#145

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT
CRIMINAL ACTION NO.
BRCR2013-00983

COMMONWEALTH

vs.

AARON HERNANDEZ

FINDINGS OF FACT, RULINGS OF LAW AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS CELLULAR TELEPHONE 203-606-8969 AND FRUITS THEREOF

INTRODUCTION

Defendant Aaron Hernandez moves to suppress cellular telephone (203) 606-8969 and all evidence derived from seizure of that phone and the search of its contents. The basis for the defendant's motion is that the warrants obtained for the phone did not authorize its seizure from his lawyers or their law office and that its seizure cannot be justified by consent because the phone was provided to law enforcement pursuant to a false claim of legal authority. An evidentiary hearing was held. For the reasons that follow, the motion to suppress is **denied**.[1]

---

[1] This court previously ruled that the warrant authorizing the seizure of a cell phone with the number (203) 606-8969 from Hernandez's residence was supported by probable cause and denied an earlier motion to suppress any cell phone seized from that residence that had this number. See Memorandum of Decision and Order on Defendant's Motion to Suppress Fruits of June 18, 2013 Search (Digital Recorder, Hard Drive, and Cell Phone with Specified Number), which was docketed on July 14, 2014. The warrant return listed two cell phones as having been seized at the residence, but did not indicate the phone number of either cell phone. Evidence submitted in connection with the defendant's motion to suppress the two cell phones seized from the residence revealed that neither cell phone had the number (203) 606-8969. See Memorandum of Decision and Order on Defendant's Motion to Suppress Fruits of June 18, 2013 Search (Two Cell Phones and Three I Pads), which was docketed on August 26, 2014.

FINDINGS OF FACT

Based upon all the evidence and the reasonable inferences drawn from that evidence, the Court finds the following facts:

On June 17, 2013, Assistant District Attorney Patrick O. Bomberg was the on-call prosecutor. As such, he played an active role in the investigation. That evening, he responded to a scene in North Attleboro where a body had been found. A search of the body turned up a wallet, a cell phone, and keys. The decedent was identified as Odin Lloyd. The keys were for a rental vehicle that was not at the scene. As the investigation proceeded, Bomberg learned the following information that evening: the vehicle for which keys had been found had been rented by Aaron Hernandez; Lloyd's sister said that Lloyd had gotten into a vehicle outside his house in the early morning of June 17th and texted her that he was with NFL; Lloyd was dating the sister of Hernandez's girlfriend and had no other contacts in North Attleboro; police saw the rental vehicle in the area of Lloyd's residence; Lloyd's cell phone had a text message between Lloyd and a contact in the cell phone denominated as "Nigga Dis" and "Dis Nigga" to the effect "still on tonight" and two other calls to the same number; the defendant told police when they came to his residence that he had last seen Lloyd the day before "up his way" and ultimately handed the police a card and told them to contact his lawyer; the card had the name of Robert Jones, a partner at Ropes & Gray. Bomberg has known Jones for over twenty years; they are close friends.

At approximately 10:45 PM, Bomberg called Jones and told him that he was at the North Attleboro police station in connection with the investigation of a homicide in North Attleboro and that the police were interested in speaking with Hernandez. Jones confirmed that he did represent Hernandez and indicated that he would look into it. Shortly thereafter, Hernandez left his house and

told the police that he would follow them to the police station. About twenty minutes later, Jones called Bomberg to advise that he also was coming to the police station. Bomberg told him that they would put Hernandez in a room to await his arrival.

Hernandez entered the police station at about 11:15 PM. He was placed in a second floor interrogation room. At no point was he interrogated by the police. The room had audio and videotape capability. The audio device was never activated. There is no evidence that any video was recorded during the time that Hernandez was in the interview room, but the video device was activated in a fashion that allowed the police to see what was happening in the room via a remote monitor. The police observed that Hernandez had a phone with him and that he used the phone quite a bit. The police did not overhear anything Hernandez may have said while using his phone. The police obtained the number of Hernandez's cell phone from Shayanna Jenkins, who had driven him to the station. An officer dialed that number and Hernandez's phone rang. The number called was the same as the number associated with "Nigga Dis" in Lloyd's phone, which caused Bomberg and the police to be extremely interested in examining Hernandez's phone.

Jones and Michael Fee arrived at the station about an hour after Hernandez. Jones and Fee were partners at Ropes & Gray. Fee is an experienced criminal defense attorney who also has been a federal prosecutor. Jones is a civil litigator who had some exposure to criminal law. Both attorneys were representing Hernandez.

