Appeal No. 22-CF-447

DISTRICT OF COLUMBIA COURT OF APPEALS

Clerk of the Court
Received 06/09/2023 02:46 PM
Filed 06/09/2023 02:46 PM

ROBERT WILSON DEAN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division
Case No. 2018-CF1-5520

BRIEF FOR APPELLANT

Anne Keith Walton, Esq.
Bar No. 991042
455 Massachusetts Ave. NW #347
Washington, DC 20001
Phone: (202) 642-5046
Email: waltonlawdc@gmail.com

Counsel for Appellant

DISCLOSURE STATEMENT

Robert Wilson Dean is Appellant before this Court and is represented by Anne Keith Walton, Esq. Mr. Dean was represented at trial in the Superior Court of the District of Columbia by Anthony Matthews, Esq. and Jonathan Armstrong, Esq. of the Public Defender Service for the District of Columbia. Mr. Dean was represented by Megan Allburn, Esq. at the sentencing hearing.

The United States of America is Appellee before this Court and is represented by the United States Attorney's Office for the District of Columbia and Assistant United States Attorney Chrisellen R. Kolb, Esq. At trial, the government was represented by Assistant United States Attorneys Monica Trigoso, Esq., and George Pace, Esq.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

* Cases primarily relied upon

OTHER:

STATEMENT OF THE ISSUE

Whether the trial court committed reversible error by denying Mr. Dean's motion to suppress electronic data obtained from his cell phone where the search warrants were overbroad and lacked particularity, and where the seizure by the prosecuting attorney of the entire contents of the phone ran afoul of the Fourth Amendment.

STATEMENT OF THE CASE

In January 2019, Mr. Dean was indicted on one count of First-Degree Murder While Armed (Premeditated) in violation of D.C. Code §§ 22-2101, 4502, in connection with the death of Tamiya White, which occurred on March 31, 2018, in the District of Columbia. R. at 836.[1] On October 20, 2021, a jury trial commenced before the Honorable Marisa Demeo ("the trial court"). On November 4, 2021, the jury found Mr. Dean guilty of Second-Degree Murder While Armed. *Id.* at 1307-08. On May 20, 2022, the trial court sentenced Mr. Dean to 300 months (25 years) incarceration and 5 years of supervised release and ordered that he pay $100 to the Victims of Violent Crime Compensation fund. Appx. A. Counsel for Mr. Dean filed a timely notice of appeal on June 18, 2022, and an amended notice of appeal on June 21, 2022. R. at 1348-49, 1351-52.

[1] "R." refers to the record. This brief cites the pages of the record PDFs, not the record indices. "Tr." refers to the transcript. "Appx." refers to the Limited Appendix.

STATEMENT OF THE FACTS

Motions to Suppress Cell Phone Data

Prior to trial, the defense submitted a Motion to Suppress Electronic Data seized from Mr. Dean's cell phone and argued that the data was seized pursuant to a facially deficient, defective, and invalid search warrant, which violated Mr. Dean's rights under the Fourth Amendment. R. at 974-1013. As background, members of the Metropolitan Police Department ("MPD") recovered a Cricket Wireless cell phone from Mr. Dean when he was arrested on April 5, 2018. *Id.* at 998. On April 6, 2018, Detective Richard Rice submitted a search warrant for the cell phone data. Appx. C. A Superior Court judge approved the search warrant. *Id*. On January 30, 2020, Detective Rice submitted a similar search warrant, seeking additional data from Mr. Dean's phone that could be obtained with technology that was not available in 2018. Appx. D. Specifically, a logical extraction had been conducted in 2018, but, in 2020, a physical extraction could be performed to obtain additional data. *Id*. A Superior Court judge approved the search warrant after making a few edits. *Id.*

In its motion to suppress the cell phone data, the defense argued that "the search of the smart phone and seizure of electronic data constitutes an immense invasion of privacy and precisely the baseless and overbroad rummaging barred by the Fourth Amendment and long condemned by our case law." R. at 975 (citing *Riley v. California*, 573 U.S. 373 (2014). Since "the warrants were overbroad and lacked

probable cause," the defense argued that they should be declared invalid, and that any evidence seized during the execution of the warrants should be suppressed. R. at 976. The government opposed the motion. *Id.* at 1051-60. Judge Ronna Lee Beck denied the motion in open court on February 18, 2020, without a hearing. Tr. 2/18/20 at 6.

The defense filed a motion to reconsider Judge Beck's ruling in light of this Court's holding in *Burns v. United States*, 235 A.3d 758 (D.C. 2020). R. at 1152-55. The government opposed the motion. *Id.* at 1159-71. A hearing was held before Judge Demeo on October 5, 2021. The government explained that it was seeking to admit text messages between Mr. Dean and Ms. White and between Mr. Dean and another witness inside of the time frame specified in the 2020 warrant (March 1 to April 5, 2018) as well as call logs and web searches within the same time period. Appx. E at 11-15. Assistant United States Attorney Monica Trigoso explained that, when the Department of Forensic Sciences ("DFS") conducts extractions, "[t]hey pull everything, because there's no way to unpull stuff." *Id.* at 18. Ms. Trigoso further explained that, when a prosecutor receives the extraction in PDF format with a Table of Contents, she is able to select and review certain items or categories that appear relevant. *Id.* at 18-25, 37. Ms. Trigoso recalled using this procedure in Mr. Dean's case, but the trial court requested that she provide additional information following the hearing. *Id.* Ms. Trigoso sent emails a few days later supplementing

her requests regarding the introduction of cell phone data evidence at trial, including, but not limited to, searches for Catholic Charities and "related searches" on Mr. Dean's phone and the status of Mr. Dean's IRS refund. R. at 1208-09. Ms. Trigoso also represented that Detective Rice "didn't view anything in the defendant's phone other than the physical phone in 2018" and "did not view any of the contents of the extraction after the 2020 extraction." *Id*.

At the October 5, 2021, hearing, the defense argued that the warrants in Mr. Dean's case were similar to those found to be overbroad and invalid in *Burns*, and the government attempted to distinguish the two cases. Appx. E at 33-34. The defense also argued that the government's procedure fits the definition of "rummaging through" Mr. Dean's personal effects because, "rather than some sort of procedure being followed to make sure that it's just the specific items of relevant evidence that's supported by probable cause, they're getting that entire universe of information like pursuant to the warrant and . . . at that point, making a decision about what is relevant to their case." *Id.* at 27. In other words, after DFS performs the extraction of the entire contents of the phone and provides it to the prosecutor, the prosecutor then has information that is outside the scope of the warrant, which constitutes an unlawful seizure. *Id.* at 28-32, 37-38. The government argued that it would be too difficult to follow a more painstaking procedure akin to a taint review

conducted by people who are not investigating or litigating the case because the government does not have "unlimited time, money, [and] resources." *Id.* at 32-33.

On October 12, 2021, the trial court granted the defense motion to suppress the cell phone data. The trial court found that:

> And so in this case, even assuming for legal argument that the warrants were properly done by the judges, what causes the Court concern in terms of Fourth Amendment issues and it just sort of glares at this Court, that *despite the efforts that judges undertook to make sure that the privacy interest of the accused here were protected in compliance with the Fourth Amendment, the Government ultimately received, seized and received the entire contents of the cell phone*.

Appx. F at 12-13 (emphasis added). The trial court further found that DFS's extraction of the data was not problematic, but that:

> But then what happened factually, the Court finds in this case, is that a detective then picked up – excuse me, initially it was unclear if the detective picked it up or not, but what is clear is that the detective never viewed it and there is some indication that the Prosecutor may have been the one who picked it up in terms of the data.
>
> Either way the Court finds it's sufficient that the detective picked up the information which contained an extract of the entire phone and based on proffer again that the detective did not see it but then provided the entire download to the actual Prosecutor prosecuting this case. And ultimately that Prosecutor is still the Prosecutor here in this matter and *I heard her efforts to stay within the confines of what the Court had permitted, however, it just doesn't change the key fact that causes the Court concern about the defendant's privacy rights and that is that in the Prosecutor's hands was the one who's prosecuting this case was given all of the extract of the defendant's phone despite that judges had attempted to narrow down the evidence that would be available to law enforcement to use in the prosecution ultimately*.

