Ms. Read left, but missed O'Keefe's dead and bleeding body on the Albert's lawn in front of those tracks defies logic. *See* R.A. at 443-444.

The Commonwealth's recitation of Ryan Nagel's statement contains several glaring omissions, all of which are exculpatory. As explained in Respondent's Opposition, Mr. Nagel stated that he drove to 34 Fairview Road to pick up his sister, Julie Nagel (aka "Juliana"), who had requested a ride home. R.O. 16. Mr. Nagel was seated in the

front passenger's seat of his friend's Ford F-150 pickup truck, with his girlfriend in the back seat. *Id.* As the truck was driving down Cedarcrest Road, he observed a mid-size black SUV's headlights coming from the opposite direction on Cedarcrest. *Id.* As the black SUV approached, the F-150 yielded to the SUV, which made a right turn onto Fairview. *Id.* The vehicle Mr. Nagel was traveling in then took a left turn onto Fairview Road, and followed behind that SUV. *Id.* Mr. Nagel confirmed that his friend stopped the F-150 directly in front of the driveway belonging to 34 Fairview Road, "and remember[ed] the black SUV stopping along the right curb towards the left side of the property as you look at the home from the street." R.A. 101. Thus, as the Commonwealth concedes, three witnesses arrived at 34 Fairview Road immediately following Ms. Read and O'Keefe (12:24 a.m.), and none of those individuals observed her "reverse into O'Keefe at a high rate of speed" with her vehicle. *See id.*

Moreover, what the Commonwealth intentionally left out of its recitation of the facts, is that (1) Mr. Nagel observed the black SUV pull up to the property line where the flagpole was located with its rear brake-lights illuminated (R.A. at 101); (2) Mr. Nagel did not observe any damage to the vehicle, including the brake-lights,

which he recalls being "illuminated" (R.A. at 102); and (3) as the F-150 drove away from 34 Fairview Road past the black SUV, Mr. Nagel observed "the interior light on and a Caucasian female operator seated inside the vehicle with her hands at 10 and 2 and noted that "**he did not see anyone else inside the passenger compartment" of the vehicle"** (R.A. at 102, emphasis added). Thus, Ryan Nagel's testimony completely undermines the Commonwealth's theory by establishing that O'Keefe had already left Ms. Read's vehicle and the surrounding area *before* Ms. Read could possibly have struck him with her SUV.

In its recitation of the facts, the Commonwealth also includes the statement of partygoer, Juliana Nagel, who was driven home by Jennifer McCabe around 1:30 or 2:00 a.m. R.O. at 17-18. As set forth in Respondent's Opposition, Juliana Nagel purportedly told Trooper Proctor that, as she drove away from the house around 1:30 or 2:00 a.m., she thought she saw something she described as a "dark object" in the snow by the flagpole outside Brian Albert's house but could not tell what it was. R.O. at 19. The Commonwealth conveniently fails to note the incredibly suspect timing of Ms. Nagel's statement. Notably, on September 19, 2022, Ms. Read filed a Rule 17 Motion requesting cell records relating to *all* of the individuals

who were present at the Albert residence on the night in question. S.R.A. at 16, n. 2. In support of that request, counsel for Ms. Read argued:

> [A]t least six individuals claim to have left the Albert residence in the early morning of January 29, 2022, after Ms. Read had left the Fairview Residence and returned home: Jennifer McCabe and Matthew McCabe purportedly drove Julie Nagel and an unnamed female home at 1:30 a.m.; Brian Higgins supposedly went to complete "administrative work" at the Canton Police Department around 1:30 a.m.; and Colin Albert supposedly returned home to his parents' residence at approximately 12:30 a.m. Yet, none of these individuals—not one—claims to have seen O'Keefe's body sprawled in Brian Albert's front yard, mere feet from the roadway all of them would have driven on.

Id. This argument was reiterated vigorously at the hearing on the Rule 17 Motion on October 3, 2022. *Id.* Remarkably, *two days* after the defense made these facts known to the Court and to the Commonwealth in a public hearing, on October 5, 2022, at 11:00 a.m., Trooper Proctor met with partygoer Juliana Nagel and interviewed her for the very first time, seven months after O'Keefe's death. *Id.* In that unrecorded interview, Trooper Proctor claims that Juliana Nagel reported that she "observed a dark object in the white snow by the flagpole" as she left 34 Fairview Road on January 29, 2022, seven months prior. *Id.*

The Commonwealth's statements regarding O'Keefe's injuries are also incomplete and misleading. According to Respondent's Opposition, Troopers reported that Dr. Irini Scordi-Bello observed several abrasions to the victim's right forearm,[5] 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. R.O. at 24. Omitted from the list of injuries reported by the Troopers are the defensive wounds on the back of O'Keefe's right hand, which is clearly bruised. R.A. at 98. According to Respondent, Dr. Irini Scordi-Bello "observed no signs of Mr. O'Keefe being involved in any type of physical altercation or fight." R.O. at 24. However, that statement is refuted by both autopsy photographs, which clearly depict bruising to the back of O'Keefe's right hand, as well as Irini Scordi-Bello's testimony before the grand jury conceding these

[5] Any layperson who reviews the autopsy photographs depicting O'Keefe's injuries to his right arm, regardless of their training and experience, can clearly see that the injuries to O'Keefe's right arm are lacerations, not abrasions as Dr. Irini Scordi-Bello suggests. *See* R.A. at 95-97. Her inability, as a medical examiner, to distinguish between a laceration and abrasion should give this Court grave concern about her ability to reach any sound conclusions in this case.

injuries. R.A. at 098. To date, the Commonwealth remains unable to articulate any reasonable explanation as to how the victim could possibly have sustained the above injuries by being struck with the taillight of Ms. Read's vehicle.

C. Trooper Proctor's repeated lies in sworn documents regarding the time that he seized Ms. Read's vehicle are not "Scrivener's Errors"

Here, MSP Trooper Proctor repeatedly claimed in sworn affidavits that he did not seize Ms. Read's vehicle until "approximately 5:30 p.m." on January 29, 2022. R.A. at 447, 506. However, as Respondent concedes, these statements were false, and Ms. Read's vehicle was actually towed to the Canton Police Department more than an hour earlier at 4:12 p.m. R.A. at 44, 510; R.O. at 26. As explained in Petitioner's Brief, establishing the correct timing of the search was absolutely critical to Ms. Read's defense because it meant that Trooper Proctor and certain personnel from the Canton Police Department had access to Ms. Read's vehicle (and taillight) for more than an hour before the SERT team executed its 5:30 p.m. after-the-fact search of the Albert's front lawn, and recovered the first pieces of taillight from the crime scene. Petitioner's Brief (hereafter "P.B.") at 17.

