

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
NO. 2014SUCR10417
NO. 2015SUCR10384

COMMONWEALTH

v.

AARON HERNANDEZ

COMMONWEALTH'S MOTION FOR AN ANTICIPATORY SEARCH
WARRANT TO BE EXECUTED UPON COMPLETION OF
THE LEGAL ADVICE PERIOD

Now comes the Commonwealth in the above-captioned matter and respectfully requests this Court find that (1) the legal advice period for Attorneys Rankin and Sultan to conduct a physical and forensic examination of the cell phone is not indefinite and counsel does not require prolonged or even unilateral access to the device; and (2) a forensic examination to download and preserve the contents of the device can be completed in a matter of hours.¹

Accordingly, pursuant to *In re Grand Jury Investigation*, 470 Mass. 399 (2015) (Cordy, J., concurring), the Commonwealth seeks a search warrant to obtain the cell phone from Rankin & Sultan, upon the completion of the legal advice period. In anticipation of this event, the Commonwealth submits the attached Application for Search Warrant with Affidavit of Detective Paul MacIsaac and requests the Court issue the Search Warrant, subject to the following conditions: (1) the Search Warrant will be executed no earlier than March 31, 2016; and (2) the Search Warrant will be executed only in the event that Rankin & Sultan retain the cell phone beyond March 30, 2016.


¹ See attached Affidavit of Sergeant Detective Kevin Witherspoon.

As noted in Justice Cordy's concurring opinion, this Court has authority to direct the parties to fashion a protocol unlikely to result in a production that is testimonial and incriminating. To this end, this Court should modify its preservation order to permit Attorneys Rankin and Sultan to transfer the cell phone to a third-party custodian that can deliver the phone to the Suffolk County District Attorney's Office.

Accordingly, the Commonwealth requests this Honorable Court issue a Search Warrant for Rankin & Sultan, to be executed no earlier than March 31, 2016, and only in the event that the attorneys continue to retain possession of the cell phone.

Respectfully Submitted
For the Commonwealth,

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Dated: March 22, 2016

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

**SUPERIOR COURT
NO. 2014SUCR10417
NO. 2015SUCR10384**

COMMONWEALTH

v.

AARON HERNANDEZ

**AFFIDAVIT OF SERGEANT DETECTIVE KEVIN WITHERSPOON IN
SUPPORT OF THE COMMONWEALTH'S MOTION FOR AN ANTICIPATORY
SEARCH WARRANT TO BE EXECUTED UPON COMPLETION OF
THE LEGAL ADVICE PERIOD**

I, Sergeant Detective Kevin Witherspoon, hereby aver under the pains and penalties of perjury that the following is true to the best of my knowledge and belief:

1. I have been a member of the Boston Police Department for approximately twenty-five years. Currently, I am the Director of the Computer Forensics Lab at the Suffolk County District Attorney's Office. Since 2007, I have specialized in examining digital evidence.

2. Generally, my training related to cell phones includes, but is not limited to, the following: United States Secret Service Forensics Academy in National Computer Forensic Institute, Mobile Forensics 101, 102, 103, hosted by Access Data and Mobile Forensic Institute, Paraben Handheld Forensics, BK Cell Phone Forensics, and Cellebrite Mobile Forensics.

3. I have been qualified on multiple occasions in Suffolk Superior Court to provide expert witness testimony relative to cell phone data extractions and related digital evidence.

4. On the above-captioned case, I have been made aware by Boston Police investigators and prosecutors that they seek to obtain a AT&T Blackberry STL-100-3 Z10, IMEI# 352922050372563, purportedly connected to the defendant.

5. The BlackBerry model Z10 is supported by Cellebrite's UFED 4PC, a mobile forensic software that we commonly use to extract data from such a device, and which I would use for this model phone.


6. Assuming that the device is not password protected, we would power the device on and then place it into airplane mode. After selecting the correct cable, we would then connect the device to the UFED Device Adapter, which is connected to our forensic machine. UFED 4PC (Cellebrite) will then allow us to perform a Logical and/or File System extraction of the device. These extractions allow us to copy the data from the device to our forensic machine.

7. Based upon prior experience with similar devices, the entire process should take less than 2 hours to complete. If the device's battery is not charged, an additional hour will be needed.

8. Additionally, I have recently communicated with Cellebrite technical support, and they advised me that an examination or extraction of this model Blackberry would take 1-2 hours.

9. From my extensive work in this field, I am aware that there are a number of highly qualified private forensic experts in and around the Boston area that specialize in Mobile Forensics and can complete a similar examination within the same time period.

Signed under the pains and penalties of perjury this the 22nd day of March, 2016.


Sergeant Detective Kevin Witherspoon
Boston Police Department

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CRIMINAL #2014-SUCR-10417
CRIMINAL #2015-SUCR-10384

COMMONWEALTH OF MASSACHUSETTS

v.

