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# STATE OF NEBRASKA, APPELLEE, V. FORREST R. COX III, APPELLANT.

___ N.W.2d ___

Filed November 13, 2020. No. S-19-780.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment or the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth or Fifth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Constitutional Law: Search and Seizure: Evidence: Police Officers and Sheriffs.** The exclusion of evidence obtained in violation of the Fourth Amendment is not itself a constitutional right; rather, it is a remedy designed to deter constitutional violations by law enforcement.
3. ____: ____: ____: ____. In situations where the exclusion of evidence as a remedy would not deter law enforcement, several exceptions to the exclusionary rule have been recognized. One of those exceptions applies to evidence obtained by police in objectively reasonable reliance on a statute later found to be unconstitutional.
4. **Trial: Evidence: Motions to Suppress: Waiver: Appeal and Error.** When a motion to suppress is overruled, the defendant must make a specific objection at trial to the offer of the evidence which was the subject of the motion to suppress in order to preserve the issue for review on appeal. Put another way, a failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal.
5. **Verdicts: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not

Appendix A.

whether in a trial that occurred without the error, a guilty verdict surely would have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.

Appeal from the District Court for Douglas County: KIMBERLY MILLER PANKONIN, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Natalie M. Andrews for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

HEAVICAN, C.J.

## INTRODUCTION

Forrest R. Cox III was convicted of first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. At issue on appeal is whether the district court erred in admitting cell phone records for Cox's phone and whether Cox invoked the right to counsel during questioning by law enforcement. We affirm.

## FACTUAL BACKGROUND

Cox was charged in connection with a shooting at a convenience store in Omaha, Nebraska, on the evening of March 6, 2017. The victim of the shooting, Laron Rogers, died on March 22 as a result of injuries he sustained.

### TRIAL TESTIMONY

According to testimony and evidence presented at trial, an employee of the convenience store called emergency services upon learning of a shooting in the parking lot of the store. Rogers was lying on the ground. Rogers was initially stabilized and taken to a hospital, but he did not respond to questions about who had shot him.

Two different witnesses at the scene of the shooting testified that Rogers was leaning into a white vehicle without license plates, which vehicle was identified by both witnesses as a Chevy Impala. According to the witnesses, it appeared that Rogers was talking to the occupants of the vehicle. A gunshot was heard, and Rogers walked a few steps before collapsing. The witnesses both testified that the white Impala then drove off. Law enforcement later obtained surveillance video from the scene and confirmed that the suspect vehicle was a white Impala.

During the course of the investigation, law enforcement visited Rogers' place of employment, a cell phone store, and spoke with the store manager. The manager showed law enforcement video clips that were taken earlier on the day of Rogers' shooting. The video clips showed two men inside the store. According to the manager, coworkers had seen Rogers outside the store interacting with the men prior to the men entering the store. Law enforcement was able to identify Cox at the time the clips were viewed. Shortly thereafter, the other man was identified as Rufus Dennis.

The manager provided law enforcement with a piece of paper with "Bubba" and the phone number ". . . 6473" written on it. According to one of Rogers' coworkers, the phone number on the piece of paper was the phone number provided by Cox as he sought assistance with his cell phone at the store. Other evidence at trial revealed that Cox's nickname was "Bubba."

That same coworker also testified that Rogers left work at approximately 6 p.m. but stayed in the parking lot, sitting in his car with a friend. The friend was a manager at a different branch of the same cell phone company that employed Rogers. She had stopped by to pick up phones for her store and stayed to smoke marijuana and talk with Rogers in his car after he got off work. The friend testified that Rogers smoked and dealt marijuana.

According to the friend, while she was in Rogers' car, two men in a white Chevy Impala, with no license plates and

displaying in-transit stickers, parked at the store. One of the men—whom she identified at trial as Cox—stopped at Rogers' car to talk to Rogers. The friend said that Cox wanted to buy some marijuana, but that Rogers did not have enough on hand. Rogers and Cox exchanged telephone numbers and agreed to be in touch later that day. Cox and the other man, unknown to the friend but later identified as Dennis, went into the store; the friend and Rogers left the store's parking lot in their separate vehicles.

During the course of the investigation, law enforcement determined that Rogers owed his drug supplier money. Both Rogers' fellow employee and Rogers' friend testified that Rogers had asked them for money, though both declined to give him any. After leaving work, Rogers went to the home he shared with his mother and father. He asked his father for money and received $200. In addition, bank records show that Rogers withdrew nearly $950 from his bank accounts on the day of the shooting. That money was not recovered.

After identifying Cox and obtaining the paper with the phone number on it, law enforcement sought subscriber information for that number. A warrant was issued, and the cell phone records from January 1 to March 24, 2017, including cell site location information (CSLI), were provided to law enforcement. In addition, law enforcement had access to Rogers' cell phone.

According to the record, Rogers sent a text message to Cox at 6:37 p.m. the day of the shooting that said, "This Ronno." Cell phone records show that there were several phone calls between Rogers and Cox on March 6, 2017, in the hour or so leading up to the shooting, but that there were no calls between the two within the approximately 2 months preceding the shooting. CSLI records further showed that Cox's phone was in the area of the shooting at the time and that he was not in the area of his purported alibi.

Evidence offered at trial also linked Cox to a white Chevy Impala. When questioned by law enforcement, Dennis admitted that he had access to a white Impala that was registered

in the name of his mother. Dennis led officers to the white Impala, which was parked near Cox's brother's residence. The car was impounded. The license plate screws on the car looked new, and there were what appeared to be glue marks from in-transit stickers in the window. Inside the car was a steering wheel cover and two remaining license plate screws in original packaging, along with a receipt from an auto parts store for the purchase of a steering wheel cover and license plate screws. Further investigation revealed video showing Cox purchasing those items.

Law enforcement was unable to locate Cox until February 26, 2018. During his interview, Cox acknowledged that his phone number was the same number ending in 6473; that he knew Rogers; that he had met with Rogers on March 6, 2017, the day of shooting; and that he wanted to obtain marijuana. Cox denied shooting Rogers and said he was with a female friend during the evening of the shooting. That friend, who testified that Rogers was her uncle, also testified that she did not recall seeing Cox on March 6 or 7 and that she did not see him until early April. In addition, as previously noted, Cox's CSLI data suggested that he was not at this friend's home on the day of the shooting.