Trooper Proctor's lies were not some "unintentional mistake" or "scrivener's error", as the Commonwealth posits. See R.O. at 62, n. 6. To be clear, the timing of Trooper Michael Proctor's search has been thoroughly litigated in the trial court and was steadfastly defended by the Commonwealth. *See* R.A. at 440, 448; S.R.A. at 70-71. For example, Ms. Read briefed this issue extensively in Defendant's Amended Motion to Compel Modification of Google Preservation Requests and for Production of Geofence Data, which was filed on September 16, 2022. R.A. at 440, 448. In that publicly filed Motion, which was served on the Commonwealth, Ms. Read attached a screenshot of video surveillance footage from her parents' residence showing that—contrary to Trooper Proctor's claims—the tow truck arrived at her parents' residence at 4:12 p.m., and thus, Trooper Proctor and Canton Police Department personnel took possession of her vehicle before any taillight pieces were recovered from the scene.[6] R.A. at 510. Notwithstanding Ms. Read's proof, at the hearing on the Motion, Assistant

[6] Thus, Respondent's suggestion that Ms. Read somehow withheld this evidence from the Commonwealth by stating "defendant provided this footage to Boston 25 News, however no video footage has been provided to the Commonwealth" is deceptive, to say the least. In fact, the Commonwealth was provided a screenshot of this very footage in September 2022. *See* R.O. at 26, n. 7.

District Attorney Lally argued that the video surveillance footage produced by Ms. Read was unreliable and might be "an hour off because of daylight savings time [which] would make it 5:12 p.m. and then 5:30 p.m. on the wrecker would conform with that." S.R.A. at 71. If this was a one-time scrivener's error, the Commonwealth surely would have corrected this critical error at that time.

Finally, Respondent states that Trooper Proctor's mistake was "rectified by other evidence, including Dighton Police reports that were authored on January 29, 2022." R.O. at 26, n.6. This statement by Respondent is also deceitful. To be clear, the Commonwealth did not turn over the exculpatory January 29, 2022, Dighton Police Report, which independently establishes Ms. Read's vehicle was towed to the Canton Police Department by the Dighton Police Department at 4:18 p.m., until May 25, 2023—a year and a half after O'Keefe's death. S.R.A. at 42-45. If the belated decision to obtain tow reports from a separate (and conflict-free) law enforcement agency had not been made in May 2023, more than a year after O'Keefe's death, it is questionable whether the Commonwealth would have ever conceded its position. Thus, Trooper Proctor's decision to alter the time that he seized Ms. Read's vehicle in a way

that only benefited him was clearly not an innocent mistake.

D. The Commonwealth's Fabrication of Expert Testimony

In Respondent's Opposition, the Commonwealth inexplicably writes that "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." R.O. at 39. That statement is untrue and wholly manufactured. First, the Commonwealth's more experienced computer forensics expert, Ms. Hyde, was never asked to analyze whether the Cellebrite computer forensics software program accurately recorded certain of Ms. McCabe's calls as deleted (presumably, because any competent, uncompromised computer forensics examiner would not question that fact and the data). R.O. at 146-152. Trooper Guarino's attempts to refute the unequivocal Cellebrite data is laughable. *See* R.A. at 46; R.O. at 124. In his report, Trooper Guarino writes: "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 (sic) file and the same record

is not found within the active database.'" R.O. at 124. Based on that alone, Trooper Guarino incorrectly concludes, "Meaning that the user of the iPhone did not actively delete anything from the Wal (sic) file." R.O. at 124. Of course Jennifer McCabe didn't delete anything from the temporary storage WAL file. WAL files are not accessible to the end-user, and that is exactly how the deleted data is recovered in the first place. *See* R.A. at 32. Rather, Ms. McCabe deleted the call from the active database. *See* R.A. at 34-35. The Commonwealth's reliance on Trooper Guarino's incomprehensible and flawed analysis can only be described as an attempt to conflate an obvious issue and confuse the Court. When confronted with pervasive misstatements of fact that always seem to inure to the benefit of the Commonwealth, the conclusion properly drawn is that such misstatements are intentional. To be sure, such provably false and misleading statements cannot be attributed to scrivener's errors.

II. G.L. c. 211, § 3 RELIEF IS WARRANTED BECAUSE THE TRIAL COURT'S ERRONEOUS DECISION TO DENY MS. READ CRITICAL THIRD PARTY CULPABILITY EVIDENCE VIOLATES THE SUBSTANTIAL RIGHTS OF MS. READ WITH NO AVAILABLE REMEDY, AND IMPLICATES ISSUES CRITICAL TO THE FAIR ADMINISTRATION OF JUSTICE

As demonstrated above, the Commonwealth's consistent and pervasive misstatements of fact, which have permeated

every aspect of this case, are precisely what makes this case "exceptional," warranting extraordinary relief. *See Commonwealth v. Cousin*, 484 Mass. 1042, 1045 (2020). Absent this Court's swift intervention, Ms. Read will be denied her constitutional right to due process and to present a defense. U.S. Const., Amend. VI; Mass. Decl. of Rights, art. 12; *See Commonwealth v. Mitchell*, 444 Mass. 786, 795 (2005).

Indeed, a defendant's right to present a defense "derives not only from the general fairness requirements of the due process clause of the Fourteenth Amendment but also, and more directly, from the compulsory process clause of the Sixth Amendment." Petitioner's Brief at 44, citing *Rosario v. Kuhlman*, 839 F.2d 918, 925 (2d Cir. 1988) (noting *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973)); U.S. Const., amend. VI). To ensure these crucial rights, Massachusetts Rule of Criminal Procedure, 17(a)(2) provides that "[t]he court may direct that books, papers, documents, or objects designated in the summons be produced before the court within a reasonable time prior to the trial or prior to the time when they are offered in evidence[.]" Mass. R. Crim. P. 17(a)(2). As set forth in the Petitioner's Brief, the lower court violated Ms. Read's substantive rights by erroneously denying her Rule 17 Motion on the basis that

the requested records were (1) not relevant, and (2) that the application was not made in good faith. R.A. at 435-439.

A. Ms. Read's narrow and targeted request for cell phone information from third party culprits and seminal witnesses Brian Albert and Jennifer McCabe clearly constitutes evidence that is relevant to the offenses charged in the Indictment

Relevance is a low standard, and evidence is deemed sufficiently relevant where it "throws light" or "shed[s] light on an issue." P.B. at 46 (citing *In re Adoption of Carla*, 416 Mass. 510, 514 (1993)). Although a showing of "potential relevance" is insufficient, courts must recognize the reality that a party seeking documents will seldom know exactly what they contain. *Commonwealth v. Lampron*, 441 Mass. 265, 269 (2004). Thus, a defendant meets the requisite relevance showing upon establishing a "sufficient likelihood" that the requested information contains conversations or information relevant to the offenses charged. *United States v. Nixon*, 418 U.S. 683, 700 (1974).

In Respondent's Opposition, the Commonwealth argues that (1) the defendant has failed to provide a sufficient factual basis to suggest that Jennifer McCabe's cell phone records may be relevant to her defense; and (2) that the

defendant has failed to produce "credible" evidence that relevant admissible evidence will be found on Brian Albert's phone. R.O. at 44. As discussed below, the record does not support Respondent's position.