Bomberg had a brief discussion with Hernandez's attorneys in the public lobby of the station. Fee stated that they were representing Hernandez and wanted to see him. Bomberg advised that Hernandez was alone in an interrogation room on the second floor. He indicated that the police wanted to question Hernandez about a homicide in North Attleboro. Bomberg drew their attention

to the fact that his wife is a partner at Ropes & Gray and that he was friendly with Jones. He stated that he wanted to be sure that appropriate disclosures would be made to Hernandez. Fee assured him that appropriate disclosures would be made. During this first encounter, as was true throughout the time that they were at the station, Fee was the primary spokesperson for Hernandez. Fee stated that he was eager to see Hernandez, and that after they had a chance to talk to him, they could reconvene. When Hernandez appeared in the lobby, Fee, Jones and Hernandez left the police station, walked some distance away from the station, and conferred for about forty-five minutes.

When they came back into the station at about 1 AM, Bomberg introduced Jones and Fee to Lt. Michael King from the State Police and to Sgt. Ciccio from the North Attleboro Police Department, and the five of them spoke in a conference room off the lobby area. The tone of the conversations was businesslike. The attorneys for Hernandez did not report back to Bomberg that Hernandez had any issue or concern about the friendship between Bomberg and Jones or the fact that Bomberg's wife was a partner of both Fee and Jones. While they were in the conference room, Hernandez was in the lobby area of the police station or outside. There were breaks in the conversation so that Jones and Fee could consult with their client. Those consultations took place outside on the steps of the station.

When they first met in the conference room, Bomberg provided the attorneys with some information as to why law enforcement was interested in speaking with Hernandez. He explained that Odin Lloyd, a young man from Dorchester, had been found dead in North Attleboro that evening at about 5:30 PM, that Lloyd's girlfriend is the sister of Hernandez's girlfriend, that keys in Lloyd's pocket were for a car that had been traced to a rental vehicle in Hernandez's name, and that the police went to Hernandez's home and that he told them that they needed to call Jones.

Bomberg asked whether Hernandez would consent to an immediate interview at the police station. He stated that the room was wired and that any interview would be both videotaped and audio taped. Fee repeatedly indicated that Hernandez wanted to be cooperative but that Hernandez was not willing to be interviewed at that time. Fee explained that Hernandez was tired and not dressed appropriately for a videotaped interview and that he needed time to speak to Hernandez. Fee indicated that counsel would call by 11 AM to report whether Hernandez had decided to be interviewed, and a tentative interview time of 1 PM on June 18th at the North Attleboro Police Station was agreed upon.

In the conference room, they also discussed the Chevy Suburban rented by Hernandez that the police had found in Dorchester. Bomberg stated that the police had keys to that car and were interested in searching it. They asked if Hernandez would consent to a search of the vehicle. Hernandez did consent. He signed a search form before leaving the station at approximately 2:30 AM.

Bomberg also asked if Hernandez would consent to surrender his phone so that the police could examine its contents. Before Bomberg made this third request, state troopers had asked him for permission to seize the phone from Hernandez while Hernandez was at the station for the purpose of securing it pending the obtaining of a search warrant. Given the indications that Hernandez wished to be cooperative, Bomberg decided instead to ask for permission to examine the phone and, if permission was not granted, to attempt to secure an agreement that all information on the phone would be preserved in its then current state.

Accordingly, Bomberg asked whether Hernandez would voluntarily surrender his phone for examination. Fee stated that Hernandez would not consent to turning over his phone because he lives

his life on the phone, which contains private information, that it would be inconvenient and that he did not want to do so. Neither Fee nor Jones alerted Bomberg to the fact that they intended to take physical possession of the cell phone, that they intended to examine the phone or that they intended to have the phone forensically examined.

When Fee declined to voluntarily turn over the phone, Bomberg noted that there was always the possibility that the police could secure a warrant for the phone, to which Fee stated that if a warrant for the phone were to be obtained, that would be a different story and "we'll honor a warrant for the phone." As Fee testified, he agreed to produce the phone if there was a search warrant. This exchange did not constitute an enforceable contract on the part of Hernandez to deliver his phone to a law enforcement officer as soon as a search warrant issued, irrespective of the terms of the warrant and the location of the phone.

When it was clear that the police were not going to have immediate voluntary access to the phone, Bomberg asked if Hernandez would agree to maintain the information on the phone in its then current state. He said that Hernandez had to understand that if the police obtained the phone through a search warrant, they would be able to detect if anything had been deleted. Fee agreed on Hernandez's behalf to that request and told Bomberg that Hernandez understood that the police would be able to detect deletions or alterations.