## PROCEDURAL HISTORY

Prior to trial, Cox filed motions to suppress his cell phone records and the statements he made to law enforcement in his February 26, 2018, interview. As to the statements, Cox argued that his rights under *Miranda v. Arizona*[1] were violated when he invoked his right to remain silent and officers continued to question him. As for the cell phone records, Cox argued that the warrant was obtained without probable cause as explained in *Carpenter v. U.S.*[2]

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[2] *Carpenter v. U.S.*, ___ U.S. ___, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018).

In its order, the district court denied the motion to suppress the statements. With respect to the cell phone records, the court noted that the State had conceded that "the search warrant, although obtained prior to *Carpenter* . . . , has not been remedied post-Carpenter. Accordingly, the State concedes this issue and Cox's motion to suppress these records is granted."

However, while the motion to suppress the cell phone records was pending, the State filed a second affidavit seeking a warrant for the cell phone records. The second affidavit included additional averments intended to cure the previous deficiency. A second warrant was then issued, and Cox filed another motion to suppress. The second motion was denied.

At trial, in response to questioning about Cox's cell phone records, counsel for Cox objected on the basis of the motion to suppress. That objection was denied. Counsel for Cox objected at the next opportunity, stating: "Judge, I would just ask that my same objection be noted for the record and a standing objection for any new matters with respect to . . . 6473." The court granted counsel's "request for a standing objection."

Counsel also objected to the admission of exhibit 162 on the basis of his motion to suppress. Exhibit 162 was a video of law enforcement's first interview with Cox. In addition to showing that video, the detective who conducted the interview testified. Cox offered few objections to this testimony and made no objections on *Miranda* grounds.

Prior to the case being submitted to the jury, the State abandoned its theory that the murder was premeditated and proceeded solely on a felony murder theory. Cox was found guilty on all counts and sentenced to life imprisonment for felony murder, 25 to 30 years' imprisonment for use of a deadly weapon, and 40 to 45 years' imprisonment for possession of a firearm by a prohibited person.

## ASSIGNMENTS OF ERROR

Cox assigns, restated and consolidated, that the district court erred in (1) admitting cell phone records for Cox's cell

phone in violation of Cox's Fourth Amendment rights and (2) admitting statements made by Cox that were in violation of Cox's Fifth Amendment rights as explained in *Miranda*.

## STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment or the safeguards established by the U.S. Supreme Court in *Miranda*, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth or Fifth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.[3]

## ANALYSIS

On appeal, Cox assigns that the district court erred in admitting his cell phone records and in admitting statements made after he invoked his right to remain silent during his February 26, 2018, interrogation.

### ADMISSIBILITY OF CELL PHONE RECORDS

Cox assigns that the district court erred in denying his second motion to suppress his cell phone records, including his CSLI. Cox's argument is rooted in the U.S. Supreme Court's decision in *Carpenter*.[4]

In *Carpenter*, the Court concluded that individuals had a reasonable expectation of privacy in their record of physical movements as captured by CSLI. Because of this expectation of privacy, the Court concluded that a warrant was, in most cases, required before such records could be acquired. The conclusion reached in *Carpenter* effectively overruled this court's earlier decision in *State v. Jenkins*,[5] in which

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[3] *State v. Schriner*, 303 Neb. 476, 929 N.W.2d 514 (2019).

[4] *Carpenter v. U.S.*, *supra* note 2.

[5] *State v. Jenkins*, 294 Neb. 684, 884 N.W.2d 429 (2016).

we held that the acquisition of CSLI did not implicate the Fourth Amendment.

Since *Carpenter*, this court has had the opportunity to address the applicability of the exclusionary rule and suppression of evidence as a remedy for a Fourth Amendment violation of the type at issue in this appeal.[6] In both *State v. Brown*[7] and *State v. Jennings*,[8] we declined to apply the exclusionary rule to CSLI obtained without a warrant supported by probable cause, explaining in each case that the rationale for the exclusionary rule would not be met on the facts presented. In both of these cases, officers relied upon the Stored Communications Act to support court orders seeking cell phone records, and specifically CSLI. At the time the court orders were sought and executed, the U.S. Supreme Court had not yet decided *Carpenter*. We concluded that officers in each case were following the statute as written and that the statute in question was not clearly unconstitutional.

[2,3] The exclusion of evidence obtained in violation of the Fourth Amendment is not itself a constitutional right.[9] Rather, it is a remedy designed to deter constitutional violations by law enforcement.[10] Thus, in situations where the exclusion as a remedy would not deter law enforcement, several exceptions to the exclusionary rule have been recognized.[11] One of those exceptions applies to evidence obtained by police in objectively reasonable reliance on a statute later found to be unconstitutional.[12]

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[6] *State v. Jennings*, 305 Neb. 809, 942 N.W.2d 753 (2020); *State v. Brown*, 302 Neb. 53, 921 N.W.2d 804 (2019).

[7] *State v. Brown, supra* note 6.

[8] *State v. Jennings, supra* note 6.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

In this case, law enforcement sought a court order based upon a statute that was, many months later, determined to be unconstitutional. Similar to *Brown* and *Jennings*, law enforcement's reliance on a court order issued under the Stored Communications Act, at a time when the act had not yet been found by the U.S. Supreme Court or by this court to implicate the Fourth Amendment, was not objectively unreasonable.

We observe that the district court originally granted Cox's motion to suppress below on the basis of the State's concession, but that the evidence was eventually admitted following the denial of a second motion to suppress. The district court reasoned that a subsequent warrant essentially cured any Fourth Amendment violation.

Of course, this reasoning varies from the reasoning we employ today, and in particular, this court's reasoning relies upon the good faith exception to the Fourth Amendment's warrant requirement. We have previously held that an appellate court may not, sua sponte, rely on the good faith exception to the warrant requirement.[13] We explained that the concern with an appellate court's reaching the issue of good faith sua sponte is that a defendant must have sufficient opportunity to defend against the application of the exception.[14] But a review of the record shows that this scenario is not presented here. The State raised the issue of good faith in its brief on appeal. Cox also argues the issue in his brief on appeal.

The district court did not err in admitting the CSLI evidence at trial. There is no merit to Cox's first assignment of error.

