COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. **SUPERIOR COURT DEPARTMENT**
NO. 2282-CR-00117

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

DEFENDANT KAREN READ'S OPPOSITION TO JENNIFER MCCABE'S MOTION TO QUASH SUBPOENA[1]

Now comes the defendant, Karen Read ("Ms. Read", or "the Defendant"), and respectfully moves this Honorable Court to deny Jennifer McCabe's Motion to Quash the subpoena compelling her to provide testimony during the May 25, 2023 evidentiary hearing regarding Ms. Read's "Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T". As grounds for this motion, Ms. Read states that the subpoena is authorized by relevant statutes, Massachusetts Rule of Criminal Procedure 17(a)(1), and the common law. Further, the subpoena is not unreasonable or oppressive, nor is it being used to subvert the provisions of Mass. R. Crim. P. 14.

FACTUAL AND PROCEDURAL BACKGROUND

On April 12, 2023, Ms. Read filed her "Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T." This motion seeks the following documentary evidence:

1. The production of all cell phone(s) in the possession of and/or used by Brian Albert between January 28, 2022, and present, so that defense expert Richard Green may conduct a forensic examination of the respective cell phone(s) for the purpose of recovering incoming and outgoing text messages, voice calls,

[1] The word summons "is synonymous with subpoena in our rules of criminal procedure." Com v. Odgren, 455 Mass. 171, 181 n. 20 (2009); *see* also Com v. Mitchell, 444 Mass. 786, 788 n. 4 (2005).

voicemails, emails, location data, web searches, photographs, and/or other communications sent and/or received by Brian Albert on any other messaging platforms between January 28, 2022 and February 5, 2022.

2. A copy of all information contained on any cloud-based accounts used to store the above-referenced information from Brian Albert's cell phone(s) between January 28, 2022 and February 5, 2022.

3. Any access codes and/or passwords necessary to access and/or forensically download the cell phones and/or cloud-based information.

Defendant's Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T[2], at p. 1-2. This motion was filed following forensic analysis of Ms. Jennifer McCabe's cell phone by defense expert, Richard Green ("Mr. Green"), which revealed that Ms. McCabe had searched "ho[w] long to die in cold" at 2:27 a.m. on January 29, 2022 — more than three hours before Officer John O'Keefe's body was discovered outside of Mr. Albert's residence at 34 Fairview Road in Canton, Massachusetts. In support of this motion, Ms. Read further noted that data from the Apple Health application on Officer O'Keefe's iPhone shows that he took 80 steps and climbed the equivalent of three floors, between 12:21:12 a.m. and 12:24:37 a.m. Given that Officer O'Keefe's cell phone "pinged" in the location of 34 Fairview Road at 12:19:33 a.m, Ms. Read asserted in her motion that this data confirms that Officer O'Keefe entered Mr. Albert's residence.

None of the above information had been provided or revealed by the Commonwealth. Specifically, Massachusetts State Police Trooper Nicholas Guarino's May 31, 2022 extraction report of Ms. McCabe's cell phone omits *all* web search history associated with her phone. As set forth in the "Affidavit of Richard Green"[3] in support of this motion, Mr. Green's analysis suggests that "there were significant deletions of call data by the user of Jennifer McCabe's iPhone 11." In fact, Ms. McCabe deleted 18 call entries between 5:33:47 a.m. and 8:50:15 a..m. on January 29, 2022. Saliently, Ms. McCabe deleted a 6:23:00 a.m. call to Mr. Albert, her brother-in-law, and deleted a screen shot of Mr. Albert's contact information at 12:53:23 p.m. That screenshot had been taken at 6:08:35 a.m. that morning.

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[2] The "Defendant's Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T" is incorporated herein by reference.

[3] "Affidavit of Richard Green in Support of Defendant's Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T" is incorporated herein by reference.

The above information was discovered by Ms. Read's defense team well after the September 19, 2022 denial of Ms. Read's initial Rule 17 Motion directed to Brian Albert, Julie Albert, Colin Albert, and Brian Higgins[4]. Upon discovering this exculpatory evidence, Ms. Read filed the above-mentioned "Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T." This new motion contains a trove of new information that was not available to the defense team when Ms. Read's initial Rule 17 motion was filed. This new motion is not a motion to reconsider the Court's September 19, 2022 ruling on the first Rule 17 Motion.

On May 1, 2023, the Commonwealth filed an opposition to the Defendant's April 12, 2023 "Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T" — only two days before Ms. Read's scheduled motion hearing. Additionally, the defense received for the first time (in the Commonwealth's Notice of Discovery XIV, Dated May 3, 2023) an April 24, 2023 report by Trooper Nicholas Guarino, asserting that Ms. McCabe did not search any form of "how long to die in cold[5]" until 6:23:51 a.m. on January 29, 2022.

