COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
SUCR2014-10417
SUCR2015-10384

COMMONWEALTH

vs.

AARON HERNANDEZ

MEMORANDUM OF DECISION AND ORDER ON (1) COMMONWEALTH'S RULE 17 MOTION FOR PRODUCTION OF THE SPECIFIED CELL PHONE FROM ROPES & GRAY LLP and (2) COMMONWEALTH'S APPLICATION FOR A SEARCH WARRANT

BACKGROUND

On May 15, 2014, a Suffolk County grand jury indicted the defendant, Aaron Hernandez, for two counts of first degree murder in violation of G.L. c. 265, § 1, three counts of armed assault with intent to murder in violation of G.L. c. 265, § 18(b), assault and battery by means of a dangerous weapon in violation of G.L. c. 265, § 15A(b), and carrying a firearm without a license in violation of G.L. c. 269, § 10(a). Almost one year later, on May 8, 2015, a Suffolk County grand jury indicted Hernandez for witness intimidation in violation of G.L. c. 268, § 13B. Hernandez is charged with the July 16, 2012 murders of Daniel de Abreu and Safiro Furtado during an alleged drive-by shooting in the South End section of Boston, Massachusetts. As to the witness intimidation charge, the Commonwealth alleges that Hernandez intimidated Alexander Bradley by shooting him in the face on February 13, 2013 in the state of Florida because Hernandez was concerned that Bradley would implicate him in the 2012 murders.

As part of the Suffolk County grand jury investigation, Alexander Bradley testified that

on July 16, 2012, he witnessed Hernandez shoot at the five occupants of a 2003 BMW sedan, killing Daniel de Abreu and Safiro Furtado. Bradley testified that on February 13, 2013, while vacationing in Florida together, Hernandez shot Bradley in the head. Bradley testified that following the shooting, he communicated with Hernandez on multiple occasions between February 14, 2013 and June, 2013. The communications were by cellular telephone calls between Bradley and Hernandez, involving conversations and text messages. According to Bradley, on at least one occasion, Hernandez acknowledged "rocking" Bradley, which he interpreted to constitute an admission. Bradley disclosed that he threatened Hernandez during the phone calls, including threatening to sue Hernandez and publicly exposing him.

In March, 2014, the Suffolk County District Attorney filed a motion on behalf of the grand jury for the issuance of a subpoena to the law firm of Ropes & Gray, LLP seeking production of Hernandez's cellular telephone. The Commonwealth asserted that on or about June 16, 2013, Hernandez delivered his cellular phone to his then-lawyer, Michael Fee, a partner at Ropes & Gray. After several hearings, this Court authorized the issuance of the grand jury subpoena. The defendant and third-party Ropes & Gray, petitioned for interlocutory review under G.L. c. 211, § 3, challenging this Court's ruling.

On January 12, 2015, the Supreme Judicial Court issued its decision in Matter of a Grand Jury Investigation, 470 Mass. 399 (2015). The Court reversed this Court's order and concluded that the attorney-client privilege protects Hernandez against compelled production of the cell phone by Ropes & Gray and that the protection afforded by the attorney-client privilege may not be set aside based on a showing of probable cause. See Matter of a Grand Jury Investigation, 470 Mass. at 400-402 (concluding that subpoena was improperly issued based on "application of

three well-established principles: the privilege against self-incrimination, the act of production doctrine, and the attorney-client privilege"). See also Fisher v. United States, 425 U.S. 391, 405 (1976) (recognizing that if a client "transferred possession of . . . documents . . . from himself to his attorney in order to obtain legal assistance, . . . the papers, if unobtainable by summons from the client, are unobtainable by summons directed to the attorney by reason of the attorney-client privilege").