### ADMISSIBILITY OF STATEMENTS

Cox also assigns that the district court erred in denying his motion to suppress statements made to law enforcement after he invoked his right to remain silent. He argues, in turn, that the district court erred in admitting those statements. Because

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[13] *State v. Tompkins*, 272 Neb. 547, 723 N.W.2d 344 (2006).

[14] *Id.*

Cox failed to object to the investigating detective's testimony about his statements, we find no error in the admission of these statements.

At issue are statements made during law enforcement's first interview of Cox on February 26, 2018. The State offered a video of that interview, exhibit 162, which was shown to the jury. The record shows, and the State acknowledges, that Cox objected to exhibit 162 on the basis of the earlier motion to suppress. But Cox did not seek a continuing objection, or object on the basis of *Miranda*, to any other testimony regarding the statements he made during the interview.

Rather, the detective testified, without objection, that Cox agreed that he knew Rogers, that the 6473 number was his, and that he provided the name of his alibi. In addition, Cox told the detective that he was dropped off at his brother's residence after seeing Rogers at the cell phone store and that he had been in a white Chevy Impala. Other evidence showed that the white Impala in this case, found near the brother's residence, was later seized.

[4] When a motion to suppress is overruled, the defendant must make a specific objection at trial to the offer of the evidence which was the subject of the motion to suppress in order to preserve the issue for review on appeal.[15] Put another way, a failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal.[16]

Because there was no objection to the statements made by Cox and testified to by the interviewing detective, Cox has waived any right to assert error. The video that was shown and objected to was cumulative to that testimony as well as to other evidence presented at trial. Namely, several witnesses at the cell phone store testified that Rogers spoke to Cox at the

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[15] *State v. Piper*, 289 Neb. 364, 855 N.W.2d 1 (2014).

[16] See *State v. Montoya*, 305 Neb. 581, 941 N.W.2d 474 (2020).

store, both Cox's and Rogers' cell phone records supported contact between the two, and other evidence tied Cox to the white Chevy Impala.

[5] Even if the proper objections had been made, however, we would still find no reversible error in the admission of the statements, because any error would have been harmless. Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error, a guilty verdict surely would have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.[17]

During the challenged interview, Cox did not admit to the crime or even admit to being in the area at the time of the crime. When these statements are compared to the cell phone records of calls between Rogers and Cox, the CSLI, and the fact that Cox had control over a white Chevy Impala, which had been identified by multiple witnesses as being involved in the shooting, there was sufficient evidence unattributable to any error in offering the video and statements.

There is no merit to Cox's second assignment of error.

## CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

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[17] *State v. Devers*, 306 Neb. 429, 945 N.W.2d 470 (2020).

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

| | | |
|---|---|---|
| THE STATE OF NEBRASKA, | ) | CASE NO. CR18-1285 |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | MOTION TO SUPPRESS |
| | ) | |
| FORREST COX, | ) | |
| | ) | |
| Defendant. | ) | |

#44 FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA
JUN 14 2018
JOHN M. FRIEND
CLERK DISTRICT COURT

COMES NOW the Defendant, Forrest Cox, by and through his attorney, Matthew J. Miller, Assistant Public Defender, and moves the Court to suppress and exclude from use against him any and all evidence obtained as a result of a forensic search of cell phone number 402 312-6473, for the following reason:

1. That on March 27, 2017, Omaha Police applied for and obtained a search warrant for cell phone records of the above mentioned phone number;

2. That the application and search warrant is directed to Sprint Corporation, the custodian of the sought after records and information;

3. That the affidavit in support of the search warrant provided insufficient probable cause to believe that evidence of the crime being investigated, to wit the homicide of LaRon Rogers, would be contained in the information requested;

4. That the affidavit in support of the search warrant fails to provide factual information upon which the magistrate could determine the existence of probable cause. Rather, the affidavit is replete with conclusory statements that are not supported by any facts included in the affidavit;

5. That the search warrant lacks specificity and is, in effect, a general search warrant in that it fails to identify the specific items which are the target of the search and allows the police unfettered discretion to search the cell phone records;

6. That the search warrant authorized the release of information between "1/01/2017 to 3/24/2017";

7. That the homicide under investigation in this matter occurred on or about 7:50 p.m. on March 6, 2017;

Appendix B

8. That as a result of the information derived from the search of the above mentioned cell phone records the State intends to present evidence concerning the use of the cell phone for, among other things, communication and data searches;

9. That absent the information derived from the search of the above mentioned cell phone, the State would be unable to present evidence concerning these communications and data searches;

10. That 18 U.S.C.A §2702 (a)(c) prohibits a cell phone provider from releasing any record or other information pertaining to a subscriber or customer to any governmental entity with certain exceptions as authorized under §2703;

11. That §2703 authorizes release of cell phone information if the governmental entity obtains either a search warrant or obtains a court order for disclosure "if the governmental entity offers specific and articulable grounds to believe that the records or information sought are relevant and material to an ongoing criminal investigation".

WHEREFORE, the Defendant prays that the Court suppress and exclude from use against him all evidence obtained and fruits thereof, of a search of the above mentioned cell phone records for the reasons that such search was conducted in violation of the Fourth, Fifth, and Fourteenth Amendments of the Constitution of the United States and Article I, Sections 3, 7, 11, and 12 of the Constitution of the State of Nebraska and 18 U.S.C.A, §2703.

FORREST COX, Defendant

By _____
Matthew J. Miller, #21516
Assistant Public Defender
Attorney for Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the above and foregoing Motion to Suppress was personally served on Ann Miller, Deputy County Attorney, Hall of Justice, by hand delivery to her office, this 19th day of June, 2018.

_____

NOTICE OF HEARING

YOU AND EACH OF YOU ARE HERBY NOTIFIED that a hearing in the above mentioned matter has been set before the District Court at 2:30 p.m., on the 16th day of August, 2018, in Courtroom #409 before the Honorable Judge Kimberly Miller Pankonin.