Previously, on April 13, 2023, Attorney Elizabeth Little ("Attorney Little") emailed Assistant District Attorney Lally ("ADA Lally") in an effort to determine if the Commonwealth intended to dispute the accuracy of Mr. Green's findings with regard to Ms. McCabe's phone, which would necessitate an evidentiary hearing on this motion:

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[4] The Commonwealth provided a full forensic image of Ms. McCabe's phone in its February 8, 2023 Notice of Discovery VIII. This production followed numerous attempts and motions to compel this critical evidence.

[5] Per Trooper Guarino's report, Ms. McCabe searched "How long ti die in cikd" at 6:23:51AM, and "Hos long to die in cold" at 6:24:37AM.

Elizabeth Little

April 13, 2023 at 2:45 PM

Details

EL

Commonwealth v. Karen Read

To: Lally, Adam (DAA), Cc: Alan Jackson, David Yannetti, Ian Henchy

Siri found new contact info Elizabeth Little elittle@werksmanjackson.com add...

Dear Mr. Lally:

You should have received an electronic copy of our Rule 17 Motion and accompanying Affidavits and Exhibits yesterday. We also overnighted a hard copy in the mail for you. **Please provide confirmation in writing by tomorrow, Friday April 14, 2023, that you have provided notice to the record holders—namely, Brian Albert, Jennifer McCabe, Verizon, and AT&T—as required by law, indicating that our Motion will be heard on May 3, 2023 at 2:00 p.m. in Norfolk County Superior Court.**

According to various news outlets, your office has indicated that it will be responding to the Motion on or before May 3, 2023. Please confirm that to be true. Further, please advise as to whether you intend to dispute the validity of our expert's findings. If so, we will have our expert available to testify on May 3. Please bear in mind that our expert lives out of state and will be required to fly in for the hearing should it be necessary. As a professional courtesy, let us know as soon as possible if you believe that (1) you will be calling any witness or witnesses with regard to the data at issue; or (2) you plan to otherwise dispute the defense expert's findings such that it would necessitate an appearance in court.

Thanks,
Elizabeth

Elizabeth S. Little
Werksman Jackson & Quinn LLP
888 West Sixth Street, Fourth Floor
Los Angeles, CA 90017

ADA Lally responded the following day, on April 14, 2023:

Lally, Adam (NFK)

April 14, 2023 at 3:43 PM

Details

AL

RE: Commonwealth v. Karen Read

To: Elizabeth Little, Cc: Alan Jackson, David Yannetti & 2 more

Hello, yes, I did receive a copy, thank you very much! I sent notices to all involved partiers in the mail yesterday morning. I'm sorry, but I don't really pay any attention to any news outlets or press releases, but I certainly expect to have an answer by our next court date on 5/03. The information you had sent accompanying the motion is being reviewed and I should have an answer for you on those issues at some point next week. I will certainly let you know if the information is disputed and you are free to do whatever you like as far as witnesses are concerned. if it is a disputed issue, I would likely be looking to call witnesses of my own in regard to that. I'll certainly let you know as soon as possible, so both you and the Court can make whatever necessary accommodations to conduct an evidentiary hearing. Thanks, Adam

(Emphasis added). Attorney Little sent a follow-up email on April 19, 2023, requesting the names of any witnesses ADA Lally intended to call at the evidentiary hearing on this motion, and the specific information the Commonwealth intended to contest. Having received no reply, Attorney Little emailed ADA Lally again on April 25, 2023:

Elizabeth Little 4/25/23
RE: Commonwealth v. Karen Read Details
To: Lally, Adam (NFK) & 4 more

Dear Mr. Lally,

I am writing to follow up on the below. You indicated in your April 14 email that you would have an answer for us by last week. We still have not heard from you. Please advise.

Thank you,
Elizabeth

Elizabeth S. Little
Werksman Jackson & Quinn LLP
888 West Sixth Street, Fourth Floor

After receiving no reply, Attorney Alan Jackson ("Attorney Jackson") sent another follow-up email on April 26, 2023:

Alan Jackson 4/26/23
RE: Commonwealth v. Karen Read Details
To: Lally, Adam (NFK) & 5 more

Dear Adam,

Or office has now reached out to you twice (April 19 and April 25), having been ignored both times. You indicated in your email of April 14, that, "The information you had sent accompanying the motion is being reviewed and I should have an answer for you on those issues at some point next week. I will certainly let you know if the information is disputed..." Thus, we expected a response last week.

