

STATE OF SOUTH CAROLINA

VOLUME II OF II

In The Court of Appeals

 ORIGINAL

APPEAL FROM CHARLESTON COUNTY

R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RECEIVED

RESPONDENT, SEP 23 2015

SC Court of Appeals

V.

DEVIN JOHNSON,

APPELLANT

APPELLATE CASE NO. 2014-000766

RECORD ON APPEAL

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THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:

State’s Exhibit # 55 (CD Surveillance video), # 56 (CD of interview w/defendant), #60 (video still), # 61 (video still), # 62 (video still), #63 (video still), # 71 (cell tower map), #72 (cell tower map), #73 (cell tower map), #74 (cell tower map), #75 (cell tower map)

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1 apply fairly and impartially to those facts
2 that you will determine very shortly when you
3 begin your deliberations in this case.

4 Each of you will, when instructed,
5 I'm confident, evaluate all the evidence and
6 apply your commonsense and sense of logic and
7 reasoning and decide what you find to be
8 credible and believable and take the law and
9 apply it to that and report your decision.
10 And when you've done that, you will have
11 honored the commitment that you've made to
12 the parties in this matter.

13 It is essential that you assess all
14 evidence, including testimony that's
15 contradicted directly. I say that to you
16 because there always remains the inherent
17 probability and credibility of what one says.
18 And you have to assess that by applying your
19 sense of logic and reasoning and your life's
20 experiences.

21 During this instruction, you may
22 hear me use and have heard me use during the
23 trial, as I mentioned to you at the start,
24 the term of "defendant." And that's simply a
25 term to designate a party. In this case, Mr.

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1 Johnson is the defendant because of these
2 claims that have been made against him. So
3 when you hear that, please know that I'm
4 referring to Mr. Johnson.

5 As I told you when we started --
6 when we qualified you, he'd been accused in
7 these two documents which I hold in my hand;
8 they are what they appear to be, they are
9 pieces of paper. They're called indictments
10 but they will not accompany you to your jury
11 room. And the reason for that is because
12 they're not evidence. They merely contain
13 the allegations or accusations against Mr.
14 Johnson.

15 To these indictments, he's entered a
16 plea of not guilty, which as I stated when we
17 first started, places the burden solely upon
18 the State to prove his guilt beyond a
19 reasonable doubt.

20 For, you see, any person in this
21 state or this country accused in a criminal
22 offense is never required to come in and
23 prove himself or herself innocent or prove
24 anything at all. No, as I stated, there a
25 principle of law that we call the presumption

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1 of innocence. And that applies to Mr.
2 Johnson. Each one of you is required under
3 our law and by your oath to actively presume
4 that he is not guilty.

5 The presumption of innocence is
6 maintained at all times throughout the trial
7 of this case and is only removed when, at the
8 end of the case, you evaluate the evidence,
9 and you're convinced the State has brought in
10 enough evidence to persuade you beyond a
11 reasonable doubt that he is guilty of one or
12 more of these offenses.

13 So, ladies and gentlemen, as I told
14 you, a person so accused doesn't have to
15 prove or disprove anything at all. There-
16 fore, a person accused of a criminal offense
17 is not required to testify at all and that
18 cannot be considered against that defendant
19 under any circumstances or in any manner
20 whatsoever.

21 The fact that Mr. Johnson in this
22 case did not testify should not be discussed
23 by you in your room. You can't even -- you
24 should never put any weight or emphasis on
25 that. If you do, you will have violated your

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1 oath, because it rests solely upon the State
2 to prove his guilt beyond a reasonable doubt.

3 What is a reasonable doubt? A
4 reasonable doubt is a doubt that would make
5 an honest, conscientious juror who's
6 searching for the truth in a case to hesitate
7 to act. Proof beyond a reasonable doubt is
8 proof that leaves you firmly convinced of Mr.
9 Johnson's guilt.

10 I will tell you that there are very
11 few things in this life and this world that
12 you know with absolute certainty. Our law
13 does not require proof that overcomes every
14 possible doubt.

15 If based upon your considerations of
16 the evidence you are firmly convinced that he
17 is guilty, then you must return a verdict of
18 guilty as to that particular crime.

19 If, on the other hand, you think
20 there is a real possibility that he's not
21 guilty, then you must give him the benefit of
22 that doubt and return a verdict of not
23 guilty.

24 A reasonable doubt, ladies and
25 gentlemen, may arise from the evidence which

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1 is in the case or a lack or absence of
2 evidence. And it's up to you to determine
3 whether or not a reasonable doubt exists as
4 to this defendant after considering the whole
5 case.

6 And what do I mean by that? If upon
7 any issue of fact which would be essential
8 for you to return a verdict of guilty you
9 should have a reasonable doubt as to how that
10 should be resolved, I would instruct you that
11 you must resolve that in his favor.

12 Now, the evidence which you are to
13 consider consists of the testimony of the
14 witnesses and the exhibits that have been
15 introduced through their testimony, nothing
16 else. You have heard a number of things.
17 You've heard the attorneys' arguments and
18 opening statements. You're hearing my
19 charge.

20 You even heard attorneys raise
21 objections and you heard my rulings sometimes
22 on those objections. Please understand that
23 first of all, it is extremely proper and
24 exactly what they, as officers of this Court
25 have to do, and that is when a matter is

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1 heard for which there is some objection, they
2 have to raise it. Now, typically, those
3 dealt with evidentiary matters and rules of
4 evidence. You even heard me say "the Rules"
5 from time to time. And that's solely for
6 purposes of my ruling and not for your
7 consideration whatsoever.

8 The fact that an attorney made an
9 objection or reasons for that should not be
10 considered. My basis for overruling or
11 sustaining should not be considered, because
12 if you do, you step into my area of my
13 responsibility. And as I've told you, there
14 are two judges working together. And our
15 jobs and responsibilities are well-defined.

16 And, in fact, probably one of the
17 rulings that best illustrates and
18 demonstrates how we work together to resolve
19 this dispute. If an objection was made and I
20 overruled an objection then you heard the
21 question and answer. If you think now,
22 'well, since the judge overruled it, I guess
23 I have to accept that.' Well guess what?
24 You've allowed me to step into your area of
25 responsibility. At the moment I overruled

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1 it, it shifted to you. You then decide
2 whether or not you believe it, and if so, how
3 strongly. And that's how we work together.
4 I make rulings on the evidentiary rules and
5 you'll make the rules on whether you believe
6 it or how credible the testimony was.

7 The remarks of the attorneys, as I
8 told you, were very important. But please
9 remember if an attorney recited what a
10 witness said or didn't say is different from
11 your collective recollection, then you're
12 instructed to disregard the attorney's
13 statement in its entirety. Why? Because you
14 are the sole judges of the facts in this case
15 and so you're the sole judges of what a
16 witness said or didn't say.

17 Also, if there were statements
18 concerning the law, a difference with the law
19 as I give it to you, you're instructed to
20 disregard that statement, and take the law as
21 I gave it to you, because for purposes of
22 this proceeding today, I'm the sole Judge of
23 the law and you have promised to accept the
24 law as I give it to you.

25 Ladies and gentlemen, there are two

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1 types of evidence that juries customarily or
2 commonly consider. Not every case has both,
3 but most of the time they do. One is called
4 direct evidence. The other is indirect, it's
5 often popularly named or more common name is
6 circumstantial evidence.

7 Direct evidence, as the name would
8 imply to you, generally deals sensory
9 perception. It doesn't require any
10 inference, presumption, or the like. And
11 it's simply somebody said, 'I saw something,
12 I heard something, I felt something' or the
13 like. And if you are firmly convinced of
14 that testimony being credible and believable,
15 it would establish that particular fact or
16 circumstance.

17 Circumstantial evidence, unlike
18 direct evidence is when a person testifies to
19 a number of circumstances or facts. And when
20 you link them, either through deductive or
21 inductive reasoning, it leads you to a
22 logical conclusion. And that would be the
23 truth of that particular conclusion if you're
24 firmly convinced as to each of those facts,
25 and those facts have been established by the

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1 evidence in the case.

2 Now, I will tell you that the law
3 makes absolutely no distinction between the
4 weight or the value of either direct or
5 circumstantial evidence, nor is any greater
6 degree of certainty required of
7 circumstantial evidence than direct evidence.
8 You're instructed to weigh all the evidence
9 in this case.

10 But our law does say that to the
11 extent that the State relies on circum-
12 stantial evidence, that evidence, that
13 circumstantial evidence has to meet certain
14 tests. First, as I've stated the State, as
15 to each one of those events and circumstances
16 from which they rely, the State has to prove
17 those beyond a reasonable doubt. You have to
18 evaluate that and decide is there any other
19 reason, other than -- does it lead you to any
20 other conclusion, other than guilt?

21 In other words, the evidence must
22 point conclusively to the defendant's guilt
23 before you could rely on it. And lead you
24 only to -- and convince only to the logical
25 and necessary conclusion that he's guilty

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1 beyond a reasonable doubt, because the facts
2 in a case must point conclusively to the
3 guilt of a defendant. If it only leads you
4 to the conclusion and makes you suspicious of
5 his guilt or makes his guilt probable, that
6 will not be sufficient for a verdict of
7 guilty, because the mere fact that
8 circumstances point out that a case is strong
9 and suspicious of guilt or the defendant's
10 guilt is probable would not be enough,
11 because the truth has to be more than mere
12 suspicion, more than probable. It has to be
13 proof that convinces you beyond a reasonable
14 doubt.

15 Now, how do you decide the facts of
16 a case? You decide those facts by applying
17 the logic, your sense of logic and reasoning.
18 As we have stated when we qualified you -- as
19 we chatted when I qualified you, I'd hate to
20 guess how many times a day we do this, we go
21 through the of reading something or hearing
22 something and deciding for ourselves whether
23 we believe it. So you're very qualified and
24 capable of doing it. And I just urge you to
25 do that when you begin your deliberations.

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1 And there are many, many factors
2 that one may consider to assist them in
3 performing this task. I'm going to discuss
4 some of the factors that you may want to
5 consider but if I don't mention a method or
6 factor that you've used in your life and
7 you've found to be reliable, please employ
8 them in your deliberations and use them to
9 assist you in making this determination.

10 But some the things that you may
11 want to consider would be the appearance of
12 the witness.

13 How did they appear to you on the
14 witness stand, straightforward or hesitant in
15 answering the questions?

16 Was the testimony of the witness
17 consistent or was it inconsistent?

18 How did the witness come to know the
19 facts that he or she testified to and what
20 was the ability of that witness to know those
21 particular facts and circumstances?

22 Is there a reason for a witness to
23 give testimony, which may be helpful to one
24 side or the other, or which may be detri-
25 mental to one side? In other words, was the

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1 witness biased or prejudiced in any way.

2 In determining and making the
3 assessment and reaching the conclusion of
4 believability of a witness, you're entitled
5 to believe one witness against many, many
6 witnesses against one. You're entitled to
7 believe parts of a witness's testimony, all
8 of the witnesses testimony or none of the
9 witnesses testimony.

10 Now, you don't make these decisions
11 arbitrarily, but there's a reason in the
12 evidence in this case for taking that
13 position you have that prerogative because
14 your objective, what you accepted and what
15 you promised to do is to consider all the
16 evidence and determine what you believe to be
17 the truth, regardless of the source of the
18 evidence.

19 During this trial, ladies and
20 gentlemen, a statement attributed to the
21 defendant has been admitted into evidence.
22 And while the Court has made a determination
23 that the statement is admissible, I now
24 instruct you that you have to make the
25 ultimate decision of whether or not the

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1 Defendant made the statement and if the
2 Defendant did make the statement, you must
3 determine whether the statement was made by
4 the Defendant voluntarily and of his own free
5 will. This means that the statement was not
6 caused by impression force, fear, coercion or
7 intimidation or by hope or promise of
8 leniency or reward of any kind.

9 In determining whether the statement
10 was voluntary, you should consider both the
11 characteristics of the defendant and the
12 details of the questioning. Some of the
13 factors that you may consider are the age of
14 the defendant, the defendant's education or
15 lack thereof. The defendant's mental ability
16 or capacity, the defendant's IQ or
17 intelligence, the defendant's background.

18 You may consider the environment,
19 the place and length of the detention, the
20 nature of the questioning, and the advice or
21 lack thereof to the defendant of his or her
22 Constitutional rights; including but not
23 limited to the right to remain silent, that
24 any statement could be used against him in a
25 court of law, the right to have a lawyer

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1 present, and that if he could not afford a
2 lawyer, a lawyer would be appointed to
3 represent him without any costs, and that he
4 could stop making the statement at any time.

5 You must carefully consider all of
6 the surrounding circumstances before you give
7 any weight to the alleged statement.

8 I would instruct you that the State
9 has the burden of proving beyond a reasonable
10 doubt that the alleged statement was
11 voluntary. If you determine that it was, you
12 may give the statement any further
13 consideration that you deem it proper.

14 You must decide what weight, if any,
15 should be given to the alleged statement.

16 If you determine, however, that the
17 alleged statement was not freely and
18 voluntary, then you should not consider the
19 statement at all.

20 Now, ladies and gentlemen, while
21 you're given very broad discretion, wide
22 latitude regarding determining what you
23 believe to be the facts of the case, when it
24 comes to the law, as I've mentioned to you,
25 you must accept the law as I give it to you

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1 and apply that law fairly and impartially to
2 the facts.

3 As we talked when we qualified you
4 for this case, there are principles of law
5 with which we all may differ. That's our
6 right to do that, to feel that way.

7 And I'm sure that all of us in the
8 information society in which reside and live,
9 have come into this courtroom with ideas of
10 what we believe the law to be and thought the
11 law should be and I understand. But for
12 purposes of this proceeding you have promised
13 everyone -- the court, the parties and
14 attorneys -- that you would set aside
15 whatever beliefs you have and take the law as
16 I give it to you and apply that fairly and
17 impartially. And I'm confident that you will
18 do that.

19 Please do not put any greater weight
20 or emphasis on any one aspect of the charge.
21 You must consider the charge as a whole.

22 The fact that I give you instruction
23 on any particular issue should not be taken
24 by you to as a suggestion or inference of how
25 you're to resolve that particular issue.

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1 That's yours to resolve and my charge has
2 nothing to do with the facts and shouldn't be
3 considered a statement of the facts.

4 The order of the instruction means
5 nothing. I had to put it in some order to
6 give it to you. So when you go back, apply
7 the charge as a whole to your analysis of the
8 evidence and then, of course, your decision.

9 Let's look at the two charges. As I
10 mentioned to you, the indictments contain
11 two: one, he's accused of the commission of
12 the crime of murder; and, the other is
13 commission of the crime of possession of a
14 firearm during the commission of a violent
15 crime.

16 Let's look at the murder charge
17 first. Section 16-3-10 of the South Carolina
18 Code of Laws defines "murder" as the killing
19 of any person with malice aforethought,
20 either expressed or implied.

21 The State must prove beyond a
22 reasonable doubt that Mr. Johnson killed
23 another with malice aforethought. Malice is
24 hatred, ill will, hostility towards another
25 person. It is the intentional doing of a

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1 wrongful act without just cause or excuse and
2 with an intent to inflict an injury or under
3 circumstances that the law will infer an evil
4 intent. Malice indicates a formed purpose
5 designed to do an unlawful act under the
6 circumstances that exclude any legal right to
7 do.

8 Further, there must be malice
9 aforethought, which means that the malice
10 must have been conceived in the mind of the
11 defendant prior to the act producing the
12 fatal result. The word "aforethought" is
13 usually understood to refer to the time when
14 the deed was conceived.

15 The law does not require, however,
16 that the malice must exist for an appreciable
17 length of time before the commission of an
18 act. It may be conceived at the very moment
19 the action is taken, which results in the
20 death of another. Therefore, there must be a
21 combination of a previous evil intent and the
22 act.

23 Malice aforethought may be expressed
24 or inferred. Now, the terms expressed and
25 inferred do not mean kinds of malice but

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1 merely the manner in which malice may be
2 shown to exist. This may be either by direct
3 evidence or circumstantial evidence or
4 inferences to be drawn from those
5 circumstances.

6 Express malice is when a person
7 speaks words that express hatred or ill will
8 for another or when the person prepared
9 beforehand to do the act, which was later
10 accomplished.

11 Malice may be inferred from a
12 conduct showing a total disregard for human
13 life. It also may be inferred -- inferred
14 malice may also arise when the deed is done
15 or committed with a deadly weapon.

16 A "deadly weapon" is any article,
17 instrument or substance which is likely to
18 cause death or great bodily harm. Whether an
19 instrument has been used as a deadly weapon
20 depends on the facts and circumstances of
21 each case. And I will instruct you in that
22 regard that a pistol is, under our law,
23 considered to be a deadly weapon.

24 If the facts are proved beyond a
25 reasonable doubt sufficient to raise an

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1 inference of malice to your satisfaction,
2 this inference would be simply an evidentiary
3 fact to be taken into consideration by you,
4 along with all other evidence in this case
5 and you may give it the weight you find it
6 should receive.

7 You, as jurors, the judges of the
8 facts, are free to accept or reject this
9 inference, depending on your view of the
10 facts.

11 I will instruct you that malice is
12 present in the mind of the one doing the
13 killing any length of time before the act.
14 And its presence would be sufficient to
15 render the killing murder.

16 Now let's look at the offense of
17 possession of a weapon during a violent
18 crime. Section 16-23-490 provides in part
19 that if a person is in possession of a
20 firearm or displays what appears to be a
21 firearm during the commission of a violent
22 crime and is convicted of committing or
23 attempting to commit a violent crime as
24 defined by Section 16-1-60, which defines
25 murder as a violent crime, then they will be

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1 guilty of this offense as described by this
2 section.

3 The term "firearm" is defined in
4 this section as any gun, pistol, revolver or
5 any weapon which will or is designed to be or
6 may readily be converted to expel a
7 projectile.

8 Now, criminal intent is a necessary
9 element of the crime of murder and that must
10 be proved by the State beyond a reasonable
11 doubt. Criminal intent is always a matter
12 that must be determined by you as the judges
13 of the facts from the circumstances
14 surrounding the situation. So the law states
15 that criminal intent may be inferred from the
16 circumstances that have been shown to exist.

17 The State is not required to prove
18 motive, although the presence or absence of
19 this evidence and motive may be considered in
20 making your determination in this case.

21 Criminal intent is a state of mind
22 and operates jointly with an act in the
23 commission of a crime. Intent include those
24 consequences, which represent the very
25 purpose for which an act is done or known to

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1 be substantially certain to result regardless
2 of one's desire.

3 Criminal intent is a mental state of
4 conscious wrongdoing and it's up to you to
5 determine what the defendant intended to do,
6 based on the circumstances shown to have
7 existed, assuming, of course, that you are
8 convinced beyond a reasonable doubt that he
9 is the person that committed the act alleged
10 to have been committed.

11 The State must prove criminal
12 intent, as it must prove every other element,
13 beyond a reasonable doubt.

14 Ladies and gentlemen, you are not
15 partisans or advocates for the State or Mr.
16 Johnson. You have no friends to reward nor
17 do you have any enemies to punish. In fact,
18 you have been called upon as judges of the
19 facts to do something which, I will confess
20 to you, is extremely difficult to do as human
21 beings. But we all have to do it, I have to
22 do it and you have to do it. Because human
23 emotion has no place in performing the task
24 of rendering judgment. You must set aside
25 all of your emotion in making your decision.

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1 You must -- you will be expected and I know
2 that you will carefully methodically analyze
3 the evidence, setting aside all human emotion
4 in deciding what you believe to be the facts,
5 applying the law, and reporting your
6 decision.

7 To assist you in reporting that
8 decision, Madame Presiding Juror, I've
9 prepared two verdict forms, which I'll be
10 sending back with the evidence. I'd like to
11 discuss them with you here.

12 We have one for possession of a
13 firearm during the commission of a violent
14 crime and another for the crime of murder.
15 They both are identical, the caption. The
16 caption means nothing to you. That's just to
17 facilitate the filing of the document, don't
18 read anything into that.

19 The body reads, one says -- will be
20 for murder and the other for the possession
21 of a firearm, (reading): "We, the jury, by
22 unanimous consent find the Defendant, Devin
23 Johnson, on the charge of murder..." -- and
24 there are two choices. The order in which
25 they appear means nothing. I had to put them

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1 in some order. One is guilty, the other is
2 not guilty.

3 You notice there's a blank that
4 precedes the option. If you will place a
5 check in that and circle it, we'll know
6 that's your choice. If you'll sign it where
7 it says Presiding Juror, then you'll do the
8 same for the possession of a firearm.

9 What will you be saying if guilty is
10 your verdict? Of the crime of murder, you
11 will be saying that you're convinced beyond a
12 reasonable doubt, that is firmly convinced,
13 that the State has established each element
14 and has convinced you that Mr. Johnson on
15 this particular occasion, did with malice
16 aforethought, kill the victim in this case.

17 If that's your verdict -- and
18 unanimous consent, ladies and gentlemen,
19 means what you think it means. Everybody
20 must agree. Twelve to zero has to be the
21 verdict. If, on the other hand, you're not
22 firmly convinced of one of more element of
23 the crime of murder, then you must return a
24 verdict of guilty [sic]. Again, all twelve
25 of you must agree.

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1 The possession of a firearm during
2 the commission of a violent crime of course
3 is in a separate charge, but really is only
4 considered if you have returned a verdict of
5 guilty of murder. If you fail to find him
6 guilty of murder, then obviously he cannot be
7 guilty of possession of a firearm during the
8 commission of a violent crime because he
9 didn't commit a violent crime. So you would
10 have to return a verdict of not guilty.

11 But if you find him guilty of the
12 murder, then you have to consider this
13 charge. You have to decide whether the state
14 has convinced you beyond a reasonable doubt
15 that he presented or presents a firearm in
16 the commission of that murder.

17 If you're firmly convinced as to
18 each element, then you return a verdict of
19 guilty. On the other hand, if you're not,
20 then you would return a verdict of not
21 guilty, signed by the foreperson.

22 Do the first twelve of you feel
23 comfortable that you can finish this case?
24 If anyone feels that they cannot, raise your
25 hand. (No response).

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1 Mr. Alternate, at this point I'm
2 going to ask that you, when I excuse the jury
3 in just a few moments, that you not return to
4 the jury room. They will take you to another
5 room and I will be in very shortly to discuss
6 with you how long you need to remain with us.

7 I know you're anxious to get started
8 with your deliberations, and you're almost
9 there. I have to discuss my charge with the
10 attorneys and it may be -- and in order to do
11 that, I have to excuse you from the courtroom
12 as we have done throughout the trial, it's a
13 matter of law.

14 If there's a need to bring you back
15 and give you some additional instruction or
16 explanation, we'll do that. We'll bring the
17 first twelve and the alternate.

18 But if there aren't any additions
19 then we will gather the exhibits and deliver
20 them to you. When you receive the exhibits,
21 then you can begin your deliberations, not
22 before.

23 Now, the only restriction I place on
24 the deliberations is simply this. If any
25 juror has to leave the table for any reason,

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1 you must stop deliberating until all twelve
2 of you are together. Other than that, you
3 can proceed as you deem fit and proper.

4 Now, the videos, if anyone, you need
5 to review those, we'll bring you back to the
6 courtroom. We will not be sending you the
7 videos. So if you need to see those again,
8 just send us a note and we'll bring you in to
9 accomplish that. I believe all the other
10 evidence will be forwarded to you. Thank you
11 very much for your attention. Please retire
12 to your jury room and await your exhibits
13 before commencing your deliberations.

14 (JURY OUT @ 3:55 P.M.)

15 THE COURT: Exceptions?

16 MR. BUTLER: We're going to have to
17 flip a coin or have it read back -- I'm sure
18 that they understood but I believe you said
19 -- in the firmly convinced the section after
20 the definition of murder, I believe we both
21 noticed that you said if you're firmly
22 convinced you must find him guilty and if
23 you're not firmly convinced, you must find
24 him guilty.

25 SOLICITOR SIMPSON: Yes, sir.

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1 THE COURT: Well, If I said that,
2 I will bring them back in. I don't mind
3 clarifying that if I said that.

4 COURT REPORTER: (Affirmative nod),
5 you did.

6 THE COURT: Then I need to bring
7 them back in.

8 MR. BUTLER: Thank you.

9 SOLICITOR SIMPSON: I'm sure they
10 understood it.

11 THE COURT: I'll be happy to do
12 that. That's fine. Any other exceptions or
13 additions from anyone?

14 MR. BUTLER: No, sir.

15 SOLICITOR SIMPSON: None from the
16 State.

17 THE COURT: The circumstantial
18 evidence covered?

19 MR. BUTLER: Yes, sir.

20 THE COURT: Bring them back in,
21 please, sir. Thank you for catching that. I
22 appreciate it.

23 BAILIFF: The Alternate too?

24 THE COURT: Yes, sir.

25 (JURY IN @ 4:00 P.M.)

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1 BAILIFF: The jury's present.

2 THE COURT: Thank you very much.

3 Thank you. Ladies and gentlemen, it was
4 called to my attention and it's clear from
5 the record that I may have said if you are
6 firmly convinced that the State has proven
7 all the elements of a charge beyond a
8 reasonable doubt that you must find the
9 defendant guilty, and say that if you are not
10 firmly convinced that you must find him
11 guilty. Obviously I misspoke.

12 If you are firmly convinced of each
13 element of the crime of murder, then you must
14 return a verdict of guilty.

15 If, on the other hand, you're not
16 firmly convinced as to one or more elements
17 of the charge of murder then you must find
18 the defendant not guilty.

19 If you do not find the defendant
20 guilty of murder, then he would not be guilty
21 of possession of a deadly weapon during the
22 commission of a violent crime.

23 Please disregard that faux pas on my
24 part. I appreciate them both counsel
25 bringing it to my attention and I appreciate

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1 your understanding.

2 Please retire to your jury room and
3 when you receive the exhibits you may begin
4 your deliberations.

5 (JURY OUT @ 4:03 P.M.)

6 THE COURT: Any exceptions or
7 additions?

8 SOLICITOR SIMPSON: No, Your
9 Honor.

10 THE COURT: From the Defense?

11 MR. BUTLER: No, sir.

12 THE COURT: Thank you very much.

13 (ALTERNATE DISMISSED)

14 (COUNSEL APPROVAL OF EXHIBITS)

15 (JURY IN DELIBERATION @ 4:07 P.M.)

16 (RECESS)

17 (NOTIFIED OF JURY QUESTION @ 5:00 P.M.)

18 (DEFENDANT PRESENT)

19 THE COURT: Request to see the
20 video and -- Solicitor, you're right. I owe
21 you an apology.

22 SOLICITOR SIMPSON: I'm sorry.

23 THE COURT: They're wanting to
24 know about the hand of one is the hand of
25 all.

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1 And I think by their requests,
2 they've viewed the facts, and I think the
3 facts -- because you've got -- just being
4 present doesn't mean he's liable, so you've
5 got to charge that charge.

6 MR. BUTLER: I have to object
7 because I didn't address that in my closing.

8 THE COURT: Well, I understand
9 that.

10 MR. BUTLER: You know, and if I had
11 thought that that was an issue, I would have
12 addressed it. So I have to object, based on
13 the possibility of ineffective assistance of
14 counsel.

15 THE COURT: Well, you want to
16 argue? I'll allow you to argue about it.

17 MR. BUTLER: Well, that puts me in
18 a box.

19 THE COURT: No, it doesn't put you
20 in a box. I agree with you. I think that
21 the evidence that they've requested obviously
22 and asked the question, if he's present, does
23 being present merely make him responsible?
24 But being present with some prior involvement
25 does make him responsible.

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1 MR. BUTLER: I would say on the
2 evidence that we have, the answer to that is
3 no in this case. The only evidence ---

4 THE COURT: That's commenting on
5 the weight of the evidence, unfortunately and
6 I can't do that.

7 MR. BUTLER: Well, then the only
8 answer is 'you have all the evidence and you
9 have all the law.'

10 THE COURT: All right. I
11 appreciate it. I'll give you -- I'll put
12 this on there. I note your objection. I'll
13 give you an opportunity to make an argument
14 that the hand of one the hand of all, both of
15 you.

16 MR. BUTLER: I'm afraid if I do do
17 that, that I've waived the issue.

18 THE COURT: I appreciate that.

19 MR. BUTLER: I know you do.

20 THE COURT: I believe it's curable
21 if, in fact, you're entitled to an argument
22 about the charge.

23 What's the State's position?

24 SOLICITOR SIMPSON: Your Honor,
25 the State ---

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1 THE COURT: I can tell you that
2 the case -- my classmate was reversed on
3 that. Said 'I wasn't going to charge
4 something' that he -- or said, 'I'm going to
5 charge something and he didn't charge it.'
6 That was a different case, said I'm going to
7 charge it and he didn't. This is, I didn't
8 charge it but now -- that's the distinction
9 that I'm drawing. I'm familiar with that ---

10 MR. BUTLER: Jones, Lexington.

11 THE COURT: Well, I don't where it
12 was, but it was definitely Marc Westbrook was
13 trying it.

14 MR. BUTLER: Yeah. He said I'm not
15 going to charge it.

16 THE COURT: He said, I'll charge
17 that, and then he got into court and he said,
18 'I changed my mind. I'm not going to charge
19 it.' It was raised and he said, 'I decided
20 not to charge it.'

21 MR. BUTLER: Yes, sir. I have to
22 object to it being charged. And I have to --
23 they've already started deliberation.

24 THE COURT: Certainly.

25 MR. BUTLER: I have to also object

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1 to even being given the opportunity. And I
2 appreciate it, I really do. But I think I'm
3 worried that I waive the issue if I say, yes.

4 THE COURT: Anything?

5 SOLICITOR SIMPSON: The State is
6 fine with just giving the charge, but if you
7 feel that it's curable by some argument.

8 THE COURT: Well, I'm affording
9 the opportunity.

10 SOLICITOR SIMPSON: Okay.

11 THE COURT: I understand what
12 you're saying. I mean, all you can talk
13 about is what's there. And you've said
14 there's no evidence, but the problem is
15 there's evidence that he -- you have to
16 believe he was there and you'd have to
17 believe he was involved under the evidence.

18 I'd love to. Frankly, if we had the
19 federal right to charge someone with the
20 facts, I could fashion a charge but -- but I
21 can't under our Constitution. I can't charge
22 on the facts. I can't, you know. That would
23 be reversible error.

24 MR. BUTLER: This has just never
25 come up before. I thought ---

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1 THE COURT: Hasn't come up with
2 me, either.

3 MR. BUTLER: You know, I've never
4 been given the opportunity to argue after
5 they've already deliberated. I'm just trying
6 to think of the many consequences to that.

7 THE COURT: Sure. Well, we can do
8 this. We can bring them in here. Give you a
9 chance to think about it, if you need to. We
10 let them see the excerpts they want to see.
11 And then ---

12 MR. BUTLER: And I have to make a
13 call.

14 THE COURT: That's fine.

15 MR. BUTLER: Yes, sir.

16 THE COURT: They want the murder
17 charge. I'm going to send back my murder
18 charge. I've copied it. Here's a copy for
19 you. And I'm going to send back what I read
20 to them verbatim.

21 MR. BUTLER: And, Judge, I know
22 they haven't asked, but if you send it back,
23 I would request that the whole charge go
24 back.

25 THE COURT: Well, I appreciate

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1 that, but that's not what they've asked for.
2 And I'll be happy to put it on the record.
3 But, I mean, I do tell them 'if there's
4 anything else you want, I'll be happy to give
5 it to you.'

6 MR. BUTLER: Yes, sir.

7 THE COURT: But if you object to
8 that, I'd love to have that argued before the
9 Supreme Court. So it suits me fine. So
10 we'll get to the point that way. But I
11 follow the instruction.

12 MR. BUTLER: Yes, sir.

13 THE COURT: And that's why I'm
14 giving them the hand of one, because I think
15 is a legitimate request, an additional law
16 that needs to be given, explained. I don't
17 think it requires any great argument about
18 it. Because obviously they would have to
19 conclude that he was there and was the one
20 who fired the shot, to even ask the question.
21 Or somebody ask.

22 MR. BUTLER: Somebody does. It
23 could be one person.

24 THE COURT: It could be one or it
25 could be a question that came out of "what

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1 if" and nobody's really passed judgment on
2 it. But they need to understand that just
3 merely being present at the scene of a crime
4 does not make one culpable, which I can
5 certainly state. But there is a law that
6 says if you're there, and you're part of the
7 overall scheme, you can be. So I've got to
8 give them both sides and I do. My hand of
9 one -- here it is. I've copied of that, too.
10 Here is a copy, (tendering), of the hand of
11 one the hand of all.

12 SOLICITOR SIMPSON: Is there any
13 specificity as to -- do they want all of it?

14 THE COURT: Well, first of all.
15 Let me -- here's the note. We need to tell
16 her to use a whole sheet, but I'll tell them
17 when he comes in no problem.

18 That's Court's Exhibit 2.

19 COURT REPORTER: It is.

20 (SO ENTERED AS COURT'S EXHIBIT 2)

21 THE COURT: Okay. And I'm going
22 to make the charges collectively Court's
23 Exhibit 3. I brought you a copy.

24 (SO ENTERED AS COURT'S EXHIBIT 3)

25 THE COURT: They want to see

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1 interrogation pieces with Devin previously
2 shown. So they want to see those. Do y'all
3 have those marked?

4 SOLICITOR SIMPSON: I don't know
5 if we do, Your Honor. I think that's in my
6 office. I'm sorry.

7 THE COURT: You need to go get
8 that.

9 MR. BUTLER: May I step out?

10 THE COURT: Yeah, but let me tell
11 you all, the text they want -- I don't know
12 what this means. Text from 11:42 to 9:34?

13 SOLICITOR SIMPSON: There aren't
14 any.

15 THE COURT: Please see the Power
16 Point shown by the State.

17 SOLICITOR SIMPSON: Okay. Yeah,
18 I got it.

19 THE COURT: All right. And then
20 they say, "can we get the entire text
21 messages between Devin and Stephen." And
22 that was not introduced.

23 SOLICITOR SIMPSON: I think I
24 would be supplementing the facts.

25 THE COURT: No, I mean, if it's

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1 not in -- my statement on that is you have
2 all the evidence that's introduced.

3 SOLICITOR SIMPSON: Stevens is
4 Terry.

5 THE COURT: "Did they find unknown
6 fingerprints on passenger side door?" That's
7 a question for you. I can deal with it.
8 That's for them to determine. I can't answer
9 that, it would be a statement on the evidence
10 -- unless y'all want to agree to that.

11 MR. BUTLER: I don't even know the
12 answer.

13 THE COURT: Please feel free,
14 Beattie, to go ahead and make your call.

15 MR. BUTLER: I'll be back ---

16 THE COURT: Okay, whenever you get
17 back, we'll bring them in to do this.

18 (BRIEF RECESS)

19 THE COURT: I'll be honest with
20 you, I've starting to do some research as
21 well. Did you find anything?

22 MR. BUTLER: I did not. And my
23 research is consisting of trying to contact
24 Holly before 5:45.

25 THE COURT: That's fine. You go

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1 ahead. I'm going to continue -- at least go
2 through the parts we have, and I will tell
3 them about the murder charge. And I will
4 continue to do some research to see if I can
5 find anything ---

6 MR. BUTLER: If you find the answer
7 and you'll share it with me and then I'll ---

8 THE COURT: I'll be happy to.

9 MR. BUTLER: And if I get a call,
10 can I step out?

11 THE COURT: Absolutely.
12 Absolutely.

13 MR. BUTLER: Thank you.

14 THE COURT: All right. Did you
15 find anything, Mr. Simpson?

16 SOLICITOR SIMPSON: No, sir.

17 THE COURT: Okay. All right. You
18 have the Power Point though?

19 SOLICITOR SIMPSON: We've got the
20 Power Point and the video of the interview.

21 THE COURT: Let's do -- because
22 that video, the interview takes some time, so
23 that will give me some time. So will the
24 PowerPoint.

25 MR. BUTLER: And we'll do -- I

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1 mean, I had them replay different parts on
2 cross than they did on direct.

3 THE COURT: Oh, I understand.
4 Well, whatever parts you want to -- try to
5 remember what you did..

6 MR. BUTLER: I know the two parts.

7 SOLICITOR SIMPSON: We have it.

8 THE COURT: Anyway, it's
9 interesting. That's why we love what we do.

10 MR. BUTLER: Let me throw out this
11 analogy. What if they came back and say,
12 'can we find him guilty of ABHAN?' You
13 wouldn't just charge ABHAN.

14 THE COURT: No, you wouldn't. And
15 I was trying to think of it in the vein of
16 there's voluntary manslaughter.

17 I wouldn't charge ABHAN because it's
18 not a lesser- include offense. It's not a
19 part of the factual situation.

20 They don't talk about manslaughter.
21 I have denied manslaughter based on that I
22 didn't believe there was sufficient evidence.
23 Sometimes when there was one the defense
24 said, 'I want murder or nothing.' And I
25 think that that' a realistic one.

19 MR. BUTLER: Yes, sir. And
20 thinking about your manslaughter example, I
21 think I've had that very thing happen where
22 I've asked for it, been denied it, have the
23 jury say, 'Are there any lesser includes?'
24 Then, I say, 'all right, see?' Now charge
25 manslaughter, and the Court has said no.

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1 THE COURT: And there's no
2 question that the Court has made its
3 decision. Again, the Court made a legal
4 decision there that there was no basis for
5 that. I made the conclusion -- the other
6 argument that occurred to me is to declare a
7 mistrial based on my error in not charging
8 the hand of one being the hand of all.
9 Because it obviously, as we were just
10 talking, two people go back. There are shots
11 fired. It doesn't have to be -- under the
12 theory that two people are leaving that car
13 and there's evidence that they were on a
14 mission, they could conclude that's
15 circumstantial evidence that they conclude
16 they were acting in concert. And I just ---

17 MR. BUTLER: I guess -- and I
18 probably, and this is tentative, would prefer
19 a mistrial before the charge. That's just my
20 ---

21 THE COURT: Well, before I do
22 that, I'll just tell you, I'm going to have
23 to find a case that says you can't do that.

24 MR. BUTLER: Yes, sir.

25 THE COURT: Okay? Because

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1 otherwise, if I'm in the gray area -- if the
2 State wants to go, I'm willing to go.

3 SOLICITOR SIMPSON: Yeah, the
4 State would ask for that, the hand of one to
5 be charged. You know, they've deliberated
6 for about an hour now.

7 THE COURT: And my rationale for
8 it is we've constantly have been about
9 educating the jury, making sure they under-
10 stand the law and apply the law.

11 And we're dealing in such a vacuum
12 because we're restricted from not being able
13 to charge from the facts. If we were being
14 able to charge on the facts, I think we would
15 have fewer questions, but that's just my
16 humble opinion after twenty years. But I
17 can't, I don't understand how we can't answer
18 the question that is a legitimate question
19 concerning the actual decision by the jury
20 about the facts in this case.

21 So, let's see -- but anyway, I've
22 got a few minutes to start doing some more
23 research. All right. Let's ask the jury to
24 come in.

25 MR. BUTLER: Thank you, and it's

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1 okay if we just go from slide to slide.

2 SOLICITOR SIMPSON: Okay.

3 (JURY IN @ 5:50 P.M.)

4 BAILIFF: The jury's present,
5 Your Honor.

6 THE COURT: Thank you very much,
7 ladies and gentlemen. We're sorry to keep
8 you waiting, but we've been gathering some
9 information for you.

10 Your question is a Court's exhibit,
11 what's now Court's Exhibit 2. And if you
12 would, just use an entire sheet for me.

13 MADAM FORELADY: I'm sorry.

14 THE COURT: That's okay. No
15 apology. You didn't know that. That way --
16 sometimes I can write a response, but it
17 doesn't -- it's part of the record. So it's
18 not a problem.

19 There are several questions. First
20 says you'd like to see the interrogation of
21 the defendant that was shown. We're prepared
22 to do that in just a moment.

23 Define murder again.

24 And then there's an additional
25 question, if the other individual pulled the

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1 trigger, can the Defendant still be guilty?

2 I'll be giving you the murder charge
3 when you go back so that you'll have a copy
4 of it. And you can read that charge in its
5 entirety.

6 You also ask for the text messages
7 from 11:42 to 9:34. We have those text --
8 the text messages, what we can show you are
9 what was shown.

10 MADAM FORELADY: Right.

11 THE COURT: There was certainly a
12 discussion, and that's -- please understand
13 something. And I'm sure you probably already
14 knew that, but it's not uncommon for a juror
15 to ask that so and so looked at a document
16 and we'd like to see that document. That's
17 not uncommon that the document is shown.
18 There were a number of occasions where it was
19 marked, as you heard, for identification
20 only. That's so the record knows what the
21 witness is reviewing. But if it's not
22 introduced into evidence, you consider the
23 testimony regarding that document but the
24 document itself is not part of the evidence.
25 It's part of the proceeding but not evidence

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1 that you can review. So only those things
2 that you were shown will we show to you.
3 Tell me -- can we get the entire text
4 messages between ---

5 MADAM FORELADY: That wasn't
6 supposed to be part of the questions -- just
7 what's on the front.

8 THE COURT: That wasn't, it was
9 just the -- okay.

10 MADAM FORELADY: Yes, sir.

11 THE COURT: Okay. So you don't
12 want to know unknown fingerprints?

13 MADAM FORELADY: No, sir.

14 THE COURT: Because I would have
15 to tell you that's up to you guys.

16 MADAM FORELADY: That was chicken
17 scratch.

18 THE COURT: That would be one that
19 I would be commenting on the facts, and I
20 can't do that. Okay. Well, we'll proceed
21 with showing you those and maybe hopefully
22 we'll address some of your other things.

23 MADAM FORELADY: Okay.

24 THE COURT: Thank you so much,
25 ladies and gentlemen.

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1 (VIDEO OF JOHNSON INTERVIEW - STATE'S
2 EXHIBIT 56 REPLAYED)

3 SOLICITOR SIMPSON: Judge, I
4 believe that completes the video portion that
5 was played during the trial.

6 THE COURT: All right.

7 MR. BUTLER: Judge, can we approach
8 on the second matter?

9 THE COURT: Sure.

10 (OFF RECORD BENCH CONFERENCE)

11 THE COURT: All right. What we
12 have is what was played, which is basically a
13 statement of what's being said, as I recall.
14 That's what you want?

15 MADAM FORELADY: On the text
16 messages, you're saying?

17 THE COURT: The text messages
18 themselves were not introduced.

19 MADAM FORELADY: The PowerPoint?

20 THE COURT: There was a summary of
21 it. The PowerPoint is the summary of what
22 was sent. Do you want to see that?

23 MADAM FORELADY: Yes, can we play
24 the audio?

25 THE COURT: Why don't we do this?

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1 Let's, while we get setup to do that, let you
2 return to your jury room and we'll be with
3 you very shortly when we have that together.
4 Thank you.

5 (JURY OUT @ 6:15 P.M.)

6 SOLICITOR SIMPSON: That was in
7 Kosarko, close to the end.

8 THE COURT: We'll be at-ease for a
9 moment while you look for that.

10 (BRIEF RECESS)

11 (DEFENDANT PRESENT)

12 THE COURT: A Court of Appeals
13 case, I mean, a PCR case, one is that's State
14 versus -- well, *Wyles v. South Carolina*. I
15 think that's where they talk about the other
16 cases.

17 What these cases say is that --
18 in one they cited a case where there was the
19 facts, created an equivocation basically. In
20 the case they reversed, there was no
21 testimony that this person had -- other than
22 this person did the act. In the other case,
23 it could have been one of many and they said
24 that's not error. That's fine. The other
25 one was error because it shouldn't have been

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1 -- shouldn't have charged and also
2 complicated -- the judge refused mere
3 presence and mere presence is part of my hand
4 of one that says -- I talk about it twice.
5 So I think it's proper to give the additional
6 instruction.

7 MR. BUTLER: The cases that you
8 cite, did those arise in the context we have
9 here?

10 THE COURT: Those arise in the
11 context -- these are PCRs where they said
12 that it should have been -- the appellate,
13 the defense lawyer didn't do what you're
14 doing in challenging this.

15 MR. BUTLER: I got you. My concern
16 is ---

17 THE COURT: And the Court then
18 commented on it and said it was error to
19 charge it because there was no equivocation
20 in the present set of facts.

21 MR. BUTLER: I got you. But they
22 weren't contemplating the charge after the
23 jury had been deliberating?

24 THE COURT: I understand.

25 MR. BUTLER: That's been my

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1 concern. And I've got -- I worry because
2 it's in response to a question, that's it a
3 judicial comment on the facts.

4 THE COURT: And I appreciate that.
5 And I don't think it.

6 MR. BUTLER: Yes, sir.

7 THE COURT: And that's preserved
8 as well for purposes of review.

9 MR. BUTLER: Okay.

10 THE COURT: Let me look back --
11 (reading): *"During the deliberations, the*
12 *jury sent a note to trial judge asking him,*
13 *'if we say Wyles is guilty of murder, are we*
14 *saying or he or the three alone' -- or the*
15 *three alone naturally pulled the trigger. In*
16 *response to the question, over Wyles*
17 *objection, the trial Court instructed on*
18 *accomplice liability, nothing it appears 'the*
19 *only appropriate thing I can do at this point*
20 *is give a charge on the hand of one is the*
21 *hand of all.'* That's where they said, we
22 also request that you give mere presence."
23 He refused to do that. And the Court, in
24 distinguishing this from another case said,
25 there was no evidence that anybody, other

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1 than this one -- in the other case there was
2 -- the facts themselves created -- and we
3 have that here. There's no question the
4 facts in this case -- we don't know if any of
5 those two did it.

6 MR. BUTLER: I understand. In that
7 case you're saying they're saying the charge
8 is improper, no matter when it was asked.

9 THE COURT: Because there were
10 only -- the evidence didn't support the hand
11 of one.

12 MR. BUTLER: Yeah. I got that.

13 THE COURT: Okay.

14 MR. BUTLER: It would have been the
15 same whether it arose -- if it had been
16 charged earlier, yeah.

17 THE COURT: And my feeling in this
18 is that -- and I think I mentioned it to Mr.
19 Dunaway, and I'll just put this on the record
20 too, because there was a case -- it was civil
21 case where the judge realized he had charged
22 an error, brought the jury back in after
23 deliberations and corrected it. And said,
24 "I'm going to instruct you to disregard
25 that", and corrected it. The court said,

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1 that's not -- no problem.

2 MR. BUTLER: If I could just put
3 the two other bases that I have on the
4 record.

5 THE COURT: Sure.

6 MR. BUTLER: Also, it would, I
7 worry, constitute a premature deliberation
8 after the fact because they're not supposed
9 to deliberate until the case has been
10 submitted, which includes your charge. And
11 now they're hearing the charge after they've
12 been deliberating. So I have to put that on
13 the record.

14 THE COURT: That's fine.

15 MR. BUTLER: The other is to -- the
16 Court has graciously offered that I could
17 argue now. I worry that I would be shifting
18 theories myself. My argument to them was
19 he's not there. And now I have to argue, I
20 have to argue, well, even if he was there,
21 he's just merely present. I worry that I
22 that I'd be -- whatever the metaphor is,
23 changing horses mid-something or other -- mid
24 race.

25 THE COURT: Whatever. I

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1 understand that and that's fine. I don't
2 really -- that was just thinking out loud,
3 probably not a good idea. Because in none of
4 these cases -- my first thought was, this is
5 strange -- frankly, we were talking. This is
6 the -- or maybe it's a sign of what this year
7 is going to be. In twenty years, I've never
8 had someone from the audience start screaming
9 at the lawyers. I had that happen and had to
10 find the person in direct contempt of court.
11 And so we engaged in discussion and he
12 brought out some statements I made during
13 directed verdict stage, the jury never heard,
14 of course. So they -- that created -- never
15 had that happen. In twenty years, I've never
16 had this happen.

17 MR. BUTLER: And so my position is
18 clear, I object to the charge and I move for
19 a mistrial just to preserve it.

20 And I'm embarrassed. I noticed
21 something in that tape that I didn't hear the
22 first time. I'm embarrassed just to put it
23 on the record. Maybe I'll have to answer for
24 it later. I have to renew my position on the
25 *Jackson v. Denno* because I heard Detective

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1 Osborne say not only "cigarettes for
2 cooperators" but also that "non-cooperators
3 go to prison." And so I move for a mistrial
4 based upon that as well.

5 THE COURT: You didn't have to
6 because I had to consider it as a whole and
7 I ruled and I think it's properly preserved.
8 You objected to it coming in and they
9 certainly didn't allow -- you said it
10 shouldn't come in because it was coercive.
11 And that's part of the evidence, indicia of
12 coercion. I'm stuck with that.

13 MR. BUTLER: Yes, sir.

14 THE COURT: You don't have to
15 raise it. But you don't need to be
16 embarrassed. Because I'm not embarrassed by
17 my decision, so you don't need to be
18 embarrassed about raising it. All right. We
19 will -- are we ready to go with that?

20 COURT REPORTER: I haven't gotten
21 yet to all of the text messages. I'm
22 listening through. How much of them do you
23 want?

24 THE COURT: Well, what is it we
25 want?

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1 SOLICITOR SIMPSON: Judge, well,
2 the objection is Mr. Butler's. We have a
3 PowerPoint. Like, you know, it's not entered
4 into evidence.

5 THE COURT: Well, you can't play
6 it.

7 SOLICITOR SIMPSON: But it was
8 verbatim from the stand. The portion where
9 he's testifying to everything on the Power
10 Point is near the end of his ---

11 THE COURT: It's not evidence is
12 what I just told them. They can hear the
13 testimony about it.

14 SOLICITOR SIMPSON: It's near the
15 end of his testimony.

16 THE COURT: All right.

17 COURT REPORTER: Is that the only
18 portion you want or do you want to start from
19 the beginning?

20 SOLICITOR SIMPSON: I think just
21 when I start about the text, specific ---

22 THE COURT: I'll ask them if they
23 need anything.

24 COURT REPORTER: I'm trying to find
25 those text messages.

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1 SOLICITOR SIMPSON: Specifically
2 having him read the text messages, I guess.
3 THE COURT: Are you ready?
4 COURT REPORTER: Yes, sir.
5 THE COURT: Okay. Let's bring the jury
6 in, please?
7 BAILIFF: We ready for them?
8 THE COURT: Yes, ma'am.
9 (JURY IN @ 6:32 P.M.)
10 BAILIFF: The jury's present,
11 Your Honor.
12 THE COURT: Thank you very much.
13 Ladies and gentlemen. All right. We're
14 ready now to play that testimony for you.
15 Ms. Garrison, if you'll assist us, please?
16 COURT REPORTER: This is from the
17 direct examination of Craig Kosarko.
18 THE COURT: Okay.
19 COURT REPORTER: I can read the
20 text messages, Your Honor, but the microphone
21 is ----
22 THE COURT: Bear with us, please.
23 Thank you. We'll get to it. Not a problem.
24 Did we have a malfunction?
25 COURT REPORTER: We have a

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1 malfunction.

2 THE COURT: Do you need the jury
3 to ---

4 COURT REPORTER: If they would like
5 to go discuss it while I'm working on it.

6 THE COURT: Do you want me to go
7 ahead and do the charge with them? Would
8 that be ----

9 COURT REPORTER: That'll be fine.

10 THE COURT: Why don't we do that?
11 And we'll accomplish that part of it.

12 As I stated, I will be sending back
13 Court's Exhibit Number 3, which is the murder
14 charge. You also requested -- the question
15 that I understand was, (reading): "If the
16 other individual pulled the trigger, can the
17 Defendant still be guilty?"

18 First of all, I can't comment and
19 answer that question. That would be a
20 comment on the facts. And that's for you to
21 determine.

22 I'm going to give you some
23 additional law which you're to consider,
24 together with all of the other law that I've
25 given to you, simply giving you additional

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1 law applying to the charge of murder. And it
2 says, as follows, (reading):

3 "If a crime is committed by two or
4 more people who are acting together in
5 committing a crime, the act of one is the act
6 of all. A person who joins with another to
7 accomplish an illegal purpose is criminally
8 responsible for everything done by the other
9 person, which occurs as a natural consequence
10 of the acts done in carrying out the common
11 plan and purpose. If two or more people are
12 together, acting together, assisting each
13 other, committing the offense, the act of one
14 is the act of all or as is sometimes said,
15 the hand of one is the hand of all.

16 Prior knowledge that a crime is
17 going to be committed without more is not
18 sufficient to make a person guilty of that
19 crime. Mere knowledge that another person is
20 going to commit a crime, even if the
21 Defendant is present when the crime is
22 committed, is not sufficient to convict the
23 Defendant as a principal.

24 Guilt as a principal is shown by
25 actual or constructive presence at the scene

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1 as a result of prior arrangement. Therefore,
2 a finding of a prior arranged plan or common
3 scheme is necessary for finding of guilt as a
4 principal. The State must prove beyond a
5 reasonable doubt by competent evidence the
6 theory of the hand of one is the hand of all.

7 A principal in a crime is one who
8 either actually commits the crime or who is
9 present aiding, abetting, or assisting in
10 committing the crime. When a person does an
11 act in the presence of, and with the
12 assistance of another, the act is done by
13 both. When two or more are acting with a
14 common plan or intent are present at the
15 commission of crime, it does not matter who
16 actually who commits the crime. All will be
17 guilty.

18 Present at the commission of a crime
19 means to be sufficiently near to aid and abet
20 and assist in the commission of a crime.

21 However, as I have previously stated, mere
22 presence at the scene of a crime alone is not
23 sufficient to convict one as a principal on
24 the theory of aiding and abetting. It is a
25 necessary element, for there must have been a

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1 common scheme or intent to commit the crime.
2 And the crime must have been committed
3 pursuant thereto with the person aiding and
4 abetting by sole overt act.

5 Intent means intending the result
6 which actually occurs, not accidentally or
7 involuntarily. Intent may be shown by acts
8 and conduct of the Defendant and other
9 circumstances, from which you may naturally
10 and reasonably infer the intent. The State
11 must prove these elements, each one, beyond a
12 reasonable doubt."

13 With that additional instruction,
14 we'll send it back to you. You may resume
15 the deliberations until we find the location
16 of the ---

17 COURT REPORTER: I have it.

18 THE COURT: You may have it?

19 COURT REPORTER: Text messages
20 between the Defendant's phone and a number
21 843-801-8768, (reading):

22 Q. Did you later come to associate
23 that number with an individual?

24 A. Yes.

25 Q. And who was that?

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1 A. Mr. Terry Stevens.

2 Q. And did you speak with that
3 individual?

4 A. Detective Osborne did.

5 Q. Okay. Let me ask you, not to
6 try to interpret the meaning or anything of
7 those texts, but did you review specifically
8 what they said in the text messages as they
9 were written?