# ORIGINAL

RB# AJ49974

## SEAL ORDER

IN THE COUNTY COURT OF
DOUGLAS COUNTY, NEBRASKA
CRIMINAL BRANCH

| | | | |
|---|---|---|---|
| CRIMINAL INVESTIGATION | ) | | |
| Omaha Police Department | ) | | |
| Criminal Investigation Bureau | ) | DOC. | NO. |
| In relation to: | ) | | |
| **Homicide** | ) | | |

This matter came on for hearing upon the oral and/or written affidavit of Officers Ryan HINSLEY #1853 and/or Matthew BACKORA #1821, and the court being duly advised, finds and orders:

That Officers Ryan HINSLEY #1853 and/or Matthew BACKORA #1821 a court-authorized search warrant for Cell Phone/ Cell Tower records as it relates to a homicide investigation at **4145 Ames Avenue, Omaha, Douglas County, Nebraska**, on or about **Monday, March 06, 2017**. Officers of the Omaha Police Homicide Unit are still continuing with this investigation.

The court has also found after consulting with Officers Ryan HINSLEY #1853 and/or Matthew BACKORA #1821 that information within the search warrant affidavit could jeopardize this ongoing investigation if it were to be released. Therefore it is the order of this court that the search warrant affidavit be sealed by this court.

That this order shall continue in force and effect henceforth until it has been determined by this court or a Judge of the District Court that this order no longer need to be in effect.

DATED this 24th day of March, 2017.

BY THE COURT

JUDGE OF THE COUNTY COURT

#15 FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA
MAR 30 2017
JOHN M. FRIEND
CLERK DISTRICT COURT

FILED
CRIM/TRAF DIVISION
MAR 30 2017
Clerk of Court
DOUGLAS COUNTY COURT
OMAHA, NEBRASKA

Appendix C

ORIGINAL

RB: AJ49974

**IN THE County COURT OF OMAHA, DOUGLAS COUNTY, NEBRASKA**

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|---|---|
| **STATE OF NEBRASKA)** | **SEARCH WARRANT FOR** |
| **)** | **CELLULAR PHONE RECORDS** |
| **COUNTY OF DOUGLAS)** | |

**TO:** OMAHA, NEBRASKA POLICE OFFICER Ryan HINSLEY.

This matter came on for hearing on the 24 day of March, 2017, upon the sworn application and affidavit for issuance of a search warrant of Officer(s) Ryan HINSLEY, #1853 and/or Matthew BACKORA #1821 and the Court, being fully advised in the premises finds as follows:

That the Court has jurisdiction of this matter pursuant to the Sections 29-812, Nebraska Revised Statutes, 1943, as amended.

That based upon the sworn affidavit and application of issuance of a search warrant of Ryan HINSLEY and/or Matthew BACKORA dated the 24 day of March, 2017, that there is probable cause to believe that located at Sprint PCS / Nextel Communications , an electronic communications service provider as defined by 18 U.S.C. §2510(15) and Nebraska Revised Statute 86-277, AND/OR the authorized or designated agent for the custodian of records of the electronic communications service provider, the following described records and other information for 402-312-6473, to-wit:

A. The following customer or subscriber account information for each account registered to or associated with 402-312-6473 for the time period 1/01/2017 to 3/24/2017 in Central Standard Time (CST):

1. Subscriber names, user names, screen names, or other identities;
2. Mailing addresses, residential addresses, business addresses, email addresses, and other contact information;
3. Local and long distance telephone connection records, or records of session times and durations;
4. Length of service (including start date) and types of services utilized;
5. Telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address;

FILED
CRIMINAL DIVISION
MAR 30 2017
Clerk of Court
DOUGLAS COUNTY COURT
OMAHA, NEBRASKA

ORIGINAL

6. Means and source of payment for such service (including any credit card or bank account number) and billing records.

B. All records and other information relating to account(s) and time period in Part A, including:

1. Records of user activity for any connections made to or from the account, including the date, time, length, and method of connections, data transfer volume, user name, and source and destination Internet Protocol address(es);
2. All available toll records to include call detail, SMS detail, data sessions, per call measurement data (PCMD), round trip time (RTT), NELOS, cell site and cell site sector information from 1/01/2017 to 3/24/2017 Central Standard Time (CST) and cellular network identifying information (such as the IMSI, MSISDN, IMEI, MEID, or ESN);
3. Non-content information associated with the contents of any communication or file stored by or for the account(s), such as the source and destination email addresses and IP addresses;
4. Correspondence and notes of records related to the account(s).
5. Current cellular site list, in electronic format, which includes any and all markets, switches, and areas the target phone utilized during the time period listed above.

The Court finds that the applicant has offered specific and articulable facts showing that there are reasonable grounds to believe that the records or other information sought are relevant and material to an ongoing criminal investigation.

AND, if found, to seize and deal with the same as provided by law, and to make return of this warrant to me within ten days after receiving the requested information set forth in Part A and Part B.

**YOU ARE, THEREFORE, ORDERED,** pursuant to Title 18, United States Code, Section 2703(d) that Sprint PCS / Nextel Communications will, **within fourteen (14) days of the date of this Order**, turn over to the Omaha, Nebraska Police Department the records and other information as set forth in Part A and Part B.

**IT IS FURTHER ORDERED** that this data be provided in both electronic and/or paper data to the following State of Nebraska personnel:

**Officer Ryan HINSLEY #1853**
**505 S. 15th Street**
**Omaha, NE 68102**
**402-444-6364 (desk)**
**Ryan.hinsley@cityofomaha.org**
**402-444-4990 (fax)**

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MAR 30 2017
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DOUGLAS COUNTY NEBR.

ORIGINAL

**IT IS FURTHER ORDERED,** that any other person, device, computer, and/or number that is in communication with the target device shall be considered part of the criminal investigation and shall require the disclosure of the data in Part A and Part B from any provider of electronic communications services as defined by 18 U.S.C. §2510(15) and Nebraska Revised Statute 86-277. This shall also include the target device roaming or utilizing any electronic communications service provider's network and/or antennas, regardless of carrier or provider.

**IT IS FURTHER ORDERED** that Sprint PCS / Nextel Communications or any other person/company, shall not disclose the existence this Order of the Court, or the existence of the investigation, to the listed subscriber or to any other person, unless and until authorized to do so by the Court.

**IT IS FURTHER ORDERED,** that execution of the Search Warrant be forthwith during the daytime hours.

**IT IS FURTHER ORDERED,** that Omaha, Nebraska Police Officer Ryan HINSLEY and/or Matthew BACKORA, make return of this Search Warrant to me within ten days after receiving the requested information from the electronic communications service provider.