AARON HERNANDEZ

**DEFENDANT'S OPPOSITION TO COMMONWEALTH'S
MOTION FOR AN ANTICIPATORY SEARCH WARRANT**

I. STATEMENT OF RELEVANT FACTS.

On March 7, 2016, pursuant to an Order of Limited Remand by the Single Justice of the Supreme Judicial Court (Botsford, J.), this Court issued a 17-page Memorandum of Decision and Order denying the Commonwealth's Rule 17 motion for production of the defendant's cell phone from Ropes & Gray and the Commonwealth's Application for a Search Warrant for the same cell phone. On or about March 15, 2016, the Commonwealth filed a Motion to Compel Ropes & Gray, LLP to Transfer the Specified Cell Phone to Defense Counsel by a Date Certain. On March 18, 2016, the Single Justice remanded this matter to this Court for further proceedings, "including, but not limited to, motions previously filed or anticipated to be filed by the Commonwealth." On March 22, 2016, the Commonwealth filed a Motion for an Anticipatory Search Warrant to Be Executed upon Completion of the Legal Advice Period, together with a supporting affidavit of Boston Police

Sergeant Detective Kevin Witherspoon. Both motions are presently pending before this Court and scheduled for hearing on March 23, 2016.¹

II. SUMMARY OF APPLICABLE LAW.

A. Constitutional Privilege Against Self-Incrimination.

The Fifth Amendment to the Constitution of the United States provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." Article XII of the Massachusetts Declaration of Rights provides that "[n]o subject shall... be compelled to furnish evidence against himself." This protection applies to all communications that are testimonial, and "does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution." *Maness v. Meyers*, 419 U.S. 449, 461 (1975). *See also United States v. Hubbell*, 530 U.S. 27, 36 (2000); *In the Matter of a Grand Jury Investigation*, 470 Mass. 399, 402-403 (2015) ["grand jury cell phone decision"]. The constitutional privilege against self-incrimination allows for "no balancing of State-defendant interests" and does not "yield to reasonable intrusions." *Id.* at 409. The defendant is not aware of any controlling precedent that places a time limit upon this constitutional privilege.

¹ The defendant has no objection to the voluntary transfer of any cell phone of the defendant's currently in the possession of Ropes & Gray (his former counsel) to Rankin & Sultan (his present counsel) for lawful purposes. However, the defendant objects to the Commonwealth's motion to effect such a transfer through the issuance of a Court order compelling one law firm to transfer this documentary evidence to another law firm and knows of no legal authority for such an order.

B. Attorney-Client Privilege and the *Fisher* Doctrine.

"The attorney-client privilege 'is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure'." *In Re Grand Jury Investigation*, 453 Mass. 453, 456 (2009), quoting *Purcell v. District Attorney for the Suffolk District*, 424 Mass. 109, 116 (1977). "A party asserting the privilege must show that (1) the communications were received from the client in furtherance of the rendition of legal services; (2) the communications were made in confidence; and (3) the privilege has not been waived." *Id.* See also *Matter of the Reorganization of Elec. Mut. Liab. Ins. Co.*, 425 Mass. 419, 421 (1997). The well-established, common law attorney-client privilege belongs to the client and thus can be waived only by the client. *In Re John Doe Grand Jury Investigation*, 408 Mass. 480, 483 (1990). The defendant is unaware of any controlling precedent that places a time limit on attorney-client privilege.

In *Fisher v. United States*, 425 U.S. 391, 410 (1976), the Supreme Court addressed a claim of act of production privilege respecting documents transferred from individual taxpayers to their lawyers. The Court observed that under such circumstances, the lawyers stood in the shoes of their clients: "Since each taxpayer transferred possession of the documents in question from himself to his attorney in order to obtain legal assistance in the tax investigations in question, the papers, if unobtainable by summons from the client, are unobtainable by summons directed to the attorney by reason of the attorney-client privilege." *Id.* at 405. The *Fisher* doctrine applies, *inter alia*, to the contents of a cell phone. *In the Matter of a Grand Jury Investigation*, 470 Mass. at 403-410.

C. Statutory Prohibition on Searching Law Offices.

The issuance of search warrants in Massachusetts is governed by M.G.L.c. 276, § 1. That statute specifically provides, *inter alia*, that no 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." The Commonwealth bears the burden of showing that this limited exception to the general prohibition on search warrants directed at a lawyer has been satisfied. *See In the Matter of a Grand Jury Investigation*, 470 Mass. at 413, 414. Not surprisingly, the statute is silent about how the prosecutor should go about seeking to make the requisite showing. One thing the Commonwealth may not do is to call defense lawyers as witnesses without meeting the stringent requirements set forth in SJC Rule 3.7, DR 3.8 (f). That rule "is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship." Comment to Rule 3.8 (f), ¶ 4.