Can you please respond? Or if you have no intention of responding, please advise so we can deal with that in a timely manner. As you know, the May 3 hearing is quickly approaching.

Best,

ADA Lally responded on April 27, 2023:

Lally, Adam (NFK) 4/27/23 Hide AL

RE: Commonwealth v. Karen Read

To: Elizabeth Little,

Cc: Alan Jackson, David Yannetti, Ian Henchy, McLaughlin, Laura (NFK)

Hello – I do anticipate filing an opposition to both the Rule 17 seeking production of animal control records, as well as the Rule 17 seeking production of CDR's and Mr. Albert's phone. I do not have any objection to the CDR's being ordered, but do as it relates to Mr. Albert's phone. I hope to have those filed, along with attachments, with the Court and to you as well by this coming Monday at the latest. As far as your witness is concerned for the upcoming date of 5/03, obviously that's entirely up to you, the only caution I would provide in reference to that is the case is not scheduled for an evidentiary hearing, this Court typically conducts evidentiary hearings at 9am or some time in the morning session and typically does not entertain them in the afternoon sessions. As I said, whatever you choose to do on that front is entirely your decision, but I'd be remiss if I didn't mention that, given whatever time and expense to your witness and your client is concomitant with his appearance.

In light of that information, the parties opted to schedule an evidentiary hearing on the Rule 17 Motion on May 25, 2023. The Court reorganized its schedule to accommodate this request. The emails, supplemental police report, and opposition from the Commonwealth ultimately confirmed to the defense that an evidentiary hearing on this motion was necessary. Furthermore, in light of (1) the supplemental report received by Trooper Guarino; (2) the opposition filed by the Commonwealth; (3) ADA Lally stating on April 14, 2023, "if it is a disputed issue, I would likely be looking to call witnesses of my own . . ."; and (4) the Court scheduling the evidentiary hearing, the Defendant reasonably believed that both her defense team and the Commonwealth had agreed on the necessity for such a hearing, and that — at a minimum — both Trooper Guarino and Richard Green would provide testimony.

On May 22, 2023, three days prior to the scheduled evidentiary hearing, the defense received "Brian Albert's Motion to Quash the Subpoena of Defendant Karen Read", a "Motion

to Quash Subpoena" filed by Ms. McCabe's attorney, and — most surprisingly — the "Commonwealth's Opposition to Defendant's Request for an Evidentiary Hearing on Mass. R. Crim. P. 17."

LEGAL STANDARD

In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him . . . U.S. Const. Amend. VI. "We have recognized . . . that face-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person. *See* Coy, *supra*, 487 U.S., at 1019–1020 ('It is always more difficult to tell a lie about a person to his face than behind his back')." Maryland v. Craig, 497 U.S. 836, 846 (1990).

When properly called upon by subpoena or summons, all citizens have a public obligation to aid the judicial process by appearing in court and providing testimony to the best of their ability. Hurtado v. U.S., 410 U.S. 578 (1973). The obligation to appear when summonsed into court exists even if a privilege applies. Young, Pollets and Poreda, 19 Massachusetts Practice: Evidence § 500.0 (3d ed.) (providing an introductory note on privileges); Cypher, 30 Massachusetts Practice: Criminal Practice and Procedure §§ 29:18 to 29:21 (4th ed.)

The availability of summonses for compelling witnesses to appear in court at criminal trials is constitutionally required. Com. v. Blaikie, 375 Mass. 601, 608 n.3 (1978) (noting that the "Sixth Amendment's compulsory process clause, applicable to the States through the due process clause of the Fourteenth Amendment, governs not only the right to secure the presence of defense witnesses but also the defendant's right to have the testimony of these witnesses entered in evidence"). Washington v. Texas, 388 U.S. 14, 23 (1967).

ARGUMENT

I. M.G.L. c. 233 § 1, MASS. R. CRIM. P. 17(a)(1), AND THE COMMON LAW PROVIDE AUTHORITY FOR THE DEFENDANT TO SUMMONS WITNESSES FOR AN EVIDENTIARY HEARING WITHOUT THE NEED FOR PRIOR JUDICIAL APPROVAL

M.G.L. c. 233 § 1 states: "A clerk of a court of record, **a notary public or a justice of the peace may issue summonses for witnesses in all cases pending before courts**, magistrates, auditors, referees, arbitrators or other persons authorized to examine witnesses, and at all

hearings upon applications for complaints wherein a person may be charged with the commission of a crime; but a notary public or a justice of the peace shall not issue summonses for witnesses in criminal cases except upon request of the attorney general, district attorney or **other person who acts in the case in behalf of the commonwealth or of the defendant**. If the summons is issued at the request of the defendant that fact shall be stated therein. The summons shall be in the form heretofore adopted and commonly used, but may be altered from time to time like other writs." (Emphasis added) M.G.L. c. 233 § 1.