Given under my hand this 24 day of March, 2017.

Judge of the Douglas County Court

FILED
CRIM/TRAF DIVISION
MAR 30 2017
Clerk of Court
DOUGLAS COUNTY COURT
NEBRASKA

ORIGINAL

RB: AJ49974

IN THE County COURT OF OMAHA, DOUGLAS COUNTY, NEBRASKA

| | | |
|---|---|---|
| STATE OF NEBRASKA | ) | AFFIDAVIT AND APPLICATION FOR |
| | ) | ISSUANCE OF A SEARCH WARRANT |
| COUNTY OF DOUGLAS | ) | FOR CELLULAR PHONE RECORDS |

The complaint and affidavit of Officer(s) Ryan HINSLEY, #1853 and/or Matthew BACKORA #1821 on this 24 day of March, 2017, who, being first duly sworn, upon oath says:

That the officer has just and reasonable grounds to believe, and does believe that there is concealed or kept as hereinafter described, the following property, to wit:

A. The following customer or subscriber account information for each account registered to or associated with 402-312-6473 for the time period 1/01/2017 - 3/24/2017 in Central Standard Time (CST):

1. Subscriber names, user names, screen names, or other identities;
2. Mailing addresses, residential addresses, business addresses, email addresses, and other contact information;
3. Local and long distance telephone connection records, or records of session times and durations;
4. Length of service (including start date) and types of services utilized;
5. Telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address;
6. Means and source of payment for such service (including any credit card or bank account number) and billing records.

B. All records and other information relating to account(s) and time period in Part A, including:

1. Records of user activity for any connections made to or from the account, including the date, time, length, and method of connections, data transfer volume, user name, and source and destination Internet Protocol address(es);
2. All available toll records to include call detail, SMS detail, data sessions, per call measurement data (PCMD), round trip time (RTT), NELOS, cell site and cell site sector information from 1/01/2017 to 3/24/2017 Central Standard Time (CST) and cellular network identifying information (such as the IMSI, MSISDN, IMEI, MEID, or ESN);

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CRIM/TRAF DIVISION

MAR 30 2017

Clerk of Court
DOUGLAS COUNTY COURT
OMAHA, NEBRASKA

ORIGINAL

3. Non-content information associated with the contents of any communication or file stored by or for the account(s), such as the source and destination email addresses and IP addresses;
4. Correspondence and notes of records related to the account(s).
5. Current cellular site list, in electronic format, which includes any and all markets, switches, and areas the target phone utilized during the time period listed above.

That said property is concealed or kept in, on, or about the following described place or person, to wit:

Sprint PCS / Nextel Communications
Attn: Custodian of Records/Subpoena Compliance
6480 Sprint Parkway
Overland Park, Kansas 66251

That said property is under the control or custody of:

**Custodian of Records**

That the following are the grounds for issuance of a search warrant for said property and the reasons for the officers' belief to wit:

On Monday March 06, 2017 at 1949 hours uniform patrol officers were dispatched to the Ames Ave Convenience Store at 4145 Ames Avenue, Omaha, Douglas County, Nebraska in reference to a shooting. Upon arrival officers located the victim, later identified as LaRon ROGERS (date of birth 8/26/1991) lying in the parking lot suffering from an apparent gunshot wound to the right flank. ROGERS was transported by medics to CHI health (601 North 30th Street) to be treated.

Witnesses at the scene advised they saw two vehicles parked in the far south parking lot at that location. The vehicles were described as a silver Chevy Impala and a white Chevy Impala with no license plates and dark rims. One witness stated he heard a single gunshot and then saw the victim running from the driver's side of the silver Impala, yelling "Call the Police!" Witnesses stated the white Impala with no plates then left the parking lot, driving southbound on 42nd Street, then east bound on Paxton Boulevard.

At the scene, detectives and members of the Omaha Police Forensic investigations Unit processed and searched the victim's silver Chevy Impala. Inside the Impala investigators located a glass jar and two plastic bags containing apparent marijuana and

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CRIM/TRAF DIVISION
MAR 30 2017
Clerk of Courts
DOUGLAS COUNTY 242 NE
OMAHA, NEBRASKA

ORIGINAL

marijuana in order to get extra money and believed on the day of initial shooting (3/06/2017) ROGERS had $900 cash on him.

Upon reviewing the video surveillance from Boost Mobile, detectives were immediately able to identify one of the unknown black male parties, from previous investigations, as Forrest COX (dob 7/15/1988). Upon receiving an anonymous tip, the second unknown black male party was identified as Rufus DENNIS (dob 7/19/1977). A data check through OPD records revealed COX had self-reported the phone number 402-321-6473 in 2016.

Upon reviewing the downloaded data from the cell phones recovered in ROGERS' silver Impala, detectives discovered that on 3/06/2017 at 1837 hours ROGERS had sent a text message to 402-312-6473, which he apparently had saved to his cell phone under the name "Bubba". A search for the cell phone provider for the phone number 402-312-6473 revealed it to be active through Sprint Spectrum.

Affiant Officer is requesting that this Court issue a search warrant for the information provided in Part A and Part B which is stored with Sprint PCS / Nextel Communications, for the purposes of ascertaining what transpired during the time period requested for the incident being investigated.

WHEREFORE, the officers pray that a Search Warrant may be issued according to law.

1853

Omaha Police Officer

SUBSCRIBED AND SWORN to me this 24 day of March, 2017.

Judge of the County Court

FILED
CRIM/TRAF DIVISION
MAR 30 2017
Clerk of Court
DOUGLAS COUNTY COURT
OMAHA, NEBRASKA

IN THE DISTRIC[illegible] 00179494 1D01 , NEBRASKA

THE STATE OF NEBRASKA,

Plaintiff,

vs.

FORREST R. COX, III,

Defendant.