> And I did hear, you know, the concerns from the Government in terms of that's just how it's structured at the United States Attorney's Office, that there is not some other entity or person or anyone available to review these large volumes of information but that unfortunately, you know, for the Court [that] doesn't resolve the privacy issue.

Id. at 13-14 (emphasis added). The trial court rejected the government's argument that it could not have taken additional steps to protect Mr. Dean's privacy and granted the defense motion to suppress, prohibiting the government to present any evidence "that was obtained through any download or extract of the defendant's phone." *Id.* at 16-17.

The government filed a motion to reconsider, and the defense opposed the motion. R. at 1212-26, 1233-36. The trial court issued a written order reversing her previous ruling, explaining that it had misapplied *Burns*, and finding that the search warrant complied with the Fourth Amendment, that the execution of the warrant was lawful, and that the information obtained from Mr. Dean's cell phone would be admitted at trial. Appx. B.

Government's Evidence at Trial

Anderlene Wiggins, Francisca Martinez, Officer Wilfredo Guzman, James Morris, Ruth McNeal, Maureen Silva, Milton Lewis, Catherine Roller, Detective Andre Parker, Officer Tashina Wilhelm, Brianna Hutson, Sasha Breland, Detective Richard Rice, Christina Nash, and Zachary McMenamin testified for the government. Testimony began with Ms. White's aunt, Anderlene Wiggins, who

provided background information about Ms. White but conceded that she did not see Ms. White regularly and had no knowledge of Mr. Dean or his relationship with Ms. White. Tr. 10/25/21 at 83-85.

Francisca Martinez testified that she was employed as a cashier at the McDonald's at 1901 9th Street, NE in March 2018. *Id.* at 91-92. Ms. Martinez recalled that an injured woman entered the McDonald's on March 31, 2018. *Id.* at 94. According to Ms. Martinez, the woman had her hand on her neck, and blood was coming from her neck and chest area. *Id.* at 95, 108. Ms. Martinez testified that another McDonald's employee called 911 and that medical staff responded to the scene and administered treatment. *Id.* Ms. Martinez also testified about video surveillance at McDonald's and described footage from March 31, 2018, which the government played for the jury. *Id.* at 98-105. On cross examination, Ms. Martinez testified that it did not appear that the woman had been stabbed 30 times. *Id.* at 111.

Officer Wilfredo Guzman testified that he and his partner received a call for service ("radio run") to respond to the McDonald's at 5:04 p.m. *Id.* at 116. The radio run was played for the jury. *Id.* at 119-20. Officer Guzman testified that, when he pulled into the McDonald's parking lot, he saw a burgundy Toyota Avalon parked by the door. *Id.* at 120. According to Officer Guzman, the driver's door was open and there was a trail of blood leading towards the inside of the McDonald's. *Id.* In the McDonald's, Officer Guzman came into contact with Ms. White, who was seated

at a booth, could not speak, and was being treated by medics. *Id.* at 121. According to Officer Guzman, Ms. White was taken to an ambulance, and he witnessed her take her last breath, but he could not verify that, as he is not a medical professional. *Id.* at 122, 163-64. Officer White also described video surveillance played for the jury and identified Ms. White pulling up to the McDonald's in her Toyota Avalon and stepping out of the driver's side door. *Id.* at 125. Officer Guzman was later able to look inside of Ms. White's vehicle and learned that she lived about two minutes away from the McDonald's by car. *Id.* at 144.

James Morris testified that he was a long-time friend of Mr. Dean. Tr. 10/26/21 at 7-9. According to Mr. Morris, Mr. Dean sent him a text message on March 31, 2018, stating that he was upset and might be going to jail. *Id.* at 10. Mr. Morris was not concerned at that point that Mr. Dean was going to hurt anyone and agreed that "I might be going to jail" can be used as an expression or joke. *Id.* at 59-60. Mr. Morris recalled that he called Mr. Dean, and that Mr. Dean said he was upset with a lady, and that she had taken money from him or used him. *Id.* at 11. Mr. Morris further recalled that Mr. Dean, who was upset and crying, also stated that Ms. White would not let him back in her apartment and so he had been sleeping in the laundry room. *Id.* at 14, 16. About two hours later, Mr. Morris drove from Woodbridge, Virginia to the District to pick up Mr. Dean. *Id.* at 17, 61. Mr. Morris recalled that, upon Mr. Dean's request, he picked him up across the street from the

apartments at Mount Olivet Road. *Id.* at 18-19. According to Mr. Morris, Mr. Dean was still upset and began talking about what had occurred with Ms. White. *Id.* at 19. Mr. Dean did not appear high or intoxicated and was not bragging about what had occurred. *Id.* at 65, 67. Mr. Morris recalled that Mr. Dean stated that he got into an altercation with Ms. White and that "she hit him in the face with something and scratched his face" and then Mr. Dean stabbed her with a screwdriver 30 times, and then threw the screwdriver into the bushes. *Id.* at 22-25, 67-68. Mr. Morris recalled that Mr. Dean had a big scratch on his face (about 1 inch) and was bleeding, and it looked like Mr. Dean had been struck with an object, such as keys. *Id.* at 26, 64, 69. Mr. Morris and Mr. Dean went to eat and then went to Mr. Morris's daughter's house, and then Mr. Morris took Mr. Dean back to the District. *Id.* at 27-28.

Mr. Morris later watched the news, which reported that a woman had been stabbed, and then texted Mr. Dean to verify whether this was the woman who he had stabbed. *Id.* at 34-35, 48. Mr. Morris testified that he tried to get Mr. Dean to turn himself in, but that Mr. Dean was not willing to do so because, according to Mr. Dean, the police did not have any evidence on him. *Id.* at 36, 39. On April 2, 2018, Mr. Morris anonymously called the MPD tip line to report a homicide, was called by a detective, and met with the detective and Ms. Trigoso. *Id.* at 42-44. He showed them his phone with pictures of the text messages that he had exchanged with Mr. Dean. *Id.*

Ruth McNeal testified that she knew Mr. Dean from the neighborhood where they grew up but did not stay in touch with him over the years. *Id.* at 89-90. According to Ms. McNeal, she saw Mr. Dean in March 2018 (about 2 or 3 weeks before Ms. White's death) in her neighborhood, which was near Ms. White's apartment, and Mr. Dean told her that he could not get into the house and was waiting for his disability benefits (SSI) in the amount of $4000. *Id.* at 90-92, 95-96, 99. Mr. Dean also told Ms. McNeal that, when his money came in, he would "bless [her]," meaning that he would give her money. *Id.* at 138-39. Ms. McNeal told Mr. Dean that he could go to her apartment and get some cigarettes, which he did, and Ms. McNeal also gave him some money. *Id.* at 93-95.

According to Ms. McNeal, the next time she saw Mr. Dean was on March 31, 2018, when her husband, Milton Lewis, brought him into their apartment. *Id.* at 100-02. Ms. McNeal testified that Mr. Dean was "hyper" and kept saying "I killed that bitch." *Id.* at 102-03. Mr. Lewis testified that Mr. Dean started shouting, "That bitch dead. I hope that bitch dead." *Id.* at 222. Ms. McNeal further testified that Mr. Dean explained to her that he had given Ms. White $400 for rent, that they used the money on drugs, and that she made him leave her apartment, so he had been sleeping in the laundry room for a few days. *Id.* at 111-12. Mr. Lewis provided similar testimony. Tr. 10/27/21 at 26-27.

