COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
FOURTH DIVISION
CASE No. 12-CR-260-001

COMMONWEALTH OF KENTUCKY, Plaintiff

vs.

SARAH JONES, Defendant

and

CASE No. 12-CR-260-002

COMMONWEALTH OF KENTUCKY, Plaintiff

vs.

CHERYL JONES, Defendant

MOTION TO SUPPRESS

The Defendants, Sarah Jones and Cheryl Jones, move this Court to suppress all text message evidence obtained in the above captioned case.

I. THE DEFENDANTS HAD A REASONABLE EXPECTATION OF PRIVACY IN THE CONTENT OF THE TEXT MESSAGES SENT TO CY AND THEREFORE HAVE STANDING TO CHALLENGE THE NOVEMBER 23, 2011 SEARCH WARRANT AND ALL SEARCH WARRANTS RELATING TO CONTENT OF TEXT MESSAGES

A defendant that makes a motion to suppress evidence that the government intends to use against them at trial must show that they were a victim of a search and seizure rather than one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. *Jones v. United States*, 362 U.S. 257 (1960), *overruled on other grounds by U. S. v. Salvucci*, 448 U.S. 83 (1980). If the person had a reasonable expectation of privacy in the items seized, they are a victim of a search and seizure. The standard is sometimes broken down into two steps: 1) did that person exhibit subjective expectation of privacy, and 2) was the expectation reasonable such as to be accepted as legitimate by society. *Smith v. Maryland*, 442 U.S. 735, 739 (1979).

In *Katz v. United States*, 389 U.S. 347 (1967), the Supreme Court first recognized a privacy expectation in the contents of a telephone conversation in a closed public phone booth. *Id.* at 353. In *Smith v. Maryland*, the Supreme Court refined that privacy expectation, noting the distinction between the contents of a telephone call (for which a legitimate privacy expectation exists) and the actual phone numbers dialed (no privacy expectation). *Id.*, 442 U.S. at 743-44 (1979). However, when it comes to new forms of communications such as email or text messages, the Supreme Court has been reluctant to answer questions about when a reasonable expectation of privacy exists. *See City of Ontario v. Quon*, 130 S.Ct. 2619, 2629 (2010) ("The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." The court held there was no reasonable expectation of privacy in text messeages sent and received on city-owned wireless equipment.)

The Sixth Circuit Court of Appeals held that an email "subscriber enjoys a reasonable expectation of privacy in the contents of emails 'that are stored with, or sent or received through, a commercial ISP'" such that "[t]he government may not compel a commercial ISP to turn over the contents of a subscriber's emails without first obtaining a warrant based on probable cause." *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010). Courts have applied the content exception to the third-party-disclosure doctrine in order to preserve the reasonable expectation of privacy to users of new forms of communication technology that expose what society regards as highly private information. *See, e.g., United States v. Forrester*, 512 F.3d 500, 511 (9th Cir. 2008) ("E-mail, like physical mail, has an outside address 'visible' to the third-party carriers that transmit it to its intended location, and also a package of content that the sender presumes will be read only by the intended recipient. The privacy interests in these two forms of communication are identical. The contents may deserve Fourth Amendment protection, but the address and size of the package do not.")

In *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007), a government worker argued that he had a reasonable expectation of privacy on the phone that was provided by his employer. *Id.* at 259. The Fifth Circuit Court of Appeals held that the worker had a reasonable expectation of privacy in the call records and text messages on the cell phone and therefore had standing. *Id.* The Court reasoned that although the employer could have read the text messages once he returned the phone, this does not imply that the worker should not have reasonably expected to be free from intrusion from both the government and the general public. *Id.* Further, the government stipulated that the worker was permitted to use the phone for his own personal purposes. *Id.*

In *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892 (9th Cir. 2008), *rev'd on other grounds, City of Ontario v. Quon*, 130 S.Ct. 2619 (2010), the Court of Appeals for the Ninth Circuit held that users of text messaging services have a reasonable expectation of privacy in their text messages stored on the service provider's network. *Id.*, at 904. The *Quon* court held that the fact the service provider "may have been able to access the contents of the messages for its own purposes is irrelevant" because the phone user "did not expect that [the service provider] would monitor their text messages, much less turn over the messages to third parties without Appellants' consent." *Id.* at 905-906. "As a matter of law, Trujillo, Florio, and Jerilyn Quon had a reasonable expectation that the Department would not review their messages absent consent from either a sender or recipient of the text messages." *Id.*, at 906.

The warrant dated November 23, 2011 was seeking the contents of text messages sent and received by Ms. Jones from CY's service provider. Ms. Jones had an expectation that any message she sent to CY would be free from government intrusion in the absence of CY's disclosure of or consent to search the content of the messages. Email has become a dominant feature of cell phones and the fact that an email or text message is sent by cell phone would not likely cause a person to believe that they had a less reasonable expectation of privacy. Any text information that was sent to CY was intended for him as a recipient.

While the dissemination of the messages could come from the recipient, no reasonable person would expect that their text messages would be subject to government or public intrusion. This is true whether the government uses the defendants' service provider or the recipient's service provider. Like in *Quon*, both defendants had a reasonable expectation that the government could not view the content of their text messages without the consent of the recipient. The recipient in all cases has never consented to the search or viewing of the text

messages. Therefore both defendants had a reasonable expectation of privacy in their text messages stored by the cell provider and have standing to challenge the November 23, 2011 search warrant.

II. ALL EVIDENCE OBTAINED AS A RESULT OF THE SEARCH WARRANTS SHOULD BE SUPPRESSED BECAUSE SIGNING JUDGE WAS NOT NEUTRAL AND DETACHED, THE AFFIDAVIT DID NOT SUPPORT A FINDING OF PROBABLE CAUSE, OFFICER INMAN WAS RECKLESS IN REGARD TO THE TRUTH OF THE STATEMENTS CONTAINED IN THE AFFIDAVIT, AND THE DEFENDANT'S TRIAL HAS BEEN PREJUDICED BY THE PROSECUTOR'S MISCONDUCT

A. Judge Easterling's self-initiated ex-parte meeting with the alleged victim, his close ties to Dixie Heights High School parents, and his previous involvment in the disposition of tickets for students of Dixie Heights, including twice for the alleged victim, lend at least an appearance that he was not a neutral and detached magistrate as required by the state and federal constitutions.