CR 18-1285

**ORDER ON DEFENDANT'S MOTIONS TO SUPPRESS**

#6 FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA
NOV 21 2018
JOHN M. FRIEND
CLERK DISTRICT COURT

This matter came before the Court for hearing on October 9, 2018, on Defendant's Motions to Suppress. The State appeared by Deputy County Attorneys, Ann Miller and Amy Jacobsen. The Defendant appeared with his counsel, Assistant Public Defenders Matthew Miller and Natalie Andrews. Evidence was adduced, and a briefing schedule was ordered. Upon submission of the legal briefs, the matter was taken under advisement. Being now fully advised in the premises, the Court finds and orders as follows:

## FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In April 2018, the State filed an Information charging Defendant, Forrest R. Cox, III, with count I: Murder in the 1st degree, a class IA felony; count II: use of a deadly weapon (firearm) to commit a felony, a class IC felony; and count III: possession of a deadly weapon by a prohibited person, a class ID felony. On June 14, 2018, Cox filed two motions to suppress. One motion argued that Cox's statements to police officers on February 26, 2018, should be suppressed because they were obtained in violation of Cox's rights under the 5th Amendment of the Constitution of the United States and Article I, Section 12 of the Constitution of the State of Nebraska. The second



Appendix D.

motion argued that evidence obtained from a forensic search of Cox's cell phone should be suppressed because the warrant was not supported by probable cause and lacked specificity.

Hearing on Cox's motions to suppress was continued on motions of the parties and was held on October 9, 2018. At the hearing, the State adduced testimony from Detective Ryan Hinsley of the Omaha Police Department. The Court additionally received: Exhibit 1, a copy of the seal order, affidavit and application for a search warrant for cell phone records, and a copy of the signed search warrant dated March 30, 2017; Exhibit 2, a DVD containing a video recorded interview with Cox by Detective Hinsley at the Omaha Police Department headquarters on February 26, 2018; Exhibit 3, a DVD containing a video recorded interview by Detective Hinsley with Cox at OPD headquarters on March 8, 2018, following his arrest; and Exhibit 4, an Omaha Police Department Rights Advisory Form dated February 26, 2018.

At the suppression hearing, Detective Hinsley testified that the Omaha Police Department received a report of a shooting at 4145 Ames Avenue on March 6, 2017. The victim, LaRon Rogers died from his injuries on March 22, 2017, and the homicide case was assigned to Hinsley.

***Defendant Statements***

At the October 9, hearing, this Court also received evidence related to Cox's motion to suppress his statements from the February 26, 2018, interview. The Court received a copy of this taped interview. Cox was detained at a traffic stop and transported to Omaha Police Headquarters by uniform patrol officers on February 26, 2018 at 02:19 p.m. Cox was placed in an interrogation room where he was joined by OPD Detective Ryan Hinsley. Detective Hinsley informed Cox that he had been attempting to contact him regarding two cases. When unable to reach Cox, Detective Hinsley had procured active DNA orders to detain Cox and bring him in for questioning. Detective Hinsley then advised Cox of his *Miranda* rights by utilizing a Rights Advisory Form and audio

recording. (Ex. 2, 2:21:22). Cox affirmed that he understood his rights as read to him. (Ex. 4). Detective Hinsley then asked Cox, "Are you willing to sit here and let me ask you some questions?" Cox responded. "Yeah, you can ask me some questions." (Ex. 2, 2:22:16).

Detective Hinsley began by informing Cox that the case he wished to talk about was the "Rodgers shooting." (Ex. 2, 2:22:25). Officer Hinsley asked Cox, "What can you tell me about that? [Rogers shooting]." (Ex. 2, 2:22:30). Cox responded, "Nothing." *Id.* Detective Hinsley then asked "Why do you think your name's come up in any of it?" (Ex. 2, 2:22:41). Cox responded, "I don't know...[parties talking over one another] ... look I don't got nothing to do with none of this, I don't know nothing about it, I can't tell you nothing about it, I raise kids on my own, I don't play around with this shit, that's not--." (Ex. 2, 2:22:41-2:23:01). Detective Hinsley cut off Cox's response with the follow-up, "What I'm being told is that you have information about it and you have information about who is responsible for that shooting." (Ex. 2, 2:22:56-2:23:01). Cox replied, shaking his head, and again using emphatic gestures to punctuate his rhythmic response, "I don't got no information for you, I don't got no—I'm telling you, I been -- everybody has been coming to me, even on the street, I don't got nothing for you, I don't got nothing, I wasn't there, I never had a problem with LaRon, I used to wor--." (Ex. 2, 2:22:56-2:23:20). As soon as Cox mentioned LaRon, Hinsley interrupted, asking, "How'd you know LaRon?" (Ex 2, 2:23:14). Cox responded, "I used to work with him in Manheim." (Ex 2, 2:23:14-16). Cox then answered questions about how long ago and where he and LaRon [Rodgers] had worked together. (Ex. 2, 2:23:20-2:23:33).

Hinsley then continued, "On the day he's shot, which was almost a year ago now, which was March 6, you have contact with him that day, tell me about that." (Ex 2, 2:23:31-39). Cox replied, "Um, I seen him at, the Boost Store . . .we – [Hinsley interrupts with the question, "Who

were you with at the Boost?"] -we exchanged numbers--." (Ex. 2, 23:39-53). Hinsley then interrupted, ascertaining that Cox knew LaRon prior to meeting him at the Boost store; Cox responded affirmatively. (Ex. 2, 23:39-59). Cox then answered follow-up questions about how much time passed between when Rodgers and Cox worked together and when he saw him at the Boost store. (Ex 2, 23:59-2:24:42). Cox stated that in total, he had known Rodgers about 2-3 years. (Ex. 2, 2:24:30-42). As Hinsley made a note, Cox was quiet for a few seconds, and then began speaking unprompted about knowing Rodgers. (Ex. 2, 2:24:42-47).

Hinsley cut off Cox and asked "What was discussed at Boost?" (Ex. 2, 2:24:47-2:24:48). Cox responded, saying that they didn't really discuss anything, but Rodgers was just getting his number because he had walked into the Boost to get his phone turned back on and he saw Rodgers for the first time in a while so they exchanged numbers, Cox paid his phone bill, and that was it. (Ex 2, 2:24:48-2:25:08). Cox agreed with Hinsley that his phone number then was 402-321-6473. (Ex. 2, 2:25:00-2:25:40). Cox and Hinsley then discussed that Cox was with "Rufus" at the Boost Store; Cox stated that he had met "Rufus" in Tecumseh. (Ex. 2, 2:25:40-2:26:20).