In addition, the Supreme Judicial Court was "mindful" of this Court's concern that if evidence possibly obtainable through a search warrant when it was in a client's hands were to become immune from both a search warrant and a subpoena when the evidence is placed in an attorney's hands, the result would be a race to the lawyer's office.[1] The Court made the following observations:

> First, G.L. c. 276, § 1, only operates to bar the search of an attorney's offices in a narrow set of circumstances. The statute is limited to searching for documentary evidence and would not typically encompass situations where a client seeks to hide the instrumentalities or proceeds of a crime at an attorney's office. While the telephone at issue here constitutes "documentary evidence" under the statute, the statute also provides explicit exceptions for circumstances where the evidence "will be destroyed, secreted or lost in the event a search warrant does not issue," or for circumstances where the holder of the evidence "has committed, is committing, or is about to commit a crime."

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[1] In order to obtain a search warrant for a lawyer's office, the prosecutor must make a showing of "probable cause to believe that the documentary evidence will be destroyed, secreted, or lost in the event a search warrant does not issue," or that "there is probable cause to believe that the lawyer . . . in possession of such documentary evidence has committed, is committing, or is about to commit a crime." G.L. c. 276, § 1. See Matter of a Grand Jury Investigation, 470 Mass. at 413. The Supreme Judicial Court considered whether the Commonwealth could obtain the cell phone through a search warrant under G.L. c. 276, § 1, which the Commonwealth suggested would be an alternative approach to a subpoena. Matter of a Grand Jury Investigation, 470 Mass. at 410-414. The Court cautioned that the Commonwealth could not obtain the phone through a search warrant under the provision of G.L. c. 276, § 1, preserving "powers of search and seizure," among other reasons. Id. at 410-415.

> Second, it is the act of producing the telephone by the law firm, rather than the telephone itself, that is covered by the attorney-client privilege. The client's right against compelled production by his or her attorney is not absolute. To fall under the Fisher rule, materials whose contents are not themselves privileged must have been transferred to counsel "for the purpose of obtaining legal advice." Fisher, 425 U.S. at 404. Accordingly, when a client transfers materials to an attorney for purposes of shielding them from law enforcement's reach, the Fisher rule offers no protection.
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> Third, nothing we have said suggests that a lawyer, having received materials whose contents are not themselves privileged for purposes of rendering legal advice, may retain such materials indefinitely, absent a continuing bona fide need and purpose related to the provision of legal advice. Any assessment of whether and, if so, when client materials would cease to be protected by the Fisher rule is, of course, a complex matter, involving factual determinations that will depend on the specific circumstances presented. Because the Commonwealth has never argued that either Doe's initial transfer of the telephone or the law firm's continued retention of it are not justifiable "for the purpose of obtaining legal advice" under Fisher, and the parties have not provided briefing on the issue, we do not address the availability of a subpoena compelling the production of evidence in other circumstances.

Matter of a Grand Jury Investigation, 470 Mass. at 415-416.

Now before this Court are two pending matters: (1) Commonwealth's Rule 17 Motion for Production of the Specified Cell Phone from Ropes & Gray, LLP and (2) Commonwealth's Application for Search Warrant. Primarily at issue is whether the evidence sought by the Commonwealth (a cell phone), if it is in the possession of Ropes & Gray, continues to be held in connection with and for the purpose of providing legal advice and services.

Following several hearings in October and November of 2015 (including an ex parte hearing with Hernandez, his attorneys, and counsel for the third-party law firm on October 13, 2015) and this Court's November 17, 2015 decision to issue proposed findings of fact relating to the Commonwealth's pending motion and request for a search warrant, on December 1, 2015,

Hernandez sought relief from a Single Justice of the Supreme Judicial Court pursuant to G.L. c. 211, § 3 regarding the disclosure of some of those proposed findings of fact to the Commonwealth.