According to Ms. McNeal, Mr. Dean told her that, when he saw Ms. White on March 31, 2018, he approached her, and Ms. White said "Bitch-ass nigger, I'm not paying for nothing." Tr. 10/26/21 at 113. Mr. Lewis recalled that Ms. White had called him a "bitch ass mother fucker." Tr. 10/27/21 at 30. Mr. Dean also told Ms. McNeal and Mr. Lewis that Ms. White hit him in his face with something after reaching into her car. Tr. 10/26/21 at 104, 107, 109, 114, 141-43, 228; Tr. 10/27/21 at 31. Ms. McNeal verified that Mr. Dean had a scratch underneath his right eye, and that his face was bleeding, and that she gave him a towel to put on his face. Tr. 10/26/21 at 104, 107-08. Mr. Lewis also verified that Mr. Dean was bleeding from his face, which was swollen on the left side, and Mr. Dean said that Ms. White had stabbed him in the face with something. *Id.* at 225. Mr. Lewis also testified that he could see a puncture within a knot on Mr. Dean's face "maybe, like, the size of maybe like a key." *Id.* at 226-27. According to Ms. McNeal, Mr. Dean also told her that he hit Ms. White about 30 times, and that he used a screwdriver, but that Ms. White had hit him first. *Id.* at 104-06, 109. According to Mr. Lewis, Mr. Dean said that he had stabbed Ms. White with a screwdriver, which he had in his coat pocket. *Id.* at 228-29. Ms. McNeal and Mr. Lewis also testified that Mr. Dean told them that, after the altercation with Ms. White, she got in her car and drove away. *Id.* at 115-16, 231. According to Mr. Lewis, Mr. Dean told him that he had thrown the screwdriver in the bushes. *Id.* at 232.

Ms. McNeal testified that, at some point, Mr. Dean's friend (Mr. Morris) picked him up, but later Mr. Dean returned, and even though Mr. Dean had told her about the altercation with Ms. White, Ms. McNeal let him stay in her apartment overnight. *Id.* at 117-19. According to Ms. McNeal and Mr. Lewis, Mr. Dean called hospitals to find out if Ms. White was dead. *Id.* at 121; Tr. 10/27/21 at 45. Ms. McNeal and Mr. Lewis also recalled that they saw a news flash on Mr. Dean's phone about what had occurred with Ms. White and saw that there was a $25,000 reward being offered to anyone with information about the incident. Tr. 10/26/21 at 121-22, 154; Tr. 10/27/21 at 50-51. In the morning, Ms. McNeal told Mr. Dean that he had to leave. Tr. 10/26/21 at 124-25. Ms. McNeal and Mr. Lewis testified that they decided to contact Mr. Lewis's nephew, Detective Andre Parker, on April 2, 2018. *Id.* at 129; Tr. 10/27/21 at 64-67. Subsequent to that, Detective Rice went to Ms. McNeal's apartment to discuss the case and recover evidence, including a brown jacket that Mr. Dean had left in her apartment. Tr. 10/26/21 at 116, 125, 131.

Ms. McNeal admitted that she had been wanting to move out of her Section 8 housing, and that she addressed this with the detectives and prosecutor, and they gave her financial assistance (a security deposit and rent payments) to move to a better environment. *Id.* at 158-64. Ms. McNeal also admitted that she had multiple prior convictions, including theft of less than $500 in 2010, grand theft in 2002, petty theft in 2002, theft of less than $500 in 2003, and solicitation in 2013. *Id.* at 167-68,

176; Tr. 10/27/21 at 12-13. Mr. Lewis reluctantly admitted that he asked Detective Rice about the reward money on his way to testify before the Grand Jury. Tr. 10/27/21 at 80-81.

MPD Officer Tashina Wilhelm testified that she and her partner, Officer Foote, responded to a dispatch about a family disturbance and went to Ms. White's apartment on March 18, 2018, at about 1:22 a.m. Tr. 10/28/21 at 18-20. Ms. White, who was very erratic and in an "elevated or agitated state," met Officer Wilhelm and her partner in front of the building and indicated that she needed Mr. Dean removed from her apartment. *Id.* at 21-22. According to Officer Wilhelm, it appeared that Ms. White was intoxicated, and she smelled like alcohol. *Id.* at 33, 39. Officer Wilhelm entered Ms. White's apartment and encountered Mr. Dean, who was sitting in a chair and was "very calm [and] relaxed." *Id.* at 23. In contrast, Ms. White was moving erratically, pulling at her clothes, and talking fast. *Id.* at 34. Ms. White told the officers that Mr. Dean had kicked her door in, but the chain was still on the door so that did not seem plausible. *Id.* at 34. Ms. White also indicated that Mr. Dean had keys to the apartment, but he did not, nor did he have any weapons. *Id.* at 29, 37-38. After Mr. Dean and Ms. White "air[ed] their grievances," including Ms. White's insistence that she had no money to give Mr. Dean, he left the apartment voluntarily. *Id.* at 35-36. The interaction was captured on Officer Foote's body-worn-camera

("BWC"), and portions of the footage (some muted) were played for the jury. *Id.* at 24-27.

Officer Wilhelm testified that she had no reason to arrest Mr. Dean. *Id.* at 30. Officer Wilhelm further testified that, after she left, she heard another dispatch stating that Mr. Dean was banging on Ms. White's door, but Officer Wilhelm believed that was false because, at the time she received the call, she saw Mr. Dean sitting at a bus terminal or gas station at a different location. *Id.* at 40-42.

Detective Andre Parker testified that his uncle, Milton Lewis, contacted him on April 2, 2018, in connection with Mr. Dean's case. Tr. 10/27/21 at 208. Detective Parker recalled that he then contacted Detective Rice and advised Mr. Lewis that Detective Rice would contact him with regards to the investigation. *Id.* at 209-10.

Detective Rice, the lead detective in Mr. Dean's case, testified that he was notified that someone had contacted the tip line with information about the homicide of Ms. White. Tr. 10/28/21 at 183. When Detective Rice called the number on April 2, 2018, Mr. Morris answered, and agreed to go to the District to meet with him the same day. *Id.* at 186-87. Mr. Morris allowed Detective Rice to go through his cell phone, and Detective Rice reviewed text messages exchanged between Mr. Dean and Mr. Morris in the aftermath of the incident with Ms. White. *Id.* on 197-201.

Detective Rice was also notified by Detective Parker to get in touch with Mr. Lewis. *Id.* at 209. Detective Rice went to the residence of Mr. Lewis and Ms. McNeal

on April 3, 2018, and spoke with them about their interactions with Mr. Dean following Ms. White's death. *Id.* at 210-12. Detective Rice also recovered a black beanie hat and a brown jacket with what appeared to be blood on the sleeves. *Id.* at 212-13. Detective Rice also spoke with Mr. Dean on April 7, 2018, and made an audio recording of a large portion of the interview. Tr. 11/1/18 at 49-50. At that time, Mr. Dean had already been arrested and was at the hospital because he had been shot 5 times a few days earlier *Id.* at 81, 83-84. The recording was played for the jury. In the interview, Mr. Dean explained what happened and told Detective Rice that he had asked Ms. White for money, words were exchanged, he pushed her, she struck him in the face, and he stabbed her. *Id.* at 86-87. Detective Rice later found a screwdriver at a location identified by Mr. Dean. *Id.* at 63-65. Detective Rice also acknowledged that drug paraphernalia was found in one of Ms. White's pockets. *Id.* at 93-94.

Detective Rice testified that Ms. McNeal and Mr. Lewis inquired about the reward money in this case twice in March 2018 (during his first conversation with them and before they testified before the grand jury), as well as financial assistance that they could receive from the government to move to a new apartment. Tr. 11/1/18 at 62, 102-05.

Catherine Roller, an expert in forensic DNA analysis, performed DNA testing in connection with Mr. Dean's case. First, Ms. Roller obtained a single-source

profile from left-hand and right-hand fingernail clippings taken from Ms. White, and Mr. Dean was excluded as a possible contributor. Tr. 10/27/21 at 149-50. Christina Nash, also an expert in forensic DNA analysis, performed further analysis (Y-STR testing) on the right-hand fingernail clippings taken from Ms. White and detected a very small amount of male DNA. Tr. 11/1/21 at 123, 131-32. Ms. Nash obtained a partial Y-STR profile, and Mr. Dean was included at nine locations. *Id.* at 134. Ms. Nash testified that the findings could possibly be consistent with a struggle. *Id.* at 137.