Mass. R. Crim P. 17(a)(1) provides the procedure for compelling the attendance of witnesses: "(a) Summons. (1) For Attendance of Witness; Form; Issuance. A summons shall be issued by the clerk **or any person so authorized by the General Laws**. It shall state the name of the court and the title, if any, of the proceeding and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein." (Emphasis added) Mass. R. Crim. P. 17(a)(1).

Mass. R. Crim. P. 17(a)(1) stands in contrast with Mass. R. Crim. P. 17(a)(2), which addresses the production of documentary evidence and objects. The assertion made in Ms. McCabe's Motion to Quash that "Rule 17 does not contemplate oral testimony let alone subpoenaing witnesses subject to unfettered cross examination by a hostile party"[6] is not correct; Mass. R. Crim. P. 17(a)(1) deals squarely with the ability of a defendant to summons a witness to testify. Ms. McCabe's memorandum conflates the provisions of Mass. R. Crim. P. 17(a)(1) with Mass. R. Crim. P. 17(a)(2). Footnote 12 of Commonwealth v. Mitchell notes that the Defendants need not obtain leave of the Court to issue a summons commanding a witness to appear at a hearing or trial:

> As the above discussion should make clear, the requirement that a judge must be satisfied that the *Lampron* standards are met before a summons issues is applicable only when the documents being sought must be produced *prior to trial.* **Rule 17(a)(1)** of the Massachusetts Rules of Criminal Procedure, 378 Mass. 885 (1979), **provides that for a summons to issue, by the clerk or any other person authorized by statute, commanding the presence of persons into court**, and, under rule 17(a)(2), prior permission need not be obtained for a summons to command a witness to produce "books, papers, documents, or other objects designated therein." **Nor is leave of the court independently required under G.L. c. 233, § 1, for a notary public or justice of the peace to issue a summons requested by a defendant, or a defendant's counsel, commanding a witness to appear at a hearing or trial**, and, inferentially, to bring into court documents that may be needed at that hearing or trial. The pronouncements in

[6] "Memorandum in Support of Motion to Quash Subpoena Served on Jennifer McCabe, Government Witness", at p. 2.

> *Lampron* were made in the context of a defendant seeking to compel the production of documents or records from a third party *prior to trial.*

(Emphasis added) Com. v. Mitchell, 444 Mass. 786, 791 n.12 (2005). This point is underscored and reiterated in Com v. Odgren, 455 Mass. 171 (2009):

> The earliest statutory authority for issuing criminal subpoenas—a precursor to G.L. c. 233, § 1—granted such power to justices of the peace. *See* St. 1783, c. 51, § 2 (justices of peace "authorized and impowered to grant subpoenas for witnesses in all criminal causes pending before" various courts). A subsequent version of that statute provided that, unless in connection with a "complaint brought before himself," a justice of the peace could issue a subpoena in a criminal case only at the "request" of a prosecutor or defendant for "witnesses to appear at any court ... to give evidence." St. 1791, c. 53.16 **Neither prosecutors nor defendants were statutorily required, however, to obtain leave from a justice of the peace, but merely had to "request" the issuance of a subpoena. The same is true today, under G.L. c. 233, § 1**. *See* Commonwealth v. Mitchell, 444 Mass. 786, 791–792 n. 12, (2005) . . .
>
> Rule 17 subpoenas. Rule 17(a)(1) and (2)—consistent with G.L. c. 233, § 1, and G.L. c. 277, § 68—**empower a court clerk or any person authorized by statute to issue a summons, without prior judicial approval, for a witness to "attend and give testimony"** and produce "books, papers, documents, or other objects" (collectively, records) **at a trial or evidentiary hearing**. *See* Commonwealth v. Mitchell, 444 Mass. at 791–792 n. 12; Lampron, *supra* at 270 (rule 17[a][2] authorizes issuance of summons "for a trial or evidentiary hearing"). *See also* 25 Moore's Federal Practice par. 617.02[1], at 617–6—617–7, and par. 617.08 [1], at 617–19 (3d ed. 2009) (under Fed. R. Crim. P. 17[a] and [c][1], subpoena may issue for witness's appearance, including records, "at any type of criminal proceeding in which evidence may be adduced," such as before grand jury, at trial, or at defendant's competency or detention hearing); K.M. Brinkman & G. Wiessenberger, Federal Criminal Procedure: Litigation Manual at 206 (2008) ("Rule 17 provides procedures for obtaining witness testimony and tangible evidence by subpoena for grand jury, trial, Rule 15 depositions [compare Mass. R. Crim. P. 35, 378 Mass. 906 (1979)], and pretrial and post-trial hearings such as preliminary examinations, suppression hearings, and sentencing hearings.