D. Adjudicating Applications for Law Office Searches.

As noted above, M.G.L.c. 276, § 1 is silent about the criteria or process to be employed in determining whether the "secreted" exception to the prohibition on law office search warrants applies. In the grand jury cell phone case, the Supreme Judicial Court confined itself to the record before it, declining to discuss the applicable procedures or the substantive legal standards: "We leave for another day the question whether and under what circumstances the prolonged retention by counsel of client documents unprotected or no longer protected by any privilege might qualify as secreting under the meaning of G.L.c. 276, § 1." 470 Mass. at 414. Three Justices (Cordy, J. with

Gants, C.J. and Spina, J.) filed a concurring opinion proposing a protocol for adjudicating such applications. *Id.* at 420-421. The majority of the Court took note of that proposed protocol, adding: “[W]e take no view as to its propriety.” *Id.* at 416, n.7. Accordingly, unless and until a majority of the Supreme Judicial Court says otherwise, that proposed protocol is not authorized by law.

III. APPLICATION OF LAW TO FACTS.

The sole legal authority relied upon by the Commonwealth in its motion for an anticipatory search warrant of a law office is Justice Cordy’s concurring opinion in the grand jury cell phone case. That opinion, however, has not been adopted by a majority of the Court and thus does not constitute binding legal precedent. “A concurring opinion, while persuasive, is not binding and does not constitute authority under the doctrine of stare decisis, or have any precedential value.” 21 C.J.S. Courts §198 (3/16 Update). Accordingly, it would be legal error for this Court to accept the Commonwealth’s invitation to rely upon a novel protocol proposed in that concurring opinion to circumvent the prohibition on law office searches embodied in c. 276, §1 in the circumstances of this case.

Putting the novelty of Justice Cordy’s proposal to one side, the Commonwealth’s request for a law office search warrant is predicated on several flawed assumptions. First, the Commonwealth apparently assumes that the defendant’s privilege against self-incrimination, including act of production privilege, has some temporal limit. It does not. Second, the Commonwealth apparently assumes that attorney-client privilege, which underlies the Fisher rule, has some temporal limit. It does not. *In Re John Doe Grand Jury Investigation*, 408 Mass. at 483. Third, the Commonwealth would interpret the term “secreted,” as it appears in c. 276, §1, to be synonymous with “unavailable to law enforcement.” That, however, is not what the term means. If the Legislature intended to

authorize searches of law offices for documentary evidence whenever such evidence would otherwise be unavailable to law enforcement, it presumably would have said so. It did not.

Indeed, the SJC specifically addressed and rejected such a construction of the statute in its grand jury cell phone decision:

The interpretation offered by the Commonwealth diverges from any accepted definition of “secreted” or “lost”. An item is “secreted” when it is “hid[den],” conceal[ed],” or “remove[d]” from observation or the knowledge of others; an item is “lost” when it is “not to be found; missing” or “no longer held or possessed; parted with.” [citation omitted] The Commonwealth’s argument would require that we add to these familiar definitions a new, distinctly unfamiliar definition “unobtainable by law enforcement because of the combined effect of a legal privilege and a statute.”.... Nothing in the language of the exception supports this view, and it gains no support from the legislative history of the act that amended G.L. c. 276, §1, to add the provision at issue here.

470 Mass. at 412-413.

Apparently recognizing the serious legal problems inherent in a “production that is testimonial and incriminating,” the Commonwealth suggests that the defendant’s law firm should “transfer the cell phone to a third-party custodian that can deliver the phone to the Suffolk County District Attorney’s Office.” *Comm. Motion*, p. 2. Yet that suggestion was also expressly considered and rejected by the SJC in its cell phone grand jury decision:

The policy underlying the Fisher rule reveals the inadequacy of the Commonwealth’s suggestion that “the firm could appoint an alternate third party designee to logistically present the [tele]phone to the grand jury.” The Fisher rule serves to protect open communication between attorneys and clients by ensuring that a client does not sacrifice the protection that evidence otherwise would receive against compelled production by transferring it to an attorney. The damage to the attorney-client relationship would result whenever previously unobtainable materials became obtainable as a result of being transferred to the attorney, regardless of whether the materials were

handed over by a third-party designee or by the law firm itself.

470 Mass. at 405.

In sum, the Commonwealth has utterly failed to show that its motion for an anticipatory law office search warrant falls within the limited exception to the statutory prohibition on such searches set forth in c. 276, §1, as that statute has been construed by a majority of the Supreme Judicial Court. This Court has a duty to apply the law as it is, not as the Commonwealth might wish it to be or as it may become at some future time. Accordingly, the Commonwealth's Motion for an Anticipatory Search Warrant must be denied.

Respectfully submitted,

AARON HERNANDEZ


By his attorneys,



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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing document upon the Commonwealth by e-mailing and delivering a copy thereof, IN HAND, to: Patrick M. Haggan, First Assistant District Attorney, One Bulfinch Place, Boston, MA 02114-2997 on March 23, 2016.



James L. Sultan