"Kentucky courts have repeatedly held that no search warrant shall be issued unless supported by an affidavit alleging probable cause." *Carrier v. Commonwealth*, 142 S.W.3d 670, 673 (Ky. 2004) Additionally, the warrant must be signed by a neutral and detached magistrate and the affidavit must be supported by a statement of facts sufficient to create probable cause. R.Cr. 13.10; *Carrier v. Commonwealth*, 142 S.W.3d 670, 674 (Ky. 2004). If a judge rubber stamps a search warrant without determining whether the affidavit is sufficient, or is otherwise biased, then no probable cause has been found and the evidence should be suppressed under the exclusionary rule.

Whatever else neutrality and detachment might entail, it is clear that it requires severance and disengagement from activities of law enforcement. *Shadwick v. Tampa*, 407 U.S. 345, 350-51 (1972) (noting that there should be a showing of a connection with any law enforcement activity which would distort the independent judgment of the magistrate). Additionally, the "alleged bias must emanate from some 'extrajudicial source' rather than from participation in

judicial proceedings." *Demjanjuk v. Petrovsky*, 776 F.2d 571, 577 (6th Cir. 1985), *vacated on other grounds*, 10 F.3d 338 (6th Cir. 1993).

There need not be an actual claim of bias or impropriety levied, but the mere appearance that such an impropriety might exist is enough to implicate due process concerns. *Commonwealth v. Brandenburg*, 114 S.W.3d 830, 834 (Ky. 2003). The *Brandenburg* court quoted extensively from the decision in *American Cyanamid Co. v. Federal Trade Comm'n*, 363 F.2d 757, 763–764 (6th Cir.1966) (*quoting In re Murchison*, 349 U.S. 133, 136 (1955)):

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge ... not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 U.S. 11, 14 (1954).

Id. If the magistrate abandons the "detached and neutral" judicial role or if the officer's belief in the existence of probable cause was wholly unreasonable, suppression of evidence remains available as a remedy. *See Hensley v. Commonwealth*, 248 S.W.3d 572 (Ky.App. 2008).

In *Brandenburg*, the defendant argued that the trial commissioner that signed the warrant was not neutral and detached because her husband worked for the Commonwealth Attorney's Office as the victim advocate. *Commonwealth v. Brandenburg*, 114 S.W.3d 830 (Ky. 2003). The Supreme Court of Kentucky held that the trial commissioner did not exhibit the neutrality and detachment demanded of a judicial officer in charge of issuing search warrants due solely to the appearance of impropriety created by her relationship to an employee of the Commonwealth

Attorney's office. *Id.* "Such is a violation of Canon 2 of the Code of Judicial Conduct and Section 10 of the Kentucky Constitution." *Id.* at 835.

The Court reasoned, "It is enough that the public might perceive that the trial commissioner is not impartial . . . thereby creating an appearance of impropriety. In such an instance, recusal is mandatory." *Id.* at 833. The Court noted that the United States Supreme Court's interpretation of the Due Process Clause merely establishes the minimum guarantees of the Federal Constitution. *Id.* at 835.

> "[T]his Court and other state courts are at liberty to interpret state constitutions to provide greater protection of individual rights than are mandated by the United States Constitution." *Crayton [v. Commonwealth]*, 846 S.W.2d [684] at 685 (Ky. 1992). While we have previously recognized that there is little difference in the language of Section 10 of the Kentucky Constitution and the Fourth Amendment to the U.S. Constitution, *id.*, this Court has at no time denied itself the right to enhance the protections afforded the citizens of this Commonwealth by the Kentucky Constitution. The need for such enhanced protection is particularly evident when the nature of the error goes to the accused's right to have a probable cause determination made by a neutral and detached judicial officer. An error of this magnitude taints the entire judicial process. The error can only be cured by suppression of any evidence obtained pursuant to the tainted search, regardless of the good faith of all the parties.

Similarly, the judicial disqualification statute indicates the times in which a judge must disqualify himself as result of personal knowledge of the case, because he is no longer detached and neutral. KRS 26A.015(2)(a) and (e) mandate that a judge disqualify himself if he has "personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts . . ., or has expressed an opinion concerning the merits of the proceeding . . ." or has "knowledge of any other circumstances in which his impartiality might reasonably be questioned".

In *Dixon v. Commonwealth*, 890 S.W.2d 629 (Ky. App. 1994), the Defendants argued that the trial commissioner who issued the search warrant was not a neutral and detached

magistrate because she was the law partner of the county attorney. The Kentucky Court of Appeals held that the association of the trial commissioner and the county attorney in the practice of law presented an insurmountable conflict of interest and appearance of impropriety, which destroyed the trial commissioner's character as a neutral and detached magistrate. The court concluded that the good faith exemption from exclusion of the evidence was inapplicable because the issuing authority had not met the threshold requirement of neutrality. The court of appeals reversed defendants' convictions and the trial court's denial of their suppression motions. *Id.*

There have been many people involved in Ms. Jones' investigation and many of them can be traced back to the parents of Dixie Heights High School students ("Dixie Parents"). Judge Easterling is one of those players; he signed six different search warrants and he is a Dixie Parent, whose son is good friends with the alleged victim, CY. As a Dixie Parent, Judge Easterling was aware of the rumors circulating about CY and Ms. Jones. The investigation into the rumors circulating Dixie Heights High School came to a head when Morgan McCafferty reported the rumors to Officer Zurborg, the father of TZ, who is a cheerleader at Dixie and who worked with Ms. Jones on the cheerleading squad. Officer Zurborg then took the complaint to Chief Kramer, who has a son that is a senior at Dixie. Additionally, Rob Sanders, the Commonwealth's Attorney is also friends with another Dixie cheerleader's aunt and uncle, and the neighbors of the alleged victim. Out of the three players essential to this case, two of them serve a law enforcement function and all have close ties to Dixie Heights High School.