Detective Hinsley proceeded to ask Cox about the phone calls he exchanged with LaRon Rodgers the day of the shooting, emphasizing that he did not care about any sale of marijuana Cox or the victim were engaged in on the side. (Ex.2, 2:26:20-2:27:35). Cox stated that he didn't have any contact with LaRon [Rodgers] except for at the Boost store. (Ex. 2, 2:26:20-30). When Hinsley stated he had phone records, Cox held his hand in a telephone gesture and said, "you got me calling him one time on his phone, I guarantee." (Ex. 2, 22:26:35-45). Cox stated he was with a female when he called Rodgers. (Ex. 2:26:34-56). Hinsley responded that phone records showed several contacts throughout the evening leading up to the shooting around 7:45, and asked, "so what I want to know is, what are you guys chatting about? I've already heard what other people are telling

me that you guys are chatting about, but I'd like to hear it from you, to know, you know –" at which point Cox interrupted and retold the story about calling, talking to an old buddy and giving him his number, that's it. (Ex. 2, 2:27:00-32). Hinsley emphasized that he did not care about anything else "they were arranging" on the side. (Ex. 2, 2:27:32-43). Cox again responded, "I don't got nothing for you." (Ex.2, 2:27:44). Cox gestured to emphasize not having anything, making eye contact with Hinsley. (*Id.*). Hinsley then followed up with a more specific question about arranging a marijuana sale. (Ex. 2, 2:27:42-47). Cox responded emphatically that he was not trying to buy weed, had just gotten a tax return, and did not want to buy weed, and anyone else's statements to that effect were false. (Ex. 2, 2:27:47-2:28:00).

Detective Hinsley asked if anyone else would have had Cox's phone on the day of the shooting, and Cox said "I don't know." (Ex. 2, 2:28:00-2:28:17). When pressed on whether he had his phone all day, Cox answered, "I told you what happened, I got nothing, you can go with that--Like I said, you can take my DNA or whatever, but I told you what I told you, I ain't got nothing else to say about it." (Ex. 2, 2:28:17-2:28:50). Detective Hinsley then said, "I just want to show you something real quick. When you say you talk to him one time, this is . . . your phone history that day--." (Ex. 2, 2:28:46-51). Cox looked away and replied, "Look, I'm done talking about it, I already told you—[inaudible]" before he is cut off by Hinsley. (Ex. 2, 2:28:47-2:28:56). Hinsley continues asking who the shooter is, and says that without clarification by Cox, there was probable cause to file charges against him. (Ex. 2, 2:28:56-2:30:25). Hinsley concluded by saying, "so let me show you a couple more things before you decide you're not gonna, you know, wanna provide me with anything else." (Ex. 2, 2:30:25-58). Cox responded, "I'm telling you, I done provided you with everything I have, man." (Ex. 2, 2:30:58-2:31:02).

Hinsley then returned to the phone records and showed Cox at least 6 phone contacts between Rodgers and Cox the day of the shooting. (Ex. 2, 2:31:02-2:31:56). Cox responded, "I don't got nothing to do with that shit, I'm trying to tell you." (Ex. 2, 2:31:56-2:32) A few seconds later, Cox reiterates, "I can't—I don't know, that's why I can't—I ain't got—that's why I came down here I don't got time to see no one turn against me [inaudible as parties talk over each other]." (Ex. 2, 2:32:00-19). After a follow-up comment by Hinsley, Cox stated, "I can't clarify, I just told you everything I know, there's no reason for me to have no problem with this man, I have no problem with . . .." (Ex. 2, 2:32:03-27). Following this exchange, Cox continued to answer questions and make statements about the Rodgers shooting for 10-15 more minutes before Hinsley turned the interview to an unrelated case. (Ex. 2, 2:32:27-2:47:55).

***Search Warrant***

In the warrant affidavit contained in Exhibit 1, the affiant, Detective Hinsley, reports that officers received the March 6 shooting call shortly before 8:00 p.m. (E1, p. 3). Upon arrival, officers located Rogers lying in the parking lot suffering from an apparent gunshot wound. (E1, p. 3). Rogers was transported to CHI health to be treated. (E1, p. 3). Rogers later died from his injury. (E1, p. 4). Witnesses at the scene advised that they had seen a silver Chevy Impala and a white Chevy Impala with no plates and dark rims in the far south corner of a parking lot where the shooting took place. (E1, p. 3). A witness reported hearing a single gunshot and then seeing the victim run from the driver's side of the silver Impala yelling, "Call the Police!" (E1, p. 3). Witnesses then saw the white Impala with no plates leave the scene of the shooting. (E1, p. 3). At the scene of the shooting, officers searched the Rogers's silver Impala and located a glass jar and two bags containing marijuana and two cellular telephones. (E1, pp. 3-4). Rogers's girlfriend advised officers that Rogers was selling marijuana prior to his death and that she believed that on

the day of the shooting he had $900 in cash on him. (E1, pp. 4-5). A search of the victim's cell phone revealed that a few minutes before the shooting, Rogers had sent a text message to the phone number 402-321-6473, which was saved in Rogers's phone under the name "Bubba."

Officers conducting follow up learned that two males driving a white Chevy Impala with no plates had contacted Rogers at the Boost Mobile store where he worked approximately an hour before the shooting. (E1, p. 4). One of the males had identified himself to another employee as "Bubba" and left the phone number 402-312-6473. (E1, p. 4). Officers reviewing surveillance footage of the Boost Mobile store immediately identified one of the males as Cox based on prior investigations. (E1, p. 5). A data check of OPD records showed that Cox had a self-reported phone number of 402-321-6473. (E1, p. 5). Officers were able to identify the second male as Rufus Dennis. (E1, p. 5).

The Affidavit requested customer records from cell phone service providers for an account associated with the phone number 402-312-6473 for the time period January 1, 2017, to March 24, 2017. (E1, p. 2). The Affidavit requested records including: subscriber names, addresses, contact information; telephone connection records; length of service; telephone number or subscriber number or identity including temporarily assigned network addresses; means of payment; user activity records for connections made to or from the account including the date, time, length, and method of connections, data transfer volume, user name, and source and destination Internet Protocol addresses; all available toll records to include call detail, SMS detail, data sessions, per call measurement data, round trip time, NELOS, cell site and cell site sector information from 1/01/2017 to 3/24/2017 Central Standard Time and cellular network identifying information; non-content information associated with the contents of any communication or file stored by or for the

accounts, such as source and destination email and IP addresses; correspondence and notes of records related to the accounts; and the current cellular site list. (E1, pp. 2-3).