10 A. Yes.

11 Q. Could you identify, did you
12 identify the text message from the Defendant
13 to that number at 11:42 a.m.?

14 A. At 11:42, yes.

15 Q. And what was that text message?

16 A. "What's popping?"

17 Q. What about at 12:08 p.m.?

18 A. Yes.

19 Q. And what was that text message?

20 A. May I refer to my notes?

21 Q. Absolutely? Are your notes
22 direct verbatim reflection of the records
23 that you received?

24 A. Yes. Yes, I took them from the
25 actual printed out text messages.

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1 Q. Okay. 12:08 p.m.?

2 A. This is from the Defendant, "I
3 gonna need that bread today, at least half."

4 Q. 12:10 p.m.?

5 A. That's again from the
6 Defendant, "I on my ass, bra, bra."

7 Q. And it's to a identified friend
8 of his?

9 A. It is. This is to Terry
10 Stevens.

11 Q. 12:15 p.m.?

12 A. Again from the Defendant, "When
13 go because I'm almost on E and my girl got to
14 get to work rest of the week."

15 Q. 12:27 p.m.?

16 A. This is from Terry.

17 Q. I'm sorry. 12:27?

18 A. A.M.?

19 Q. Omitting all texts sent by
20 Terry.

21 A. Oh, okay.

22 Q. Is there any text from the
23 Defendant to Terry at 12:27 p.m.?

24 A. That one, I don't have. I may
25 have missed that one.

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1 Q. 1:30 p.m.?

2 A. Again, from the Defendant,
3 "What time you get off? I'm whipping. We
4 can cool it."

5 Q. 12:27 p.m.?

6 A. Okay. "Just hit me up, I be
7 around."

8 Q. 1:41 p.m.?

9 A. From Devin, "Where you at? I
10 be around. I'm driving 5."

11 Q. And 1:54 p.m.?

12 A. That will be from Devin again,
13 "Just hit me up 5."

14 Q. And 4:39 p.m.?

15 A. At 4:39. "I'm about at 5, what
16 time us get off?"

17 Q. That was at 4:39 p.m.?

18 A. Yes.

19 Q. What about 4:44 p.m.?

20 A. 4:44 is "Yeah, I take you back
21 to the Chuck."

22 Q. Have you ever heard that phrase
23 before, "the Chuck", in your experience with
24 law enforcement?

25 A. Yes.

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1 Q. And what's that?

2 A. Chuck is short for Chucktown.

3 That's Charleston..

4 Q. 8:33 p.m.?

5 A. It's again from the Defendant,

6 "Just bring your ass down here, because I'll
7 come down there before my 5 work."

8 Q. 8:59 p.m.?

9 A. "I need you. When you gonna be
10 home?"

11 Q. Detective, I want to go now to
12 4:37 p.m.. Is this text also from the
13 Defendant to his friend?

14 A. Yes.

15 Q. And what is that text message
16 to Terry?

17 A. It says, "hey, I go wet dude
18 ass up tonight."

19 Q. And this is on, for what date?

20 A. This is June 8th, the day of the
21 murder.

22 Q. At what time?

23 A. It's 4:37 p.m.

24 Q. And this is part of that series
25 that we've been viewing today?

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1 A. Yes.

2 Q. Sergeant Kosarko, what was the
3 last text in this series that Devin sent to
4 his friend Terry?

5 A. This was, "I can't wait on you.
6 I gotta handle my biz."

7 Q. And what time did that text,
8 was that text sent?

9 A. About 9:34 p.m.

10 COURT REPORTER: End of testimony
11 for text messages.

12 THE COURT: That concludes that.
13 If you will retire to your jury room, we will
14 send back the charges. Resume your
15 deliberations. Thank you.

16 (JURY OUT @ 7:00 P.M.)

17 THE COURT: All right. Any
18 exceptions or additions to the hand of one
19 charge from the State?

20 SOLICITOR SIMPSON: No, Your
21 Honor.

22 THE COURT: Other than those
23 previously made, any additional exceptions?

24 MR. BUTLER: No. And just to say
25 that the evidence doesn't support it. That's

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1 it.

2 THE COURT: Thank you. And in
3 response of the rationale, my reasoning for
4 it, how the evidence does, because the
5 evidence as presented supports -- we had two
6 leaving the car, walking towards where the
7 shooting occurred, the shooting, and two
8 people come back, running, leaving, and
9 identified by eyewitnesses as two people. A
10 person is shot, cartridges are found, all of
11 that is as to who was the shooter. For those
12 reasons, I did it and I understand your
13 objections. I'm going to send you another
14 copy. I had one reprinted. I deleted some
15 in the second page because it was
16 repetitious. And I'll give it to you.

17 MR. BUTLER: I understand this is
18 going -- the only two charges going back are
19 murder and ---

20 THE COURT: And the hand of one.
21 And I understand you want me to send the
22 entire charge?

23 MR. BUTLER: At least -- yes, sir.
24 And my request for reasonable doubt since
25 it's included in the hand of one charge.

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1 THE COURT: Correct. I would
2 appreciate it if they would -- I will do
3 this. I'll bring them back in and add this
4 addition to it if you want me to. All right.
5 Let me bring the jury back in. That will be
6 4.

7 (SO ENTERED AS COURT'S EXHIBIT 4)

8 THE COURT: Thank you.

9 BAILIFF: Are you ready for them?

10 (JURY IN @ 7:07 P.M.)

11 BAILIFF: The jury's present.

12 THE COURT: All right. Ladies and
13 gentlemen, thank you very much. I'm sending
14 back for you Exhibit's 3 and 4. Those are
15 the only parts of my instruction that you
16 requested. Do you wish additional instruct-
17 tion now or do you want the entire charge?

18 MADAM FORELADY: I'm sorry. The
19 questions -- I feel as though all of our
20 questions have been answered.

21 THE COURT: Have been answered?

22 MADAM FORELADY: Yes, sir.

23 THE COURT: All right. Do you
24 need the charge on the murder charge as well?

25 MADAM FORELADY: We will take it.

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1 Yes, sir.

2 THE COURT: Well, I mean, do you
3 need it? If you don't need it -- you don't
4 have to have it. I'm not requiring it unless
5 you ask me for it. Don't need it?

6 MADAM FORELADY: No, sir.

7 THE COURT: So you don't need the
8 hand of one charge sent back, either?

9 MADAM FORELADY: No, sir.

10 THE COURT: I won't be sending
11 anything. Okay. Thank you very much. That
12 helps me. Thank you.

13 (JURY OUT @ 7:10 P.M.)

14 THE COURT: That eliminates that
15 request. They did not ask for and I will not
16 give any additional instructions. The reason
17 there is some case law that supports that.
18 And I can only give instructions to what's
19 requested. But since they didn't ask for it,
20 then that's eliminated that problem. Any
21 exceptions or additions from the State?

22 SOLICITOR SIMPSON: None, Your
23 Honor.

24 THE COURT: Any additional
25 exceptions from the Defendant?

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1 MR. BUTLER: No, sir.

2 THE COURT: Thank you so much.

3 We'll be at-ease. Appreciate it. But I'm
4 going to keep those as part of the record.

5 (JURY IN DELIBERATION)

6 (NOTIFIED OF JURY REQUEST @ 7:30 P.M.)

7 (DEFENDANT PRESENT)

8 THE COURT: Okay, I've talked
9 about this with Judge McDonald. And this
10 said if you send the charge back you have to
11 send the whole charge back. It doesn't
12 matter. Notwithstanding -- I want to read
13 the case because there are several that I was
14 looking at, where I was looking for the other
15 one, to give charges on things they didn't
16 request is an error. You can't expand what
17 they ask for, which is what you're doing if
18 you send the whole charge back. So I want to
19 see how they reconcile that, if they do. But
20 just for your information, there are cases
21 that support your position.

22 MR. BUTLER: But they still have
23 not -- you're not going to act on the new
24 case after that?

25 THE COURT: No, I'm not going to

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1 send -- they said they didn't want it. They
2 didn't want anything.

3 MR. BUTLER: I got you, okay.

4 THE COURT: And there's certainly
5 -- there's no requirement that I charge
6 orally.

7 MR. BUTLER: No, I understand.

8 THE COURT: So I think the
9 record's okay for that. I don't think
10 there's any error what's been thus far.

11 MR. BUTLER: I thought you were
12 going to tell me, you're right. There's a
13 case that say after they start deliberating,
14 you can't charge the hand of one.

15 THE COURT: No.

16 SOLICITOR SIMPSON: For the
17 record, I thought the same thing.

18 MR. BUTLER: Well, I'm going home
19 now.

20 THE COURT: I tell you what that
21 -- you know what, I remember -- I'm off the
22 record here.

23 (OFF THE RECORD DISCUSSIONS)

24 (DEFENDANT PRESENT)

25 THE COURT: We need to think about

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1 the jury, if they want to continue or -- if
2 they request to go home, I will give them a
3 strong instruction about discussion of the
4 case and tell them that -- this is what I
5 have done and did in my death penalty case.
6 And I don't think that's -- I didn't
7 sequester. It's the first one I didn't
8 sequester the jury and it worked. And we did
9 go over the weekend. And we administered an
10 oath and every day I queried them as to the
11 oath. I think they are -- that it is a
12 reasonable request. So I'm going to do that
13 again. Tell them we're going to place them
14 under oath that they cannot discuss the case
15 and then I will examine them in the morning.

16 MR. BUTLER: I thought there was a
17 -- that once they started deliberations that
18 they couldn't be separated ---

19 THE COURT: Yeah, I've look at
20 that and it's a discretionary ruling. Would
21 there be any objection from the defendant?

22 MR. BUTLER: No, sir.

23 THE COURT: And no objection from
24 the Defendant. Okay. I do it consistently
25 in civil cases. One of the reasons I stopped

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1 -- and we don't have that problem here. I
2 was in Manning, let them go home -- we waited
3 -- but I had to declare a mistrial because a
4 juror didn't show. When I asked him, he said
5 'Well, I call the number and it said there
6 was no need to report. So I went to work.'
7 So that's why I tell jurors to not call the
8 number.

9 MR. BUTLER: Are we ordering them
10 dinner or ---

11 THE COURT: No, they said they
12 want some snacks and -- Don said that -- are
13 you taking this?

14 COURT REPORTER: Yes, sir.

15 THE COURT: Mr. Michele told them
16 that if they want dinner that they have to
17 write a note.

18 MR. BUTLER: If they want to go
19 home, I don't object.

20 THE COURT: What is the State's
21 position?

22 SOLICITOR SIMPSON: I don't have
23 a position.

24 THE COURT: You don't take a
25 position?

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1 SOLICITOR SIMPSON: I would
2 prefer to hold out a little while longer. If
3 they ---

4 THE COURT: I know you would.

5 MR. BUTLER: We don't know why
6 they've asked, how many have asked, whether
7 they have children/child issues or ---

8 THE COURT: My feeling is -- I
9 know you worry about -- we talk about the
10 Allen charge, but I can't think of anything
11 worse than forcing people to stay after
12 they've asked to take a break. Other states
13 do it regularly. My feeling is that once
14 they ask, you have to allow it -- but I'm not
15 going to go in there and say, 'Would y'all
16 like to go home?' I'm going to wait for them
17 to come to ---

18 MR. BUTLER: I misunderstood. I
19 thought that one witness (sic), that one
20 jurors ---

21 THE COURT: We asked about dinner
22 and they just asked for some snacks.

23 MR. BUTLER: But they didn't ask if
24 they could go home?

25 THE COURT: No.

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1 MR. BUTLER: I misunderstood.

2 THE COURT: Not yet. We will at
3 at-ease. Thank you very much.

4 (JURY IN DELIBERATION)

5 (NOTIFIED OF JURY QUESTION @ 7:30 P.M.)

6 (SO ENTERED AS COURT'S EXHIBIT 5)

7 THE COURT: Let the record
8 reflect that Mr. Johnson is present. We have
9 a note from the jury requesting to go home.
10 We've had a discussion that request
11 might be forthcoming. Understanding that
12 there is no objection from the State and no
13 objection from the defense, I will bring them
14 in and give them instructions not to discuss
15 the case.

16 (JURY IN @ 7:30 P.M.)

17 BAILIFF: The jury's present,
18 Your Honor.

19 THE COURT: Thank you, ladies and
20 gentlemen. I have now what is Court's
21 Exhibit Number 5. And it says, (reading):
22 "We would like to take a break until tomorrow
23 morning at 9:30 a.m., after we have had a
24 chance to get some rest. Is this possible?"

25 When I first started practicing,

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1 these rules didn't exist. And it's been
2 created since I started. And there is a
3 rule, the first sentence, Rule 47, Jurors,
4 (reading):

5 (c) If it appears that the
6 jury's deliberations may extend into the
7 night, the Court may order the jury to be
8 taking to a suitable sleeping quarters for
9 the night. And on the following morning they
10 shall resume their deliberations.

11 You know what that means? That
12 means sequestered. But the key word is
13 "may." That means it's discretionary. It's
14 been my practice, notwithstanding -- I don't
15 have the expressed authority, but I don't
16 think they deny me the authority or any other
17 Judge. I think that's an extremely
18 reasonable request. And I think as human
19 beings, we all need rest; and we don't need
20 to rest somewhere else, we need to rest in
21 your respective homes. I have no problem
22 with that.

23 Why do they require sequestration
24 after the jury has begun their deliberations
25 and not before? Because now you are

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1 deliberating. Now you are talking about the
2 case. Now you are changing your positions
3 that you didn't -- that you honored before
4 keeping that open mind. You're in the
5 process. So it's really a step now removed
6 from what we normally have.

7 But I trust you, each of you are
8 adults and each of you are willing to follow
9 the instructions. And we can understand.
10 We've talked about how significant it is.
11 How it would be a shame for all of us that
12 have invested the time we have and to have
13 something by doing something that just simply
14 -- I really think is intentional. Sometimes
15 I think it can be breached.

16 So it is extremely imperative that
17 you not talk among yourselves, that you not
18 talk with anyone at home, that you not do
19 anything so far as furthering this
20 deliberative process. You can't read
21 anything. You can't watch anything. I'm
22 confident that each of you honor that.

23 When we return in the morning, we
24 will assemble here and I will administer an
25 oath and ask you whether each of you solemnly

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1 swear that you have honored in every respect
2 the instruction that I've just given you.

3 I thank you for that. Have a
4 wonderful night. Does anyone need a deputy
5 escort to their cars? (No response). I see
6 no hands raised. It's still daylight. Have
7 a good evening. Thank you.

8 MADAM FORELADY: 9:30, Your Honor?
9 9:30.

10 THE COURT: Yeah. 9:30 in the
11 morning.

12 MADAM FORELADY: Thank you, sir.

13 THE COURT: Thank you so much.

14 JUROR: We can't read anything?

15 THE COURT: You can read anything,
16 just not about this case. That's a very good
17 question.

18 (JURY OUT @ 7:38 P.M.)

19 THE COURT: Any exceptions or
20 additions from the State?

21 SOLICITOR SIMPSON: No, sir.

22 THE COURT: Any exceptions or
23 additions from the Defendant?

24 MR. BUTLER: No, sir.

25 THE COURT: Thank you all. See

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1 you in the morning at 9:30.

2 (COURT IN RECESS)

3 (TRANSCRIPT CONTINUED NEXT PAGE)

4

5 APRIL 3, 2014

9:15 A.M.

6

7 (DEFENDANT PRESENT)

8 THE COURT: Let the record reflect
9 that Mr. Johnson is present. Good morning,
10 Mr. Johnson.

11 DEFENDANT: Good morning.

12 THE COURT: We will be at-ease
13 until all the jurors arrive.

14 BAILIFF: We have everyone, Your
15 Honor.

16 THE COURT: Invite them in,
17 please, ma'am.

18 (JURY IN @ 9:47 A.M.)

19 BAILIFF: All jurors are present
20 Your Honor.

21 THE COURT: Good morning, ladies
22 and gentlemen. I hope you've had a restful
23 evening and you're ready to continue the
24 process that you started yesterday afternoon,
25 and that is to continue your deliberations in

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1 this case.

2 When we last were together I re-
3 requested you have no conversation and not to
4 discuss this case with anyone and to not
5 discuss it among yourselves. In fact, not to
6 continue with any individual deliberations.

7 Now I'd ask each of you to raise
8 your right hand, please?

9 (JURORS COMPLIED)

10 THE COURT: Do each of you
11 solemnly swear or affirm that you have
12 complied with the Court's instruction at all
13 times throughout this, especially the
14 instruction given before the recess last
15 night? You have honored it in every respect.
16 If so, please indicate by saying, I have.

17 (UNANIMOUS AFFIRMATIVE RESPONSE)

18 THE COURT: You can put your hands
19 down. Any member that was unable to make
20 that commitment, please stand? (No
21 response). Thank you very much.

22 Ladies and gentlemen, I'm here.
23 We're going to be doing some other things.
24 But if you have any other questions, I'll be
25 happy to respond to them if you'll just send

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1 them to me. Please retire to your jury room
2 and resume your deliberations.

3 (JURY OUT @ 9:50 A.M.)

4 THE COURT: Any exceptions or
5 additions from the State?

6 SOLICITOR SIMPSON: No, Your
7 Honor.

8 THE COURT: Any exceptions or
9 additions from the Defendant.

10 MR. BUTLER: No, sir.

11 THE COURT: Let the record reflect
12 Mr. Johnson was present at all times. And
13 good morning. We will be at-ease then.

14 SOLICITOR SIMPSON: Thank you,
15 Your Honor.

16 MR. BUTLER: Thank you.

17 (JURY IN DELIBERATIONS)

18 (NOTIFICATION OF JURY QUESTION @ 10:20)

19 (DEFENDANT PRESENT)

20 THE COURT: We have received a
21 question from the jury. It will be Court's
22 Exhibit ---

23 COURT REPORTER: Court's Exhibit 6,
24 Your Honor.

25 THE COURT: Court's Exhibit 6.

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1 (SO ENTERED AS COURT'S EXHIBIT 6)

2 Please bring in our jury.

3 (JURY IN @ 10:30 A.M.)

4 BAILIFF:: All jurors are
5 present, Your Honor.

6 THE COURT: Thank you very much.
7 Thank you, ladies and gentlemen. I have now
8 what's Court's Exhibit 6. The question is,
9 (reading):

10 "Were we told who the 803-837-2475
11 phone number belonged to in State's Exhibit
12 Number 57. The call was made at 22:37,
13 10:37. If we were, whose phone number is
14 it?"

15 That's another question that goes to
16 the factual issues that I can't comment on.
17 Now, why I brought you in was to tell you
18 that, and to tell you if in your delibera-
19 tions you decide what witness you want to
20 rehear, then I'll be happy -- we can bring
21 you back in and play that for you. But I
22 cannot answer your question. You have to
23 resolve that amongst yourselves. Thank you
24 very much. And I'd appreciate it if you
25 would continue your deliberations.

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1 (JURY OUT @ 10:32 A.M.)

2 SOLICITOR SIMPSON: Judge, can
3 you repeat the number for our own ---

4 THE COURT: Yeah. It's right
5 here. What's the number, Deb?

6 COURT REPORTER: 803-837-2475.

7 MR. BUTLER: Oh, I know who it is.

8 SOLICITOR SIMPSON: Yeah.

9 THE COURT: It's who?

10 SOLICITOR SIMPSON: The girl-
11 friend.

12 (JURY IN DELIBERATION)

13 (JURY NOTIFICATION OF VERDICT @ 11:06)

14 THE COURT: Let me just state that
15 -- well, first of all, let's wait for Mr.
16 Johnson to come in.

17 (DEFENDANT PRESENT)

18 THE COURT: Thank you. Let the
19 record reflect Mr. Johnson's present. And
20 we're advised, Mr. Johnson, that the jury's
21 reached a verdict. And is the Defendant
22 ready to receive the verdict?

23 MR. BUTLER: Yes, sir.

24 THE COURT: The State's ready?

25 SOLICITOR SIMPSON: Yes, sir.

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1 (JURY IN @ 11:10 A.M.)

2 BAILIFF: All jurors are
3 present, Your Honor.

4 THE COURT: Thank you very much.
5 And thank you very much, ladies and
6 gentlemen. I have been advised the jury has
7 reached a verdict. Is that correct?

8 FORELADY: Yes, Your Honor.

9 THE COURT: If you would pass that
10 verdict form to the bailiff, please?

11 FORELADY: (Tenders).

12 BAILIFF: (Tenders verdict form
13 to Judge)

14 THE COURT: (Upon review), the
15 verdict forms have been properly completed.
16 You may publish the verdict, please.

17 CLERK: The Defendant will please
18 rise.

19 DEFENDANT: (Complies).

20 CLERK: State of South Carolina
21 County of Charleston in the Court of General
22 Sessions, Case Number 2011-GS-10-5207,
23 (reading):

24 "We, the jury, by unanimous consent
25 find the Defendant, Devin Jamal Johnson, on

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1 *the charge of murder, guilty."*

2 Signed, Ashley Elizabeth Busby,
3 presiding juror, dated April 3, 2014.

4 State of South Carolina County of
5 Charleston in the Court of Court of General
6 Sessions, Case Number 2011-GS-10-5208, State
7 of South Carolina versus Devin Johnson,
8 (reading): *"We, the jury, by unanimous*
9 *consent find the Defendant, Devin Jamal*
10 *Johnson, on the charge of possession of a*
11 *firearm during the commission of a violent*
12 *crime, guilty."* Signed, Ashley Elizabeth
13 Busby, dated April 3, 2014.

14 Madam presiding juror and ladies and
15 gentlemen of the jury if these are your
16 verdicts, please signify by raising your
17 right hand.

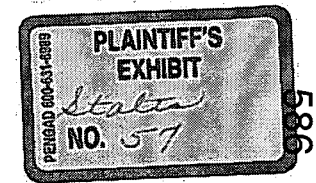
18 (UNANIMOUS AFFIRMATIVE RESPONSE)

19 CLERK: You may put them down.
20 Your Honor, please allow the record reflect
21 that all jurors raised their right hand.

22 THE COURT: Thank you very much
23 Mr. Michele. Anything else from the jury?

24 MR. BUTLER: Request a polling be
25 witnessed.

25



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B445 8432173243												
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413	Charleston MTX4	8432173243	8432173243	0	6/8/2011 19:14	136	303	3	303	3		
414	Charleston MTX4	8432173243	9088626	1	6/8/2011 19:16	85	303	3	303	3		
415	Charleston MTX4	8432173243	8435180340	1	6/8/2011 19:35	142	303	3	303	3		
416	Charleston MTX4	8432173243	8432173243	0	6/8/2011 20:02	548	303	3	303	3		
417	Charleston MTX4	8432173243	8432173243	5	6/8/2011 20:14	17	0	0	0	0		
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422	Charleston MTX4	8432173243	8438018768	1	6/8/2011 21:04	390	405	1	405	1		
423	Charleston MTX4	8432173243	8433437981	1	6/8/2011 21:15	60	303	3	303	3		
424	Charleston MTX4	8432173243	9088626	1	6/8/2011 21:18	90	303	3	303	3		
425	Charleston MTX4	8432173243	8433437981	1	6/8/2011 21:20	46	303	3	303	3		
426	Charleston MTX4	8432173243	8438018809	1	6/8/2011 21:21	35	303	3	303	3		
427	Charleston MTX4	8432173243	*678437301470	1	6/8/2011 21:30	12	303	3	303	3		
428	Charleston MTX4	8432173243	*678437301470	1	6/8/2011 21:30	28	303	3	303	3		
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431	Charleston MTX4	8432173243	8432173243	0	6/8/2011 22:35	23	329	3	329	3		
432	Charleston MTX4	8432173243	8038372475	1	6/8/2011 22:37	102	330	2	330	2		
433	Columbia MTX5	8432173243	8038372475	5	6/8/2011 22:37	102	0	0	0	0		
434	Charleston MTX4	8432173243	8432173243	6/8/2011 22:40	6	0	0	0	0	0		
435	Charleston MTX4	8432173243	8438018768	1	6/8/2011 23:08	45	303	3	303	3		
436	Charleston MTX4	8432173243	8438018768	1	6/8/2011 23:09	10	303	3	303	3		
437	Charleston MTX4	8432173243	8038372475	1	6/8/2011 23:09	34	303	3	303	3		
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440	Charleston MTX4	8432173243	8432173243	0	6/8/2011 23:11	85	303	3	303	3		
441	Charleston MTX4	8432173243	8433437981	1	6/8/2011 23:15	46	303	2	303	2		
442	Charleston MTX4	8432173243	8435994793	1	6/8/2011 23:18	26	303	1	303	1		
443	Charleston MTX4	8432173243	9088626	1	6/8/2011 23:26	34	442	2	442	2		



Columbia_MTX5	8432173243	8038372475	1 6/4/2011 20:18	16
Columbia_MTX5	8432173243	8038372475	1 6/4/2011 20:24	15
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Columbia_MTX5	8432173243	8038372475	1 6/4/2011 20:36	34
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Columbia_MTX5	8432173243	8032901406	1 6/4/2011 20:41	36
Columbia_MTX5	8432173243	8032901406	1 6/4/2011 20:43	39
Charleston_MTX4	8432173243	8432173243 F	6/4/2011 20:43	4
Charleston_MTX4	8432173243	8432173243 F	6/4/2011 20:43	3
Charleston_MTX4	8432173243	8432173243 F	6/4/2011 20:43	3
Columbia_MTX5	8432173243	8036149166	2 6/4/2011 20:45	52
Columbia_MTX5	8432173243	8038372475	1 6/4/2011 20:46	36
Charleston_MTX4	8432173243	8432173243	5 6/4/2011 20:48	129
Columbia_MTX5	8432173243	8033515505	0 6/4/2011 20:48	129
Columbia_MTX5	8432173243	8032901406	1 6/4/2011 21:04	37
Columbia_MTX5	8432173243	8032901406	1 6/4/2011 21:12	35
Columbia_MTX5	8432173243	8037478033	1 6/4/2011 21:18	27
Columbia_MTX5	8432173243	8037478033	1 6/4/2011 21:18	28
Columbia_MTX5	8432173243	8033515580	0 6/4/2011 21:32	45
Charleston_MTX4	8432173243	8432173243	5 6/4/2011 21:32	45
Columbia_MTX5	8432173243	8032901406	1 6/4/2011 21:58	63
Columbia_MTX5	8432173243	8033783927	2 6/4/2011 22:38	44
Columbia_MTX5	8432173243	8033783927	2 6/4/2011 22:58	51
Charleston_MTX4	8432173243	8432173243	5 6/4/2011 23:07	2
Columbia_MTX5	8432173243	8439260378	1 6/4/2011 23:14	218
Charleston_MTX4	8432173243	8439260378	5 6/4/2011 23:14	217
Charleston_MTX4	8432173243	8432173243 F	6/5/2011 1:10	5
Charleston_MTX4	8432173243	8432173243 F	6/5/2011 1:26	22
Charleston_MTX4	8432173243	8432173243 F	6/5/2011 1:38	4
Charleston_MTX4	8432173243	8432173243 F	6/5/2011 1:48	6
Charleston_MTX4	8432173243	8432173243 F	6/5/2011 1:50	15
Charleston_MTX4	8432173243	8432173243 F	6/5/2011 1:51	39

Originating MSID	.8435995753	Terminating MSID	
Originating COS	50	Terminating COS	1
Originating Num. Plan	2	Terminating Num. Plan	2
Originating Num. Type	2	Terminating Num. Type	2
Billing Id	0	Billable	true
Delivery Init. Method	IS41Req	Broadcast message	false
Priority	0	Data Header Indicator	false
Subscriber Rating	0	Message Rating	0
Message ID	20810034192705	Message TeleService	4098
Length of text message	76	Data Coding	0

Message Text
[Jus bring yo ass down here way u gud at cuz ill cum down there for my 5 word]

Attempt History

[Time	] [Operation]	[Result]	[End Point	]
06/08/2011 20:33:18	IS41Req	CC:403	8438018768	

Search Target	Duluth221_FDA		
Log Written	06/08/2011 20:59:00	Number of attempts	1
Message arrival	06/08/2011 20:59:00	Last Cause Code	0
Final Disposition	06/08/2011 20:59:00	Message Final Status	Delivered
Message Source	MO_AlphaPg	Input Label	AUX2
Source Protocol	MO	Output Protocol	smpp
Input Port	0	Output Port	2735
Operation Type	unknown_method	HLR Address	
Orig. MSC PC	204.223.057	Message Dest. Address	
Call Back number	8432173243	Message MSID	8438018768
Originating DN	8432173243	Terminating DN	8438018768
Originating MSID	8435995753	Terminating MSID	
Originating COS	50	Terminating COS	1
Originating Num. Plan	2	Terminating Num. Plan	2
Originating Num. Type	2	Terminating Num. Type	2
Billing Id	0	Billable	true
Delivery Init. Method	IS41Req	Broadcast message	false
Priority	0	Data Header Indicator	false
Subscriber Rating	0	Message Rating	0
Message ID	20803006795509	Message TeleService	4098
Length of text message	23	Data Coding	0

Message Text
[I need u when u go b hm]

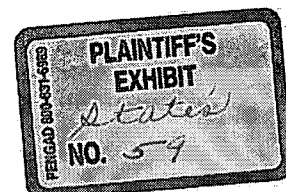
Attempt History

[Time	] [Operation]	[Result]	[End Point	]
06/08/2011 20:59:00	IS41Req	CC:403	8438018768	

Search Target	Duluth221_FDA		
Log Written	06/08/2011 21:34:00	Number of attempts	1
Message arrival	06/08/2011 21:34:00	Last Cause Code	0
Final Disposition	06/08/2011 21:34:00	Message Final Status	Delivered
Message Source	MO_AlphaPg	Input Label	AUX2
Source Protocol	MO	Output Protocol	smpp
Input Port	0	Output Port	2736
Operation Type	unknown_method	HLR Address	
Orig. MSC PC	204.223.057	Message Dest. Address	
Call Back number	8432173243	Message MSID	8438018768
Originating DN	8432173243	Terminating DN	8438018768
Originating MSID	8435995753	Terminating MSID	
Originating COS	50	Terminating COS	1
Originating Num. Plan	2	Terminating Num. Plan	2
Originating Num. Type	2	Terminating Num. Type	2
Billing Id	0	Billable	true
Delivery Init. Method	IS41Req	Broadcast message	false
Priority	0	Data Header Indicator	false
Subscriber Rating	0	Message Rating	0
Message ID	20829006816364	Message TeleService	4098
Length of text message	38	Data Coding	0

Message Text
[I cnt wait on u i gotta handle my biz]

Search Target	Duluth221_FDA		
Log Written	06/08/2011 22:41:22	Number of attempts	1
Message arrival	06/08/2011 22:41:22	Last Cause Code	0
Final Disposition	06/08/2011 22:41:22	Message Final Status	Delivered
Message Source	AlphaPg	Input Label	AUX3
Source Protocol	Smpp	Output Protocol	smpp
Input Port	2735	Output Port	7410
Operation Type	unknown_method	HLR Address	full_digits
Orig. MSC PC		Message Dest. Address	
Call Back number		Message MSID	8432173243
Originating DN	8038372475	Terminating DN	8432173243
Originating MSID		Terminating MSID	8435995753
Originating COS	0	Terminating COS	50
Originating Num. Plan	0	Terminating Num. Plan	1
Originating Num. Type	0	Terminating Num. Type	1
Billing Id	9100	Billable	true
Delivery Init. Method	IS41Req	Broadcast message	false
Priority	0	Data Header Indicator	false
Subscriber Rating	0	Message Rating	0
Message ID	20500038149514	Message TeleService	4098
Length of text message	112	Data Coding	0



Message Text

[Since u kno so fuckin much i was ridin wit my brah peeps ry when u call but stay on dat bs 4 ur reasons]

Attempt History

[Time]	[Operation]	[Result]	[End Point]
06/08/2011 16:14:18	IS41Req	CC:403	8038372475

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=====
Search Target      Duluth221_FDA
Log Written        06/08/2011 16:37:38  Number of attempts      1
Message arrival    06/08/2011 16:37:38  Last Cause Code         0
Final Disposition  06/08/2011 16:37:38  Message Final Status     Delivered
Message Source     MO_AlphaPg  Input Label              AUX2
Source Protocol    MO  Output Protocol        smpp
Input Port         0  Output Port              2735
Operation Type     unknown method  HLR Address
Orig. MSC PC       204.223.057  Message Dest. Address
Call Back number   8432173243  Message MSID             8438018768
Originating DN     8432173243  Terminating DN          8438018768
Originating MSID   8435995753  Terminating MSID
Originating COS    50  Terminating COS         1
Originating Num. Plan 2  Terminating Num. Plan   2
Originating Num. Type 2  Terminating Num. Type   2
Billing Id         0  Billable                 true
Delivery Init. Method IS41Req  Broadcast message        false
Priority           0  Data Header Indicator    false
Subscriber Rating  0  Message Rating           0
Message ID         20815006799628  Message TeleService      4098
Length of text message 31  Data Coding              0
Message Text
[ Ay i go wet dude ass up da nite ]
=====

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Attempt History

[Time]	[Operation]	[Result]	[End Point]
06/08/2011 16:37:38	IS41Req	CC:403	8438018768

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=====
Search Target      Duluth221_FDA
Log Written        06/08/2011 16:43:42  Number of attempts      1
Message arrival    06/08/2011 16:43:42  Last Cause Code         256
Final Disposition  06/08/2011 16:43:42  Message Final Status     Delivered
Message Source     AlphaPg  Input Label              AUX3
Source Protocol    Smpp  Output Protocol          SS7
Input Port         2736  Output Port              0
Operation Type     new_msg arrival  HLR Address              full digits
Orig. MSC PC       204.223.057  Message Dest. Address
Call Back number   8438018768  Message MSID             8432173243
Originating DN     8438018768  Terminating DN          8432173243
Originating MSID   8435995753  Terminating MSID        8435995753
Originating COS    0  Terminating COS         50
Originating Num. Plan 0  Terminating Num. Plan   1
Originating Num. Type 0  Terminating Num. Type   1
Billing Id         9100  Billable                 true
Delivery Init. Method Default  Broadcast message        false
Priority           0  Data Header Indicator    false
Subscriber Rating  0  Message Rating           0
Message ID         20500038087509  Message TeleService      4098
Length of text message 61  Data Coding              0
Message Text
[ Man we get out arnd 6:30 you goin to be in smvl "Up in smoke" ]
=====

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=====
Search Target      Duluth221_FDA
Log Written        06/08/2011 16:44:47  Number of attempts      1
Message arrival    06/08/2011 16:44:47  Last Cause Code         0
Final Disposition  06/08/2011 16:44:47  Message Final Status     Delivered
Message Source     MO_AlphaPg  Input Label              AUX2
Source Protocol    MO  Output Protocol        smpp
Input Port         0  Output Port              2735
Operation Type     unknown method  HLR Address
Orig. MSC PC       204.223.057  Message Dest. Address
Call Back number   8432173243  Message MSID             8438018768
Originating DN     8432173243  Terminating DN          8438018768
Originating MSID   8435995753  Terminating MSID
Originating COS    50  Terminating COS         1
Originating Num. Plan 2  Terminating Num. Plan   2
Originating Num. Type 2  Terminating Num. Type   2
Billing Id         0  Billable                 true
Delivery Init. Method IS41Req  Broadcast message        false
Priority           0  Data Header Indicator    false
Subscriber Rating  0  Message Rating           0
Message ID         20816006812322  Message TeleService      4098
Length of text message 31  Data Coding              0
Message Text
[ Yea i go take u bac to da chuck ]
=====

```

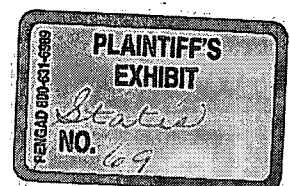
Attempt History

[Time]	[Operation]	[Result]	[End Point]
06/08/2011 16:44:47	IS41Req	CC:403	8438018768

```

=====
Search Target      Duluth221_FDA
=====

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STATE OF SOUTH CAROLINA

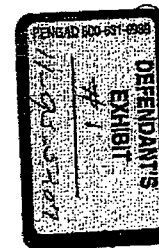
County of Charleston

SEARCH WARRANT

Date 06/13/2011

Officer Craig Kosarko

FILE
COPY



243

(L.S.)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

AFFIDAVIT

Personally appeared before me, one Craig Kosarko
who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions
of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

Any and all digital files to include but not limited to: call history logs, text messages, photographs, videos and
contact lists.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

Black Samsung cell phone (843-217-3243).

REASON FOR AFFIANT'S BELIEF THAT THE
PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

at on 6-8-2011 at approximately 10:15pm, while at the Georgetown Apartments located at 1476 Orangegrove
Road, Charleston, SC CPD officers responded to a shots fired call. Upon arrival, officers found the victim,
AAkeem Moses Smalls with multiple gunshot wounds. EMS responded and transported Mr. Smalls to MUSC
where he later died. Prior to the shooting the victim had been in an ongoing dispute with Devin Johnson (b/m,
8/21/83) that escalated to the shooting on the second story porch of the apartment building. Devin Johnson was
observed by witness Shaonnar Goff through her bedroom window moments after hearing the gunshots holding
the firearm. Devin's family members provided investigators with his cell phone number of 843-217-3243. That,
investigators believe the information contained in the cell phone will help further this investigation.

Sworn to and Subscribed before me
this 13 day of June, 20 11

[Signature]
Signature of Judge

[Signature]
Affiant

Address 180 LOCKWOOD BLVD.

CHARLESTON, SC 29403

Phone 843-577-7434

RETURN

I received the attached Search Warrant _____, 20 _____ and have executed it as follows:
 On _____ 20 _____ at _____ o'clock _____ M, I searched
 (the person) described in the warrant and (the premises)

I left a copy of the warrant with _____
 Name of person searched or "at the place of search" with.
 Together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

 This inventory was made in the presence of _____
 AND _____

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

SWORN to before me this _____
 day of _____ 20 _____
 _____ (L.S.)
 Signature of Judge

 (Signature of Officer Executing Warrant)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

AFFIDAVIT

Personally appeared before me, one _____
who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions
of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

Subscriber information, account comments, billing records, outbound and inbound calls from 06/04/2011 to
06/09/2011 for phone number 843-217-3243, subscriber information on any other Verizon numbers listed in the
report.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

Cellco Partnership DBA Verizon Wireless

Attn: Custodian of Records

180 Washington Valley Rd. Bedminster, NJ 07921

Fax: 908-306-7491 or 7492

REASON FOR AFFIANT'S BELIEF THAT THE
PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

That on 6-8-2011 at approximately 10:15pm, while at the Georgetown Apartments located at 1476 Orangegrove
Road, Charleston, SC CPD officers responded to a shots fired call. Upon arrival, officers found the victim,
AAkeem Moses Smalls with multiple gunshot wounds. EMS responded and transported Mr. Smalls to MUSC
where he later died. Prior to the shooting the victim had been in an ongoing dispute with Devin Johnson (b/m,
8/21/83) that escalated to the shooting on the second story porch of the apartment building. Devin Johnson was
observed by witness Shacommor Goff through her bedroom window moments after hearing the gunshots holding
the firearm. Devin's family members provided investigators with his cell phone number of 843-217-3243. That,
investigators believe the requested phone records will help further this investigation. Continue to Page 2.

Sworn to and Subscribed before me
this 13 day of June, 2011
J. B. [Signature] (L.S.)
Signature of Judge

[Signature]
Affiant

Address 180 LOCKWOOD BLVD.

CHARLESTON, SC 29403

Phone 843-577-7444

Charleston Police Department

STATE OF SOUTH CAROLINA)

Pg. 2 of 2

COUNTY OF CHARLESTON)

AFFIDAVIT

Continued from pg. 1

Through experience and training, The Investigator knows cellular service providers maintain records related to subscriber information, account registration, billing and airtime records, outbound and inbound call detail, connection time and dates, internet routing information (Internet Protocol numbers), and message content, that may assist in the identification of person/s accessing and utilizing the account.

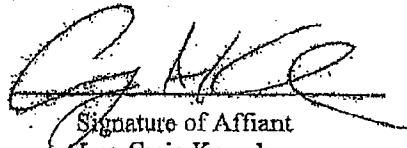
The Investigator is requesting subscriber information for any Sprint numbers listed therein.

Through experience and training, The Investigator knows that the cellular service provider maintains records that include cell site information and GPS location. Cell site information shows which cell site a particular cellular telephone was within at the time of the cellular phone's usage. Some model cellular phones are GPS enabled which allows the provider and user to determine the exact geographic position of the phone. Further, the cellular service provider maintains cell site maps that show the geographical location of all cell sites within its service area. Using the cell site geographical information or GPS information, officers would be able to determine the physical location of the individual using the cell phone number 843-217-3243 information is necessary to the investigating officers in order to investigate the crime. If it is possible, please e-mail the results to the investigator in an excel format to Investigator Craig Kosarko e-mail address is kosarkocr@charleston-sc.gov.

SWORN TO AND SUBSCRIBED before me
this 12 day of January, 2011

Signature of Issuing Judge (L.S.)

COMPLAINT # 11-09420
WARRANT #


Signature of Affiant
Inv. Craig Kosarko
Charleston, SC 29403
843-577-7434

SOUTH CAROLINA
COUNTY OF CHARLESTON

SEARCH WARRANT

Form Approved by
U.C. Attorney General
Section 17-13-160
March 18, 1918TO ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE MUNICIPALITY
OF CHARLESTONIt appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure
under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises:DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHEDCellco Partnership DBA Verizon WirelessAttn: Custodian of Records180 Washington Valley Rd. Bedminster, NJ 07921Fax: 908-306-7491 or 7492Now, therefore, you are hereby authorized to search the subject premises for the property described below, and to seize
such property if found:

DESCRIPTION OF PROPERTY

Subscriber information, account comments, billing records, outbound and inbound calls from 06/04/2011 to
06/09/2011, subscriber information on any other Verizon numbers listed in the report, call origination location,
physical address of cell sites and rf coverage map, all stored communications, or files, including voice mail, e-
mail, digital images, text messages, buddy lists, and any other files associated with the cellular number 843-
217-3243.

This Search Warrant shall not be valid for more than ten days from the date of issuance.

A written inventory of all property seized pursuant to this Search Warrant shall be made to

Issuing Judgewithin ten days from the date of this warrant, such inventory to be signed by the officer executing this warrant, and a copy
of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made.A copy of this Search Warrant shall be delivered to the person in charge of the premises searched at the time of such
search if practicable, and, if not, to such person as soon thereafter as is practicable; in the event the identity of the person
in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person, a copy
shall be attached to a prominent place on such premises.Charleston, S. C.CA/513
-78)13 June 20 11Signature of Judge(I.S.)

RETURN

I received the attached Search Warrant _____, 20 _____ and have executed it as follows:
 On _____ 20 _____ at _____ o'clock _____ M, I searched
 (the person) described in the warrant and (the premises)

I left a copy of the warrant with _____
 Name of person searched or "at the place of search" with.
 Together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

 This inventory was made in the presence of _____
 AND _____

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

SWORN to before me this _____
 day of _____ 20 _____
 _____ (L.S.)
 Signature of Judge

 (Signature of Officer Executing Warrant)

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
SOUTH CAROLINA)

-versus-

DEVIN JOHNSON,
Defendant.

THE COURT OF GENERAL SESSIONS
FOR THE NINTH JUDICIAL CIRCUIT
Case No. 2011-GS-10-05207

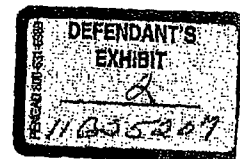
MOTION TO SUPPRESS

Because the affidavit in support of the search warrant used to secure the Defendant's cell phone data and cell provider records lacked probable cause, the search was illegal under the Fourth Amendment of the United States Constitution, Article 1, § 10 of the South Carolina Constitution, and South Carolina Code § 17-13-140. Consequently, Defendant hereby moves to suppress all evidence seized from Defendant's residence.

I. Facts¹

On June 8, 2011 Akeem Smalls was found shot near the Georgetown Apartments in West Ashley. He soon thereafter died. Authorities developed the Defendant as a suspect and then charged him with Smalls' murder on June 11, 2011. On June 13, 2011 a local magistrate issued two search warrants, one for data stored in the Defendant's cell phone, the other for information from the Defendant's cell phone provider. From the phone itself, the warrant sought, amongst other information: subscriber information, outbound and inbound calls from 06/04/2011 to 06/09/2011, call origination location, cell tower location, all stored communications including text images, all associated with the Defendant's cell phone number. From the phone itself, the warrant sought: "any and all digital files to include but not limited to: call history logs, text messages, photographs, videos and contacts list."

¹ The following is based upon discovery material provided the Defense by the State.



As justification for the searches, both warrants cite the same language in the affidavit in support of probable cause:

That on 6-8-11 at approximately 10:15 pm, while at the Georgetown Apartments located at [REDACTED] Charleston SC CPD officers responded to a shots fired call. Upon arrival, officers found the victim, Akeem Moses Smalls with multiple gunshot wounds. EMS responded and transported Mr. Smalls to MUSC where he later died. Prior to the shooting the victim had been in an ongoing dispute with Devin Johnson that escalated to the shooting on the second story porch of the apartment building. Devin Johnson was observed by witness Shaconnar Goff through her bedroom window moments after hearing the gunshots holding the firearm. Devin's family members provided investigators with his cell phone number of 843-217-3243. That investigators believe the requested phone numbers *will help further the investigation.* (emphasis added)

Through experience and training, the investigator knows cellular service providers maintain records related to subscriber information, account registration, billing and airtime records, outbound and inbound call detail, connection time and dates, internet routing information (Internet Protocol Numbers) and message content, that may assist in the identification of person/s accessing and utilizing the account.

The investigator is requesting subscriber information for any Sprint [sic] numbers listed therein.

Through experience and training, the investigator knows that the cellular service provider maintains records that include cell site information and GPS location. Cell site information shows which cell site a particular cellular telephone was within at the time of the cellular phone's usage. Some model cellular phones are GPS enabled which allows the provider and user to determine the exact geographic position of the phone. Further, the cellular service provider maintains cell site maps that show the geographical location of all cell sites within its service area. Using the cell site geographical location or GPS information, officers would be able to determine the physical location of the individual using the cell phone number 843 217-3243. *[I]nformation is necessary to the investigating officers in order to investigate the crime.* (emphasis added)

Simply put, law enforcement sought the Defendant's cell phone records, including the identities of individuals he called, the identities of all who called him, the times and duration of all calls and the location of cell towers associated with those calls, allowing

law enforcement to track the movements of the phone and presumably the Defendant's movements, based solely on the facts that arguably link the Defendant to the Smalls' homicide.

II. Argument

- A. Because nothing in the affidavit suggests a nexus between the information related to the homicide and the Defendant's cell phone, the affidavit does not state facts sufficient to establish probable cause to obtain information relating to Defendant's cell phone.

In determining whether probable cause to search a location exists, the crucial element is not whether the target of a search is suspected of committing a crime, but whether there is sufficient reason to believe that evidence of criminal activity will be found in the location specified. *Zurcher v. Stanford Daily*, 98 S.Ct 1970 (1978). Despite the fact that a search warrant provides sufficient information concerning illegal activity on the part of a suspect, absent some connection between the activity and the location to be searched, probable cause does not exist.

For example, where an affidavit detailed that an informant reported to police that he personally purchased drugs from the defendant, and gave specific details about the defendant's name, address, alias, mode of operation, and area where he sold drugs, but nothing in the affidavit pointed to any criminal activity or evidence thereof in the place to be searched — the defendant's residence — the Fourth Circuit found a search warrant deficient in failing to establish a nexus between the reliable information and the place to be searched. *U.S. v. Lator*, 996 F.2d 1578 (4th Cir. 1993). "The court finds the affidavit is devoid of any basis from which the magistrate could infer that evidence of drug activity would be found at (the defendant's residence). The affidavit does not describe circumstances that indicate such evidence was likely stored at (defendant's) residence. . .

Nor does the affidavit explain the geographic relationship between the area where the drug sales occurred and (the defendant's residence). *Id.* at 1582, 1583.

In *U.S. v. Charest*, 602 F.2d 1015 (1st Cir. 1979), the United States Court of Appeals for the First Circuit reversed a conviction because the search warrant that yielded the murder weapon failed to state a sufficient basis to believe that the weapon would be found in the defendant's residence. There, the affidavit in support of probable cause stated that an eyewitness observed the defendant shoot the victim. The Court of Appeals reversed the conviction holding that: "There is nothing in the affidavit from which a factual finding could be made that the gun used in the shooting was probably located at the defendant's residence." *Id.* at 1017.

Here, the affidavit makes no mention of the Defendant's cell phone. It does not indicate the cell phone was used in any criminal activity. It does not indicate witnesses place the Defendant with a cell phone at or around the time of the homicide. It does not indicate the Defendant made calls on his cell phone at or around the time of the homicide or if he did why the records of such calls or other information would help prove who killed the victim. Unlike some criminal activity, drug trafficking for example, there is no allegation that cell phone use frequently occurs and assists in the carrying out of the crimes alleged here. Indeed, from the language itself, it is clear the search warrant was an attempt to collect the very information law enforcement did not have, but would need, in order to justify the search.

At least two courts have refused to uphold similar searches. In *State v. Patino*, 2012 R.I. Super. LEXIS 139, the court found a search warrant lacking in probable cause for failing to allege a connection between alleged illegal activity and the defendant's cell

phone, despite the allegation that the defendant and a potential witness exchanged text messages around the time of the incident. There, a young boy died after sustaining injuries while in the defendant's care. Unfortunately, apparent police misconduct complicated the investigation and the court's opinion reflects as much. However, the court clearly held that something beyond the fact that the defendant and the boy's mother communicated via text message was required before authorities could seize information from the defendant's cell phone service provider.

The determination of probable cause then rests on the included statement that (the child's mother) exchanged text messages with Defendant. *See Murray*, 487 US at 542. (stating that a warrant is not an independent source where probable cause does not persist past removal of tainted content). While this statement does introduce the idea of text messages, there is nothing within it, or elsewhere in the affidavit, that provides a *nexus to* (the child's) death or Defendant's possible culpability for his death. For this Court to find probable cause, it would have to make a significant assumption as to the conduct of Defendant. This Court cannot conclude that probable cause exists just because Defendant and Trisha Oliver exchanged text messages relative to the time period when Marco Nieves became ill. *Id.* at 248 (emphasis added).

The Rhode Island court appealed to a decision from the District of Columbia which rejected the idea that the experience of law enforcement officers that drug dealers use cell phones as part of their illegal activity justified a search of cell phone provider records:

First, (the accused drug dealers) are asserted to have an ownership interest in the garage where the police later found a substantial quantity of powder cocaine, crack cocaine, and marijuana. As noted in my earlier order, a police officer has represented that, in his experience, narcotic traffickers commonly use cell phones to communicate with each, suppliers and customers. But, even if I credit that experience, I would have to conclude in every instance that the ownership of premises where drugs are found in itself justifies the search of the entire contents of the owner's cell phone, even though there is no indication that the owner ever used the phone in any way to facilitate drug trafficking. While (other accused drug dealers) were in the garage where the drugs are found, I am not ready to

conclude that there is, *ipso facto*, a reasonable likelihood that they have used their cell phones to sell drugs, thus justifying the search of its entire contents. I must therefore decline to sign the warrant the government has presented. *In re Search of Certain Cell Phones*, 541 F.Supp.2d 1, 3 (D.D.C. 2008)

Here, unlike the cases above, the search warrants make no attempt to establish a nexus between the alleged behavior and information sought. Indeed, the affidavits in support of probable cause admit as much, by essentially stating "we need to see what these records show because they may be helpful."

B. Because the warrant lacked specificity as to what law enforcement was seeking, the warrant was a general search warrant, in effect a "fishing expedition, and thus illegal.

General search warrants, those that do not specify the items sought, are prohibited by the Fourth Amendment. "[T]he problem [posed by the general warrant] is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings.... [The Fourth Amendment addresses the problem] by requiring a 'particular description' of the things to be seized." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). This requirement "makes general searches... impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Stanford v. Texas*, 379 U.S. 476, 485 (1965), quoting *Marron v. United States*, 275 U.S., at 196. The language of the "description of property sought" is so broad in this case; it is hard to imagine any information within the Defendant's cell phone records that would *not* fall under the scope of the warrant. This was, essentially a "fishing expedition."

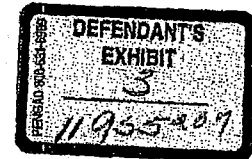
Conclusion

For all of the foregoing reasons, the Defendant moves that this Court suppress all evidence obtained as a result of the search of the Defendant's cell phone and records from his service provider.

Respectfully submitted,

March _____, 2013

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STATE OF RHODE ISLAND v. MICHAEL PATINO

C.A. NO.: P1-10-1155A

SUPERIOR COURT OF RHODE ISLAND, PROVIDENCE

2012 R.I. Super. LEXIS 139

September 4, 2012, Filed

JUDGES: [*1] SAVAGE, J.

OPINION BY: SAVAGE

OPINION

DECISION

SAVAGE, J. When the precious rights of individuals to keep private the expression of their innermost thoughts collides with the desire of law enforcement to know all at all costs, this Court must take special care to ensure that what it says today is fair game for police conduct does not sacrifice on the altar of tomorrow the rights that we hold most dear under our state and federal constitutions.

In this criminal case, the State indicted Defendant Michael Patino for the alleged murder of Marco Nieves, the six-year-old son of Defendant's girlfriend, Trisha Oliver. The case against the Defendant is built largely on cell phone text messages that the State claims were sent by the Defendant to his girlfriend and that the Defendant claims were illegally obtained by the Cranston Police Department, without a warrant, in violation of his privacy rights. Defendant protests not only the way in which the police have attempted to build a case against him, but the charge of murder itself; he contends that he at no time intended to hurt, much less kill, Marco, and that the text messages at issue do not prove otherwise.

The case is before this Court principally for decision [*2] with respect to a panoply of pre-trial motions to suppress filed by the Defendant by which he seeks to bar the State from introducing certain evidence at trial, including the text messages found on Trisha Oliver's cell phone, numerous cell phones and their contents, and his videotaped and written statements that were a product of

his police interrogation. Defendant argues that the collection of evidence by the Cranston Police Department repeatedly violated his rights against unreasonable searches and seizures and self-incrimination, as guaranteed by the *Fourth, Fifth, and Fourteenth Amendments to the United States Constitution* and Article I, sections 6 and 13 of the Rhode Island Constitution. He also contends that his videotaped and written statements to the police were involuntary and the result of coercive and threatening police tactics, in violation of his due process rights under the State and Federal Constitutions.

This Court convened an unprecedented month-long series of evidentiary hearings to address the volume of issues presented by these and other pre-trial motions. In the middle of the hearing, the Defendant moved for a Franks hearing, arguing that the suppression hearing [*3] had adduced evidence of multiple false statements in a dozen affidavits sworn to under oath by the police to secure search warrants in this case.