Fee explicitly stated to Bomberg that Hernandez would maintain possession of the phone. Bomberg reasonably understood this to mean that the phone would remain in Hernandez's actual possession. The possibility that Hernandez might transfer the phone to his attorneys was not discussed.

When they left the police station, it was agreed that either Fee or Jones would be the point

of contact at Ropes & Gray for the police department.

Hernandez's counsel did not call the police station at 11 AM to indicate whether Hernandez would be appearing at the station at 1 PM. Neither Hernandez nor his counsel appeared at 1 PM. Fee called Bomberg at 2 PM. He reiterated that Hernandez wanted to cooperate and said that their meeting started late and that they needed more time. He did not suggest an alternative date for an interview.

Further information was developed by investigators during the day on June 18th that caused the police to seek and obtain two search warrants. Bomberg was involved in the applications for these warrants. Both warrants were issued shortly before 7 PM. The phone was not in the possession of law enforcement when the warrants issued. Bomberg assumed that the phone still was with Hernandez.

The first warrant commanded a search for video surveillance equipment and "a cellular phone with the number of 203-606-8969" at 22 Ronald C. Meyer Dr. North Attleboro, MA. No other location was specified in the search warrant. The warrant further states that the police "are also commanded to search any person present who may be found to have such property in his or her possession or under his or her control or to whom such property may have been delivered."

The second warrant commanded a search of "all data files including call logs, text messages, image files, videos, voice mails, locations, contact lists and other data files that can reasonably be related to the death of Odin Lloyd" at "Cellular Phone with phone number 2036068969 which is occupied by and/or in the possession of Aaron Hernandez." The warrant did not specify any location beyond the defendant's person. By contrast to the warrant for the phone to be executed at the residence, the warrant for the phone in Hernandez's possession states that the police "are not also

commanded to search any person present who may be found to have such property in his or her possession or under his or her control or to whom such property may have been delivered." When the police applied for this search warrant, they did not know whether Hernandez would be inside his residence when the warrant for the phone at his residence was executed. Had Mr. Hernandez been outside the curtilage of his North Attleboro residence, in his automobile or some public setting, the police had authority under the warrant for the phone in his possession to seize the phone from his person.[2]

Law enforcement proceeded to execute the warrants almost immediately after they issued. They crossed the threshold of the North Attleboro residence at 7:03 PM. Shortly thereafter, at 7:06 PM, Sgt. Paul Baker informed Bomberg that law enforcement had made entry into the residence without any problems, that Hernandez, Jenkins and a baby were inside, and that two persons seen in the driveway had been asked to go to the police station for interviews.[3] They did not discuss the phone.

Bomberg immediately called Fee to tell him that the police were at Hernandez's house executing search warrants. He truthfully stated that the police had two search warrants, one for the house and one for the phone. Bomberg did not tell Fee that he understood that the phone was with Hernandez's lawyers at Ropes & Gray. When he told Fee about the warrants, Bomberg believed that

---

[2] This motion does not present the question whether a warrant for an object in the possession of a person would allow law enforcement to enter upon private premises if there were a reasonable belief that the named person was inside.

[3] Baker was the first officer to enter the residence. He testified that he had copies of the warrants with him, which he gave to Jenkins, and that he did not have copies of the affidavits in support of those warrants. His testimony provides further support for the Court's ruling suppressing the cell phones and iPads taken from Hernandez's residence.

the phone was with Hernandez at his home.[4] Bomberg had made no arrangements for retrieval of the phone from Ropes & Gray prior to the call. Fee had no reason to believe that Bomberg suspected that the phone might be at Ropes & Gray.[5]

In response to the information conveyed by Bomberg, Fee told Bomberg that the phone was at Ropes & Gray.[6] He also told Bomberg that if he had a warrant for the phone to please send a copy to Jones for his review and that they would produce it if it was as Bomberg had indicated. The tenor of the conversation was businesslike. Bomberg stated that he would have to arrange for someone to be the person to whom the phone is provided. Fee responded that he should deal with Jones, whom he knew was at the office. Fee stated that he was not at the office but that Jones was. He did not tell Bomberg that he was in his car driving to his daughter's birthday party in downtown Boston.[7]

At no point during their conversation did Bomberg, explicitly or implicitly, claim authority under the warrant to send police to the offices of Ropes & Gray to seize the phone or indicate that

---

[4] To the extent that the instant motion also argues that information regarding the location of Hernandez's cell phone was extracted from him during a custodial interrogation at his home, the Court rules on that issue in the context of the defendant's separate Motion to Suppress Fruits of Unlawful Police Interrogation. The findings of fact contained in the Court's ruling on that motion are incorporated herein.