Com. v. Odgren, 455 Mass. 171, 178-181 (2009). Mass. R. Crim. P. 17 notes that "A summons shall be issued by . . . any person so authorized by the General Laws". Mass. R. Crim. P. 17(a)(1). When read together, Mass. R. Crim. P. 17(a)(1) and M.G.L. c. 233 § 1 provide unambiguous statutory authority for a defendant to issue a summons, compelling live testimony from a witness in a criminal case. The relevant case law is explicit that this process may be executed to compel live witness testimony for an evidentiary hearing. *See* Mitchell, 444 Mass. at 791-792, n. 12; Odgren, 455 Mass. 171 at 178-181.

Here, the Defendant has filed a motion pursuant to Mass. R. Crim. P. **17(a)(2)**, seeking production of "documentary evidence" or "objects" — i.e., Brian Albert's cell phone(s) and data

from the same. The Defendant has utilized the correct procedure in seeking this production under Mass. R. Crim. P. 17(a)(2) and the Lampron-Dwyer protocol. The obligation to appear when summonsed into court exists even if a privilege applies. Young, Pollets and Poreda, 19 Massachusetts Practice: Evidence § 500.0 (3d ed.) (providing an introductory note on privileges); Cypher, 30 Massachusetts Practice: Criminal Practice and Procedure §§ 29:18 to 29:21 (4th ed.) (discussing production of evidence in possession of third party prior to trial—claim of statutory privilege—the Dwyer protocol; forms). Generally, privileges are not self-executing. Com. v. Martin, 423 Mass. 496, 502-03 (1996). Thus, the obligation to appear exists, even in criminal cases where witnesses have a constitutional privilege not to testify. Pixley v. Com., 453 Mass. 827, 833-34 (2009); Com. v. Freeman, 442 Mass. 779, 784-85 (2004); Com. v. Harvey, 397 Mass. 351, 357 n.6 (1986). *See generally* § 13:2. Generally, 43A Mass. Prac., Trial Practice § 13:2 (3d ed.)

In seeking to satisfy the Lampron criteria, the Defendant has summonsed a number of witnesses under Mass. R. Crim. P. **17(a)(1)** and M.G.L. c. 233 § 1 to testify at the hearing on that motion, including Ms. McCabe. The Defendant concedes the obvious point that a subpoena for the documentary or tangible evidence sought, served directly upon Ms. McCabe, *would* have been improper and would have no legal effect. *See generally* Mass. R. Crim. P. 17(a)(2). That, however, is not at all what the Defendant did in this case. Instead, the Defendant has filed a proper Rule 17 motion with factual allegations that the Commonwealth is disputing. Given that factual dispute, both the Commonwealth and the Defendant are entitled to call witnesses to prove the facts alleged. It is in this context that the Defendant has summonsed witnesses for an evidentiary hearing. Those procedures are plainly authorized by statute, the Massachusetts Rules of Criminal Procedure, and the common law.

II. TESTIMONY FROM MS. MCCABE WILL SERVE TO AID THE COURT IN DETERMINING WHETHER TO ISSUE A SUMMONS UNDER MASS. R. CRIM. P. 17(a)(2), AND THE SUMMONS IS NOT INTENDED TO VEX, HARASS, OR INTIMIDATE MS. MCCABE, NOR IS IT BEING USED TO SUBVERT THE PROVISIONS OF MASS. R. CRIM. P. 14

"The court on motion may quash or modify the summons if compliance would be unreasonable or oppressive or if the summons is being used to subvert the provisions of

[Mass.R.Civ.P. 14, 378 Mass. 874 (1979)]." Legitimate objections brought pursuant to a motion to quash may be wide ranging and may properly include objections to the general "lawfulness of the command to produce and other issues." Commonwealth v. Rodriguez, 426 Mass. 647, 648 (1998).

