STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		**SUPERIOR COURT**
	(Filed – September 4, 2012)	
STATE OF RHODE ISLAND	**:**	
	:	
V.	**:**	**C.A. NO.: P1-10-1155A**
	:	
MICHAEL PATINO	**:**	

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 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 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 deliberately false or made in reckless disregard of the truth so as to entitle him to a Franks hearing subject 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

[1] The witnesses who testified in connection with 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.

odds with this chronology, it will address them later in this Decision in its analysis of the issues presented.

On the morning of October 4, 2009, at approximately 6:08 a.m.,[2] Trisha Oliver placed a frantic 911 call[3] 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 arrived at the hospital with Marco before 6:30 a.m. See St.'s Ex. 6.

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.

[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).

Upon entering the apartment, Sgt. Kite observed a male, later identified 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.

After the quick tour of the apartment, Sgt. Kite returned with Trisha Oliver to the entrance of the apartment. Officer Carroll transported her to the 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

[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.

[5] It 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

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 phone[8] on the dining room table; a black T-Mobile Sidekick cell phone[9] on the back headrest of the couch, near where Mr. Patino was sitting; and an iPhone on the far armrest of the couch.[10]

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 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

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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, 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.

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 landline 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 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.

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

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.

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 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 Jazyln 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, "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.

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

[12] Prior to and throughout this hearing, there were blatant inconsistencies in the evidence about which cell phones were seized from the apartment. Sgt. Kite testified that the cell phone that was missing after Defendant's departure from the apartment was a Metro PCS 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.

[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 that morning.

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, 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]

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.

[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.

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] See St.'s Ex. 68.[17] By 8:40 a.m., Defendant had signed and waived his Miranda rights. See St.'s Ex. 65 & 66.

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 Trisha Oliver and Marco, though 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

[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.

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 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 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 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 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 unconcerned 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 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, 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, 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 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 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. [18] 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 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 Nieves right shoulder and also determined Nieves was suffering from brain trauma which he classified as suspicious.

[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.

Id.

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 signed all of the affidavits in support of these warrants.

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

[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.

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 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 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 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 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 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.

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

[22] A number known to be the cell phone number of Defendant's mother is listed in the Metro PCS phone 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.

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 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 18-2703-D. 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 18-2703-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.

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

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

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 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 18-2703-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-*

[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.

Mobile number 401-699-7580."[25] 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, 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 18-2703-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.

Interestingly enough, the cell phone associated with this warrant affidavit is also a T-Mobile cell phone. T-Mobile Law Enforcement Group produced the records sought by this warrant on October 20, 2009. See St.'s Ex. 52 & 41.[26] 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.

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

[25] The change to this sentence is highlighted with italics.
[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.

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 18-2703-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.

St.'s Ex. 42.

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 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 18-2703-D." The warrant sought: "subscriber information, cell site information, saved/stored text messaging, and voice mail records between 0001

[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.

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

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.

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 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 warrant[30] 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 18-2703-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

[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.

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 Angie 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 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.

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 (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[32] on Cox Communication Keeper of Records again at the location of Sprint/Nextel Keeper of Records, and it allowed 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.

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.

[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 Sgt. Gates in response. St.'s Ex. 54.

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 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.

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 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

[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.

> 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 following 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 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 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 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 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 Childen'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). 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 eearly [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 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 Sergeant 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 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 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. Sometimtime [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 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, 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 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

[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.

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 'Marco, I'm going to fuckin' punch you in your fuckin' head,' just like that." Id.

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 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 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. 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 disgorging 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 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 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) 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 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 counterpoint in the Rhode Island Constitution.

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 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

[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.

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, 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, (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 (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) (dealing with a right to privacy in the contents of e-mails); State v. Smith, 920 N.E.2d 949, 954 (Ohio 2009) (discussing an expectation of privacy in text messages); State v. Clampitt, 364 S.W.3d 605 (Mo. Ct. App. 2012) (discussing text messages obtained from a service provider through investigative subpoenas); State v. Hinton, 2012 WL 2401673 (Wash. App. Div. June 26, 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 (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 2629-30 (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 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 (1928) (holding that the Fourth Amendment does not protect private telephone conversations), overruled by Katz v. U.S., 389 U.S. 347, 353 (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 unchartered 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].[39] 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,

[39] http://pewinternet.org/Reports/2011/Cell-Phone-Texting-2011.aspx

1133-1135 (2011/2012) (detailing the invention and development of cell phones) [hereinafter Mireille Dee, Getting Back to the Fourth Amendment].

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 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 (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 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]

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 of opportunity to access this data. See generally Markey Congressional Inquiry; 2011 R.I. S.B. 3074 (NS), Rhode

[40]http://www.macworld.com/article/1162844/atandt_sprint_and_verizon_the_plans_compared.html.

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

[42] 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 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).

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.

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 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) (dealing with wiretaps).[45] As a

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[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 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 infamous 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 1, 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

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).

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 (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 (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 (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 . . . 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

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individual's conversations only 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.

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 (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 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.

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.; 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

[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 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.