[5] The Court does not draw an inference to the contrary from the fact that, on subsequent occasions, Bomberg did not advise Fee when the police were executing search warrants.

[6] When Hernandez came to Ropes & Gray on June 18th, he had his cell phone with him. At Fee's request, he gave it to Fee so that it could be analyzed. Fee took the phone from Hernandez as part of his representation of him. He intended to send the phone to a vendor who would extract its contents.

[7] After the conversation with Bomberg terminated, Fee called Jones and told him that Bomberg had informed him that the police had a warrant for Hernandez's phone, that Bomberg would be sending the warrant to Jones and that there would be arrangements made to surrender the phone. Fee was satisfied that Jones was a competent lawyer who was poised to deal with the matter.

police were on the way to Ropes & Gray to seize the phone under the authority of a warrant. Bomberg did not suggest that the police had obtained a warrant for the phone that would allow them to execute it at Ropes & Gray. Fee did not understand the warrant he was discussing with Bomberg to be a search warrant for Ropes & Gray's office and, in his conversation with Bomberg, Bomberg did nothing to suggest that he had a warrant for Ropes & Gray. Fee did not understand Bomberg to be stating that the police had a warrant that would allow them to come to the premises of Ropes & Gray to seize the phone. At the end of his conversation with Bomberg, as Fee testified, he did not expect a warrant for the phone to be executed by the state police anywhere; he expected Jones to surrender the phone. Fee knew that the police had a warrant for the phone and that, only because of what he had told Bomberg, law enforcement knew where the phone was located; it was his understanding that Jones would receive the warrant and then produce the phone.

After he spoke with Fee, Bomberg called Baker at 7:13 PM and informed him that Hernandez's phone was with his lawyers in Boston. He asked Baker to send a copy of the search warrant for the phone to him for forwarding to Hernandez's lawyer. Prior to this conversation, Baker did not realize that Hernandez's phone was not at the residence.

Baker discussed what he had learned from Bomberg with King, who sent a picture of the warrant to Bomberg. As soon as a picture of the warrant was texted to him, shortly after 7:17 PM, Bomberg immediately forwarded it to Jones. The text was legible.

Bomberg spoke to Jones at 7:20 PM. Jones told him that he had the search warrant, that it appeared fine and that he would produce the phone. At no point during this conversation did Bomberg, explicitly or implicitly, claim authority under the warrant to send a state trooper to the offices of Ropes & Gray to seize the phone or indicate that the State Police were on the way to Ropes

& Gray to seize the phone under the authority of the warrant. When Jones told Bomberg that he would turn over the phone, Bomberg asked if he would be agreeable to a state trooper contacting him directly to make the pick-up arrangements. Jones said that would be fine, and the call then ended.

The warrant forwarded to Jones was the warrant for the phone in the possession of Aaron Hernandez. Bomberg had no reason to believe that Hernandez's attorneys believed that the police had secured a warrant that would have allowed the police to seize it on the premises of Ropes & Gray or that they believed that the prosecutor was taking the position that the police had secured a warrant that would have allowed the police to execute it at Ropes & Gray. Bomberg conveyed no opinion to Fee or to Jones as to whether the search warrant for the phone would have authorized its seizure at Ropes & Gray. It was not Bomberg's intent to use the authority of the cell phone warrant to send police into Ropes & Gray to seize the phone, and he expressed no such intent.

Jones forwarded a copy of the warrant he received to Fee[8] and also to Hernandez's other counsel in connection this matter, namely Attorneys Rankin and Sultan, experienced criminal defense attorneys.

After speaking with Jones, Bomberg informed Baker that the trooper picking up the phone could make arrangements directly with Jones. Baker arranged for Trooper Joseph Collins, who was working at a private detail in Boston, to pick up the phone.

Collins called Jones and explained that he was working at a detail and needed to arrange coverage and asked him whether he planned to leave shortly. Jones told Collins that he would be at Ropes & Gray for some time. During that call, Collins told Jones that he would contact him once he had made arrangements for coverage and asked whether it would be an issue if Collins came into the

[8] Fee did not review the warrant before Jones handed over the phone.

law firm wearing his uniform. Jones said that there was no issue. The tone of the conversation was cordial.