1. Jennifer McCabe's cell phone carrier records are clearly relevant

First, as to the relevance of Jennifer McCabe's call detail records, the Commonwealth argues that the defendant has not "'provided a sufficient factual basis that the cell phone records [of Jennifer McCabe] may be relevant to [Ms. Read's] defense.'" R.O. at 44 (citing C.A. at 61). In support of this contention, the Commonwealth writes only: "[T]he defendant asserts, without any factual support, that the cell records will 'undoubtedly reveal text messages and calls that Ms. McCabe deleted from her phone in an effort to interfere with the investigation[.]'" R.O. at 45. That any neutral third party could review the evidence in this case and conclude, with a straight face, that the cell phone communications *deleted by Jennifer McCabe in the days and hours surrounding O'Keefe's death* are not relevant offends all notions of fairness and reasonableness. Indeed, the Commonwealth's own investigative agents, the Massachusetts State Police ("MSP"), knew her communications from this time frame were relevant, which is why they

obtained and forensically analyzed her cell phone in the first place. R.A. at 15. Ms. McCabe consented to the search of her phone, and the MSP forensically imaged it—because both knew that it was relevant and material to the case. *See* R.A. at 71. For the Commonwealth to now claim that the records associated with that very cell phone are irrelevant and an invasion of privacy rights is sophistry.

Contrary to the Commonwealth's assertions, the facts set forth in Defendant's Rule 17 Motion establish a sufficient likelihood that Ms. McCabe's call detail records will reveal additional communications that Jennifer McCabe intentionally deleted from her phone during this crucial time, which are otherwise unrecoverable. *See* R.A. at 25-26, 34-35, 45-48. Evidence of further deletions and attempts by Ms. McCabe to tamper with evidence is not only relevant—it is exculpatory. To be clear, the trial court, in reaching its determination on the Rule 17 Motion, made a factual finding that Jennifer McCabe did, in fact, conduct a Google search for "ho[w] long to die in cold" at 2:27 a.m. on January 29, 2022, three hours before she claims to have "discovered" John O'Keefe's hypothermic body on Brian Albert's front lawn. R.A. at 436 & n.1. The lower court also made a factual finding that Jennifer McCabe took affirmative steps to delete this chilling and inculpatory

search before turning her phone over to MSP on February 2, 2022, four days later. *Id.*

However, this inculpatory search is not the only material evidence that McCabe deleted from her phone. As explained in the Rule 17 Motion, Jennifer McCabe also deleted (or at least attempted to delete) all her call records in the hours immediately preceding and immediately following O'Keefe's death. *See* R.A. at 34, 46. As set forth in Defendant's Rule 17 Motion and the supporting affidavit of defense computer forensics expert Richard Green, the Cellebrite extraction of Jennifer McCabe's cell phone revealed, *inter alia*, the following: (1) on January 28, 2022, the day before O'Keefe's death, there was no recoverable call log data from the main storage location (CallHistory.storedata.db)of McCabe's cell phone, but the KnowledgeC database, which records various user activity, establishes the existence of calls on that date; (2) on January 29, 2022, between 5:33:47 a.m. and 8:50:15 a.m. Cellebrite recovered 18 deleted calls; and (3) normal call activity was observed between January 29, 2022 at 8:59:34 a.m. and February 2, 2022. R.A. at 34, 46. Thus, incontrovertible evidence establishes that Jennifer McCabe took affirmative steps to delete all of her call records in the hours immediately preceding O'Keefe's death and in the

five hours after his death (i.e. until 8:50:15 a.m. on January 29, 2022). *See id.* That is not a coincidence. That is consciousness of guilt.

Significantly, however, forensic extraction software was unable to recover all the communications deleted by Ms. McCabe during the relevant time period. *See* R.A. at 34-35. As set forth in Defendant's Rule 17 Motion, defense computer forensics expert Richard Green was able to conclusively verify that there were, in fact, communications that were deleted by Ms. McCabe on January 29, 2022, which could not be recovered using forensic extraction software, such as Cellebrite. *Id.* For example, Mr. Green cross-referenced all call entries recovered from Jennifer McCabe's cell phone on January 29, 2022 (the date of O'Keefe's death), with data obtained from the decedent's cell phone. *Id.* Notably, although O'Keefe's cell phone shows that Jennifer McCabe called the decedent 17 times in the early morning of January 29, 2022, only one of those calls is found in Jennifer McCabe's call history and it is marked as "deleted."[7] *Id.* The high concentration of

[7] Her deletions of these material communications is particularly suspect given that Ms. McCabe explicitly told law enforcement that she "did not think much" of O'Keefe's failure to enter the residence that night and assumed that O'Keefe and Ms. Read simply changed their mind and decided to go home. R.A. at 11.

deletions on Jennifer McCabe's cell phone at the precise time of O'Keefe's death establishes thoughtfulness and intention. *See* R.A. at 34. As explained in the supporting affidavit of computer forensics expert Richard Green, "[t]he absence of recent historical call information suggests that a user has taken affirmative steps to delete the call history...[and] suggests that a user has engaged in efforts to tamper with, alter, destroy, and/or hide information or evidence." R.A. at 34. Ms. McCabe tampered with material evidence in this case, which, in addition to being a crime, also evidences consciousness of guilt and supports Ms. Read's third party culprit defense. *Id.* Mr. Green further explained that the only way to recover additional deleted communications (which could not be recovered from Ms. McCabe's phone itself) is to obtain Jennifer McCabe's cell carrier records from the dates in question. *See id.*

Based on the above, there is more than a sufficient likelihood that call detail records will reveal additional material communications in the days and hours immediately before and after O'Keefe's death, which Ms. McCabe deleted before producing her sanitized phone for use as evidence in this case. The requested records are evidentiary and relevant as there is a sufficient likelihood they will

contain: (1) additional evidence that Jennifer McCabe tampered with her cell phone before turning it over to law enforcement; (2) additional deleted communications, evidencing consciousness of guilt and revealing the identity of co-conspirators; and (3) additional communications between Jennifer McCabe and relevant witnesses in the early morning of January 29, 2022. The import of this evidence cannot be overstated. *See Nixon*, *supra*, 418 U.S. at 700.

In sum, Ms. Read has set forth more than enough facts to establish a sufficient likelihood that Ms. McCabe's call detail records from the period in question are evidentiary and relevant.

2. The requested information from Brian Albert's cell phone is clearly relevant

Second, the Commonwealth argues that defendant has failed to sufficiently establish that relevant, admissible evidence will be found on Brian Albert's cell phone because "only speculative claims that are without factual support or identifiable sources [] form the basis for defendant's contention that Brian Albert has "destroyed evidence" or is a third party culprit, responsible for the victim's death." R.O. at 44. In Respondent's Opposition, the Commonwealth completely ignores the panoply of evidence produced by Ms.

Read in support of Defendant's Rule 17 Motion, and instead parrots an excerpt of the trial court's denial, which states: "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 '[sic]between [Brian] Albert's phone and this case[.]" R.O. at 44; *see* R.A. 438 (Trial Court's Memorandum of Decision). The notion that the defense's relevancy showing is based on a "single missed call" from Jennifer McCabe to Brian Albert at 6:23 a.m. on January 29, 2022, is patently absurd. Indeed, the rationale behind the trial court's decision suggests a grave misunderstanding of the facts and a misapplication of the law. The question before the Court is not, as the trial court suggests, whether Brian Albert's cell phone is physically tethered in some way to this case, but whether there is a sufficient likelihood that the requested information contained on his phone is evidentiary and relevant. *See Nixon*, *supra*, 418 U.S. at 700. The lower court's failure to consider, *inter alia*, the myriad facts discussed below in reaching its determination as to this issue is, on its face, prejudicial error. *See* R.A. at 435-39.