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 (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 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 facts 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 (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, 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)"). 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, 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, 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 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, 406 A.2d 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). 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) ("[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 (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 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 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 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 (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 (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 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, 920 N.E.2d 949, 954 (Ohio 2009) (rejecting container analogy as applied to cell phones); see also Mireille Dee, 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 Dee, Getting Back to the Fourth Amendment at 1159. As the Ohio Supreme Court has stated, in declining to analogize cell phones to containers, "[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 expectation of privacy in the at-issue text messages stored within that phone. See Katz v. U.S., 389 U.S. 347 (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 (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 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 then 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 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 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 "Workaround"

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 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 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 —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 determine 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 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.

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 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,

[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.

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 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 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 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 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; 529 F.3d 892, 906-907. In doing so, however, it is particularly telling that the Supreme

[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.

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 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.

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 (1979).

Upon 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 (1972) (recognizing one of the Fourth Amendment's purposes as being to protect private communications).

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 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

[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 (1966).

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. 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 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, 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.

(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.

[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 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).

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 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 (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.

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, 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.

[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.

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." 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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[53] http://www.abajournal.com/magazine/article/the_data_question_should_the_third-party_records_doctrine_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 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. Huie, 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 (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 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

[55] http://latimesblogs.latimes.com/technology/2009/05/invented-text-messaging.html.

(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. Warshak, 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 will be released to other persons for other purposes." Smith v. Maryland, 442 U.S. at 749 (Marshall, J., dissenting).

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 (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 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 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. 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 possible 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 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. Clampitt, 364 S.W.3d 605, 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 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" information—is not protected. See U.S. v. Jacobsen, 466 U.S. 109, 114 (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 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 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

[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.

iPhone Messages.[57] Cell phone service providers also keep track of text messages that are both sent and 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.

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, 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.

[57] http://www.apple.com/iphone/built-in-apps/messages.html

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 (1980) (holding that, absent some exigency, law enforcement must obtain a warrant in order to open sealed packages 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 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 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 inquires, well-wishes, and quips—are abundant. Additionally, with the general advancement of text messaging capability, text messaging 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, 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

[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.

"many, if not all, mobile phone owners are in immediate possession of their phones at all times." Id.

Expectation of privacy law for oral communications can be separated into two directional areas: face-to-face conversations and phone conversations. Regarding phone 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 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 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, 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 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 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. 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 that could be any more private or worthy of protection from

[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.

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 (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 (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 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).

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 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]

3

The Illegality of the Search

Having established that Defendant has a reasonable expectation of privacy in 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 (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 (1971) (pertaining to plain view) ("It is well established

[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.

that under certain circumstances the police may seize evidence in plain view without a warrant."); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (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 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,

(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 (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, 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.

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therefore, will not address the warrant exception 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.

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 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 to discredit his story.[62]

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, 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 officers so as to justify its seizure under 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

[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.

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 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 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)

Plain 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, 396 U.S. 128, 136 (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 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 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 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 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

[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

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).

In addition, there is no evidence that the Defendant consented to the police 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 (2011) ("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

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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.

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 (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 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 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 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 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 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 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 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.

As this focus on the cell phones advanced, the abysmal handling of the evidence

[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 this cell phone undoubtedly would have been heightened if they already knew it contained the subject text messages.

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 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 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 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 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 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 and 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 and arguments at the suppression hearing on a cell phone other than one tied to the Defendant.[65]

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

[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.

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 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 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 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 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 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 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.

(1)

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 (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 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 (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 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, 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. 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 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 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 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 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." 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 circumstances 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]

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 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

[66] Remote deletion 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).

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 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 would have had any opportunity to engage in the remote deletion of the text messages, even were it to

[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.

have been possible and the idea of it to have occurred to them.

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 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 (1963); State v. Burns, 431 A.2d 1199, 1205 (R.I. 1981)). The underlying prophylactic purpose of the exclusionary rule is "to deter law enforcement officers from violating a defendant's rights." State v. Huy, 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 (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.'"[68] 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 poisonous tree thus may be direct or indirect, tangible or non-tangible— the form of the evidence is irrelevant. See

[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. LaFave, 6 Search & Seizure § 11.4 (4th ed.).

id.

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 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 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 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.[69] 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, 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

[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 for any other reason than Sgt. Kite's illegal viewing of the text messages on the LG cell phone.

be in plain view.

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 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 poisonous 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, 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 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 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 (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 (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 (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 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 that he was Mirandized, is sufficient to dissipate 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 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 knew 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 (1984) (holding that evidence obtained

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 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 interview 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 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

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when an officer relied in good faith upon a facially valid warrant is admissible even if the warrant is later invalidated).

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 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 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 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]

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 (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

[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 software (St.'s Ex. 32), following an additional warrant obtained on June 8, 2012 (St.'s Ex. 57). The Cellebrite software allows 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.

independent source, free of any taint from the illegality.[72]

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 to assist them in securing warrants—further evidence of the continuing taint in its criminal investigation. Specifically, this Court emphasizes 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

[72] This Court will address warrants as a potential independent source in more detail subsequently.

poisonous tree. The affidavit for the warrant, signed by Det. Cardone, contains the same language based on Sgt. Kite's illegal search as the other warrants, tainting the warrant as well.[73]

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 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

[73] This Court will address this warrant for the T-Mobile cell phone in more detail subsequently.