At about 7:45 PM, Collins advised Jones that he had secured coverage and was on his way over. Jones volunteered to meet Collins at the security desk in the lobby of the Prudential Center, a public area. Collins arrived at the Prudential Center between 8:20 and 8:30 PM. As soon as he parked, he phoned Jones to tell him that he was walking into the Prudential Center. Collins proceeded to the security desk and requested the security officer to call Jones. Three to five minutes later, Jones approached Collins with a manilla envelope in his hands. They made eye contact. Jones presented the manilla envelope to Collins without manifesting any objection or protest. It was closed with a clasp but not sealed. Collins opened the envelope. Inside was a light blue envelope that contained a Blackberry cell phone in three pieces, the main body, a battery, and the backing to the phone. Collins inquired as to why the phone was in three pieces, and Jones explained that this is the way it was given to him. Collins asked when it was given to him like that. Jones stated that, between two and three o'clock earlier that day, Hernandez presented it that way in their office. Jones and Collins shook hands and Collins left. At no point during this interaction or during any of their telephone conversations did Collins assert any authority to enter upon the premises of Ropes & Gray to seize the phone pursuant to a warrant or to seize the phone in the lobby from the person of Jones pursuant to a warrant. The phone was voluntarily surrendered by Jones to Collins.

At 8:46 PM, Collins reported to Bomberg that he had obtained the phone from Jones in the lobby.

The turning over of the phone was a voluntary act. It was not the result of force, threat, trickery, duress, or coercion. The turning over of the phone was not mere acquiescence to a claim

of authority or simple resignation to the perceived power of the state. The Commonwealth did not deliberately induce Hernandez's lawyers to turn over his cell phone based upon a false claim of legal authority.

RULINGS OF LAW

Particularity

The Fourth Amendment permits a warrant to be secured for an object in the possession of a third party. No showing need be made that the occupant of the place to be searched or any specific person is reasonably suspected of complicity in the crime being investigated. Zurcher v. Stanford Daily, 436 U.S. 547, 549-550 (1978).

The ability to obtain a warrant to seize items that may have been transferred to a third party does not vitiate in any way the particularity requirement embedded in both the Fourth Amendment and Article 14 of the Massachusetts Declaration of Rights. The Fourth Amendment provides that no warrants shall issue except upon probable cause and "particularly describing the place to be searched, and the persons or things to be seized." Similarly, Article 14 of the Massachusetts Declaration of Rights states that the order in the warrant is to "make search in suspected places . . ." and the warrant must contain "a special designation of the persons or objects of the search . . . ."[9] Accordingly, a sufficient showing must be made to the magistrate that there is both reason to seize certain items and that the items are likely to be found in a particular place. The particularity requirement was the mechanism chosen by the Framers to ensure that general warrants will not issue leaving the place

[9] In addition to the constitutional protections found in the Fourth Amendment and Article 14, G. L. c. 276, § 1 requires that a search warrant name or describe the "place to be searched," and § 2 provides that "[s]earch warrants shall designate and describe the building, house, place, vessel or vehicle to be searched."

to be searched to the discretion of the officer executing the warrant. See Commonwealth v. Carrasco, 405 Mass. 316, 323 (1989) (particularity requirement guards against warrants becoming like the "wide-ranging exploratory searches the Framers intended to prohibit").

Fundamental to the protection of the constitutional particularity requirement is that, once a search warrant issues, the authority to search is limited to the specific place or places described in the warrant and does not extend to additional or different places. United States v. Pennington, 287 F.3d 739, 744 (8th Cir. 2002). Law enforcement, of course, is free to seek additional authority from a magistrate to look for the designated items at a different location. Any contrary result would mean that the police could obtain a warrant for an object with no location designated and be free to enter onto any premises reasonably believed to contain that object in order to effectuate the warrant. Such a result would eviscerate the constitutional prohibition against general warrants.

In Commonwealth v. Douglas, 399 Mass. 141, 144 (1987), the Supreme Judicial Court made clear that a warrant that fails to identify the premises to be searched is invalid. The warrant at issue in that case described the place to be searched as "premises to be identified by [a named state trooper] prior to execution of the warrant." Id. The Court held that such language eliminates the role of the neutral and detached magistrate and substitutes a "blank check" to be filled in by a designated officer. Id.[10] "A police officer can never validate a general warrant through objectively reasonable reliance on the warrant." Id. See also United States v. Leon, 468 U.S. 897, 922-923 (1984).

