

70

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

NORFOLK SUPERIOR COURT
DOCKET NOS. 2282CR0117

COMMONWEALTH

v.

KAREN READ

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

I. Introduction

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

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II. Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Argument

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

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

inspection may tend unreasonably to delay the trial; and
(4) that the application is made in good faith and is not intended as a
general “fishing expedition”.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

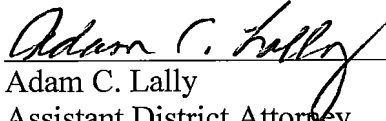
This overbroad request does not meet the Lampron standard. See Commonwealth v. Bourgeois, 68 Mass. App. Ct. 433, 436 (2007) (generalizations and unsubstantiated statements concerning a particular victim’s credibility are not enough); Commonwealth v. Sealy, 467 Mass. 617, 628 (2014) (affidavit based on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

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

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

Respectfully Submitted,
For the Commonwealth

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