Moreover, Judge Easterling has a direct tie to the alleged victim in this case. (Exhibit A). The least concerning aspect of the Judge's conduct is that he assisted CY two times in the disposition of traffic tickets. (Exhibits B & C). The first time that Judge Easterling helped CY

occurred during the early summer of 2011. After being assigned to Judge Easterling for court and completing traffic school, CY returned his proof of completion and his proof of insurance to Judge Easterling at his house, so that CY would not have to return to court. The second time, in February 2012, CY called the Judge's son and asked if his dad could take care of his newest ticket. The Judge's son replied that CY would have to come to his house.

When CY arrived at the judge's house, the Judge told CY that he would likely have to complete three hours of community service and gave CY the appropriate papers to fill out. The Judge then asked to talk to CY in private, away from the presence of the Judge's son. In private, the Judge questioned CY about the ongoing investigation into his rumored relationship with Ms. Jones. CY replied that he was fine and that the allegations were not true. The Judge continued the conversation but started to stutter and seemed hesitant. He stated multiple times that CY should not worry about the situation and that the Judge should not even be talking to him about it. He next said that Ms. Jones was not going to get jail time and encouraged CY to tell the truth on the stand if questioned; "I'm not saying it will go that far, but if it does you better tell the truth." The entire conversation lasted roughly fifteen minutes, and eventually the Judge indicated that he knew about the investigation because he was a judge in Kenton County. At the end of the conversation, the Judge shook CY's hand and told him everything would be alright.

Judge Easterling was the signing judge for six different search warrants, including the search warrants dated November 23, 2011. (Exhibit D) His relationship with CY alone is sufficient to warrant an appearance of impropriety and as a Dixie Heights parent he was aware of the rumors circulating, which at least infers that he took it into account when making his finding of probable cause. His son was friends with CY and while this alone might not create an appearance of impropriety, his involvment in the disposition of these tickets for the alleged

victim of the crime does show bias in this case. Judge Easterling even texted CY to let him know that he would "take care" of the second ticket. If the Judge is willing to expedite the process that everyone else has to go through for the victim, then an inferred bias is reasonable. However, during this second meeting the Judge initiated a private, ex parte meeting with the victim to make his own investigation into the case at bar. Judicial officers are restrained from gaining extrajudicial knowledge of cases over which they have power.

An appearance of impropriety exists when a judge signs a warrant for an investigation into crime in which the victim is his son's friend, the judge has previously expedited a speeding ticket for the victim, the judge is aware of rumors circulating about the crime, and the judge later initiates an ex-parte meeting with the victim. Additionally, the fact that the ex parte meeting occurred after the warrant was signed only shows that suppression of the evidence is warranted by the appearance of impropriety. Another likely reason for the meeting was to alleviate any concerns that CY may have about the proceedings. A judge might not have to give up their sense of decency to attain a neutral and detached role, but when that judge has already done the victim a favor in the disposition of one ticket and the victim is a friend of the judge's son, initiating a secretive ex-parte meeting with an alleged victim demonstrates a level of concern that rises to a loss of a neutral and detached role. Judge Easterling was not impartial. The dockets show that Judge Easterling specifically took the CY's cases from other judges.

The ex parte meeting appears to be an attempt to further guarantee the prosecution of the defendant and protect CY. Judge Easterling appears to be usurping the role of CY's father in protecting CY by helping the prosecutor try the defendant and at the same time console him. If actual impropriety does not exist, then the appearance of impropriety does and the defendant

requests this court to suppress all evidence obtained as a result of the November 23, 2011 search warrants and all fruit later obtained through that evidence.

B. The Affidavit Attached to the November 30th Search Warrant is Insufficient to Allow an Interpretation of Probable Cause because it is Based Almost Entirely on Hearsay, Double Hearsay, and Rumor with Almost No Corroborative Evidence

The State and Federal Constitutions require a determination of probable cause by an impartial magistrate before issuance of a search warrant. *Rooker v. Commonwealth*, 508 S.W.2d 570, 571 (Ky. 1974). An affidavit supporting a search warrant must state sufficient facts to establish probable cause for the search of the property or premises. *Guth v. Commonwealth*, 29 S.W.3d 809, 811 (Ky.App. 2000). In determining probable cause,

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and the 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for ... conclud(ing)' that probable cause existed.

Brown v. Commonwealth, 711 S.W.2d 488, 489 (Ky. 1986) (quoting *Beemer v. Commonwealth*, 665 S.W.2d 912 (Ky. 1984)).

It is insufficient for an Affiant applying for a search warrant to state his information and belief of the existence of facts sought to be discovered by the warrant; rather the affidavit must be supported by a statement of facts sufficient to create probable cause. *See Carrier v. Commonwealth*, 142 S.W.3d 670 (Ky. 2004). An affidavit consisting primarily of hearsay information may be sufficient to support the issuance of a search warrant; however the affidavit must indicate the reliability of the source and include some factual information which independently corroborates the hearsay report. *Jones v. United States*, 362 U.S. 257 (1960), *overruled on other grounds by U. S. v. Salvucci*, 448 U.S. 83 (1980). Additionally, it should be noted that "hearsay on hearsay" in an affidavit for a search warrant necessarily reduces the

magistrate's ability to make an independent determination of the reliability of the information to establish probable cause. *Commonwealth v. Eilers,* 503 S.W.2d 724, 726-727 (Ky. 1973). Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. KRE 801(c). Informants' tips, like all other clues and evidence, may vary greatly in their value and reliability. *Illinois v. Gates,* 462 U.S. 213, 232 (1983).