When the police secured the warrants for the cell phone 203-606-8969, the expectation was

---

[10] As in Douglas, there has been no showing by the Commonwealth that time pressures made it impractical to submit to a magistrate, by supplemental affidavit, the location of the place to be searched once the location was ascertained. 399 Mass. at 143. The Commonwealth does not rely on exigent circumstances as an exception to the warrant requirement.

that this phone would be seized at Hernandez's residence or from Hernandez's person if he were not at his residence.[11] Nothing in the affidavits submitted in support of either search warrant gave any hint to the magistrate that the requested phone was at Ropes & Gray.

When an object is not in police custody at the time of issuance of the warrant, the object itself cannot constitute the place to be searched. "If it could be said that the [specified objects] constituted the place to be searched, the officers would have been justified in searching anywhere that the [objects] conceivably might have been located." United States v. Alberts, 721 F.2d 636, 639 (8th Cir. 1983) (warrant for certain large green garbage bags named as the "place" to be searched does not enable officer to locate the garbage bags at a residence not specified in the warrant). Cf. State v. Peakes, 440 A.2d 350, 353 (Me. 1982) (search warrant referring only to property of defendant and his wife saved by affidavit indicating location to be searched where affidavit was attached to warrant at time of execution and incorporated therein by reference).

The Commonwealth argues that seizure of the phone was expressly authorized by the warrant permitting search of a phone in "the possession of Aaron Hernandez." This language, the Commonwealth contends, is sufficiently broad to reach the phone in the hands of anyone holding it for Hernandez, allowing the police to seize the phone from any person or place as long as Hernandez had constructive possession of it. Reading the word possession in the warrant as encompassing both "actual" and "constructive" possession, as the Commonwealth urges, would mean that the police would be entitled to enter upon the premises of any individual to whom the person named in the

---

[11] The affidavit in support of the search warrant for the phone in Hernandez's possession stated, in part, that there was probable cause to believe that evidence related to Lloyd's death will be found on the cell phone "in the possession of Aaron Hernandez" and requested an order of seizure and authority to search the phone for data files.

warrant transferred an object, as long as the person named in the warrant had constructive possession of the object. The Commonwealth cites no case standing for that proposition.[12] To adopt that position would, in essence, condone the use of a general warrant.

Moreover, the warrant at issue expressly prohibited the seizure of the phone from a person to whom it may have been transferred. The Commonwealth ignores the language in the warrant instructing the police that they "are **not** also commanded to search any person present who may be found to have such property in his or her possession or under his or her control or to whom such property may have been delivered." (emphasis added).

The warrant for the phone is valid. The defendant's argument that the warrant allows only for a search of the phone after it is already in the Commonwealth's possession lacks merit. Obviously it would have been impossible to search the phone without first taking it into police custody. As is made clear in the affidavit in support of the warrant, the police did not yet have the phone when the warrant was sought. The defendant's construction of the warrant would mean that Hernandez, had he still had

---

[12] Commonwealth v. Brzezinski, 405 Mass. 401, 409 (1989), and Commonwealth v. Rosa, 17 Mass. App. Ct. 495, 498 (1984), uphold convictions for drug trafficking based upon constructive possession. Schwimmer v. United States, 232 F.2d 855, 861 (8th Cir. 1956) stands for the proposition that a person in constructive possession of books and papers in the physical possession of a third party has standing to move to quash a grand jury subpoena on the grounds that it is an unreasonable search and seizure. Fisher v. United States, 425 U.S. 391, 402-405 (1976) holds that compelled production of documents from an attorney does not implicate whatever Fifth Amendment privilege the client might have enjoyed from being compelled to produce them himself, that pre-existing documents that could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by the client, and that, as a matter of attorney-client privilege, when the client himself would be privileged from production of a document, the attorney having possession of the document is not bound to produce it. That Hernandez may have had constructive possession of the phone in the hands of his attorneys does not answer the question whether the warrant allowed seizure of the phone outside Hernandez's North Attleboro residence from any person other than Hernandez himself.

the phone in his actual possession, could have avoided its immediate seizure merely by remaining away from his North Attleboro home. By securing an independent warrant for a phone in the possession of Hernandez, the police obtained authority to seize the phone from Hernandez even if he were found to be outside the curtilage of his home. A "seizure" of property occurs when "there is some meaningful interference with an individual's possessory interests in that property." Soldal v. Cook County, 506 U.S. 56, 63 (1992). The warrant authorizing a search of data files in Hernandez's phone in his possession permitted the seizure of that phone in Hernandez's possession in order to carry out the search. "Where, as here, the search and seizure of electronically stored information is at issue, 'the normal sequence of "search" and then selective "seizure" is turned on its head;' first, the government seizes the property, then it searches it." Preventive Medicine Associates, Inc. v. Commonwealth, 465 Mass. 810, 817 n.13 (2013).