Ms. Read's defense is predicated on a third-party culprit defense. The defense has uncovered significant and reliable evidence that not only exculpates Ms. Read, but also implicates Jennifer McCabe and Brian Albert. *See* R.A. For purposes of the Rule 17 Motion, the lower court made a factual finding that Brian Albert's sister-in-law, Jennifer McCabe, Googled "ho[w] long to die in cold" at 2:27 a.m. on January 29, 2022, three hours before she claims to have "discovered" John O'Keefe's hypothermic body on Brian Albert's front lawn at 6:04 a.m. R.A. at 436 & n.1. The lower court also made a factual finding that Jennifer McCabe deleted evidence of this critical search before turning her phone over to law enforcement on February 2, 2022, a mere four days later. *Id.* This evidence alone opens the door for a third party culpability defense, in which Boston Police Officer Brian Albert is clearly implicated as the relative and homeowner of the residence wherein O'Keefe was killed and outside of which he was left to die in the cold. *See* R.A. at 10-11.

Defendant's third party culprit defense is further supported by Apple Health data obtained from O'Keefe's cell phone, which recorded 80 steps and 3 flights of elevation change immediately upon his arrival at Brian Albert's residence shortly after midnight. *See* R.A. at 14-15. The

only reasonable interpretation of this data is that he did, in fact, make it into Brian Albert's three-story residence that night, directly contravening Jennifer McCabe and Brian Albert's claims to the contrary. *Id.* As set forth in Defendant's Rule 17 Motion, "location data obtained from O'Keefe's phone establishes that his phone pinged in the neighborhood near the Albert residence at 12:19:33 a.m., and again at 12:24:28 a.m. Immediately following his arrival at the Albert Residence, between 12:21:10 a.m. and 12:24:37 a.m., Apple Health recorded O'Keefe taking 80 steps (i.e. traveling approximately 87.74 meters) and climbing or descending the equivalent of three floors *with his location data pinging in close proximity of the Albert Residence*." R.A. at 14, 36. Then, again, between 12:31:56 a.m. and 12:32:16 a.m., Apple Health recorded O'Keefe taking 36 steps and traveling approximately 83 feet. R.A. at 14-15, 36-37. Contrary to the Commonwealth's assertion that defense's claims are without factual support and come from unidentified sources, much like all of the facts set forth in Defendant's Rule 17 Motion, this finding is supported by (1) an affidavit of defense computer forensics expert Richard Green; and (2) a verified copy of the Apple Health data obtained from O'Keefe's cell phone, which establishes the same. R.A. at 36-37,64-66. This reliable,

data-driven evidence undeniably suggests that Jennifer McCabe and Brian Albert lied to law enforcement when they claimed John O'Keefe never made it inside the house. *See* R.A. at 14.

As explained above, Jennifer McCabe deleted all of her communications in the early morning of January 29, 2022, so, as yet, the defense does not have records of all communications sent and received by her in the hours immediately following O'Keefe's death. *See* R.A. at 34-35, 45-48. However, the extraction of Ms. McCabe's cell phone reveals that immediately after disconnecting with 9-1-1 dispatch to report finding O'Keefe's body on the Albert's front lawn, Ms. McCabe made two calls to her sister Nicole Albert (Brian Albert's wife), aka "CoCo", at 6:07 a.m. and 6:08 a.m., which lasted 9 and 7 seconds, respectively. R.A. at 18. Both of these calls are recorded in Cellebrite as being "answered" by *someone* and then "deleted".[8] *See* R.A. at 46. This is particularly disturbing given that Nicole Albert told law enforcement that she and her husband Brian Albert were "still in bed [in the early morning of January 29, 2022] when her sister Jen came into the room and shared

[8] This fact is also established by an affidavit of computer forensics expert Richard Green and a verified copy of the Cellebrite report showing record of these calls. R.A. at 34, 46.

with her what had transpired outside, and that John was found deceased on the edge of her property by the street in the snow." R.A. at 18, 125. Nicole Albert further told police that she and her husband "never left [the] home [to see what was going on outside] and by the time she came downstairs, Canton Fire . . . must have [already] transported both John and Karen from the scene." R.A. 18, 125. However, deleted phone records actually show that Brian and Nicole Albert were notified that O'Keefe was found lying unresponsive mere feet away on their front lawn *three minutes* after his body was discovered at 6:04 a.m. R.A. at 34, 46. In spite of that fact, Brian (a first responder) and Nicole Albert chose to sequester themselves in their home—distancing themselves from the investigation—rather than check on O'Keefe, assist in life-saving efforts, or otherwise investigate the circumstances surrounding the fact that their family member discovered the body of a Boston Police Officer on their front lawn. R.A. at 18-19. Particularly given that Brian Albert is a Boston Police Officer with close ties to the Canton Police Department, his actions are completely inconsistent with an individual who has nothing to hide. *See* R.A. at 10.

As set forth in Defendant's Rule 17 Motion, immediately thereafter, at 6:08:35 a.m. on January 29,

2022, Jennifer McCabe took a screenshot of Brian Albert's contact information, "uncle brian a" with the description "home #3", presumably to share with law enforcement (or some other witness). R.A. at 35, 52. Hours later, at 12:53:23 p.m., Jennifer McCabe deleted that screenshot, which clearly suggests (1) consciousness of guilt; and (2) an attempt to conceal Brian Albert's participation in John O'Keefe's murder and/or the coverup thereafter.[9] R.A. at 21. As set forth in the Rule 17 Motion, the defense also presented evidence that Jennifer McCabe made an outgoing call to Brian Albert at 6:23 a.m. that went unanswered, and then deleted the record of that call.[10] R.A. at 21, 35, 52.

Significantly, Defendant's Rule 17 Motion further showed that Ms. McCabe's attempts to sanitize her phone of contacts and communications with Brian Albert on the morning in question are not the only instances of witnesses in this case attempting to conceal Brian Albert's number from appearing in official law enforcement records. *See* R.A. at 21-22. For example, on October 25, 2022, the Commonwealth produced to the defense a copy of the initial

[9] Again, this contention is supported by (1) an affidavit of defense computer forensics expert Richard Green, and (2) a copy of the Cellebrite extraction report, which shows the date and time the screenshot was taken and then deleted from Jennifer McCabe's cell phone. R.A. at 21, 35, 52.

Canton Police Department Incident Report with a purported creation date of January 29, 2022, at 0824 hours. R.A. at 21. Apparently unbeknownst to the individual that altered that report, a hard copy of that very same report dated "January 29, 2022, at 0824 hours" had already been provided to counsel for Ms. Read at her Arraignment seven months prior, on February 2, 2022. *Id.* The two reports are (almost) identical and purport to have been created and generated on the exact same date at the exact same time. *Id.* However, the original report produced on February 2, 2022, differs from the report produced on October 25, 2022, in two very significant and alarming ways. *See id.* First, the altered report swaps the single crime scene photograph included within the report from a photograph that was taken on the morning of January 29, 2022, by the Canton Police Department (where there were clearly **no** pieces of Ms. Read's taillight at the crime scene) to a photograph taken by a different police agency (MSP) days later on February 3, 2022, *after* Trooper Proctor had taken possession of Ms. Read's vehicle, which shows a taillight fragment at the scene.[11] R.A. at 21, 127-150. Notably, Canton Police

[11] Notably, as set forth in Defendant's Rule 17 Motion, Brian Albert's brother, Kevin Albert, is a high-ranking officer in the Canton Police Department. R.A at 22-23.