Ms. Roller also obtained a DNA profile from swabs from the screwdriver handle, and they were consistent with being from a mixture of two individuals, including a male contributor, and both Ms. White and Mr. Dean could not be excluded as possible contributors. *Id.* at 151-52. According to Ms. Roller, "Tamiya White fit best as contributor one and Robert Dean fit best as contributor two," with Ms. White contributing approximately 97% and Mr. Dean contributing just 3% to the mixture. *Id.* at 154.

Turning to a red-brown stain taken from the left sleeve of a brown jacket, Ms. Roller obtained a single-source profile that matched the DNA profile of Ms. White, and Mr. Dean was excluded as a possible contributor. Tr. 10/27/21 at 156-57. Finally, a partial DNA profile consistent with a mixture of 3 individuals, including at least 1 male contributor, was obtained from the interior wrist cuffs of the jacket,

and neither Ms. White nor Mr. Dean could be excluded as possible contributors. *Id.* at 157-58. Brianna Hutson, an expert in forensic biology, tested the red-brown stain taken from the left sleeve of the brown jacket and obtained a positive result for the presumptive presence of blood. Tr. 10/28/21 at 103, 107-11.

Dr. Sasha Breland, the deputy chief medical examiner for Washington, D.C. at that time, was qualified as an expert in forensic pathology Tr. 10/28/21 at 130, 134. Dr. Breland performed an autopsy on Ms. White and observed two stab wounds – one on the left neck and one on the left breast. *Id.* at 134, 141. Ms. White also had lacerations of the lips and an abrasion of the left upper lip. *Id.* at 154. Dr. Breland testified that the wounds to Ms. White's neck and lips were consistent with a Phillips-head screwdriver. *Id.* at 156-57. Dr. Breland also testified that Ms. White did not have black or bruised eyes, broken bones, or strangulation marks around her neck, and that she could have swung a screwdriver pre-injury and post-injury. *Id.* at 161, 166. Dr. Breland concluded that Ms. White's cause of death was multiple stab wounds, and the manner of death was homicide. *Id.* at 159-60.

Maureen Silva, a forensic scientist for the digital evidence unit at DFS, testified that she completed a physical extraction of the data on Mr. Dean's cell phone and created a Cellebrite report, which included, among other things, calls, call logs, text messages, and web browsing data. Tr. 10/26/21 at 195- 201. Ms. Silva proceeded to testify about specific calls, text messages and web browsing history

that were obtained from Mr. Dean's phone, such as a call with Ms. McNeal, text messages with Mr. Morris, and an article about Ms. White ("Woman Stabbed to Death"). *Id.* at 205-12. Ms. Silva noted that some text messages had been deleted. *Id.* at 210.

Zachary McMenamin, an investigative analyst with the United States Attorney's Office, testified that he was provided with a redacted exhibit and call detail records for Mr. Dean's phone and was asked to create a summary exhibit for trial that placed everything in chronological order. Tr. 11/1/21 at 146-50. He testified regarding text messages and calls from Mr. Dean to Ms. White and from Mr. Dean to Mr. Morris, including deleted messages, as well as internet searches on the phone. *Id.* at 153-56; Tr. 11/2/21 at 25-37.

The defense argued in closing that Mr. Dean was not guilty of all charges because he killed Ms. White in self-defense. Tr. 11/2/21 at 90-110. The government argued that Mr. Dean was guilty of first-degree murder while armed. *Id.* at 56-88. The jury found Mr. Dean guilty of second-degree murder while armed. R. at 1307-08.

Defense Evidence at Trial

Dr. Ian Blair and Dr. Neil Blumberg testified for the defense. Dr. Blair, an expert in toxicology, testified that he reviewed the toxicology report in this case, and that several substances were found in Ms. White's femoral artery blood, with the

major substance being PCP. Tr. 10/27/21 at 179-83. There was also a trace amount of cocaine and a cocaine metabolite called benzoylecgonine. Tr. 10/17/21 at 181-82. The level of PCP in Ms. White's blood was twice the level that one would expect to see behavioral effects of the drug, which include feelings of invincibility and symptoms akin to schizophrenia. *Id.* at 183-84, 197.

Dr. Neil Blumberg, an expert in psychiatry and forensic psychiatry, testified that there was evidence in the toxicology report that there was PCP, cocaine, and a cocaine metabolite in Ms. White's bloodstream. Tr. 10/28/21 at 66-68, 70. Dr. Blumberg explained that PCP causes people to experience bizarre symptoms akin to schizophrenia, such as disorientation, agitation, and delirium. *Id.* at 70. People under the influence of PCP may become impulsive, belligerent, and assaultive. *Id.* at 74. They also may seem to have "superhuman strength" because they don't feel pain. *Id.* at 76. Dr. Blumberg also reviewed Ms. White's medical records and found that she had several mental health diagnoses, including post-traumatic stress disorder (PTSD) and recurrent major depressive disorder. *Id.* at 76-77. Also listed in her medical records were severe major depressive disorder with psychotic features, as well as severe bipolar disorder with psychotic features. *Id.* at 77. Records from March 2016 indicated that her behavior was consistent with someone who has psychotic or bipolar symptoms – she was threatening the provider with getting a lawyer, and was loud, angry, irritable, and hostile, with poor judgment and insight.

Id. at 79. As to PTSD, Dr. Blumberg explained that taking PCP would be "like pouring gasoline on a fire" with regards to the exacerbation of symptoms. *Id.* at 81. Ms. White had been prescribed several medications, including the antipsychotic Seroquel, the antidepressant Sertraline, and the tranquilizer Klonopin. *Id.* at 77-78. Medical records indicated that Ms. White had difficulty with noncompliance and was not taking her medication on a regular basis. *Id.* at 79.

SUMMARY OF THE ARGUMENT

A search warrant for electronic data contained in a person's cell phone must meet the dual requirements of probable cause and particularity to comply with the Fourth Amendment, and this is especially important where modern cell phones are concerned, as they contain vast amounts of information about a person's private life.

In Mr. Dean's case, the facts contained in the affidavits in support of the search warrants for his cell phone data did not establish probable cause to search the entire contents of his phone, and they lacked particularity, running afoul of the Warrant Clause of the Fourth Amendment. The trial court correctly ruled that the warrants did not comply with the Fourth Amendment, and that the cell phone data evidence must be suppressed at trial, but later reversed its own ruling and allowed the evidence to be admitted at trial. In its decision, the trial court misapprehended and misapplied this Court's findings in *Burns* and erroneously found that the

warrants issued in Mr. Dean's case satisfied the requirements of the Fourth Amendment.

Furthermore, the trial court's finding that the 2020 search warrant was properly executed was erroneous, as neither the Fourth Amendment nor Rule 41 of the Superior Court Rules of Criminal Procedure ("Rule 41") allows the seizure and search of the entire contents of a person's cell phone, including information that goes beyond the scope of the search warrant. Therefore, Mr. Dean's conviction must be reversed.

ARGUMENT

I. A search warrant for electronic data contained in a person's cell phone requires stringent privacy protections to comply with the Warrant Clause of the Fourth Amendment.

"[No] Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Through "the dual constitutional mandates of probable cause and particularity, the words of the Warrant Clause are meant to deny police the ability to 'rummage at will' through a person's private matters." *Burns*, 235 A.3d at 771 (citing *Arizona v. Gant*, 556 U.S. 332, 345 (2009)).