For the reasons set forth in this Decision, this Court holds that the Defendant has a reasonable expectation of privacy in his text messages and in the apartment where the subject cell phones were searched and seized so as to grant him standing, under the *Fourth Amendment*, to challenge the legality of the searches and seizures of those phones and their contents by the police. Based on the tsunami of illegal evidence collected by the Cranston Police Department, this Court grants Defendant's suppression motions and excludes the State's core evidence from being used at trial, including the text messages, all cell phones and their contents, all cell phone records, and critical portions of the Defendant's videotaped statement and his written statement given to the police. In addition, this Court finds that the Defendant made a preliminary showing that numerous sworn statements made by police officers in a dozen warrant affidavits were either deliber-

ately false or made in reckless disregard of the truth so as to entitle him to a Franks hearing subject [*4] to further argument on additional preliminary issues. This Court reserves decision as to all other pending pre-trial issues until trial.

I

Facts and Travel

A

Initial Investigation

The factual background of this case, as outlined in this Decision, does not represent this Court's actual view of the facts in this case. It reflects instead the chronology of events pertinent to the suppression motions, as testified to by the witnesses and established by the exhibits introduced during the lengthy suppression hearing.¹ This Court emphasizes, however, that much of what the Cranston Police Department did during the course of its investigation of the Defendant fails to square with this chronology; the evidence of record conflicts in many respects with the testimony of witnesses at the suppression hearing or their testimony was simply lacking in credibility. This factual background, therefore, is outlined simply for context as the version of events presented to this Court at the hearing. To the extent that this Court finds the facts to be at odds with this chronology, it will address them later in this Decision in its analysis of the issues presented.

1 The witnesses who testified in connection with [*5] the Defendant's suppression motions included: Detective Peter Souza, Sergeant Michael Kite, Officer Jeremy Machado, Sergeant Edward Walsh, Detective Wayne Cushman, Sergeant Michael Gates, Officer Ryan Shore, Detective Jean Paul Slaughter, Detective John Cardone, Robert Oliver, Arlene Oliver, and Angie Patino. The witnesses who testified in connection with the parties' motions filed pursuant to Rule 404(b) of the Rhode Island Rules of Evidence included: Guida Andrade, Rafael Nieves, Letitia Nieves, Alexandria Correia, Officer Jeremy Machado, and Joseph Peters.

On the morning of October 4, 2009, at approximately 6:08 a.m., Trisha Oliver placed a frantic 911 call from her Cranston apartment at 575 Dyer Avenue, Apartment B18. According to the recording of the call, Trisha Oliver indicated that her six-year-old son, Marco Nieves, was unresponsive and not breathing. At approximately 6:11 a.m., Cranston Rescue and Fire Department responded to her apartment. Within minutes,

rescue personnel transported Marco to Hasbro Children's Hospital. The dispatcher called ahead to alert emergency staff at the hospital that Marco was in full cardiac arrest. According to the 911 call, rescue personnel [*6] arrived at the hospital with Marco before 6:30 a.m. See St.'s Ex. 6.

2 See St.'s Ex. 55 (the call records for Trisha Oliver's home telephone, which were later obtained through a search warrant, (St.'s Ex. 53), show that she called 911 at 6:08 a.m.); St.'s Ex. 6 (the tape of the 911 call that corroborates the time of the call).

3 See St.'s Ex. 6 (which includes an approximately ten-minute audio recording of the 911 call and the dispatch calls that followed).

While these events transpired at the hospital, the Cranston Police Department began its investigation at the scene. Sergeant Matthew Kite responded to the apartment at approximately 6:20 a.m. As he arrived, Sgt. Kite spoke very briefly with Officer Aldrich, who was leaving the scene in his police cruiser to escort the ambulance carrying Marco to the hospital. Subsequently, Sgt. Kite met with Officers Kim Carroll and Dan Lee, as well as Trisha Oliver. See St.'s Ex. 5. After speaking briefly outside the apartment, Trisha Oliver escorted Sgt. Kite into the apartment and showed him those rooms and areas of the apartment that he already had deemed relevant to Marco's illness.

Upon entering the apartment, Sgt. Kite observed a male, later identified [*7] as Trisha Oliver's boyfriend, Defendant Michael Patino. Defendant was sitting on the couch with a young child, later identified as his and Trisha Oliver's 14-month old daughter, Jazlyn Oliver. Trisha Oliver showed Sgt. Kite into Marco's bedroom, where he observed a stripped bed and linens on the floor; she showed him into the master bedroom, where Sgt. Kite saw another stripped bed and a trash can that had been used as a vomit receptacle by Marco; and she showed him the bathroom, where Sgt. Kite observed dark brown vomit that looked like coffee grounds in the toilet.⁴ Sgt. Kite's tour of the apartment, of necessity, took him through the dining and the living rooms that one must pass through upon entering the apartment to get to the bedrooms. The only room Sgt. Kite claims that Trisha Oliver did not specifically show him was the kitchen, although he may have accessed that area of the apartment on his own.

4 A photograph taken approximately two hours after Sgt. Kite's tour of the apartment shows the contents of the toilet. See St.'s Ex. 8.

After the quick tour of the apartment, Sgt. Kite returned with Trisha Oliver to the entrance of the apart-

ment. Officer Carroll transported her to the [*8] hospital soon thereafter.⁵ See St.'s Ex. 5. Upon their departure at approximately 6:30 a.m., Sgt. Kite requested that Officer Lee start a Crime Scene Roster. See St.'s Ex. 5. Though no officers yet considered the apartment a crime scene, Sgt. Kite testified that he believed it was prudent to record who entered and exited the apartment.⁶ Sgt. Kite remained on the scene in the living and dining room areas looking for potentially hazardous materials that could have caused Marco's illness. In the process, he observed four cell phones: an LG Verizon cell phone on the kitchen counter;⁷ a Metro PCS Kyocera cell phone⁸ on the dining room table; a black T-Mobile Sidekick cell phone⁹ on the back headrest of the couch, near where Mr. Patino was sitting; and an iPhone on the far armrest of the couch.¹⁰

5 It [*9] is important to note at this juncture that this Court is unclear what conversations the officers on scene may have had with Trisha Oliver and with each other before Trisha Oliver's departure and what investigation the officers may have conducted at the scene in its early stages. Trisha Oliver did not testify before this Court at the evidentiary hearing, nor did Officers Aldrich, Lee, or Carroll.

6 Testimony given by Sgt. Kite and other officers indicated that some, if not all, of the officers did not sign themselves in and out of the scene on the Crime Scene Roster. This is evidenced further by the fact that the roster was not created until approximately 6:30 a.m., but some of the times on the document precede its creation. Sgt. Kite testified that he personally filled out the first six entries, including, in order of their appearance on the document: Dan Lee, Matt Kite, Kim Carroll, Seth Aldrich, Cranston Fire Department, and Michael Patino. After these entries, the Court is unclear who maintained the roster.

7 State's Exhibits 12, 13, and 14 show the LG cell phone on the kitchen counter where Sgt. Kite claims to have seen it shortly after arriving at the apartment. The LG cell phone, [*10] itself, was entered as evidence in this hearing as State's Exhibit 15A. This Court notes that the evidence bag in which the LG cell phone was presented to the Court also includes its charger—a fact that the police could not readily explain. It was unclear from the testimony how the charger got in the bag, from where it came, and who put it in the bag and why.

8 The Metro PCS Kyocera cell phone is State's Exhibit 16.

9 The black T-Mobile Sidekick cell phone is State's Exhibit 18.

10 State's Exhibits 10 and 11, photographs of the living room in Trisha Oliver's apartment, from two different angles, show the iPhone on the armrest of the couch where Sgt. Kite claims to have seen it before 7:15 a.m. The iPhone is State's Exhibit 17.

During this time, Sgt. Kite spoke with Defendant about going to the Cranston Police Station and making a formal statement about that morning's events, to which Defendant apparently was amenable, though he explained that there were no family members who could take care of Jazlyn in the interim. In his testimony, Sgt. Kite explained that he asked Defendant what happened the night before, to which Defendant responded that he did not know because he had not spent the night [*11] there. Sgt. Kite subsequently asked Defendant when Trisha Oliver had called him and asked him to come over, to which Defendant responded that she had not called him because he did not own a cell phone. According to Sgt. Kite, Defendant asserted that he had arrived at the apartment in the early hours of the morning only by chance.

Sometime after this interaction, the apartment land-line telephone rang and the call was answered by Defendant.¹¹ Afterwards, at some time before 7:15 a.m., Sgt. Kite picked up and manipulated the cell phone on the kitchen counter, later identified as an LG Verizon cell phone with phone number (401) 486-5573, which he claimed he did in response to a "beeping" sound that it had made. Because Defendant made no move to acknowledge or respond to the sound, Sgt. Kite felt that it was necessary to investigate the phone, in the event that it was a family member calling with respect to Marco's situation. In his testimony, Sgt. Kite maintained that he was most concerned about getting in touch with Marco's birth father, who had been unreachable up to that point. Upon picking up the phone, Sgt. Kite said he viewed an alert on the front, exterior screen of the device that [*12] said there was one new message. He then opened the phone, allowing him to view the interior screen. That screen said there was one new message, but that it could not be received due to a lack of credit on the account. Sgt. Kite testified that he "manipulated a button" to "acknowledge receipt of the message to avoid repeat notifications." This manipulation led him to a list of text messages, with the most recent appearing at the top. As he saw the word "hospital" in the message at the top of the list, he clicked on this message. Subsequently, Sgt. Kite viewed the following message in the "SENT" folder, addressed to "DaMaster" at phone number (401) 699-7580: "Wat if I got 2 take him 2 da hospital wat do I say and dos marks on his neck omg." St.'s Ex. 28. Though this message was located in the "SENT" folder, it indicates that it was "Saved," implying that the attempt

to send it failed and it never reached its intended recipient.

11 The landline telephone is State's Ex. 19.

Though Sgt. Kite stated in his testimony that he was disturbed by this message and found it suspicious, he claimed that he did not scroll through the rest of the messages on the phone. Sgt. Kite testified that, after reading [*13] this one message, he closed and replaced the phone on the counter and called Lieutenant Sacoccia at headquarters to inform him of the suspicious text message. During that phone call, Sgt. Kite also informed Lt. Sacoccia that there were no family members available to take care of Jazlyn during Defendant's interview. Pursuant to this conversation, Lt. Sacoccia consulted with the Department of Children, Youth, and Families ("DCYF") and, on its advice, had an ambulance dispatched to transport Jazlyn to the hospital. The ambulance arrived and then left with Jazlyn at approximately 7:20 a.m. See St.'s Ex. 5.

Officer Jeremy Machado escorted Defendant to Cranston Police Department headquarters, arriving at approximately 7:30 a.m., where they were met by Officer Ryan Shore. Officers Machado and Shore remained with Defendant until they transferred him to the Detective Division at approximately 8:15 a.m.

At the apartment, after Defendant left at approximately 7:25 a.m., Sgt. Kite noticed that the cell phone, which had previously been on the back headrest of the couch near where Defendant was sitting, was no longer there. He immediately called headquarters to alert officers of this fact and to suggest, [*14] "there's possibly some information that needs preservation and you might want to take [the cell phone] off [Defendant] upon arrival." He also relayed the contents of the text message that he had seen on the LG cell phone to Lt. Sacoccia.

Back at headquarters, Officer Machado testified that he confiscated the black T-Mobile cell phone that Defendant had on his person. Instead of placing the phone in a secure "trap" at the station, Officer Machado secured the phone on his person.¹² Officer Machado subsequently gave Sgt. Walsh the cell phone taken from Defendant's person. Sgt. Walsh placed the cell phone in his pocket and did not turn it over to the Department of the Bureau of Criminal Investigation ("B.C.I.") until later that evening. At this point, this Court briefly notes that all the evidence which the Cranston Police Department seized and took into custody was not secured until much later in the day on October 4, 2009.

12 Prior to and throughout this hearing, there were blatant inconsistencies in the evidence about which cell phones were seized from the apart-

ment. Sgt. Kite testified that the cell phone that was missing after Defendant's departure from the apartment was a Metro PCS [*15] cell phone. Likewise, the many warrant affidavits mention that a Metro PCS cell phone belonging to the Defendant was taken from him while he was in police custody. Yet, that cell phone appears on the B.C.I. seizure report and photographs taken at the apartment at 9:22 a.m. reveal that the Metro PCS cell phone was on the dining room table at the apartment at that time. In other testimony and at least one warrant affidavit, it says that it was the T-Mobile cell phone that was taken from the Defendant's person.

At 8:09 a.m., it appears that an officer at the apartment used the LG cell phone, phone number (401) 486-5573, to call the phone's voicemail account, though the officer hung up after 15 seconds.¹³ St.'s Ex. 32. Sgt. Kite remained on scene in a supervisory capacity until 10:15 a.m., during which time Detectives Wayne Cushman and Peter Souza of B.C.I. arrived at 7:15 a.m. and 8:32 a.m., respectively.¹⁴ See St.'s Ex. 5. All detectives remained on standby at the scene until Lt. Sacoccia called them and confirmed that a search warrant for the apartment had been signed. At this point, B.C.I. detectives began photographing and videotaping the scene. Det. Cushman took still photographs, [*16] while Det. Souza videotaped the scene. Following the filming and photographing, both detectives gathered and bagged items for evidence. See St.'s Ex. 6 and 23; Def.'s Ex. G. Notably, the critical cell phones seized by the B.C.I. detectives were placed in little brown paper bags that were not securely sealed. Photographs of the apartment reveal that the officers picked up and moved the Metro PCS cell phone that morning.¹⁵

13 State's Exhibit 32, the extraction report of the LG cell phone that was created pursuant to the June 8, 2012 warrant, reveals a detailed account of the contents of the phone, including: incoming/outgoing calls, texts messages sent/received, alerts from the service provider, and any other action which occurred on the device and which remained on the device at the time of extraction. This report shows a phone call made from the LG cell phone, number (401) 486-5573, to its voicemail account at 8:09 a.m., which lasted 15 seconds. Due to the absence of all of the apartment's regular residents at this time, this Court finds it most likely that an officer from the Cranston Police Department executed this call during the course of the police investigation in the apartment [*17] that morning.

14 As referenced previously, none of the listed parties signed themselves in and out of the roster at their respective arrival and departure times.

15 See photographs 0008-0015, 0053, 0055, and 0060 from State's Ex. 6 to view the change in position of the Metro PCS cell phone.

After Sgt. Walsh arrived at the apartment with a hard copy of the search warrant, he and Sgt. Kite decided to have B.C.I. photograph the contents of the LG cell phone ostensibly to protect the integrity of the investigation against the possibility of the relevant text messages being remotely deleted. See St.'s Ex. 23. The photographs taken at this point reveal incriminating text messages on the LG cell phone with profane language and references to punching Marco "three times," the hardest of which was in the stomach. St.'s Ex. 28.

Sgt. Kite was given the LG cell phone in an unsealed paper bag by B.C.I. detectives at approximately 10:15 a.m. Sgt. Kite turned the bag over to Det. Cushman at headquarters later that afternoon.

B

The Interrogation

Meanwhile, Detectives Jean Paul Slaughter and John Cardone interrogated Defendant at the Cranston Police Department for almost three hours from 8:36 a.m. to 11:31 a.m.¹⁶ [*18] See St.'s Ex. 68. By 8:40 a.m., Defendant had signed and waived his Miranda rights. See St.'s Ex. 65 & 66.

16 During this interrogation, Detectives Cardone and Slaughter each left the interview room a number of times, and the information gained during these absences is of particular interest to this Court, as it may pertain directly to the Defendant's motions to suppress.

17 State's Exhibit 68 is the CD of the interview. State's Exhibit 66, marked only for identification, is the transcript of that interview; while not totally accurate, as reflected by the Defendant's submission of his own transcript of the interview which is also marked for identification, this Court will refer to State's Ex. 66, as the parties did in questioning witnesses during the hearing, to assist in identifying certain portions of the videotaped interview.

Very early on in the interview, Detectives Slaughter and Cardone made a number of general references to text messages and their evidentiary value. St.'s Ex. 68. When asked for his cell phone number toward the beginning of the interview, Mr. Patino responded, "699-7580." Id. At 9:45 a.m., Defendant expressed a desire to see both Tri-

sha Oliver and Marco, though [*19] he stayed in the interview room after Detective Cardone explained, "we have a job to do, too." Id.

Immediately afterward, both Detectives Cardone and Slaughter left the room, leaving Defendant alone for a short time. Upon his return, Det. Slaughter immediately discussed the text messages, saying, "You know we have your phone . . . We secured a search warrant for the property. . . . Those texts are damaging." Id. It is unclear from this statement and from Det. Slaughter's testimony, whether the "phone" to which Det. Slaughter was referring was the LG cell phone or the black T-Mobile Sidekick cell phone and it is likewise unclear whether and from where it was taken (the apartment or the Defendant's person). Det. Slaughter then told Defendant "Either you tell me . . . you're gonna [sic] be charged anyway." Id. When Defendant asked "what am I gonna [sic] be charged with," Det. Slaughter said "probably murder." Id.

Det. Slaughter then stated, "I just talked to my supervisor, based on the texts we have, you're being charged. You ever been to the ACI?" From here on, the interview became markedly more aggressive. Id. In response to Defendant's general unwillingness to acknowledge the existence [*20] of, or his participation in the suspicious text messages, Det. Slaughter asserted, "they're on your phone, even the ones sent back." Id.

Det. Cardone then questioned Defendant about the events of the previous evening, and asked repeatedly, "What happened to Marco?" Id. Defendant consistently asserted that he did not know and that he was "being honest." Id. The conversation then turned to whether Defendant may have had any physical contact with Marco, including the occasion to discipline him. Defendant volunteered no information regarding physical or violent contact between himself and Marco and, in fact, denied any such contact when then Det. Cardone accused him directly. At 10:02 a.m., Defendant volunteered that he had been teaching Marco how to "stand up for himself." Id. Det. Slaughter quoted alleged text messages to Defendant, reciting, "tell that bitch to man up, I didn't hit him that hard." Id. Det. Slaughter proceeded to explain to Defendant that "those texts are damaging . . . no matter what you say in this room, you're still going to be charged." Id.

Det. Slaughter's word choice was extremely similar to some of the text messages which were photographed on the LG cell phone minutes [*21] earlier that morning. See St.'s Ex. 23 & 28. This similarity leads this Court to believe that Det. Slaughter had seen, possibly first-hand, the content of those messages on some cell phone, or at least been explicitly advised of their contents, prior to this portion of the interview. Yet, Sgt.

Walsh and Det. Slaughter testified that the content of these messages was relayed verbally only. Det. Cardone testified that there was a possibility that he saw a visual representation of the text messages from some unidentified source at the time of Defendant's initial interview, but he could not offer the Court a concrete recollection. He testified that he saw "pictures" of text messages during some of his absences from the interrogation room, but he could not definitively recall at what time he saw them, whether he saw them on a cell phone, or what cell phone. This Court has taken notice of the fact that, at the time of Defendant's interview and during each of the detectives' respective absences from the interview room to consult with other officers, Sgt. Walsh had what he referred to as Defendant's cell phone in his pants pocket. Sgt. Walsh testified that he never took that phone out of his [*22] pocket until he logged it as evidence with B.C.I.

Defendant admitted that he and Trisha Oliver had been arguing via text messages the day before, but claimed that the messages were written with harsh and profane language to aggravate and upset her. See St.'s Ex. 68. At the recurring request from the detectives to "tell us what happened," Defendant replied, "what do you want me to do if I didn't do anything?" Id. At this point, Det. Slaughter began to recite the different benefits that Defendant would receive if he confessed, including leniency as a result of his remorse. Both detectives intimated that there were different sentences associated with different degrees of murder charges. Id.

After repeated statements from Det. Cardone suggesting to the Defendant what might have happened, Defendant indicated that he and Marco had been horsing around the previous day and that Marco had fallen off the bed. Id. Defendant explained that Marco fell off the bed onto his back, and that Defendant fell on top of him, their bodies forming a cross. Defendant also claimed that Marco "got up" and "was fine." Id. Defendant said the two of them continued to play and that Marco came in on him as he was showing [*23] Marco how to punch and he hit Marco in the left side of his ribs. Id. Det. Cardone then asked Defendant "Was it a body shot?" Id. Defendant responded "Huh?" Id. Det. Cardone then said "Was it a body shot you were trying to show him or were you, were you going straight like a jab?" Defendant responded, "A bodyshot." Id. Det. Cardone explained in his testimony, but not to Defendant, that a body shot is a boxing term.

At the hearing, it was insinuated that Det. Cardone's word choice in classifying Defendant's action as a "body shot" was taken directly from the text messages, but this Court has found no indication of "body shot" language anywhere in the text messages that have been logged and entered into evidence. When asked why he had been un-

concerned with Marco's illness, despite the fact that Trisha Oliver had alerted him to it and requested his assistance the previous day, Defendant explained to Detectives Cardone and Slaughter that Marco had a history of self-induced vomiting as a form of rebellion and tantrum. Id. Though Defendant relayed the instance of horseplay with Marco on the day preceding the incident, Defendant maintained the belief that this instance was unrelated to Marco's [*24] illness. Id.

It was at this point, at 10:30 a.m., that Detective Slaughter began discussing Defendant's daughter, Jazlyn, and how Marco's imminent death and Mr. Patino's likely arrest would affect her future. Id. Det. Slaughter said, "You're not gonna [sic] have a chance to say goodbye to your own daughter." He continued, "if you tell us the truth, guess who gets to go home with mommy," and then asserted that DCYF had already arrived for Jazlyn and that Jazlyn would most likely remain in the State's custody. Throughout these comments, Det. Slaughter implied that the quality and content of Defendant's statements could alleviate Jazlyn's situation. Id.

Shortly after this time period, Det. Slaughter said, "Do you know that on one of those texts, it says there are 'marks on his neck?' 'Oh my God,' it says, 'OMG,' that means Oh my God." Id. This statement is a direct quote from the text message that Sgt. Kite claimed to have seen at the scene around 7:15 a.m. that morning. This statement further indicates that Det. Slaughter had very explicit access to, and perhaps viewed the contents of, the subject text messages during the course of the interrogation. Toward the end of the interrogation, [*25] Defendant said he was dizzy and Det. Cardone said to him, "You don't look all right." After this, Defendant was left alone to write his statement.

Defendant seemed to write his statement to include material that the Detectives desired. He referenced text messages, writing, "... I just sent [Trisha Oliver] some really mean text messages because I knew that they would push her buttons." St.'s Ex. 67. Defendant stated that he used T-Mobile and that his number was "699-7580." St.'s Ex. 68. From approximately 11:00 a.m. to 11:22 a.m., Defendant was alone in the interview room. Id. At 11:22 a.m., Det. Slaughter re-entered the room, read Defendant's statement, and said "Where's the body shot?" Id. Defendant said "Huh?" Id. Det. Slaughter repeated "Where's the body shot?" Id. Defendant said, "Oh." Id. Det. Slaughter then said, "Leave that out? So you put that in somewhere." Id. Defendant added to his statement "and Marco ran into a body shot when we continued to play." St.'s Ex. 67. Det. Slaughter made him initial that part of the statement. See St.'s Ex. 68.

At 11:31 a.m., Officers Machado and Shore entered the interview room, confiscated Defendant's remaining

belongings, handcuffed him, [*26] and then escorted him down to one of the holding cells. Id. At this point, they placed all of Defendant's belongings--except for the cell phone that the police had taken previously from his person--in a trap in accordance with standard procedure. The cell phone, which had been originally confiscated off Defendant earlier that morning, remained in Sgt. Walsh's custody until later that day.

C

The Hospital

At 12:30 p.m. on October 4, 2009, at Hasbro Children's Hospital, Patrolman E. Robert Arruda (who did not testify at the hearing) apparently provided a rights waiver to, and took a formal, written statement from, Trisha Oliver. In this statement, Trisha Oliver explained that Marco began throwing up between 2:30 p.m. and 3:00 p.m. the previous day. She continued by writing, "My boyfriend said he went to go hit [Marco] and [Marco] moved causing him to hit my son in the stomach." According to Trisha Oliver's statement, Marco continued to vomit throughout the evening and into the night. Upon waking at 6:10 a.m. to "check on [Marco]," Trisha Oliver found that "he wasn't breathing." St.'s Ex. 75 & 76.

An hour later, at 1:30 p.m., Detectives Cardone and Slaughter arrived at the hospital with the [*27] primary intention of checking on the status of Marco and the secondary intention of talking to family and friends who may have been potential witnesses to abuse. They encountered Dr. Christine Fortin, who advised them that Marco remained in "critical condition." St.'s Ex. 74. She provided the detectives with her initial report on the condition of Marco Nieves, which suggested evidence of child abuse. Id. In the report, Dr. Fortin relays that Marco arrived at the hospital in cardiac arrest and that, during his stay, prior to his death, "Marco's grandmother report[ed] that Marco's 'stepfather' Michael Patino 'confessed' to 'punching' Marco in the 'stomach.'" Id.

At 2:10 p.m., Detectives Cardone and Slaughter administered a second rights form to Trisha Oliver, and, following their conversation, Trisha Oliver signed a Consent to Search form for the "LG cell-phone belonging to Trisha Oliver. (401) 486-5573." St.'s Ex. 58, 59 & 77.

At 4:53 p.m., while still at the hospital, Detectives Cardone and Slaughter also interviewed Guida Andrade, the mother of Marco's biological father's then-girlfriend. Her statement, she testified, is an account of what was "in her mind" upon hearing that Marco was [*28] in the hospital.

At 5:05 p.m., Marco Nieves expired at Hasbro Children's Hospital. At 6:00 p.m., Det. Cardone took a second written statement from Trisha Oliver. In this statement, she included a more detailed list of the events that transpired on October 3, 2009 and provided a more incriminating portrayal of Defendant's role in those events, writing:

[Marco] threw up as we where leaving church. At home I offered him food he didn't want to eat. He just wanted water then he went to sleep on my bed. I then texted Mike and asked what happened he said that he went to go hit him and he moved and he ended up hitting him the stomach. [sic]

St.'s Ex. 78.

D

The Warrants

In investigating the Defendant, the Cranston Police Department sought and obtained over a dozen warrants to search and seize evidence at the scene, the contents of cell phones and the records of service providers connected with those phones. The first search warrant, according to testimony, was signed at approximately 9:10 a.m. on October 4, 2009." See St.'s Ex. 22. The warrant says that it was served on Trisha Oliver at the location of 575 Dyer Ave., Apt. B18, Cranston, RI, and it allowed for the search and seizure of, "Any and [*29] all articles, instruments, or otherwise that may have evidentiary value pertaining to an investigation of an unresponsive child known as Marco Nieves DOB 9/15/03 which has been determined to be suspicious in nature." Id. There is no evidence that Trisha Oliver was officially served with the warrant. It would have been difficult for the police to serve her at her apartment, as the warrant said they did, as she was at the hospital at that time. The affidavit for this warrant read:

I, Sergeant Edward Walsh, an elector of the State of Rhode Island and Providence Plantations, and a member of the Cranston Police Department, having been continuously employed in that capacity for the past 22 years, hereby depose and say that I have reason to believe and do believe that there is evidence relating to a six year old male identified as Marco Nieves DOB 9/15/03 who resides at 575 Dyer Ave., Apt. B-18, Cranston, Rhode Island who was found unresponsive inside

of this apartment. Officer's [sic] who had responded to this apartment observed dark brown vomit inside of the toilet.

Marco Nieves was transported to Hasbro Hospital where he is in very critical condition. The attending doctor located marks on [*30] Nieves right shoulder and also determined Nieves was suffering from brain trauma which he classified as suspicious.

Id.

18 Despite the importance of the time that the Judge signed this warrant, this Court would note that it bears no time of issuance on its face. Police departments should be encouraged to request and include this information as a matter of course.

This affidavit, signed by Sgt. Walsh, who had the Defendant's phone on his person when the Judge signed the warrant, conspicuously includes no information about text messages or cell phones. It was pursuant to this warrant, however, that Detectives Cushman and Souza of B.C.I. seized all the evidence from the apartment, including the LG cell phone, the Metro PCS cell phone, and the iPhone. The Return of Service attached to the warrant, in fact, lists the LG cell phone and the Metro PCS cell phone first and second, respectively, on the list of items seized.

Later that day, the police drafted several additional warrants, including one to search the Metro PCS cell phone,¹⁹ a second one to search the contents of the LG Verizon cell phone,²⁰ and a third one to obtain the T-Mobile records for telephone number (401) 699-7580.²¹ Sgt. Gates [*31] signed all of the affidavits in support of these warrants.

19 See St.'s Ex. 34.

20 See St.'s Ex. 35.

21 See St.'s Ex. 36. During his interrogation, Defendant reported that his phone number was (401) 699-7580 and that his cell service provider was T-Mobile. See St.'s Ex. 68.

More specifically, sometime soon after Marco Nieves' death at 5:05 p.m. on October 4, 2009, Sgt. Gates drafted a warrant specific to the Metro PCS cell phone. The police served the warrant on Sprint/Nextel and requested the search of the "Metro PCS Cellular Phone and the stored content including but not limited to Text and Voice Messages." As the text of this warrant affidavit is important to understanding the activities of the police prior to its issuance, the course of their investigation and

the subsequent warrants they obtained, the full text of the affidavit has been included below:

I, Detective Sgt. Michael H. Gates, an Elector of the State of Rhode Island and Providence Plantations, and a member of the Cranston Police Department, having been continuously employed in that capacity for the past (18) years, on solemn oath depose and say that I have reason to believe that evidence in the form of text messages and voice [*32] messages, related to the crime of Child Abuse, can and will be located in the Cellular Phone(s), an LG Cell Phone and an Metro PCS Cell Phone properly seized under order of a Search Warrant from the crime scene.

On 10/04/09 at about 0612 hrs, Cranston Police responded to 575 Dyer Av, Riverbend Apts., Apt. number B18, with regard to a Medical Emergency; along with Cranston Rescue. Upon arriving there, officers learned there was a six year old male child who was unresponsive and would need immediate attention at Hasbro Children's hospital.

Upon investigating the possible causes of the child's condition, officer's [sic] learned the boy had been struck by the suspect, Michael Patino (dob 01/27/1982). Michael Patino himself stated he had accidentally struck the child at about 1500 hrs (or 3:00pm). The child immediately began experiencing pain and vomiting from the time the incident occurred, throughout the evening, and into the early morning hours on 10/04/09. It was further learned the suspect is the boyfriend of the child's mother, Trisha Oliver (dob 12/08/1982), that he often lives with the victim, and shares a 14 month old daughter in common with the victim's mother.

While Sgt. Kite was [*33] at the scene, he made several observations including the dark color of the victim's vomit, possibly indicating the extent of injury, and several cellular phones, one an LG Verizon Sidekick cell phone belonging to Trisha Oliver, and a second Metro PCS cell phone belonging to the suspect, Michael Patino.

During the time Sgt. Kite was in the apartment, the LG Verizon Sidekick phone rang and Sgt. Kite attempted to answer it but instead received a prompt indicating the message was an incoming text message that would not be delivered due to Trisha Oliver not having purchased additional minutes on her "prepay" card. As Sgt. Kite attempted to disconnect, the prompt took him to the text message box where he read the last text sent to "Da Master" at phone number 401-699-7580. That message read, "Wat if I got 2 take him 2 da hospital wat will I say and dos marks on his neck." Sgt. Kite informed that message was time stamped on 10/03/2009 at 6:10pm. While continuing the investigation, it was learned from Trisha Oliver the person she sent that message to, "DaMaster" was in fact, Michael Patino. The Metro PCS cell phone was seized at Cranston Police HQ from the suspect. The LG cell phone belonging [*34] to the mother of the victim was voluntarily turned over to the Cranston Police BCI investigators by Trisha Oliver.

The six year old male victim was transported by city rescue workers to Hasbro Children's Hospital. During the morning hours on 10/04/2009, it was reported by attending physicians at Hasbro that the types of injuries the child was suffering from were consistent with what is normally seen in abuse cases, and certainly were not sustained by a single accidental strike.

Later on that afternoon, it was learned by detectives present with family members at Hasbro, the victim had been taken off life support systems and did expire at 1705 hrs (or 5:05pm).

Based on the above information, I respectfully request a search warrant be issued for the two cellular phones in order to review additional potential incriminating text messages and voice messages between the mother of the deceased, Trisha Oliver, and the suspect, Michael Patino.

St.'s Ex. 34.

It is important to note several key details in this affidavit. In the first paragraph, Sgt. Gates wrote that the LG cell phone and the Metro PCS cell phone were seized pursuant to the original warrant at the scene. This statement is inconsistent [*35] with other evidence suggesting that the Metro PCS cell phone was taken off of Defendant's person at the station. Second, in the fourth paragraph, Sgt. Gates referred to the LG cell phone as an "LG Verizon Sidekick." *Id.* This reference is perhaps the first official mention of the LG cell phone as a Sidekick, but it certainly is not the last. In fact, the LG cell phone, which the police consistently have referred to as an "LG Verizon Sidekick" throughout the investigation and proceedings in this case, is *not* a Sidekick model phone. This Court finds it imperative to point out, however, that the black T-Mobile cell phone was, in fact, a Sidekick.

Also in the fourth paragraph, the Metro PCS cell phone is attributed to the Defendant. While it appears that Defendant did own the Metro PCS cell phone, this phrase is notable because it suggests that either the police seized the Metro PCS cell phone from the Defendant at the station, rather than the T-Mobile cell phone as suggested by other evidence, or an officer handled the Metro PCS cell phone prior to B.C.I.'s bagging it for evidence.

Photographs taken of this Metro PCS cell phone on October 28, 2009, pursuant to this warrant, show compelling [*36] evidence that Defendant was using, or had used, this cell phone.²² They also show that the contested text messages are not on, or at least were not photographed from, this phone. See St.'s Ex. 31. To understand these warrants and the case as a whole, this Court must clarify that, several weeks later, on October 28, 2009, Det. Cardone says that he discovered that the Metro PCS cell phone was not, in fact, confiscated from Defendant at the Cranston Police Station on the morning of October 4, 2009, as he said had been assumed by the police for the first twenty-four days of the investigation. In fact, he said that Officer Machado confiscated the T-Mobile cell phone at the station and that the police seized the Metro PCS cell phone at the scene on the morning of October 4, 2009. As a result of this alleged belated discovery, Det. Cardone drafted an additional warrant on October 28, 2009 (which this Court will address later) that he claims he did in an effort to correct this alleged confusion regarding the cell phones and to obtain the correct and necessary information from the relevant phone.

22 A number known to be the cell phone number of Defendant's mother is listed in the Metro PCS phone [*37] under the contact name, "Momz." Additionally, one of the photographs in State's Ex. 31 is a photograph of a text message from (401) 617-4301 that reads, "Yo - Mike." There are also several photographs of a young,

female child who appears to be Jazlyn Oliver. See St.'s Ex. 31.

The third warrant—likely obtained at the same time as the warrant for the Metro PCS cell phone—allowed for the search of the "LG Verizon Sidekick Cellular Phone and the stored content including but not limited to Text and Voice Messages." St.'s Ex. 35. The affidavit in support of this warrant is identical to the one written for the Metro PCS cell phone; it contains the same inaccuracies and its content appears to have been copied or cut and pasted from the earlier affidavit. This duplication is particularly apparent in the last paragraph of both warrant affidavits, which reads, "Based on the above information, I respectfully request a search warrant for the two cellular phones in order to review additional potential incriminating text messages . . ." St.'s Ex. 34 & 35 (emphasis added).

As the only photographs of the LG cell phone entered into evidence at this hearing were those of the text messages that were taken [*38] at the apartment on the morning of October 4, 2009, it appears that the police drafted the later warrant for the contents of the LG cell phone (St.'s Ex. 35) simply to cure any deficiency in the scope of the prior warrant for that cell phone. While the warrant allowed the officers and detectives assigned to the case to search through the cell phone to view the text messages first hand, no full evidence has been produced to this Court that the police obtained specifically pursuant to this warrant.

On October 6, 2009, Sgt. Gates drafted, and had signed, four additional search warrants, to obtain cell phone records specific to various cell phones and cell phone numbers. As these warrants contain no information as to their respective times of issuance that day, they will be listed here according to their exhibit numbers, as entered by the State during the suppression hearing.

Sgt. Gates obtained a warrant for phone records associated with cell phone number (401) 699-7580 and served it on T-Mobile Law Enforcement Group at the location of Sprint/Nextel Keeper of Records,²³ which allowed for the search of "T-mobile cellular number 401-699-7580 as enumerated in Federal Statute Title 18 U.S.C. § 2703(c)(1)(D)." [*39] This warrant sought: "subscriber information, cell site information, saved/stored text messaging, and voice mail records between 0001 hours and 0000 hours 10/04/09." St.'s Ex. 36. The affidavit is nearly identical to the prior affidavits for the Metro PCS cell phone (St.'s Ex. 34) and the LG cell phone (St.'s Ex. 35), including the statement that "evidence in the form of text messages and voice messages, related to the crime of Child Abuse, can and will be located in the Cellular Phone(s), an LG Cell Phone and an

[sic] Metro PCS Cell Phone." Id. The sole difference between this affidavit for the T-Mobile cell phone and the prior affidavits for the other two cell phones is the last paragraph, which reads:

Based on the above information, I respectfully request a search warrant be issued for T-Mobile cellular number 401-699-7580 as enumerated in Federal Statute Title 18 U.S.C. § 2703(c)(1)(D). The information being sought is as follows: subscriber information, cell site information, saved/stored text messaging, and voice mail records between 0001 hrs 10/03/09 and 0000 hrs 10/04/09.

Id.

23 This location, being for a different service provider, has been identified during the hearing as a likely error. It appears [*40] erroneously in multiple warrants.

Sgt. Gates sent a letter to T-Mobile in advance of obtaining the warrant for the T-Mobile phone records to ask the service provider to preserve the information that he expected to request by the warrant. See St.'s Ex. 37. T-Mobile produced the requested information on October 20, 2009, and the records show that Defendant's use of the T-Mobile cell phone was almost exclusively for text messaging. The results also reveal that T-Mobile does not store, and has no capacity to produce, the content of subscriber text messages. See St.'s Ex. 38.

Neither this warrant, nor the attached affidavit, contain any particularized information about the cell phone in question. The make, model, size, and even the color of the phone, to which the number (401) 699-7580 belonged, are curiously absent. As explained above, both the LG cell phone and the Metro PCS cell phone are mentioned in the affidavit, but the black T-Mobile Sidekick is not. The cell phone number and the service provider, which the Defendant revealed at the end of his interrogation, are the only details included.

Sgt. Gates also obtained a warrant for phone records for phone number (401) 359-6789, believed [*41] to belong to Mario Palacio, a friend of the Defendant, and served it on the T-Mobile Law Enforcement Group again at the location of Sprint/Nextel Keeper of Records on October 6, 2009.²⁴ It allowed for the search of "Subscriber information, cell site information, saved/stored text messages, and voice mail regarding cellular telephone number 401-359-6789, as enumerated in Federal Statute Title 18 U.S.C. § 2703(c)(1)(D)." St.'s Ex. 39. The affidavit for this warrant, once again, is almost identical to

the prior affidavits for the warrants seeking the contents of the Metro PCS cell phone (St.'s Ex. 34), the LG cell phone (St.'s Ex. 35) and the T-Mobile cell phone (St.'s Ex. 37) with a few additions. In this affidavit, Sgt. Gates changed the second sentence of the fifth paragraph to read, "As Sgt. Kite attempted to disconnect, the prompt took him to the text message box where he read the last text sent to *"DaMaster" from Verizon Wireless number 401-486-5573 to T-Mobile number 401-699-7580.*"²⁴ The other change to this warrant affidavit is contained in its bottom two paragraphs, which read:

On 10/06/09 Det. John Ryan spoke with a witness, Mario Palacio (dob 03/13/59) who informed he was with the suspect, [*42] Michael Patino, during the hours immediately following the assault against the victim. According to Trisha Oliver, she did receive a phone call from Patino following the assault, but did not recognize the phone number. The time of that call, and the witness who lent Patino his phone, Mario Palacio, are relevant to the investigation in order to corroborate information already learned as well as completing a time line of events leading to the death of the juvenile victim.

Based on the above information, I respectfully request a search warrant be issued for T-Mobile cellular number 401-359-6789 as enumerated in Federal Statute Title 18 U.S.C. § 2703(c)(1)(D). The information being sought is as follows: subscriber information, cell site information, saved/stored text messaging, and voice mail records between 1500 10/03/09 and 2130 hrs 10/03/09.

St.'s Ex. 39.

24 The warrant for phone records for (401) 359-6789, the cell phone of Mario Palacio, also was preceded by a notice of preservation, which Sgt. Gates sent to T-Mobile. See St.'s Ex. 40.

25 The change to this sentence is highlighted with italics.

Interestingly enough, the cell phone associated with this warrant affidavit is also a T-Mobile cell phone. T-Mobile [*43] Law Enforcement Group produced the records sought by this warrant on October 20, 2009. See St.'s Ex. 52 & 41.²⁵ The records verify that Palacio owned the cell phone and show that someone made a nine minute phone call from Palacio's phone to (401) 383-7022,

the phone number for Trisha Oliver's landline phone, at 9:35 p.m. on October 3, 2009. See St.'s Ex. 41.

26 State's Exhibit 52 is T-Mobile Law Enforcement Group's notice of preservation, sent to the Cranston Police Department on October 7, 2009.

Sgt. Gates further obtained a warrant for phone records for phone number (401) 486-5573, belonging to Trisha Oliver, and served it on the Verizon Wireless Legal Department, again at the location of Sprint/Nextel Keeper of Records. This warrant requested subscriber information and records for the LG cell phone. See St.'s Ex. 43.²⁷ All of the information listed in this affidavit is identical to the information in the affidavit for Palacio's phone records, (St.'s Ex. 39), except for the final paragraph, which reads:

Based on the above information, I respectfully request a search warrant be issued for Verizon Wireless cellular number 401-486-5573 as enumerated in Federal Statute Title 18 U.S.C. § 2703(c)(1)(D). The [*44] information being sought is as follows: subscriber information, cell site information, saved/stored text messaging, and voice mail records between 0001 hrs 10/03/09 and 0000 hrs 10/04/09.

St.'s Ex. 42.

27 Sgt. Gates also preceded this warrant with a notice of preservation to Verizon Wireless. See St.'s Ex. 43. Additionally, Sgt. Gates sent a follow-up letter to Verizon Wireless on October 9, 2009, requesting that the information be emailed or faxed in response to the warrant. See St.'s Ex. 45.

Unlike T-Mobile, Verizon was able to produce records with text messaging content in them. See St.'s Ex. 44. The content of the LG cell phone matches the photographs taken on October 4, 2009 by Det. Cushman, including a text message which reads, "Wat if I got 2 take him 2 da hospital wat do I say and dos marks on his neck omg," which is the message that Sgt. Kite testified to having seen that morning. Id.

Sgt. Gates finally obtained a warrant for the phone records for phone number (401) 454-9765, believed to have been in Guida Andrade's name but belonging to Marco's father, Rafael Nieves. See St.'s Ex. 46. He served this warrant on Sprint/Nextel Legal Compliance at the location of Sprint/Nextel Keeper [*45] of Records. See St.'s Ex. 47.²⁸ It allowed for the search of

"Sprint Nextel cellular number 401-454-9765 as enumerated in Federal Statute Title 18 U.S.C. § 2703(c)(1)(D)." The warrant sought: "subscriber information, cell site information, saved/stored text messaging, and voice mail records between 0001 1/25/09 and midnight 1/25/09." St.'s Ex. 46. The affidavit is identical to the affidavit for Palacio's records (St.'s Ex. 39), with the following addition:

Moreover, the investigation also revealed the biological father of the victim, Rafael Nieves, received a voice mail on his cellular phone, 401-454-9765 (Sprint/Nextel) from the suspect, Michael Patino, on 01/25/09. That voice mail was a threat to punch the child, the deceased child from this case.

Id.

28 State's Exhibit 47 is yet another notice of preservation which Sgt. Gates sent to Sprint/Nextel.

Defendant supposedly left the voicemail, referenced in this warrant affidavit, when he accompanied Trisha Oliver to drop off Marco to see his biological father on January 25, 2009. Sprint/Nextel produced the information responsive to this warrant on October 9, 2009. In its report, no phone calls, of the 62 that were recorded, are shown to or from (401) 699-7580 [*46] or (401) 486-5573. See St.'s Ex. 48.

On October 8, 2009, Sgt. Gates drafted and had signed two additional warrants. The first warrant sought phone records for phone number (401) 431-3626, which then belonged to Angie Patino, the Defendant's sister.²⁹ He served this warrant³⁰ on the Sprint/Nextel Legal Compliance department at the location of Sprint/Nextel Keeper of Records, and it allowed for the search of "Sprint Nextel cellular number 401-431-3626 as enumerated in Federal Statute Title 18 U.S.C. § 2703(c)(1)(D)." The warrant sought: "subscriber information, cell site information, saved/stored text messaging, and voice mail records between 0001 09/28/09 and midnight hrs 10/04/09." St.'s Ex. 49. This warrant affidavit is almost identical to the warrant affidavit for Rafael Nieves' phone (St.'s Ex. 46), although it also has the following addition:

Additionally, with cooperation from the victim's mother, the ongoing investigation revealed the suspect may have had contact with his sister, Angie Patino. The victim's mother, Trisha Oliver, stated An-

gie Patino has a cell phone with the number 401-431-3626, a Sprint/Nextel number. It is believed the suspect contacted his sister on her cell phone often which [*47] would corroborate the phone number, 401-699-7580, as belonging to the suspect, Michael Patino, as Trisha Oliver claimed. This would make it irrefutable for the suspect to deny that 401-699-7580 is the phone that is under his constructive control on a regular basis, and would also prove that Michael Patino is in fact, "DaMaster."

St.'s Ex. 49.

29 Angie Patino testified during the suppression hearing that her cell phone number in October 2009 was (401) 431-3626.

30 This warrant was also preceded by a notice of preservation sent from Sgt. Gates to Sprint/Nextel Corporate Security requesting that the records for (401) 431-3626 be preserved from "midnight 09/28/09 through midnight 10/04/09." St.'s Ex. 50.

Sprint/Nextel responded on October 13, 2009. See St.'s Ex. 51. It produced two preserved text messages, both of which were unrelated to this case, and no voice mail messages. Its records indicate that several outgoing phone calls were made from Angie Patino's phone to both (401) 486-5573 (the LG cell phone) and (401) 383-7022 (the apartment landline phone) between the hours of 5:21 p.m. and 11:15 p.m. on October 4, 2009. See St.'s Ex. 60 & 62. According to the call log, only one of these calls [*48] (at 5:21 p.m.) was answered and that conversation lasted only three seconds. Id. The log also indicates that Angie Patino called (401) 699-7580 one time on October 4, 2009 at 8:58 p.m., but received no answer. Id. Otherwise, the records show that Ms. Patino was in repeated contact with her mother, at phone number (401) 475-9434, between 11:23 a.m. and 11:59 p.m. on October 4, 2009. See St.'s Ex. 32 & 34.³¹

31 State's Exhibits 32 and 34 are the records of the Metro PCS cell phone and the extraction report for it, respectively, and appear to confirm that the number (401) 475-9434 was, in fact, Ms. Patino's mother. In the Metro PCS cell phone's contact list, the number is saved under the title "Momz," and the extraction report shows that the number was saved as "Mike's Mom" on the LG cell phone. Ms. Patino also testified that her parents' home phone number was (401) 475-9434.

Sgt. Gates sought a second warrant on October 8, 2009 for phone records for phone number (401) 383-7022, the landline phone number at the apartment, which was in Trisha Oliver's name. He served this warrant on Cox Communication Keeper of Records again at the location of Sprint/Nextel Keeper of Records, and it allowed [*49] for the search of "Cox Communications Subpoena Response keeper of the records for number 401-383-7022." The warrant sought: "any and all incoming and outgoing calls between the hours of 0001 hrs on 10/03/09 and midnight on 10/04/09." St.'s Ex. 53. The affidavit for this warrant was also identical to the warrant issued for Rafael Nieves' phone records, except that it included the following addition:

During an interview with the victim's mother, Trisha Oliver, she informed she had run out of her pre-paid minutes for her cell phone. Because of that, Ms. Oliver stated she began using her "landline" telephone to communicate with the suspect. Ms. Oliver's landline home phone is 401-383-7022 and is a Cox Communications account. It is relevant to obtain records of incoming and outgoing phone calls to that Cox number in order to corroborate that the suspect's phone is 401-699-7580 and that number is directly correlated with Ms. Oliver's address book which lists Michael Patino as "DaMaster."

St.'s Ex. 53.

32 Sgt. Gates followed this warrant with a letter to Cox Communications, which informed the company that a search warrant had just been faxed and that the results could be faxed or emailed to [*50] Sgt. Gates in response. St.'s Ex. 54.

The documents returned by Cox Communications indicated that three outgoing calls were made from (401) 383-7022 to (401) 699-7580 on the evening of October 3, 2009. The first, made at 6:19 p.m., lasted five seconds. The second, at 6:31 p.m., lasted five seconds as well. The third, made at 10:11 p.m., lasted only three seconds. The call records also show the 911 call as originating at 6:08 a.m. on October 4, 2009 and lasting one minute and seventeen seconds. See St.'s Ex. 55.

On October 28, 2009, Det. Cardone drafted a warrant specifically regarding a "black T-Mobile Sidekick, cell number 401-699-7580."³³ St.'s Ex. 56. This warrant was signed by the Judge and served on Defendant, and it allowed for the search of the "Black T-Mobile Sidekick

cell phone; number 401-699-7580; likely containing stored text and voice mail information necessary to continue the successful investigation into the death of this child."³⁴ Id. Det. Cardone's affidavit is again strikingly similar to Sgt. Gates' affidavit for the records of Rafael Nieves' cell phone. There are, however, a few key exceptions. First, Det. Cardone stated that it was the LG Verizon cell phone and the [*51] black T-Mobile SideKick phone that were "properly seized under order of a Search Warrant at the crime scene." Id. This information deviated not only from the warrant affidavit for Rafael Nieves' cell phone records (St.'s Ex. 46), but from all of the warrant affidavits written by Sgt. Gates, which state that the police seized the LG cell phone and the Metro PCS cell phone from the scene. Later in the affidavit, Det. Cardone contradicted himself, writing, "The Black T-Mobile SideKick cell phone was seized at Cranston Police HQ from the suspect." St.'s Ex. 56.

33 For clarification, State's Ex. 79 is a photograph of the black T-Mobile cell phone, taken pursuant to the October 28, 2009 warrant.

34 As there was conflicting evidence as to which cell phone belonged to the Defendant, Det. Cardone testified that he verified, on October 28, 2009, that the black T-Mobile Sidekick cell phone did, in fact, correspond to phone number (401) 699-7580 by calling it from his work cell phone. State's Ex. 33 is a photograph documenting this alleged effort.

Det. Cardone also added the following paragraph to his affidavit:

Following the seizure of the T-Mobile SideKick from the suspect, Michael Patino, a Search [*52] Warrant was applied for, reviewed and signed by Judge William Clifton, and served to T-Mobile Law Enforcement Relations. The results did return subscriber information indicating Michael Patino was the name listed for account billing for mobile number 401-699-7580. However, T-Mobile LE Relations also indicated they did not have any information regarding text messaging or voice mail recorded with their company, but informed that information may be stored on the mobile phone itself. Additionally, a Search Warrant was also served to Verizon Wireless Legal and External Affairs Dept., and it was verified in the results faxed to the Cranston Police, as Trisha Oliver had states [sic], that there were text messages exchanged between her phone and the suspect's phone fol-

lowing the time when the child was first injured and when he was pronounced dead. As T-Mobile has indicated, and the victim's mother (Trisha Oliver) in documented statements, there is probable cause to believe the content of those text messages and incriminating voice mail messages are stored on the Black T-Mobile SideKick phone seized from Michael Patino's pocket at the time of his arrest.

Id. Det. Cardone attempted to explain [*53] in testimony that this October 28, 2009 warrant affidavit was designed to correct previous statements in Sgt. Gates' warrant affidavits which had suggested erroneously that the police actually confiscated the Metro PCS cell phone from Defendant at the Cranston Police Station on the morning of October 4, 2009. Det. Cardone also tried to explain further that he realized that officers had made this error, when he reviewed phone records obtained from the various service providers pursuant to the earlier warrants, thereby prompting him to seek this additional warrant. Yet it is highly notable that he did not seek this warrant for this critical cell phone until almost a month into the investigation of the Defendant and after receiving phone records for and looking at all of the other cell phones. It also is particularly important to note that, at the time he sought this warrant for the T-Mobile cell phone text message records, he already knew that T-Mobile did not keep a record of text messages.

Following the issuance of a warrant for the T-Mobile cell phone, Detectives Slaughter, Cushman, and Cardone viewed that phone a collective total of six times between October 28, 2009 and November [*54] 5, 2009. See Def.'s Ex. N & O. Pursuant to Det. Cardone's warrant, the police took a collection of photographs of the contents of the black T-Mobile Sidekick cell phone. See St.'s Ex. 30. Time-stamped on October 29, 2009, these photographs are limited in that they show the contents of the cell phone as it existed twenty-five days after Marco's death. They are further limited in that it appears, inexplicably, that the police failed to photograph all of the contents of the phone. One of the last photographs in the collection shows the phone's "System Info" page, where most cell phones display the device's phone number and other details about the service plan. Id. Interestingly, the T-Mobile's "System Info" page reads, "Not Available," in the location where the phone number should be displayed. Three other pictures taken of the T-Mobile cell phone on October 29, 2009 indicate, in fact, that a text conversation was carried out between an officer and one "x TRACILICIOUS x" on October 8, 2009. Id. These photographs, taken of the inbox of the

phone, show that the inbox contained forty-four other messages that were not photographed by the detectives. Also curiously absent from the collection [*55] of photographs are any and all photographs in the outbox, even though the contested text messages were supposedly sent from the T-Mobile phone. Id.

Despite the fact that several officers testified that they never saw any text messages on the T-Mobile cell phone itself, and given that text messages and cell phone technology were particularly significant to this case at its inception, this Court finds it highly unlikely that the Defendant's cell phone remained unexamined while in police custody and prior to the issuance of a proper warrant. In addition, it appeared to this Court that testifying officers knew more about this examination than they were willing to divulge.

A final warrant, obtained almost three years later by Sgt. Gates on June 8, 2012, authorized the creation of an "extraction report" of the contents of the LG cell phone using a Cellebrite software program owned by the Cranston Police Department. The affidavit, signed by Sgt. Gates, was similar in content to the October 2009 warrant affidavits, but was not identically worded. It also contained some of the same inconsistencies as the previous warrant affidavits, in addition to new information regarding the purported necessity [*56] of the extraction report. The June 8, 2012 warrant, in full, reads:

Your affiant upon oath states that he has reasons to believe that grounds for such warrant exist and state the following facts on which such belief is founded on the following affidavit.