The Supreme Judicial Court's case docket for this matter, SJ-2015-0502, indicates that the Single Justice (Botsford, J.) held hearings on January 5, 2016 and February 18, 2016. According to the docket and representations by the parties at subsequent hearings before this Court, the Single Justice is considering reporting questions for reservation and report to the full bench of the Supreme Judicial Court. On February 19, 2016, the Single Justice issued the following Order of Limited Remand:

> This matter came before the Court, Botsford, J., presiding, on a petition pursuant to G.L. c. 211, § 3. After hearing, it is ORDERED that the petition be, and the same hereby is, allowed to the limited extent that the publication and distribution to the Commonwealth of the Superior Court judge's sealed proposed findings of fact set forth in the second sentence of paragraph 6 and paragraphs 7-9 in the judge's Proposed Findings of Fact Relating to Commonwealth's Rule 17 Motion/Request for Search Warrant, dated November 17, 2015, shall remain stayed until further order of this court.
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> It is FURTHER ORDERED that this matter be, and the same hereby is, remanded to the trial court to permit the judge to decide the Commonwealth's pending Application for a Search Warrant and Rule 17 Motion for Production of the Specified Cell Phone from Ropes & Gray, LLP. Insofar as the judge includes in his decision or order the proposed findings of fact referred to in the previous paragraph, those findings that have been placed under seal should remain under seal, and should not be disclosed to the Commonwealth at this time. With recognition that this order places a burden on the Superior Court judge, any ability of the judge to render a decision in the reasonably near future would be very much appreciated. Following the issuance of the judge's decision or order (or both), counsel for the parties are to contact the clerk of this court to schedule a hearing in this matter.

Although the Order of Limited Remand does not explicitly reference whether this Court may

consider (but not publish to the Commonwealth) facts adduced at the October 13, 2015 hearing, all counsel agree (based on hearings before the Single Justice) that it is appropriate for the Court to do so.

Based on the facts as found and referenced herein and applying the law as enunciated by the Supreme Judicial Court in an earlier review of this matter in Matter of a Grand Jury Investigation, 470 Mass. 399 (2015), the Commonwealth's Rule 17 Motion for Production of the Specified Cell Phone from Ropes & Gray, LLP and the Commonwealth's Application for Search Warrant are **DENIED**. The Court will discuss each pleading in turn, referencing further facts as necessary to resolve the matter.

DISCUSSION

1. Commonwealth's Rule 17 Motion for Production of the Specified Cell Phone from Ropes & Gray, LLP

In October, 2015, the Commonwealth filed a "Rule 17 Motion for Production of the Specified Cell Phone from Ropes & Gray LLP." The Commonwealth's Motion is supported by the Affidavit of Assistant District Attorney Patrick M. Haggan. According to Attorney Haggan:

> 3. Based upon evidence reviewed, on or around June 16, 2013, the defendant [Hernandez] entrusted a cellular telephone, an AT&T Blackberry, to the care, custody, and control of Ropes & Gray LLP.
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> 4. Based upon representations by Attorney Aaron Katz, the Commonwealth believes that the cell phone remains in the possession of Ropes & Gray LLP, pursuant to an order of this Court.
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> 5. The Commonwealth cannot obtain the contents of the phone absent an order of this Court and cannot fully prepare for trial without the production of the contents of the phone.
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> 6. The cell phone contains information that is relevant and has evidentiary value in the prosecution of this case.

> 7. This cell phone, specifically the information contained therein and accessible through a forensic examination of the phone, constitutes evidence that is essential to the prosecution of this case, the phone is not otherwise protected by any privilege, and there is no feasibly alternative to obtain the information contained therein.

Affidavit of Patrick M. Haggan dated Oct. 5, 2015.

Under Mass. R. Crim. P. 17(a)(2), regarding a summons for the production of documentary evidence and objects:

> A summons may also command the person to whom it is directed to produce the books, papers, documents, or other objects designated therein. The court on motion may quash or modify the summons if compliance would be unreasonable or oppressive or if the summons is being used to subvert the provisions of rule 14. The court may direct that books, papers, documents, or objects designated in the summons be produced before the court within a reasonable time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents, objects, or portions thereof to be inspected and copied by the parties and their attorneys if authorized by law.

Mass. R. Crim. P. 17(a)(2).

To obtain third-party records under Rule 17, the moving party must make a good cause showing "(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). See also Commonwealth v. Dwyer, 448 Mass. 122, 139-141 (2006) (establishing protocol for inspection of third-party records protected by a statutory privilege).