The warrant for the phone conforms to constitutional standards for specificity. It allows the search and seizure of a particular phone – "a Cellular Phone with phone number 2036068969" – and it specifies the person from whom the phone may be seized – "Aaron Hernandez." The person of Hernandez is, in effect, the location. The Fourth Amendment permits the issuance of a search warrant for the search of a particularly described person without limitation as to a specified premise. See United States v. Baca, 480 F.2d 199, 203 (10th Cir.), cert. den., 414 U.S. 1008 (1973) (warrant that authorized search of defendant and search of designated premises authorized search of defendant at different location); Commonwealth v. Franklin, 990 A.2d 795, 800 (Pa. Sup. Ct. 2010) (prevailing view is that warrant may issue for search of a person and search may occur at location not named in warrant); State v. O'Campo, 644 P.2d 985, 988 (Idaho Ct. App. 1982) (warrant properly issued for search of defendant and his luggage). The warrant for the phone does not authorize the seizure of the

phone from the premises of Ropes & Gray or from any person other than Hernandez himself. See Lohman v. Superior Ct., 69 Cal. App.3d 894, 900-903 (Cal. Ct. App. 1977) (where police had warrant authorizing search of particularly described person, that person was, in effect, a "place" to be searched and police entitled to conduct limited detention of that person, if found in public, to search him but could not enter private residence not described in warrant to do so).

Search of Law Offices

G. L. c. 276, §1 provides, in relevant part, as follows:

> [N]o search warrant shall issue for any documentary evidence in the possession of a lawyer . . . unless, in addition to the other requirements of this section, a justice is satisfied that there is probable cause to believe that the documentary evidence will be destroyed, secreted, or lost in the event a search warrant does not issue. . . . For purposes of this paragraph, 'documentary evidence' includes, but is not limited to, writings, documents, blueprints, drawings, photographs, computer printouts, microfilms, X-rays, files, diagrams, ledgers, books, tapes, audio and video recordings, films or papers of any type or description.

The appellate courts have not yet ruled whether the term "documentary evidence" as used in the statute includes physical items such as cell phones and computers that may contain documents like text messages, e-mails, PDFs, photographs, videos, drawings, spreadsheets and writings in other formats. A warrant authorizing the search for an object such as a phone creates a far different and far smaller risk of exposure to attorney-client privileged documents in an attorney's office during the search than a warrant authorizing the search for specified documents. Cf. O'Connor v. Johnson, 287 N.W.2d 400, 404-405 (Minn. 1979) (warrant authorizing search of an attorney's office is unreasonable because, if police are permitted to rifle through and peruse an attorney's files for documents listed in a warrant, even the most particular warrant cannot adequately safeguard the attorney-client privilege, the attorney's work product, and the criminal defendant's constitutional right

to counsel).

Because the warrants obtained by the police did not permit the seizure of the phone from any person other than Hernandez and from any premises other than Hernandez's North Attleboro residence, the Court need not reach the argument made by the defendant that the warrant fails because it does not comply with the special provisions in G. L. c. 276, § 1 for search warrants seeking documentary evidence in the possession of a lawyer. Resolution of the defendant's motion to suppress does not turn on whether law enforcement could have obtained a further warrant to search for the phone at the premises of Ropes & Gray simply by filing a supplemental affidavit with the magistrate attesting to no additional facts other than what had been discovered regarding the phone's location or whether law enforcement was required to obtain a further warrant from a justice setting out probable cause that the phone would be destroyed, secreted, or lost in the event that a search warrant did not issue.

Consent

A search conducted pursuant to consent from a third party with actual or apparent authority is constitutionally permissible. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973); Commonwealth v. Porter P, 456 Mass. 254, 262 (2010); Commonwealth v. Viriyahiranpaiboon, 412 Mass. 224, 227 (1992). The Commonwealth bears the burden of demonstrating under both the Fourth Amendment and Article 14 that the consent was in fact freely and voluntarily given. Commonwealth v. Costa, 69 Mass. App. Ct. 823, 828 (2007).

Such consent must be "unfettered by coercion, express or implied, . . . [which is] something more than mere 'acquiescence to a claim of lawful authority.'" Commonwealth v. Walker, 370 Mass. 548, 555, cert. denied, 429 U.S. 943 (1976) (quoting Bumper v. North Carolina, 391 U.S. 543, 549

(1968)). See also Schneckloth v. Bustamonte, 412 U.S. at 228 ("the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means. . . . For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed").