In *Beemer v. Commonwealth,* 665 S.W.2d 912 (Ky. 1984), the Kentucky Supreme Court accepted the *Gates* standard for determining probable cause. Thus the standard in Kentucky and Federal Court for determining whether a warrant was issued on probable cause is based upon the totality of the circumstances. *Illinois v. Gates,* 462 U.S. 213, 238 (1983).

> While an informant's veracity, reliability, and basis of knowledge are all "relevant considerations in the totality of the circumstances analysis," they are not conclusive and "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability."

Lovett v. Commonwealth, 103 S.W.3d 72, 77-78 (Ky. 2003)

An informant's knowledge is simply determined by looking at the basis upon which the informant bases their knowledge. The simple thrust of the "basis of knowledge" prong was that the informant must not pass on his conclusion, let alone the conclusion of someone else, but must furnish the raw data of his senses, so that the reviewing judge could draw his own conclusion from that data. *Stanley v. State,* 19 Md. App. 507, 525, 313 A.2d 847, 858 (1974). "[I]n the absence of a statement detailing the manner in which the information was gathered," the tip could still be relied upon if it contained "sufficient detail" to permit the magistrate to conclude "that he [was] relying on something more substantial than a casual rumor circulating in the

underworld or an accusation based merely on an individual's general reputation." *Spinelli v. United States*, 393 U.S. 410, 416 (1969)

At most, the November 23, 2011, affidavit (Exhibit E) alleges that there is some sort of communication between Ms. Jones and CY. At no point in the affidavit does either witness make a statement of perceived fact beyond the possibility of communication between Ms. Jones and CY. The vast majority of the affidavit is based on mere rumors that an inappropriate relationship exists, and the witnesses' beliefs that it does. In a number of instances the Affiant is relying upon double hearsay and beyond. Nowhere does the Affiant state that either witness perceived any physical contact between Ms. Jones and C.Y.

One glaring example of one of the informant's almost complete lack of basis of knowledge in the November 23, 2011 affidavit consists of Morgan McCafferty's description of the Facebook messages as "flirty." There is no factual basis as to why the alleged Facebook messages were flirty; just a conclusory statement that Morgan McCafferty illegally accessed the messages, thought the messages were flirty, and her further inference that that the two were involved in an inappropriate relationship. There is no indication of what any part of the alleged messages contained which led Morgan McCafferty to believe the messages were flirty.

This very same paragraph in the affidavit is also a cause of concern for the veracity of the informant. Not only was the informant, Morgan McCafferty, a minor at that time,[1] but she has also admitted to unauthorized access of a Facebook account, amounting to hacking and a violation of federal law. Additionally, because Morgan McCafferty was an ex-girlfriend of CY her purpose in being an informant is likely retribution rather than a citizen doing her duty to report crime. This is even demonstrated by the witness's stalking behavior: she continued to access CY's Facebook account to spy on his activities.

[1] She has since turned 18, which is why her name is not reduced to initials.

In the next paragraph of the affidavit, Morgan McCafferty claims to have observed Ms. Jones texting the victim by seeing a "760" number show up on Ms. Jones' phone; however, there is no indication as to how she saw to whom Ms. Jones was sending any text messages. There would have to be some indication as to how she saw this, because cell phones are small and texting is a relatively private enterprise. That would be like telling an officer that she saw someone deal drugs and she has a basis of knowledge because she was in the same house as them, when all she did was see two people walk to another room and later return. Having a belief that a drug deal occurred is different than observing one happen. The difference is that there has to be a factual basis as to how she knows it, such as "the informant saw 'person 1' hand a small baggie containing a green leafy material to 'person 2', who then gave 'person 1' $20." Similarly, in the case at bar, seeing Ms. Jones texting someone with the *belief* that CY is the recipient is different than seeing her send a message to him. The size of cell phones and the close proximity required to see the text message indicates that there is no basis of knowledge for this assertion; without more information as to how she could tell who Ms. Jones might have been texting at the basketball game.

The second informant, Brittany Taylor[2] rests a significant amount of her testimony not just on hearsay, but on double hearsay. This does not even take into account that the Affiant in the case is Officer Inman, which would then add one level of hearsay to each statement. This is nothing more than a case of high school gossip gone awry. As an example of the completely overwhelming amount of hearsay: Brittany Taylor had a conversation with KA who dates JH who told KA that CY and another person have been to Ms. Jones' mother's house. Due to the large number of people involved in this game of telephone, even the Affiant had trouble

[2] Brittany Taylor was also a minor at the time of the events related, but has also turned 18 since then.

remembering who is who. And what does this statement prove exactly? That, if true, CY may have gone to Ms. Jones' Mother's house with his friend to visit his friend's girlfriend.

Not only is it almost one hundred percent irrelevant as to whether Ms. Jones had any sexual contact with CY, it is confusing to a fault. Not even the Affiant is able to keep the parties straight, and at two different points she puts CY's name in a spot that was intended for another person. The most enlightening example of this is in the sentence preceding the Affiant's signature. "If CY has engaged in sexual contact with a juvenile student, the actions are against the peace and dignity of the Commonwealth of Kentucky." If CY had sexual contact with a juvenile student then no law has been broken, at least not considering he is the alleged victim in this case. If the Affiant cannot keep the parties straight then how could the signing judge have been able to get a sense of any of the parties' reliability, veracity, or basis of knowledge?

The November 23, 2012 affidavit rests not just upon double hearsay, but upon triple hearsay and rumor. In *Lakes v. Commonwealth*, 200 Ky. 266, 254 S.W. 908 (1923), the Court found that an affidavit for a search warrant was insufficient as it rested upon rumor that the defendant was operating an illegal still. The vast majority of the information in the affidavit in the case at bar is based on rumor rather than anything that was viewed by any of the informants. Any information that was independently corroborated in the report merely indicated that Ms. Jones and CY had communications through Facebook and cell phone calls. However, this independently corroborated evidence is not sufficient to create the substantial basis required for a finding of probable cause that Ms. Jones had any sexual contact with CY.