Department should not even have that February 3, 2022 photograph, because they lost jurisdiction of the case on January 29, 2022 at 7:59 a.m. *See* R.A. 447. Thus, the original Canton Police report was altered to make Ms. Read *appear* more guilty.[12] *See* R.A. at 21, 127-150, 447. This fact, alone, should shock the conscience. What's more, the altered report also replaces Brian Albert's "primary" cell phone number (the very same number Jennifer McCabe deleted from her cell phone) with a completely different number. R.A. at 21-22.

Furthermore, the defense presented a sworn affidavit to the trial court by defense expert and former Chief Medical Examiner for San Bernardino County, Dr. Sheridan, in which he explained that the lacerations to O'Keefe's right arm appeared inconsistent with having been struck by a moving vehicle but were consistent with scratches and/or bite marks from an animal attack. R.A. at 590, 602-603. Significantly, animal control records establish that Brian Albert rehomed his K-9 German Shepherd "Chloe", his family dog of seven years, to some unknown location in the months following O'Keefe's death. R.A. at 605-606. Over Brian

[12] Significantly, Defendant's Rule 17 Motion included copies of both the original and altered police reports, along with an affidavit from counsel attesting to the dates these reports were received. R.A. at 127-153.

Albert's strenuous objection and representations to the lower court that his German Shepherd was rehomed due to an animal attack and has never attacked any humans, records obtained from the Canton Town Clerk establish that Brian Albert's dog attacked two humans, both of whom were sent to the hospital as a result of Chloe's attack. R.A. at 539. These records are now in the possession of the trial court and the Commonwealth. *See id.*

Finally, the defense uncovered evidence establishing that on November 17, 2022, mere months after the defense first publicly accused Brian Albert of being implicated in O'Keefe's murder, Brian Albert listed his longtime home for sale, which has been in his family for multiple generations. R.A. at 23. In a thinly veiled attempt to further distance himself from the crime scene, Brian Albert sold his house shortly thereafter on February 17, 2023. *Id.* This assertion is supported by an affidavit of counsel along with screenshots of publicly available records relating to the listing and sale of the home. R.A. at 23, 70, 113-114.

Thus, this and other evidence set forth in Defendant's Rule 17 Motion, establishes a sufficient likelihood that Brian Albert's location information and communications in the hours and days immediately surrounding O'Keefe's death

will reveal information that is evidentiary and relevant to this case, including (1) statements of witnesses; (2) further evidence of the conspiracy, which supports Ms. Read's third party culpability defense; and (3) evidence of coordination with law enforcement. *See* R.A. at 24-26. In sum, Brian Albert's communications (i.e. statements of witnesses) and location information on January 29, 2022, and the days immediately following O'Keefe's death are clearly evidentiary and relevant.

B. Ms. Read's narrow and targeted request for cell phone information from two of the Commonwealth's seminal witnesses, both of whom evidence suggests have made material misstatements and undertaken efforts to destroy evidence in this case is not a fishing expedition and is made in good faith

As set forth more fully in Petitioner's Brief and Defendant's Rule 17 Motion, Ms. Read's request is not a general fishing expedition. P.B. at 50-53. In Respondent's Opposition, the Commonwealth asks this Court to ignore all of the evidence presented in support of Defendant's Rule 17 Motion and instead accept as true the Commonwealth's facially unsupported and unsubstantiated allegation that "while extremely intoxicated the defendant operated her vehicle in reverse for a period of time, before striking the victim at a high rate of speed[]", and thus, a request for any information that doesn't fit the Commonwealth's

narrative is a fishing expedition. R.O. at 46. As explained in Part I. of Petitioner's Reply Brief, *supra*, this allegation is completely unsupported by the record, much less actual provable facts. To allow the Commonwealth to, in essence, block a defendant's right to compulsory process based on vague statements alleging guilt makes a mockery of the presumption of innocence and an accused's constitutional right to defend herself and to compulsory process. *See* U.S. Const., Amend. VI; Mass. Decl. of Rights, art. 12; *Mitchell*, *supra*, 444 Mass. at 795.

In support of its argument, the Commonwealth relies on *Commonwealth v. Lam*, 444 Mass. 224, 229 (2005), for the proposition that "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'." This statement is made in the context of explaining why the Commonwealth has standing to be heard with regard to the issuance of a third party summons for records. *Id.* at 228-229. It does not, however, stand for the proposition that the Commonwealth can unilaterally override a defendant's constitutional right to compulsory process by making conclusory allegations of guilt, which, in light of the facts of this case, is a truly terrifying prospect. *See id.*

Indeed, the requirement that the application is made in good faith and is not intended as a general "fishing expedition" is borne of the understanding that there is a legitimate interest in "preventing *unnecessary* harassment of a complainant . . . caused by burdensome frivolous, or otherwise improper discovery requests." *Lam*, 444 Mass. at 229 (emphasis added). Although this consideration is undeniably important, it is not a way to circumvent the fundamental rights of a person charged with a crime, particularly where the defense is premised on the culpability of the very persons that are being subpoenaed. U.S. Const. amends. VI, XIV. Thus, 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." *Lam*, 444 Mass. at 229-230.

The Commonwealth makes no showing that the instant request will unnecessarily delay trial or result in the unwarranted harassment of witnesses. *See* R.O. 47-51. Instead, the Commonwealth significantly relies on the unpublished case of *R.C. v. Chilcoff*, SJ-2020-0081, 2020 WL 8079734 (Dec. 15, 2020), for the proposition that the trial court must *consider* a complainant's inherent privacy interest in a victim-witnesses cell phone or cell phone

records when ruling on a request for those records under Rule 17. *See id.* at *4; R.O. at 47-51. That case does not, however, suggest that the privacy rights of an individual trump a defendant's constitutional right to compulsory process when they have satisfied their burden under *Lampron*. A closer look at the facts underlying that decision is instructive.

In *R.C. v. Chilcoff*, the defendant was indicted on one count of rape on a college campus, and filed a Mass. R. Crim. P. 17(a)(2) motion to obtain information from the victim-witness's cell phone relating to her electronic communications and use of social media over a 12-day period beginning with the day of the incident. *Id.* at *2-3. The trial court ordered the victim-witness to produce, *inter alia*, (1) her cell phone and/or any "backups" for forensic examination to recover all record of communications sent and/or received by the victim-witness over any platform for a 12-day period beginning with the day of the incident; and (2) the names of any third-party service providers, such as Apple or Samsung, that might be in possession of the requested information, including the names and log-in information of any third-party service providers that were in possession of the above information. *Id.* at *3. The victim appealed the trial court's order, requesting that

the *date range* of the trial court order be narrowed to communications sent and received between December 8, 2017, and 10:00 a.m. on December 9, 2017, and that the second portion of the order be vacated. *Id.* at *1.

