

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
NO. 2014SUCR10417
NO. 2015SUCR10384




COMMONWEALTH

v.

AARON HERNANDEZ

COMMONWEALTH'S MOTION TO COMPEL ROPES & GRAY, LLP
TO TRANSFER THE SPECIFIED CELL PHONE
TO DEFENSE COUNSEL BY A DATE CERTAIN

Now comes the Commonwealth and respectfully requests this Honorable Court order Ropes & Gray, LLP to transfer custody of the specified cell phone to the defendant's current counsel in the above-captioned cases, Rankin & Sultan, on or before March 21, 2016. Further, the Commonwealth requests this Court maintain its order -- in addition to the professional ethical obligations imposed by Mass. R. Prof. C. 3.4(c) -- that counsel "not alter, transfer, dispose of, return, or otherwise render the telephone unavailable," pending further court order, with notice to the Commonwealth and the opportunity to be heard. *See In re Grand Jury Investigation*, 470 Mass. 399, 402 (2015). By allowing the phone to pass to successor counsel, additional transfers must not be permitted in an effort to avoid production of the cell phone and withhold evidence from the Commonwealth.

On March 7, 2016, this Court denied 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 (hereinafter "March 7, 2016 Order").

3/17/16 Filed

This Court found that, from March 2014 to date, “Rankin & Sultan have not been able to access the phone in connection with their provision of legal services to the defendant,” because Ropes & Gray were subject to the Court’s order prohibiting transfer or disposal of the phone. *See March 7, 2016 Order* at p. 10. The Commonwealth does not dispute this Court’s factual finding, based on ex parte communications, that Attorneys Rankin and Sultan now require a reasonable period of time to review the device and to conduct a forensic examination to examine its contents.¹

To date, defense counsel has not stated in open court that they need access to the cell phone itself. Indeed, as the Supreme Judicial Court has acknowledged, the value of the item is in the “documents” and contents within the phone, not the device itself. *See In re Grand Jury Investigation*, 470 Mass. at 412. Within a matter of days (if not hours), defense counsel can download and preserve the contents of the device. After the forensic examination extracts the contents of the cell phone, counsel will no longer have a bona fide need to possess the cell phone and the “*Fisher* rule” protections will no longer apply. Simply put, counsel does not need prolonged, indefinite, or unilateral access to the cell phone itself to provide legal advice.

¹ However, “the phone was turned over to Ropes & Gray in connection with their representation of [the defendant] in several matters” “sometime around June 16, 2013.” *March 7, 2016 Order* at p. 10, 15, and Rankin & Sultan entered appearances on behalf of the defendant after he was arrested for the murder of Odin Lloyd, on or around June 26, 2013. It is unclear how this Court’s preservation order obstructed defense counsel’s ability to review and examine the device while it was in Ropes & Gray’s possession.

Accordingly, to avoid unnecessary delays in the instant prosecution, the Commonwealth respectfully requests this Honorable Court compel Ropes & Gray to transfer the specified cell phone to Rankin & Sultan by March 21, 2016. In the event that the phone is not transferred by this date (or another date as specified by the Court), the Commonwealth will renew its Rule 17 Motion for Production of the Specified Cell Phone from Ropes & Gray, and its Application for a Search Warrant.

Respectfully Submitted
For the Commonwealth,

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Dated: March 15, 2016

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
SJ-2015-0502

Suffolk Superior Court
No. SUCR2014-10417;
SUCR2014-10384 ✓
(15)

COMMONWEALTH

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ORDER OF REMAND

This matter came before the Court, Botsford, J., presiding, on a petition pursuant to G. L. c. 211, § 3. There was argument by counsel for the parties and upon consideration thereof, it is ORDERED that this matter be, and the same hereby is, remanded to the trial court for further proceedings, including, but not limited to, motions previously filed or anticipated to be filed by the Commonwealth. Following issuance of the trial court's ruling(s) on these motion(s), counsel for any aggrieved party may re-petition this court for interlocutory appellate relief in this existing action.

It is FURTHER ORDERED that the trial court judge's sealed proposed findings of fact referenced in this Court's February

19, 2016, Order of Limited Remand, shall remain under seal and their publication and distribution to the Commonwealth shall remain stayed until further order of this Court.

By the Court, (Botsford, J.) *MB*

A handwritten signature in cursive script, appearing to read "J. C. Stewart", followed by a horizontal line.

Assistant Clerk

Entered: March 18, 2016