The defendant's motion is grounded on the premise that once Bomberg discovered that the phone was at Ropes & Gray, rather than return to the magistrate to seek a search warrant for the law firm, he simply relied upon the existing warrants to claim legal authority to seize the phone and that this was a false claim of legal authority because neither warrant authorized seizure of the cell phone from Hernandez's lawyers or their law office. Voluntariness of consent is a question of fact to be determined by taking into account all of the circumstances. Schneckloth v. Bustamonte, 412 U.S. at 227; Commonwealth v. Harmond, 376 Mass. 557, 561 (1978). "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion – albeit colorably lawful coercion. Where there is coercion there cannot be consent." Bumper v. North Carolina, 391 U.S. at 550.[13] See also United States v. Allison, 619 F.2d 1254, 1264 n.5 (8th Cir. 1980); United States v. Alberts 721 F.2d at 640 (search not made with voluntary consent when officer told occupant that he had a search warrant for her property and warrant named a different place to be searched).

When the words exchanged between a law enforcement officer and the holder of property are so ambiguous that a court is unable to discern whether the possessor voluntarily consented to turn over the property, the inquiry is over and the seizure must be deemed unlawful. Cf. Commonwealth

[13] In Bumper, the police did have a warrant, but the prosecution did not rely upon the warrant as the basis for the search. Bumper v. North Carolina, 391 U.S. at 546.

v. Rogers, 444 Mass. 234, 238-239 (2005). Here, there was no ambiguity. Bomberg accurately represented that the police had secured a search warrant for the phone. He sent a copy of the warrant to one of Hernandez's attorneys, who forwarded it to the rest of the defense team. Bomberg said nothing that would have led a reasonable person to believe that the state claimed authority under the warrant to enter upon the premises of Ropes & Gray to effect a seizure of the phone, and counsel did not believe that he was making such a representation.

The facts supporting the holding in Bumper differ significantly from the facts in this case. In Bumper, the law enforcement officer claimed "authority to search [the] home under a warrant, [and] announce[d] in effect that the occupant ha[d] no right to resist the search." Bumper v. North Carolina, 391 U.S. at 550. Here, by contrast, Bomberg called Fee and notified him that the investigators had obtained a warrant for a search of Hernandez's home, which was true, as well as a warrant for Hernandez's cell phone, which also was true. It was crystal clear that Bomberg was not claiming to have a warrant that authorized a search of Ropes & Gray for the phone. When Bomberg told Fee about the warrants, Fee had no reason to believe that Bomberg suspected that the phone was not with Hernandez. Neither Bomberg nor any law enforcement personnel dealing with Hernandez's attorneys claimed to have a warrant allowing them to seize the cell phone from Ropes & Gray or from an attorney at Ropes & Gray walking outside the firm's premises.

Merely stating that the police have a search warrant but not claiming authority under that warrant to search premises not specified in the warrant or implying in any way that Ropes & Gray would have no right to resist a search of its offices does not amount to coercion. See, e.g., United States v. Streich, 759 F.2d 579, 585 (7th Cir. 1985) (finding consent where defendant directed his neighbor to bring over the gun he was harboring in her home after being informed that agents

possessed a search warrant that gave them authority to search defendant's home for the gun); Pate v. Commonwealth, 243 S.W.3d 327, 330 (Ky. 2007) (determining that police reference to a valid arrest warrant does not negate consent to search a home); State v. Hastings, 631 A.2d 526, 530 (N.H. 1993) (rejecting argument that defendant was merely acquiescing to police claim of lawful authority under a search warrant when defendant voluntarily retrieved firearm from his van after police accurately stated that they were on his premises conducting a search pursuant to a warrant because at no time did the officers state or suggest they had authority to search the van).

After examining the totality of the circumstances, the Court concludes that the Commonwealth has established that the turning over of the phone was not motivated by mere acquiescence to a claim of authority or simple resignation to the perceived power of uniformed officials. Commonwealth v. Rogers, 444 Mass. at 238. The Commonwealth has met its burden of demonstrating that the phone was freely and voluntary provided to the police.

ORDER

For the reasons stated above, it is hereby **ORDERED** that the defendant's Motion to Suppress Cellular Telephone 203- 606-8969 Fruits Thereof be **DENIED**.

E. Susan Garsh
Justice of the Superior Court

DATED: October 10, 2014