In affirming the victim-witness's request to limit the date range of the information requested, Justice Cypher held that defendant "has offered nothing more than speculation that there may be relevant evidence in the information he seeks", noting that a "generalized claim that the victim could have fabricated her account of the rape" does not satisfy the *Lampron* standard. *Id.* at *5. Finally, Justice Cypher held that the request that the victim-witness produce a list of third-party service providers and subscriber information associated with those accounts, which might contain the requested communications, was akin to a "discovery" request or "interrogatory" and was an improper use of Rule 17. *Ibid.*

Here, unlike in *R.C. v. Chilcoff*, Ms. Read's request for data is targeted to the hours just prior to and the days immediately following John O'Keefe's death (i.e. the days in which the substantive investigation and purported recovery of evidence from the Albert residence took place). R.A. at 23-24. Petitioner's narrowly tailored request for these records is not based on mere "speculation" or a

generalized claim that these witnesses *might* be lying. As discussed at length in Defendant's Rule 17 Motion, the factual basis underpinning defendant's request is significant. R.A. at 10-30. Conversely, the Commonwealth presents no facts whatsoever to support its contrary position that defendant's request is meant as a fishing expedition. Instead, the Commonwealth merely quotes the trial court's decision denying defendant's request on the basis that Brian Albert's and Jennifer McCabe's "compelling privacy interests" in the contents of their cell phones and cell phone records "far outweigh[] the defendant's **desire** for the materials requested." R.O. at 51 (emphasis added); R.A. at 439 (Trial Court's Memorandum of Decision). This statement by the trial court reveals a fundamental misunderstanding and/or failure to meaningfully consider the facts set forth in Defendant's Rule 17 Motion and Ms. Read's constitutional right to present a defense.

For example, with regard to the Commonwealth's claim that defendant's request for Jennifer McCabe's call detail records is somehow "frivolous" or constitutes "unnecessary harassment" (R.O. at 47), it is important to note that the Commonwealth and the Massachusetts State Police already recognized the evidentiary value of Jennifer McCabe's cell phone, which is why law enforcement collected it as

evidence, forensically imaged it, and later (albeit reluctantly) provided a copy of that forensic image to the defense. *See* R.A. at 15-16. Indeed, a significant portion of the evidence implicating Jennifer McCabe in O'Keefe's murder and the subsequent coverup thereof was obtained from an analysis of her device. Jennifer McCabe waived any claimed privacy interest in her cell phone when she voluntarily provided a *sanitized* copy of that phone to law enforcement, which she knew would be used in this prosecution. R.A. at 15-16. Thus, it is confounding that the Commonwealth objected to this request in the first place. To be clear, the only information requested by petitioner that even remains private (i.e. is not already in the defendant's possession) is location information and communications from the 7-day period surrounding O'Keefe's death **that Jennifer McCabe successfully scrubbed from her phone**. Jennifer McCabe does not have any meaningful privacy interest in the information she intentionally withheld and concealed from law enforcement, much less a "compelling" one. Conversely, Ms. Read's constitutional right to compulsory process and to defend herself against murder charges is extremely compelling given that the requested information is likely to further establish that third party culprit Jennifer McCabe tampered with evidence in this

case. In conclusion, Ms. Read's right to prepare and present a defense significantly outweighs any theoretical privacy interest Jennifer McCabe may have in the information she unilaterally chose to delete from her phone before she handed it over to MSP for use in this case.

Similarly, any inherent privacy interests Brian Albert may have in his phone are significantly outweighed by Ms. Read's constitutional right to present a defense, which is predicated on Brian Albert's involvement in O'Keefe's death and the subsequent coverup thereof, especially given the extremely narrow timeframe at issue in Ms. Read's request. As set forth at length above, Ms. Read's targeted request for Brian Albert's location information and communications sent and/or received between January 29, 2022, and February 5, 2022, is not "speculative" or based on a general need for evidence that might theoretically impeach a witness. As explained in more detail above, Defendant has already made a significant factual showing establishing that Brian Albert is implicated in O'Keefe's murder, or at the very least, the coverup thereof, including, *inter alia*: (1) Jennifer McCabe's incredibly inculpatory Google search; (2) Jennifer McCabe's affirmative deletions of evidence in the hours immediately preceding and following O'Keefe's death, including deletions of her contacts with Nicole and Brian

Albert on January 29, 2022; (3) Brian Albert's proximity to O'Keefe at the time of his death (i.e. the decedent was found dead on his front lawn); (4) evidence from decedent's phone that he made it into Brian Albert's house on the night in question, refuting Brian Albert's and Jennifer McCabe's claims that he never entered the residence; (5) Brian Albert's connection and ties to law enforcement, including his brother, Kevin Albert (Canton Police Department), and Trooper Michael Proctor (the lead detective assigned to this case); (6) conclusive proof that the Canton Police Department altered the original police report in this case in an effort to make Karen Read appear more guilty, while simultaneously concealing Brian Albert's cell phone information; (7) O'Keefe's injuries are wholly inconsistent with the Commonwealth's theory of the case; (8) O'Keefe suffered defensive wounds (i.e. bruising on the back of his hand consistent with being in a fight); (9) O'Keefe suffered deep lacerations on his right arm consistent with an animal attack (and inconsistent with being struck by a vehicle), which is incredibly inculpatory given that Brian Albert had a German Shepherd in the home at the time of O'Keefe's death; (10) Brian Albert suspiciously got rid of his family dog of seven years in the months following O'Keefe's death; (11) Brian Albert

lied to the trial court, falsely claiming that his dog had never bitten a human and was "rehomed" due to an incident involving another dog, when in truth the records show two individuals were hospitalized as a result of his dog's attack. The instant request for cell phone information is therefore expressly limited to Brian Albert's communications, web searches, and location information between January 28, 2022 (the night Brian Albert met John O'Keefe), and February 5, 2022 (the date law enforcement completed the bulk of its investigation into the case). Thus, Defendant's request for information from Brian Albert's cell phone is narrowly tailored to information that will further shed light on Brian Albert's involvement in and coverup of O'Keefe's murder in furtherance of Ms. Read's third party culprit defense.

In sum, for the reasons set forth above, Defendant's narrowly tailored request for third party culprit cell phone information is not a "fishing expedition." Moreover, Ms. Read's constitutional right to obtain this information in support of her defense outweighs any privacy interests claimed by third party culprits Jennifer McCabe and Brian Albert.

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C. The Court erred in quashing the summonses served on Jennifer McCabe and Brian Albert to testify at the evidentiary hearing

As explained in Petitioner's Brief, the trial court's decision to quash summonses for the personal appearance and testimony of Brian Albert and Jennifer McCabe at the May 25 evidentiary hearing violated Ms. Read's constitutional right to compulsory process and to present witnesses in her own defense as guaranteed by the Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights. U.S. Const., Amend. VI; Mass. Decl. of Rights, art. 12.

First, no legal authority supports the proposition that a third party witness can move to quash a summons for personal appearance at an evidentiary hearing. P.B. at 64-68. In the Intervenor's Opposition, Brian Albert mistakenly relies on Mass. R. Crim. Pro. 17(a) for the proposition that he may move to quash *any* summons, which he purports infringes on his legitimate interests, is unreasonable or oppressive, or is used to subvert the provisions of rule 14. Intervenor's Opposition (hereafter "I.O.") at 5-7. However, Rule 17(a), only authorizes a third party in interest to file a motion to quash a summons for the production of documents or objects, not a summons for personal appearance and testimony. *Compare* Mass. Rule of

Crim P. 17(a)(1) (providing no mechanism for quashing a summons for personal appearance and testimony), *with* Mass. Rule of Crim. P. 17(a)(2) (providing court may quash or modify summons on motion for production of documentary evidence and of objects if compliance is unreasonable or oppressive or used to subvert the provisions of rule 14). Thus, Mr. Albert's motion to quash was legally improper.