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.[74] 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.

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 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

[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 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).

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, 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 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 pursuant to that warrant are subject to exclusion as fruits of the poisonous tree.

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

[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.

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 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.

(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

[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 (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 also serve to cast additional doubt on the already-questionable validity of the warrants.

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 (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 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 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 (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 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] 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. 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. LaFave 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. LaFave, 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 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."[77] Barkmeyer, 949 A.2d at 998.

[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 would have been searched soon); State v.

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").

(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 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

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> 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).

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 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 (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 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 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 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. 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 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 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 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 precluded—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 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 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 confession was sufficiently removed from the taint of his unlawful arrest because of the intervening circumstance of having been released on his own recognizance

[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.

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.

(c)

The October 28, 2009 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 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 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.").

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

[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 affidavit after the tainted content is removed).

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 (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 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 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 independent 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 asked what had happened to her son, and Patino told her that he went to hit him and

[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 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.

> 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.

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 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,[82] 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 report for the LG cell phone produced pursuant to it is admissible under the independent source exception.

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

[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.

Oliver's statement to the detectives was independent of the taint from Sgt. Kite's illegal search. Additionally, 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 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.[83] 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.[84] 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 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.[85] To the contrary, she did

[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 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

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.

For Trisha Oliver's statements to be considered an independent source, this Court emphasizes that the State would need to have demonstrated, by a 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 LG 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.

Moreover, this Court further observes that the actions of the Cranston Police

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example of the kind of statement that could be addressed in a Franks hearing, had Defendant raised the issue.

[86] For example, the first incriminating 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).

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. 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 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 report was necessary to verify that the LG cell phone belonged to, and was primarily used by, Trisha Oliver.[87] 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-

[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.

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 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.

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[88] 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

[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.

independent source. Further, the Court believes that permitting the text message evidence 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.

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 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.

Olmstead v. U.S., 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). The allowance of such a reparative warrant would undermine the Fourth Amendment to a debilitative 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 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 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. Kite'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 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.

The United States Supreme Court explicated the concept of the re-seizure of tangible evidence in Murray:

> It seems to us . . . that reseizure 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, 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*

[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.

> *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 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 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 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)[91]; and (18) Defendant's confession for the death of Marco Nieves (St.'s Ex. 67).

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 mandated under the federal Constitution.[92] See Pa. Bd. of Probation and Parole v. Scott, 524 U.S. 357, 362-63 (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 (2011) (quoting Herring v. U.S., 555 U.S. 135, 143 (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.

In the instant case, the high cost to the State, should the tainted evidence be

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[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).

[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 (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 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.

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 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 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 (1964) ("[G]ood faith on the part of the [officer] is not 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 (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 Amendment. The requirements of the Fourth Amendment are not to be set aside so easily. See Arizona v. Gant, 556 U.S. 332, 349 (2009) (quoting Mincey v. Arizona, 437 U.S. 385, 393 (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 (1927); Lustig v. U.S., 338 U.S. 74, 80 (1949). See also Olmstead v. U.S., 277 U.S. 438, 482-83, (1928) (Brandeis, J., dissenting), overruled by Katz, 389 U.S. 347; and Berger v. New York, 388 U.S. 41 (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 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 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

[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 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.

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.

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, 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 of the Constitution," by permitting the illegally obtained evidence to be admitted at trial. Weeks v. U.S., 232 U.S. 383, 394 (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 (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 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 1265, 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, 405 N.E.2d 188, 192 (N.Y. 1980)). One of the methods of interrogation which courts 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., Lynumn v. Illinois, 372 U.S. 528, 534 (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 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. 68). 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 Lynumn, 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 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 condition 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 Schneckcloth v. Bustamonte, 412 U.S. 218, 226 (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 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 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

[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 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.

underscores both the troubling aspects of the Detectives' behavior during the interrogation and the Defendant's lack of understanding and generally tractable behavior.

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 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 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 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

(1978); State v. DeMagistris, 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 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 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 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 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 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. Chesher, 678 F.2d 1353 (9th Cir.

[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.

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).

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]

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,[98] 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

[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 suggested that Defendant did not have standing to contest any of the challenged warrants for purposes of his suppression motions.

[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)

the events surrounding his search of the LG cell phone. This Court thus finds that Defendant's offerings as to the potential falsity of statements surrounding Sergeant Kite's interactions with the LG cell phone to be more than conclusory.

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 affidavits 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 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

[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.

affidavits, Sgt. Gates, testified that he was unaware of which phone was seized at the Cranston Police Department headquarters.

This Court finds troubling the inconsistencies and uncertainties surrounding where each cell 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 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

[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)

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 the LG cell phone.

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 486-5573, 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 strike[102] starts on a somewhat different footing. 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 attributed 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.

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: 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

[102] This statement is included verbatim in every challenged warrant except for the June 8, 2012 warrant. (St.'s Ex. 57)

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, 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, 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 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 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 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 Trisha Oliver's apartment provided by Cox Communications (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.