The Commonwealth advances two arguments in support of its Motion. First, the

Commonwealth argues that this Court should issue an order or third-party summons for the cell phone because the Commonwealth has shown that the "documents" sought are relevant, have evidentiary value, and are needed in advance of trial to ensure that the Commonwealth is adequately prepared. The Commonwealth cites this Court's prior decision regarding the grand jury subpoena and information contained in Detective Paul MacIsaac's affidavit in support of the application for a search warrant in support of its argument that the cell phone is evidentiary and relevant.

Next, the Commonwealth contends that this Court should issue an order or third-party summons for Ropes & Gray to produce the cell phone because the Commonwealth has complied with Mass. R. Prof. C. 3.8(f).[2] The Commonwealth believes that the cell phone and its information is not protected by any privilege, there is no feasible alternative to obtaining the information, and that the Commonwealth's request is made in good faith in order to produce evidence that will assist the trier of fact.

Hernandez filed an opposition to the Commonwealth's Motion. He argues that the Motion is "in essence, a replay of the motion for a grand jury subpoena to Ropes & Gray" previously filed by the Commonwealth and that the Supreme Judicial Court already rejected that attempt to obtain the cell phone through a subpoena based on various applicable privileges. See Matter of a Grand Jury Investigation, 470 Mass. at 402-416. Hernandez also contends that the Commonwealth has

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[2] Under Mass. R. Prof. C. 3.8(f), a prosecutor in a criminal case shall, "not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless: (1) the prosecutor reasonably believes: (i) the information sought is not protected from disclosure by any applicable privilege; (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (iii) there is no other feasible alternative to obtain the information; and (2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding . . . ."

not made the requisite showing under Mass. R. Prof. C. 3.8(f) because it does not explain why the cell phone constitutes evidence that is essential to the prosecution of its case.

Upon review and consideration, the Commonwealth's Rule 17 Motion for Production of the Specified Cell Phone from Ropes & Gray LLP must be denied. Although I find that the Commonwealth has satisfied the threshold requirements under Lampron,[3] the Commonwealth has not overcome the barrier imposed by the Fisher rule. As the Supreme Judicial Court ruled in the earlier proceeding, where a client's possession of evidence is shielded from governmental reach by the act of production doctrine implicit in the Fifth Amendment, the attorney-client privilege similarly shields it from governmental reach when held by an attorney. As discussed above, the Supreme Judicial Court previously determined that the Commonwealth could not obtain the cell phone through a grand jury subpoena.

The fact that the Commonwealth is now seeking the cell phone through a motion under Mass. R. Crim. P. 17 does little to change the Supreme Judicial Court's prior analysis discussing the applicable privileges such a summons would violate. "[I]t is the act of producing the telephone by the law firm, rather than the telephone itself, that is covered by the attorney-client privilege." In the Matter of a Grand Jury Investigation, 470 Mass. at 415. The privilege attaches when the evidence was "transferred to counsel 'for the purpose of obtaining legal advice.'" Id., quoting Fisher, 425 U.S. at 404. Therefore, even if the attorney had completed the provision of

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[3] Contrary to the defendant's claim that the phone has no evidentiary value, I find that the phone, or more precisely the contents of the phone, would demonstrate a relationship between Hernandez and Bradley: specifically, the fact that they communicated on numerous occasions after Bradley was shot in February, 2013 and likely an admission by Hernandez to having "rocked" Bradley. Such evidence is relevant, at a minimum, to the indictment alleging intimidation of a witness.

legal services, the continued retention of the item would seemingly be protected by the privilege, at least for a reasonable period of time in order to return it to the client. It cannot be the case that the minute the attorney has completed rendering legal advice, the privileged protection of the item instantly evaporates and the item becomes subject to legal process. Such a result would undermine the Fisher rule and the protections of art. 12 of the Massachusetts Declaration of Rights.