Notwithstanding that fact, Ms. Read recognizes that an accused's right to present witnesses on her own behalf is not "absolute." *Com. v Blaikie*, 375 Mass. 601, 608-610 (1978) (citing *United States v. Nobles*, 422 U.S. 225 (1975)). Indeed, it is the trial court's duty to control the scope of examination of witnesses and, in instances where the trial court questions whether a witness's testimony is appropriate, permits the trial court to request an offer of proof as to the need for the witness's testimony. *See id.* (explaining it is constitutional error for a court to quash a summons where defendant makes satisfactory offer of proof that the testimony of the witness would be relevant, material, and not cumulative).[13]

[13] Here, the trial court made a perfunctory ruling on Brian Albert's and Jennifer McCabe's motions to quash without requesting an offer of proof or making even the slightest inquiry as to the scope of the witnesses' testimony. R.A. at 372.

As discussed below, Mr. Albert's testimony was absolutely relevant and material to the disputed factual issues that were before the Court. This was not, as Mr. Albert suggests, an instance where petitioner filed a baseless Rule 17 Motion, devoid of any evidentiary support for its request, and then summonsed a witness in the hopes that she might be able to extract information to meet her burden or depose that witness to "create new evidence".[14]

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[14] In Intervenor's Brief, Mr. Albert pulls a misleading quote from the Supreme Judicial Court's decision in *In re Impounded Case*, 491 Mass. 109 (2022) for the general proposition that a "deposition order" under Rule 17 is inappropriate. I.O. at 11-12. That case is inapposite. In that case, the trial court granted a defendant's Rule 17 Motion to examine a social worker's treatment records concerning her work with the accuser. *In re Impounded Case, supra*, 491 Mass. at 109. When the social worker revealed that she had inadvertently destroyed the accuser's records after closing her private practice, the trial court ordered that, as a remedy for the destruction of records, the defendant would be permitted to conduct a limited deposition of the social worker. *Id.* A single justice of the Supreme Judicial Court, Justice Cypher, vacated the trial court's deposition order, finding no basis for the deposition order under Rule 17(a)(2). *Id.* Defendant appealed. *Id.* On appeal, the Supreme Judicial Court reversed Justice Cypher's decision, finding that **the deposition order was permissible under the courts' inherent power to do whatever may be done under the general principles of jurisprudence to ensure a fair trial**. *Id.* at 119-120. In doing so, the Supreme Judicial Court acknowledged that Rule 17(a)(2) typically only contemplates the examination of existing objects and "not the creation of new evidence", but held that extraordinary fact patterns may require courts to exercise their inherent authority to ensure a defendant's right to a fair trial. *Id.* Here, Ms. Read is not asking the court to order a "deposition" or the "creation of new evidence" pursuant to Rule 17(a)(2).

See I.O. at 10-12. Rather, as explained by Ms. Read's defense counsel at the hearing, because the Commonwealth (and the Intervenor) took the extraordinary position of disputing critical and substantiated facts underlying petitioner's request, the defense summonsed Mr. Albert for the purpose of resolving these factual disputes. R.A. at 371-372; *see* S.R.A. at 1-9.

Significantly, in the Intervenor's Opposition, Mr. Albert argues that he "could not possibly have assisted the Court in resolving any factual disputes raised by the various forensic experts retained by the petitioner and the Commonwealth." I.O. at 9. That is false. The incriminating 2:27 a.m. Google search, which Ms. McCabe deleted from her phone, was far from the only disputed fact at issue underlying Defendant's Rule 17 Motion. In point of fact,

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Rather, petitioner requested an **evidentiary hearing** to resolve disputed facts, which are: (1) already known to Ms. Read; (2) substantiated in Defendant's Rule 17 Motion; and (3) which the Commonwealth and/or Intervenor disputed. As discussed in Part II.D., *infra*, substantial authority exists for the trial court to hold an evidentiary hearing to resolve disputed facts separate and apart from Rule 17. Thus, the trial court's decision to adopt the unsupported and unsworn statements of the Commonwealth and the Intervenor, and reject the substantiated facts set forth in Ms. Read's Rule 17 Motion without an evidentiary hearing, violates her constitutional right to a fair trial, her constitutional right to prepare and present a defense, and her constitutional right to compulsory process. *See* U.S. Const., Amend. VI; Mass. Decl. of Rights, art. 12.

Mr. Albert himself, through counsel, filed an Opposition disputing numerous material and substantiated facts which formed the basis for Defendant's Rule 17 Motion, including (1) denying that he communicated with Jennifer McCabe on January 29, 2022 (S.R.A. at 5); (2) denying that his German Shepherd had a history of attacking human beings (S.R.A. at 6-7); (3) claiming, contrary to listing records, that he decided to sell his house before O'Keefe's death (S.R.A. at 5-6); and (4) denying the propriety of one of the three photos (*see* R.A. at 79, 535-537), which establish the Alberts have a pre-existing relationship with the lead detective on the case, Trooper Michael Proctor (S.R.A. at 7-8).

A closer look at some of these claims is instructive. For example, in Brian Albert's Opposition to the Subpoena of Defendant Karen Read, Mr. Albert represented to this Court that "there is no record of any phone conversations . . . between [himself] and Jennifer McCabe on January 28 and 29, 2022." S.R.A. at 5. This statement is provably false. The forensic examination of Jennifer McCabe's cell phone established that she actually exchanged **seven** phone calls with Brian Albert on January 29, 2022 (not including any calls that were successfully deleted by Ms. McCabe). R.A. at 46. Additionally, in Brian Albert's

Opposition to Ms. Read's Rule 17 Motion, he also disputed defendant's assertion that Mr. Albert rehomed his German Shepherd "Chloe" four months after O'Keefe's death because of her involvement in a violent skin-piercing incident. S.R.A. at 7. Specifically, Mr. Albert, through his counsel, made the following representation to the trial court:

> By saying [Mr. Albert's German Shepherd was involved in a] 'violent skin-piercing incident four months after O'Keefe's death,' the defense is asking the reader to conclude that the dog in question has a history of attacking human beings, and that it was sent away because it was violent toward people. [¶] As with other defense assertions, this is not true."