At the most the raw data of Morgan McCafferty and Brittany Taylor's senses merely indicates that there was some sort of communication between Ms. Jones and CY. Even the cell phone records are not sufficient to make a finding of probable cause that any sexual contact

occurred. All of this can be explained by numerous innocent reasons. Teachers play the role of mentor to all students, but it is possible that any teacher may take on a more significant role as mentor for a particular student. This additional role could easily require frequent check-ups as well as longer calls to help the student with homework. Additionally, there is the possibility of an existing "family friend" relationship.

Human relationships are complicated and are not contained in the neat packages that Affiant claims. Some unrelated people play the role of parent or family to those not related by blood for many reasons: death of a parent, a deadbeat parent, a family friend relationship that is stronger than that of a sibling, to name a few. The people involved in that relationship are not required to end the relationship because one becomes the other's teacher. Numerous other innocent explanations for any calls existed. The Affiant's statement that there is no other possible reason for the calls was tainted by her reliance upon rumor; rumor and a complete lack of the understanding, or avoidance, of the dynamic nature of innocent human relationships.

While the *Jones* case indicates that an affidavit consisting primarily of hearsay may support a search warrant, here there is no indication of the reliability of Morgan McCafferty, Brittany Taylor, KA, JH, or any other person involved in spreading the rumor nor is there any evidence that corroborates any of the hearsay "evidence." *Jones v. United States*, 362 U.S. 257 (1960), *overruled on other grounds by U. S. v. Salvucci*, 448 U.S. 83 (1980). An unqualified inference that the Facebook messages were flirty and rumors, especially those spread by kids, are not allegations of criminal activity. No reasonable, well-trained police officer or judge making a practical and common sense determination, could justify intruding into someone else's privacy based upon rumors that do not even amount to an allegation of criminal activity.

If the Judge's finding of probable cause based on hearsay is upheld in this case, then the Fourth Amendment rights of everyone may be trampled upon in the instance of a rumor and even one coincidental fact. Any adult that communicates with a minor through Facebook, text messages, or by phone could be subject of search and seizure by the creation or spread of a baseless rumor; a rumor that may be started by anyone with ill designs. Therefore, this court should find that the November 23, 2011 affidavit was not sufficient for a finding of probable cause and suppress the evidence seized through the warrants that it accompanied as well as all following evidence as fruit of the poisonous tree.

C. The Affidavit with the Inclusion of Hearsay Evidence is not Sufficient to Warrant a Finding of Probable Cause

Even if this Court decides to allow the hearsay and double hearsay statements as evidence for the purposes of finding probable cause, there was not a substantial basis presented in the affidavit for the judge's finding. The second paragraph of the November 23, 2011 affidavit, even taking the hearsay into account and that all information in the affidavit as truthful, would tend to show that Morgan McCafferty thought that CY was involved in an inappropriate relationship because of her summary categorization of the Facebook messages as "flirty." The third paragraph shows that the witness believes that any text messaging between the alleged victim and Ms. Jones confirmed the relationship. The fourth paragraph shows that another student witnessed Ms. Jones talk to CY on the witness's phone and called him her favorite student and promises to get him a souvenir from vacation. It also states that the witness was aware of rumors circulating and described a game of telephone that ends with the possibility that CY may have gone to Ms. Jones mother's house with a friend to visit Ms. Jones' sister.

The Affiant next attempts to confirm or deny the rumored relationship by the use of phone records. Pointing to 500 calls that took place in an eight month period of time, the Affiant

concluded that there is no possible innocent explanation for the calls. She "further corroborated" the relationship by talking to Brittany Taylor who said that CY called her and was upset that she had been talking to the police. There are also two different points that the affiant states that both CY and Ms. Jones denied the relationship, as a way to infer that one did exist.

During the full course of the investigation, there has not been one incident of CY, the alleged victim, reporting any sexual contact with Ms. Jones. Nor has Ms. Jones ever made any admission of any inappropriate conduct. The affidavit attempts to take a rumor and make it appear as if it were evidence of an inappropriate relationship, when each separate piece of evidence, even taken as a whole, only tends to show that either Brittany Taylor or Morgan McCafferty believed an inappropriate relationship existed and that some form of communication occurred between Ms. Jones and CY. Nothing indicates that any of the text messages or other communications were improper.

Even the fact that CY may have accompanied his friend to Ms. Jones' mother's house only shows that it is possible that some sort of relationship existed. Three determinations could come from the information: 1) they went to see only Ms. Jones' sister, 2) CY accompanied his friend to engage in inappropriate sexual conduct with Ms. Jones while all or part of her family and the friend were in the home, or 3) they went to visit all or a portion of the family. A practical and common sense determination would not rest on the existence of an inappropriate relationship based on a rumor spread by children. While evidence of a relationship exists, there is no evidence that it was improper beyond the rumors and therefore no substantial basis for a finding of probable cause existed.

D. The Numerous Discrepancies with the Subpoenas and Warrants

When a criminal procedure rule is violated but the defendant's constitutional rights are not affected, suppression may still be warranted if there is (1) prejudice to the defendant, in the

sense that the search might not have occurred or been so abusive if the rule had been followed or (2) if there is evidence of deliberate disregard of the rule. *Copley v. Commonwealth*, 361 S.W.3d 902 (Ky. 2012) (noting at 907 in footnte 5: "We adopt the 'deliberate disregard' phraseology instead of 'good/bad faith' in order to avoid confusion with the 'good faith' exception to the exclusionary rule."). Under the R.Cr. 13.10(3), the officer executing a search warrant shall make return thereof to the appropriate court within a reasonable time of its execution. The return shall show the date and hour of service. *Id.* The rule also requires an affidavit to be filed with the search warrant sufficient to meet the constitutional standards. *Id.* at 13.10(1).