Here, I find that the phone was turned over to Ropes & Gray in connection with their representation of Hernandez in several matters. In short order, the law firm of Rankin & Sultan joined Attorney Fee in representing the defendant in connection with his indictment in Bristol County. While that case was pending, Hernandez was indicted for murder in Suffolk County and attorneys Rankin and Sultan filed appearances in that case, and in the related intimidation of a witness investigation that later resulted in indictment. When the Commonwealth filed its motion for issuance of a grand jury subpoena to Ropes & Gray in March, 2014, Rankin & Sultan opposed the motion, asserting a privilege on behalf of Hernandez, as did Attorney Aaron Katz on behalf of Ropes & Gray. Since that time, Ropes & Gray has been subject to this court's order not to transfer, release, or dispose of the phone (and no party or third-party has sought to have that order vacated). As a result, Rankin & Sultan have not been able to access the phone in connection with their provision of legal services to the defendant.

Based on these facts, as well as information provided to the Court during an ex parte hearing involving the defendant, his attorneys, and the third-party law firm, which by order of the Single Justice are sealed from "publication or distribution to the Commonwealth," the Court finds, and rules, that continued possession of the cell phone by counsel or successor counsel

(Rankin & Sultan) is protected by the attorney-client privilege.[4] Consequently, the Commonwealth's use of a summons under Mass. R. Crim. P. 17 to obtain the device is precluded by the Supreme Judicial Court's decision in Matter of a Grand Jury Investigation, 470 Mass. 399.

Further, based on the ex parte showing by the defendant, it is appropriate to vacate the order to Ropes & Gray to the extent that the cell phone may be transferred to Hernandez's current attorneys, subject of course to the limitations of Mass. R. Prof. C. 3.4(a). The issue of whether Rankin & Sultan's possession of the device for a prolonged or indefinite period of time without a continuing bona fide need and purpose related to the provision of legal advice, such that the Fisher rule protections would no longer apply, is not presently before the Court and no opinion is offered in that regard.

2. **Commonwealth's Application for a Search Warrant**[5]

The Commonwealth, relying on the SJC decision in Matter of a Grand Jury Investigation, and more particularly on a protocol suggested in the concurring opinion of three justices in that decision, is seeking approval of its Application for a Search Warrant pursuant to G.L. c. 276, § 1. The Application asserts that there is probable cause to believe that a cell phone, an AT&T Blackberry STL-100-3 Z10, IMEI #352922050372563, contains evidence of a crime or evidence of criminal activity and that the cell phone is located at Ropes & Gray LLP, Prudential Tower, 800 Boylston Street, Boston, MA 02199. Further, the Commonwealth asserts that there is ample evidence showing that the phone is no longer held by Ropes & Gray for the purposes of providing

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[4] In particular, this Court adopts the findings set forth in Paragraphs 7, 8, and 9 of the Proposed Findings of Fact that are under seal by Order of the Single Justice.

[5] Attached, under seal, is a copy of the Application and Affidavit in Support of the Search Warrant.

legal services or advice to Hernandez, and consequently, that the law firm's continued possession constitutes "secretion" of evidence under G.L. c. 276, § 1.

As to the evidentiary significance of the phone, the Commonwealth asserts, and the Court agrees, that probable cause has been demonstrated based on the twenty-six page affidavit of Detective MacIsaac submitted in support of the application for the search warrant. In his affidavit, MacIsaac detailed the circumstances leading up to and surrounding the shooting of Daniel de Abreu and Safiro Furtado on July 16, 2012; the unrelated police investigation surrounding the shooting death of Odin Lloyd in North Attleboro in June, 2013, leading to the discovery of the defendant's Toyota 4Runner; the recovery of a .38 caliber Smith & Wesson revolver on June 21, 2013, that was subsequently linked to the Boston homicides, and inferentially linked to the defendant's cousin; and statements and grand jury testimony from Alexander Bradley describing the defendant's actions in shooting de Abreu and Furtado in July, 2012, and shooting Bradley in Florida in February, 2013.