S.R.A. at 7 (emphasis added). **In fact, the defense assertion *was* and *is* true.** Significantly, records obtained pursuant to an order for the production of records from Canton Animal Control and the Canton Town Clerk *after* the filing of Defendant's Rule 17 Motion establish that Albert's counsel's representation (which was apparently adopted by the trial court) was false. In fact, according to official documents produced pursuant to a summons by the Canton Town Clerk and Canton Animal Control, two separate individuals (humans) were so badly injured by Mr. Albert's dog's attack on May 15, 2022 (mere months after O'Keefe's death), that they were transported to the ER by ambulance for treatment. R.A. at 539. One victim received treatment

for bites to her arms, neck, and leg; the other received treatment for a bite to her left hand. *Id.*

It is patently unfair that Mr. Albert was permitted to sway the trial court by making false and unsubstantiated representations in unsworn pleadings about material facts, while simultaneously refusing to allow Ms. Read to cross-examine Mr. Albert as to those unsworn statements in order to establish their falsity.[15] *See* R.A. 438. The trial court's decision to deny Petitioner the ability to resolve those disputed factual issues in her favor by summonsing witnesses (including Brian Albert) to testify at an evidentiary hearing sets a dangerous precedent, which would vitiate a defendant's pretrial right to compulsory process where the Commonwealth and/or Intervenor claims disagreement with substantiated facts produced by the defense. *See Commonwealth v. Gordon*, 82 Mass. App. Ct. 389, 394-395 (2012), citing *Commonwealth v. Stewart*, 383 Mass. 253, 260 (1981) (Generally, "where a substantial issue is

[15] The trial court inexplicably found that the only "credible" evidence set forth in Defendant's Rule 17 Motion, which supported her request for Brian Albert's cell records, was a single missed call between Brian Albert and Jennifer McCabe on January 29, 2022. R.A. at 438. Thus, the trial court apparently adopted Brian Albert's unsworn, unsubstantiated, and provably false claims in reaching her decision.

raised and is supported by a substantial evidentiary showing, the judge should hold an evidentiary hearing.")

As such, the Court's decision to quash the summons outright, rather than limiting the scope of Mr. Albert's testimony to resolving the facts disputed by the Commonwealth and/or Intervenor, was error.

D. The court's erroneous decision to cancel the evidentiary hearing violated Ms. Read's substantive rights

As set forth in Petitioner's Brief, the trial court made a series of procedural rulings that had no basis in law and prejudiced Ms. Read, including (1) cancelling an evidentiary hearing, which was necessary to resolve factual disputes material to Defendant's Rule 17 Motion; and (2) the trial court's consideration of the position of third parties Brian Albert and Jennifer McCabe as to whether an evidentiary hearing should go forward (after erroneously quashing summonses for their appearance). *See* P.B. at 59-71.

In Respondent's Opposition, the Commonwealth argues that the defendant proffered no support to warrant a belief that she was entitled to an evidentiary hearing. R.O. at 51. However, as explained above and at length in Petitioner's Brief, an evidentiary hearing is required if a defendant establishes that material facts are disputed and

that a hearing would assist the Court in resolving the dispute. *See Commonwealth v. Gordon*, 82 Mass. App. Ct. 389, 394-395 (2012), citing *Commonwealth v. Stewart*, 383 Mass. 253, 260 (1981) (Generally, "where a substantial issue is raised and is supported by a substantial evidentiary showing, the judge should hold an evidentiary hearing."); *United States v. Colón-Muñoz,* 318 F.3d 348, 358-59 (1st Cir. 2003). Here, Ms. Read filed a proper Rule 17 Motion supported by substantiated factual allegations, which the Commonwealth quite clearly disputed. *See* R.A. at 7-159. Thus, an evidentiary hearing was necessary in order for the trial court to properly resolve the material facts underlying Ms. Read's motion.

Indeed, it is precisely because of the significant factual disputes attendant to this motion that the Commonwealth agreed to an evidentiary hearing. *See* R.A. 245-247. Specifically, on April 14, 2023, Assistant District Attorney Lally emailed Attorney Elizabeth Little stating:

> The information you had sent accompanying the motion is being reviewed and I should have an answer for you on those issues at some point next week. 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. If 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.**

R.A. at 245 (emphasis added). How the Commonwealth can possibly argue that the defense misunderstood the "tone" of this email as evidencing the Commonwealth's agreement to an evidentiary hearing, and that instead this email "more accurately depicts the Commonwealth's understanding that for any criminal motion, neither party is entitled to an evidentiary hearing" is beyond comprehension. *See* R.O. at 52-53.

The trial court's erroneous decision to cancel the previously scheduled evidentiary hearing and force defendant to argue the merits of her Rule 17 Motion a day ahead of schedule, without notice, severely prejudiced Ms. Read and denied her a full and fair opportunity to argue the merits of her motion. *See* P.B. at 37-39. Although the trial court may have accepted Ms. McCabe's incriminating 2:27 a.m. Google search as true for purposes of the Rule 17 Motion, it disregarded significant substantiated evidence underlying Ms. Read's motion, including, *inter alia*, the location data obtained from O'Keefe's phone which clearly suggested he made it inside the residence that night; the fact that Ms. McCabe took affirmative steps to delete her call records in the hours immediately surrounding O'Keefe's

death; and Brian Albert's claims that his German Shepherd has never attacked a human being. *See Gordon*, *supra*, 82 Mass. App. Ct. at 394-395 (requiring evidentiary hearing where a material issue is raised, and a substantial showing is made by the movant). There is no doubt that the trial court's decision was improperly swayed by Brian Albert's unsworn claims and the two last-minute expert reports filed by the Commonwealth the day before the May 24, 2023 hearing. Thus, the trial court's decision to cancel the evidentiary hearing, while simultaneously resolving material factual disputes in the Commonwealth's favor, clearly violated Ms. Read's substantial rights.

III. MS. READ HAS NO ADEQUATE ALTERNATIVE REMEDY AND, ABSENT THIS COURT'S INTERVENTION, SHE WILL BE SEVERELY PREJUDICED

As set forth in Petitioner's brief, relief is warranted under G.L. c. 211, § 3 where a defendant "has no adequate alternative remedy." *McMenimen v. Passatempo*, 452 Mass. 178, 185 (2008). Denial of a request for third-party culprit evidence passes the threshold of irremediable error because a "defendant has a constitutional right to present evidence that another may have committed a crime." *Commonwealth v. Conkey*, 443 Mass. 60, 66 (2004) (citing *Commonwealth v. Tague*, 434 Mass. 510, 515-16 (2001)). Not

only does that denial satisfy the requirement that a substantial right be violated, but it also constitutes an irremediable error because the harm created by the delay will increase over time. *See Gilday v. Commonwealth*, 360 Mass. 170, 171 (1971).

In Respondent's Opposition, the Commonwealth argues that Ms. Read has failed to show prejudice because "defendant's expert may . . . testify at trial regarding his forensic examination of the victim's and Jennifer McCabe's cell phone data" and can cross-examine Brian Albert and Jennifer McCabe about their "actions, whereabouts, or motive." *See* R.O. at 54. However, Ms. Read cannot meaningfully cross-examine the Commonwealth's witnesses at trial without having pretrial access to these records, which are directly relevant to her third party culpability defense. Moreover, defendant requires access to this information in advance of trial such that this information can be included in motions *in limine* and other pretrial motions, including a motion to dismiss the indictments in this case. Finally, the "normal appellate process" is wholly inadequate, whereas here, the evidence has a substantial likelihood of being lost and/or destroyed with the passage of time. Moreover, forcing Ms. Read to wait until after she has expended all of her resources on

what will be a months-long trial to challenge these erroneous decisions is patently unfair.

Thus, the trial court's erroneous decisions in this case clearly prejudiced Ms. Read. Absent intervention by this Court, Ms. Read is left with no adequate alternative remedy.

Respectfully Submitted,
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Dated: October 27, 2023

CERTIFICATE OF SERVICE

I, Elizabeth S. Little, hereby certify that on this date, October 27, 2023, I served the foregoing document upon Respondent and interested third-parties, Brian Albert and Jennifer McCabe, via electronic mail to the following counsel of record:

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