When considering an application for a search warrant, a judge must determine "whether, in light of all of the circumstances described in the supporting affidavit, 'there is a fair probability that contraband or evidence of a crime will be found in a

particular place.'" *Burns*, 235 A.3d at 771 (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). The affidavit "must demonstrate cause to believe" that evidence "is likely to be found at the place to be searched" and that there is "a nexus between the item to be seized and [the] criminal behavior" being investigated. *United States v. Griffith*, 867 F.3d 1265, 1271 (D.C. Cir. 2017) (quoting *Groh v. Ramirez*, 540 U.S. 551, 568 (2004)). Furthermore, "an affidavit submitted in support of a warrant application must provide the judge 'a substantial basis for determining the existence of probable cause' – *i.e.*, it must supply '[s]ufficient information' to enable the judge to make independent findings on the necessary elements of the probable cause standard." *Burns*, 235 A.3d at 771-72 (citing *Gates*, 462 U.S. at 239). "Only in that way can the judge 'perform his neutral and detached function and not serve merely as a rubber stamp for the police.'" *Burns*, 235 A.3d at 772 (citing *Aguilar v. Texas*, 378 U.S. 108, 111 (1964).

The Supreme Court found in *Riley v. California*, 573 U.S. 373 (2014) that a modern smart phone raises unique and unprecedented privacy concerns. Smart phones contain "[t]he sum of an individual's private life," and implicate an unprecedented amount of information about a person. *Id.* at 394. Furthermore, "[c]ell phones differ in both a quantitative and qualitative sense from other objects that might be kept on an arrestee's person." *Id.* at 393. "One of the most notable distinguishing features of modern cell phones is their immense storage capacity.

Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy." *Id.* at 394. With the advent of cell phones, "the possible intrusion on privacy is not physically limited in the same way." *Id.* "Even the most basic phones that sell for less than $20 might hold photographs, picture messages, text messages, Internet browsing history, a calendar, a thousand-entry phone book, and so on." *Id.* As such, the entirety of an individual's private life "can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet." *Id.* at 394. And "[a] person might carry in his pocket a slip of paper reminding him to call [a person]" but "he would not carry a record of all his communications with [that person] for the past several months, as would routinely be kept on a phone." *Id*. Also, a cell phone's data regularly documents "a wealth of detail about [a person's] familial, political, professional, religious, and sexual associations." *Id.* at 396 (quoting *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring).

This Court recently found in *Burns*, that:

> *A search warrant for data on a modern smart phone therefore must fully comply with the requirements of the Warrant Clause. It is not enough for police to show there is probable cause to arrest the owner or user of the cell phone, or even to establish probable cause to believe the phone contains some evidence of a crime. To be compliant with the Fourth Amendment, the warrant must specify the particular items of evidence to be searched for and seized from the phone and be strictly limited to the time period and information or other data for which*

> *probable cause has been properly established through the facts and circumstances set forth under oath in the warrant's supporting affidavit.* Vigilance in enforcing the probable cause and particularity requirements is thus essential to the protection of the vital privacy interests inherent in virtually every modern cell phone and to the achievement of the "meaningful constraints" contemplated in *Riley*, 573 U.S. at 399.

Burns, 235 A.3d at 773 (emphasis added). As noted in *Burns*, the Supreme Court recently held that judges are "obligated – as 'subtler and more far-reaching means of invading privacy have become available to the Government' – to ensure that the 'progress of science' does not erode Fourth Amendment protections." *Carpenter v. United States*, 138 S.Ct. 2206, 2223 (2018) (quoting *Olmstead v. United States*, 277 U.S. 438, 473-74 (1928). In sum, case law has made clear that a search warrant for cell phone data requires stringent privacy protections to comply with the Warrant Clause of the Fourth Amendment.

II. The facts contained in the affidavits in support of the search warrants for Mr. Dean's cell phone data did not establish probable cause to search the entire contents of his phone, and they lacked particularity, running afoul of the Warrant Clause of the Fourth Amendment.

The affidavits in support of the cell phone data search warrants in Mr. Dean's case were substantially similar to those in the *Burns* case – lacking in both probable cause and particularity, in violation of the Warrant Clause of the Fourth Amendment. In *Burns*, this Court explained that the facts included in the affidavits established probable cause to believe that the defendant's phones contained text messages with the decedent on the night of the shooting and a log showing the time that the

defendant called his cousin on the night of the shooting. *Burns*, 235 A.3d at 774. The facts also supported a search of the GPS tracking features to determine the defendant's location at certain times on the day of the shooting and the day after the shooting. *Id.* at 774. "But beyond those discrete items, the affidavits stated no facts that even arguably provided a reason to believe that any other information or data on the phones had any nexus to the investigation of [the decedent's] death." *Id.* Thus, the affidavits were "bare bones statements as to everything on [the defendant's] phones for which [the detective] made a claim of probable cause beyond the three narrow categories of data for which the affidavits made proper factual showings." *Id.* Furthermore, "[i]n approving a more expansive request, the warrant judge failed to fulfill his obligation to make an independent determination of probable cause." *Id.* This Court further found that the "unsupported assertions of probable cause in the affidavits authorized the review of literally all of the data on both phones." *Id.*

This Court also found in *Burns* that the warrants lacked particularity, listing "generic categories covering virtually all of the different types of data found on modern cell phones," which is "intolerable." *Id.* at 775. *This Court explained that "[t]he few discrete items for which probable cause had been shown could have been obtained through a targeted search of a tiny fraction of the phones' data.*" *Id.* at 776 (emphasis added). This Court further explained that, though text messages between the defendant and the decedent might be found in third-party applications, they

would not be found in the defendant's internet search history, photographs, and other broad categories of data included in the search warrants. *Id.* In conclusion, this Court found:

> In sum, the affidavits submitted by [the detective] in support of the search warrant applications established probable cause to look for and seize evidence likely to be found in at most three narrow categories of data on [the defendant's] phones. The warrants, however, authorized a far more extensive search and failed to describe the items to be seized with anywhere near as much particularity as the Constitution required in the circumstances. Overbroad and lacking in probable cause and particularity, the warrants were therefore issued in violation of the Warrant Clause of the Fourth Amendment.

Id. at 777-78. Accordingly, this Court reversed Mr. Burns's conviction. *Id.* at 791.

In Mr. Dean's case, both the 2018 and 2020 Affidavits in Support of an Application for Search Warrant may have included facts sufficient to establish probable cause to believe that Mr. Dean's phone contained: (1) two text messages between Mr. Dean and Mr. Morris, (2) three calls between Mr. Dean and Mr. Morris, and (3) location data for Mr. Dean's whereabouts between March 31 and April 2, 2018. Appx. D, Affidavit at 2-4.[2] However, the affidavits did not include facts sufficient to establish probable cause to believe that any other text messages, calls, or other data on Mr. Dean's phone included evidence of Ms. White's homicide.

[2] The trial court's order granting the government's motion to reconsider focused on the 2020 warrant. Accordingly, this appeal focuses on the 2020 warrant. Where portions of the 2018 and 2020 warrants are identical, this appeal cites only the 2020 warrant (Appx. D).