I, Detective Sgt. Michael H. Gates, under oath do depose and say that I am a member of the Cranston Police Department and I am currently assigned to the Detective Division as an investigator. I have been a police officer for 21 years and I have been assigned to the Criminal Investigation Unit for 8 years. As such, I am charged with the duty of investigating all violations of laws of the State of RI.

On 10/04/2009 at about 0612 hours, Cranston Police responded to 575 Dyer Av, Riverbend Apts., Apt. number B18, with regard to a Medical Emergency; along with Cranston Rescue. Upon arriving there, officers learned there was a six year old male child who was unresponsive and would need immediate attention at Hasbro Children's Hospital. Trisha Oliver (d.o.b 12/8/82) was present at 575 Dyer

Avenue when the Cranston Police arrived, along with her six year old son Marco Nieves, her fourteen month old Jazlyn Oliver, and Michael Patino (d.o.b 1/27/82). [*57] The six year old male victim was transported by city rescue workers to Hasbro Children's Hospital. During the morning hours on 10/04/09, it was reported by attending physicians at Hasbro that the type of injuries the child was suffering from were consistent with what is normally seen in abuse cases, and certainly were not sustained by a single accidental strike. Later on that afternoon, it was learned by detective present with family members at Hasbro, the victim has been taken off of life support systems and did expire at 1705 hours.

Responding investigators on 10/04/09 learned that the boy had been experiencing pain and vomiting the previous day, throughout the evening and into the early [sic] morning hours on 10/04/09. It was further learned that Michael Patino is the boyfriend of the victim's mother, Trisha Oliver, and shares the 14 month old daughter, Jazlyn, in common with Trisha Oliver.

Sergeant Matthew Kite was among the responding Cranston Police officers. While Sgt. Kite was at the scene, he made several observations including the dark color of the victim's vomit, possibly indicating the extent of injury, and four cellular phones. One of the cell phones was an LG Verizon Sidekick [*58] cell phone that Sergeant Kite observed on the kitchen counter in Apartment B18. A second Metro PCS cell phone was first observed by Sergeant Kite in Apartment B18 on the back of the headrest of a couch or above the shoulder of where Michael Patino was seated. The Metro PCS phone was taken from the person of Michael Patino a short time later by Officer Machado at Cranston Police Headquarters. Those two cellular phones were seized by the Cranston Police and assigned evidence room property numbers 09-4995-PR, respectively. Those two phones were secured and stored in the locked Cranston Police BCI evidence room, and have remained in Cranston Police custody undisturbed since. While at Apartment B18, Michael Patino told Ser-

geant Kite that Trisha Oliver has not called him about the child's condition because he did not have a cellular phone.

Upon investigating the possible causes of the child's condition on 10/04/09, Cranston Police detectives John Cardone and Jean Paul Slaughter interviewed separately both Trisha Oliver and Michael Patino. Trisha Oliver has provided conflicting accounts to rescue, police, and hospital officials earlier in the day on 10/04/09 about her knowledge of the cause [*59] of her son's injuries. In a written statement to detective on 10/04/09 Trisha Oliver said on 10/03/09 she texted Michael Patino and asked what had happened to her son, and Patino told her that he went to hit him and the boy moved. Oliver told police that Michael Patino told her that he ended up hitting Marco in the stomach. In a recorded interview sometime later 10/04/09, Ms Oliver was shown text messages that police had viewed that morning on the LG Verizon Sidekick phone. She told police that the LG Verizon phone was hers and that the messages were ones sent from and to her phone (401-486-5573) on 10/3/09, and that she was communicating with Michael Patino about what had happened to her son and that he was experiencing pain and vomiting. In the texts, the incoming texts appear as having come from "DaMaster" whom Ms. Oliver identified as Michael Patino. The designation "DaMaster" has been entered into the memory of the LG Verizon phone.

Following the Cranston Police investigation, the matter was presented to the Providence County Grand Jury. The jury returned an indictment charging Michael Patino with one count of murder in 2010 in indictment number P1-2010-1455A. The case is now expected [*60] to be tried before Ms. Justice Savage in the Fall of 2012. Assistant Attorney General Randall White has told your affiant that defendant Patino has indicated through counsel that he intends to assert that the LG Verizon Sidekick phone is his. Sometime [sic] after the boy's death on 10/4/09 your affiant obtained a search warrant for the contents of the LG Verizon Sidekick phone from Justice William

Clifton of the District Court. The police searched the phone and seized the text messages from it that they had viewed and photographed on the morning of 10/4/09.

The need to corroborate the claim of Trisha Oliver as the person with constructive control, and primary user, of the LG Verizon Sidekick with cellular number 401-486-5573, can be achieved by extracting digitally stored information on the phone, including Ms. Oliver's contact list and other information such as stored photographs, voice mail, text messages, and other types of personal information which would indicate who regularly uses the phone. This can be completed using a hardware and software system made by Cellebrite UFED, and regularly used by trained Cranston Police-BCI investigators. In addition to the make and model of [*61] the phone, the phone also has other identifying features including a model number of VX9800, and what is considered to be a serial number located behind the battery listed as ESN DEC# 02107143164. These things were not obtained when police searched the LG phone in 2009.

Based on the above information there is cause to believe that the cellular phone ID by phone number 401-486-5573 does belong to victim's mother, Trisha Oliver, and the information contained and stored in the phone is extracted, would verify the claim by Ms. Oliver, that particular phone was hers and used primarily by her prior to and up to the time the Cranston Police seized it. I respectfully request a search warrant be issued for the cellular phone and its stored content in order to corroborate this belief.

St.'s Ex. 57.

Here again, the LG cell phone is referred to as an "LG Verizon Sidekick." This Court finds it astonishing that the affiant was able to record the model number and serial number of the LG cell phone, yet did not correct the misnomer with which the phone has been referenced since October 4, 2009.

The result of this recent warrant was a thirty-five page report, logged into evidence as State's Exhibit 32, [*62] which includes the history of voice mail and text

messages and phone calls that were recorded on the LG cell phone. The report does not show a message regarding "insufficient funds" arriving on the LG cell phone on the morning of October 4, 2009, contradicting Sgt. Kite's testimony that the phone "beeped" and displayed that incoming message. The report does, however, include a similar message, sent from the service provider, which reads "You have insufficient funds to send message," shown to have arrived that morning at 8:09 a.m., indicating that an officer had attempted to send a text message from the phone at the scene prior to obtaining a warrant. This report also shows the aforementioned call to voicemail at 8:09 a.m. that morning, further suggesting that the phone was being explored and manipulated prior to issuance of the initial warrant. The rest of the report appears to match the contents of the LG cell phone that the police already had obtained earlier in the investigation.

E

The Continuing Investigation

After Marco Nieves' death at 5:05 p.m.³⁵ on October 4, 2009, Detectives Cardone and Slaughter proceeded with their investigation of what was now considered a homicide. Around [*63] 7:45 p.m.,³⁶ they interviewed Rafael Nieves and his then-girlfriend, Alexandria Correia. Though the two had little to say regarding Marco's recent death and the events that preceded it, they discussed Marco's prior hesitations about being with Defendant. Mr. Nieves explained that neither he nor Ms. Correia had seen Marco since August of that year. He continued to describe a voice message which used violent language and which Mr. Nieves claimed was a direct threat from Defendant to Marco, which was unintentionally left on Mr. Nieves' voicemail in January of 2009. Mr. Nieves explained in detail the events that transpired at that time, and stated that he had confronted Defendant about abusing his son after he heard this message. Mr. Nieves described the message to Detectives Cardone and Slaughter explaining, "... [Mr. Patino] asked him, 'Marco, is this where you father lives?' and Marco said 'I don't know,' he's five years old at the time." St.'s Ex. 3. After clarifying for the detectives that, on this particular day, Marco was coming to stay with Mr. Nieves and Ms. Correia for the weekend, Mr. Nieves continued, stating, "And [Marco]'s like 'I don't know' and then [Mr. Patino]'s like [*64] 'Marco, I'm going to fuckin' punch you in your fuckin' head,' just like that." Id.

³⁵ See St.'s Ex. 56. The time of Marco Nieves' death is recorded in several of the warrant affidavits. Though the validity of some information in the warrants is contested, the time of death is not contested by either party.

36 State's Exhibits 3 & 4 provide this time estimate. While interviewing Nieves and Correia, Det. Cardone stated, "Again, we're very sorry for your loss..." which places the interview after Marco's death. See St.'s Ex. 3. Furthermore, the time listed on the written statement of Mr. Nieves, which was completed after the interview, is 8:25 p.m. See St.'s Ex. 4.

The interview then changed topics and proceeded to address the issue of Mr. Patino's prior abusive behavior toward Marco, insofar as Ms. Correia and Mr. Nieves were aware of it. Mr. Nieves indicated that Marco had mentioned abuse to him "more than" three times in the past. St.'s Ex. 3 & 4. Mr. Nieves then continued with an anecdote in which he discovered a bruise on Marco's back, during Marco's bath time, "a little before January [2009]." St.'s Ex. 3. According to Mr. Nieves, after being asked multiple times, Marco confessed that [*65] Defendant had hit him and caused the bruise. Mr. Nieves said that he reported these incidents to the Cranston Police Department in January 2009, which then referred him elsewhere. After giving a detailed verbal account of these incidents, the detectives asked Mr. Nieves to provide a formal, written statement. *Id.* This statement was dictated by Mr. Nieves to Ms. Correia because, Mr. Nieves explained, "I'm not a good speller." *Id.*

That same day, October 4, 2009, Detectives Cardone and Slaughter conducted a second interview of Michael Patino at 9:36 p.m. See St.'s Ex. 71. Mr. Patino read and signed his rights and then immediately asked for a lawyer. The interview concluded immediately. See St.'s Ex. 69 & 70. The police also apparently learned information from Joseph Peters in the early stages of their investigation, relative to Defendant being rough with Marco in the recent past when they brought in groceries to the apartment, although they took no formal statement from Mr. Peters.

On October 13, 2009, Arlene Oliver provided a formal version of the statement she gave to Dr. Fortin on October 4, 2009. In her testimony, Arlene explained that she based her formal statement on information that [*66] she had gathered from her daughter at the hospital on October 4, 2009. She stated, "Trisha told me that that guy hit my grandson." Arlene explained that Trisha Oliver had relayed that information around "2 or 3" in the afternoon that day, but that she did not speak to any police officers about the information. Rather, Arlene claimed that the police obtained the information by eavesdropping on the conversation between she and Trisha Oliver. Arlene dictated her formal statement verbally to Detective Slaughter, who then wrote it down, at Mrs. Oliver's request. In her testimony, she acknowledged that this statement was, in fact, her words, if not her writing.

On August 15, 2012, after the conclusion of the suppression hearing and as this Court worked feverishly to pen this Decision, the State appeared in court to represent that it had secured a warrant on August 2, 2012 from the District Court to again search both the Metro PCS cell phone (St.'s Ex. 16) and the T-Mobile cell phone (St.'s Ex. 18)—this time with the same Cellebrite software that the police had employed on the eve of the suppression hearing, pursuant to the June 8, 2012 warrant, to extract the contents of the LG cell phone. [*67] This brought the number of warrants in this case up to thirteen. It asked for permission to withdraw the two cell phones from evidence for that purpose. This software, reportedly not available at the Cranston Police Department at the time of the earlier searches of these cell phones, can reveal the contents of cell phones and the history of their prior use that might not be seen upon an ordinary visual inspection of the cell phones. The Court allowed the cell phones to be withdrawn from evidence for this additional testing, over the objection of the Defendant, but with the requirement that the phones remain in the custody and control of prosecutor Randall White at all times and be tested only in the presence of defense counsel. The parties returned for a hearing on August 17, 2012 to represent that they gleaned some additional information from this visual inspection of these cell phones, but that the application of the Cellebrite software had not been successful in disgorgeing their contents.

The State then represented that it intended to seek two additional search warrants to test these two cell phones under the auspices of the State Police, using even more sophisticated software. It [*68] asked for leave to retain the cell phones for testing, under the same conditions imposed by this Court previously, which this Court allowed. Assuming that the State obtained the two warrants that it requested from the District Court, this would bring the number of warrants in this case up to fifteen.

As the evidence in the suppression hearing closed at the conclusion of that hearing on July 10, 2012, at which time this Court took this matter under advisement, this Court inquired at both the hearing on August 15, 2012, and again at the hearing on August 17, 2012, as to whether the parties expected that any warrants obtained in August 2012, or any subsequent searches of cell phones in evidence conducted pursuant to them, would affect the pending decision. The parties could not answer that question, absent knowledge of the results of the subsequent searches. This Court, therefore, will proceed to decision, letting the proverbial chips fall where they may.

F

Procedural History

Defendant has filed multiple motions to suppress the text message evidence, the actual cell phones themselves, all of the cell phone records obtained, the phone records of the apartment landline phone, the video recording [*69] taken of the apartment, the video recording and transcript of his interview which took place on the morning of October 4, 2009, and his written confession. He argues that all of this evidence was the product of illegal searches and seizures in violation of the *Fourth* and *Fifth Amendments of the United States Constitution* and *Article 1, Section 6 of the Rhode Island Constitution*. Defendant also has filed a motion to suppress the video recording and transcript of his interview and his written confession as being involuntary and obtained in violation of his due process rights under both the United States and Rhode Island Constitutions. In addition, Defendant has filed a motion for a Franks hearing with respect to alleged false statements in all of the warrant affidavits. Defendant further has filed a number of motions in limine to exclude: certain text message evidence, as unduly prejudicial and on grounds of hearsay; the testimony and medical opinion of Dr. Christine Fortin; and certain Rule 404(b) [*70] evidence that was the subject of two days of evidentiary hearings at the beginning of the suppression hearing, including the testimony of Rafael Nieves and Joseph Peters and related witnesses.³⁷

37 The State objects to these motions and has filed its own motion in limine with respect to the R.I. R. Evid. 404(b) evidence.

Defendant argues, in support of his suppression motions,³⁸ that he has standing to challenge the search of the LG cell phone and the seizure of the cell phones from the apartment because he has a reasonable expectation of privacy and in the apartment, as a frequent overnight guest, and in the LG cell phone, because he purchased it and used it. Defendant further contends that because Sgt. Kite searched the LG cell phone to view the text messages before obtaining a warrant and before Trisha Oliver gave her consent, the search was unreasonable and a violation of the *Fourth Amendment*. Defendant insists that all the text message evidence, the cell phone records, and his recorded and written statements to the police should be excluded from trial as fruit of the poisonous tree. Lastly, Defendant argues that both his oral and written statements to the police should be suppressed [*71] because they were involuntary and obtained pursuant to coercive police tactics in violation of his due process rights under both the *Fourteenth Amendment to the United States Constitution* and its counterpart in the Rhode Island Constitution.

38 At this point, the Court notes that both parties' legal arguments focused largely on the issue of standing as a threshold issue in the case. The

other legal arguments were made, unfortunately, in a perfunctory manner. This Court has been required, therefore, to extrapolate from both parties' arguments, as made in their briefs and at the hearing, in order to attempt to fully construct their positions and the law relevant to them for purposes of this Decision. The lack of adequate legal briefing by both parties has resulted in the unnecessary and exhausting expenditure of precious judicial resources.

The State objects to Defendant's motions. As to its suppression motions, the State asserts that Defendant lacks standing to challenge either the search of the LG cell phone or the seizure of the cell phones from the apartment because Defendant did not live at the apartment and because the LG cell phone belonged to Trisha Oliver. Moreover, the State [*72] argues that, even if Defendant has standing, Sgt. Kite's actions in viewing the text messages were objectively reasonable and did not exceed the exigencies of the situation he faced. The State further contends that the text message evidence should be admissible at trial because this evidence was later lawfully obtained from valid warrants that provided an independent source for the discovery of the text messages. Finally, the State argues that Defendant's oral and written confessions were voluntary and should not be suppressed because Defendant was advised of his Miranda rights, knowingly waived them, and the police did not coerce his confessions. As to the Franks motion, the State argues that there is insufficient evidence of falsity, Defendant lacks standing to make the motion, and regardless of the falsity of any statements, no Franks hearing is required because the warrants are supported by probable cause.

This Court convened the suppression hearing and an evidentiary hearing on the Rule 404(b) motions on June 18, 2012 and concluded, after more than three weeks of testimony, on July 10, 2012. In the midst of the hearing, and based on the evidence adduced at the suppression hearing, [*73] Defendant moved for a Franks hearing. This Decision will address Defendant's motions to suppress and his motion for a Franks hearing. All other pre-trial motions are reserved until the time of trial.

II

Analysis

A

Motion to Suppress Text Messages and Other Evidence from Cell Phones

The issues raised by Defendant's motions to suppress cell phone text messages and related evidence are

issues of first impression in Rhode Island. These issues involve thoroughly contemporary problems of the relationship between rapidly evolving technology and the law. Not only have our own courts just begun to wade into these waters, but other courts around the country have just begun to put a proverbial toe in the water. See, e.g., *State v. Smith*, No. K2-10-422A, 2012 R.I. Super. LEXIS 128, (Super. Ct. Aug. 16, 2012) (dealing with an expectation of privacy relative to an email account); *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892 (9th Cir. 2008) (rev'd by *City of Ontario v. Quon*, 130 S. Ct. 2619, 177 L. Ed. 2d 216 (2010)) (discussing text messages sent and received on a pager as accessed through a service provider); *U.S. v. Finley*, 477 F.3d 250 (5th Cir. 2007) (involving call records and text messages retrieved from a cell phone); *Warshak v. U.S.*, 490 F.3d 455 (6th Cir. 2007) [*74] (dealing with a right to privacy in the contents of e-mails); *State v. Smith*, 124 Ohio St. 3d 163, 2009 Ohio 6426, 920 N.E.2d 949, 954 (Ohio 2009) (discussing an expectation of privacy in text messages); *State v. Clappitt*, 364 S.W.3d 605 (Mo. Ct. App. 2012) (discussing text messages obtained from a service provider through investigative subpoenas); *State v. Hinton*, 169 Wn. App. 28, 280 P.3d 476, 2012 WL 2401673 (Wash. App. Div. 2012) (considering privacy rights as they apply to the exchange of text messages).

Even the United States Supreme Court has struggled with the legal challenges raised by emerging technology, most especially in the realm of cellular phones and their contents. See *City of Ontario v. Quon*, 130 S. Ct. 2619, 177 L. Ed. 2d 216 (2010). Indeed, in *City of Ontario v. Quon*, the parties asked the high court to decide whether text messages should be afforded *Fourth Amendment* privacy protection. 130 S. Ct. at 2629. But the Supreme Court declined, choosing instead to decide the case on narrower grounds and allow this question to percolate in the lower courts. *Id.* at 2622-30 (assuming, without deciding, that Quon had a reasonable expectation of privacy in his text messages, but finding that a search of his government-issued pager by his government employer [*75] was justified by the special needs of the workplace such that it did not violate the *Fourth Amendment*). It specifically stated that:

[t]he court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment The judiciary risks error by elaborating too fully on *Fourth Amendment* implications of emerging technology before its role in society has become clear.

130 S. Ct. at 2629. (citing *Olmstead v. U.S.*, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (holding that the *Fourth Amendment* does not protect private telephone conversations), overruled by *Katz v. U.S.*, 389 U.S. 347, 353, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (holding that, under the *Fourth Amendment*, there is a reasonable expectation of privacy in a telephone conversation). In staying its hand, the Supreme Court deprived this Court of the very guidance that it seeks today to resolve the novel and important issues presented. And yet, it is when the state courts are asked to write on a blank slate that they have the greatest responsibility to the litigants and, even more importantly, to the citizenry to proceed carefully and honor wholly the core precepts of our state and federal constitutions.

In treading into these [*76] uncharted waters, this Court is mindful that the *Fourth Amendment* concerns implicated by law enforcement's use of the contents of cell phones have become more urgent with the increasing ubiquity of cell phones and text messages. For context, 83% of American adults—4 of 5 people—own a cell phone. Pew Research Center, Americans and text messaging (Sep 19, 2011) [hereinafter Pew Research Center 2011 Report]. The cell phone has, in effect, "moved beyond a fashionable accessory and into the realm of life necessity." *Id.*; see also Mireille Dee, Getting Back to the *Fourth Amendment*: Warrantless Cell Phone Searches, 56 N.Y.L. Sch. L. Rev. 1129, 1133-1135 (2011/2012) (detailing the invention and development of cell phones) [hereinafter Mireille Dee, Getting Back to the *Fourth Amendment*].

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<http://pewinternet.org/Reports/2011/Cell-Phone-Texting-2011.aspx>

Text messages, defined as short electronically-transmitted written communications between mobile devices, are closely intertwined with the popularity and adoption of cell phones. See Katherine M. O'Connor, : O OMG They Searched My Txts: Unraveling the Search and Seizure of Text Messages, *U. Ill. L. Rev.* 685, 687 (2010) [hereinafter Katherine [*77] M. O'Connor, OMG They Searched My Txts]. The typical adult sends or receives an average of 41.5 messages per day. Pew Research Center 2011 Report at 2. Nationwide, an average of 4.1 billion text messages are exchanged daily. Br. of Electronic Frontier Foundation et. al. as Amici Curiae in Support of Resp'ts, *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 177 L. Ed. 2d 216 (2010), at 7, [hereinafter Br. of EFF]. "According to a 2008 Nielson Mobile survey, U.S. mobile subscribers "sent and received on average 357 text messages per month [in the second quarter of 2008], compared with making and receiving 204 phone calls a month." Br. of EFF at 8.

Moreover, text messaging stands to become an increasingly prominent aspect of society. Ninety-five percent of young adults, ages 18-29, use text messaging. Pew Research Center 2011 Report at 3. This emerging group sends or receives an average of 87.7 daily text messages. *Id.* American teenagers, perhaps more importantly, send an average of 3,146 text messages monthly. *Br. of EFF* at 5. According to one media analyst, "texting is the form of communication for the next generation." *Br. of EFF* at 7. Texting has largely replaced calling as the preferred form of communication [*78] by many young adults, particularly because many service providers offer plans that make it less expensive to text than to call. See Joel Mathis, AT&T, Sprint, and Verizon: The plans compared, (Oct. 6, 2011).⁴⁰

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http://www.macworld.com/article/1162844/atandt_sprint_and_verizon_the_plans_compared.html.

As Americans have turned to their cell phones to communicate, law enforcement has taken notice. Cell phones now represent a "powerful tool...to cull information on a wide range of crimes." Eric Lichtblau, *More Demands on Cell Carriers in Surveillance*, New York Times, (July 8, 2012).⁴¹ Accordingly, law enforcement agencies made 1.3 million requests for consumer phone information—including text messages—from the nine largest cellular carriers in 2011. Press Release, Congressman Ed Markey, Markey: Law Enforcement Collecting Information on Millions of Americans from Mobile Phone Carriers (on congressman's website) [hereinafter Markey Congressional Inquiry].⁴² In doing so, law enforcement has taken advantage of information that these companies have preserved, often without the knowledge or consent of their customers,⁴³ knowing that the legislature or the courts may some day close their window [*79] of opportunity to access this data. See generally Markey Congressional Inquiry; 2011 R.I. S.B. 3074 (NS), Rhode Island 2012 Legislative Session (proposed by Rep. Edith H. Ajello, D-Providence, January 12, 2012) (vetoed by Gov. Lincoln D. Chafee, Jun 25, 2012) [hereinafter R.I. Cell Phone Proposed Legislation] (requiring a warrant before cell phones may be searched incident to an arrest). Indeed, this Court, though not unfamiliar with cell phones and text messaging, was stunned to learn during the evidentiary hearing in this matter that one cellular carrier that figures prominently in this case—Verizon—retains a record of the actual text messages sent and received by its customers, while another cellular carrier involved here—T-Mobile—does not.

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http://www.nytimes.com/2012/07/09/us/cell-carriers-see-uptick-in-requests-to-aid-surveillance.html?_r=1&pagewanted=all.

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<http://markey.house.gov/press-release/markey-law-enforcement-collecting-information-millions-americans-mobile-phone-carriers> (last visited August 28, 2012).

43 In this case, for example, law enforcement obtained multiple warrants to allow it to gather from service providers the cell phone records of numerous individuals other [*80] than the Defendant or Trisha Oliver. See St.'s Ex. 39 (warrant to T-Mobile Law Enforcement Relations for the phone records of Mario Palacio); St.'s Ex. 49 (warrant to Sprint Nextel for phone records of Angie Patino); St.'s Ex. 46 (warrant to Sprint Nextel for phone records of Rafael Nieves). There is no evidence that the police sought, nor did the service providers require, consent from any of these individuals before the records were sought or obtained. See Stored Communications Act, 18 U.S.C. § 2703 (dealing with the requirements for service providers to give requested information to law enforcement).

Attempting to reconcile the difficult dichotomy between protecting the privacy of cell phone data and enabling law enforcement, the Rhode Island legislature recently approved a bill mandating a warrant in order to search the contents of a cell phone incident to an arrest. See R.I. Cell Phone Proposed Legislation. Governor Lincoln D. Chafee vetoed the bill, stating that the courts, not the legislature, were better suited to resolve the question of *Fourth Amendment* privacy rights in electronic communications. See Katie Mulvaney, *Chafee Vetoes Search-Warrant Bill*, Providence Journal, June [*81] 27, 2012. Mindful of these unsettled waters, this Court begins its analysis and, as this case presents issues of first impression, looks to the jurisprudence of its sister states and federal courts for guidance.

1

Fourth Amendment Background

The *Fourth Amendment of the United States Constitution* provides that:

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The text of *Article I, Section 6 of the Rhode Island Constitution* is nearly identical to the *Fourth Amendment* and generally has been interpreted in the same manner.⁴⁴ States are free, however, to adopt a higher standard of protection than the constitutional floor established by the *Fourth Amendment*. In certain limited areas, therefore, the Rhode Island Supreme Court has held previously that *Article I, Section 6 of the Rhode Island Constitution* provides greater protection for defendants than its federal analog. See *State v. Maloof*, 114 R.I. 380, 390, 333 A.2d 676, 681 (1975) [*82] (dealing with wiretaps).⁴⁵ As a general rule, the Rhode Island Supreme Court has stated that "[t]he decision to depart from minimum standards imposed by the *Fourth Amendment* should be made guardedly and should be supported by a principled rationale" and should be limited to areas where the United States Supreme Court's jurisprudence is uncertain.⁴⁶ *State v. Werner*, 615 A.2d 1010, 1014 (R.I. 1992) (internal quotations omitted) (applying the federal rule that allows a warrantless search of an automobile, even in the absence of exigent circumstances, where there is probable cause to believe that the automobile holds evidence of a crime).

44 *Article I, Section 6 of the Rhode Island Constitution--our State's "Fourth Amendment"*--states in full:

The right of the people to be secure in their persons, papers and possessions, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but on complaint in writing, upon probable cause, supported by oath or affirmation, and describing as nearly as may be, the place to be searched and the persons or things to be seized.

R.I. CONST. Art. I, § 6. In this Decision, this Court will refer to the *Fourth Amendment of the United States Constitution* [*83] and *Article I, Section 6 of the Rhode Island Constitution*, collectively, as the "*Fourth Amendment*," unless specifically noted. Similarly, references to the "*Fifth Amendment*" will include the *Fifth Amendment of the United States Constitution* and its mirror provisions of the Rhode Island Constitution. The *Fifth Amendment of the United States Constitution* provides, in pertinent part:

No person shall be held to answer for a capital, or otherwise in-

famous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law

U.S. CONST. amend. V. Article I, Section 13 of the Rhode Island Constitution--our State's "Fifth Amendment"--states: "No person in a court of common law shall be compelled to give self-[in]criminating evidence."

45 In *State v. Maloof*, the Rhode Island Supreme Court insisted on adhering to the higher standard of protection provided by the Rhode Island legislature with regard to wiretaps of citizens' phones. It interpreted the relevant statute as authorizing intrusions into an individual's conversations only [*84] for the shortest possible time period and requiring that any wiretap cease upon accomplishing its purpose. The Supreme Court thus suppressed evidence originating from a wiretap that went beyond its stated purpose.

46 This Court notes that the instant case appears to be precisely the type of case that the Supreme Court had in mind to justify providing greater protection under the R.I. Constitution than the federal one.

The purpose of the *Fourth Amendment* is to "prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 554, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976). The *Fourth Amendment* thus "protects people from unreasonable government intrusions into their legitimate expectations of privacy." *U.S. v. Chadwick*, 433 U.S. 1, 7, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977). The fundamental inquiry when considering *Fourth Amendment* issues is whether the search or seizure was reasonable under the totality of the circumstances. See *Cooper v. California*, 386 U.S. 58, 59, 87 S. Ct. 788, 17 L. Ed. 2d 730 (1967). The United States Supreme Court has recognized that, in deciding questions of reasonableness, courts should consider "[r]apid changes in the dynamics of communication and information transmission [*85] . . . not just [in] the technology itself but in what society accepts as proper behavior." See *Quon*, 130 S. Ct. at 2629. "The *Fourth Amendment* must keep pace with the inexorable march of technological progress, or its guarantees will wither and perish." *U.S. v. Warshak*, 631 F.3d 266, 285 (6th Cir. 2010). "In the application of a constitution our consideration cannot be only what has been but of what maybe."

Olmstead v. U.S., 277 U.S. at 474. (Brandeis, J., dissenting) (quoting *Weems v. U.S.*, 217 U.S. 349, 373, 30 S. Ct. 544, 54 L. Ed. 793 (1910)). Looking backward to *Fourth Amendment* precedent and forward in its application in the face of emerging technologies, this Court turns to the issues in this case.

2

Standing to Challenge

As a threshold matter, this Court must determine whether the Defendant has standing to challenge the search and seizure of certain phones and their contents. The State contends that Defendant lacks standing to mount such a challenge because he did not have a reasonable expectation of privacy in the apartment where the police seized and searched certain phones. Specifically, the State argues that Defendant did not have a reasonable expectation of privacy in the apartment because he did not [*86] live in the apartment, did not have a key to it and—by his own admission—had not stayed overnight there on the night of October 3, 2009 and into the early morning hours of October 4, 2009. The Defendant counters that he did have a reasonable expectation of privacy in the apartment because he frequently stayed there.

The State further maintains that Defendant did not have a reasonable expectation of privacy in the text message contents of the LG cell phone that the police seized and searched in the apartment because the phone belonged to, and was primarily, if not exclusively, used by Trisha Oliver.⁴⁷ Defendant disagrees, arguing that the LG cell phone belonged to him and Trisha Oliver only used the phone with his permission. The parties' arguments are premised on the assumption that the at-issue text messages are from the Defendant. This Court will address each of these standing issues in *seriatim*.

47 This standing issue looms larger in this case because the police, at least to date, have produced no evidence that the key text messages are also on a cell phone belonging to the Defendant. While the absence of that evidence does not mean that it does not exist or that the police never searched [*87] the Defendant's cell phone or saw those messages on his phone, it has allowed the State to attempt to focus standing in a way narrowly on the LG cell phone in which the Defendant may or may not have standing. As this Court will discuss, however, this construct is artificial and fails to resolve the question of standing in this case either as a matter of fact or law.

It is well-settled that the *Fourth Amendment* protects people, not places. See *Katz v. U.S.*, 389 U.S. at 351.

"What a person knowingly exposes to the public, even in his own home . . . is not a subject of *Fourth Amendment* protection. But what he seeks to preserve as private, even in an area accessible to the public, may be considered constitutionally protected." *Id.* (citations omitted). "Fourth Amendment rights are personal rights" and "cannot be asserted vicariously by a defendant merely because he or she may be aggrieved by the introduction of damaging evidence." *State v. Quinlan*, 921 A.2d 96, 109 (R.I. 2007) (quoting *State v. Bertram*, 591 A.2d 14, 18 (R.I. 1991)). The burden thus lies with the defendant to establish by a preponderance of the evidence the "requisite standing to challenge the legality of the search." *Id.*; [*88] *State v. Hershenow*, 680 F.2d 847, 855 (1st Cir. 1982).

To establish standing, a defendant must show that he or she had a reasonable expectation of privacy in the area that the police searched or the item that the police seized. See *U.S. v. Lipscomb*, 539 F.3d 32 (1st Cir. 2008); *State v. Casas*, 900 A.2d 1120, 1129-30 (R.I. 2006). A reasonable expectation of privacy is determined through a two-tiered analysis. First, a defendant must show a subjective expectation of privacy in the area searched or item seized; second, a defendant must demonstrate that his or her subjective expectation of privacy is one society recognizes as reasonable, i.e. that his or her expectation of privacy was objectively "justifiable" under the circumstances. See *Smith v. Maryland*, 442 U.S. 735, 740, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979); *Quinlan*, 921 A.2d at 109. In determining whether a reasonable expectation of privacy exists, courts consider several factors, of which no single one is determinative. See *Quinlan*, 921 A.2d at 109. Among the factors that courts have considered are whether the person possessed or owned the area searched or the property seized; his or her prior use of the area searched or the property seized; the person's ability [*89] to control or exclude others' use of the property; and the person's legitimate presence in the area searched. See *id.* In assessing these factors, courts do not consider what the police officer knew at the time they conducted the challenged search, but rather the objective, *ex post facto* as known to the court when considering the motion to suppress. See Wayne R. LaFave, *Search & Seizure* § 11.3.

(a)

Defendant's Expectation of Privacy in the Apartment

First, with regard to Defendant's standing to challenge the search of the apartment and the searches and seizures of the phones from the apartment, it has been established that a person may have a sufficient expectation of privacy in a place other than where he or she was legitimately staying overnight. See *Minnesota v. Olson*,

495 U.S. 91, 97-98, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990). Courts also have found that a person has a reasonable expectation of privacy in a residence where he or she regularly visits and stays overnight, even if his or her stays are not continuous. See, e.g., *Commonwealth v. Wagner*, 486 Pa. 548, 406 A.2d 1026 (Pa. 1979) (finding defendant had standing in the house belonging to his fiancée as it was "tantamount to being [his] residence (or at least one of his residences)"). [*90] Moreover, a place need not have been the place where a person slept overnight for that person to have a legitimate expectation of privacy in that place. See *id.* at 99 (discussing *Katz*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576, where the United States Supreme Court found that a person had an expectation of privacy in a telephone booth, not because he slept there, but because it was "a temporarily private place [where] momentary occupants' expectations of freedom from intrusion are recognized as reasonable[.]") (internal citations omitted).

In the instant case, Defendant presented substantial evidence to establish that he had a reasonable expectation of privacy in the apartment. The testimony of Defendant's sister, Angie Patino, indicated that Defendant regularly visited and frequently stayed overnight at the apartment, statements which are supported both by the relationship between Trisha Oliver and Defendant, the fact that the Defendant's biological daughter, Jazlyn, lived there, Defendant's action in answering the landline phone in the apartment when it rang, and the presence in the apartment of cell phones that the State suggests belonged to him and were located there. In addition, Joseph Peters, a neighbor, [*91] testified that he saw the Defendant bringing in groceries to the apartment with Marco Nieves approximately two weeks before the child's death. Furthermore, it appears that Defendant stored personal belongings at the apartment, e.g., the two bags of clothing that Angie Patino later removed from the apartment. The photographs taken of the apartment also reveal men's clothing and shoes in the closet. See St.'s Ex. 6. Defendant also stated, during his interrogation, that he slept at the apartment for a couple of hours after arriving there in the early morning hours of October 4, 2009. Indeed, the police found him in the apartment at around 6:30 a.m. when they responded to the 911 call. Finally, even the affidavits for warrants that the police prepared to obtain the contents of cell phones seized from the apartment all assert that the Defendant "often lives" at the apartment. See, e.g., St.'s Ex. 42 (warrant to Verizon for phone records of Trisha Oliver); St.'s Ex. 34 (warrant for contents of Metro PCS phone). These facts all militate in favor of Defendant having standing in the apartment.

Moreover, the State's argument that Defendant could not have an expectation of privacy in the apartment

[*92] because it was not in his name and he did not have a key to it is focused too narrowly on the actual ownership of the premises—a view explicitly rejected by the United States Supreme Court in *Olson*. See 495 U.S. at 96-97. In addition, it is disingenuous of the State to claim that the Defendant lacks standing in the apartment because he is not its owner or occupant where the police emphasized his regular occupancy to assist them in securing search warrants for the premises.

In totality, the evidence is sufficient to establish that Defendant used the apartment as one of his residences. See *Wagner*, 486 Pa. at 554-55. "The pertinent fact for purposes of judging the privacy expectation is that [he was] engaging in the necessary, intimate activities of daily life while staying in a dwelling provided by someone else, activities ordinarily conducted in secure, enclosed spaces and which our society regards as private." *State v. Simmons*, 714 N.W.2d 264 (Iowa 2006). [*93] This Court is thus satisfied that Defendant has established a reasonable expectation of privacy in the apartment sufficient to confer upon him the standing required for him to challenge its search and the seizure of items found there.

(b)

Defendant's Expectation of Privacy in the LG Cell Phone

The State's next contention is that Defendant lacks standing to challenge the search of the LG cell phone in the apartment because the phone belonged to and was primarily used by Trisha Oliver. Its argument in this regard is impliedly based on analogizing a cell phone to a container. As courts have frequently analogized cell phones to containers to hold that people have a reasonable expectation of privacy in the contents of their own cell phones, the State argues that if Defendant does not have a proprietary interest in the LG cell phone, then he cannot have a reasonable expectation of privacy in its contents—namely, the text messages he allegedly sent to his girlfriend on the LG cell phone. See, e.g., *U.S. v. Finley*, 477 F.3d 250, 259-60 (5th Cir. 2007) (equating cell phones to containers to hold that a cell phone could be lawfully searched incident to an arrest); *U.S. v. Quintana*, 594 F. Supp. 2d 1291, 1299 (M.D. Fla. 2009) [*94] ("[a]n owner of a cell phone generally has a reasonable expectation of privacy in the electronic data stored on the phone."). The State, more simply put, contends that a possessory interest in an item held within a container—here, the Defendant's text messages—does not provide standing to challenge a search of the container from which the item was seized—here, the LG cell phone allegedly belonging to Trisha Oliver. See *Rawlings v. Kentucky*, 448 U.S. 98, 104-106, 100 S. Ct. 2556, 65 L.

Ed. 2d 633 (finding that defendant did not have standing to challenge the search of his girlfriend's purse, notwithstanding the fact that he claimed ownership of the drugs found within the purse). According to the State, Defendant must establish a separate privacy interest in the LG cell phone itself for him to have standing to contest the search and seizure of his text messages contained within it.

To address this argument, this Court must examine the nature of a cell phone to determine if it fits within the definition of a container under United States Supreme Court precedent. More importantly, it must determine if the nature of a cell phone militates in favor of focusing the standing inquiry on a person's privacy rights in the contents [*95] of the phone rather than beginning and ending the standing inquiry with the device itself.

(i)

Cellular Phones as Containers and Text Messages as Their Contents

Any discussion of whether cell phones should be analogized to containers must account for the technological realities of today's cell phones.

[M]odern cellular phones have the capacity for storing immense amounts of private information. Unlike pagers or address books, modern cell phones record incoming and outgoing calls, and can also contain address books, calendars, voice and text messages, email, video, and pictures. Individuals can store highly personal information on their cell phones, and can record their most private thoughts and conversations on their cell phones through email and text, voice and instant messages.

United States v. Park, 2007 U.S. Dist. LEXIS 40596, 2007 WL 1521573 (N.D. Cal. May 23, 2007). Information that a person otherwise would be incapable of carrying in his or her pocket is now easily accessible, at any moment, via cell phones. See Joshua A. Engel, Doctrinal Collapse: Smart Phones Cause Courts to Reconsider Fourth Amendment Searches of Electronic Devices, 41 U. Mem. L. Rev. 233, 260 (Winter 2010). "[T]he vast amount of information [*96] that may be stored digitally [in a cell phone or in the cloud as accessed through a cell phone] far exceeds traditional [physical boundaries]." *Id.* (citing Matthew E. Orso, Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence, 50 Santa Clara L. Rev 183

(2010)). Thus, a different notion of scope, virtual rather than spatial, is at play when discussing searches of cell phones and other electronic devices. *Id.*

In *New York v. Belton*, the Supreme Court defined a container as "any object capable of holding another object." 453 U.S. 454, 460, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981) (holding that the contents of containers found within the passenger compartment of an automobile may be searched incident to lawful arrest); see *U.S. v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973) (holding that a cigarette package containing drugs is a closed container). Notwithstanding this definition, which implies that a container must hold a physical object, federal courts first confronted with the question, two decades ago, of whether to analogize electronic devices to containers were quick to employ it. See, e.g., *U.S. v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996) (adopting the holding of *Chan* that a pager is a closed [*97] container); *U.S. v. Chan*, 830 F. Supp. 531, 534 (N.D. Cal. 1993) (likening a pager to a closed container); *U.S. v. David*, 756 F. Supp. 1385, 1390 (D. Nev. 1991) (holding that a computer memo book is a closed container). In so doing, these courts latched on to an analogy that was easy to apply, but which, in hindsight and given the evolution of technology from pagers to cell phones, appears inapt.

A more enlightened approach—and one that is beginning to be embraced by commentators and the courts—is to recognize that cell phones and other electronic devices do not fit the definition of a "container" articulated by the United States Supreme Court in *Belton*. See *State v. Smith*, 124 Ohio St. 3d 163, 2009 Ohio 6426, 920 N.E.2d 949, 954 (Ohio 2009) (rejecting container analogy as applied to cell phones); see also Mireille Dea, Getting Back to the Fourth Amendment. This approach acknowledges the fact that "[u]nlike mere physical objects, cell phones store information in a digital format, allowing for an incredible amount of personal information to be stored on a very small device." Mireille Dea, *Getting Back to the Fourth Amendment at 1159*. As the Ohio Supreme Court has stated, in declining to analogize cell phones to containers, [*98] "[e]ven the more basic models of modern cell phones are capable of storing a wealth of digitized information wholly unlike any physical object found within a closed container." *State v. Smith*, 920 N.E.2d at 954. Hence, because a cell phone allows access to digital information, rather than storing physical objects, it necessarily follows under this approach that a "cell phone is not a container for purposes of Fourth Amendment analysis." *Id.*

This Court finds this logic highly persuasive. A cell phone is the device by which text messages are sent, received, and stored. It is not, on accord of its physical dimensions or functionality, a closed container. Also,

text messages are not a tangible object that fit within a cell phone. They are, in fact, information born in non-tangible digital form. In this Court's view, therefore, a cell phone is better thought of not as a container but as an "access point" to potentially boundless amounts of digital information.

Therefore, the more pertinent question in this Court's opinion--and one that is conspicuously absent from the State's discussion of standing--is not whether Defendant has standing in the LG cell phone itself but whether he has a reasonable [*99] expectation of privacy in the at-issue text messages stored within that phone. See *Katz v. U.S.*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (stating that the *Fourth Amendment* "protects people" and that privacy is determined per a two-tiered subjective and objective analysis of the surrounding circumstances). Indeed, almost half a century ago, this is precisely where the United States Supreme Court focused in determining whether a person had a reasonable expectation of privacy in an old-fashioned, pre-text message form of communication--a telephone call placed from a telephone booth. *Id.* In *Katz*, the Supreme Court rejected the government's argument that the *Fourth Amendment* issue presented could be resolved by finding that the telephone booth from which the petitioner placed his phone call was not a constitutionally protected area. It made clear that the "the premise that property interests control the right of the government to search and seize has been discredited." *Id.* at 353 (quoting *Warden v. Hayden*, 387 U.S. 294, 304, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967)). Instead, the Court ruled that the *Fourth Amendment* protects people, and not simply areas, so that it matters not that the telephone booth was open to the public. *Id.* What the caller [*100] in the phone booth

sought to exclude when he entered the phone booth was not the intruding eye--it was the uninvited ear. He did not shed his right simply because he made his calls from a place where he might be seen . . . One who place[s] a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

Id. at 352. Similarly here, Defendant's property right, or lack thereof, in the LG cell phone at issue should not be controlling. What should control are the contents of the communications rather than the device used to communicate. Though text messages, unlike oral telephone conversations, are meant to be read rather than listened

to, they implicate the same issues. What Defendant "sought to exclude when he [allegedly sent text messages to that phone]" was not the "uninvited ear" but the "intruding eye." *Id.* He did not "shed his right simply because he [allegedly sent his texts] to a place that [they] might be seen." *Id.* "One who [sends a text] is similarly entitled to assume that [the] words [that [*101] he or she writes] will not be broadcast to the world." *Id.* "To read the Constitution more narrowly is to ignore the vital role that [text messaging] has come to play in private communication." *Id.*

Indeed, it is arguable that the United States Supreme Court implicitly adopted this view in *Quon*. 130 S. Ct. at 2630. While it declined to determine whether a person has a reasonable expectation of privacy in his or her text messages, the manner in which it left that issue for another day is instructive; it did not assume, without deciding, that a person has a reasonable expectation of privacy in the electronic device itself--there, a pager--but instead presumed that a person has a privacy interest in the contents of the device--namely, text messages. In fact, the courts below it had not only framed the issue in that same manner but had decided that a person does have a reasonable expectation of privacy, not in the device, but in his or her text messages. See *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d at 906-908; *Quon v. Arch Wireless*, 445 F. Supp. 2d 1116 (C.D. Cal. 2006) (finding that Quon did have a reasonable expectation of privacy in the contents of the text messages sent to and [*102] from the government-provided pager). In framing the issue in that regard, the Supreme Court suggested, as does this Court today, that it is the content of the communication, and not the device used to communicate, that is important for the privacy analysis under the *Fourth Amendment*.

(ii)

Text Messages and a Fourth Amendment "Work-around"

It is this Court's view that if text messages were not afforded privacy protection, regardless of their form or method of discovery, the wall of protection provided by the *Fourth Amendment* would be rendered 10 feet high by 10 feet long--an impotent defense from unreasonable search and seizure. The constitutional restrictions placed on governmental intrusion effectively could be avoided, so to speak, by simply maneuvering around the ten feet of length or height of the wall to seize the communication from another untargeted party or source. All that the police would have to do is to search a cell phone in which a person has standing, without a warrant, and then find the corresponding cell phone and obtain the same information from its owner or service provider.

It is a technological truth that "copies" of any particular text message may be accessed from multiple [*103] places--the sending phone, the receiving phone and, perhaps, the service provider's records. Absent a grant of standing in the text messages themselves, law enforcement, in effect, would possess an easily effectuated and legally substantiated workaround to the core privacy protections of the *Fourth Amendment*. The aggrieved party before the court would lack standing, while the other participating party, for all practical purposes, would lack the motivation to challenge the constitutional violation on account of burdens including, but not limited to, obtaining an attorney, paying legal fees, spending time in court, and potentially derailing the prosecution of a crime. It further follows that the government's violation would, in some scenarios, be likely to escape review because the party whose cell phone was actually searched might lack knowledge of the violative conduct, might not be able to prove it, or might perceive any injury from a violation as unworthy of pursuit.

Additionally, given the extent and amount of personal information available within cell phones and text messages, law enforcement also would be encouraged to partake in "fishing expeditions." Information and evidence could [*104] be culled aggressively from persons only tenuously connected to an investigation without worry that such search is at all, legally speaking, improper. It would therefore be an elevation of form over substance--ignoring the technological realities of text messages--to view a cell phone and the text messages it contains as one and the same for purposes of analyzing an expectation of privacy sufficient to confer standing.

This Court does not idly posit this concept of a "workaround" and the prospect of a covert fishing expedition. Indeed, given the state of the evidence in this case, that may be precisely what happened here. Notwithstanding a near month-long evidentiary hearing and the parade of Cranston police officers who testified, this Court knows little more today than it did before the suppression hearing about the whereabouts of the text messages that correspond to those text messages that the police found on the LG cell phone allegedly belonging to Trisha Oliver. The State claims that the Defendant sent those corresponding text messages to the LG cell phone from his cell phone. Yet, there is no evidence before this Court that the cell phones in evidence attributed to the Defendant [*105] --the Metro PCS cell phone and the T-Mobile cell phone--contain the corresponding text messages or that those text messages could have been seen on the cell phones at the time the police seized and searched them on October 4, 2009.

Indeed, the way in which the police handled the evidence in this case suggests that they have so compromised its integrity that it may not be possible to deter-

mine what text message evidence was on the Metro PCS and T-Mobile cell phones and visible at the time the police seized and searched them. After the police seized these two cell phones, they literally "pocketed" the evidence, carrying them between the station and the scene and even to the house of the warrant-signing Judge. They searched the cell phones, charged them and used them to make calls, and ultimately "secured" them in unsealed, little brown paper lunch bags, counter to protocol, with no attempt to ensure their unbroken chain of custody. Unlike the LG cell phone in evidence, the police did not photograph the text message contents of these two cell phones as it appeared on those cell phones at the time of seizure. There is no evidence of what SIM card was in what cell phone when the police seized [*106] the cell phones.⁴⁸ Only later, in some instances well after the casual seizure of the cell phones, did the police photograph limited evidence of their alleged contents and request evidence of their alleged contents from cell phone service providers' records. Yet, they did so pursuant to warrants that contain inconsistent sworn statements by police officers as to where and when the police seized each phone. Again, unlike the LG cell phone, the police never sought to extract the contents of the Metro PCS and T-Mobile cell phones prior to the suppression hearing--a sophisticated process that might demonstrate what historical text message information is contained on each cell phone.

48 A SIM card, or a subscriber identity module card, is an integrated circuit that stores network identification information along with personal information of the subscriber such as a contact list or text messages. SIM cards, this Court notes, are removable and can be transferred between mobile devices.

In addition, the State did not fill this evidentiary void with any testimony at the suppression hearing. While the testimony was often quite evasive, if not wholly lacking in credibility, no officer admitted that [*107] he had ever seen the text messages corresponding to those text messages found on the LG cell phone. Yet, the testifying police officers could not exclude the possibility that the corresponding text messages existed on the T-Mobile cell phone or the Metro PCS cell phone or that the police had seen those text messages.

It thus is quite likely--as this Court will discuss at length later in this Decision--that the police illegally seized and searched the Defendant's cell phone on October 4, 2009. It is possible, though it cannot be proven definitively, that their illegal search of the contents of that cell phone revealed the text messages corresponding to those text messages found on the LG cell phone. Notwithstanding that possibility, however, the police have

deprived the Defendant of the evidence needed to prove that fact. As a result, the Cranston Police Department may have effectuated a workaround--revealing only evidence of the text messages in which the State claims the Defendant lacks standing--namely, the text messages on the LG cell phone--while depriving the Defendant of the very evidence that the State claims he needs to prove standing--namely, proof that the corresponding text messages [*108] are on his cell phone and could have been viewed and, in fact, were viewed by the police at the time of their search. This prospect can turn the law of standing on its head.

The State should not be able to place the burden on the Defendant to prove that his text messages were on his cell phone at the time the police illegally seized and searched his cell phone--potentially the ultimate issue as to his guilt--in order to prove that he has standing to contest the illegality of that search. When the salient evidence necessary to prove standing is within the control of the State, it should have the burden to disprove that the police engaged in a workaround or otherwise deprived the Defendant of the evidence that he needs to prove standing in the device. In this case, the State would be hard-pressed to meet that burden of proof.

The prospect of a workaround, therefore, in theory or in actuality, is yet another reason to reject analogizing cell phones to containers in defining the standing inquiry. Were this Court to confine the standing inquiry to the device itself, as the State argues, it could unwittingly encourage the police to employ the workaround--routinely searching cell phones surreptitiously [*109] without a warrant, using any incriminating evidence found on the cell phone to locate that evidence on the corresponding electronic device (or in its records) in which a defendant had no standing, and then hiding behind standing to block a defendant's ability to challenge the evidence that the police could not have obtained in the absence of an unconstitutional search and seizure. The better approach is to focus the standing inquiry on a defendant's privacy interest in the fruits of the illegal search - here, the text message contents of the device.

Were this Court to rule to the contrary, and analogize the LG cell phone to a container, it then would be required to determine whether Defendant demonstrated a reasonable expectation of privacy in that cell phone itself. The evidence at the hearing on this issue was controverted. There was evidence that Defendant purchased the LG cell phone originally and there was at least some evidence in the call records for this cell phone indicating that he used that phone on several occasions, e.g., the calls made to and received from the apartment landline and the photographs stored on the cell phone that appear to have been taken by someone other [*110] than Trisha Oliver (and presumably the Defendant). On the other

hand, Defendant stated in his police interrogation that the phone number attached to the LG cell phone belonged to Trisha Oliver. The contact list on this cell phone also appears to contain her list of contacts, and there is evidence of phone calls to the persons on this list from this phone. It also appears that she allegedly received text messages from the Defendant on this cell phone. In addition, after the police searched this cell phone, they allegedly sought and received Trisha Oliver's consent to search it.

It appears from this evidence, therefore, that the Defendant owned the phone and occasionally used it, but that, with his knowledge and consent, Trisha Oliver was the primary user of the phone and that it was primarily under her control. Absent evidence that Defendant retained a possessory or ownership interest in the phone after its purchase or that he granted Trisha Oliver only permissive use of the phone while retaining the ability to control its use or exclude her use of it, this Court would be constrained to conclude that Defendant has failed to demonstrate a sufficient privacy interest in the LG cell phone [*111] to establish standing in the device itself.

(c)

Defendant's Expectation of Privacy in the Contents of His Communications

(i)

Text Messages and the Seminal Katz Test

Being satisfied that Defendant's claim of standing to challenge the search and seizure of his text messages does not--and should not--rise and fall based on his interest in the LG cell phone, this Court now must determine if Defendant has a reasonable expectation of privacy in the contents of his text communications.⁴⁹ At the outset, this Court notes that the question of whether people have an expectation of privacy in the contents of their text messages has not yet been settled. As noted previously, the United States Supreme Court in *Quon* assumed, without deciding, that people do have a reasonable expectation of privacy in their text messages. See 130 S. Ct. 2619, 2629-30, 177 L. Ed. 2d 216; 529 F.3d 892, 906-907. In doing so, however, it is particularly telling that the Supreme Court and the courts below focused on the employer's privacy policy, and not the text messages themselves, in determining the extent to which *Quon* could have reasonably expected his text messages to remain private. It surely follows that personal text messages exchanged between [*112] privately-owned mobile devices should be constitutionally protected where neither party to the communications had any reason to believe that the texts would be viewed by a third party.

Indeed, the Supreme Court appeared to telegraph as much in its decision, stating:

Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy.

Quon, 130 S. Ct. at 2630.

49 For purposes of this discussion, the Court will assume, *arguendo*, that the text messages sent to and from "DaMaster" at the 699 telephone number were, in fact, text messages sent to and from the Defendant.