The affidavit filed on November 23, 2011 is signed and sworn at 5:30 p.m. before Judge Easterling. However, there are two identical search warrants signed by Judge Easterling. They both describe the place to be searched as the "Business records for Cincinnati Bell cellular phone account (859) 760-**** from 1/1/11 thru 11/23/11," looking for text messages and subscriber information. At first glance these look like duplicate copies, but upon inspection it becomes clear that these are two unique copies, each separately signed by Judge Easterling. One search warrant is "blown up" and can be differentiated from the other by the location and the less-neat writing for the date, court designation, the division designation and the Judge's signature.

This creates concern because it raises an inference that Judge Easterling may have "rubber stamped" the search warrants without making a finding of probable cause. The presence of two warrants for the same search can lead to an inference that they were created post search or to cover up a warrant-less search. Additionally, one search warrant was signed and dated by Officer Inman and the other was not. The dated search warrant (Exhibit F) was signed by Officer Inman and attached to a subpoena (Exhibit G) requesting the call logs for CY's phone, which was referenced in the November 23, 2011 affidavit. The other search warrant (Exhibit H)

was not dated or signed by Officer Inman, or anyone else besides Judge Easterling, and was attached to the content of the text messages obtained through the search.

The warrants used to obtain the evidence, and the affidavits for the warrants, were ordered sealed by Judge Grothaus. (Exhibit I) The sealing order listed thirteen warrants, the first one being on December 9, 2011. However, contained within the sealed returns was the November 23 warrant and the information provided by the warrant. This creates a further implication that the November 23, 2011 warrants are deficient for another reason. There is concern that Officer Inman, the Affiant and Executing officer, has a connection in Cincinnati Bell's office where Officer Inman previously worked. The concern is that Officer Inman contacted a friend in that office to perform an illegal search of CY's phone records and that this search formed the basis for the entire case against both defendants.

Adding to the concern is the fact that Officer Inman refused to disclose any subpoenas to CY's father, the contact person for the Cincinnati Bell account which CY uses, even after explaining that all four cell phones on the account are registered under his name. CY's father has also attempted to find the date of first access to his account information through Cincinnati Bell, but to date no information has been provided. Obtaining the date for first enquiry would clear up any ethical questions about obtaining the messages, but the defendants have only been met by a stone wall.

There are also discrepancies with the subpoenas issued and the information given by the service providers. In the first instance the subpoena dated November 18, 2011 calls only for the caller details of CY's number and specifically includes "no content" on the charge. Yet the prosecutor received the content of the text messages from CY's phone number, presumably as the result of the November 23 subpoena; this was the same evidence that the prosecution

presented to the grand jury to indict Ms. Jones. Another subpoena, dated January 4, 2012, was issued requesting Cincinnati Bell to provide detailed subscriber information including billing address if available for CY's new phone. (Exhibit J). The subpoena does not call for the specific content obtained from the messages and yet the content of a message from Cheryl Jones was disclosed. Therefore the defendant requests that this court suppress the evidence obtained as a result of the November 23, 2011 and January 4 2012 search warrants as well as the November 23, 2011 affidavit and all evidence obtained as a result of the fruit of the poisonous tree.

E. The November 23, 2011 Affidavit Contained Little Truthful Information, and the Affiant Demonstrated her Reckless Disregard for the Truth by Portraying the Information as Factual

Besides lacking probable cause, the affidavit attached to the November 23, 2011 search warrants contained a number of lies in which the Affiant recklessly relied on. To satisfy the Fourth Amendment requirement that a search warrant only be issued on a factual showing sufficient to comprise of probable cause, the factual showing must be truthful. *Franks v. Delaware*, 438 U.S. 154, 164-65 (1978). Not every fact recited in the affidavit must be correct, but it does mean that the information put forward is believed or appropriately accepted by the affiant as true. *Id.* If an informant's tip is the source of the information, the affidavit must recite some underlying circumstances from which the informant concluded that relevant evidence might be discovered and the underlying circumstances from which the officer concluded that the informant was credible or the information was reliable. *Id.*

When an affidavit supporting a search warrant is challenged, it is presumptively valid. *Blane v. Commonwealth*, 364 S.W.3d 140, 146 (Ky. 2012). The challenger must allege deliberate falsehood or reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. *Id.* If the falsehoods are established by a preponderance of the evidence, then the affidavit's false material is set to one side, and if the affidavit's remaining

content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. *Id.*

The Affiant was reckless with regard to the truth when she relied on evidence of communication and rumor in presenting a search warrant. A rumor in the community that "person one" deals drugs and a showing that "person two" communicates with them is facially insufficient to show probable cause to search "person two" without more corroborating evidence. Here, the Affiant is attempting to show that because Ms. Jones and CY communicated with each other and there is a rumor they are involved in an inappropriate relationship, that there is probable cause. Communication is an innocent activity in and of itself and rumor of an inappropriate relationship is insufficient to create probable cause without a factual basis for the assertion. While hearsay is admissible for the purposes of finding probable cause, none of the hearsay or double hearsay does anything other than establish that a rumor exists.

Further, the informants, although named, were minors and one of them had obvious ulterior motives for reporting a false rumor to police. The minor informants were never used before and as minors were likely not aware of the negative consequences for filing a false complaint, when all they likely wanted was to make the defendants suffer. Additionally, there is no factual basis for the assertion that the defendant had an inappropriate, sexual relationship with CY. The only information that they relayed to the Affiant was that there were Facebook posts between the Ms. Jones and CY. The Affiant merely reported the witness's inference of an inappropriate relationship rather than facts showing that an inappropriate relationship existed. All other assertions were not backed by any factual assertions and the Affiant was reckless in relying on the uncorroborated evidence.

In February of 2012, Ms. Jones ran into Morgan McCafferty at LA Fitness in Villa Hills. Morgan McCafferty made several disparaging comments about Ms. Jones and called police to report Ms. Jones for harassment. (Exhibit K). When the police arrived to investigate, the gym manager, Gage Miller, told them the truth, that Morgan McCafferty had been harassing Ms. Jones. While the affiant could not have been aware of this incident, she was reckless in taking the word of a minor with a clear reason for a vendetta against Ms. Jones as truthful. The incident at the gym is just an example of the lengths that Morgan McCafferty will go to get "revenge." Yet, knowing that Morgan McCafferty had an ulterior motive, the affiant took her report of rumor as the truth, and then backed it up with the testimony of another minor and friend of Morgan McCafferty.