As an initial matter, the language of Mass. R. Crim. P. 17 that addresses motions to quash or modify a summons fall under Mass. R. Crim. P. 17(a)(2): "(2) For Production of Documentary Evidence and of Objects. A summons may also command the person to whom it is directed to produce the books, papers, documents, or other objects designated therein. The court on motion may quash or modify the summons if compliance would be unreasonable or oppressive or if the summons is being used to subvert the provisions of Rule 14." Mass. R. Crim. P. 17(a)(2). Further, the cases undersigned counsel located on quashing or modifying a summons under Mass. R. Crim. P. 17 address documentary evidence, rather than the appearance of a witness at an evidentiary hearing or trial. *See e.g.* In re Jansen, 444 Mass. 112 (2005), abrogated by Com v. Dwyer, 448 Mass. 112 (2006); Com v. Caceres, 63 Mass. App. Ct. 747 (2005); *see also* § 13:2. Generally, 43A Mass. Prac., Trial Practice § 13:2 (3d ed.) ("In criminal cases, the rules of criminal procedure govern subpoenas duces tecum. When responding to a subpoena duces tecum or a summons a keeper of records is obligated to produce only the records specifically requested in the subpoena or summons. No one can be compelled to produce a document which is not in their possession or under their control. When a subpoena duce tecum appears unreasonable or oppressive a motion to quash or modify it should be filed before the time specified in a subpoena for compliance.")

There is no provision under Mass. R. Crim. P. 17(a)(1) for quashing a summons that compels only witness attendance and testimony. *See* Mass. R. Crim. P. 17(a)(1); *see also* "Massachusetts Criminal Practice", Blumenson, Baker (4th Ed., 2012)[7]. *Cf.* United States v. Klubock, 639 F. Supp. 117, 123 (1986), aff'd, 832 F.2d 649 (1st Cir. 1987), on rehearing, 832 F.2d 664 (1st Cir. 1987) (noting that under analogous Federal Rule, federal courts have heard motions to quash subpoenas or compel testimony when the interests of justice have so warranted).

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[7] *See* https://www.suffolk.edu/-/media/suffolk/documents/law/faculty/mcp/ch13summons_pdftxt.pdf?la=en&hash=90489DA5EDB7B76456A242E70816521146768693

Under the analogous Massachusetts Rule of Civil Procedure, Mass. R. Civ. P. 45, the Supreme Judicial Court has noted that "to restrict the right to require the attendance of witnesses runs contrary to the letter and intent of Mass. R. Civ. P. 45." Roche v. Massachusetts Bay Transp. Authority, 400 Mass. 217, 221-22 (1987).

Counsel for Ms. McCabe has not cited any case under Massachusetts law that would undermine the proposition that no mechanism for quashing a subpoena for testimony exists. Instead, Ms. McCabe has cited a number of federal cases, including a case from the Eighth Circuit. That case, United States v. Hardy, 224 F.3d 752, 756 (8th Cir. 2000) addresses a motion to quash a subpoena seeking the production of documents under the analogous federal provision, and does not address a motion to quash a subpoena seeking testimony. United States v. Hughes, 895 F.2d 1135 (1990) deals with the same issue, and is similarly silent on a subpoena seeking testimony. Finally, undersigned counsel was unable to locate any case entitled "United States v. Romeri", which was the final case cited by Ms. McCabe, which supposedly stands for the proposition that a "judge is vested with wide discretion to quash or modify subpoenas to insure witnesses are not harassed or intimidated." Even if such a case exists and discusses a judge's wide discretion in another jurisdiction, no judge should exercise that jurisdiction to exclude relevant and material testimony from an evidentiary hearing in a criminal case.

Without waiving any argument that a motion to quash a summons for the attendance of a witness is improper and not allowed under the Massachusetts Rules of Criminal Procedure, the Defendant avers that requiring the attendance of Ms. McCabe at this critical evidentiary hearing is neither unreasonable nor oppressive, nor is it vexatious or intended to harass or intimidate, and her testimony is certainly relevant and material to Ms. Read's Rule 17 motion.

As noted above, Richard Green's analysis suggests that "there were significant deletions of call data by the user of Jennifer McCabe's iPhone 11". Ms. McCabe deleted eighteen call entries between 5:33:47AM and 8:50:15 a.m. on January 29, 2022. Of particular relevance is the fact that Ms. McCabe deleted a 6:23:00 a.m. call to Mr. Albert, and deleted a screenshot of Mr. Albert's contact information at 12:53:23 p.m.. That screenshot had been taken at 6:08:35 a.m. that same day. In total, Ms. McCabe's call log showed seven incoming or outgoing calls with Mr. Albert between 6:23:00A a.m. and 5:15:12 p.m. on January 29, 2022. *See* Affidavit of Richard Green in Support of Defendant's Motion for Order Pursuant to Mass. R. Crim. P. 17 Directed to Brian Albert, Verizon, and AT&T. Ms. McCabe's testimony will help to clarify the

contact she had with Mr. Albert on the morning of January 29, 2022, and why she may have felt compelled to delete evidence of that contact. In addition, testimony from Ms. McCabe will help to elucidate why the forensic extraction of her phone shows *no calls* between 10:18:28 a.m. on January 27, 2022, and 5:33:4 a.m. on January 29, 2022, while her application activity log shows several incoming or outgoing telephone and/or Facetime calls:

	To 7818580204 Direction Outgoing	6 08 17 AM(UTC-5)				Name Unknown network (United States)*			
214	To 7818580204 Direction Outgoing	1/29/2022 6 07 42 AM(UTC-5)	00 00 09	Answered	us	Network Name Unknown network (United States)*		Source	Yes
215	To 911 Direction Outgoing	1/29/2022 6 03 47 AM(UTC-5)	00 03 32	Answered	us	Network Name Unknown network (United States)*		Source	Yes
216	To +17814136678 Direction Outgoing	1/29/2022 5 57 38 AM(UTC-5)	00 00 02	Answered	us	Network Name Unknown network (United States)*		Source	Yes
217	To +17814136678 Direction Outgoing	1/29/2022 5 52 38 AM(UTC-5)	00 00 00	Not answered	us	Network Name Unknown network (United States)*		Source	Yes

824

218	To 16179229234 Direction Outgoing	1/29/2022 5 52 15 AM(UTC-5)	00 00 00	Not answered	us	Network Name Unknown network (United States)*		Source	Yes
219	To +17814136678 Direction Outgoing	1/29/2022 5 33 47 AM(UTC-5)	00 00 00	Not answered	us	Network Name Unknown network (United States)*		Source	Yes
220	From +16179099860 Direction Incoming	1/27/2022 10 18 28 AM(UTC-5)	00 00 00	Missed			Yes	Source: FaceTime	

				Launch Artifact Family:		
1417	com.apple.mobilemail	Start time: 1/28/2022 11:59:24 AM(UTC-5) End time: 1/28/2022 12:01:15 PM(UTC-5)	Activity Type: com.apple.mail.mailbox	Additional info: Action: Launch Artifact Family:	Source: KnowledgeC	
1418	com.apple.mobilephone	Start time: 1/28/2022 12:00:28 PM(UTC-5) End time: 1/28/2022 12:00:34 PM(UTC-5)		Additional info: Launch reason: com.apple.SpringBoard.transitionReason.homescreen Action: Launch Artifact Family:	Source: KnowledgeC	
1419	com.apple.InCallService	Start time: 1/28/2022 12:00:34 PM(UTC-5) End time: 1/28/2022 12:01:09 PM(UTC-5)		Additional info: Action: Launch Artifact Family:	Source: KnowledgeC	
1420	com.apple.mobilephone	Start time: 1/28/2022 12:01:09 PM(UTC-5) End time: 1/28/2022 12:01:13 PM(UTC-5)		Additional info: Action: Launch Artifact Family:	Source: KnowledgeC	
1421	com.apple.mobilephone	Start time: 1/28/2022 12:01:13 PM(UTC-5) End time: 1/28/2022 12:01:13 PM(UTC-5)		Additional info: Launch reason: com.apple.SpringBoard.transitionReason.systemgesture Action: Launch Artifact Family:	Source: KnowledgeC	
1422	com.apple.mobilemail	Start time: 1/28/2022 12:01:13 PM(UTC-5) End time: 1/28/2022 12:01:35 PM(UTC-5)		Additional info: Launch reason: com.apple.SpringBoard.transitionReason.homescreen Action: Launch Artifact Family:	Source: KnowledgeC	

More importantly, the searches for "hos long to die in cold" and "how long ti die in cikd" recovered by Richard Green formed a large part of the basis of Ms. Read's motion pursuant to Mass. R. Crim. P. 17(a)(2). The Commonwealth disputes that Ms. McCabe searched "hos long to die in cold" at 2:27AM. Testimony from Ms. McCabe will assist the Court in determining exactly when she first ran these Google searches, and will help to elucidate why her phone shows *no web search history* between January 27, 2022 at 11:39:05PM and January 29, 2022 at 6:23:51AM:

	5)						
108	1/29/2022 8:15:25 PM(UTC-5)	KnowledgeC	john o'keefe obituary		Unknown		
109	1/29/2022 8:15:20 PM(UTC-5)	Safari	john o'keefe obituary		Unknown		
110	1/29/2022 8:15:19 PM(UTC-5)	Safari	john o'keefe obituary		Unknown		
111	1/29/2022 6:24:18 AM(UTC-5)	Safari	hos long to die in cold		Default		
112	1/29/2022 6:23:51 AM(UTC-5)	Safari	how long ti die in cikd		Default		
113	1/27/2022 11:39:29 PM(UTC-5)	Safari	ANTOINETTE OKOH & basketball		Unknown		
114	1/27/2022 11:39:05 PM(UTC-5)	KnowledgeC	ANTOINETTE OKOH & basketball		Unknown		
115	1/27/2022 11:39:00 PM(UTC-5)	Safari	ANTOINETTE OKOH & basketball		Unknown		
116	1/27/2022 11:39:00 PM(UTC-5)	Safari	ANTOINETTE OKOH & basketball		Unknown		
117	1/27/2022 11:38:59 PM(UTC-5)	Safari	ANTOINETTE OKOH & basketball		Default		
118	1/27/2022 4:49:32 PM(UTC-5)	Safari	raining men		Unknown		
119	1/27/2022 4:49:31 PM(UTC-5)	Safari	raining men		Unknown		
120	1/27/2022 4:49:30 PM(UTC-5)	Safari	raining men		Default		
121	1/27/2022 4:45:58 PM(UTC-5)	Safari	do u want to build a snowman		Unknown		
122	1/27/2022 4:45:57 PM(UTC-5)	Safari	do u want to build a snowman		Unknown		
123	1/27/2022 4:45:57 PM(UTC-5)	Safari	do u want to build a snowman		Default		

There is a factual dispute regarding Ms. McCabe's actions vis-à-vis her cell phone. To resolve that factual dispute, this Court must hear evidence from both sides – including from witnesses in possession of information relevant facts supporting the Rule 17 motion. This Court should afford the Defendant the opportunity to cut through this noise and attempt to elicit the relevant facts directly from Ms. McCabe — as is her right by statute and the relevant Rules of Criminal Procedure. "Cross-examination, the primary interest secured by the Confrontation Clause, is 'the principal means by which the believability of a witness and the truth of his testimony are tested'." Kentucky v. Stincer, 482 U.S. 730, 736 (1987) (quoting Davis v. Alaska, 415 U.S. 308, 316 (1974)); United States v. Alvarez, 987 F.2d 77, 82 (1st Cir. 1993).

Ms. McCabe's testimony will assist the Court in determining whether to allow or deny Ms. Read's Rule 17 motion, seeking access to his phone and the data from the same.

CONCLUSION

The Defendant has the right, under M.G.L. c. 233 §1, Mass. R. Crim. P. 17(a)(1), and the common law, to summons witnesses for the evidentiary hearing currently scheduled for May 25, 2023. Ms. McCabe's opposition, like Mr. Albert's, conflates the ability of a defendant to compel testimony from witnesses without prior judicial approval for an evidentiary hearing under Mass. R. Crim. P. 17(a)(1) and M.G.L. c. 233 § 1 with the requirement that the *Court* must issue a summons for documentary evidence held by a third-party under Mass. R. Crim. P. 17(a)(2). The Defendant unambiguously has the right to summons witnesses for this evidentiary hearing for the purpose of assisting the Court in determining whether a summons should ultimately issue for the records sought (i.e., Mr. Albert's phone and accompanying data) under Mass. R. Crim. P. 17(a)(2).

For these reasons, the Defendant respectfully requests that this Honorable Court denies Ms. McCabe's "Motion to Quash Subpoena Served on Jennifer McCabe, Government Witness".

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

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May 23, 2023

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT DEPARTMENT
NO. 2282-CR-00117

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

AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANT KAREN READ'S OPPOSITION TO JENNIFER MCCABE'S MOTION TO QUASH SUBPOENA

I, David R. Yannetti, do hereby depose and state that the following is true to the best of my knowledge, information, and belief:

1. I am an attorney licensed to practice in Massachusetts since December 20, 1989. My office address is: Yannetti Law Firm, 44 School St., Suite 1000A, Boston, MA 02108. I represent Karen Read ("Ms. Read") regarding the above-captioned matter.
2. On May 22, 2023, I received Jennifer McCabe's "Motion to Quash Subpoena" from her attorney, Kevin Reddington.
3. The information contained in Ms. Read's "Opposition to Jennifer McCabe's Motion to Quash Subpoena" is true and accurate to the best of my knowledge, information, and belief.

Signed under the pains and penalties of perjury this 23rd day of May, 2023.

David R. Yannetti

CERTIFICATE OF SERVICE

I, Attorney David R. Yannetti, do hereby certify that I served the "Defendant Karen Read's Opposition to Jennifer McCabe's Motion to Quash Subpoena", along with the accompanying affidavit of counsel, upon the Commonwealth by emailing a copy on May 23, 2023 to Norfolk County Assistant District Attorney Adam Lally at adam.lally@mass.gov, and to Jennifer McCabe's attorney, Kevin Reddington, by emailing a copy of the same to kevinreddington@msn.com.

5/23/23

Date

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