With the issue not yet definitively resolved, however, this Court will apply the seminal *Katz* test to determine Defendant's expectation of privacy in his alleged text messages. Specifically, the Court will explore the extent to which Defendant has indicated a subjective expectation of privacy in the text messages on the LG cell phone and whether such expectation of privacy is one society accepts as objectively reasonable. See *Smith v. Maryland*, 442 U.S. 735, 740, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979).

Upon [*113] review, the Court is satisfied that Defendant has shown a subjective expectation of privacy in the contents of his alleged text messages on the LG cell phone. It appears that text messaging was the Defendant's primary means of communication with others, given the frequency and number of text messages sent to and received by Defendant. Indeed, the Court notes that Angie Patino testified that Defendant's own cell phone did not even have the capability to make actual phone calls. Similar to many young adults today, Defendant did not call others, he texted them. Defendant's reliance on text messages as the primary means of communicating with his girlfriend, his sister, and other friends, therefore, supports a finding of a subjective expectation of privacy in their contents. This Court cannot justifiably find that Defendant did not have an expectation of privacy in the contents of his interpersonal communications, simply as a function of the means used to make those communications, especially where there is no danger that Defendant's alleged text messages were seen or overheard by parties other than the police.⁵⁰ Cf. *U.S. v. U.S. Dist. Ct. for Eastern Dist. of Mich., Southern Div.*, 407 U.S. 297, 313, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972) [*114] (recognizing one of the *Fourth Amendment's* purposes as being to protect private communications).

50 The Court emphasizes that this case does not involve a situation where the contents of Defendant's text communications were voluntarily revealed to law enforcement by the alleged recipient of the communications, Trisha Oliver. Ms. Oliver left her cell phone behind in her apartment, with Defendant still situated there, when she rushed to the hospital with her unresponsive child. The police accessed her cell phone in her absence, long before they applied for any warrant or sought her consent. The case also does not involve a situation where Defendant mistakenly believed, in texting, that he was communicating with someone else when he was actually communicating with law enforcement. It has been well-settled that those other situations would not constitute a violation of the *Fourth Amendment*. See *Hoffa v. U.S.*, 385 U.S. 293, 303, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966).

Moreover, the Court is satisfied that both the tenor and the contents of Defendant's alleged text messages on the LG cell phone are indicative of his subjective expectation of privacy in them. Indeed, the very incriminating nature of the contents of the text [*115] messages supports this finding of a subjective expectation that the text messages would remain private, i.e., between Defendant and Trisha Oliver. The State, in oral argument, effectively conceded Defendant's subjective expectation of privacy in his alleged text messages. It characterized those texts as revealing "the unfettered Michael Patino." It argued that the text messages document how Defendant speaks and acts "when he thinks no one is watching." This Court can conceive of no better definition of a subjective expectation of privacy than what the State offered.

Transitioning to the objective tier of the *Katz* test, this Court is satisfied that Defendant's expectation of privacy in his alleged text messages was also objectively reasonable. Cell phones have replaced telephones. People send and receive billions of text messages to and from their cell phones daily. Text messaging, especially among young adults, has become an oft-employed substitute for face-to-face conversations, cell phone conversations, or email. These text messages are often raw, unvarnished and immediate, revealing the most intimate of thoughts and emotions to those who are expected to guard them from publication. [*116] The text messages may be true or untrue. In addition, most individuals now keep their cell phones in their possession at all times. Individuals are closely associated with, if not identified by, their cell phone numbers. Accordingly, this Court finds that it is objectively reasonable for people to expect the contents of their electronic text messages to remain

private, especially vis-à-vis law enforcement. Cf. *Quon*, 130 S. Ct. at 2630 ("Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification.").

Moreover, this Court finds that the possibility that someone other than the intended recipient of a text message will be in possession of the receiving cell phone at any given time is unreflective of contemporary cell phone usage. Most cell phone owners are in immediate possession of their phones at all times; indeed, the primary convenience of cell--"mobile"--phones is largely predicated on the fact that they stay with a person at all times. This Court, therefore, does not find that the remote possibility that an unintended party will receive a text message due [*117] to his or her possession of another person's cell phone is sufficient to destroy an objective expectation of privacy in such a message. Even if a cell phone were to be separated from its owner, the majority of cell phones now feature some type of locking or password system that prevents easy access to or reading of a text message.⁵¹ The "risk" that a text message will be viewed by someone other than the intended recipient is simply too remote to eliminate a person's objectively reasonable belief that his or her text message will, in fact, be viewed only by the intended recipient. Cf. *State v. Hamilton*, 2003 MT 71, 314 Mont. 507, 67 P.3d 871 (Mont. 2003) (finding that a remote possibility of harm did not meet the standard for an objectively reasonable belief that such a threat existed). For all of these reasons, this Court would suggest that Defendant does have a reasonable expectation of privacy in the content of his alleged text messages on the LG cell phone.

51 In this Court's opinion, the very fact that cell phones now provide an option to password protect their contents or restrict the plain view display of incoming messages speaks to an objective, societal view that the contents of a cell phone--and [*118] text messages--are private and thus worthy of protection. See generally Adam M. Gershowitz, Password Protected? Can A Password Save Your Cell Phone from A Search Incident to Arrest?, 96 Iowa L. Rev. 1125 (2011).

(ii)

Electronic Communications and the Third-Party Doctrine

In such an unsettled area of the law, however, it behooves this Court to make a thorough review of the preceding relevant jurisprudence before reaching a final determination. Accordingly, this Court will address the

well-settled third-party doctrine to determine if it stands as an obstacle to finding an expectation of privacy in the contents of text messages and/or other electronic communications.

The third-party doctrine, succinctly stated, holds that a person does not have a reasonable expectation of privacy in information that he or she has voluntarily exposed or communicated to a third party. See *Smith v. Maryland*, 442 U.S. at 743-44 (holding that where a person "conveyed numerical information to the phone company and . . . its equipment in the normal course of business, he assumed the risk that the company would reveal the information to the police."). If applied absolutely, the third-party doctrine would effectively [*119] defeat any expectation of privacy in text messages and, potentially, all electronic communications. This result is untenable, however, in our modern world where electronic communication is omnipresent and a cultural necessity.⁵² See *Jones*, 132 S. Ct. 945, 957, 181 L. Ed. 2d 911 (2012) (Sotomayor, J., concurring) (noting that the third-party doctrine is "ill-suited to the digital age, in which people reveal a great deal about themselves to third parties in the course of carrying out mundane tasks."). This Court, consequently, will further examine the doctrine in light of today's technological realities.

52 As an example, hard copy job applications, formerly mailed or hand-delivered to prospective employers, have been replaced almost universally by digitally formatted resumes sent via email. To not have an email address or digitally formatted resume is a significant disadvantage in participating fully in our current economy.

The third-party doctrine, in theory, seeks to strike a balance between the *Fourth Amendment* privacy rights of citizens and the investigative needs of the government. See generally Orin S. Kerr, The Case for the Third-Party Doctrine, 107 Mich. L. Rev. 561 (2009) [hereinafter Orin S. Kerr, [*120] The Case for the Third-Party Doctrine]. Accordingly, the *Fourth Amendment* protects certain places and things while leaving others available for surveillance. *Id.* at 574. Such a division purports to allow the government to investigate crimes effectively without exposing citizens to unjustified intrusions. *Id.*

Professor Kerr offers a telling hypothetical as to the purpose of the third-party doctrine. Orin Kerr and Greg Jojeim, The Data Question: Should the Third-Party Records Doctrine Be Revisited, ABA Journal (August 1, 2012) (blog post) (paragraphs 1-8 under Orin Kerr's Counterproposal).⁵³ The hypothetical involves the physical delivery of a message by a person to a neighbor in the absence of third parties. *Id.* He posits that the government is only permitted to monitor the individual as he or she walks in public to the neighbor's home. *Id.* Professor

Kerr further notes that the government, under the *Fourth Amendment*, has no right to know the contents of the message being delivered; the government only may know that the message was delivered. *Id.* The hypothetical is relevant because it highlights that with the advent of third-party services, many formerly public actions became "private." [*121] *Id.* A person, through third parties, may achieve remotely what he or she previously had to do in person. Why walk to a neighbor's home to speak, for example, when a simple telephone call or email will suffice? The use of third parties thus allows certain transactions to be removed from the public sphere. *Id.* To the savvy criminal, this is a boon. To the curious criminal investigator, this is a significant blow. The third-party doctrine, it follows, has evolved as a manner of restoring the *Fourth Amendment* balance between privacy and investigation, as imbalanced by third-party services.⁵⁴

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http://www.abajournal.com/magazine/article/the_data_question_should_the_third-party_recordsDoctrine_be_revisited

⁵⁴ The third-party doctrine has developed over a period of time ranging from the early 1950's to the early 1980's through a series of cases dealing primarily with secret agents and business records. Orin S. Kerr, *The Case for the Third-Party Doctrine* at 567-70. These cases, in essence, sought to distinguish between what investigative steps the government could take under the *Fourth Amendment* and what steps were forbidden. *Id.* at 574.

Historically, the third-party doctrine has been invoked [*122] to find that a person does not have a reasonable expectation of privacy in the address on an envelope, telephone numbers dialed, or certain financial information provided to a bank. See *U.S. v. Hule*, 593 F.2d 14, 15 (5th Cir. 1979) ("There is no reasonable expectation of privacy in information placed on the exterior of mailed items and open to view and specifically intended to be viewed by others."); *Smith v. Maryland*, 442 U.S. at 743-45 ("When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business."); *U.S. v. Miller*, 425 U.S. 435, 442, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976) ("All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.").

With respect to this case, the third-party doctrine presents a distinct problem on account of how text messages are technologically exchanged. The sender of a

short message service (SMS) text message enters 160 characters or fewer into a mobile device for transmission to the Short Message Center (SMC). See Katherine [*123] M. O'Connor, *OMG They Searched My Txts at 689*; see also Mark Milian, *Why text messages are limited to 160 characters*, Los Angeles Times, (May 3, 2009).⁵⁵ The text message is then temporarily stored at the SMC before being forwarded to the mobile device of the intended recipient. *Id.* Each text message is therefore exposed to a third party--theoretically activating the third-party doctrine--in the following four places: (1) the SMC; (2) the service provider's network; (3) the sender's phone or wireless device; and (4) the recipient's phone or wireless device. *Id.* at 689. Nevertheless, this Court reasons that the simple technological reality of how text messages are transmitted should not be allowed to entirely negate an individual's right to privacy. See *U.S. v. Warshaw*, 631 F.3d 266, 286 (6th Cir. 2010) (stating "the mere ability of a third-party intermediary to access the contents of a communication cannot be sufficient to extinguish a reasonable expectation of privacy") (emphasis in original). As Justice Marshall so presciently stated, "[p]rivacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts ... need not assume that this information [*124] will be released to other persons for other purposes." *Smith v. Maryland*, 442 U.S. at 749 (Marshall, J., dissenting).

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<http://latimesblogs.latimes.com/technology/2009/05/invented-text-messaging.html>

In Professor Kerr's enlightening hypothetical, it is highly notable that the content of the message being physically delivered by one neighbor to another neighbor was never under threat of governmental surveillance. The content of the message was revealed only in the receiving neighbor's home under the protection of the *Fourth Amendment*. Only the sending neighbor's action of delivering the message was public, and therefore, available for observation.

Professor Kerr further considered the landmark case of *Smith v. Maryland*, where an individual harassed a robbery victim by phone. 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979). Law enforcement, in response, asked the phone company to install a pen register so as to monitor the numbers that the suspect called. On account of the third-party doctrine, the United States Supreme Court held that such action was not a violation of the *Fourth Amendment*. This result makes perfect sense. Before telephone service, the harassment of the robbery victim by a third party would have [*125] occurred in public where it could have been observed, and responded to, by law enforcement. It necessarily follows, therefore, that under the third-party doctrine, the monitoring of

phone numbers called by the suspect by law enforcement would have been no more intrusive than what had historically been allowed under the *Fourth Amendment*.

In applying the analytical construct provided by Professor Kerr to this case, this Court is satisfied that, in an era before the advent of cell phones, the content of the text messages that Defendant allegedly sent to Trisha Oliver and that appeared on the LG cell phone would never have been public. The messages would have been exchanged by Defendant and Trisha Oliver in person or via landline phone outside the view of law enforcement. Surveillance of the Defendant and Trisha Oliver by law enforcement would have revealed the fact that Defendant and Trisha Oliver may have spoken—via the exchange of text messages—but not the content of their communication. This Court thus follows the ostensible logic of *Smith v. Maryland* and, consequently, holds that the third-party doctrine is not applicable with respect to the content of the text messages that were allegedly [*126] exchanged between Defendant and Trisha Oliver. The third-party doctrine, in this Court's view, defeats an expectation of privacy, at most, as to the fact that the two parties actually exchanged text messages.

Moreover, the third-party doctrine is impliedly based on a theory of assumption of risk—i.e., the theory that a sender of a text message assumes the risk that the recipient of that message will disclose its substance to a third party. Yet, this theory of assumption of risk does not match today's realities of electronic communications. As Justice Marshall observed apropos telephones:

Implicit in the concept of assumption of risk is some notion of choice By contrast here, unless a person is prepared to forgo use of what for many has become a personal or professional necessity, he [or she] cannot help but accept the risk of surveillance. It is idle to speak of 'assuming' risks in contexts where, as a practical matter, individuals have no realistic alternative.

Smith v. Maryland, 442 U.S. at 749-50 (Marshall, J., dissenting) (internal citations omitted). In light of the widespread use of text messaging, to not partake in the medium is tantamount to actively choosing not to communicate. [*127] This is particularly true for rising generations that have almost universally adopted the technology. It is even more true for young persons with limited financial resources, like Defendant and Trisha Oliver, who may feel compelled by the cost structure of the service plans offered by their cell phone service providers to text rather than call. While it is certainly possi-

ble to forgo text messaging, the choice is unpalatable, rather untenable, and disadvantageous relative to participating within our technologically dependent culture. Thus, unless an individual is ready to relinquish his or her ability to effectively communicate in today's technological climate, the risk of surveillance is not a choice, but an undeniable reality.

Further, cell phone service providers, like Internet Service Providers for emails, retain text messages, both sent and received, for varying periods of time. Again, were the third-party doctrine absolutely applied, an individual's expectation of privacy in text messages would be made dependent upon his or her service provider's text message retention policy. This result is fundamentally unfair because: (1) many people are unaware of their respective service [*128] provider's policies; (2) service providers maintain the right to change their text message retention policies without notice; and (3) many people may not have a choice in service providers depending on their location. Any discussion of the privacy rights in text messages, therefore, must go beyond consideration of the third-party doctrine. Notably, at least one court has agreed that the third-party doctrine does not pertain to text messages and service providers. See *State v. Clappitt*, 364 S.W.3d 603, 611 (Mo. Ct. App. 2012) ("[T]he providers' ability to access those messages does not diminish subscribers' expectation of privacy in their text message communications. Rather, subscribers assume that the contents of their text messages will remain private despite the necessity of a third party to complete the correspondence."). This Court holds, therefore, on separate grounds, that the third-party doctrine is ill-suited for contemporary forms of communication and thus should not wholly defeat an individual's expectation of privacy in the contents of his or her text messages.

(iii)

The Analogies Used in Existing Fourth Amendment Jurisprudence

In deciding whether an individual has a reasonable [*129] expectation of privacy in his or her text messages, this Court will next review the existing *Fourth Amendment* jurisprudence regarding text messages along with the different analogies that have been employed. Unsurprisingly, considering both the constantly evolving nature and technological subtlety of the issue, courts have reached categorically divergent results in addressing whether and to what extent people have a reasonable expectation of privacy in text messages. See *Quon*, 529 F.3d at 892 (rev'd on other grounds) ("The extent to which the *Fourth Amendment* provides protection for the contents of electronic communications in the Internet age is an open question.").

Text messages most commonly have been analogized to other forms of written communications such as letters and emails. See, e.g., *Quon*, 529 F.3d at 904-905 ("We see no meaningful difference between the e-mails at issue in *U.S. v. Forrester*, 512 F.3d 500 (9th Cir. 2008)] and the text messages at issue here. . . . [W]e also see no meaningful distinction between text messages and letters."). The contents of letters and emails are constitutionally protected under the *Fourth Amendment*, although the address information--the "envelope" [*130] information--is not protected. See *U.S. v. Jacobsen*, 466 U.S. 109, 114, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984) ("Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy."). Further, through applying this analogy, courts have generally found that people only have an expectation of privacy with respect to text messages which they have received, but not in the text messages they send. See e.g., *U.S. v. Jones*, 149 Fed. Appx. 954 (11th Cir. 2005) (comparing text messages to letters and determining that a sender of a text message does not have an expectation of privacy once the message has been received by another party). This Court finds, however, that this analogy fails to the extent that text messages are qualitatively different from both letters and emails--a fact that has escaped recognition and insightful discussion by many courts to date.

Most basically, letters and emails are different from text messages because of their form. Neither letters nor emails have associated mechanisms--e.g., character limits--that encourage brevity. Letters and emails are therefore, almost always, significantly longer than text messages. It thus follows that [*131] the expression contained within a letter or email is similar in form to a monologue in the sense that it is, generally, able to be understood through only its imparted information. Letters and email, in effect, provide their own context. Additionally, senders of letters are aware that the recipient will not receive the letter for a matter of days, making each letter--even when it is one of a series of correspondence exchanged between two people--an independent and discrete communication. Emails, due to their electronic form, are exchanged at a pace that is decidedly faster than letters, but still notably slower than text messages. Text messages, in contrast, are typically exchanged in rapid-fire bunches with a rhythm similar to that of an oral conversation. The information expressed in a single text message is relatively short and generally reactive as opposed to the, albeit sometimes short, monologue characteristically offered in a letter or email. Stated otherwise, comprehension of a text message is commonly dependent upon, or relative to, the viewing of preceding messages. Thus, while a letter or email can be understood on its own, a text message's meaning is best

comprehended in [*132] the context of its surrounding messages from sender and recipient.

This distinction in form--between monologue and dialogue--is particularly important to consider because of the fact that *Fourth Amendment* jurisprudence, in determining whether an expectation of privacy exists, has traditionally focused on whether the communications were sent or received by the person challenging the search or seizure. Each letter is obviously discrete and separate from any response to that letter, even in a case where the sender has retained a copy of the letter. Even email interfaces present a clear distinction between an inbox (for received items) and an outbox (for sent items). The separation of text messages sent versus received, conversely, is increasingly blurred, if not altogether demolished, because of the manner in which text messages are displayed on phones. "Smartphones,"⁵⁶ for instance, present text messages in a manner similar to that of an instant message conversation where the back-and-forth between parties is displayed as a singular entity that includes past offerings. See, e.g., Apple iPhone Messages.⁵⁷ Cell phone service providers also keep track of text messages that are both sent and [*133] received on their network. As a result, law enforcement agents are frequently unable to view just one side of a text message exchange regardless of whether they are viewing phone records or an actual phone. This essential truth regarding text messages stands in stark contrast to law enforcement's ability to selectively view an individual email separate from the chain of which it is a part. Thus, the sent/received distinction that the existing law seems to recognize is quite often unworkable for practical purposes.

56 So-called "smartphones" refer to those newer models of cell phones that also have Internet capabilities and, among other things, permit users to send and receive emails as well as text messages. See Mireille Dee, *Getting Back to the Fourth Amendment* at 1134.

57 <http://www.apple.com/iphone/built-in-apps/messages.html>

Letters and emails are also qualitatively different from text messages because of their accessibility. As a general matter, letters are only accessible to the recipient, once sent. Indeed, letters are only accessible to the sender if the sender chooses to keep a copy of the letter. In contrast, emails and text messages are much more accessible. An email account, [*134] in practice, may be accessed through any Internet-enabled device so long as the person is in possession of the associated username and password. An email message is also accessible from the email account of both the sender and recipient. Text

messages, comparatively, are attached to a specific cellular phone or, at very least, a phone number or SIM card rather than an account that can be accessed from multiple places or devices. Text messages, however, can be accessed on either of the participating devices, or potentially in the service providers' records. Most basically, this means that access to the messages, either text or email, is possible at multiple points. There is more than one "copy" of a message in this sense. This is not true of letters.

Letters are also provided greater privacy protection by law than emails or text messages. Federal law, for example, protects against the interception or opening of letters by an unintended party. See *18 U.S.C. 1708* (making it a crime for anyone other than the recipient to open a letter); see also *Walter v. U.S.*, 447 U.S. 649, 100 S. Ct. 2395, 65 L. Ed. 2d 410 (1980) (holding that, absent some exigency, law enforcement must obtain a warrant in order to open sealed packages [*135] and envelopes). Text messages, in contrast, are not provided—at least not at this juncture—any comparable protections to letters because they are not "sealed" in any meaningful way. Emails are protected because access to them generally requires knowledge of the associated email account's username and password. There is also no comparable federal statute deeming it a crime for someone other than the addressee to intercept and read a text message.

Finally, it should be noted that letters are not nearly as subject to view by law enforcement because they are rarely carried on people's persons. Text messages, because of the mobile nature of cell phones, are almost always with a person and thus exponentially more vulnerable to warrantless searches by law enforcement. Indeed, this Court has found that the majority of cases dealing with the warrantless search of text messages and the contents of cell phones have occurred in the context of a search incident to arrest. See, e.g., *U.S. v. Cote*, 2005 U.S. Dist. LEXIS 11725, 2005 WL 1323343 (N.D. Ill. May 25, 2005) ("Searches of items such as wallets and address books, which I consider analogous to Cote's cellular phone since they would contain similar information, have long [*136] been held valid when made incident to an arrest."); *U.S. v. Wurie*, 612 F.Supp.2d 104, 109 (D.Mass. 2009) (listing cases permitting the search of a cell phone pursuant to a valid arrest).

Given these qualitative differences between text messages and letters and emails, this Court is of the view that analogizing text messages to other written forms of communication, such as letters and emails, is an error. It is clear to this Court that such analogies fail to account for the fundamental differences between the mediums. To blindly employ these analogies, therefore, is to undervalue the privacy expectations of those who engage in text messaging.

(iv)

Text Messages as Analogized to Oral Communications

An analogy perhaps more closely reflecting the realities of text messages is that of oral communications.⁵⁸ Text messages are frequently used to convey information that formerly would have been subject to an oral conversation. Br. of EFF at 7. Scenarios where an individual will text information instead of making a phone call—i.e., details of plans, directions, basic inquiries, well-wishes, and quips—are abundant. Additionally, with the general advancement of text messaging capability, text messaging [*137] is no longer limited to simple informational statements. Layered interpersonal communication is now functionally possible and has consequently become commonplace, particularly among younger users. Further, visual or audible authentication is no longer necessary for a sender to reasonably believe that his or her message will be received by the intended party. See *State v. Hinton*, 169 Wn. App. 28, 280 P.3d 476, 2012 WL 2401673 at *14 (Wash. App. Div. 2, June 26, 2012) (Van Deren, J., dissenting). As a result, private topics previously reserved for secured oral communication are now confidently exchanged through text messaging because "many, if not all, mobile phone owners are in immediate possession of their phones at all times." *Id.*

58 Several law review articles have suggested analogizing text messages to oral communications. See, e.g., Katherine M. O'Connor, *OMG They Searched My Txts*. To date, however, this Court's research has disclosed no courts that have used this analogy. This Court, however, will nonetheless address the analogy to oral communications.

Expectation of privacy law for oral communications can be separated into two directional areas: face-to-face conversations and phone conversations. Regarding phone [*138] conversations, people maintain an expectation of privacy to the extent that they have shown some subjective intention to keep their discussion private. See *Katz*, 389 U.S. at 352 ("What he sought to exclude when he entered the booth was . . . the uninvited ear. . . . [o]ne who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world."). Still, all oral communications are subject to the possibility that the other participant in the conversation will disclose the contents of that conversation to another party or law enforcement. Cf. *Hoffa v. U.S.*, 385 U.S. at 303 ("The risk of being overheard by an eavesdropper or betrayed by an informer or

deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak.") (internal quotations omitted). For phone conversations, the Court notes that law enforcement is prohibited as a matter of both federal and state law from using electronic surveillance to intercept and record the contents of telephone [*139] communications without a warrant. See *Katz*, 389 U.S. at 353 ("The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth. . ."); *R.I.G.L. 1956 § 12-5.1-2 et seq.* (detailing the procedures required before wire and oral communications may be intercepted).

Nevertheless, the analogy to oral communications is not perfect, as text messages are inherently a form of written communication. The messages thus can be shown to, or viewed by, others with notable ease. The sender of a text message is open to the risk that the message will be viewed by anyone who possesses the phone to which he or she sent the message. Accordingly, text messages are more vulnerable to discovery than oral communications, which in itself may cause individuals to have less of a subjective expectation of privacy in the content of those communications.

In dealing with these realities, as applied to the now-obsolete pager, at least one court, over two decades ago, found that a person does not have a reasonable expectation of privacy in a message sent to a pager because the sender assumes the risk that [*140] the message will be received by whoever is in possession of the pager. See *U.S. v. Meriwether*, 917 F.2d 955, 959 (6th Cir. 1990) ("Unlike the phone conversation where a caller can hear a voice and decide whether to converse, one who sends a message to a pager has no external indicia that the message actually is received by the intended recipient."). Another court recently extended this logic to text messages. See, e.g., *Hinton*, 169 Wn. App. 28, 2012 WL 2401673 (Wash.App.Div. June 26, 2012) (holding "it is the individual's decision to transmit a message to an electronic device that could be in anybody's possession . . . that defeats the individual's expectation of privacy in that communication."). In so reasoning, these courts implicitly rejected analogizing text messages to oral communications.

Given the parallels between text messages and oral communications, however, this Court is of the view that rejecting the analogy between these forms of communication fails to account for their similarities. To blindly discard the analogy, therefore, is to undervalue the privacy expectations of those who engage in text messaging as a substitute for oral communication. This Court is reminded in this regard of the [*141] logic of Justice

Brandeis in his seminal dissent in *Olmstead v. U.S.*, 277 U.S. at 471-85, that ultimately paved the way for the majority opinion in *Katz v. U.S.*, 389 U.S. 347, almost four decades later:

There is, in essence, no difference between the sealed letter and the private telephone message . . . "True, the one is visible, the other invisible; the one is tangible, the other intangible; the one is sealed, and the other unsealed, but these are distinctions without a difference." The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations between them upon any subject, and although proper, confidential, and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him. As a means of espionage, . . . general warrants are but puny instruments of tyranny and oppression when compared with wire tapping.

Olmstead v. U.S., 277 U.S. at 475-76 (Brandeis, J., dissenting). Similarly here, the [*142] warrantless search of a cell phone is an evil "far greater than that involved in tampering with the mails." *Id.* at 475. Whenever the cell phone text messages of any person are searched, "the privacy of the persons at both ends" of the text communication --the sender of the text message as well as the receiver-- "is invaded and all conversations between them upon any subject, and although proper, confidential, and privileged may be [read and, in effect,] overheard." *Id.* at 475-76. "Moreover, the [search of the texts on one person's telephone] involves [the search] of the telephone of every other person who he [or she] may [text] or who may [text] him [or her]." *Id.* at 476. "As a means of espionage, [therefore,] general warrants are but puny instruments of tyranny and oppression when compared with [the warrantless search of cell phones to obtain such text messages]." *Id.*

All together, this Court finds that the usual tropes--such as letters and emails--through which courts have viewed the limits of a reasonable expectation of privacy in text messages are of only limited use as they are largely predicated on a misconception regarding the technology's nature and use in contemporary society. [*143] Text messages are not letters, email, or even an

oral communication alone—they are a technological and functional hybrid. It follows that any consideration of people's subjective expectation of privacy in their text messages must reflect this reality. This Court will not strain, therefore, to apply existing law based on imperfect analogies. See generally Luke M. Milligan, *Analogy Breakers: A Reality Check On Emerging Technologies*, 80 *Miss. L.J.* 1319 (Summer 2011). To do such would be to willingly commit analytical error.

Accordingly, this Court finds that the Katz test for determining whether a person has a reasonable expectation of privacy is the appropriate one to apply. In applying the Katz test, this Court finds further that the Defendant does have a reasonable expectation of privacy in the content of his alleged text messages.

In so holding, the Court emphasizes that in viewing the contents of people's text messages, just as with GPS monitoring,⁵⁹ law enforcement is able to obtain "a wealth of detail about [a person's] familial, political, professional, religious, and sexual associations." *U.S. v. Jones*, 132 S.Ct. at 955 (Sotomayor, J., concurring). It is hard to imagine information [*144] that could be any more private or worthy of protection from unfettered examination by law enforcement. Any other result would be untenable and out of keeping with the general goal of the *Fourth Amendment* to prevent "a too permeating police surveillance." *U.S. v. Di Re*, 332 U.S. 581, 595, 68 S. Ct. 222, 92 L. Ed. 210 (1948). This concern for protecting "[t]he security of one's privacy against arbitrary intrusion by the police," *Wolf v. People of the State of Colorado*, 338 U.S. 25, 27, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949), should be all the more salient when it comes to the contents of a person's communications because "[a]wareness that the Government may be watching chills associational and expressive freedoms." *Jones*, 132 S.Ct. at 956 (Sotomayor, J., concurring).

Of [*145] all the rights of the citizen, few are of greater importance or more essential to his [or her] peace and happiness than the right of personal security, and that involves, not merely protection of his [or her] person from assault, but exemption of his [or her] private affairs, books, and papers [and this Court would add the content of his or her text messages] from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value.

In re Pacific Railway Comm'n, 32 F. 241, 250 (C.C.N.D. Cal. 1887).

59 A Global-Positioning System ("GPS") tracking device permits monitoring of a person or vehicle's movements by means of signals from multiple satellites, thereby establishing the location of the person or vehicle being tracked to within 50 to 100 feet. See *Jones*, 132 S.Ct. at 948.

In light of the reviewed analogies and discussed considerations, this Court offers a series of interconnected holdings. This Court finds that the third-party doctrine is untenable for today's technological climate and thus should not be applied absolutely. It also finds that text messages should not be considered solely as the contents of a single individual's cell [*146] phone for purposes of analyzing an expectation of privacy in those messages under the *Fourth Amendment*. For this analysis, this Court finds that text messages sent and received should be viewed as a single entity due to their interdependent nature and form. Finally, in applying the Katz test for standing, this Court finds that a person has a reasonable expectation of privacy in the contents of his or her text messages. Accordingly, this Court holds that Defendant possesses standing to challenge the actions of the Cranston Police Department in searching the LG cell phone and viewing his alleged text messages to and those messages from Trisha Oliver.⁶⁰

60 The State does not challenge the Defendant's right to contest the search of any other phones in evidence. In fact, it appears to assert that both the Metro PCS cell phone and the T-Mobile cell phone belong to the Defendant. Regardless, this Court's determination with respect to the Defendant's standing to challenge the text messages on the LG cell phone obviously would extend to his text messages on any other cell phone in evidence.

3

The Illegality of the Search

Having established that Defendant has a reasonable expectation of privacy in [*147] the contents of his text messages, this Court will go on to address whether the Cranston Police Department's actions in searching the apartment, seizing phones, and searching the LG cell phone to discover its text message contents constituted an illegal search and seizure under the *Fourth Amendment*. This inquiry necessitates an examination of the warrant requirement of the *Fourth Amendment* and certain well-settled exceptions to it.

It is axiomatic that a search conducted without a warrant is per se unreasonable under the *Fourth Amendment*. See *Katz*, 389 U.S. at 357. This core constitutional precept is limited by a few—specifically established and

well-delineated--exceptions in which a warrantless search may be permitted. See *id.* Among these exceptions are searches conducted under exigent circumstances, a plain view search, or a search conducted with an individual's consent. See, e.g., *Warden, MD Penitentiary v. Hayden*, 387 U.S. 294, 298-99, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967) (pertaining to exigent circumstances) ("The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others."); *Coolidge v. New Hampshire*, 403 U.S. 443, 465, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971) [*148] (pertaining to plain view) ("It is well established that under certain circumstances the police may seize evidence in plain view without a warrant."); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) (pertaining to consent) ("[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.").

(a)

Sgt. Kite's Initial Viewing of the Text Messages on the LG Cell Phone

It is undisputed that Sergeant Kite's initial viewing of the text messages on the LG cell phone was not authorized by a warrant. His search of this phone must be deemed to be in violation of the *Fourth Amendment*, therefore, unless it was justified by an exception to the warrant requirement.

This inquiry requires this Court to determine whether his warrantless search of the LG cell phone is nonetheless justified under the *Fourth Amendment* under the exceptions to the warrant requirement for searches conducted under exigent circumstances, in plain view, or with consent. This Court will address each of these exceptions to the warrant requirement in *seriatim*.⁶¹

⁶¹ This Court focuses on these three exceptions to the warrant requirement as [*149] potentially applicable here. It is important to note that the State does not invoke the well-settled exception to the warrant requirement for a search incident to arrest that arguably would allow for a search of a cell phone on a defendant's person at the time of arrest on the theory that he or she has a lesser expectation of privacy in the cell phone and its contents at that time. See *State v. Brown*, 260 A.2d 716, 719-20, 106 R.I. 453, 460 (1970) (reviewing the search incident to arrest exception to the warrant requirement). In fact, it denies that the Cranston Police Department searched any cell phone belonging to the Defendant at any time

prior to obtaining warrants for that purpose. More specifically, it denies that the Defendant was under arrest at headquarters at the time that the officers routinely secured the T-Mobile phone that it claims was on his person and further denies that the officers searched that phone at that time. As to the LG cell phone, the State maintains that it was never on the Defendant's person and that its search by Sgt. Kite occurred before the police arrested the Defendant later that morning. This Court, therefore, will not address the warrant exception [*150] for search incident to arrest and specifically leaves for another day the question of whether and under what circumstances a cell phone may be searched incident to arrest.

(i)

Exigent Circumstances

The exigent circumstances exception to the warrant requirement permits police officers to make warrantless entries and searches and seizures in situations where "some compelling reason for immediate action excuses law enforcement officers from pausing to obtain a warrant." *U.S. v. Martins*, 413 F.3d 139, 146 (1st Cir. 2005). Common examples of exigent circumstances include: "hot pursuit" of a fleeing felon, the possible loss or destruction of evidence, and emergency aid, i.e. when police reasonably believe that immediate action is needed to safeguard life or prevent serious harm. See *id.* "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." *Mincey v. Arizona*, 437 U.S. 385, 392, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978) (internal citations omitted). During this sort of emergency search, the police are permitted to seize any evidence in plain view. See *State v. Jennings*, 461 A.2d 361, 367 (R.I. 1981). A search prompted by exigent circumstances, [*151] however, must be limited in scope and purpose. See *id.* The United States Supreme Court has stated that the search must be "strictly circumscribed by the exigencies which justify its initiation." *Mincey*, 437 U.S. at 393. Moreover, "the intrusion [must] not be a pretext to make an arrest or a search to seize evidence." *Duquette v. Godbout*, 471 A.2d 1359, 1363 (R.I. 1984).

In determining whether Sgt. Kite's warrantless search of the LG cell phone was justified by exigent circumstances, this Court must scrutinize his handling of that phone. Sgt. Kite admits that he viewed an alert on the front exterior screen of the device that said the cell phone had one new message. Sgt. Kite then opened the phone to view the interior screen and as a result was informed that there was one new message that could not be received due to a lack of credit on the account. Sgt. Kite

consequently "manipulated a button" to "acknowledge receipt of the message to avoid repeat notifications." This manipulation led Sgt. Kite to a list of text messages. The word "hospital" appeared in the message at the top of the list. Sgt. Kite then clicked on this message and subsequently viewed the following addressed to "Da [*152] Master" at phone number (401) 699-7580: "Wat if I got 2 take him 2 da hospital wat do I say and dos marks on his neck omg." At that point, Sgt. Kite said that he closed the phone and examined no further text messages.

While Sgt. Kite attempted to justify his alleged actions in picking up, opening and viewing of the LG cell phone by suggesting that he did so in response to an audible or visual alert on the phone that he thought might be signaling that someone was trying to contact Trisha Oliver regarding Marco Nieves' condition, this Court does not credit his testimony in this regard. It likewise does not credit his testimony that he saw an insufficient funds message thereafter and thus continued to scroll through the phone in an attempt to locate the message associated with the alert. Significant to the Court in this regard is that the phone records for the LG cell phone and the extracted contents of the phone itself, introduced later in the hearing after Sgt. Kite testified, were stunningly devoid of any evidence of the insufficient funds text message that figured so prominently in his testimony. Not only did these records fail to corroborate his version of the events, but they served [*153] to discredit his story.⁶²

62 This story figures prominently in this Court's later "fruits of the poisonous tree" analysis, as the police not only stuck to this story but repeated it at least a dozen times in applying for search warrants. The falsity of the story also is one of the bases upon which this Court has determined that a Franks hearing may be necessary in this case.

Absent some audible or visual alert regarding an incoming message, there is no other evidence in the record to justify Sgt. Kite's actions in picking up and manipulating the LG cell phone. This Court specifically emphasizes that the situation at the time did not involve the investigation of any crime that might commonly involve either cell phones or text messages, such as drug trafficking. See, e.g., *State v. Carroll*, 2010 WI 8, 322 Wis. 2d 299, 778 N.W.2d 1, 11 (Wis. 2010) (where the court accepted police officer's testimony that "drug traffickers frequently personalize their cell phones with images of themselves with items acquired through drug activity," and that drug traffickers frequently use their personalized cell phones to make their transactions). In addition, a cell phone is not an instrument that might reasonably pose a danger to [*154] officers so as to justify its seizure un-

der the exigent circumstances exception to the warrant requirement. Sgt. Kite's warrantless search of the LG cell phone cannot be justified, therefore, as objectively reasonable in the name of an ongoing emergency.

Moreover, even assuming that Sgt. Kite handled the LG cell phone initially in response to an audible or visual alert out of concern for Marco Nieves and saw the insufficient funds message, his continued manipulation of the phone thereafter to access its substantive text message contents would have been objectively unreasonable and beyond the scope of any permissible search at that time. If he saw such an insufficient funds message, and knew that it explained the alert and had nothing to do with Marco Nieves' condition, he should have refrained from any further manipulation of the phone and ceased his "search" at that time. The emergency situation involved a rescue call for an unresponsive child. Any search of the LG cell phone should have been limited perforce to what was necessary to determine the cause of the child's condition or otherwise assist in helping Marco Nieves.

While Sgt. Kite attempted, through his testimony, to limit the [*155] scope of his search to what he believed was reasonably necessary to respond to the ongoing emergency situation involving Marco Nieves--namely, reading a single text message about the marks on Marco Nieves' neck and the concern about those marks being revealed if the child had to go to the hospital--this Court does not accept that his search was so limited. The idea that Sgt. Kite would have seen that one incriminating text message and instantly shut the phone to avoid a more invasive search is preposterous. No reasonably curious person, much less a seasoned police officer in the throes of investigating a child's mysterious medical decline, would have seen that suspicious text message and been able to resist scrolling for more.

The purpose of Sgt. Kite's examination of the contents of the LG cell phone, in this Court's view, was not to deal with an ongoing emergency involving a child, as he testified; his purpose, purely and simply, was to scroll quickly but thoroughly through the cell phone for possible evidence of a crime. The problem, however, is that he did so without first obtaining a warrant, and the circumstances created no exigency that could excuse that failure. This Court thus [*156] holds that Sgt. Kite's actions in searching the text messages on the LG cell phone were objectively unreasonable and not justified by the exigent circumstances exception to the warrant requirement.

(ii)

Plato View

The plain view exception to the warrant requirement permits an officer to seize evidence in plain view "when he [or she] is lawfully in a position that allows him [or her] to see the evidence and it is immediately apparent to the officer that the object is evidence of criminality." *State v. Portes*, 840 A.2d 1131 (R.I. 2004). This exception generally applies where "the police officer...had a prior justification for an intrusion[,] in the course of which he came inadvertently across a piece of evidence incriminating the accused." *Horton v. California*, 496 U.S. 128, 136, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990) (internal citations omitted).

In this case, the State appears to be arguing that Sgt. Kite's actions in viewing the text message content on the LG cell phone fall under the plain view exception to the warrant requirement because he saw it inadvertently as a result of his reasonable decision to pick up the LG cell phone to view an incoming text message. As this Court discussed previously, however, in addressing [*157] the exigent circumstances exception to the warrant requirement, it does not accept Sgt. Kite's story as to what prompted him to pick up that cell phone nor does it agree that his handling of the phone was reasonable or that he saw only one text message.

It likewise is not convinced that Sgt. Kite's viewing of the text message content of the LG cell phone—even if limited to a single message—was, in fact, inadvertent. To view the text message content of the LG cell phone, Sgt. Kite had to take affirmative actions, pressing at least one button, before the text messages would appear. This is not a case where the display screen on the LG cell phone immediately displayed something that was evidently incriminating on its face. Compare *State v. Carroll*, 778 N.W.2d at 9 ("After [the officer] legally seized the open phone, his viewing of the marijuana image also was legitimate because that image was in plain view."). Regardless, any claim of inadvertence must be rejected because it conflates the fact that inadvertence is a necessary condition for the plain view doctrine to apply with inadvertence alone being a sufficient condition.

The State also appears to argue that Sgt. Kite's viewing of the [*158] LG cell phone was reasonable because it was in plain view at the time when he "seized" and "searched" it. Even assuming, however, that the Court accepts that the LG cell phone was a "closed container" for purposes of this analysis, that assumption would not make Sgt. Kite's actions in searching the "container"—the LG cell phone—reasonable. It is well-settled that even if a container may be lawfully "seized" in plain view, law enforcement may not then expand its actions to "search" the container without a warrant. See *Horton*, 496 U.S. at 136 ("[T]he 'plain view' doctrine may not be used to extend a general exploratory

search from one object to another until something incriminating at last emerges.") (internal citations omitted).

Finally, the Court emphasizes that the plain view doctrine is meant to apply to the seizure of items, the criminality of which must be immediately apparent. See *id.* This Court cannot find that a cell phone is an object that, in and of itself, has apparent criminality, except perhaps in cases where the officer has probable cause to believe that the cell phone is contraband.

Accordingly, this Court holds that Sgt. Kite cannot justify his discovery of the text message [*159] content of the LG cell phone as inadvertent or the result of the items being in plain view. As such, his search of the LG cell phone does not fall within the plain view exception to the warrant requirement.

(iii)

Consent

A search conducted pursuant to consent is constitutionally permissible. See *State v. Casas*, 900 A.2d 1120, 1134 (R.I. 2006). Where a person consents to a search, however, that search must be limited to what is objectively reasonable in order to accomplish the purpose for which the person gave consent. See *U.S. v. Turner*, 169 F.3d 84, 87 (1st Cir. 1999).

In the instant case, Trisha Oliver impliedly consented to Sgt. Kite's search of her apartment when she accompanied him on a tour of the residence after his arrival. Her consent, however, was impliedly, if not expressly, limited to a search for items that might have caused Marco Nieves' deteriorating health condition. Sgt. Kite implicitly recognized these limits when he testified that he took some care to confine his search to items in plain view that the child might have ingested, rather than opening up drawers or closed containers to find such evidence.

Sgt. Kite's affirmative action in searching the LG cell phone to view [*160] the incriminating text messages thus stepped beyond the scope of what could have reasonably been understood to be encompassed by Trisha Oliver's consent. Neither a cell phone nor text messages could reasonably be expected to have caused Marco Nieves' medical condition.⁶³ "Government agents may not obtain consent to search on the representation that they intend to look only for certain specified items and subsequently use that consent as a license to conduct a general exploratory search." *Turner* 169 F.3d at 87 (internal citations omitted).

63 While Trisha Oliver ultimately may have given written consent to search the contents of the LG cell phone, the police did not ask her to

sign a written consent form, nor did she sign one until the afternoon of October 4, 2009, while she was at the hospital awaiting news of her son's condition. St.'s Ex. 58. As Ms. Oliver did not sign this consent form until hours after Sgt. Kite's morning search of the LG cell phone and its text messages, her consent, even if valid, is irrelevant to this Court's determination of whether consent existed at the time of his warrantless search.

In addition, there is no evidence that the Defendant consented to the police [*161] being in the apartment or seizing or searching any phones there. Indeed, it would be inconsistent for the State to argue such consent where it takes the position that the Defendant has no standing in the apartment or in the LG cell phone that Sgt. Kite searched. Accordingly, this Court finds that Sgt. Kite's search of the LG cell phone and its text message contents was not objectively reasonable as a search pursuant to consent that would justify relief from the warrant requirement. Having reviewed the exceptions to the warrant requirement for searches that are justified by exigent circumstances, plain view or consent, and having found the evidence insufficient under each exception to justify Sgt. Kite's warrantless search of the LG cell phone at issue here, this Court must conclude that his search was objectively unreasonable. There is no reason, under the circumstances of this case, to excuse the Cranston Police Department from its constitutional obligation to secure a warrant before proceeding with a search.

This Court reiterates that the standard by which a warrantless search is judged is one of objective reasonableness and not an officer's subjective intent. See *Kentucky v. King*, 131 S. Ct. 1849, 1859, 179 L. Ed. 2d 865 (2011) [*162] ("Our cases have repeatedly rejected a subjective approach, asking only whether the circumstances, viewed objectively, justify the action.") (internal quotations omitted). While Sgt. Kite, and other officers, might well have believed that his cell phone search was reasonable, their subjective beliefs, being objectively unreasonable, cannot carry the day. The very purpose of the warrant requirement is to ensure that a neutral magistrate stands between law enforcement and the people to decide whether it is reasonable to allow law enforcement's requested intrusion into a person's private affairs. See *McDonald v. U.S.*, 335 U.S. 451, 455-56, 69 S. Ct. 191, 93 L. Ed. 153 (1948) (stating that the warrant requirement was made "so that an objective mind might weigh the need to invade that privacy in order to enforce the law.").

Given the amount of private information that can be readily gleaned from the contents of a person's cell phone and text messages--and the heightened concerns for privacy as a result--this Court will not expand the warrantless search exceptions to include the search of a cell

phone and the viewing of text messages. It is particularly reluctant to do so here where it was unclear, before the search of [*163] the cell phone, whether any crime had been committed and where there was no evidence of a crime involving the use of cell phones and text messages. See *id.* ("The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.").

In so holding, this Court acknowledges the seriousness of Marco Nieves' medical condition and the consequent motivation, on the part of Sgt. Kite and other officers, to do whatever possible to investigate its cause. The investigatory instincts and talents of law enforcement are critical to maintaining our civilized society and holding persons accountable for their actions. Yet, the seriousness of Marco Nieves' injuries does not otherwise justify an intrusive, non-consensual warrantless search into a cell phone that was clearly not the immediate cause of the injury. "It is inconsistent with the *Fourth Amendment* to adopt the position that 'the seriousness of the offense under investigation itself creates . . . [the] circumstances . . . that under the *Fourth Amendment* justify a warrantless search.'" *Jennings*, 461 A.2d at 367 (quoting *Mincey*, 437 U.S. at 394). Accordingly, this Court [*164] holds that Sgt. Kite's actions in manipulating the LG cell phone to view its text message contents constituted an illegal, warrantless search, in violation of the *Fourth Amendment*.

(b)

Search and Seizure of Other Phones

After Sgt. Kite's illegal search of the LG cell phone at the apartment, B.C.I. detectives of the Cranston Police Department purportedly took formal steps at the scene to seize and search phones at the apartment, including--according to B.C.I.'s seizure report--the LG cell phone, the Metro PCS cell phone, the iPhone and the landline phone. It also photographed the text messages that appeared on the LG cell phone, inclusive of those text messages that Sgt. Kite had discovered illegally. The State claims that it did so legally, pursuant to the first search warrant issued in this case.

Before examining the warrant and the propriety of any searches that occurred after its issuance, however, this Court must pause to address whether any seizure of phones and search of the contents of the phones occurred at the scene or otherwise before issuance of the warrant so as to render those searches and seizures illegal. It then must proceed to consider the propriety of any searches and seizures [*165] of phones and their contents that occurred after the police obtained the first warrant.

(i)

Warrantless Searches and Seizures

Based on the testimony and evidence adduced at the suppression hearing, this Court is not satisfied that the State has proven, by a preponderance of the evidence, that the police were in the apartment legally after Marco had been transported and Trisha Oliver had left for the hospital. The emergency had ended as had their plain view search in her company. There is no evidence thereafter that the police sought or received the Defendant's consent to remain there.

Even assuming the right of the police to be on the premises, this Court is not convinced that the State proved that the police confined their search and seizure of phones, prior to issuance of the first warrant, to the LG cell phone in the apartment that Sgt. Kite admittedly searched and seized. It makes no sense to this Court that seasoned police officers, with well-honed investigative instincts, would have searched only the LG cell phone that was the subject of Sgt. Kite's testimony, especially when that phone, upon examination by Sgt. Kite, raised questions about the identity of "DaMaster," whether the [*166] last message on the phone that Sgt. Kite admittedly viewed asking whether the sender should tell the hospital about the marks on Marco Nieves' neck was actually sent and whether "DaMaster" answered that inquiry. Given that Sgt. Kite examined the LG cell phone in detail before issuance of the first search warrant, it is probable, and indeed far more likely, that the officers on scene examined the other phones in the apartment—either before or after Sgt. Kite's search of the LG cell phone—to determine if there were any incriminating text messages or other electronic data of interest on any of the phones and, more particularly, to try to determine which cell phone belonged to whom, the identity of "DaMaster" as the sender of the messages on the LG cell phone and the location of the corresponding text messages to the LG cell phone.

It is also probable that this search and seizure of phones, prior to issuance of the first warrant, extended to the cell phone taken from Defendant's person at headquarters. While the Cranston police have taken shockingly inconsistent positions, throughout their investigation and in their testimony at the suppression hearing, as to whether the Defendant had on [*167] his person at the station the Metro PCS cell phone or the T-Mobile cell phone and which of those two cell phones was in the apartment, the handling of the evidence suggests that either cell phone or its SIM card could have been in the apartment and/or at the station at different times that morning. Regardless, the conflict in the evidence on these points—though proof positive of woefully deficient, if not blatantly illegal and deceptive evidence handling—does not need to be parsed further by this Court

for purposes of defining the extent of the warrantless searches and seizures that morning; regardless of where the Metro PCS cell phone and the T-Mobile cell phone were located and when on the morning of October 4, 2009, this Court is convinced that they were both seized and searched by the police, along with the LG cell phone, the iPhone and the landline phone, prior to their seeking or obtaining the first warrant.

Support for this Court's conclusions in this regard can be found in the testimony and evidence at the suppression hearing. This evidence reveals that the police were focused on cell phones and text messages at the earliest stages of the investigation and well before they sought [*168] or obtained the first search warrant for the apartment. Sgt. Kite, by his own admission, had noticed at least four cell phones in the apartment, had seen the Defendant answer the landline phone and had, in this Court's view, examined the incriminating text messages on at least the LG cell phone. Indeed, this focus is what prompted the police to take Defendant to the station to give a statement. In the ensuing two hours or more from the time the Defendant left the apartment until the police obtained the first search warrant, the officers had both the motive and the opportunity to examine all of the cell phones to find the sending and receiving cell phones containing the incriminating text messages, discover additional incriminating cell phone contents, and link the Defendant to those messages.

During this time period, Sgt. Kite remained in the apartment with other B.C.I. detectives. They were not just twiddling their thumbs, waiting for a warrant to be prepared and signed—something they could have, and should have, done outside of the apartment. The problem is that the only basis that they had to seek a warrant, at least based on the testimony at the hearing, was the illegally obtained [*169] text messages. Instead, Sgt. Kite, by his own admission, immediately alerted Lt. Sacoccia at the station about the text messages he had seen (though Lt. Sacoccia was not a witness at the suppression hearing so this Court has limited information about his activities in this regard). Sgt. Kite also asked that the Defendant's cell phone be taken off of his person at the station, even though the Defendant had not been arrested. Sgt. Kite tried to justify this warrantless seizure of the Defendant's cell phone by saying that he had seen the Defendant pick up his cell phone from the back of the couch in the apartment and take it with him to the station and that he was concerned about preserving evidence.⁶⁴ At this point, the police focus on the cell phones expanded from those cell phones in the apartment to include the cell phone on Defendant's person at headquarters.

64 This Court notes that the mere fact that Defendant picked up a cell phone when he left the apartment hardly denotes any suspicious activity concerning the cell phone. Cell phones are almost always in their owners' immediate control and are, indeed, intended to be carried by their owners. Of course, the officers' concern about [*170] this cell phone undoubtedly would have been heightened if they already knew it contained the subject text messages.

As this focus on the cell phones advanced, the abysmal handling of the evidence by the police in this case--specifically the critical cell phones at issue--plays into this Court's view that the police seized and searched all of these cell phones without a warrant. When the police relieved the Defendant of his cell phone at headquarters, they did not secure that cell phone in evidence; they literally pocketed the evidence, with the Defendant's cell phone first going into the pocket of Officer Machado and then from him into the pocket of Sgt. Walsh. This Court cannot fathom that this phone was pocketed without being examined, especially since Sgt. Walsh headed with this phone to the scene and had it with him when he asked Judge Clifton to issue the first warrant in this case.

Meanwhile, there is evidence of additional police manipulation of the LG cell phone at the apartment. Soon after the police transported the Defendant to headquarters, just prior to beginning his interrogation and well before the police made application for a search warrant, an officer at the apartment [*171] actually manipulated the LG Verizon cell phone (again) and used it to call the phone's voicemail account, at phone number (401) 486-5573, for 15 seconds, after which the officer hung up. See St.'s Ex. 32.

As the detectives began the Defendant's interrogation, still prior to obtaining a search warrant, their questioning confirms that the police had been focused, and were continuing to focus, on the cell phones, their text message contents and tying Defendant to the incriminating text messages. They referenced text messages and their evidentiary value and asked Defendant right away to state his cell phone number. As this was happening, other officers monitored the interview and its contents from an external monitoring room. The interview proceeded with the detectives going in and out of the interview room, conferring with other officers outside of the room. None of the police witnesses at the suppression hearing wanted to talk about what was really going on at this time.

In the ensuing timeframe, as noted, it appears that Sgt. Walsh returned to the scene--with the cell phone taken from Defendant at headquarters still in his pocket. There is also evidence that an unknown officer at the

scene [*172] picked up the Metro PCS cell phone and reoriented it on the dining room table, as shown in photographs taken later at the scene, suggesting examination of it. Sgt. Walsh and Sgt. Kite both left the scene at some point with cell phones on their persons and returned to headquarters, and neither of them turned those phones over to B.C.I. until later that day. The cell phones were never secured properly as evidence; they traveled in police pockets and in unsecured little brown paper lunch bags, capable of easy examination, confusion, or substitution. As the interrogation progressed, the detectives began to use more particularized cell phone text messages in interviewing the Defendant and left and returned to the room repeatedly without adequately explaining these activities at the hearing, leading this Court to infer that they had ready access to cell phones and their contents.