Additionally, Bradley described a series of telephone and text messages that he sent to Hernandez between February and June, 2013 in which Bradley and Hernandez communicated about why Bradley had been shot. The messages contained threats by Bradley to expose Hernandez, and according to Bradley, in at least one text message, Hernandez admitted "rocking" Bradley, which Bradley interpreted as an admission that Hernandez had shot Bradley. The affidavit further recounted that the defendant had acquired a new cell phone on June 9, 2013 (which included some text messages after June 9, 2013 between the defendant and Bradley), and delivered his other cell phone with text messages from Bradley to Ropes & Gray.

Based on these factual assertions, there is probable cause to believe that the cell phone, or

more precisely, data contained within the cell phone, will provide evidence of the relationship between Bradley and the defendant, their presence together in Florida in February, 2013, and text messages referencing the circumstances surrounding Bradley being shot and the defendant's role and possible culpability in that criminal incident. Such evidence is undoubtedly relevant to the indictment against Hernandez for Intimidation of a Witness (Bradley).

The Commonwealth must also show probable cause that the law firm's possession of the cell phone is for a purpose other than providing legal advice such that it is not protected by the attorney-client privilege and is at risk of being "destroyed, secreted, or lost in the event a search warrant does not issue." G.L. c. 276, § 1. In this regard, the SJC noted that these terms ordinarily would not encompass documentary evidence protected by the attorney-client privilege; to interpret them in that manner would add a "new, distinctly unfamiliar definition: 'unobtainable by law enforcement because of the combined effect of a legal privilege and a statute.'" Matter of a Grand Jury Investigation, 470 Mass. at 413. The Court further noted that on the factual record that was before this Court at the time of the earlier order permitting a grand jury subpoena, the Commonwealth would not satisfy the "secreted" exception. Id. at 414.

Here, the Commonwealth relies on statements made by Attorney Katz, representing Ropes & Gray, during oral argument before the SJC in Matter of a Grand Jury Investigation, to demonstrate probable cause that the phone is "secreted." MacIsaac quotes portions of Attorney Katz's oral argument in his affidavit. He notes that a video of the oral arguments is available online and that he viewed the hearing online. According to MacIsaac, in response to a question from the Court as to whether the cell phone needed to be retained by the law firm for legal advice and when the legal advice period would end, Attorney Katz stated, "I think we would concede that

if the target were not in the Commonwealth custody right now, the law firm would no longer have the phone. That is something that we would be willing to concede."[6]

The defendant objects to this Court's consideration of Katz's statements at the earlier SJC hearing. Noting that there is scant appellate law on the use of an attorney's statements as evidence, the defendant cites one Massachusetts case, Cadigan v. Crabtree, 192 Mass. 233, 241 (1906), where the court discounted an attorney's statement as bearing on a different point. Notably, nowhere in its decision in Matter of Grand Jury Investigation does the majority opinion reference statements made by Attorney Katz as proof of any fact at issue. Where the very appellate court to whom the concession was made fails to rely on it, this Court is disinclined to do so. Moreover, in light of the information adduced during the ex parte hearing on October 13, 2015, the Court is able to make requisite findings without consideration of, and notwithstanding, Attorney Katz's representations before the Supreme Judicial Court.

As noted, the question of whether counsel's continued possession of the phone is necessary to the provision of legal services or advice was the subject of this Court's hearings in October and November, 2015, including an ex parte hearing involving the defendant, his current attorneys, and counsel for Ropes & Gray.[7] In order to resolve that issue, this Court ruled that it

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[6] This Court notes that Attorney Katz indeed made that statement at oral argument in response to a question from Justice Cordy. See Supreme Judicial Court Oral Argument Transcript at 11-12 (Sept. 4, 2014). The oral arguments are available online through a website administered by Suffolk University Law School, and the parties provided a copy of the transcript of the arguments to this Court. Attorney Katz also believed that using a search warrant would be the narrowest way of ruling in the Commonwealth's favor, but Ropes & Gray did not believe it would be an appropriate reading of the search warrant statute. Moreover, Ropes & Gray requested some guidance on how to handle the search warrant's execution.