The only facts in the Probable Cause section of the affidavits that specifically identified evidence that could be found on Mr. Dean's cell phone were:

> 10. Witness 2 states that, *on March 31, 2018, at approximately 3:59 PM (approximately one hour prior to the homicide), IT received a text message from Robert Dean*, hereinafter referred to as the Defendant. The Defendant's text message included a standard greeting and then said, "I feel that am about to go to jail." *Following the receipt of this text message, at approximately 4:16 PM, Witness 2 engaged the Defendant in a phone conversation*. During the phone conversation, the Defendant told Witness 2 that he was angry at the decedent because she blew through his social security check in two days and then kicked him out of their apartment. The Defendant also told Witness 2 that he had been living in the decedent's apartment building's communal laundry room for the past two days and that the decedent would not answer the door for him. According to Witness 2, the Defendant sounded "crazy" and IT agreed to meet with the Defendant and get him some food. Witness 2 agreed to pick the Defendant up from 1070 Mount Olivet Road, Northeast, Washington, District of Columbia.
>
> 11. *At approximately 5:00 PM, the Defendant called Witness 2 and told IT not to come to 1070 Mount Olivet Road, Northeast and instead to respond to a nearby apartment building across the street.* Witness 2 responded to the newly agreed upon location and met the Defendant as planned.
>
> 12. While meeting with the Defendant, the Defendant and Witness 2 traveled to locations that are known to law enforcement. During their time together, the Defendant confided in Witness 2 that he had just been involved in an argument with the Defendant's girlfriend. The Defendant told Witness 2 that, during the argument, the decedent hit the Defendant and that the Defendant responded by stabbing the decedent up to thirty times with a screwdriver. The Defendant mentioned that he has stabbed the decedent at least once in her neck. The Defendant told Witness 2 that, following the stabbing, the decedent got into her car and drove up Mount Olivet Road, Northeast. The Defendant noted that the decedent appeared disoriented because she drove out of the apartment complex's parking lot with her door open. The Defendant stated that he got rid of the screwdriver by throwing it

> into a bush. Witness 2 did not know the location of the bush that the Defendant used to conceal the screwdriver.
>
> 13. Witness 2 told detectives that the Defendant utilized phone number "202-718-9076" during Its telephone correspondence. As the result of a previous order, Cricket Wireless disclosed to MPD detectives on April 4, 2018 that "202-718-9076" was registered to a Robert Dean.
>
> 15. *On Sunday, April 1, 2018, Witness 2 said IT texted the Defendant and asked the Defendant for the name of his girlfriend.* The Defendant replied, "Tamiy [sic] White." The decadent's name is Tamiya White.
>
> 16. *On Monday, April 2, 2018, Witness 2 called the Defendant and told the Defendant that he should turn himself in.* During the phone conversation, the Defendant assured Witness 2 that he would be OK because the police had no evidence against him.

Appx. D, Affidavit at 2-4. As can be seen above, the probable cause section identified evidence of two text messages, three calls, and the location of Mr. Dean at certain times between March 31 and April 2, 2018. That is all. Notably, no facts established probable cause to believe that a search of Mr. Dean's cell phone data prior to March 31, 2018, would contain evidence of Ms. White's homicide. Nevertheless, the 2020 warrant permitted the government to conduct the search and seizure of all data beginning on March 1, 2018. *Id.* at 10.

Thus, the warrants in Mr. Dean's case were flawed in substantially similar ways to the warrants in the *Burns* case. As this Court explained, the facts set forth in the affidavits in *Burns* established probable cause to believe that Mr. Burns's phone contained text messages between him and the decedent on the day of the shooting, a log showing the time that Mr. Burns called his cousin on the night of the shooting,

and GPS tracking features showing his whereabouts on the day of the shooting and the day after the shooting. *Burns*, 235 A.3d at 774. "But beyond those discrete items, the affidavits stated no facts that even arguably provided a reason to believe that any other information or data on the phones had any nexus to the investigation" of the homicide. *Id.* In Mr. Dean's case, the affidavits may have established probable cause to believe that his phone contained text messages with Mr. Morris at 3:59 p.m. on March 31, 2018, a text message with Mr. Morris on April 1, 2018, calls with Mr. Morris at 4:16 p.m. and 5:00 p.m. on March 31, 2018, and a call on April 2, 2018, as well as location data on those dates, but there was no probable cause to believe that any other information or data on Mr. Dean's phone had any nexus to the investigation of Ms. White's homicide. Appx. D.

The warrants in Mr. Dean's case also lacked particularity, as they permitted the government to search, for example, "[a]ny and all evidence related to the murder of Tamiya White," "[a]ny and all evidence regarding the relationship between Tamiya White and Robert Dean," and "[a]ny and all evidence related to the relationship between W-2 and Dean." Appx. D, Attachment B at 10. The warrants also authorized a search of broad categories of data, using "[e]vidence of user attribution" to search "logs, phonebooks, saved usernames and passwords, documents, images, and browsing history." *Id.* at 11. The affidavits also defined "records" and "information" as "includ[ing] all of the foregoing items of evidence

in whatever form and by whatever means they may have been created or stored, including any form of computer or electronic storage." *Id.*

The Burns court condemned the language "any evidence" as "generic categories covering virtually all of the different types of data found on modern cell phones," and found that, "[t]he warrants imposed no meaningful limitations as to how far back in time police could go or what applications they could review, and, instead, endorsed the broadest possible search without regard to the facts of the case or the limited showings of probable cause set forth in the affidavits." *Burns*, 235 A.3d at 775 (emphasis added). The affidavits in Mr. Dean's case included the same "intolerable" language as the *Burns* affidavits, such as "any and all evidence" and the listing of generic categories.

Additionally, the *Burns* court condemned the detective's statement that it was his "belief" that evidence would be found on Mr. Burns's phone in subscriber and owner information, call logs, contact lists, voice mail and text messages, videos, photographs, and tweets. *Id.* at 774. This was similar to Detective Rice's statement that, "[f]rom training and experience, I also know that a cell phone frequently contains images, video recordings, and audio recordings of the cell-phone user and his close associates," which "may reveal or confirm distinguishing characteristics . . . that may help identify them." Appx. D, Affidavit at 6. As in the *Burns* case, the affidavits in Mr. Dean's case were "bare bones" statements, and "[i]n approving a

more expansive request, the warrant judge failed to fulfill his obligation to make an independent determination of probable cause, *Gates*, 462 U.S. at 239, and risked becoming 'a rubber stamp for the police,' *Aguilar*, 378 U.S. at 111." *Burns*, 235 A.3d at 774.

The *Burns* court attributed the lack of particularity in the warrants to the use of a template. *Id.* at 775. "Templates are, of course, fine to use as a starting point." *United States v. Winn*, 79 F. Supp. 3d 904, 919 (S.D. Ill. 2015). "But they must be tailored to the facts of each case." *Id.*; *see United States v. Oglesby,* No. 4:18 CR 0626, 2019 U.S. Dist. LEXIS 71238, at *21-22 (S.D. Tex. April 26, 2019). Accordingly, the *Burns* court explained that the detective's failure to tailor his template for cell phone search warrants resulted in a lack of particularity, which was "precisely the type of unbridled rummaging 'the Framers intended to prohibit.'" *Burns*, 235 A.3d at 775 (citing *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). This is what happened in Mr. Dean's case, as exemplified by the language included in the section of the affidavits entitled "Analysis of Electronic Data." Appx. D, Affidavit at 6. For example, Detective Rice wrote that, "Based on my [] experience, I know that people who commit crime in Washington, D.C., often use their cell phones in ways that reveal their location and/or activities before, after, or while engaging in criminal activity." *Id.* Another example is Detective Rice's statement that, "[b]ased on my training and experience, I know that crimes carried out by more than one

person usually involve some amount of communication among those involved," and that, "I know from training and experience that cell phones are frequently used for this purpose and that a cell phone recovered from a participant in such criminal activity frequently contains evidence of communication among accomplices." *Id.* Without a doubt, there were no accomplices in Mr. Dean's case, and, had Detective Rice made an effort to tailor the affidavit to the facts of Mr. Dean's case, this language should certainly have been removed. These are but two examples of how the use of a template obliterated the particularity of the warrant.

In summary, the affidavits in Mr. Dean's case, just like those in the *Burns* case, were overbroad, lacked probable cause to support a search of the entire contents of Mr. Dean's cell phone, and lacked particularity. Therefore, the warrants issued in Mr. Dean's case ran afoul of the Warrant Clause of the Fourth Amendment.

III. The trial court misapprehended and misapplied this Court's findings in *Burns* and erroneously found that the warrants issued in Mr. Dean's case satisfied the requirements of the Fourth Amendment.