While it is possible that some of these police activities occurred after issuance of the first warrant, the issuance of the warrant itself and any activities taken pursuant to it still suggest that the police were engaged in the active pursuit of cell phone and text message evidence before the warrant. The police [*173] would have wanted to ensure that any cell phone that they thought was valuable, which certainly would have included the Defendant's cell phone that corresponded with the LG cell phone, was in the apartment at the time they obtained the warrant so that its search and seizure would have been covered by the warrant. This desire would have required investigating the cell phones to try to make sure that all cell phones with evidentiary importance were in the apartment when the warrant was executed.

The police, having taken the Defendant to the station for interrogation early that morning, also would have wanted that interrogation to encompass as much cell phone and text message evidence that they could find. They would have wanted their search for cell phones and text message evidence, therefore, to proceed as swiftly as possible. Not mentioning any cell phones or text messages in the warrant affidavit or the warrant itself is consistent with already having found the evidence illegally, as is the fact that the detectives questioning the Defendant were prepared to use the explicit text message evidence--which they reference as being from the Defendant's own cell phone--immediately on the heels [*174] of when the police say they secured the warrant. If the police did not already have possession of such evidence at the time the warrant was issued, they would have needed time to execute the warrant, seize and search all of the cell phones and relay their findings to the detectives in the interview room--tasks that would have taken longer time than the timeline indicated by the officers' own testimony and the course of the interrogation. From all of this evidence, it can be reasonably inferred that the police examined all of the cell phones found at the scene

and the cell phone taken from Defendant's person at headquarters, prior to obtaining a search warrant.

Moreover, the fact that there is no evidence before this Court as to whether the Metro PCS cell phone or the T-Mobile cell phone in evidence actually contain the corresponding incriminating text messages to those found on the LG cell phone does not affect this Court's conclusion. That evidence indeed may exist on the Metro PCS cell phone or the T-Mobile phone, as the police were careful not to photograph such evidence or the absence of it in their subsequent searches of the contents of those phones, they did not prepare an extraction. [*175] report of the contents of those phones (as they did for the LG cell phone) for submission as evidence in the suppression hearing, the phones in evidence are uncharged and thus their contents cannot be viewed by this Court, and no testifying officer could guarantee to the Court that some other officer did not see the broader contents of these phones at some point. In addition, the ensuing warrant affidavits are replete with inconsistent statements about which of those two phones were where and Det. Cardone's affidavit attempt to explain it and those inconsistencies did not ring true.

Regardless, whether the Metro PCS cell phone or the T-Mobile cell phone contain evidence of the incriminating text messages matters not to this Court in reaching its conclusion that these cell phones were searched by the police before they obtained the first warrant or thereafter in excess of the scope of that warrant. If the police did not see those incriminating text messages on one of those cell phones, they would have had every incentive to search harder for them; if they saw those messages on one of those cell phones, they would have had every incentive to focus the investigation and their evidence [*176] and arguments at the suppression hearing on a cell phone other than one tied to the Defendant.⁶⁵

⁶⁵ Indeed, as this Court has noted previously, the State's standing argument is premised on the implicit assumption that the police did not view the incriminating text messages on Defendant's cell phone, which is troublesome given this Court's conclusion that the police searched and seized that phone.

Moreover, while the State attempted to suggest, based largely on the testimony of officers and evidence of the Crime Scene Roster that served as a timeline of their activities at the scene, that no searches and seizures occurred at the scene other than a plain view search authorized by Trisha Oliver and Sgt. Kite's viewing of the text messages on the LG cell phone, this Court finds otherwise. It would note, in this regard, that the State could not explain away the documentary evidence confirming that a search of the LG cell phone to access its voicemail

clearly occurred at the scene prior to the issuance of the first warrant. In addition, it is clear from testimony that officers admittedly were in the apartment conducting a search before other officers arrived at the scene with the warrant signed [*177] by Judge Clifton in hand. To justify this action, officers testified that Lt. Sacoccia had called them, before they initiated their search, to indicate that the search warrant had been signed. As Lt. Sacoccia did not testify, however, there was no evidence to corroborate this testimony. In addition, the warrant itself bears no time stamp or equivalent information on its face to show when it was signed—a fact that is particularly troubling to this Court in light of the importance of the timeline of police activities in this case. Moreover, the usual, and legally required, practice is for officers on scene not to begin any search until the warrant has been served on the owner or occupant of the premises and the officers know its scope; otherwise, they risk engaging in an unlawful warrantless search or a search that exceeds the scope of the warrant. This testimony does not convince this Court, therefore, that these officers, who admittedly searched, did so pursuant to the first warrant.

Furthermore, the written timeline contained in the Crime Scene Log, upon which testifying officers relied in giving their testimony about the time and order of their activities on the morning of October [*178] 4, 2009, and upon which the State relies in suggesting that no other searches and seizures of cell phones occurred before the first warrant, was not, in this Court's view, reliable evidence of the actual timeline. See St.'s Ex. 5. Sgt. Kite testified that he asked Officer Lee to initiate the Crime Scene Roster at 6:30 a.m. that morning to document which officers entered and left the scene and at what times. Sgt. Kite's testimony in this regard was not corroborated by Officer Lee, who did not testify at the hearing. Sgt. Kite struggled to explain why he would initiate a crime scene roster if he did not view the scene at that time as a crime scene, stating that he simply wanted to document police activity at the apartment. Sgt. Kite testified further that he filled in the first six entries on the roster, suggesting that it was he and not Officer Lee who initiated it. He also conceded that officers may not have signed themselves in and out of the roster but that other officers might have done that for them. There also is no evidence as to who maintained the roster during the course of the morning.

This testimony suggests that police officers did not document their own entries on this roster [*179] contemporaneously with the events listed on it, and that no one controlled the document itself, thereby rendering the entries recorded on it unreliable. There are also entries on the roster that are inconsistent with other evidence in the case. The testimony and evidence thus raises the specter that the roster may have been prepared after the

fact to provide a template for testimony about the timeline of activities at the scene so that it would square with the documentary evidence of when B.C.I. took photographs, the videotape of the scene, and the videotape showing when the detectives began to question Defendant about the text messages—all in an effort to demonstrate that their activities at the scene, other than a plain view search for evidence that could have caused Marco's medical condition and Sgt. Kite's "inadvertent" viewing of the text messages on the LG cell phone, were taken after issuance of the warrant. As many testifying officers evidenced no independent memory as to the timeline of their activities at the scene, and relied on the roster as the sole basis for their testimony as to when they did what at the apartment, this Court finds that it is virtually impossible to [*180] construct a true timeline of all police activity at the scene. The absence of a reliable timeline convinces this Court further that the State has failed to establish that there were no searches and seizures of additional cell phones at the scene or otherwise prior to issuance of the first warrant.

Accordingly, this Court concludes that the police officers on the scene conducted a search and seizure of all of the phones in the apartment, the cell phone seized from the Defendant's person and the contents of all of those phones before obtaining the first warrant. Put another way, this Court is not convinced that the State proved that such illegal searches and seizures of phones did not occur. No testifying officer could state with certainty that the contents of the Metro PCS cell phone and the T-Mobile cell phone had not been examined. Just as Sgt. Kite's actions in illegally searching the contents of the LG cell phone lacked justification under the exigent circumstances, plain view, and consent exceptions to the warrant requirement, so too did the police officers' other actions in searching the apartment and searching and seizing the other phones in evidence. The Cranston Police Department [*181] thus engaged in an illegal warrantless search and seizure of all of the phones in evidence and the contents of those phones, including the LG cell phone, the Metro PCS cell phone, the T-Mobile cell phone, the iPhone, and the land line, in violation of the Defendant's rights under the *Fourth Amendment*.

(II)

Searches and Seizures After Warrant Obtained

Even assuming, arguendo, that the police at the scene engaged in no informal search and seizure of the phones in the apartment and the phone taken from the Defendant's person before B.C.I. first obtained a warrant and then proceeded to formally seize the evidence, that would not end the inquiry into the legality of its actions. It likewise would not end the inquiry into the propriety

of B.C.I. taking photographs at the scene of certain text messages stored in the LG cell phone pursuant to the first warrant.

These inquiries require this Court to consider whether the searches and seizures of the phones and the taking of the photographs of the text messages, even if done after obtaining the first warrant, exceeded the scope of that warrant so as to make the collection of this evidence illegal. If the taking of the photographs exceeded the scope [*182] of the first warrant, this Court then must consider further whether the police took those photographs out of a reasonable fear that the subject of the photographs—namely, the text messages stored in the LG cell phone—might be deleted remotely so as to make these photographs admissible, even without a warrant, under the exigent circumstances exception to the warrant requirement.

(I)

Particularity of the Warrant and the Scope of the Search

The *Fourth Amendment* requires that warrants describe with particularity the place to be searched and the persons or things to be seized. *Coolidge v. New Hampshire*, 403 U.S. 443, 471, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971); *State v. Pratt*, 641 A.2d 732, 736 (R.I. 1994). "The particularity requirement [dates back to adoption of our federal Constitution and] ar[ose] out of a hostility [on the part of the framers] to the Crown's practice of issuing general warrants taken to authorize the wholesale rummaging through a person's property in search of contraband or evidence." *U.S. v. Upham*, 168 F.3d 532, 535 (1st Cir. 1999). A search or seizure, therefore, must conform to the scope of the warrant. See *id.* at 536. A warrant cannot be extended beyond the privileges granted in its issuance. See [*183] *In re No. 191 Front St., Borough of Manhattan, City of New York*, 5 F.2d 282, 285 (2d Cir. 1924).

The particularity requirement prevents the seizure of one thing under a warrant describing another thing. See *Marron v. U.S.*, 275 U.S. 192, 196, 48 S. Ct. 74, 72 L. Ed. 231, *Treas. Dec.* 42528 (1927). "If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of [particularity]." *Coolidge*, 403 U.S. at 471. The particularity requirement thus limits the discretion of the officer executing the warrant, and any insufficient description in the warrant itself cannot be cured by a showing that the executing officer was aware of other facts not in the affidavit which enabled him or her to know exactly what things were intended to be covered. See, e.g., *Green v. State*, 688 So.2d 301, 306

(*Fla. 1996*) (holding that "where the search warrant description was insufficient, it is not relevant to this analysis that the officer who actually executed the warrant had information not contained in the warrant").

Whether a police search and seizure, pursuant to a warrant, was within the scope of [*184] the warrant is a question of objective reasonableness under the totality of the circumstances. See *U.S. v. Cofield*, 391 F.3d 334, 336 (1st Cir. 2004). The burden is on the State to show that any search and seizure of items was justified within the four corners of the warrant. See *Commonwealth v. Taylor*, 10 Mass. App. Ct. 452, 409 N.E.2d 212, 215 (Mass. App. Ct. 1980); see also *Carlton v. State*, 449 So.2d 250, 251 (*Fla. 1984*) ("[T]he particularity requirement and its constitutionality must be judged by looking only at the information contained within the four corners of the warrant.").

In determining here whether the first warrant for the apartment is sufficiently particularized to allow for the searches and seizures of the phones and the photographing of the text messages on the LG cell phone by B.C.I., this Court must examine the language of that warrant. By its terms, the warrant authorized the search and seizure of: "[a]ny and all articles, instruments, or otherwise that may have evidentiary value pertaining to an investigation of an unresponsive child known as Marco Nieves DOB 9/15/03 which has been determined to be suspicious in nature" and limited the place to be searched to the apartment in question. [*185] The corresponding affidavit mentioned Marco Nieves' unresponsive condition, that the officers had "observed dark brown vomit inside of the toilet," and that the attending doctor had "located marks on Nieves' right shoulder and determined that Nieves was suffering from brain trauma which he classified as suspicious." See St.'s Ex. 22. This Court specifically notes that there is no mention anywhere in either the affidavit or the warrant itself of cell phones or text messages.

According to the language contained within the four corners of the warrant, therefore, the warrant authorized the search and seizure of items from the apartment that related to a child (Marco Nieves), who had become unresponsive under suspicious circumstances. Its language was broad, in the sense that it authorized the search and seizure of "any and all [items] that may have evidentiary value," yet any search that took place had to be limited to what was objectively reasonable to believe would provide evidence relating to an unresponsive child under suspicious circumstances.

In construing this language, this Court cannot find that the language of the warrant reasonably included a seizure of all phones that could be [*186] located in the apartment and a search of their contents. This Court

acknowledges that the seizure of those phones and a search of their contents, including B.C.I.'s photographing of the text messages on the LG cell phone, may have been subjectively reasonable as a result of Sgt. Kite's viewing of the text message content of the LG cell phone. The scope of a search conducted pursuant to a warrant, however, is limited by what appears in the four corners of the warrant itself and does not depend on any omitted information--such as the existence of multiple phones in the apartment and references to text messages on the LG cell phone or otherwise--that was not included as part of the sworn affidavit presented to the Judge who signed the warrant. As the warrant failed to authorize, with particularity, the search and seizure of phones and text messages, the scope of the searches and seizures under the warrant must have been limited to items in the apartment that were reasonably related to a child who had become unresponsive under suspicious circumstances--i.e., within the objectively reasonable scope of the searches and seizures specifically authorized by Judge Clifton in signing the warrant.

This [*187] Court emphasizes in this regard that an unresponsive child, or even a child who may be suspected of being the subject of a crime of child abuse, is not commonly associated with either phones or text messages. It was not objectively reasonable, therefore, for the police to interpret a general warrant authorizing a search and seizure of items in the apartment relating to an unresponsive child, even under suspicious circumstances, to include a search and seizure of phones in the apartment and their contents or, even more obviously, the cell phone taken from the Defendant's person.

The fact that Sgt. Walsh and the other B.C.I. detectives were aware of the relevance and importance of the cell phones and their text messages in this case does not justify the seizure of the phones and the photographing of text messages where it cannot reasonably be stated that the face of the warrant authorizes those seizures and searches. In the instant case, especially where the police had information that, if lawfully obtained, could have permitted the issuance of a warrant that specifically authorized the seizure of the cell phones and the search of their contents, this Court cannot find that the seizure [*188] of phones and photographing of the contents of the LG cell phone was reasonably within the scope of the searches and seizures authorized by the warrant.

Finally, this Court reiterates that a search of cell phones, and of their electronic contents in particular, involves a high degree of intrusiveness into the private affairs of the persons using or communicating with such phones because of the sheer amount and type of personal information that can be revealed, generally, through the phone's contents, and, more particularly, through the contents of text messages stored on any such phone. As a

general matter, therefore, this Court finds that any warrant that allows for the seizure and search of phones and their contents must authorize, with particularity, the phones that may be seized and searched, by phone number and other identifying characteristics, as well as the nature of the contents of those phones that may be searched and seized. Cf. *U.S. v. Payton*, 573 F.3d 859, 861-62 (9th Cir. 2009) ("There is no question that computers are capable of storing immense amounts of information and often contain a great deal of private information. Searches of computers therefore often involve a [*189] degree of intrusiveness much greater in quantity, if not different in kind, from searches of other containers. Such considerations commonly support the need specifically to authorize the search of computers in a search warrant.").

In reaching this conclusion, this Court emphasizes that, at the time the police applied for the first warrant at issue here, the officers already had information specifically relating to phones based, at a minimum, on their observation of multiple phones in plain view at the scene and their taking of Defendant's cell phone off of his person at the station. They also knew of the text message content of the LG cell phone as a result of Sgt. Kite's viewing of that phone. This case thus squarely involves a situation, not unlike that condemned by the United States Supreme Court in *Coolidge*, where the police already knew of evidence and intended to seize it, but the evidence was nowhere mentioned in the warrant or the application that preceded its issuance. See 403 U.S. at 471.

Indeed, when this Court questioned the affiant, Sgt. Walsh, about the omission of any reference to text messages or cell phones in the first warrant affidavit, he stated that it was a "mistake." [*190] This Court believes, to the contrary, that it was more likely a conscious effort to try to purge the affidavit of evidence of the warrantless search of the LG cell phone by Sgt. Kite, that the police knew was illegal, as well as potentially the illegal, warrantless conduct of other officers in searching and seizing other phones, so as to try to sanitize those warrantless searches and seizures, after the fact, with a warrant. Ironically, however, in so doing, the police necessarily narrowed the scope of the warrant to exclude the very evidence that they sought most to capture--namely, the phones and their contents of which they were already aware.

(2)

Exigent Circumstances

Having determined that B.C.I.'s photographing of the text messages on the LG cell phone did not fall within the scope of the warrant, this Court next must determine if it was otherwise justified under the exigent cir-

cumstances exception to the warrant requirement. This question asks this Court to decide whether it was objectively reasonable for the police to believe that the photographing of the text messages on the LG cell phone was necessary to prevent their loss or destruction through remote deletion.⁶⁶

66 Remote deletion [*191] is the ability of some phones to receive "a kill command . . . that will cause the device to encrypt itself or overwrite data stored on the device." U.S. Dept. of Justice, Computer Crime & Intellectual Property Section, Searching & Seizing Computers and Obtaining Evidence in Criminal Investigations at 30 (2009).

An imminent risk of the loss or destruction of evidence may create the exigent circumstances necessary to justify a warrantless search. See *U.S. v. Martins*, 413 F.3d 139, 146 (1st Cir. 2005). The belief that the loss or destruction of evidence is imminent must be objectively reasonable based on specific and articulable facts. See *U.S. v. Young*, 909 F.2d 442, 446 (11th Cir. 1990). "The mere possibility of loss or destruction of evidence is insufficient justification for its warrantless search or seizure." *U.S. v. Radka*, 904 F.2d 357, 363 (6th Cir. 1990).

In this case, this Court is not convinced that the possibility of remote deletion of the text messages from the LG cell phone is what drove the decision on the part of the B.C.I. detectives, on the morning of October 4, 2009, to photograph those text messages. It seems more likely that the B.C.I. detectives took those photographs [*192] to preserve the evidence, have easier access to it and, most importantly, to attempt to demonstrate that it collected the evidence legally pursuant to a valid warrant. The fear of remote deletion appeared to this Court to be an argument contrived after the fact to attempt to save otherwise illegally gathered evidence from exclusion at trial.

Even assuming that a fear of remote deletion played a role in the decision to photograph, the State has failed to convince this Court that such a fear was reasonable. The State presented no evidence to show that it is possible to delete messages from a cell phone using technology from a remote location. More particularly, even assuming that such a possibility exists today, the State offered no evidence that the technology existed with respect to the LG cell phone, back in 2009, that would have allowed someone then to remotely delete text messages from that cell phone and, more importantly, that the detectives knew about that technology at the time.

Accepting that it was possible to remotely delete text messages from the LG cell phone in 2009, the State failed to introduce any evidence, aside from that mere

possibility, to support a belief on the [*193] part of the B.C.I. detectives that morning that it was immediately necessary to photograph the text messages on the LG cell phone to prevent their remote deletion. Without any specific facts on which to base their assertion of exigent circumstances, this Court cannot deem reasonable the detectives' alleged fear that the text messages would otherwise be lost.

Indeed, under the circumstances of this case, this Court finds that any fear that the text messages would be remotely deleted was both objectively and subjectively unreasonable. During the morning in question, when the detectives photographed the text messages, Trisha Oliver was at the hospital awaiting further news of her son's condition, and the Defendant was already at police headquarters being questioned by Detectives Slaughter and Cardone. The State posits that all of the incriminating text messages on the LG cell phone were exchanged between Defendant and Trisha Oliver. It is reasonable to conclude, therefore, that only Defendant or Trisha Oliver would have had either the motive or the ability to attempt remote deletion of text messages from the LG cell phone.⁶⁷ Yet, under the circumstances, neither Defendant nor Trisha Oliver [*194] would have had any opportunity to engage in the remote deletion of the text messages, even were it to have been possible and the idea of it to have occurred to them.

67 This Court questions whether Trisha Oliver would, in fact, have been motivated to delete the text messages, in light of her purported action, a few hours later, in consenting to the search of the LG cell phone. It will assume, however, that it was at least possible for purposes of this discussion.

There is nothing in the record, therefore, to suggest that the remote deletion of the text messages in question was anything more than a hypothetical possibility. In light of the intrusive nature of any search of text messages, this Court cannot find that the exigent circumstances exception to the warrant requirement would apply, absent specific facts showing that remote deletion was not only possible but also an imminent threat that was objectively reasonable. To hold otherwise would make a mockery of the *Fourth Amendment* warrant protections when it comes to the contents of cell phones and text messages, permitting police officers to search cell phones and photograph their contents based upon mere speculation, unsupported by [*195] any facts.

This Court thus finds that the officers' searches and seizures of the phones in evidence and their contents at the scene or from Defendant's person that morning, including the photographing of the text message contents of the LG cell phone, even if done pursuant to the first

warrant, exceeded the scope of that warrant and cannot be justified under the exigent circumstances exception to the warrant requirement. Accordingly, this Court holds that those searches and seizures were objectively unreasonable and hence violative of the *Fourth Amendment*.

4

The Admissibility of the Evidence

(a)

The Exclusionary Rule

Having determined that the Cranston Police Department engaged in the illegal search and seizure of the phones and text messages from the LG cell phone, this Court next must consider what evidence in this case is subject to exclusion at trial under the exclusionary rule. The exclusionary rule "bars from introduction at trial evidence obtained either during or as a direct result of searches and seizures in violation of an individual's *Fourth Amendment* rights." *State v. Jennings*, 461 A.2d 361, 368 (R.I. 1983) (quoting *Wong Sun v. U.S.*, 371 U.S. 471, 485, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); *State v. Burns*, 431 A.2d 1199, 1205 (R.I. 1981)). [*196] The underlying prophylactic purpose of the exclusionary rule is "to deter law enforcement officers from violating a defendant's rights." *State v. Hug*, 960 A.2d 550, 556 (R.I. 2008) (citing *State v. Barkmeyer*, 949 A.2d 984, 998 (R.I. 2008)). "The exclusionary rule is not intended to assuage the harm caused to persons who suffer as a result of an illegal search and seizure." *Id.* (citing *Pa. Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 362, 118 S. Ct. 2014, 141 L. Ed. 2d 344 (1998)).

The jurisprudence of the United States Supreme Court has extended the exclusionary rule to "indirect as well as direct products of [] unlawful actions." *Wong Sun*, 371 U.S. at 484; *Jennings*, 461 A.2d at 368. The exclusionary rule "traditionally bar[s] from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion," but the Supreme Court has held that "statements obtained by exploitation of an illegal arrest are [also captured by the exclusionary rule as] 'fruits of the poisonous tree.'" *Jennings*, 461 A.2d at 368 (citing *Wong Sun*, 371 U.S. at 485). The exclusionary rule does not "invite any logical distinction between physical and verbal evidence." *Wong Sun*, 371 U.S. at 486. Fruits of the [*197] poisonous tree thus may be direct or indirect, tangible or non-tangible-- the form of the evidence is irrelevant. See *id.*

68 The "fruit of the poisonous tree" analogy is thus employed to make clear that where the source of the evidence is tainted, the evidence

arising from the source is also tainted. For purposes of this analogy, the source of the evidence is the "tree," and the evidence itself is the "fruit." See Wayne R. LaFare, 6 Search & Seizure § 11.4 (4th ed.).

The focus of this *Fourth Amendment* "fruits of the poisonous tree" inquiry is on "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality . . ." *Wong Sun*, 371 U.S. at 485, 488; *Jennings*, 461 A.2d at 368. Stated simply, it must be determined whether there has been any attenuation of the taint from the principal illegality with regard to each piece of challenged evidence. This determination can be made by "examin[ing] the particular facts of each [piece of evidence] . . . along with: (1) the temporal proximity of the illegality; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the illegal [*198] police conduct." *Jennings*, 461 A.2d at 368; *Burns*, 431 A.2d at 1205-06.

In applying the exclusionary rule in this case, this Court first will determine whether the police obtained any physical or tangible evidence during or as a result of an illegal search or seizure. It then will consider whether that evidence is subject to exclusion as fruit of the poisonous tree. After determining the evidence that is subject to exclusion, it will consider what evidence should, in fact, be excluded under the exclusionary rule.

(i)

Illegally Seized Evidence

This Court previously found that the Cranston Police Department illegally seized certain phones from the apartment or the Defendant's person because it seized them without a warrant and/or because the seizure exceeded the scope of the warrant obtained. This category of evidence includes the LG cell phone (St.'s Ex. 15), the Metro PCS cell phone (St.'s Ex. 16), the T-Mobile cell phone (St.'s Ex. 18), the iPhone (St.'s Ex. 17), and the landline phone (St.'s Ex. 19). These phones also were illegally searched. This Court found further that the police illegally searched the LG cell phone and photographed its contents in excess of the scope of the warrant [*199] obtained and under non-exigent circumstances.

All of the phones in evidence and the photographs from the LG cell phone are thus "physical, tangible materials obtained either during or as a result of searches and seizures in violation of an individual's Fourth Amendment rights." *Jennings*, 461 A.2d at 368. Accordingly, the evidence is subject to exclusion under the exclusionary rule.

(ii)

Fruits of the Poisonous Tree

In applying the exclusionary rule, this Court next must examine the poisonous tree in this case--the incriminating text messages that Sgt. Kite discovered as a result of his illegal search of the LG cell phone-- and ask whether the subsequent collection of evidence by the Cranston Police Department is fruit of that poisonous tree. Put another way, this Court must decide if the police exploited that principal illegality in its later collection of evidence, including its searches and seizures of phones and the contents of cell phones, as well as in its interrogation of the Defendant that resulted in his videotaped and written confessions, so as to require exclusion of that evidence at trial.

In its fruit of the poisonous tree analysis, this Court finds it important to review the [*200] inexact timeline of events in this case, as constructed through the testimony and evidence admitted at the suppression hearing, to determine whether any of that evidence is subject to exclusion under the exclusionary rule. The review of this chronology is no easy task because it spans almost three years now and encompasses multiple warrantless searches and seizures of numerous phones, the lengthy interrogation of the Defendant and his resulting videotaped and written confessions, and additional searches and seizures of the contents of multiple cell phones pursuant to more than a dozen warrants. This task would not be nearly so vexing were it not for the fact that Sgt. Kite's search of the LG cell phone and its text message contents occurred at the beginning of this tale, raising the specter of a bountiful harvest of poisonous fruit. It thus is important to begin a critical reading of this tale at chapter one.

Before Sgt. Kite's illegal search, there is no evidence that the Cranston Police Department had commenced any criminal investigation of the Defendant.⁶⁰ Indeed, there is no evidence that the police had any reason to suspect that a crime of any kind had occurred. Based on the evidence, [*201] the only thing that the police knew, up until the time Sgt. Kite viewed the incriminating text messages on the LG cell phone, was that Marco Nieves, a previously healthy child, had become unresponsive under unknown circumstances. Indeed, Sgt. Kite testified that, when he arrived at the apartment, he did not consider it a crime scene. He admitted, in fact, that he suspected that the child might have accidentally ingested some substance that caused him to become unresponsive and that the purpose of his initial tour and visual scan of the apartment was to attempt to locate any offending substance, such as pills or household cleaning products that might be in plain view.

69 As this Court noted previously, it is convinced that the police illegally seized and searched all of the cell phones that morning before obtaining a warrant, inclusive of the Metro PCS cell phone and the T-Mobile cell phone. While it is possible that the police saw the incriminating text messages on a cell phone other than the LG cell phone before Sgt. Kite looked at the LG cell phone, this Court has no evidence before it to suggest that the police focused on the Defendant as a potential suspect that morning before or [*202] for any other reason than Sgt. Kite's illegal viewing of the text messages on the LG cell phone.

Only as a result of Sgt. Kite's illegal search of the LG cell phone-- and the telling information that it provided-- did Defendant become a suspect and the police deduce that certain evidence was of value. It was Sgt. Kite's viewing of the incriminating text messages that transformed the police officers' emergency response into a criminal investigation and, more specifically, into an investigation that would depend heavily on cell phones and text messages. Stated differently, Sgt. Kite's illegal search and discovery of these incriminating text messages precipitated the criminal investigation and directed that investigation toward a particular person--the Defendant--and a particular evidentiary focus-- text messages and other contents of cell phones as evidence of the crime. Consequently, this Court must consider the totality of the evidence obtained by the Cranston Police Department during the course of its ensuing criminal investigation of the Defendant as potentially "tainted" by his illegal search.

(1)

Physical Evidence

This Court first must consider the physical evidence seized and searched [*203] by the Cranston Police Department, either prior to obtaining that first warrant or pursuant to the first warrant but in excess of its scope. See St.'s Ex. 22 (first warrant for the apartment dated October 4, 2009). This evidence includes the cell phones--the LG cell phone, the Metro PCS cell phone, the T-Mobile phone, and the iPhone-- as well as the landline phone in the apartment. It also includes the photographs of the text messages on the LG cell phone taken by B.C.I. (St.'s Ex. 14, Photographs 0037-0050). While this Court already has determined that this evidence is subject to exclusion as "tangible [evidence] obtained either during or as a direct result of illegal searches and seizures," it will address, in the alternative, whether it is subject to exclusion as "fruit of the poison-

ous tree." *Jennings*, 461 A.2d at 368; *Wong Sun*, 371 U.S. at 485.

To the extent that the police seized this evidence after Sgt. Kite's illegal search of the LG cell phone and before issuance of the first warrant and/or pursuant to the first warrant, its seizure occurred as a direct result of knowledge on the part of the police--thanks to Sgt. Kite's viewing of the incriminating text messages-- that phones, [*204] and more particularly cell phones and their contents, were of evidentiary value in this case. The State has presented no evidence to support a finding that cell phones or other phones found at a crime scene are automatically seized, regardless of the crime being investigated. It would be hard-pressed to suggest that the police here employed such a policy where it appears that B.C.I. may not have seized all of the cell phones that it saw at the apartment that morning or where the phones that it says it seized may not have been the phones it seized. Moreover, this Court finds that such a policy of automatic seizure would run afoul of the particularity requirement of the *Fourth Amendment*.

The State likewise has presented no evidence to suggest that there was a reason for the seizure of this evidence, independent of Sgt. Kite's viewing of the incriminating text messages. As a result, the seizure of the LG cell phone, the Metro PCS cell phone, the T-Mobile phone, the iPhone and the landline phone, as well as the taking of photographs of text messages on the LG cell phone, to the extent done after Sgt. Kite illegally viewed the text messages and regardless of whether it was done pursuant [*205] to a valid warrant, was tainted by Sgt. Kite's illegal search and thus are subject to exclusion as fruits of the poisonous tree.

(2)

Videotape of the Apartment

In contrast, however, this Court is satisfied that the videotaped recording made of the apartment (St.'s Ex. 6) was done pursuant to a valid warrant and would have been made regardless of Sgt. Kite's search. The video recording of the apartment is general, covers all areas of the apartment, and is not limited to the cell phones. Indeed, the majority of the video recording shows portions of the apartment and the physical evidence related to Marco Nieves' illness that are completely unrelated to cell phones or text messages. Accordingly, this Court does not find that the videotaped recording of the apartment was tainted by Sgt. Kite's search and it may be admitted at trial.

(3)

Videotaped Interrogation and Written Confession

Next up for consideration as being potentially tainted by Sgt. Kite's illegal search is the police interrogation of the Defendant that occurred during the morning hours of October 4, 2009 and that resulted in a videotaped recording (St.'s Ex. 68) and written transcript (see St.'s Ex. 66) of the interrogation. There [*206] is no question that the police would not have interviewed the Defendant in the early stages of their investigation, absent Sgt. Kite's illegal discovery of the text messages on the LG cell phone. It is least arguable, therefore, that this illegal discovery of the text messages tainted his entire interrogation.

Before wading into the text of the interrogation itself, however, to determine which portions of it may be tainted, this Court must consider whether there were any intervening circumstances, between Sgt. Kite's illegal action and the interrogation, that dissipate any potential taint. See, e.g., *Brown v. Illinois*, 422 U.S. 590, 598-600, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975). At the outset, this Court notes that, prior to being questioned formally by the police, Detective Slaughter secured a waiver by the Defendant of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The fact the police gave the Defendant his Miranda warnings, however, does not in and of itself suffice to attenuate the taint. See *Oregon v. Elstad*, 470 U.S. 298, 306, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985) ("Where a Fourth Amendment violation 'taints' the confession, a finding of voluntariness for the purposes of the Fifth Amendment is merely a threshold requirement in [*207] determining whether the confession may be admitted in evidence. Beyond this, the prosecution must show a sufficient break in events to undermine the inference that the confession was caused by the Fourth Amendment violation."). It is, however, one intervening circumstance that the Court will consider.

This Court also will consider, as another intervening circumstance, the fact that the Cranston Police Department would have questioned Defendant regarding Marco Nieves' condition during the course of its investigation—even if the text messages had not been viewed. This conclusion is supported by the fact that the police interviewed a number of other people who had some relationship to Trisha Oliver and to Marco Nieves, including Trisha Oliver's parents and Rafael Nieves, the child's biological father. Defendant, as Trisha Oliver's boyfriend and an adult who, according to the affidavits for the warrants obtained on October 4, 2009, "often [lived] with [Marco Nieves]," undoubtedly would have been questioned as an important witness regarding Marco Nieves' unexplained medical decline.

The high probability that Defendant would have been interviewed regardless of the illegal search and the fact [*208] that he was Mirandized, is sufficient to dis-

sipate the taint from those portions of the interview that do not specifically refer to or stem from use of the text messages. Accordingly, this Court finds that the portions of the interview that do not exploit the illegally obtained text messages are not tainted and may be admissible at trial.

A further review of the content of the interrogation is necessary, however, to identify precisely which portions of it constitute an impermissible use of the illegally obtained evidence to make them subject to exclusion as fruit of the poisonous tree. This Court is satisfied that at least some portions of the interrogation were clearly tainted by the illegal search of the text messages. This taint is evidenced by the frequent references to the text messages scattered throughout the interview. The first reference to the text messages occurred at approximately 8:50 a.m., even before the first warrant for the apartment was signed, and many more references followed. See St.'s Ex. 66, Tr. at 16:6-12 to end. Moreover, this Court is troubled by the fact that Det. Cardone and Det. Slaughter were unable to account for their activities during their absences [*209] from the interview room when they clearly conferred with other officers who had illegal possession of cell phones. Neither Detective appeared to be willing to state either when or how they were informed of the incriminating text messages-- if they physically viewed the text messages themselves or were only told about the text messages by other officers. In light of the convoluted nature of the facts surrounding the Cranston Police Department's actions throughout this investigation, this Court finds their testimony to be suspicious.⁷⁰

70 While this Court cannot state that the Detectives know that the text messages were obtained illegally, the State certainly has not proven clearly and convincingly to the contrary. Cf. *U.S. v. Leon*, 468 U.S. 897, 922-23, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) (holding that evidence obtained when an officer relied in good faith upon a facially valid warrant is admissible even if the warrant is later invalidated).

Mindful of these considerations and after a careful review of the videotape and transcript of the interrogation, this Court finds that the following portions of the interrogation are too directly related to Sgt. Kite's illegal search of the contents of the LG cell phone and consequently [*210] are subject to exclusion: (1) St.'s Ex. 66, Tr. 14:20-18:4 (at approximately 8:50 a.m. on St.'s Ex. 68); (2) St.'s Ex. 66, Tr. 54:11-55:12 (at approximately 9:30 a.m. on St.'s Ex. 68); (3) St.'s Ex. 66, Tr. 61:13-63:10 (at approximately 9:35 a.m. on St.'s Ex. 68); (4) St.'s Ex. 66, Tr. 67:19-68:3 (at approximately 9:40 a.m. on St.'s Ex. 68) and (5) the remainder of the inter-

view after St.'s Ex. 66, Tr. 77:13 (beginning at approximately 9:50 a.m. on St.'s Ex. 68). As to the latter portion of the interview, this Court finds that the tenor of the interview changed dramatically at the beginning of this section when Detective Slaughter stated that "Those texts are damaging to you . . . you're gonna [sic] be charged anyway, okay?" St.'s Ex. 66, Tr. 77:17-18. Such a direct reference to the contents and the nature of the text messages constitutes an exploitation of illegally obtained evidence. Moreover, from that point forward, the text messages are explicitly used by the Detectives to attempt to force a confession from the Defendant. The use of the illegally obtained text messages in the interrogation of the Defendant began almost simultaneously with B.C.I.'s illegal photographing of the [*211] evidence and was too purposeful to evidence any attenuation of the taint. Accordingly, this Court holds that the specified portions of the interview are so closely related to Sgt. Kite's illegal search as to be subject to exclusion as fruits of the poisonous tree.

Lastly, the Court must determine whether Defendant's written confession that followed his interrogation (St.'s Ex. 67) is also subject to exclusion. At the outset, the Court notes that the police obtained Defendant's written confession at the conclusion of the interrogation and within hours of the principal illegality, namely Sgt. Kite's discovery of the text messages. Moreover, the illegal viewing of the text messages not only directed the Cranston Police Department to focus on Defendant as the target of its investigation but, more importantly, convinced the Detectives that the Defendant was guilty. There were no intervening circumstances to break the causal connection between the illegal text messages and Defendant's written confession. On the contrary, the illegally obtained text messages served as the impetus for the interrogation, the ammunition for the Detectives' continued questioning of the Defendant, and the reason [*212] they sought a written confession. Detectives Slaughter and Cardone repeatedly conveyed to Defendant that he was going to be charged with murder solely based on his incriminating text messages. See St.'s Ex. 66, Tr. at 77:18; 91:21-22. Additionally, throughout the interview, both Detectives accused Defendant of not telling the complete truth. See *id.* at 78:7-11; 79:12-14; 84:4-14; 117:4-9. This Court is satisfied that the Detectives' insistence that Defendant was concealing the truth was a direct consequence of the Detectives' knowledge of the contents of the text messages.

Finally, the police obtained the Defendant's written confession only after repeated references to the incriminating nature of the text messages where the Detectives quoted from the text messages in an attempt to intimidate Defendant into confessing. See *id.* at 91:1-12; 93:11-13; 107:15-16. Importantly, the Defendant did not pen his

written confession until after the conclusion of his videotaped interrogation and, more particularly, after the concluding portion of the interview that this Court already has determined must be excluded.

In addition, the Detectives' general demeanor and the other threats to charge the Defendant [*213] with murder, charge him regardless of his story and take his daughter away—made in the course of questioning a dizzy Defendant about the text messages—constitute the sort of coercive psychological pressure that exploits illegally obtained text message evidence to try to obtain a confession. The exploitation of the illegally seized text messages to obtain a confession reflects an abuse of the *Fourth Amendment* violation that is inimical to the underlying principles of both the *Fourth* and the *Fifth Amendments*. Accordingly, this Court finds that the Defendant's written confession would not have been obtained but for the exploitation of the illegal text message evidence and thus is subject to exclusion as fruit of the poisonous tree.

(4)

Additional Photographs of Contents of Cell Phones

Beyond the seizure of the phones and the interrogation of the Defendant, this Court must determine if Sgt. Kite's illegal search of the LG cell phone also was the impetus for the Cranston Police Department's subsequent efforts to seek warrants later in the day on October 4, 2009 to obtain evidence of the contents of the cell phones that it had seized. Upon learning of the incriminating nature of text messages [*214] on the LG cell phone, the B.C.I. detectives and other police officers took steps to document further certain text messages and other contents of the cell phones that were thought to have potential evidentiary value. The resulting "text message evidence" consists of: (1) photographs of certain contents of the LG cell phone apparently taken at police headquarters during the evening of October 4, 2009 (St.'s Ex. 28); (2) photographs of certain limited contents of the Metro PCS cell phone taken at the Cranston Police Department headquarters on the evening of October 4, 2009 (St.'s Ex. 31); and (3) photographs of certain contents of the T-Mobile phone taken on October 29, 2009 (St.'s Ex. 30).⁷¹

⁷¹ It was not until almost a month later, on October 28, 2009, that the police belatedly obtained a warrant and took the photographs of limited contents of the T-Mobile cell phone. Years later, the police also obtained additional text message evidence in the form of an extraction report listing the text messages and other contents of the LG cell phone made using Cellebrite soft-

ware (St.'s Ex. 32), following an additional warrant obtained on June 8, 2012 (St.'s Ex. 57). The Cellebrite software allows [*215] for a disgorgement of past content of a cell phone that may not be apparent upon a visual examination of the phone. It reportedly was not available to the police until relatively recently. This additional search of the LG cell phone thus did not occur until after the Defendant filed his suppression motions and just prior to this Court beginning the suppression hearing. As a result of this timing and because of the different content of those later two warrants, this Court will address the warrants from October 28, 2009 and June 8, 2012 and the evidence obtained pursuant to them later in this Decision.

This Court notes that warrants themselves, no less than other types of evidence, may constitute fruits of the poisonous tree if the warrants were obtained by exploitation of the illegality. In determining if warrants themselves are tainted, courts look to the supporting affidavits to determine if any mention of the illegality or any information obtained as a result of the illegality were used in the affidavits in order to obtain the warrants. Any "tainted" information then must be removed from the warrant affidavits as such information is not permitted to be used. See *Murray*, 487 U.S. at 539 [*216] (stating that the central tenet of forbidding the acquisition of evidence in a certain way is that illegally acquired evidence may not be used at all). If, after the tainted evidence is removed from the supporting affidavit, a court finds that probable cause remains to support the warrant, then the warrant--with the tainted information removed--may be considered an independent source, free of any taint from the illegality.⁷²

72 This Court will address warrants as a potential independent source in more detail subsequently.

This Court is of the view that the Cranston Police Department gathered this evidence of the contents of these cell phones by exploitation of the knowledge it gained through Sgt. Kite's illegal search of the text messages on the LG cell phone. But for his discovery of the incriminating messages, this Court finds that this evidence would not have been sought or collected. Indeed, the very purpose of securing this evidence was to prove that the Defendant wrote the incriminating text messages found on the LG cell phone and sent them to his girlfriend, Trisha Oliver. In addition, the police obtained much of this evidence by using tainted portions of the Defendant's interrogation [*217] to assist them in securing warrants--further evidence of the continuing taint in its criminal investigation. Specifically, this Court em-

phasizes that the nearly identical affidavits for the warrants used to obtain the contents of the LG cell phone (St.'s Ex. 35) and Metro PCS cell phone (St.'s Ex. 34) are almost entirely based on Sgt. Kite's illegal search to view the text messages. No other information is provided in the affidavits themselves that would provide probable cause for the search of the contents of cell phones. The contents of these warrant affidavits themselves prove that the photographs of the contents of the LG cell phone (St.'s Ex. 28) and the Metro PCS cell phone (St.'s Ex. 31), taken on October 4, 2009 pursuant to the warrants, are subject to exclusion as fruits of the poisonous tree, as they are the direct result of warrants obtained using evidence from Sgt. Kite's illegal search.

The contents of the T-Mobile cell phone obtained pursuant to the warrant (St.'s Ex. 56) obtained on October 28, 2009 are also subject to exclusion as fruits of the poisonous tree. The affidavit for the warrant, signed by Det. Cardone, contains the same language based on Sgt. Kite's illegal [*218] search as the other warrants, tainting the warrant as well.⁷³

73 This Court will address this warrant for the T-Mobile cell phone in more detail subsequently.

Additionally, this Court reiterates its previous finding that the LG cell phone and other cell phones were seized illegally because the seizures occurred prior to or went beyond the scope of the first warrant. In addition, as noted earlier, the Defendant's cell phone, too, was illegally seized either prior to or pursuant to the first warrant and not as the product of a lawful search incident to arrest. These illegal seizures thus are alternative--and discrete--"poisonous trees" that require the exclusion of evidence obtained as a result of the seizures. The fruit of these illegal seizures includes any and all of the photographs of the contents of these cell phones, whether taken at the apartment or at police headquarters, as they are tainted by the illegal seizures of the cell phones themselves. Put another way, the Cranston Police Department never should have seized the cell phones from the apartment or the Defendant's person and, but for these illegal seizures, would not have been able to take photographs of the contents of the [*219] cell phones, had they acted lawfully. Consequently, the photographs of the contents of the LG cell phone, the Metro PCS cell phone, and the T-Mobile phone are also fruits of the poisonous tree because they were only obtained after and as a direct result of illegal seizures.

(5)

Phone Records

This Court also finds that the phone records and communications that the Cranston Police Department

procured by warrants under § 2703 of the Stored Wire and Electronic Communications and Transactional Records Act, 18 U.S.C. § 2701 *et seq.*, ("SCA"), are tainted." Section 2703 of the SCA allows government entities to compel third-party service providers—i.e., cell phone companies—to disclose to law enforcement the communications or records of a customer upon production of a valid warrant and satisfaction of certain other procedural prerequisites. See 18 U.S.C. § 2703.

74 These warrants include: a warrant to T-Mobile Law Enforcement Relations for the phone records of the phone number (401) 699-7580 that has been identified as Defendant's phone number (St.'s Ex. 36); a warrant to T-Mobile for the phone records of the number (401) 359-6789 that has been identified as Mario Palacio's phone number (St.'s [*220] Ex. 39); a warrant to Verizon Wireless for the phone records of the number (401) 486-5573 that has been identified as Trisha Oliver's phone number (St.'s Ex. 42); a warrant to Sprint/Nextel for the number (401) 454-9765 that has been identified as Rafael Nieves' phone number (St.'s Ex. 46); and a warrant to Sprint/Nextel for the number (401) 431-3626 that has been identified as Angie Patino's phone number (St.'s Ex. 49).

The documents that these cell phone providers produced in this case include: (1) T-Mobile cell phone records and communications from 1:00 a.m. on October 3, 2009 through 12:00 p.m. on October 4, 2009 for an account in the name of the Defendant (St.'s Ex. 38); (2) T-Mobile cell phone records and communications from 3:00 p.m. on October 3, 2009 through 9:30 p.m. on October 4, 2009 for an account in the name of Mario Palacio (St.'s Ex. 41); (3) Verizon phone records and communications from 1:00 a.m. on October 3, 2009 through 12:00 p.m. on October 4, 2009 for an account in the name of Trisha Oliver (St.'s Ex. 44); (4) Sprint Nextel phone records and communications from 1:00 a.m. on January 25, 2009 through 12:00 p.m. on January 25, 2009 for an account in the name of Guida [*221] Andrade but referred to by the Cranston Police Department as a phone number belonging to Rafael Nieves (St.'s Ex. 48); and (5) Sprint Nextel phone records and communications from 1:00 a.m. on September 28, 2009 through 12:00 p.m. on October 4, 2009 for an account in the name of Angie Patino (St.'s Ex. 51).

The affidavits supporting the multiple warrants that led to the production of these phone records, unlike the first warrant in this case, clearly indicate that Sgt. Kite's illegal viewing of the text messages was the basis for their application. All of the warrants for the phone records contain the same information regarding Sgt. Kite's

illegal search of the LG cell phone and the first incriminating text message he read. See, e.g., St.'s Ex. 49 (warrant for Angie Patino's cell phone records). Moreover, the multiple warrants were obtained for the ostensible purpose of proving that "DaMaster" of the 699 telephone number was, in fact, Defendant. See St.'s Ex. 49 ("It is believed the suspect contacted his sister on her cell phone often which would corroborate the phone number, 401-699-7580, as belonging to the suspect, Michael Patino . . . and would also prove that Michael Patino is, [*222] in fact, "Da Master"). Only through Sgt. Kite's viewing of the incriminating text messages, which were sent to the LG cell phone from "DaMaster," did the police learn that "DaMaster" was a person of interest. The Cranston Police Department sought to use illegally-accessed information to gain legal access to incriminating evidence-- by definition, exploitation.

The fact that the police obtained most of this text message evidence and other phone records pursuant to warrants does not suffice to erase the taint from the illegal LG cell phone text messages because the very pursuit of these warrants was corrupted by that initial search. Fruit of the poisonous tree may be direct or indirect; thus, the taint germane to the pursuit of the warrants transfers to the warrants themselves and, ultimately, to the evidence produced. Accordingly, this Court is satisfied that these later warrants for cell phone records, as well as the evidence of cell phone communications that the police obtained pursuant to these warrants, were the product of the exploitation of the text message evidence from Sgt. Kite's initial illegal search.

Similarly, this Court finds that the records pertaining to use of the landline [*223] phone at the apartment from 1:00 a.m. on October 3, 2009 through 12:00 p.m. on October 4, 2009, as obtained from Cox Communications, to be tainted for the same reasons as the evidence obtained under the SCA. See St.'s Ex. 55. The pursuit of the enabling warrant (St.'s Ex. 53), and thus the warrant and its produced evidence, is tainted because it was founded on Sgt. Kite's illegal search of the LG cell phone. The Cranston Police Department only knew to ask for such records as a result of Sgt. Kite's illegal viewing of the incriminating text messages that set in motion the criminal investigation of the Defendant. The affidavit for the warrant for the records of the landline phone is largely identical to those for the various cell phone records, all focusing on Sgt. Kite's illegal search of the text messages and asserting that the requested phone records were necessary to prove that "DaMaster" of the 699 phone number was, in fact, Defendant.⁷⁵ With the information about Sgt. Kite's search and the incriminating text message to "DaMaster" removed, the warrant for the landline is similarly lacking in probable cause and is, therefore, invalid. Accordingly, the records for the

landline obtained [*224] pursuant to that warrant are subject to exclusion as fruits of the poisonous tree.

75 The Court notes that the records from Cox Communications would not—and indeed, did not—prove that the 699 phone number belonged to Defendant, as the phone records only reveal the dates and times at which the 699 number called or was called by the landline, without any evidence as to who was actually using either phone at the time.

Moreover, this Court is satisfied that neither the warrants for the phone records nor the phone records themselves are attenuated enough from the illegal search in order to dissipate the taint. The warrants for the phone records were requested within days of the illegal search (on October 6 and October 8, 2009), and the State has presented no evidence of any intervening circumstances that occurred in that time, e.g., any other evidence that came to light, nor do the affidavits for the warrants themselves make any mention of any other evidence that would have given the Cranston Police Department probable cause to obtain the warrants. Finally—and perhaps most crucially—this Court emphasizes that in this case, the Cranston Police Department obtained no less than nine (9) different [*225] warrants for both phone records and the contents of the cell phones themselves from affidavits that are nearly identical and all largely, if not entirely, based solely on Sgt. Kite's illegal search. The affidavits also betray a troubling array of facts, that are internally inconsistent and otherwise riddled with inaccuracies.⁷⁶ The flagrancy of the Cranston Police Department's conduct in pursuing its investigation of Defendant and any and all phone records related to Defendant provides ample support for a finding that the warrants for the phone records, and the phone records themselves, are fruits of the poisonous tree and, consequently, subject to exclusion.

76 The Court notes that this issue of inaccuracies and misstatements in the warrant affidavits may need to be addressed in a Franks hearing. See *Franks*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Unsurprisingly, Defendant made a motion for a Franks hearing based on certain of these false statements during the course of the suppression hearing. This Court will, therefore, address the inaccuracies in the multiple warrants in detail later. For purposes of the fruit of the poisonous tree analysis, this Court only reiterates that the numerous inaccuracies [*226] also serve to cast additional doubt on the already-questionable validity of the warrants.

(iii)

Exceptions to the Exclusionary Rule

Having concluded that almost all of the challenged evidence is subject to exclusion, this Court now must determine whether any of it still may be admitted at trial pursuant to any established exception to the exclusionary rule. The United States Supreme Court has stated that "the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred . . ." *Nix v. Williams*, 467 U.S. 431, 443, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984). Accordingly, exceptions to the exclusionary rule have developed as a means of mitigating the rule's sometimes overly harsh effects. In effect, courts have come to recognize that "evidence derived from sources separate from a constitutional violation need not be suppressed under the exclusionary rule." *State v. Barkmeyer*, 949 A.2d 984, 998 (R.I. 2008). The inevitable discovery and independent source doctrines have developed, therefore, as a [*227] means of effectuating this policy.

(1)

The Independent Source Doctrine

The independent source doctrine pertains to a "particular category of evidence acquired by an untainted search which is identical to the evidence unlawfully acquired." *Murray*, 487 U.S. at 538. The independent source doctrine posits that "[w]hen the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation." *Barkmeyer*, 949 A.2d at 998. The First Circuit Court of Appeals has observed that "[i]n the classic independent source situation, information which is received through an illegal source is considered to be cleanly obtained when it arrives through an independent source." *Murray*, 487 U.S. at 539-40 (quoting *U.S. v. Silvestri*, 787 F.2d 736, 739 (1st Cir. 1986)). Speaking of the independent source doctrine relative to the exclusionary rule, the United States Supreme Court has stated:

The essence of a provision forbidding the acquisition of evidence in a certain way is . . . not merely [that] evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does [*228] not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is

gained from an independent source they may be proved like any other.

Murray, 487 U.S. at 539 (quoting *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385, 392, 40 S. Ct. 182, 64 L. Ed. 319, T.D. 2984, 17 Ohio L. Rep. 514 (1920)).

Under the independent source doctrine, a later-obtained valid warrant may permit evidence seized pursuant to that warrant to be admitted in court, even where the evidence was first observed during an illegal search. See *id.* at 541. In considering the independent source doctrine as applied to warrants, a court may find itself tasked with the heavy analytical endeavor of purging multiple affidavits of tainted content so as to see if the requisite probable cause remains. See *id.* at 542 (discussing warrants in the context of the independent source doctrine and holding that a warrant is an independent source where probable cause persists upon removal of "fruit of the poisonous tree").

The ultimate question . . . is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted [*229] by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.

Id. More specifically, as the Supreme Court explicitly clarified, a court "must ask whether [the warrant] would have been sought even if what actually happened had not occurred - not whether it would have been sought if something else has happened." *Id.* n.3. Thus, for the independent source doctrine to apply, the principal illegality must be irrelevant to the pursuit of the warrant. *Id.* at 542.

(2)

The Inevitable Discovery Exception

"The inevitable discovery doctrine with its distinct requirements is in reality an extrapolation from the independent source doctrine: Since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered." *Murray*, 487 U.S. at 539. The doctrine "is a judicial recognition that, if the State established by a preponderance of the evidence that

the challenged evidence ultimately or inevitably would have been discovered by some lawful fashion, 'then the deterrence rationale [of the exclusionary rule] [*230] has so little basis that the evidence should be received.'" *Barkmeyer*, 949 A.2d at 998 (citing *Nix*, 467 U.S. at 444). The doctrine essentially holds that where the "evidence sought to be suppressed 'would inevitably have been discovered without reference to police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible.'" *Barkmeyer*, 949 A.2d at 998 (citing *State v. Firth*, 708 A.2d 526, 529 (R.I. 1998)).