[7] The Court conducted the hearing in part based on a protocol proposed in the concurring opinion of Justice Cordy in Matter of Grand Jury Investigation, 470 Mass. at 420 (upon receipt of

was incumbent on the defendant (or third-party attorney) to show that the attorney-client privilege still applied. See Purcell v. District Attorney for the Suffolk Dist., 424 Mass. 109, 115 (1997) (recognizing that burden of proving that attorney-client privilege applies to a communication rests on the party asserting the privilege). Although the Commonwealth bears the ultimate burden of demonstrating probable cause to believe that the evidence is being "secreted," there is no other conceivable way under the circumstances presented here that the Commonwealth could affirmatively show that defense counsel would have no continuing purpose in possessing the phone in connection with their legal representation of the defendant. That showing, at least in the first instance, is properly placed on the defendant.

The phone at issue here was delivered to Ropes & Gray sometime around June 16, 2013. Attorney Michael Fee was a partner at Ropes & Gray and represented Hernandez. At the time, Alexander Bradley had been threatening to sue Hernandez for the Florida shooting and to expose Hernandez's violent behavior in the public arena. Ten days later, Hernandez became the subject of a police investigation in Bristol County relating to the homicide of Odin Lloyd on June 17, 2013. Over the next one to two weeks, investigators intensified their focus on Hernandez, executing search warrants at his residence and on vehicles, interviewing him and his companions, and searching his cousin's home in Bristol, Connecticut. On June 26, 2013, Hernandez was arrested for the murder of Odin Lloyd. Shortly thereafter, Attorneys Charles Rankin and James Sultan, and their law firm, Rankin & Sultan, joined forces with Fee to represent Hernandez on the Bristol County murder charge and in connection with an ongoing Suffolk County grand jury

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a search warrant directed to a law firm, court should issue a short order of notice, providing the law firm with an opportunity to raise privilege claim).

investigation into the murders of de Abreu and Furtado.

The defendant was indicted by a Suffolk County grand jury in May, 2014. He was arraigned on May 28, 2014, represented by Attorneys Fee, Rankin, and Sultan. In pretrial hearings before me, Attorneys Rankin and Sultan represented that they were exclusively focused on the Bristol County case (having been indicted earlier and that had an anticipated trial date in January, 2015) and likely would not turn their attention to the Suffolk County charges until after the defendant's trial in Bristol County had concluded. The Bristol County trial commenced on January 9, 2015 and ended on April 15, 2015; the defendant was found guilty of murder and firearms charges.[8] Three weeks later, on May 8, 2015, the Suffolk County grand jury returned an indictment against the defendant for witness intimidation arising out of the shooting of Bradley.

Added to these facts are the compelled disclosures made by Attorneys Katz and Sultan during the ex parte hearing on October 13, 2015, from which this Court made proposed (and now final) findings of fact which remain, in part, under seal. Suffice it to say, Attorney Katz provided good reason why the phone remained at Ropes & Gray after Mr. Fee's separation from the firm, and Attorney Sultan provided good reason why the phone is still necessary for the provision of legal services to the defendant. It is also worth noting that the phone has been subject to this Court's order preserving the status quo since April, 2014.

In light of the facts set forth herein, the Commonwealth has not shown probable cause under G.L. c. 276, § 1 to believe that the cell phone is at risk of being "destroyed, secreted, or lost

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[8] The Court takes judicial notice of the Superior Court docket in Commonwealth v. Hernandez, BRCR2013-00983. See Home Depot v. Kardas, 81 Mass. App. Ct. 27, 28 (2011) (recognizing that court may take judicial notice of docket entries and papers filed in separate cases, but may not take judicial notice of facts or evidence brought out in those separate actions).

in the event a search warrant does not issue." Consequently, a search warrant aimed at Ropes & Gray cannot issue.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Commonwealth's Rule 17 Motion for Production of the Specified Cell Phone from Ropes & Gray, LLP, and the Commonwealth's Application for a Search Warrant are **DENIED**.

Justice of the Superior Court

Dated: March 7, 2016