In writing the November 23, 2011 affidavit, the affiant relied on Brittany Taylor's statements about what occurred two years prior to the interview, and rather than question an adult present during that time, the affiant took Brittany Taylor's word for it. Brittany Taylor even claimed that she was Ms. Jones' cousin; however this too is a lie. Rather than try to corroborate this claim, the Affiant took it as fact. There are a number of lies told by both Morgan McCafferty and Brittany Taylor. The list of false statements is attached as Exhibit L.

Most importantly, the Affiant relied wholly upon a rumor. At the point that she filed the affidavit, no witness had come forward alleging any sexual contact between Ms. Jones and CY. There was no perceived fact that showed any crime had even been committed at the time the affidavit was filed, and the Affiant was not acting in good-faith relying solely upon a rumor and evidence of communication. Therefore this court should suppress all evidence obtained through the November 23, 2011 warrants and all evidence subsequently obtained through the use of the poisonous fruit.

F. The Commonwealth Attorney's Disclosure of Sealed Evidence, Amounting to Prosecutorial Misconduct, has Rendered the Defendant's Pending Trial Fundamentally Unfair

Trial judges are permitted to dismiss criminal indictments in the pre-trial stage. *Commonwealth v. Bishop*, 245 S.W.3d 733, 735 (Ky. 2008). These include the unconstitutionality of the criminal statute, prosecutorial misconduct that prejudices the defendant, a defect in the grand jury proceeding, an insufficiency on the face of the indictment, or a lack of jurisdiction by the court itself. *Id.*

Prosecutorial misconduct occurs when a prosecutor's improper or illegal act, which involves an attempt to persuade the jury to wrongly convict a defendant or assess an unjustified punishment. *Noakes v. Commonwealth*, 354 S.W.3d 116, 121 (Ky. 2011) (*citing* Black's Law Dictionary (9th ed. 2009)). Prosecutorial misconduct may result from a variety of acts, including improper questioning and improper closing argument. *Id.* The determination of prosecutorial misconduct hinges on the presence of conduct that is so egregious as to deny the accused her constitutional right of due process of law. *Parker v. Commonwealth*, 291 S.W.3d 647, 658-59 (Ky. 2009). The focus is on whether the trial as a whole was fair, not solely upon the culpability of the prosecutor. *Id.* Reversal is proper if the prosecutorial misconduct is so serious as to render the trial fundamentally unfair. *Id.*

During the course of the investigation, two of Ms. Jones' cheerleaders were discussing the rumors about the relationship. One cheerleader, Caroline Stahl, was aware of the specific information contained in the text messages sent between CY and Ms. Jones. It turns out that Rob Sanders, the Kenton County Commonwealth's Attorney, had shared specific text messaging information with Roy and Tawnia East, Caroline Stahl's uncle and aunt. Rob Sanders had already recused himself due to conflicts with Eric Deters, but continued to receive and share sealed evidence with another set of Dixie Parents.

The information that Rob Sanders shared was then relayed to Caroline Stahl's mother. The information that he disclosed to the Dixie Parents included very specific statements to the level that only a person that had access to the texts could know. The East's daughter has spread the detailed information to another Dixie Heights teacher and likely other students and teachers. It is important to remember that these text messages are those of the alleged victim, a minor, that are being shared. Although Rob Sanders has disqualified himself out of the case, he still disclosed this evidence in violation of a court order, which sealed it. Rob Sanders actions also negatively affect Ms. Jones from getting a fair trial because by showing these messages to others, he has attempted to poison potential jurors. (Exhibit M)

Someone also showed to the Bengals organization messages pertaining to this criminal case and that of CY. These messages were supposed to be sealed. Whoever did this must be able to explain what was shown and why was it shown to determine the consequences to Ms. Jones and CY.

By showing the messages of a minor, CY's privacy was violated and his parents are upset that while they claim to be concerned for CY, in reality the police and the prosecution have harmed CY and his parents far more than the allegations. Their testimony at the suppression hearing and trial will prove this fact.

Beyond this, Rob Sanders continues to tweet to his more than five hundred followers about Ms. Jones on Twitter, adding to the public condemnation of Ms. Jones. (Exhibit N). Not only does he "retweet" various news stories, he also makes his own comments pertaining to Ms. Jones and even posts a YouTube link to a sexually explicit cartoon originated in Taiwan made in regards to Ms. Jones.

III. ALL EVIDENCE OBTAINED THROUGH SEARCH WARRANTS AFTER THE NOVEMBER 23, 2011 SEARCH WARRANTS SHOULD BE SUPPRESSED AS FRUIT OF THE POISONOUS TREE.

> [T]o invoke "the fruit of the poisonous tree doctrine," a "defendant must show that: (1) he or she has standing to challenge the original violation, i.e., the tree; (2) the original police activity violated his or her rights; and (3) the evidence sought to be admitted against him or her, i.e., the fruit, was obtained as a result of the original violation." Leslie W. Abramson, 8 Kentucky Practice, *Criminal Practice and Procedure*, § 17:5 (2010–2011). If so, "[t]he exclusionary rule requires the suppression of any evidence that is either the direct or indirect result of illegal police conduct." *Id.*

Meece v. Commonwealth, 348 S.W.3d 627, 659 (Ky. 2011).