However, "inevitability" is a difficult analytical concept that courts have, at times, struggled to grasp. See *Barkmeyer*, 949 A.2d at 1010 (Flaherty, J., dissenting and concurring in part); see also *U.S. v. Cabassa*, 62 F.3d 470, 474 (2d Cir. 1995). In its simplest form, the inevitable discovery doctrine allows the prosecution to argue that an independent source for the challenged evidence would have come to fruition had the illegality not occurred. The inherent predicative element of the doctrine--e.g., the challenged evidence "would have" come to fruition--seems to invite, if not encourage, speculation, but the United States Supreme Court has stated explicitly that "inevitable discovery involves no speculative elements." *Nix*, 467 U.S. at 445 n. 5. [*231] It reasons that to allow pure speculation would be to undermine the exclusionary rule and render its deterrent effects powerless. The State, therefore, "may not rely on speculation [when arguing for the inevitable discovery exception] but rather must meet [its] burden of proof based on 'demonstrated historical facts capable of ready verification or impeachment.'" *Barkmeyer*, 949 A.2d at 998 (citing *U.S. v. Ford*, 22 F.3d 374, 377 (1st Cir. 1994) (quoting *Nix*, 467 U.S. at 445 n. 5)).

In determining when the inevitable discovery exception is appropriate, the Fourth Amendment scholar Wayne R. LaFare has explained:

The significance of the word 'would' cannot be overemphasized. It is not enough that the evidence 'might' or 'could' have been otherwise obtained. Once the illegal act is shown to have been in fact the sole effective cause of the discovery of certain evidence, such evidence is inadmissible unless the prosecution severs the causal connection by an affirmative showing that it *would* have acquired the evidence in any event.

6 Wayne R. LaFare, *Search and Seizure*, A Treatise on the Fourth Amendment, § 11.4 (a) at 276 (4th ed. 2004). As Justice Flaherty stated, "likely discovery is not

[*232] inevitable discovery." *Barkmeyer*, 949 A.2d at 1010 (Flaherty, J., dissenting and concurring in part). The particulars and circumstances surrounding the challenged evidence are thus highly relevant to application of the inevitable discovery exception because search and seizure occurs within a "universe of factual situations." *Barkmeyer*, 949 A.2d at 998. In effect, "[t]he trial justice must be satisfied that the seizure of the evidence [is] independent of the taint, and 'it must be inevitable as well.'" *Id.* (citing *Silvestri*, 787 F.2d at 740); see also *Ford*, 22 F.3d at 377 (adopting a flexible evaluation standard where "independence and inevitability remain the cornerstones of the analysis").

77 That evidence inevitably would have been discovered by legal means has been argued, and found, in numerous contexts:

Courts have applied the doctrine when investigative procedures already were in progress before evidence was discovered by illegal means. See *Nix*, 467 U.S. at 449-50 (holding that the murder victim's body would have been discovered even without the defendant's illegally obtained statements, when the search for it had been underway and a grid system showed that the area in question [*233] would have been searched soon); *State v. Trepanier*, 600 A.2d 1311, 1318-19 (R.I. 1991) (holding that the evidence would have been discovered because the police had been searching in the exact area where the evidence later was found). Courts also have applied the doctrine when, pursuant to some standardized police procedure or established routine, a certain evidence-revealing event definitely would have occurred later. See *State v. Firth*, 708 A.2d 526, 529 (R.I. 1998) (holding that fingerprints from the crime scene would have been matched to the defendant because his fingerprints already were on file and the police would have checked that database as part of routine procedure); see also *United States v. Almeida*, 434 F.3d 25, 29 (1st Cir. 2006) (holding that the drugs would have been found in the police's routine search

of the defendant after he legally was arrested).

Barkmeyer, 949 A.2d 984 at 1010 (emphasis added).

(c)

Applicability of the Exceptions to the Exclusionary Rule

Here, the State arguably contends that Defendant's text messages should be admitted at trial on account of the above-mentioned exceptions. The State presents two distinct arguments to this effect. The first argument [*234] is that the challenged evidence is independent of the taint because the text message evidence was discovered in multiple ways that were removed in time, place, and cause from Sgt. Kite's principal illegality, i.e., all of the searches that occurred under the challenged warrants. The second argument is that discovery was inevitable because the evidence was actually, in verifiable fact, obtained. These arguments, however, are misguided in light of the doctrines' designed purposes and governing legal standards. They incorrectly suggest that the sheer volume of the evidence, along with the multiple methods by which it was obtained, equates to independence and inevitability.

In legal terms, the State has, at times, conflated the independent source doctrine with the concept of "attenuation." Attenuation, as already articulated by this Court in discussing the fruits of the poisonous tree doctrine, pertains to evidence that can be reached through a "but-for" exercise relative to the principal illegality but, on account of certain factors, is determined to be sufficiently detached. See *Jennings*, 461 A.2d at 368 (listing the temporal proximity of the illegality, intervening circumstances, and [*235] the purpose and flagrancy of the illegal police conduct as the factors that help determine attenuation from the at-issue illegality). The independent source doctrine, comparatively, applies only to evidence that was discovered wholly apart from the principal illegality. The aforementioned "but-for" exercise does not, ever, lead to the admission of evidence under the independent source doctrine--that is, in effect, why the evidence is admitted. See *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385, 392, 40 S. Ct. 182, 64 L. Ed. 319, T.D. 2984, 17 Ohio L. Rep. 514 (1920).

To restate the Court's earlier findings, the challenged evidence was procured as a result of the Sgt. Kite's violation of the *Fourth Amendment*. The Cranston Police Department only knew to pursue the at-issue text messages, and other evidence against Defendant, because of Sgt. Kite's illegal search. In this Court's view, the behavior

and focus of the Cranston Police Department changed undeniably upon the viewing of the incriminating text messages by Sgt. Kite. As prohibited under the independent source doctrine, there is an easily charted "but-for" relationship between Sgt. Kite's principal illegality and each and every method of obtaining the challenged evidence. The State has failed [*236] to convince this Court that the police pursued the challenged evidence in any manner that is completely separated from the principal illegality. The independent source doctrine, therefore, cannot be applied in its traditional and correct form.

With regard to the State's argument for attenuation, as explained previously, this Court is unconvinced that any has occurred. The vast majority of the Cranston Police Department's investigative actions toward Defendant have a proximate relationship in cause, and also in time, to the illegality, to say nothing of the fact that this Court has significant doubts about the purity of the police work displayed by the Cranston Police Department. Perhaps most importantly, there is also no obvious intervening circumstance, if any at all, that existed to sever the connection between the illegality and the challenged evidence. This Court is hard-pressed to identify any such event, and the State has only argued attenuation implicitly, and without specificity, with respect to various at-issue warrants. Still, the warrants obtained by the Cranston Police Department cannot reasonably be considered attenuated from the taint. The warrants are not in and of themselves [*237] intervening circumstances because they were all pursued as a direct result of Sgt. Kite's illegal viewing of Defendant's text messages. Most of the warrants were also obtained in close proximity time-wise to the illegality and contain information that can, based upon the facts presently before the Court—internal inconsistencies, factual errors, and the omission of critical information surrounding Sgt. Kite's search—plausibly be labeled flagrant. It thus follows that the State's misguided argument that the independent source doctrine is applicable on account of attenuation fails.

The State's doctrinal confusion also extends to a misapplication of the inevitable discovery exception. The inevitable discovery doctrine exists for situations where the legal pursuit of evidence was prematurely aborted because of its alternative prohibited discovery. *Barkmeyer*, 949 A.2d at 998 (citing *State v. Firth*, 708 A.2d 526, 529 (R.I. 1998)) (holding that the inevitable discovery doctrine permits the admission of tainted evidence where it "would have been discovered legally had the legal means not been aborted because of the illegal seizure."). Rephrased, the inevitable discovery exception is an independent [*238] source for challenged evidence

that did not come to fruition as a result of the at-issue illegality.

At the outset, this Court takes care to note that the doctrine of inevitable discovery is analytically irrelevant here because the challenged evidence was actually, in fact, obtained. Inevitable discovery addresses evidence that *would have* come to fruition apart from illegality. Here, the challenged evidence *did*, in verifiable fact, come to fruition. There was no aborting of the pursuit of any evidence because of the illegality. No alternative method of discovery was interrupted. All of the channels of pursuit of the evidence were seen through to completion by the Cranston Police Department. There is, therefore, no need to argue or consider the hypothetical or abstract. The facts that this Court is required to consider to determine the applicability of the independent source exception are readily available. The analytical structure of the inevitable discovery doctrine, itself an extrapolation of the independent source doctrine, is thus rendered unnecessary.

Nevertheless, this Court will entertain the possibility of inevitable discovery so as to provide clarity as to the parties' arguments. [*239] Assuming the Cranston Police Department did not actually obtain the evidence, the inevitable discovery exception would remain non-applicable because both prongs of its analysis, independence and inevitability, fail. With regard to independence, the prong fails because Sgt. Kite's illegal search was, to the Court's knowledge, instrumental in each and every investigative action of the Cranston Police Department. There is nothing in the record that suggests a source for the evidence that is sufficiently separate from Sgt. Kite's illegal search. While, as the State argues, there may be independent sources, in the sense that the manners of procurement of the evidence are descriptively different from one another—e.g., the physical search of the LG cell phone versus the phone records for that phone—the channels of pursuit for the challenged evidence all share the same starting point: Sgt. Kite's illegal search. Independence in the context of the inevitable discovery doctrine is a different starting point than the principal illegality. It is a total separation from the influence of the taint—a complete lack of any relationship. To understand and accept the independence prong of inevitable [*240] discovery to mean only a descriptive difference in the method of acquisition would be clear legal error. This Court thus cannot accept the State's arguments for inevitable discovery. Its very premise is analytically flawed.

Additionally, were it assumed that independence existed relative to the challenged evidence, and were such evidence not actually obtained, the inevitable discovery doctrine still would fail on account of the inevitability prong. The State, in spite of bearing the burden of proof,

has made minimal argument that the challenged evidence would have inevitably been discovered. Upon diligently parsing the testimony, arguments, and exhibits ostensibly presented in support of its argument, this Court is left, at best, with indirect evidence that is primarily founded on inference. While it seems quite likely—as influenced by the clarity of hindsight that can be difficult to analytically divorce from this analysis—that the police would have eventually deduced the informative nature of particular evidence related to cell phones and text messages, the existing jurisprudence expressly dictates that conjecture is inappropriate. Faced with little to no substantiated evidence of [*241] inevitability, and barred from speculation, this Court is limited in its available findings. To find that the challenged evidence would have inevitably been discovered would, in effect, either be to conclude that the evidence of record meets the State's burden when it does not or to embrace speculation when it is specifically disallowed. Both options undermine the exclusionary rule, and more importantly, effectuate legal error. The inevitability prong of the analysis thus fails because, even if this Court were inclined to conclude that discovery of the challenged evidence was inevitable, there is nothing in the record that would allow the Court to justifiably convert this belief from mere inference to convincingly verifiable fact.

It thus stands that the cornerstones of the inevitable discovery analysis—*independence* and *inevitability*—are absent from the case at bar. This Court is, in sum, not satisfied that the challenged evidence would have inevitably been acquired in a manner that is independent of the at-issue taint. As certain analytical complexities are inherent to some pieces of evidence, however, this Court will address that evidence individually in light of the independent [*242] source and inevitable discovery doctrines.

(a)

The Scope of Sgt. Kite's Search

With regard to independence, Sgt. Kite's illegal search of the LG cell phone stands as the origin of any interest in Defendant's text messages and the other challenged evidence. The Cranston Police Department was originally called to the scene only in an emergency response capacity. Consequently, the efforts of the Cranston Police Department were focused on assisting with Marco Nieves and looking for any obvious source of his medical difficulties as opposed to investigating any crime. Sgt. Kite testified that during his tour of the apartment with Trisha Oliver, he was searching for toxic substances that Marco Nieves may have ingested. While certainly the potential that Marco Nieves' condition was the result of a crime could not have been wholly pre-

cluded—any time a young child is inexplicably unresponsive the possibility of foul play must be considered—Sgt. Kite was not looking for evidence of a crime *per se*. By his own admission, he was only searching, to a limited degree, for any obvious cause of Marco Nieves's medical condition. Thus, a clear distinction can be drawn as to what the police were primarily [*243] pursuing while on scene prior to Sgt. Kite's illegal search—possible causes of Marco Nieves' condition—and what they were seeking after the illegality—evidence relating to Defendant's text messages. The Cranston Police Department's search of the cause of Marco Nieves' condition is therefore not an independent source because its purpose was not to find evidence against Defendant. It was, indeed, a totally separate search or source but not for the at-issue evidence. A true independent source must be both separate from the principal illegality and reflect a search for the actual challenged evidence.

Moreover, as the search for the cause of Marco Nieves's condition did not come to fruition, the State also would have to prove inevitability. The State has provided the Court with no evidence or verifiable fact that this search would have even led to suspicion of Defendant, never mind his text messages and other specific evidence. Accordingly, even if the search of the cause of Marco Nieves' condition were independent of the taint, the inevitable discovery exception would not apply because the State did not prove inevitability.

(b)

Trisha Oliver's Consent

At first glance, Trisha Oliver's consent [*244] to search her LG cell phone (St.'s Ex. 58) may appear to be an independent source for the challenged evidence.⁷⁸ To activate the doctrine, however, the consent must have been procured in a manner that is, legally, sufficiently independent. It thus is necessary for the consent to have occurred either separate and apart from the principal illegality or relative to an intervening circumstance that succeeded in divorcing the consent from the illegality. There simply is no evidence before the Court of either element. This Court, upon considering the evidence of record, is convinced that the Cranston Police Department's pursuit of Trisha Oliver's consent to search the LG cell phone is tainted by Sgt. Kite's illegal search. But for his illegal search and the resulting knowledge that there were text messages of evidentiary value to Marco Nieves' condition on the LG cell phone, the officers would not have asked Trisha Oliver, after the fact, for her consent. In addition, there were no intervening circumstances between the time of the initial illegality and the time when the police requested consent to otherwise dissipate the taint. Compare *Wong Sun*, 371 U.S. at 491

(finding that the defendant's [*245] confession was sufficiently removed from the taint of his unlawful arrest because of the intervening circumstance of having been released on his own recognizance and the defendant voluntarily returning to the police several days later to make his confession). Accordingly, this Court concludes that Trisha Oliver's consent is tainted by the illegality and, therefore, cannot be an independent source to secure the text message contents of the LG cell phone.

78 As an aside, this Court notes that there is at least some question as to the validity of Trisha Oliver's consent. This Court questions whether it can truly be deemed to have been valid consent, given the circumstances surrounding her giving of consent—when she was at the hospital while her son was dying. This Court further notes that the police also appear to have doubted the validity of the consent since they prepared and obtained a warrant for the exact same evidence—the contents of the LG cell phone—within a couple of hours of receiving her consent. The Court can see no reason to explain the duplicative warrant for the LG cell phone except that the police also harbored doubts about the consent's validity.

(c)

The October 28, 2009 [*246] Warrant for the T-Mobile Phone

The warrant for the contents of the T-Mobile cell phone dated October 28, 2009, like all of the warrant affidavits that preceded it, is tainted by reference to Sgt. Kite's illegal search. St.'s Ex. 56. It is the first warrant affidavit, however, to make some mention of a statement of Trisha Oliver's to provide additional evidence to support probable cause for the warrant beyond the references to Sgt. Kite's illegal search. That affidavit includes an additional paragraph following the detailing of Sgt. Kite's search that reads, as follows:

Following the seizure of the T-Mobile SideKick from the suspect, Michael Patino, a Search Warrant was applied for, reviewed and signed by Judge William Clifton, and served to T-Mobile Law Enforcement Relations [St.'s Ex. 36]. The results did return subscriber information indicating Michael Patino was the name listed for account billing for mobile number 401-699-7580. However, T-Mobile LE Relations also indicated they did not have any information regarding text messaging or voice mail recorded with their company, but informed that information

may be stored on the mobile phone itself. Additionally a Search Warrant was also [*247] served to Verizon Wireless Legal and External Affairs Dept. [St.'s Ex. 42], and it was verified in the results faxed to the Cranston Police, as Trisha Oliver had stated, that there were text messages exchanged between her phone and the suspect's phone following the time when the child was first injured and when he was pronounced dead.

Id. (Emphasis added). This Court notes that both the warrants to T-Mobile and Verizon Wireless referenced in this affidavit are also tainted, and thus invalid, because the affidavits supporting them focus exclusively on Sgt. Kite's illegal search as the basis for probable cause. The information regarding Sgt. Kite's illegal search, the prior warrants, and Defendant's illegally-obtained testimony thus must be removed from this affidavit to determine if probable cause still exists for issuance of the warrant, independent of the taint, to allow the evidence collected pursuant to the warrant to survive under the independent source doctrine.

The determination of probable cause then rests on the included statement that Trisha Oliver exchanged text messages with Defendant. See *Murray*, 487 U.S. at 542 (stating that a warrant is not an independent source where probable [*248] cause does not persist past removal of tainted content). While this statement does introduce the idea of text messages, there is nothing within it, or elsewhere in the affidavit, that provides a nexus to Marco Nieves' death or Defendant's possible culpability for his death. For this Court to find probable cause, it would have to make a significant assumption as to the conduct of Defendant. This Court cannot conclude that probable cause exists just because Defendant and Trisha Oliver exchanged text messages relative to the time period when Marco Nieves became ill.⁷⁹ See, e.g., *In re Search of Certain Cell Phones*, 541 F.Supp.2d 1 (D.D.C. 2008) ("While [the two suspects] were in the garage where the drugs are found, I am not ready to conclude that there is, ipso facto, a reasonable likelihood that they have used their cell phones to sell drugs, thus justifying the search of its entire contents.").

79 This Court notes that warrants are properly judged according to the information provided in their underlying affidavits and not on the information provided after the fact or from outside sources. See *Murray*, 487 U.S. at 542 (stating probable cause must still exist within the warrants underlying [*249] affidavit after the tainted content is removed).

In drawing such an inference, this Court would be complicit with a cell phone being legally searched on no more solid ground than the fact that it was used within a certain time period of an alleged offense. A finding of probable cause in this instance would be to say that no other connection to the alleged offense, other than two people texting close in time to an alleged crime, is necessary for their cell phones to be searched. This would, in effect, provide police departments with carte blanche to search individuals' cell phones because of the ubiquitous use of cell phones and text messages; after all, the typical adult sends or receives an average of 41.5 messages per day. Pew Research Center 2011 Report at 2. It also would work to undermine the particularity requirement of the *Fourth Amendment*. See *Coolidge v. New Hampshire*, 403 U.S. 443, 471, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971); *State v. Pratt*, 641 A.2d 732, 736 (R.I. 1994).

This Court holds, therefore, that probable cause cannot be rightfully found, in this instance, based on the mere mention of text messages. More is required--a connection of some sort between the act of text messaging--or the contents of the [*250] text messages-- and Marco Nieves' death. This information is absent from the October 28, 2009 warrant and, as a result, this Court cannot find that it is a genuinely independent source from Sgt. Kite's principal illegality.

Additionally, this Court notes that the very pursuit of the October 28, 2009 warrant is tainted. The warrant's affiant, Det. Cardone, interrogated Defendant on October 4, 2009 and, while questioning Defendant, repeatedly mentioned the text messages at issue. Det. Cardone was thus aware of the incriminating nature of the text messages and exploited that knowledge to conclude that the contents of the T-Mobile cell phone were of interest and that a warrant should be pursued. Even if Det. Cardone was not aware that the text messages were illegally seized, which is possible but unlikely, his detective work and logic nonetheless benefited from knowledge of their existence. This Court cannot conclude, therefore, that pursuit of the warrant itself was independent of the taint of Sgt. Kite's illegal search of the LG cell phone.

(d)

The June 8, 2012 Warrant for Extraction of the LG Cell Phone

As previously determined, the other warrants for the cell phones' contents and associated [*251] phone records do not contain probable cause when the tainted information about Sgt. Kite's search is removed. This Court, however, finds it necessary to specifically address the warrant obtained on June 8, 2012 that allowed for the extraction of the LG cell phone in light of the independ-

ent source doctrine.⁸⁰ See St.'s Ex. 57. The affidavit for the June 8, 2012 warrant is markedly different from the previous affidavits prepared by the police in October of 2009. Most notably, the affidavit omits any mention of Sgt. Kite's actions in picking up the LG cell phone and viewing the incriminating text message. The affidavit also recounts the events surrounding the investigation of Defendant with a specificity missing from the previous warrants, for example by detailing the locations where Sgt. Kite observed the various cell phones.⁸¹ The affidavit then continues by referencing witness statements of Trisha Oliver:

Trisha Oliver had provided conflicting accounts to rescue, police, and hospital officials earlier in the day on 10/4/09 about her knowledge of the cause of her son's injuries. In a written statement to detectives on 10/4/09 Trisha Oliver said on 10/3/09 she texted Michael Patino and [*252] asked what had happened to her son, and Patino told her that he went to hit him and the boy moved. Oliver told police that Michael Patino told her that he ended up hitting Marco in the stomach. In a recorded interview sometime later on 10/4/09, Ms. Oliver was shown text messages that police had viewed that morning on the LG Verizon Sidekick phone.

Id. (Emphasis added). The affidavit does not duplicate the contents of the text messages but does mention that they appeared as having come from "DaMaster" and that Trisha Oliver identified "DaMaster" as Defendant. Later in the affidavit, there is an additional explanation as to the origin of the already-mentioned text messages:

[Sometime] after the boy's death on 10/4/09 your affiant obtained a search warrant for the contents of the LG Verizon Sidekick phone [St.'s Ex. 35] from Justice William Clifton of the District Court. The police searched the phone and seized the text messages from it that they had viewed and photographed on the morning of 10/4/09.

⁸⁰ The extraction report (St.'s Ex. 32) includes the incriminating text messages to and from "DaMaster" and, therefore, if admissible, would allow the contents of Defendant's alleged at-issue

[*253] text messages to be admitted at trial as well.

81 The Court notes that in spite of this additional detail, the June 8, 2012 warrant identifies the Metro PCS cell phone as being the one taken from Defendant at the Cranston Police Station, in contradiction to Det. Cardone's affidavit and other evidence at the suppression hearing.

At the outset, the Court notes that, taken together, these last two sentences implicitly concede that the LG cell phone was searched and that the text messages on it were seized without a warrant, as the affidavit had previously mentioned that Marco Nieves did not die until late in the afternoon on October 4, 2009. It follows then--as has been previously mentioned and as the affidavit states--that the text messages seized during that morning were seized before the warrant for the LG cell phone contents had been signed.

In analyzing this affidavit further, this Court notes that it has been carefully crafted to avoid any explicit mention of illegality and is, moreover, very misleading when it comes to any potential illegality. Indeed, this Court finds that the amount of detailed information given in the affidavit following the mention of the time of Marco Nieves' death [*254] and prior to the statement that the search warrant for the LG cell phone was not obtained until afterwards was very likely motivated by a desire to obfuscate the fact that the search of the LG cell phone occurred without a warrant. The Court finds that this explanation is also supported by the deliberate omission of Sgt. Kite's name in connection with searching the LG cell phone, naming him only as an officer who observed the cell phones' locations at the apartment, while later stating only that unidentified "police" had viewed the text messages on the LG cell phone. The misleading nature of the statements in the affidavit regarding the legality of the search to view the text messages is troubling,¹⁴ but unavailing. The explicit references to the text messages, including those referring to "DaMaster," all must be excluded from the affidavit as tainted by the illegal search. Similarly, the above-quoted statements regarding the warrant for the contents of the LG cell phone and the seizure of the text messages also must be excluded. The Court then must consider whether the remaining untainted portions of the affidavit support probable cause for issuance of the warrant such that the extraction [*255] report for the LG cell phone produced pursuant to it is admissible under the independent source exception.

82 The Court notes that the misleading nature of the statements in the affidavit appear to be of a kind that could be addressed in a Franks hearing. As Defendant has not specifically challenged

those statements in his pending motion for a Franks hearing, however, this Court will not address this issue further.

Remaining in the warrant affidavit is the assertion regarding Trisha Oliver's written statement to police that she had texted Defendant. The information about her statement appears--at first blush--to provide an untainted, independent source that is sufficient to establish probable cause. This Court has painstakingly reviewed the assertions in the warrant regarding Trisha Oliver's statement and the related evidence in the record to determine if her statement was, in fact, independent of the taint so as to provide an independent source for the text message evidence in the extraction report. Having done so, however, this Court finds that the State has failed to prove that Trisha Oliver's statement to the detectives was independent of the taint from Sgt. Kite's illegal search. Additionally, [*256] this Court finds that the assertions regarding Trisha Oliver's statement in the warrant are highly--and troublingly--misleading.

To begin with, this Court notes that the affidavit's language clearly leads to the conclusion that Trisha Oliver's statement that mentioned texting the Defendant occurred at a separate time, unrelated to the "recorded interview sometime later on 10/4/09" where she was shown the illegally-obtained text messages. Thus, the affidavit implies that Trisha Oliver mentioned text messages of her own volition, uninfluenced by--and entirely discrete from--the illegal search. The evidence, however, shows otherwise. The first written statement given by Trisha Oliver on October 4, 2009 was taken at 12:30 p.m. See St.'s Ex. 76. Significantly, this is two hours before Trisha Oliver was asked for her consent to search the LG cell phone and, therefore, before Trisha Oliver had any reason to know that the Cranston Police were interested in or otherwise investigating the contents of text messages and cell phones. Had Trisha Oliver's first written statement mentioned texting Defendant about Marco Nieves' condition, this statement would constitute an independent source. However, it [*257] does not. Her first statement only contains a statement saying, "My boyfriend said he went to hit [Marco] and he moved causing him to hit [Marco] in the stomach." See St.'s Ex. 76 (Emphasis added). There is no mention of either cell phones or text messages in the statement.

The next written statement by Trisha Oliver--obtained at the "recorded interview sometime later on 10/4/09," as mentioned in the warrant affidavit-- was taken at 6 p.m. See St.'s Ex. 78. This second statement occurred after Trisha Oliver had given her consent to search the LG cell phone--thereby giving her reason to know that the Cranston Police had seen the text messages on that phone.¹⁵ This Court presumes that this written statement was taken after Trisha Oliver "was shown text

messages that police had viewed that morning," as stated in the June 8, 2012 warrant affidavit.⁸³ St.'s Ex. 57. This second written statement of Trisha Oliver does mention text messages, stating, "I then texted Mike and asked what happened he said that he went to go hit [Marco] and [Marco] moved and he ended up hitting [Marco] in the stomach." St.'s Ex. 78. Significantly, this statement is almost exactly the same statement that is in the June [*258] 8, 2012 warrant affidavit, which reads: "In a written statement to detectives on 10/4/09 Trisha Oliver said on 10/3/09 she texted Michael Patino and asked what had happened to her son, and Patino told her that he went to hit him and the boy moved." St.'s Ex. 57. This Court finds it particularly troubling that the June 8, 2012 warrant affidavit clearly attempts to make Trisha Oliver's statement regarding texting Defendant seem independent of the taint from the text messages by saying Trisha Oliver's statement was given to detectives before she was shown the text messages.⁸⁴ To the contrary, she did not give the statement to them before seeing the text messages, as evidenced by her two written statements. Accordingly, Trisha Oliver's statement is not independent of the initial illegality and thus cannot constitute an independent source for the text messages.

83 This statement was taken by Detective Cardone so the Court notes that it is possible that, at this time, Trisha Oliver also was aware that Defendant had been arrested.

84 This Court finds it highly improbable that the written statement was taken before the interview and, therefore, before Ms. Oliver had been shown the at-issue text [*259] messages. As an example, the Court notes that Defendant's written confession (St.'s Ex. 67) was obtained only after his interview had ended. St.'s Ex. 66 & 68.

85 Indeed, this Court is convinced that the apparent error in the June 8, 2012 warrant affidavit regarding when Trisha Oliver made the statement about texting Defendant was a thinly-veiled attempt to mislead the Court into believing Trisha Oliver's statement was untainted and independent of the illegality. Had this Court given up from exhaustion in reviewing the volume of warrants and other evidence from the suppression hearing before it got to the June 8, 2012 warrant affidavit and—most importantly, had it not gone beyond the face of this craftily-composed warrant affidavit—it might not have labored to dig deep into Trisha Oliver's statements themselves—put into evidence by the State on the last day of the hearing—to discover the taint. This warrant affidavit is yet another example of the kind of statement that could be addressed in a Franks hearing, had Defendant raised the issue.

For Trisha Oliver's statements to be considered an independent source, this Court emphasizes that the State would need to have demonstrated, by a [*260] preponderance of the evidence, that she would have brought up her text message exchanges with Defendant regarding Marco even had Sgt. Kite's search never occurred. This Court cannot find that the State has met its burden in this regard nor does this Court find it likely that she would have done so. The evidence before the Court shows a clear nexus between Sgt. Kite's search and Trisha Oliver's statement about texting Defendant. Because of Sgt. Kite's search, the Cranston Police Department was made aware of the crucial importance of text messages and asked Trisha Oliver for her consent to search the I.G. cell phone. As a result of the consent—which this Court already has deemed tainted—Trisha Oliver was aware that the Cranston Police knew about the text messages on her phone. Significantly, this Court notes that the at-issue text messages may also implicate Trisha Oliver.⁸⁶ Ms. Oliver thus had an incentive in her second statement to mention the text messages herself and explain their incriminating nature. Ms. Oliver's statement regarding the text messages, then, was obtained as a result of the initial illegality and must be regarded as tainted by it.

86 For example, the first incriminating [*261] text message viewed by Sgt. Kite that was sent by Trisha Oliver read "Wat if I got 2 take him 2 da hospital wat will I say and dos marks on his neck." (Emphasis added).

Moreover, this Court further observes that the actions of the Cranston Police Department in pursuing the investigation and obtaining almost a dozen warrants from the night of October 4, 2009 through October 28, 2009 implicitly recognize that Ms. Oliver's statement was tainted. In not a single warrant affidavit up until October 28, 2009 does Sgt. Gates, the police affiant, mention Trisha Oliver or her statements on October 4, 2009. As previously noted, these warrant affidavits for phone records and cell phone contents are all based almost entirely on Sgt. Kite's illegal search. It is not until the belated October 28, 2009 warrant affidavit for the T-Mobile cell phone (St.'s Ex. 56)—the only one inexplicably prepared by Det. Cardone—that Trisha Oliver's statement is ever mentioned and, in that warrant affidavit, the description of the statement is purposefully limited; it states only that she had texted with Defendant during the relevant time period but makes absolutely no mention of the incriminating nature of the texts. [*262] The absence of a reference to text messages reflects a scrupulous attempt to avoid mentioning them. This Court finds it highly unlikely that the Cranston Police Department would have ignored Trisha Oliver's statement as a potential basis for probable cause to obtain the contents of cell phones had the police believed Ms. Oliver's statement to be valid and

untainted. This Court is satisfied, therefore, that Trisha Oliver's statement is also tainted by the illegality.

As such, it becomes clear that the June 8, 2012 warrant does not constitute an independent source that can trigger the exception to the exclusionary rule and allow for admission of the tainted text message evidence. The information in the warrant affidavit that provides probable cause to obtain the extraction report of the LG cell phone is based on the illegal viewing of the text messages and on Trisha Oliver's statement about texting Defendant that is tainted by that illegality. Accordingly, the June 8, 2012 warrant must be regarded as tainted by the initial illegality, thus making the extraction report obtained pursuant to it (St.'s Ex. 32), also tainted and subject to exclusion as fruit of the poisonous tree.

As the State [*263] also appears to argue that the June 8, 2012 warrant is sufficiently attenuated from the illegal search of the text messages to dissipate any taint, however, this Court, in the interests of thoroughness, will further address the June 8, 2012 warrant in light of any possible attenuation. The police obtained the June 8, 2012 warrant more than two years after the illegality occurred; however, the lack of temporal proximity alone does not suffice to prove attenuation. This Court emphasizes that there have not been--nor has the State provided any evidence of--any intervening circumstances that might serve to dissipate the taint. The absence of any intervening circumstance is made apparent because none of the information in the warrant regarding Marco Nieves' death and Trisha Oliver's statement regarding the text messages is unrelated to the illegal search. This case is not one where new evidence has been discovered that provides an unrelated, discrete source for illegally-obtained evidence.

Finally, this Court must consider the apparent purpose for obtaining the June 8, 2012 warrant. The Court does not find credible the ostensible purpose stated in the warrant affidavit--that the extraction [*264] report was necessary to verify that the LG cell phone belonged to, and was primarily used by, Trisha Oliver." This Court can conceive of no rational purpose for obtaining the June 8, 2012 warrant except as a means of attempting to prove an independent source for the at-issue text messages through a later-obtained and facially-valid warrant. This finding is supported by the evident care with which the police, presumably with the assistance of the Department of Attorney General, drafted the affidavit, deliberately avoiding any explicit mention of Sgt. Kite's search of the LG cell phone and attempting to make Trisha Oliver's statement about texting Defendant sound independent of the illegal search. This Court is not to be fooled by such sophistry--indeed, decries it--and cannot find that the June 8, 2012 warrant is independent from the illegality. In so finding, this Court is mindful that the

purpose of the independent source doctrine is to ensure that the police are not put into a worse position than they would have been in the absence of the illegality. See *Barkmeyer*, 949 A.2d at 998. In the circumstances of this case, this Court finds that permitting the June 8, 2012 warrant to be considered [*265] an independent source to allow for the at-issue text messages to be admitted at trial would be to place the police in a better position than they would have been in, if the illegality had not occurred.

87 The extraction report of the LG cell phone would not have provided any information to disprove Defendant's purchase of the LG cell phone and would not have provided additional information about his use of the phone.

This Court further notes that it was only because of the illegal seizure of the LG cell phone that the Cranston Police Department had custody of that cell phone in order to perform the extraction" and it was as a result of Sgt. Kite's illegal search that the police knew that the extraction report would include incriminating evidence against Defendant. Especially when considering the repeated and flagrant nature of the police misconduct in this case--the illegal searches and seizures, the multiple invalid warrants, the highly-questionable conduct in handling the evidence, and the coercive methods used to obtain Defendant's confession--this Court cannot find that the June 8, 2012 warrant is an independent source. Further, the Court believes that permitting the text message evidence [*266] to be admitted at trial pursuant to the June 8, 2012 warrant would be to put a stamp of tacit judicial approval on the cascade of police illegalities that have brought us to this day.

88 With regard to the illegal seizure of the LG cell phone, this Court notes that it provides an alternative ground, to be discussed subsequently in this Decision, to require the suppression of the extraction report as fruit of the poisonous tree. The extraction report was only able to be performed by "exploiting" the illegal seizure of the LG cell phone.

Neither the independent source nor the inevitable discovery exceptions to the exclusionary rule apply to this case, as the State has not presented any evidence of an independent source nor has it demonstrated inevitability. In addition, this Court must emphasize that law enforcement's violations of the *Fourth Amendment* cannot be belatedly repaired with the sort of chicanery that is manifest in the June 8, 2012 warrant affidavit, regardless of the understandable desire to save relevant and probative evidence from exclusion at trial. Mindful of this

well-meaning motivation, this Court recalls the words of Justice Brandeis:

Experience should teach us to be [*267] most on our guard to protect liberty when the government's purposes are beneficent. Men [and women] born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men [and women] of zeal, well-meaning but without understanding.

Ohnstead v. U.S., 277 U.S. 438, 479, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting). The allowance of such a reparative warrant would undermine the *Fourth Amendment* to a debilitating degree. It would, for all practical purposes, place the *Fourth Amendment* in the fallible hands of government agents who are predisposed to overstepping the limits imposed by the Constitution. Investigation is an inherent element of law enforcement and, at the very least, a degree of invasion of privacy is inherent in investigation. Law enforcement is thus motivated to test the *Fourth Amendment*, particularly when tasked with securing justice for any number of crimes. It is therefore worth asking the following: what would stop government agents, where the incentive is strong enough, from ignoring the provided protections of the *Fourth Amendment* upon knowledge that their potentially violative actions [*268] can be legally explained? See *Murray v. U.S.*, 487 U.S. 533, 546-47, (Marshall, J., dissenting) (discussing an analogous situation and reasoning that "the police [] know in advance that they have little to lose and much to gain by forgoing the bother of obtaining a warrant and undertaking an illegal search."). The answer of this Court is--very little. The combination of incentive and lack of consequence would simply be too great to resist.

In light of this finding, this Court recalls that the purpose of the exclusionary rule is "to deter law enforcement officers from violating a defendant's rights." *Huy*, 960 A.2d at 556 (R.I. 2008). This Court is therefore mindful that to permit reparative actions--such as the June 8, 2012 warrant--would be to promote the exact opposite. This Court, as guardian of the protections provided by the *Fourth Amendment*, does not wish to be party to such action. Accordingly, this Court is of the view that the fruits of the June 8, 2012 warrant must be excluded from trial.

(e)

Re-Seizures of the Cell Phones

Lastly, this Court will address the issue of the re-seizure of the cell phones by the police--the LG cell phone (St.'s Ex. 15), the Metro PCS cell phone (St.'s [*269] Ex. 16), and the T-Mobile cell phone (St.'s Ex. 18)--after their seizure on the morning of October 4, 2009, in order to further search the contents of the phones and obtain an extraction report of the contents of the LG cell phone. As has been previously stated, this Court has determined that police illegally seized these cell phones. The cell phones were effectively re-seized,⁸⁹ however, so the Cranston Police Department could photograph the contents and perform the extraction on the LG cell phone.⁹⁰ In particular, this Court focuses on the re-seizure of the LG cell phone pursuant to the June 8, 2012 warrant that allowed the police to extract its contents and record them in the extraction report, as that report provides another source for the at-issue text messages. See St.'s Ex. 32. The Court emphasizes that had it not been for Sgt. Kito's illegal search, the police would not have seized the cell phones on the morning of October 4, 2009. In fact, the police would not--and, indeed, should not--have had physical possession of the cell phones in order to further search their contents. In searching the contents of the cell phones further and performing the extraction of data from the LG [*270] cell phone pursuant to the various warrants, the police essentially re-seized the cell phones, as they would not otherwise have had the cell phones in their custody had they not illegally seized the cell phones without a warrant or limited their seizures to the scope of the first warrant obtained.

89 This Court notes that this concept of re-seizure does not apply to the phone records obtained from the respective service providers, as the physical phones themselves were not necessary to obtain those records.

90 While the State recently informed this Court that it intended to request warrants to allow the State police to perform extractions of the Metro PCS and T-Mobile cell phones as well, this Court has no knowledge, as of the time of this writing, as to whether it obtained any such warrants or performed any additional extractions.

The United States Supreme Court explicated the concept of the re-seizure of tangible evidence in *Murray*:

It seems to us . . . that re-seizure of tangible evidence already seized is no more impossible than rediscovery of intangible evidence already discovered. The independent source doctrine does not rest upon such metaphysical analysis, but upon the policy that, [*271] while the government should not profit from its illegal

activity, neither should it be placed in a worse position than it would otherwise have occupied. *So long as a later, lawful seizure is genuinely independent of an earlier, tainted one (which may well be difficult to establish where the seized goods are kept in the police's possession) there is no reason why the independent source doctrine should not apply.*

487 U.S. at 541-42 (emphasis added). In the instant case, this Court emphasizes that the cell phones have been in police custody throughout this almost three-year-long saga, running from the time when the police first seized the phones illegally on October 4, 2009 and the time when the phones were, in effect, re-seized in order to perform additional searches of their contents. While in their custody, the evidence has not been adequately secured nor has its chain of custody been ensured. Moreover, the later seizures cannot be said to be lawful even if the cell phones were later re-seized and searched pursuant to warrants obtained by the Cranston Police Department. The later warrants were all—as has been previously discussed—tainted by the initial illegality. There were no intervening [*272] circumstances to break the causal connection between Sgt. Kite's illegal search and the later searches and seizures of the cell phones. It was only as a direct result of Sgt. Kite's actions that the Cranston Police Department began pursuing the contents of cell phones as containing relevant evidence as to the cause of Marco Nieves' death.

As for the LG cell phone in particular, when the police performed the extraction of its contents, the only possible "intervening circumstance" to dissipate the taint from the first seizure of the cell phone in October 2009 was the passage of time. As this Court has previously noted, the passage of time alone is not sufficient to dissipate the taint. The re-seizure of the LG cell phone was not in any way independent of the original seizure. Accordingly, the independent source doctrine cannot save the re-seizures of the cell phones and the fruits of the searches of their contents and extraction from exclusion. Thus, the photographs of the contents of the cell phones and the extraction report of the LG cell phone's contents are subject to exclusion as tainted by the initial, illegal search on this ground as well.

(iv)

Defining the Evidence to be Excluded [*273] Under the Exclusionary Rule

In consequence of its analysis of the exclusionary rule and its exceptions, the Court finds that the following

evidence is subject to exclusion at trial: (1) the LG cell phone (St.'s Ex. 15); (2) the Metro PCS cell phone (St.'s Ex. 16); (3) the iPhone (St.'s Ex. 17); (4) the landline phone (St.'s Ex. 19); (5) the T-Mobile phone (St.'s Ex. 18); (6) the photographs of the contents of LG cell phone taken at Trisha Oliver's apartment (St.'s Ex. 14, Pictures 0037-0050); (7) the photographs of the contents of the LG cell phone taken at police headquarters (St.'s Ex. 28); (8) the photographs of the contents of the Metro PCS cell phone (St.'s Ex. 31); (9) the photographs of the contents of the T-Mobile cell phone (St.'s Ex. 30); (10) the contents of the LG cell phone extracted by use of the Cellebrite software (St.'s Ex. 32); (11) the phone records and communications of Defendant provided by T-Mobile (St.'s Ex. 38); (12) the phone records and communications of Mario Palacio provided by T-Mobile (St.'s Ex. 41); (13) the phone records and communications of Trisha Oliver provided by Verizon (St.'s Ex. 44); (14) the phone records and communications of Rafael Nieves provided [*274] by Sprint Nextel (St.'s Ex. 48); (15) the phone records and communications of Angie Patino provided by Sprint Nextel (St.'s Ex. 51); (16) the landline phone records for the apartment provided by Cox Communications (St.'s Ex. 55); (17) certain portions of Defendant's interrogation as memorialized on videotape and in a written transcript (St.'s Ex. 66)*; and (18) Defendant's confession for the death of Marco Nieves (St.'s Ex. 67).

91 As previously discussed, the tainted portions of the interview, as memorialized in the transcript for reference, are: (1) St.'s Ex. 66, Tr. 14:20-18:4 (at approximately 8:50 a.m. on St.'s Ex. 68); (2) St.'s Ex. 66, Tr. 54:11-55:12 (approximately 9:30 a.m. on St.'s Ex. 68); (3) St.'s Ex. 66, Tr. 61:13-63:10 (at approximately 9:35 a.m. on St.'s Ex. 68); (4) St.'s Ex. 66, Tr. 67:19-68:3 (approximately 9:40 a.m. on St.'s Ex. 68) and (5) the remainder of the interview after St.'s Ex. 66, Tr. 77:13 (beginning at approximately 9:50 a.m. on St.'s Ex. 68).

Before determining the ultimate question of whether all of the above-listed evidence must be excluded, this Court acknowledges that suppression of illegally obtained evidence and its "fruits" is not constitutionally [*275] mandated under the federal Constitution.²² See *Pa. Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 362-63, 118 S. Ct. 2014, 141 L. Ed. 2d 344 (1998). It is, rather, a judicially-created remedy to deter unconstitutional conduct on the part of law enforcement. See *id.* The deterrence benefits of exclusion "[vary] with the culpability of the law enforcement conduct at issue." *Davis v. U.S.*, 131 S.Ct. 2419, 2427, 180 L. Ed. 2d 285 (2011) (quoting *Herring v. U.S.*, 555 U.S. 135, 143, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009)). "When the police

exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for *Fourth Amendment* rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *Id.*

92. While Rhode Island's exclusionary rule is statutory-- embodied in *G.L. 1956 § 9-19-25*-- and not a matter of common law, the Rhode Island exclusionary rule is interpreted in accordance with the federal rule. See *State v. Mattatall*, 603 A.2d 1098, 1113 (R.I. 1992) ("From the time of the enunciation of the exclusionary rule in *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio Law Abs. 513 (1961)), this court has, with very few exceptions, followed the opinions of the United States Supreme Court whether premised on the *Fourth Amendment* or on our own statutory exclusionary rule. The Rhode Island [*276] exclusionary rule is a statute that has never acquired or developed an independent body of jurisprudence."). Accordingly, this Court will refer to the exclusionary rule as including both the federal judge-made doctrine and the Rhode Island statute.

In the instant case, the high cost to the State, should the tainted evidence be excluded, is not lost on this Court. The amount of relevant and probative evidence regarding Defendant's culpability that is subject to exclusion speaks for itself in terms of the potential societal cost that would be exacted were the evidence to be suppressed as a result of the Cranston Police Department's actions.

Yet, here, this Court is convinced that exclusion is not only justified when weighed against the societal costs, but necessary in order to deter future violations of the *Fourth Amendment*. This Court finds that the actions of the Cranston Police Department reveal an indifference to the requirements of the law, if not a willful violation of it. Beginning with the illegal search that is at the heart of this case, this Court finds troubling the fact that the evidence does not support Sgt. Kite's testimony regarding the impetus for his first picking up the [*277] LG cell phone, i.e., the audible and visual alert of an incoming message. Absent such an alert, it follows that Sgt. Kite picked up and viewed the contents of the LG cell phone with no motivation aside from the desire--understandable as it might be--to learn as much as possible regarding Marco Nieves and his condition.

In addition, this Court finds that the police illegally searched and seized all of the other cell phones in evidence. Such action speaks to an utter disregard of the limits placed on law enforcement by the *Fourth Amendment*. The amount and extent of personal information about persons that may be readily gleaned from a search

of a cell phone should require heightened care to limit such searches to circumstances where the contents of a cell phone may reasonably be expected to yield evidence related to what is being investigated. Cf. *Smallwood v. State*, 61 So.3d 448 (Fla.App. 2011) ("We are equally concerned that giving officers unbridled discretion to rummage through at will the entire contents of one's cell phone, even where there is no basis for believing evidence of the crime of arrest will be found on the phone, creates a serious and recurring threat to the privacy of [*278] countless individuals."). The *Fourth Amendment's* privacy protections would become largely meaningless if law enforcement were to be permitted to search cell phones at will, with no other justification aside from the knowledge that the contents of a cell phone provide unparalleled, easy access to a wealth of information regarding every aspect of a person's life.

The State argues that Sgt. Kite's actions were limited in scope and made in good faith considering the emergency situation that he faced and, as such, should not trigger the exclusionary rule. This Court, however, finds the State's argument to be without merit and based on a conflation of different strands of *Fourth Amendment* jurisprudence. Warrantless searches, such as Sgt. Kite's search of the LG cell phone, are per se unreasonable under the *Fourth Amendment*, as noted earlier in this Decision. This Court emphasizes that there is no good faith exception to the warrant requirement nor is a subjective determination of an officer's good faith legally significant to a determination of whether a warrantless search fell within the exceptions. See *Beck v. Ohio*, 379 U.S. 89, 97, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964) ("[G]ood faith on the part of the [officer] is not [*279] enough. If subjective good faith alone were the test, the protections of the *Fourth Amendment* would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."). The *Fourth Amendment* deals with objective standards; that Sgt. Kite may have deemed the circumstances to be urgent does not suffice to justify an intrusion into the alleged private communications between Defendant and Trisha Oliver without an objectively reasonable justification to believe that a cell phone was somehow related to Marco Nieves' condition. "The interests in human dignity and privacy which the *Fourth Amendment* protects forbid any such intrusions on the mere chance that desired evidence might be obtained." *Schmerber v. California*, 384 U.S. 757, 767-70, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

Further, when the police sought and obtained the first warrant, they obtained a very broad and general warrant, using that general warrant to justify the additional search and seizure of cell phones, without regard for the particularity requirement of the *Fourth Amend-*

ment. The requirements of the *Fourth Amendment* are not to be set aside so easily. See *Arizona v. Gant*, 556 U.S. 332, 349, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) [*280] (quoting *Mincey v. Arizona*, 437 U.S. 385, 393, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978)) ("[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the *Fourth Amendment*"). Likewise, the Cranston Police Department's actions either in searching the LG Verizon cell phone or in photographing its text messages cannot be justified by its belated and speculative claim of the possibility of remote deletion. In addition, its actions cannot be justified by the fact that the text messages thus obtained were probative of the cause of Marco Nieves' medical condition. It is axiomatic that a search may not be justified by what it turns up. See, e.g., *Byars v. U.S.*, 273 U.S. 28, 29, 47 S. Ct. 248, 71 L. Ed. 520 (1927); *Lustig v. U.S.*, 338 U.S. 74, 80, 69 S. Ct. 1372, 93 L. Ed. 1819 (1949). See also *Olmstead v. U.S.*, 277 U.S. 438, 482-83, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting), overruled by *Katz*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576; and *Berger v. New York*, 388 U.S. 41, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 (1967) ("Here the evidence obtained by crime was obtained at the government's expense, by its officers, while acting on its behalf . . . for the purpose of securing evidence with which to obtain an indictment and to secure a conviction. The evidence so obtained constitutes the warp and woof of the government's [*281] case.").

Moreover, beyond the illegal search, this Court notes the troublesome drafting of the warrant affidavits, as evidenced by the fact that all of the warrants obtained in October 2009 are obviously based on the same affidavit with very little variation and, furthermore, that the affidavits are internally inconsistent and riddled with inaccuracies. In particular, this Court must emphasize the degree of contradiction as to the various cell phones and their respective locations, manifested in the different affidavits. In an investigation that was focused so heavily on cell phones, this Court finds the contradictory warrant affidavits as to which cell phone was seized from Defendant at the Cranston Police Station and which cell phone was seized in the apartment to be evidence of a gross inattention to probative facts, at the very least, if not evidence of deliberate errors made to mislead.⁹³ Moreover, this Court finds that the conduct of the Cranston Police Department in failing to ensure the chain of custody of the cell phones to be-- in a word-- unbelievable, e.g., Sergeant Walsh keeping Defendant's cell phone in his pocket for the better part of the day on October 4, 2009 and taking [*282] it to Judge Clifton's home to get a warrant, Sgt. Kite doing the same with a cell phone, and B.C.I. bagging the evidence in little unsealed brown paper lunch bags that were not sealed. Finally, this Court notes with disapproval the way in which

Detectives Cardone and Slaughter refused to testify in full as to their activities outside of the room during the Defendant's interrogation and, during the interrogation,⁹⁴ repeatedly threatened to charge the Defendant with murder and the loss of custody of his daughter and told the Defendant that he would be charged regardless of what he told them. Additionally, after suggesting the term "body shot" as an apt term to describe Defendant's hitting of Marco Nieves, the Detectives instructed Defendant to insert that very term into his confession after he had written it without it. See St.'s Ex. 66.

93 The warrant for the extraction of the LG cell phone (St.'s Ex. 57), for example, stated that the Metro PCS cell phone was seized from the Defendant at Cranston Police Station, whereas the warrant for the contents of the T-Mobile phone (St.'s Ex. 56) stated that the T-Mobile cell phone was seized from Defendant there.

94 This Court notes that at the time [*283] Defendant's interview took place, Marco Nieves had not yet died. While the seriousness of his condition may have justified a belief that he would not recover, this does not, in the Court's opinion, justify the repeated statements that Defendant would be charged with murder, no matter what Defendant said.

In all, the Court finds that the Cranston Police Department's actions--both with regard to the illegal search and the ensuing investigation into Defendant's culpability--manifested an overall attitude of gross negligence, if not downright recklessness, in blatant disregard of the requirements of the law.

One branch of the government should not be permitted to use the flagrant wrongdoing of another branch of government to punish a citizen. The cost to society of the suppression of relevant evidence concerning a defendant's guilt is not insubstantial, but it is a cost which it has been concluded must be paid in such cases in order to assure greater adherence to constitutional requirements.

Commonwealth v. Nine Hundred and Ninety-Two Dollars, 383 Mass. 764, 422 N.E.2d 767, 771 (Mass. 1981). Accordingly, this Court will not "affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions [*284] of the Constitution," by permitting the illegally obtained evidence to be admitted at trial. *Weeks v. U.S.*, 232 U.S. 383, 394, 34 S. Ct. 341, 58 L. Ed. 652, T.D. 1964 (1914).

B

The Involuntariness of the Confession

As an alternative ground for suppression of his confession, Defendant argues that his confession was involuntary and made as a result of police coercion. In the instant case, Defendant specifically claims that the police obtained his confession through coercion by threatening him with the loss of his daughter and also that he was more vulnerable to such coercion because of his physical condition arising from a lack of sleep.

It is well-settled under both the United States and the Rhode Island Constitutions that a defendant's confession, if involuntary, cannot be used against him at trial. See *Dickerson v. U.S.*, 530 U.S. 428, 433-34, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000); *State v. Monteiro*, 924 A.2d 784, 790 (R.I. 2007). In determining the voluntariness of a confession, the burden on the State is high; it must produce clear and convincing evidence that the confession was a product of a defendant's clear and rational choice. See *State v. Ortiz*, 448 A.2d 1241 (R.I. 1982). A determination of the voluntariness of a defendant's confession is made on the [*285] basis of the totality of the circumstances, including the behavior of the defendant and the behavior of the interrogators, with the ultimate test being whether the defendant's statements were the product of his free and rational choice or the result of coercion that overbore the defendant's free will at the time of the confession. See *State v. Briggs*, 756 A.2d 731, 738 (R.I. 2000). "A statement is involuntary if it is extracted from the defendant by coercion or improper inducement, including threats, violence, or any undue influence that overcomes the free will of the defendant." *Id.* (quoting *State v. Humphrey*, 715 A.2d 1263, 1274 (R.I. 1998)).

[M]ore subtle methods [of interrogation], though sometimes harder to perceive, are equally to be condemned when they trammel on the rights of those in custody . . . it may take a discerning eye to tell those that are fundamentally unfair from those which are no more than permissible instances in which the police have played the role of a "midwife to a declaration naturally born of remorse or relief, or desperation, or calculation."

Id. (quoting *People v. Tarsia*, 50 N.Y.2d 1, 405 N.E.2d 188, 192, 427 N.Y.S.2d 944 (N.Y. 1980)). One of the methods of interrogation which courts [*286] have condemned as rendering a confession involuntary is the use of threats made against a suspect's family, such as

threatening a suspect with the loss of custody of a child. See *Streetman v. Lynaugh*, 812 F.2d 950, 957 (5th Cir. 1987); *U.S. v. Tingle*, 658 F.2d 1332, 1336-37 (9th Cir. 1981) (acknowledging that "the psychological coercion generated by concern for a loved one could impair a suspect's capacity for self-control, making his confession involuntary.") (quoting *U.S. v. McShane*, 462 F.2d 5 (9th Cir. 1972)).