"An error of constitutional magnitude in the trial court requires reversal of a criminal conviction on appeal unless the government establishes that the error was harmless beyond a reasonable doubt." *Burns*, 235 A.3d at 791 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967). The trial court in Mr. Dean's case misapprehended and misapplied *Burns* and made errors of "constitutional

magnitude" that require reversal of his conviction. The trial court incorrectly found that:

> While there was some limited narrow information available to the judge in *Burns*, by comparison, Judge Smith was presented with an affidavit filled with information that, in light of all the circumstances, there was a fair probability that evidence related to the homicide of Ms. White would be contained on the defendant's phone during the period authorized (3/1/2018-4/5/2018).

Appx. B at 9. The trial court then discussed the information provided by Mr. Morris regarding his calls and text messages with Mr. Dean and the location of Mr. Dean, information about the romantic relationship between Mr. Dean and Ms. White, and information about the screwdriver. *Id.* Based on that information, the trial court found that Judge Smith "properly had a basis to find probable cause for the search warrant" because, "[c]onsidering all of the circumstances . . . a judge would have had 'cause to believe' not only that the evidence listed on the warrant '[w]as likely to be found at the place to be searched,' but also that there was 'a nexus between the item to be seized and [the] criminal behavior' under investigation.'" *Id.* at 10 (citing *Burns*, 235 A.3d at 771). The trial court also found that:

> By way of further comparison, the DCCA found that the *Burns'* search warrants "authorized the review of literally all of the data on both phones." That is absolutely not the case here, where the detective tailored what could be searched to the facts learned during the investigation, and Judge Smith further tailored what could be searched by placing in date limits and other edits.

Id. (internal citation omitted). The trial court's findings contained multiple errors.

First, it should be noted that Judge Smith made just four minor edits to Attachment B of the 2020 warrant, which included: (1) limiting the date range to March 1 to April 5, 2018, despite there being no facts supporting probable cause to believe that any cell phone data before March 31, 2018, would have evidence of Ms. White's homicide, (2) removing "and assault with intent to kill" from the first sentence, leaving "murder" as the only offense under investigation; (3) removing "any and all evidence related to the shooting of Robert Dean," and (4) removing "suspects" from information relating to motive and/or intent. Appx. D, Attachment B at 10. The trial court found that, "[q]uite distinct to what was done in *Burns*, here, Judge Smith clearly did not permit a wide-ranging exploratory search which would lead to rummaging." Appx. B at 11. According to the trial court, Judge Smith "defined what items could be searched and those were carefully tailored to their justifications." *Id.* This is not true. Judge Smith only made four minor edits and approved many items containing the phrase "any and all evidence," which clearly permitted rummaging.

The trial court also found that that there was information in the affidavits about text messages, call logs, Mr. Dean's location before and after Ms. White's death, and information about the screwdriver and the romantic relationship between Mr. Dean and Ms. White, but instead of recognizing that this information should have limited the permissible scope of the search warrant, the trial court made the

general finding that there was a fair probability that Mr. Dean's phone would contain evidence of the homicide. *Id.* at 9. The trial court missed the point. As explained above, while the affidavits may have established probable cause to believe that Mr. Dean's cell phone contained text messages with Mr. Morris at 3:59 p.m. on March 31, 2018, a text message with Mr. Morris on April 1, 2018, calls with Mr. Morris at 4:16 p.m. and 5:00 p.m. on March 31, 2018, and a call on April 2, 2018, as well as location data on those dates, there was no probable cause to believe that any other information or data on Mr. Dean's phone contained evidence of Ms. White's homicide. Appx. D, Affidavit at 2-4.

Furthermore, the trial court erroneously found that, though the *Burns* search warrants authorized the review of all of the data on the phones, "[t]hat is absolutely not the case here." Appx. B at 10. To the contrary – that is *exactly* what happened in Mr. Dean's case. Nothing in the warrant limited the search to the specific text messages, calls, and location data in the affidavit, but rather Judge Smith authorized the overbroad "any and all evidence" language. Appx. D, Attachment B at 10. The warrant also backdoored the search of a wide array of data on the phone under "evidence of user attribution," which included "logs, phonebooks, saved usernames and passwords, documents, images, and browsing history." *Id.* at 11. Attachment B then concluded with the sweeping definition of "records" and "information" as "all of the foregoing items of evidence in whatever form and by whatever means they

may have been created or stored, including any form of computer or electronic storage." *Id.*

The trial court also erroneously found that, "the detective tailored what could be searched to the facts learned during the investigation." Appx. B at 10. Again, that is not accurate. The detective could have listed, for example, "text messages between W2 and Defendant" on the specific dates and times listed in the affidavit, "calls between W2 and Defendant" on the specific dates and times listed in the affidavit," and "location data" for the specific dates and times between March 31 and April 2, 2018. After all, by 2020 the government had thoroughly investigated Mr. Dean's case and Detective Rice could easily have described other relevant information that he expected to find in Mr. Dean's phone if that investigation had developed probable cause to believe it existed. The fact is that this did not occur. Instead, the detective used the same search warrant from 2018, adding only that a logical extraction could not be done in 2018, and that a new warrant was required to do a physical extraction. Appx. D, Affidavit at 6.

Additionally, the trial court attempted to differentiate Mr. Dean's case from *Burns* by stating that "probable cause already had been found by a Superior Court judge that defendant had committed First Degree Murder while Armed of Tamiya White on March 31, 2018." Appx. B at 5. This is of no moment. As this Court explained in *Burns*:

> *It is not enough for police to show there is probable cause to arrest the owner or user of the cell phone, or even to establish probable cause to believe the phone contains some evidence of a crime.* To be compliant with the Fourth Amendment, the warrant must specify the particular items of evidence to be searched for and seized from the phone and be strictly limited to the time period and information or other data for which probable cause has been properly established through the facts and circumstances set forth under oath in the warrant's supporting affidavit.

Burns, 235 A.3d at 773 (emphasis added). Thus, no matter if the subject is a suspect, an accused, a target, a person of interest, or any other term the government chooses to assign, a search warrant still must satisfy the dual requirements of probable cause and particularity.

Likewise, the fact that Judge Smith limited the date range to March 1 to April 5, 2018, is of no moment because nothing in the warrant affidavit established probable cause to believe that evidence of Ms. White's homicide was contained in cell phone data prior to March 31, 2018. Clearly, March 1, 2018, was a totally arbitrary date that served as a red herring but did not serve to validate the warrant. The trial court thus erroneously found that the warrants issued in Mr. Dean's case satisfied the requirements of the Fourth Amendment, and its decision to admit the cell phone data evidence merits reversal of Mr. Dean's conviction.

IV. The trial court's finding that the 2020 search warrant was properly executed was erroneous, as neither the Fourth Amendment nor Rule 41 of the Superior Court Rules of Criminal Procedure allows the search of the entire contents of a person's cell phone, including information that goes beyond the scope of the search warrant.

As background, DFS extracted the entire contents of Mr. Dean's cell phone and created a nearly 15,000-page Cellebrite report that contained absolutely everything on his phone. Ms. Trigoso received the entire report and then allegedly made some effort to comply with the warrant by perusing the report to locate what she considered to be relevant evidence. Appx. E at 18-37. As justification, Ms. Trigoso asserted that it would be overly burdensome to employ a "taint team" to prevent the prosecutor litigating the case from seeing information outside the scope of the warrant. *Id.* at 24, 39-40. The fact remains that, in both 2018 and 2020, the entirety of Mr. Dean's cell phone data was extracted and reviewed by the government.[3]

In analyzing the lawfulness of the execution of the warrant in Mr. Dean's case, the trial court credited the government's argument that Super. Ct. Crim. R. 41 ("Rule 41") contemplates and authorizes that all data on a cell phone will be seized and copied in an extraction report, which law enforcement may then review for responsive data that falls within the scope of the approved warrant. Appx. B at 13. The trial court explained that:

[3] In fact, the 2020 Affidavit states that, "[d]uring a review of the logical extraction, your affiant noted that some call and text data which were reflected in the call detail records for the seized phone were missing from the extraction." Appx. D, Affidavit at 5-6. This implies that Detective Rice reviewed the logical extraction, though this is uncertain because the government presented no testimony to support its contention that it properly executed the search warrant.