A court may admit the fruit of the poisonous tree if the prosecutor establishes that: (1) the evidence was obtained from a source independent of the primary illegality; (2) the evidence inevitably would have been discovered in the course of the investigation; or (3) the connection between the challenged evidence and the illegal conduct is so attenuated that it dissipates the taint of the illegal action. *Id.*

As stated earlier, the defendant has standing to challenge the search warrants and the police violated her Fourth Amendment rights when they searched the content of the text messages she sent to CY. (All subpoenas, search warrants, and accompanying affidavits are attached as Exhibit O). The November 23, 2011 search warrant was supported by an affidavit that relied upon rumor and evidence of communication between Ms. Jones and CY. This affidavit caused six different search warrants to be signed by a judge that abandoned his role as a neutral and detached magistrate and the affidavit was completely unsupported by probable cause. The evidence obtained through this violation of the defendants' constitutional rights should be excluded.

Another search warrant, dated January 9, 2012, relied upon the evidence obtained by the illegal November 23, 2011 search warrants. Without the illegally obtained evidence there is slim

to no chance that any neutral and detached magistrate could have found probable cause. The evidence obtained through these search warrants was then used to make showings of probable cause for all subsequent search warrants and all evidence obtained should be suppressed.

Additionally, the evidence seized from the November 23, 2011 search warrant was directly obtained by the primary illegality. The evidence would not have been obtained had the warrant been legally sufficient. There is also no evidence that the evidence would have been independently discovered in the course of the investigation. The facts alleged in the affidavit do not even support a finding that any crime occurred, and without the evidence obtained through the warrants, no further investigation would have been possible. The alleged victim and his family are not cooperating with the prosecution in this case, and without evidence of some sort of sexual contact the investigation would have been stalled indefinitely. Finally, all evidence obtained was directly related to the November 23, 2011 search warrants and all evidence was obtained in a short period of time as a direct result of the taint. Therefore this court should suppress all evidence obtained as a result of the November 23, 2011 search warrant and affidavit.

IV. THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE IS NOT APPLICABLE BECAUSE AFFIDAVIT WAS NOTHING MORE THAN A SUPERFLUOUS BARE BONES AFFIDAVIT, THE AFFIANT WAS RECKLESS IN REGARDS TO THE TRUTH OF THE INFORMATION CONTAINED IN THE AFFIDAVIT, AND THE SIGNING JUDGE WAS NOT NEUTRAL OR DETACHED

The Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984) held that an officer's reasonable reliance on a search warrant issued by a neutral and detached magistrate could save evidence from being excluded when the warrant was later determined to be deficient for lack of probable cause. *Id.* at 914. This good faith exception is inappropriate in at least four circumstances: 1) if the issuing magistrate was misled by information in an affidavit that the Affiant knew was false or would have known was false except for his reckless disregard for the truth, 2) if the issuing magistrate wholly abandoned his judicial role, 3) if the affidavit was "so

lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," and 4) if the warrant may be so facially deficient as to fail to particularize the place to be searched or the things to be seized. *Id.* at 915-23.

An affidavit that is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable is what is commonly referred to as a bare bones affidavit. *Id.* at 923. "An affidavit that states suspicions, beliefs, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge, is a 'bare bones' affidavit." *United States v. Weaver*, 99 F.3d 1372, 1378 (6th Cir. 1996).

At its essence the November 23, 2011 affidavit is a bare bones affidavit that the Affiant attempted to "shore up" with an unnecessarily long explanation that revealed little factual basis for any of the allegations. The only factual basis in the affidavit is that there was some sort of communication between Ms. Jones and CY. Nowhere in the affidavit was there a recitation of any facts showing that either minor witness, or any person, perceived any remotely sexual act between the Ms. Jones and CY.

A rumor in the community that "person one" deals drugs and a showing that "person two" communicates with and is friends with them, is facially insufficient to show probable cause to search "person two" without more evidence corroborating the commission of a crime. Here, the Affiant attempts to show that because Ms. Jones and CY communicated with each other and there is a rumor they are involved in an inappropriate relationship, that probable cause exists in this case. Communication and association are innocent activities in and of themselves, and rumor of an inappropriate relationship is insufficient to create probable cause without someone that has perceived an act that can act as a factual basis for the assertion.

Additionally, the Affiant was reckless in regards to the truth of the information included in the affidavit. She relied on the testimony of two minors who are friends and reported nothing more than hearsay. One of those minors was known by the Affiant to be the ex-girlfriend of CY who was actively engaged in stalking CY through unauthorized access of his Facebook account. It is reckless to regard the information as truthful because there was no indication of the veracity of either student, neither had been an informant before and at least one of them had clear ulterior motives in reporting the rumor. Morgan McCafferty had a beef with Ms. Jones and initiated contact with the police to report a rumor, which the Affiant either took as the truth recklessly or knew it was false so that she could initiate an unconstitutional search on the defendant. Finally, Judge Easterling abandoned his role as a detached and neutral magistrate in signing the November 23, 2011 search warrant.

VII. CONCLUSION

For the foregoing reasons, the evidence obtained from the warrants should be suppressed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certrify that a copy of the foregoing was served by hand delivery upon the persons named below on June 11, 2012.

cc:
Honorable Sara Farmer
Assistant Commonwealth Attorney
514 W. Liberty St
Louisville KY 40202-2887

Index of Exhibits
(Exhibits are being filed separately)

A. Affidavit of CY, regarding Judge Easterling
B. CY Speeding Ticket that Judge Easterling handled in 2011
C. CY Speeding Ticket that Judge Easterling handled in 2012
D. All Search Warrants Signed by Judge Easterling
E. November 23, 2011 Affidavit
F. November 23, 2011 Search Warrant attached to Subpoena
G. November 18, 2011 Subpoena for CY, requesting billing address, incoming/outgoing, and text number detail (No Content)
H. November 23, 2011 Search Warrant attached to CY messages
I. List of Warrants Sealed, without November 23 being listed
J. January 4, 2012 Subpoena for CY, requesting subscriber information only
K. Email from Edgewood Chief of Police Anthony Kramer, regarding MM's false accusations
L. List of False Statements made by the only two cooperating witnesses
M. Affidavit of MW, regarding Rob Sanders
N. Rob Sanders Tweets, regarding Sarah and Cheryl Jones
O. All other subpoenas signed in regards to Sarah and Cheryl Jones