This Court will first address the threats made regarding the custody of Jazlyn. This sort of psychological coercion has been found to make a confession involuntary. See, e.g., *Lynum v. Illinois*, 372 U.S. 528, 534, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963) ("It is thus abundantly clear that the petitioner's oral confession was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not 'cooperate.' . . . [A] confession made under such circumstances must be deemed not voluntary, but coerced."). Indeed, in *Tingle*, the court cited the "relationship between parent and child" as a "primordial and fundamental value of our [*287] society," and found coercion where police made a mother reasonably fear, during her interrogation, that she would not be allowed to see her child for a long time. See *Tingle* 658 F.2d at 1336.

Similarly, in the instant case, Detective Slaughter not only threatened Defendant with the loss of custody of his daughter, but also stated, "You're not gonna [sic] have a chance to say goodbye to your own daughter." See St.'s Ex. 66, Tr. at 114:15-16 (occurring at approximately 10:30 a.m. on St.'s Ex. 63). He also threatened to charge Trisha Oliver with conspiracy in trying to conceal what had happened in order to strengthen his assertion that Defendant's daughter Jazlyn would end up in State custody. See *id.* at 114:19-115:6. This Court notes with disapproval that the explicit and repeated invocations of DCYF and the threat of the loss of custody of Jazlyn cross the line of what has been deemed to be acceptable methods of questioning in an interrogation. See *Lynum*, 372 U.S. at 534.

In addition, this Court acknowledges that the Defendant's interrogation took place over the course of three hours, after Defendant had been waiting at headquarters for more than an hour, and moreover, that he only had [*288] slept for a couple of hours the night before. There is evidence in the record suggesting that Defendant's physical condition affected the interview when, toward the end of the interrogation, Defendant stated that he was dizzy and Det. Cardone actually said to Defendant "You don't look all right." See Ex. 66, Tr. at 73:16.

Yet, these findings regarding the threats to place Jazlyn in State custody and Defendant's physical condi-

tion do not end the analysis. In determining whether a defendant's will was ultimately overborne, a court must assess the totality of all the circumstances, including characteristics of the accused, such as youth, the lack of education, low intelligence, and previous experience with law enforcement. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). While this Court finds that the threats to place Defendant's daughter in State custody and Defendant's physical condition, may not, in and of themselves, have induced Defendant to confess, this Court is ultimately unconvinced that the State has met its burden of proving by clear and convincing evidence that Defendant's confession was entirely voluntary. In its review of the details of the interrogation, this Court [*289] is particularly troubled by the Detectives' increasingly threatening demeanor and words. As has been previously mentioned, the Detectives repeatedly made reference to the incriminating nature of the text messages and—more significantly—told Defendant that regardless of what he said during the interrogation, he would be charged anyway. Specifically, this Court emphasizes the manner in which the Detectives persistently suggested that Defendant would be charged with murder with the only question being which degree. See St.'s Ex. 66, Tr. 77:20, 96:20-23. The Detectives' apparent unwillingness to believe anything other than a full confession of guilt, as evidenced by the constant theme during questioning that Defendant was not telling the truth, especially when combined with Defendant's suggestibility—his willingness to concede to the suggestions of the Detectives particularly as the threats escalated and his physical condition deteriorated—make the overall voluntariness of Defendant's confession questionable.

Further, this Court must focus on the Detectives' behavior during the interrogation itself and when Defendant was writing his confession regarding the term "body shot." The term, given [*290] its meaning and origins according to Det. Cardone, as a boxing term, has clearly incriminating connotations. This Court emphasizes with disapproval that the term was first introduced and repeatedly used by Det. Cardone in his questioning of Defendant; it was not a term introduced by Defendant and it is not even clear to this Court that he understood its meaning. Most troubling of all, Det. Slaughter instructed the Defendant to add the body shot language to his written confession after Defendant had finished writing it.⁹⁵ This repeated insistence on the use of the term "body shot" exemplifies an act by law enforcement of putting words into Defendant's mouth that is tantamount to writing the confession for the Defendant. The "body shot" term underscores both the troubling aspects of the Detectives' behavior during the interrogation and the Defendant's lack of understanding and generally tractable behavior.

95 Defendant's lack of protest regarding the insertion of the term "body shot" may be the most blatant and troubling instance of Defendant's suggestibility. This Court does not find that a person, who was truly cognizant of the circumstances and the implications of the term, would have [*291] agreed to such an instruction. Defendant's apparent agreement makes his knowledge and understanding of the statement—necessary to render his confession truly a product of free and rational choice—highly questionable.

This Court further notes that the use of the illegally obtained text messages impermissibly coerced Defendant into confessing, making Defendant's confession also tainted by the illegal search. In so finding, this Court emphasizes that even assuming, arguendo, that the text messages were not the product of an illegal search, the use of the text messages was coercive. The text messages were used by the Detectives to essentially convince Defendant that he had no choice but to make a guilty confession, regardless of what might have actually occurred. This is an impermissible method of extracting a confession, regardless of whether the evidence so used was legally or illegally obtained. When considering the totality of the circumstances of the Detectives' general demeanor during questioning, their threats, Defendant's lack of education, his suggestibility, his deteriorating physical condition, and the use of the illegally obtained text messages, this Court is not convinced that [*292] the State has proven clearly and convincingly that either Defendant's oral or written confession were voluntary. Accordingly, this Court finds that the entirety of Defendant's interrogation beginning from St.'s Ex. 66, Tr. 77:17 (beginning at approximately 9:50 a.m. on St.'s Ex. 68) and Defendant's written confession (St.'s Ex. 67) must be excluded as involuntary in violation of his due process rights under the State and Federal Constitution.

C

Motion for a Franks Hearing

Having addressed at length Defendant's various motions to suppress, this Court will now turn to Defendant's additional motion for a Franks hearing, as made during the course of the suppression hearing. During the course of the hearing, Defendant's counsel began to probe into both the procedure used to obtain certain warrants and the veracity of particular statements by the police included in their supporting affidavits. During the questioning of Sgt. Gates, the State objected on account that the defense was, to paraphrase, conducting an unofficial Franks hearing rather than a simple suppression hearing.

The State, *arguendo*, took further issue that notice of the supposed "Franks hearing" was not provided, thus leaving [*293] it with no opportunity to defend itself or prepare its arguments. Defense counsel responded that his line of questioning was critical to his proper representation of the Defendant. As a result, the Court asked defense counsel if he desired a Franks hearing in addition to the at-bar evidentiary hearing on the Defendant's motions to suppress. After a short recess, defense counsel submitted a hand-written motion for a Franks hearing which it later supplemented with a more comprehensive, and typed, motion. The Court acknowledged the Franks motion, provided assurance that it would be addressed accordingly, and directed the parties to refocus on the matter at hand.

Afforded time to consider the governing legal standard in light of these events, this Court is prepared to rule on whether the Defendant has made a sufficient preliminary showing as to the affiant's alleged deliberate and/or reckless falsehoods or omissions in the affidavits submitted in support of the warrants at issue. This Court will reserve decision, however, pending further argument, as to the issue of probable cause and whether a Franks hearing is ultimately required.

In *Franks v. Delaware*, the United States Supreme Court [*294] addressed the handling of warrants suspected of being obtained through "deliberate or reckless inclusion of false or misleading material statements in a warrant application and affidavit." 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); *State v. DeMagisiris*, 714 A.2d 567, 574 (R.I. 1998). The Court held that "[t]here is a presumption of validity" with respect to affidavits that support search warrants. *Franks*, 438 U.S. at 171-2. Thus, "[t]o mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine." *Id.*

Franks specifically dictates that:

There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted [*295]

today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the *Fourth* and *Fourteenth Amendments*, to his [or her] hearing. Whether he [or she] will prevail at that hearing is, of course, another issue.

Id.; *State v. Verrecchia*, 880 A.2d 89, 100 (R.I. 2005). It therefore stands that there are two distinct steps to establish a right to a Franks hearing. First, the defendant must make the requisite preliminary showing that a statement in a warrant affidavit is deliberately false or made with reckless disregard for the truth or is a statement that is deliberately or recklessly omitted, so as to render the warrant affidavit false or misleading. See *Franks*, 438 U.S. at 171-172; *U.S. v. Scalia*, 993 F.2d 984 (1st Cir. 1993) (stating that a comparable showing is required to "establish that technically accurate statements by [*296] an affiant have been rendered misleading by material omissions."). This showing must be made with specificity and in a manner that is "more than conclusory." *Franks*, 438 U.S. at 171-172.

Second, upon the defendant meeting this burden, the Court must set aside the "material subject to falsity or reckless disregard" to determine if the remaining content of the warrant affidavit "support[s] a finding of probable cause." *Id.* If probable cause can be found, no Franks hearing is required. Where probable cause is absent, the defendant is entitled to a Franks hearing. See *id.* At the hearing, the defendant is required to establish, by a "preponderance of the evidence," that the affiant included the challenged statement in the affidavit, or omitted such a statement, "knowingly or intentionally or with reckless disregard for the truth." *Id.* If the defendant meets his or her burden in that regard, the warrants must be voided and any evidence gathered from the execution of the warrants must be excluded at trial. *Id.*

Here, the Defendant challenges the warrants requesting and enabling the search of: (1) the Metro PCS cell phone (St.'s Ex. 34); (2) the LG cell phone (St.'s Ex. 35); (3) the phone records [*297] and communications of Defendant (St.'s Ex. 36); (4) the phone records and communications of Mario Palacio (St.'s Ex. 39); (5) the phone records and communications of Trisha Oliver (St.'s Ex. 42); (6) the phone records and communications

of Rafael Nieves (St.'s Ex. 46); (7) the phone records and communications of Angie Patino (St.'s Ex. 49); (8) the phone records and communications of the landline phone of Trisha Oliver's apartment (St.'s Ex. 53); (9) the T-Mobile Sidekick cell phone (St.'s Ex. 56); and (10) the data stored on the LG cell phone for a second time using Cellebrite mobile forensic technology (St.'s Ex. 57). Within the underlying affidavits for these warrants, Defendant has questioned multiple statements sworn to under oath: (1) that Sgt. Kite heard an audible signal that induced his search of the LG cell phone; (2) that Sgt. Kite viewed a text message reading "Wat if I got 2 take him 2 da hospital wat will I say and dos marks on his neck" upon attempting to disconnect from the LG cell phone; (3) that the police seized a Metro PCS cell phone from Defendant at Cranston Police Department headquarters; (4) that the type of injuries suffered by Marco Nieves were consistent ["298] with child abuse and not the type sustained from a single accidental strike; (5) that the LG cell phone belonging to Trisha Oliver was voluntarily turned over to the Cranston Police Department; and (6) that Rafael Nieves received a voicemail from Defendant on January 25, 2009 in which the Defendant threatened to punch Marco Nieves. These recited statements provide sufficient detail as to which assertions in the affidavits Defendant believes to be have been made falsely or with reckless disregard of the truth.

The first question for the Court, therefore, is whether the assertions of falsity or reckless disregard are substantiated with evidence that is more than conclusory. While this showing is typically made by the filing of affidavits in support of a request for a Franks hearing, in this case Defendant relies on evidence from the suppression hearing. It is perfectly proper for him to do so. See *Franks*, 438 U.S. at 171-172 (recognizing that the preliminary showing may also be made using "sworn or otherwise reliable testimony from witnesses"). This Court is further satisfied that the physical evidence introduced before this Court during the suppression hearing and properly verified in ["299] testimony meets the standard of "otherwise reliable" evidence that may be introduced in support of the preliminary showing for a Franks hearing.⁹⁶ See *U.S. v. Cheshier*, 678 F.2d 1353 (9th Cir. 1982) (where the court considered all of the evidence in the record in order to determine if the substantial preliminary showing was made, including a report made by a law enforcement agency).

96 Both parties have agreed to allow this Court to consider that the evidence introduced at the suppression hearing may be used by the Defendant to establish that he can make the preliminary showing under *Franks*.

At the outset, this Court will briefly note that the State has contested Defendant's standing to challenge several of the warrants under *Franks*. This Court will not further address standing at this point, as it previously reserved decision on the standing issue, at the request of the State and with the consent of the Defendant, at the conclusion of the suppression hearing.⁹⁷

97 The Court does note, however, that based on its logic regarding standing earlier in this Decision, it appears that the Defendant may well have standing to challenge the warrants at issue here. Furthermore, the State has not previously [*300] suggested that Defendant did not have standing to contest any of the challenged warrants for purposes of his suppression motions.

This Court will proceed to address the specific statements within the warrant affidavits which Defendant has challenged as being false or made with reckless disregard for the truth. Regarding the assertions in the affidavits that Sgt. Kite heard the LG cell phone "ring" and that he viewed an incriminating text message in his attempt to disconnect, Defendant has offered substantial evidence to the contrary. The data obtained from the LG cell phone using the Cellebrite mobile forensic technology, as admitted into evidence before the Court (St.'s Ex. 32), does not display the "insufficient funds" text message essential to the version of events to which Sgt. Kite testified. The message itself was not found on the cell phone, and the log of text messages sent and received on the LG cell phone does not show an "insufficient funds" message to have been received until days later. In addition, this Court has rejected Sgt. Kite's version of the events surrounding his search of the LG cell phone. This Court thus finds that Defendant's offerings as to the potential [*301] falsity of statements surrounding Sergeant Kite's interactions with the LG cell phone to be more than conclusory.

98 The statement regarding Sergeant Kite's interactions with the LG cell phone is in every challenged warrant with the exception of the June 8, 2012 warrant. (St.'s Ex. 57)

With respect to the assertion that the Metro PCS cell phone was taken off Defendant's person at Cranston Police Department headquarters, Defendant cites the inconsistent testimony of various officers who testified at the evidentiary hearing as to the names and locations of multiple phones. The LG cell phone, T-Mobile Sidekick cell phone, and Metro PCS cell phone are incorrectly referenced throughout the supporting affidavits for the at-issue warrants. The LG cell phone is commonly referred to as the LG Verizon Sidekick when the Sidekick model of cell phone is particular to T-Mobile.⁹⁹ The affi-

davits are also internally inconsistent regarding the seizure of the Metro PCS cell phone. They state that the police seized the Metro PCS cell phone both at the crime scene and off of Defendant's person at the Cranston Police Department headquarters. The testimony of several officers of the Cranston Police Department [*302] at the suppression hearing and one warrant affidavit state that the T-Mobile cell phone was the phone seized from Defendant at headquarters.¹⁰⁰ Moreover, the return for the first warrant for the apartment lists the Metro PCS cell phone as one of the items seized from the apartment. See St.'s Ex. 22. Further coloring these errors is that the sworn affiant on the multiple affidavits, Sgt. Gates, testified that he was unaware of which phone was seized at the Cranston Police Department headquarters.

99 This Court notes that any confusion regarding the makes and models of the cell phones is particularly troubling given the number of cell phones involved in this case. The Cranston Police Department's early knowledge that cell phones were of central importance to this case would appear to require the officers to take even more care to ensure that the multiple cell phones were not confused.

100 Significantly, the warrant for the contents of the T-Mobile phone (St.'s Ex. 56) is the only one of the challenged warrants that states that the T-Mobile cell phone was the one seized from Defendant at headquarters.

This Court finds troubling the inconsistencies and uncertainties surrounding where each cell [*303] phone was seized that have persisted throughout this investigation. This Court, at a minimum, must question the Cranston Police Department's procedures regarding the chain of custody of evidence if the Department is unable to consistently and accurately attest to the location from where two central pieces of evidence to an investigation were seized. This Court, in light of these findings, holds that Defendant has met his evidentiary burden to establish, in non-conclusory fashion, the potential falsity of the statement that the Metro PCS cell phone was seized at Cranston Police Department headquarters.

Through the totality of the evidence before the Court, it also can be deduced that the statement concerning the LG cell phone being turned over voluntarily to the Cranston Police Department is potentially false. The supporting affidavits contain the assertion that the LG cell phone was voluntarily turned over to the police by Trisha Oliver.¹⁰¹ This statement stands in contrast, however, to other documents produced by the Cranston Police Department that are before the Court. The Cranston Police Department received a warrant to search Trisha Oliver's apartment and consequently compiled a [*304]

list of all evidence that was seized. This list included the LG cell phone that the Cranston Police Department suggests was voluntarily turned over by Trisha Oliver. The Cranston Police Department made inconsistent statements in the record, therefore, that the LG cell phone was both voluntarily turned over to the police by Trisha Oliver and seized by them pursuant to a warrant. Moreover, the manner in which the events surrounding the LG cell phone were presented to Judge Clifton is, at the very least, questionable. The fact that the Cranston Police Department stated in the warrant affidavit that Trisha Oliver voluntarily turned over the LG cell phone and explicitly failed to mention that the LG cell phone was searched before that time, without a warrant, creates the impression that the LG cell phone was legally searched. This is undoubtedly misleading. The Cranston Police Department, in effect, represented that the police obtained the critical evidence from the LG cell phone lawfully when, at best, that fact was not clear. In following, the Court finds that the Defendant has supplied sufficient evidence to call into question the truth of the statement regarding the turning over of [*305] the LG cell phone.

101 The statement that the LG cell phone was voluntarily turned over is included verbatim in every challenged warrant with the exception of the June 8, 2012 warrant. (St.'s Ex. 57)

This Court also finds that the Defendant has made a preliminary showing of falsity or reckless disregard as to the statement in the warrant affidavits that Rafael Nieves received a voicemail on his cell phone from Defendant on January 25, 2009 in which he threatened to punch Marco. In support of his preliminary burden, Defendant has presented an affidavit of the Defendant in which he swears that he never contacted Rafael Nieves from 699-7580 on that date. In addition, the phone records in evidence at the suppression hearing show no phone calls from phone numbers 699-7580 or 436-5573, see St.'s Ex. 48, and the testimony from the suppression hearing from Rafael Nieves and Officer Machado casts doubt on the veracity of this statement and the Cranston Police Department's belief in the reliability of it.

The statement in certain affidavits that Marco Nieves' injuries were consistent with child abuse and not of a type sustained by a single accidental strike¹⁰² starts on a somewhat different footing. [*306] In the face of its evidentiary burden, the Defendant has supplied this Court with limited evidence as to the underlying veracity of the statements about the attending physician's comments. Notwithstanding this fact, this Court is troubled by the extent of potential false statements in the warrant affidavits and the absence of this statement in the June 8, 2012 warrant affidavit. In addition, the first warrant for the apartment contains a very different statement at-

tributed to the attending physician, referring to that physician in the male rather than female gender and stating that the attending physician had "located marks on Nieves' right shoulder and determined that Nieves was suffering from brain trauma which he classified as suspicious." St.'s Ex. 22. For these reasons, this Court also determines that the Defendant has met his preliminary showing as to the statements regarding Marco's medical condition.

102 This statement is included verbatim in every challenged warrant except for the June 8, 2012 warrant. (St.'s Ex. 57)

In sum, the Court finds that Defendant has made the requisite preliminary showing to warrant a Franks hearing as to the following statements in the warrant affidavits: [*307] that Sgt. Kite heard an audible ring that induced his searching the LG cell phone; that Sgt. Kite viewed a text message reading "Wat if I got 2 take him 2 da hospital wat will I say and dos marks on his neck" in attempting to disconnect from the phone; that the police seized a Metro PCS cell phone from Defendant at Cranston Police Department headquarters; that the LG cell phone belonging to Trisha Oliver was voluntarily turned over to the Cranston Police Department; that Rafael Nieves received a voicemail from Defendant on January 25, 2009 in which Defendant threatened to punch Marco; and the statements attributed to the attending physician. As required, these assertions have been made with specificity and supported with evidence that is beyond conclusory. Accordingly, this Court finds that there is reliable evidence of record to establish these statements, sworn to under oath by Sergeant Gates and Detective Cardone, are deliberately false or were made with reckless disregard of the truth. As stated previously, this Court will reserve decision as to whether Defendant is, ultimately, entitled to a Franks hearing, pending further argument as to Defendant's standing to contest these statements, [*308] and whether probable cause exists, independent of the challenged statements, to support issuance of the warrants and admission of the evidence collected pursuant to them.

IV

CONCLUSION

After a thorough review of the record and an exhaustive consideration of the relevant jurisprudence on the issues before the Court, this Court makes the following findings. First, with regard to standing, Defendant has a reasonable expectation of privacy in his alleged text messages so as to give him standing to challenge the police search that led to discovery of those text messages as violative of the *Fourth Amendment*. The Court further

finds that the third-party doctrine should not apply to diminish the expectation of privacy in the contents of electronic communications. Moreover, people have a reasonable expectation of privacy in the contents of their text messages with no distinction between whether the messages were sent or received by them. This expectation of privacy is also separate and discrete from the device used to send or receive the text messages. Defendant also has standing to challenge the search of the apartment where he was a frequent overnight guest and the seizures of evidence there.

Secondly, [*309] Sgt. Kite's actions to view the text messages on the LG cell phone did not fall within the exigent circumstances, plain view, or consent exceptions to the warrant requirement, and as such, were objectively unreasonable under the circumstances. In addition, the searches and seizures of the police of all of the cell phones in evidence and their contents were illegal as warrantless or in excess of the warrants obtained. Furthermore, search of the LG cell phone by the police to photograph its text message content was not justified by the scope of the warrant or by the exigent circumstances exception to the warrant requirement. As such, all of these searches and seizures, therefore, were unreasonable in violation of the *Fourth Amendment*.

Thirdly, almost all the evidence the Cranston Police Department obtained during the course of its investigation into the death of Marco Nieves was "tainted" by the illegal search made by Sgt. Kite or the other illegal searches and seizures of cell phones and their contents. Accordingly, this Court holds that this bountiful harvest of illegally collected evidence and poisonous fruit is inadmissible at trial: (1) the LG cell phone (St.'s Ex. 15); (2) the Metro [*310] PCS phone (St.'s Ex. 16); (3) the iPhone (St.'s Ex. 17); (4) the T-Mobile cell phone (St.'s Ex. 18); (5) the apartment landline phone (St.'s Ex. 19); (6) the pictures of the contents of the LG cell phone taken at Trisha Oliver's apartment (St.'s Ex. 14, Pictures 0037-0050); (7) the pictures of the contents of the LG cell phone taken at Cranston Police Department headquarters (St.'s Ex. 28); (8) the pictures of the contents of the Metro PCS cell phone (St.'s Ex. 31); (9) the pictures of the contents of the T-Mobile cell phone (St.'s Ex. 30); (10) the Cellebrite extraction report for the LG cell phone (St.'s Ex. 32); (11) the phone records and communications of Defendant provided by T-Mobile (St.'s Ex. 38); (12) the phone records and communications of Mario Palecio provided by T-Mobile (St.'s Ex. 41); (13) the phone records and communications of Trisha Oliver provided by Verizon (St.'s Ex. 44); (14) the phone records and communications of Rafael Nieves provided by Sprint Nextel (St.'s Ex. 48); (15) the phone records and communications of Angie Palino provided by Sprint Nextel (St.'s Ex. 51); (16) the landline phone records for

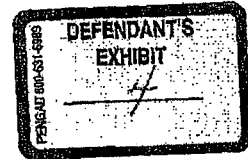
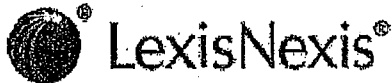
Trisha Oliver's apartment provided by Cox Communications [*311] (St.'s Ex. 55); (17) the named portions of Defendant's interview (St.'s Ex. 66) and the corresponding portions of the videotaped recording of the interview (St.'s Ex. 68); and (18) Defendant's confession for the death of Marco Nieves (St.'s Ex. 67). In addition, this Court finds that Defendant's oral and written confessions were involuntary in violation of his due process rights such that they must be suppressed.

Lastly, this Court finds that there is sufficient evidence in the record to find that Defendant made a preliminary showing that the affidavits for the warrants do

contain certain false statements, as specifically identified by Defendant, that were deliberate or made in reckless disregard of the truth. The Court reserves decision, however, as to whether Defendant is entitled to a Franks hearing, subject to further argument as to standing and probable cause.

Defendant's motion to suppress the videotape made at the apartment is denied. Defendant's other motions to suppress text messages and other evidence are granted.

It is so Ordered. Counsel shall confer with the Court regarding further proceedings in this case.



In re the Search of Certain Cell Phones

Cr. Nos. 08-174, 08-175, 08-176, 08-177 (JMF)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

541 F. Supp. 2d 1; 2008 U.S. Dist. LEXIS 27086

March 4, 2008, Decided

COUNSEL: FREDERICK H. BANKS
(1:08-cv-00174-UNA), Plaintiff, Pro se, Yazoo City,
MS.

ANTOLIN ANDREW MARKS (1:08-cv-00175-UNA),
Plaintiff, Pro se, Tacoma, WA.

For RICHARD L. SEALEY (1:08-cv-00176-CKK),
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For UNITED STATES DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF PRISONS, CIVIL RIGHTS
DIVISION, FEDERAL BUREAU OF INVESTIGATION,
UNITED STATES PAROLE COMMISSION
(1:08-cv-00176-CKK), Defendants: Heather D. Gra-
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OFFICE, Washington, DC.

For BRYAN H. SIMMS (1:08-cv-00177-RWR), Plain-
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BIDDLE & REATH LLP, Washington, DC; James G.
Fannon, Thomas J. Barton, PRO HAC VICE, Philadel-
phia, PA.

For BALL STREET VENTURES, LLC, BALL
STREET PARTNERS, LLC, BALL STREET FUND,
LLC, CHRISTIAN LABTNER, BRIAN K. DAVIS
(1:08-cv-00177-RWR), Defendants: Jeffrey S. Jacobo-
vitz, LEAD ATTORNEY, SCHIFF HARDIN LLP,
Washington, DC.

JUDGES: [**1] JOHN M. FACCIOLA, UNITED
STATES MAGISTRATE JUDGE.

OPINION BY: JOHN M. FACCIOLA

OPINION

[*1] MEMORANDUM OPINION

The government has now applied for a search war-
rant to search the memories of several cell phones that
they have seized. At my direction the government has
now submitted a Memorandum of Law addressing my
concerns that the search of the cell phones was unrea-
sonable under the *Fourth Amendment*.

The facts are unusual. As recounted by the govern-
ment in the original application for the search warrant
and now in the Memorandum of Law, two men named
Antoine Washington and Nicholas Dormu locked them-
selves into a garage owned by Darryl Jackson, Michael
Jackson and Crystal Jackson. When the police confront-
ed Darryl Jackson, he told them that he did not care who
or what was in the garage and he demanded that the po-
lice leave. The police then saw Darryl Jackson in the
house using his cell phone as he cursed at the police of-
ficers and demanded they leave. Simultaneously, the
police heard "phone chimes, rings and audible voicemail
messages coming from inside of the garage." Memorand-
um of Law at 2.

The police also saw Michael and Crystal Jackson,
with cell phones in their ears, in the backyard of the
house in which Darryl [**2] Jackson was situated. At
that point, the police heard cellular phone chimes, and
rings and audible voicemail messages coming from in-
side the garage. Seconds later, gun shots rang out more
than three blocks away from the house. While some of-
ficers left to investigate the gun shots, others remained
and saw Antoine Washington and Nicholas Dormu run
out of the garage. Dormu ran to the front of the house,
got [**2] into Michael Jackson's car, which was un-
locked with the engine running, and sped away.

I certainly agree with the government that the portion of the cell phone records captured on the day these events occurred would provide evidence pertaining to whether the communications, for example, enabled Dormu to escape by letting him know that Michael Jackson's car was in front of the house (with the engine running) and when he could flee. See Memorandum of Law at 2. This might be sufficient to authorize a search (if possible) of those limited records because there is a reasonable likelihood that they would disclose communications relating to Dormu's flight. I part company with the government, however, in its assertion that it should be permitted to search the entire cell records of all five [**3] persons.

First, Michael, Crystal, and Darryl Jackson are asserted to have an ownership interest in the garage where the police later found a substantial quantity of powder cocaine, crack cocaine, and marijuana. As noted in my earlier order, a police officer has represented that, in his experience, narcotic traffickers commonly use cell

phones to communicate with each, suppliers and customers. But, even if I credit that experience, I would to have to conclude in every instance that the ownership of premises where drugs are found in itself justifies the search of the entire contents of the owner's cell phone, even though there is no indication that the owner ever used the phone in any way to facilitate drug trafficking. While Dormu and Washington were in the garage where the drugs are found, I am not ready to conclude that there is, *ipso facto*, a reasonable likelihood that they have used their cell phones to sell drugs, thus justifying the search of its entire contents. I must therefore decline to sign the warrant the government has presented.

/S/

JOHN M. FACCIOLA

UNITED STATES MAGISTRATE JUDGE

Dated: March 4, 2008

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNT OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
STATE OF SOUTH CAROLINA	)	Indictment No(s): 2011-GS-10-05207, 05208
	)	Warrant No(s): M640238, M640239
	)	Charge: Murder, Poss. Firearm During V.C.
	)	
-versus-	)	
	)	
Devin Jamel Johnson	)	State's Response to Suppression Motion
	)	
	)	
Defendant.	)	

The State begs the Court's indulgence regarding the informal format of this response and lackluster citations and editing, as we are greatly pressed for time to respond.

The Defense has conceded that the search warrant in issue establishes probable cause to believe that a crime has been committed. The Defense has conceded that the search warrant establishes probable cause to believe that Devin Johnson committed that crime. The Defense will doubtless concede that the warrant application includes information that this phone number belonged to the Defendant at the time of the murder. The Defense has brought a motion suppress instead based on the allegation that the search warrant for phone records in this case does not establish in its text a viable "nexus" between the Defendant's cell phone and the murder.

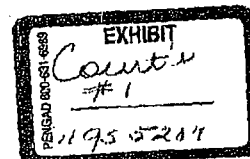
To support his argument, the defense cites a lengthy trial court ruling from Rhode Island (a case that, quite frankly, is a factual mess) and the five paragraph opinion of a U.S. Magistrate granting a search warrant for some phone records, but denying others.

1. The Defenses allegations regarding the "nexus" requirement are factually inaccurate as applied to the warrant affidavit and legally inaccurate as to what is required.

The thorough, lengthy search warrant application is attached. In it, the affiant clearly states his reason for believing that that particular cell phone belongs to Devin Johnson.

The affiant goes on to explain:

"Through experience and training, The Investigator knows that the cellular service provider maintains records related to . . . outbound and inbound call detail . . . message



content . . . that may assist in the identification of persons accessing and utilizing the account. Through experience and training, The Investigator knows that the cellular service provider maintains records . . . officers would be able to determine the physical location of the individual using the cell phone number 843-217-3243. [I]nformation is necessary to the investigating officers in order to investigate the crime."

The entire idea of a "nexus" requirement relates only to the nexus between the place to be searched and the relevant evidence that the police are looking for:

"In determining where a search warrant is supported by probable cause, the crucial element is not whether the target of the search is suspected of crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched." U.S. v. Lalor, 996 F.2d 1578 (1993).

As explained above, the "Nexus" requirement merely demands that the police reasonably believe that relevant evidence will likely be found in a certain place, that there is a nexus between the place searched and items or information relevant to a crime. Often, the place searched has nothing to do whatsoever with the actual crime, it is just reasonably believed that evidence will be located there. For instance, the Defense cites Zurcher in its brief. In Zurcher, a search warrant execution of a college newspaper was upheld because the police believed that there could be photographs of a past crime in the newspaper's possession. The court upheld the search, finding that a nexus existed between the location of the search (the newspaper office) and the relevant evidence sought (the photographs). Needless to say, the newspaper office did not commit the crime, a reporter did not commit the crime, there was no connection whatsoever between the newspaper and the actual commission of the crime. The Court, however, upheld the search warrant because there was probable cause to believe the newspaper, a third party (like a phone company) had material that constituted evidence of a crime. Zurcher v. Stanford Daily, 436 U.S. 547 (1978). Similarly, the nexus requirement in the present case merely dictates that a nexus be shown between the place to be searched (Verizon Records Department) and the items to be seized (Defendant's phone records). That "nexus" is abundantly established in the attached warrant.

All that is required to satisfy the nexus requirement is that the affiant explain that a crime has been committed and has probable cause to believe that evidence of that crime is at a certain location. The defense completely misconstrues this requirement in arguing that, for the warrant to be proper, we must connect the actual phone to the commission of the crime. Nevertheless, the irony here is that the connection the defense seeks is, in fact, drawn in the warrant. The phone belonged and was used by the defendant during the time the crime was committed, as stated in the warrant -- "Devin's family members provided investigators with his cell phone number of 843-217-3243." Implicit in this statement is the common sense conclusion that this is his current number, provided on the day of the murder as the phone he used at the time of the murder. Thus, even the spurious requirement the defense is seeking to establish for search warrants in this case is satisfied.

The search warrant application in the present case is very thorough in establishing the many types of data it is seeking.¹ It explains quite clearly how this information is relevant to the case and necessary to their investigation. However, in establishing whether or not there exists a "nexus" between a place searched (here, a phone company) and the items sought (here, text messages, call records), a Magistrate is also free to use his common understanding of the place and items. It is not required that the warrant application itself expressly states what, through life experience, the magistrate knows to be true. [Here, that people carry cell phones these days and that these phone records can often contain information about who they called, where they were, and the substance of their text messages. Again, this affidavit clearly states those things, but it doesn't have to.]:

"The Fifth, Sixth, Eighth, and Ninth Circuits have held that the nexus between the place to be searched and the items to be seized may be established by the nature of the items and the normal inferences of where one would likely keep such evidence." U.S. v. Anderson, 851 F.2d 727 (1988).

"In Anderson, 851 F.2d 727, this court adopted the rule that "the nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where one would likely keep such evidence. The court held that probable cause can be inferred from the circumstances, and a warrant is not invalid for failure to produce direct evidence that the items to be seized will be found at a particular location." U.S. v. Lalor, 996 F.2d 1578 (1993).

In other words, when common knowledge dictates that a certain location would probably contain evidence of a serious crime, it is unnecessary for the warrant to expressly say so.

A perfect analogy to the defense's assertion in this case can be found in a long line of cases, only one of which is cited in the defense brief. The defense cites U.S. v. Charest, 602 F.2d 1015 (1st Cir. 1979), for the proposition that an affidavit must include separate information establishing a "nexus" between the actual crime and the cell phone (beyond asserting that the individual possessed the phone at the time of a murder, probable cause to believe he committed the murder, and an extensive explanation of the data sought and how it may be necessary to the case).

¹ Contrary to the defense's assertions, seeking great amounts of information about a person who has been charged and arrested based on probable cause for murder is not a nefarious governmental overreach; it is the proper investigation of a serious case. Humorously, it is typically the position of the defense in a criminal trial that this attention to detail is lacking and the police failed to obtain information that was readily available to them. The phrase "fishing expedition" is often used in legal circles to describe pre-textual searches which lack probable cause, searches based on hunches, gut feelings, and speculation. The phrase does not apply to a case where probable cause is clearly established that a specific individual committed murder. In that case, the proper investigation of all potential facts and circumstances surrounding the incident, every potentially relevant evidentiary lead, should be applauded.

In Charest, the defense made a similar assertion in regard to a residence. In that case, there was probable cause to believe the defendant had committed a shooting and the police, based merely on that, obtained a warrant for his home, which was not the scene of the crime. The government argued that it was a perfectly reasonable, commonly held, belief that people often hide evidence in their homes. The defense disagreed, arguing, as in this case, that the warrant must establish some special nexus connecting the suspects abode to the actual crime, e.g. an witness who saw the defendant run directly from the crime to his home.

The relevant portion of Charest reads as follows:

"Common sense tells us that it is unlikely that a murderer would hide in his own home a gun used to shoot someone. If defendant shot [the victim], as the affidavit states, one of the first things he would do would be to get rid of the gun. The handgun could easily have been disposed of permanently within a short time after the crime. It is not reasonable to infer that defendant . . . casually placed a weapon which had fired more than one bullet into a man on the shelf in his bedroom closet. Ballistics is not only an accurate science, it is also well-known. We have been unable to find any case in which a search warrant was issued for a person's home on the sole basis that a handgun had been used by that person in the commission of the type of crime where the bullets used could be traced to the gun."

Charest, 602 F.2d at 1017.

While the holding of Charest arguably by analogy supports the defense's position in this case, what the defense fails to inform the Court is that this specific holding of the First Circuit has been summarily rejected, and the exact opposite established as the controlling rule of law, by almost every court to address it, including our controlling Federal Circuit Court of Appeals. See, U.S. v. Anderson, 851 F.2d 727, 729 (4th Cir. 1988) (specifically rejecting Charest and holding "It was reasonable for the magistrate to believe that the defendant's gun . . . would be found in his residence."); U.S. v. Jacobs, 715 F.2d 1343, 1346 (9th Cir. 1983); U.S. v. Steeves, 525 F.2d 33, 38 (8th Cir. 1975); U.S. v. Rahn, 511 F.2d 290, 293 (10th Cir. 1975); Bastida v. Henderson, 487 F.2d 860, 863 (5th Cir. 1973); Yancey v. State, 44 S.W.3d 315 (Ark. 2001); State v. Pargas, 948 P.2d 267 (N.M. App. 1997); State v. Ward, 712 A.2d 534 (Md. 1998); State v. Faragi, 498 A.2d 723 (N.H. 1985); State v. Gathers, 553 N.W.2d 569, 574 (Iowa 1996); State v. Town, 615 A.2d 484, 489 (Vt. 1992); *contra*; U.S. v. Lockett, 674 F.2d 843, 846 (11th Cir. 1979).

The controlling authority in this jurisdiction, as well as nearly every court ever to address Charest or similar arguments, has rejected this holding and held that it is reasonable, when making the common-sense determination of probable cause, for a magistrate to use his common sense in determining whether or not a nexus exists between the place searched and the items sought.

The use of common sense logic by a magistrate in determining probable cause is an interesting subject, but again, not even necessary here. The search warrant clearly outlines the probable cause to believe the defendant committed a major crime, probable cause to believe that he was using a certain cell phone number at the time of the murder, and probable cause to believe that the Verizon cell phone company had possession of evidence that was relevant to that crime. Far from a close issue, the State is hard pressed to come up with a sentence or phrase that can be added to this warrant that is not already there to satisfy what the defense seeks.

[Court's indulgence, but I'll have to summarize my further arguments due to time restraints]

2. No Good Deed Goes Unpunished.

Obtaining cell phone data, such as the defense seeks to presently suppress, without a search warrant is currently a very hot legal topic. Because cell phone data is in the possession of a third party (the phone company), the traditional view is that no warrant is required to obtain it. When an individual willingly gives information to a third party, it is traditionally not an infringement of Constitutional rights for that third party to willingly give it to law enforcement. For example, imagine a guy confessing to a crime to his best friend, who promises to never tell anyone, at a bar over drinks. If the police later approach that friend and he tells them of the confession, the defendant of course has no valid constitutional objection to this evidence. He should have known the risks of sharing that information from the get go, regardless of promises of secrecy. This has long been the general approach of our law to these issues as they apply to business records with companies citizens willingly deal with.

See, e.g., U.S. Supreme Court, Smith v. Maryland, 442 U.S. 735 (1979), dealing with phone records in possession of the phone company and whether a warrant was required:

"This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties. [internal citations] In Miller, for example, the Court held that a bank depositor has no 'legitimate expectation of privacy in financial information voluntarily conveyed to banks and exposed to their employees in the ordinary course of business.' 'The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government . . . This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.'"

To be candid, the vast improvements in technology, particularly cell phones, over the last decades have led to a nationwide rethinking of sorts of this issue. Many States have approached this issue in regard to cell phones statutorily, but interestingly, almost all merely require a showing, sometimes a mere assertion by law enforcement in writing, that the records are "relevant to the investigation" and do not require a full blown probable cause search warrant application to a magistrate. Even South Carolina, addressing the rather antiquated use of "pen registers" and "trap and trace devices" on phones, merely statutorily requires a showing that the phone information is "relevant to an ongoing criminal investigation being conducted by that agency, and that the applicant has probable cause to believe that a user of the service to which the pen register or trap and trace device is applied is a participant in the criminal activity being investigated." S.C. Code § 17-29-30. The federal government also has statutory guidelines for obtaining these records that fall far short of the search warrant probable cause standard. A small minority of State's have found that under their own State Constitutions' privacy protections, search warrants for cell phone records are required to actively track (as opposed to historical data) a person. See, e.g. People v. Weaver (New York).

The reason various states and the U.S. Congress have addressed the public's privacy concerns in cell phone records by statute (or, rarely, State Constitutional doctrine) is because U.S. Courts have thus far failed to grant a Constitutional Fourth Amendment protections in phone records that are in possession of a third party, holding specifically that there is no reasonable expectation of privacy in the records. In fact, as recently as 2012, in United States v. Jones, 132 S.Ct. 949 (2012), the U.S. Supreme Court once again disappointed privacy advocates by failing to recognize a Fourth Amendment expectation of privacy in GPS tracking, instead deciding the case on other grounds.

As applies to the present case, the State's position is simple. In consulting with local law enforcement, the Ninth Circuit Solicitor's Office (and Charleston Police Department leadership) advise going beyond what is minimally required. As a caution and perhaps in consideration of changing privacy attitudes, we often advise obtaining search warrants even when arguments exist that they are not necessary. Though the application to the present matter is ironic, obtaining search warrants when arguably unnecessary is advised to make things easier at trial, to remove complex Constitutional arguments and proceed with investigations on more solid legal footing. In this case, the police obtained search warrants, signed by a neutral magistrate, to seek records they very well might not have even required warrants for. Most cell phone companies will routinely provide this type of information with a mere subpoena, some with merely a written request from law enforcement.

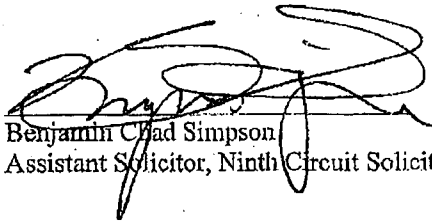
The State hopes this irony is not lost on the Court. The officers in this case likely did not even need to obtain a search warrant for these records. But because they went above and beyond and protected the defendant's arguable right to privacy in these

records, we are now challenged that the search warrant lacks some specific assertion that the phone was used during the crime.²

3. U.S. v. Leon, Good Faith Exception

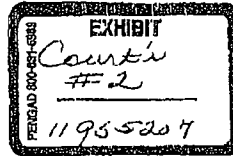
The purpose of the exclusionary rule is to deter police misconduct. Accordingly, the harsh punishment of excluding relevant evidence should only apply to cases where there has been documented police misconduct or negligence. Since exclusion of evidence has no deterring affect, then a law enforcement officer acts upon a lawfully obtained search warrant, signed by a magistrate, and no accusations are made of willful misconduct or gross negligence, the evidence should not be excluded if the officer acted in good faith. U.S. v. Leon, 468 U.S. 897 (1984). In the present case, this officer arguably went above legal requirements in obtaining these warrants. He presented a detailed and thorough affidavit as well as briefed the magistrate on the case. His work in regard to obtaining these records was above that required and certainly not misconduct. Should the court determine first that a warrant was required and second that this warrant was insufficient, we would ask that the evidence nevertheless be admitted under the good faith exception to the exclusionary rule.

Respectfully Submitted,



Benjamin Chad Simpson
Assistant Solicitor, Ninth Circuit Solicitor's Office

² For the Courts consideration, there is ample evidence in this trial, including video and the statement of the defendant himself that this phone was, in fact, used at time of this crime. The warrant application also specifically states - "Devin's family members provided investigators with his cell phone number."



see again

- Interrogation pieces w/ Devin
previously shown

~~on driving in and leaving~~

- define murder again

if the other individual
pulled the trigger can the defendant
still be guilty?

- texts 11:42 a.m. - 9:34 p.m. -> please see
power of attorney shown by
the State

Anthony Paul

MURDER CHARGE

Section 16-3-10 of the South Carolina code defines "murder" as the "killing of any person with malice aforethought either expressed or implied."

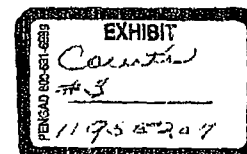
The state must prove beyond a reasonable doubt that the defendant killed another person with malice aforethought.

Malice is hatred, ill-will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with intent to inflict an injury or under circumstances that the law will infer an evil intent. "Malice" indicates a formed purpose and design to do a wrongful act under circumstances that exclude any legal right to do it.

Further, there must be malice aforethought, which means that the malice must have been conceived in the mind of the defendant prior to the act producing the fatal result. The word aforethought is usually understood to refer to the time when the evil is conceived. The law does not require that the malice must exist for any appreciable length of time before the commission of the act. It may be conceived at the very moment the action is taken which results in the death of another. Therefore, there must be a combination of the previous evil intent and the act.

Malice aforethought may be express or inferred. These terms, "express" and "inferred" do not mean different kinds of malice but merely the manner in which malice may be shown to exist. That is either by direct evidence or by inference from the facts and circumstances which are proved. Express malice is shown when a person speaks words which express hatred or ill will for another or when the person prepared beforehand to do the act which was later accomplished.

Malice may be inferred from conduct showing a total disregard for human life. Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a



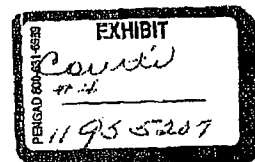
deadly weapon. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case. A pistol is a deadly weapon. If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you find it should receive. You as jurors are free to accept or reject this permissive inference depending on your view of the facts. If malice is present in the mind of the one doing the killing any length of time before the act, then its presence would be sufficient to render the killing murder.

Hand of one

If a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. A person who joins with another to accomplish an illegal purpose is criminally responsible for everything done by the other person which occurs as a natural consequence of the acts done in carrying out the common plan and purpose. If two or more people are together, acting together, assisting each other in committing the offense, the act of one is the act of all or, as it is sometimes said, "the hand of one is the hand of all".

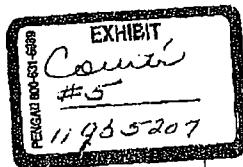
Prior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of that crime. Mere knowledge that another person is going to commit a crime, even if the defendant is present when the crime is committed, is not sufficient to convict the defendant as a principal. Guilt as a principal is shown by actual or constructive presence at the scene as a result of prior arrangement. Therefore, a finding of a prior arranged plan or common scheme is necessary for a finding of guilt as a principal. The state must prove beyond a reasonable doubt by competent evidence the theory of the hand of one is the hand of all.

A principal in a crime is one who either actually commits the crime or who is present aiding, abetting, or assisting in committing the crime. When a person does an act in the presence of and with the assistance of



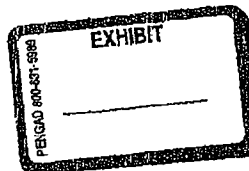
another, the act is done by both. Where two or more, acting with a common plan or intent, are present at the commission of a crime, it does not matter who actually commits the crime. All are guilty.

Present at the commission of a crime means to be sufficiently near to aid and abet and assist in the commission of the crime. However, mere presence at the scene of a crime is not sufficient to convict one as a principal on the theory of aiding and abetting. Intent is also a necessary element, for there must have been a common design or intent to commit the crime and the crime must have been committed pursuant thereto with the person aiding and abetting by some overt act. Intent means intending the result which actually occurs; not accidentally or involuntary. Intent may be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent. The state must prove these elements beyond a reasonable doubt.



We would like to take a
break until tomorrow
morning at 9:30 am after
we have had a chance to get
some rest. Is this possible?

Ashley Elizabeth Bus





Were we told who the
803.837.2475 ph #
belonged to in the states
exhibit #57. The call was
made at 22:37 (10:37pm)?
If we were, whose
ph # is it?

Ashley Elise Hall

WITNESSES

Charleston City Police Department

AGENCY CASE NUMBER

1109420

ARREST WARRANT NUMBER

M640238

DATE OF ARREST

June 11, 2011

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date:

SEP 12 2011

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2011GS1005207

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

September Term 2011

THE STATE

vs.

DEVIN JAMEL JOHNSON

DOB: [REDACTED]

B/M

Indictment for

Murder

FILED

9/28/2011 9:23:34 AM
JULIE J. ARMSTRONG
CLERK OF COURT

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S. & F.C.
By [Signature]
DEPUTY CLERK

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

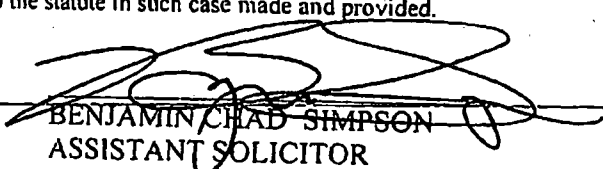
INDICTMENT

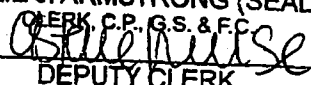
At a Court of General Sessions, convened on September 12, 2011 the Grand Jurors of Charleston County present upon their oath:

Murder

That in Charleston County on or about June 8, 2011, with malice aforethought, DEVIN JAMEL JOHNSON did kill and murder Akeem Smalls by means of a 9MM caliber handgun, and that Akeem Smalls did die in Charleston County as a proximate result thereof on June 8, 2011; in violation of Section 16-3-10 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


BENJAMIN CHAD SIMPSON
ASSISTANT SOLICITOR

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S. & F.C.
By 
DEPUTY CLERK

STATE OF SOUTH CAROLINA

COUNTY OF Charleston
 STATE VS.
Devin Jamel Johnson
 AKA:
 Race: BLACK Sex: M Age: 30
 DOB: [REDACTED] SS#: [REDACTED]
 Address: [REDACTED]
 City, State, Zip: Orangeburg, SC 29115
 DL#: [REDACTED] SID#: SC01360453

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐
 In disposition of the said indictment comes now the Defendant who was
 TO: Murder

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS1005207
 A/W#: M640238
 Date of Offense: 6/8/2011
 S.C. Code § : 16-03-0010, 0020
 CDR Code #: 0116

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
 w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)
 The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: [Signature] 71257
Simpson, Benjamin Chad SC Bar# [REDACTED] Defendant Attorney for Defendant SC Bar# [REDACTED]

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 36 days/months/years or ☐ under the Youthful Offender Act not to exceed years
 and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
 of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
 by the State Department of Corrections. Credit for time served since June 11, 2011
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP
 Total: \$ plus 20% fee: \$
 Payment Terms:
☐ Set by SCDPPPS

Recipient:

*Fine: \$
 § 14-1-206 (Assessments 107.5 %) \$
 § 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00
 § 14-1-211(A)(2) (DUI Surcharge) \$100 \$
 § 56-5-2995 (DUI Assessment) \$12 \$
 § 56-1-286 (DUI Breath Test) \$25 \$
 Proviso 47.9 (Public Def/Prob) \$500 \$
 § 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00
 § 14-1-213 (Drug Court Surcharge) \$150 \$
 § 50-21-114(BUI Breath Test Fee) \$50 \$
 § 56-5-2942(J) (Vehicle Assessment) \$40/ea \$
 Proviso 90.5 (SCCA Surcharge) \$5 \$ 5.00
 3% to County (if paid in installments) \$ 3.90
 TOTAL \$ 133.90

 days/hours Public Service Employment
 Obtain GED ☐
 Attend Voc. Rehab. or Job Corp.
 May serve W/E beginning
 Substance Abuse Counseling ☐
 Random Drug/Alcohol testing ☐
 Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ beginning
 \$ paid to Public Defender Fund
 Other:

☐ Appointed PD or appointed other counsel,
 § 47.12 requires \$500 be paid to Clerk
 during probation.

Clerk of Court/ Deputy Clerk [Signature]
 Court Reporter: Deb Garrison
 SCCA/217 (03/2011)

Presiding Judge [Signature]
 Judge Code: 2060
 ATTEST: A TRUE COPY 4/3/14
 JULIE J. ARMSTRONG (SEAL)
 CLERK, C.P. (G.S. & F.C.)
 By [Signature]
 DEPUTY CLERK

WITNESSES

Charleston City Police Department

AGENCY CASE NUMBER

1109420

ARREST WARRANT NUMBER

M640239

DATE OF ARREST

June 11, 2011

ACTION OF GRAND JURY

TRUE BILLForeperson of Grand Jury
Date:

SEP 12 2011

VERDICT

Foreperson of Petit Jury

Date:

INDICT

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

September Term 2011

THE STATE

vs.

DEVIN JAMEL JOHNSON

DOB: [REDACTED]

B/M

Indictment for

Possession of a Firearm during the
Commission of a Violent CrimeATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S. & F.C.
By [Signature]
DEPUTY CLERK

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

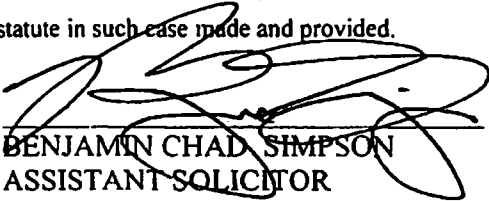
INDICTMENT

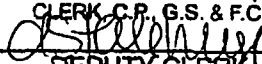
At a Court of General Sessions, convened on September 12, 2011 the Grand Jurors of Charleston County present upon their oath:

Possession of a Firearm during the Commission of a Violent Crime

That in Charleston County, South Carolina, on or about June 8, 2011, the Defendant, DEVIN JAMEL JOHNSON, did possess a 9MM caliber handgun or visibly display what appeared to be a knife during the commission, or attempted commission, of murder, a violent crime. This is in violation of 16-23-490 of the South Carolina Code of Laws, (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


BENJAMIN CHAD SIMPSON
ASSISTANT SOLICITOR

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S. & F.C.
By 
DEPUTY CLERK

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

699

COUNTY OF Charleston
 STATE VS.
Devin Jamel Johnson

AKA:

Race: BLACK Sex: M Age: 30DOB: [REDACTED] SS#: [REDACTED]Address: [REDACTED]City, State, Zip: Orangeburg, SC 29115DL#: [REDACTED] SID#: SC01360453*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
 TO: Possession of a Firearm or Knife During Commission of a Violent Crime

INDICTMENT/CASE#: 2011GS1005208A/W#: M640239Date of Offense: 6/8/2011S.C. Code § : 16-23-0490CDR Code #: 0549

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSin violation of § 16-23-0490 of the S.C. Code of Laws, bearing CDR Code # 0549

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST

[Signature]
Simpson, Benjamin Chad71a57
SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
 by the State Department of Corrections. Since June 11, 2011

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ <u>5.00</u>
3% to County (if paid in installments)	\$	\$ <u>3.90</u>
TOTAL	\$	\$ <u>133.90</u>

PTUP _____

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel,
 § 47.12 requires \$500 be paid to Clerk
 during probation.

Clerk of Court/ Deputy Clerk

Court Reporter: Deb Garrison

SCCA/217 (03/2011)

Presiding Judge

Judge Code: 2060ATTEST: TRUE COPY 4/2/14

JULIE L ARMSTRONG (SEAL)

CLERK, C.P. GS & FC

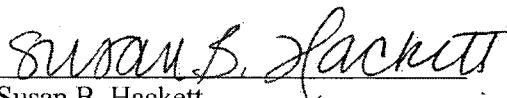
By [Signature]

DEPUTY CLERK

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

September 23rd, 2015



Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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ATTORNEY FOR APPELLANT

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