> Turning the lens back to this case, the court returns to the question of whether the prosecutor's receipt of the entire extract violates the Defendant's Fourth Amendment rights. It is clear upon a review of Fourth Amendment case law and D.C. SCR-Crim. Rule 41 that the receipt by the prosecutor of more data than is contained in the warrant does not as a matter of law mean that the Defendant's rights were violated as courts have recognized that this over-seizing is considered to be an inherent part of the electronic search process.

Id. at 16 (internal quotations and citations omitted). The trial court misapprehended Rule 41 and made erroneous findings.

While Rule 41 may authorize the seizure of a cell phone and extraction of a copy of its data, it does not authorize the government to review a nearly 15,000-page report that renders all of that data – including a vast amount of information that falls outside the scope of the warrant – in readable text, especially in Mr. Dean's case where there was a limited time frame that could be searched (March 1 to April 5, 2018). Rule 41(e)(2) Warrant Seeking Electronically Stored Information states that:

> A warrant under this rule may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing the warrant in this rule refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review.

The Comment to 2017 amendments to Rule 41(e)(2) acknowledges "the need for a two-step process: officers may seize or copy the entire storage medium and review it later to determine what electronically stored information falls within the scope of the warrant." What Rule 41 does not say is that the government has the right to

peruse the entire report. Nor does it authorize the prosecutor litigating the case to peruse the entire report, using a strategy that in no way ensures compliance with the warrant and the Fourth Amendment.

Mr. Dean does not argue that there was anything improper about DFS extracting the entirety of the data from Mr. Dean's phone. What occurred next, however, was a complete violation of Mr. Dean's Fourth Amendment rights. DFS gave a nearly 15,000-page extraction report to Ms. Trigoso, who was prosecuting the case. She received a vast amount of information that fell outside the scope of the warrant and clearly reviewed at least some of that information. According to Ms. Trigoso:

> That's not cherry-picking. And I don't think [I] agree with that from defense counsel, because it's not like I've looked at the entirety of all of the pages of the extraction, and that's what I'm representing to the Court: That I've looked back. And that's when the Court kind of asked about specifics about location data or something like that I mainly have been focusing both on the call logs and the text messages during that time frame.
>
> I don't even know off the top of my head how long the defendant had the phone, if he even had it prior to those dates, because I was even more so focusing on a more specified view of the timeline and initially, I know I had been focusing around March 18th, because that was a significant date between the decedent and the defendant. But for W2, I've been focusing more so on the date of the murder or a day before and then leading up to the time that Mr. Dean had been incarcerated or taken into custody, which was on April 5th of 2018.

Appx. E at 28-29. She also explained that, as a general practice, prosecutors "kind of use a Table of Contents in that [Cellebrite] PDF to kind of skip over to the sections

where we think not only [we] are able to go to, based on the Attachment B section, but also usually we're in some collaboration with the detective to draft up a warrant to see like, 'what evidence do we think could be likely on the phone, based on the evidence in the investigation?'" *Id.* at 25. This should not have instilled confidence in the trial court that the government followed a procedure that complied with the requirements of either the Fourth Amendment or Rule 41. After all, Ms. Trigoso used the phrase "kind of" to describe her alleged attempt to comply with the warrant. *Id.*

The trial court should not have second guessed its initial ruling that granted the defense motion to suppress the cell phone data evidence. In the October 12, 2021, ruling, the trial court stated:

> And so in this case, even assuming for legal argument that the warrants were properly done by the judges, what causes the Court concern in terms of Fourth Amendment issues and it just sort of glares at this Court, that *despite the efforts that judges undertook to make sure that the privacy interest of the accused here were protected in compliance with the Fourth Amendment, the Government ultimately received, seized and received the entire contents of the cell phone*.

Appx. F at 12-13 (emphasis added). The trial court further found that DFS's extraction of the data was not problematic, but that:

> But then what happened factually, the Court finds in this case, is that a detective then picked up – excuse me, initially it was unclear if the detective picked it up or not, but what is clear is that the detective never viewed it and there is some indication that the Prosecutor may have been the one who picked it up in terms of the data.

> Either way the Court finds it's sufficient that the detective picked up the information which contained an extract of the entire phone and based on proffer again that the detective did not see it but then provided the entire download to the actual Prosecutor prosecuting this case. *And ultimately that Prosecutor is still the Prosecutor here in this matter and I heard her efforts to stay within the confines of what the Court had permitted, however, it just doesn't change the key fact that causes the Court concern about the defendant's privacy rights and that is that in the Prosecutor's hands was the one who's prosecuting this case was given all of the extract of the defendant's phone despite that judges had attempted to narrow down the evidence that would be available to law enforcement to use in the prosecution ultimately*.
>
> And I did hear, you know, the concerns from the Government in terms of that's just how it's structured at the United States Attorney's Office, that there is not some other entity or person or anyone available to review these large volumes of information but that unfortunately, you know, for the Court [that] doesn't resolve the privacy issue.
>
> I mean the whole crux of the Fourth Amendment vis-à-vis these cell phones, is that the Court, the Supreme Court and our Court of Appeals is saying that we the Court have to be very careful with these modern-day cell phones which basically not only have all the information that would be contained in a person's house that would be searched but actually has even much more than that. The sort of inner thinkings of an individual, everything from their medical information to, you know, private information about their relationships, to family relationships, to other information, very broadly speaking, that is contained – sort of something that the framers of the constitution probably never had any thought that this type of information would be accessible to law enforcement.

Id. at 13-15 (emphasis added). The trial court also found that:

> The Government ultimately, I find factually, received much broader information; this is, the Prosecutor specifically received much broader information than what's authorized by judges.
>
> And so again although – if the Court had just been looking at what the judges did, you know, there was an argument to be made that this was

> a stronger factual scenario than the scenario in Burns, but unlike what the Court was looking at, I guess, in Burns here, you know, *it's clear that the Government, the Prosecutor, has received the entire extract and therefore has access to all the information that is contained in the defendant's phone, both that which was authorized to be seized and looked at but also anything else that's on his phone*.

Id. at 15-16. (emphasis added).

The trial court got it right the first time. However, when the government gave the trial court an argument to hang its hat on to reverse its own ruling, it did so. Unfortunately, the trial court's order reversing its previous ruling included erroneous findings, including a misapprehension of Rule 41, as well as a misapprehension and misapplication of this Court's findings in *Burns*. Therefore, its decision to grant the government's motion for reconsideration and admit the cell phone data evidence at trial merits reversal of Mr. Dean's conviction.

CONCLUSION

Mr. Dean respectfully requests that this Court reverse his conviction, which is the appropriate remedy in this case.

Respectfully submitted,

/s/ Anne Keith Walton
Anne Keith Walton, Esq.
Bar No. 991042
455 Massachusetts Ave. NW #347
Washington, DC 20001
Phone: (202) 642-5046
Email: waltonlawdc@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that, on June 9, 2023, a copy of the foregoing Appellant Brief and the accompanying Limited Appendix were served via the court's e-filing system to: Chrisellen R. Kolb, Chief of the Appellate Division of the United States Attorney's Office for the District of Columbia.

/s/ Anne Keith Walton
Anne Keith Walton, Esq.

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief, please initial the box below at "G" to certify you are unable to file a redacted brief. Once Box "G" is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, amended May 2, 2023, and Super. Ct. Crim. R. 49.1, and removed the following information from my brief:

A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date
(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
(b) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
(c) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

AKW
Initial here

G. I certify that I am incarcerated, I am not represented by an attorney (also called being "pro se"), and I am not able to redact this brief. This form will be attached to the original filing as record of this notice and the filing will be unavailable for viewing through online public access.

/s/ Anne Keith Walton
Signature

22-CF-447
Case Number(s)

Anne Keith Walton
Name

June 9, 2023
Date

waltonlawdc@gmail.com
Email Address