After a hearing on the search warrant application, the County Court for Douglas County issued a "Search Warrant for Cellular Phone Records." (E1, p. 6). The County Court found that the applicant offered "specific and articulable facts showing that there [we]re reasonable grounds to believe that the records or other information sought [we]re relevant and material to an ongoing criminal investigation" and therefore ordered, "pursuant to Title 18, United States Code, Section 2703(d) that Sprint PCS / Nextel Communications turn over the requested records to the Omaha Police Department. (Exhibit 1, p. 7).

## STANDARD OF REVIEW

Whether a defendant unambiguously invoked his or her right to remain silent is a mixed question of law and fact. *State v. Hernandez*, 299 Neb. 896, 911, 911 N.W.2d 524, 539 (2018). An appellate court reviews a trial court's finding of historical facts for clear error and independently determines whether those facts satisfy the constitutional standards. *Id.*

A ruling on a motion to suppress is a question of fact to be determined by the trial court as the finder of fact. *State v. Tucker*, 262 Neb. 940, 946, 636 N.W.2d 853, 859 (2001). On a claim of insufficiency of the affidavit supporting the issuance of a search warrant, the trial court's ruling on a motion to suppress will be upheld unless its findings are clearly erroneous. *State v. Ball*, 271 Neb. 140, 150, 710 N.W.2d 592, 602 (2006). The State bears the burden of proof at a suppression hearing, but that burden is only by a preponderance of the evidence. *United States v. Matlock*, 415 U.S. 164, 177 n. 14, 94 S. Ct. 988, 996 (1974).

## ANALYSIS

This order addresses both Cox's motion to suppress his February 26 statements, and his motion to suppress his cellular telephone records. The Court addresses each of Cox's arguments below.

### 1. Motion to Suppress Statements

In his brief, Cox argues that his statements should be suppressed because he did not waive his *Miranda* rights and because questioning did not stop when he invoked his right to silence mid-way through the February 26 interview. The Court addresses each argument and ultimately denies Cox's motion to suppress.

#### *a. Waiver of Miranda Rights*

Cox first argues that his statements should be suppressed because he did not waive his *Miranda* rights. In *Miranda v. Arizona*, 384 U.S.436, 86 S.Ct. 1602, 16 L.Ed 2d 694 (1966), the U.S. Supreme Court announced the rule that confessions obtained in custodial interrogations may not be used in criminal prosecutions unless certain procedural safeguards were met, including advising the detainee of his or her constitutional right to remain silent and right to counsel. *State v. Hernandez*, 299 Neb. 896, 911, N.W.2d 524 (2018). These rights must be knowingly and voluntarily waived. *Id.* The *Miranda* warnings are an "absolute prerequisite" to custodial interrogation; statements made during a custodial interrogation in the absence of these warnings and a valid *Miranda* waiver are inadmissible, even if otherwise voluntarily made. *Id.* (internal citations omitted). A waiver is "knowing" if it is "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* (internal citations omitted). A waiver is "voluntary" if it is "the product of a free and deliberate choice rather than [through] intimidation, coercion, or deception." *Id.* (internal citation omitted). Whether a

knowing and voluntary waiver has been made is determined by looking to the totality of the circumstances. *Id.*

On the facts of this case, the Court determines that Cox knowingly and voluntarily waived his *Miranda* rights and agreed to speak to Detective Hinsley. At the outset of the recorded interview, Hinsley advised Cox of his *Miranda* rights by utilizing a Rights Advisory Form. (Ex. 2, 2:21:22). Cox affirmed that he understood his rights as read to him. (Ex. 4). When asked if he would waive his rights and speak to the detective, Cox initially only agreed to provide his DNA. However, Detective Hinsley then asked Cox, "Are you willing to sit here and let me ask you some questions?" Cox responded. "Yeah, you can ask me some questions." (Ex. 2, 2:22:16). Given the context and body language of the parties during the exchange, the Court finds that Cox did knowingly and voluntarily waive his *Miranda* rights when, after being read the rights advisory, he responded, "Yeah, you can ask me some questions" and proceeded to answer questions. See *State v. Hernandez*, *supra*.

***b. No Unequivocal Invocation of Silence***

Cox also argues that his statements should be suppressed because he invoked his right to silence between 2:28:22-2:29:07 of the recorded February 26 interview. An invocation of the right to remain silent or right to counsel must be clear, unambiguous, and unequivocal. *State v. Hernandez*, 299 Neb. 896, 920, 911 N.W.2d 524, 544 (2018). The safeguards of *Miranda* assure that the individual's right to choose between speech and silence remains unfettered throughout the interrogation process. *State v. Clifton*, 296 Neb. 135, 158–60, 892 N.W.2d 112, 132–33 (2017) (internal citations omitted). If the suspect indicates that he or she wishes to remain silent or that he or she wants an attorney, the interrogation must cease. *Id.* The right to choose between speech and silence derives from the privilege against self-incrimination. *Id.*

Before the police are under a duty to cease the interrogation, however, the suspect's invocation of the right to cut off questioning must be "unambiguous," "unequivocal," or "clear." *State v. Clifton*, *supra* (internal citations omitted). This requirement of an unequivocal invocation prevents the creation of a "third layer of prophylaxis" which could transform the prophylactic rules of *Miranda* "into wholly irrational obstacles to legitimate police investigative activity." *Id.* (internal citation omitted). To invoke the right to cut off questioning, the suspect must articulate his or her desire with sufficient clarity such that a reasonable police officer under the circumstances would understand the statement as an invocation of the *Miranda* right to remain silent. *Id.*

If the suspect's statement is not an "unambiguous or unequivocal" assertion of the right to remain silent, then there is nothing to "scrupulously honor" and the officers have no obligation to stop questioning. *State v. Clifton*, *supra* (internal citations omitted). Officers should not have to guess when a suspect has changed his or her mind and wishes the questioning to end, nor are they required to clarify ambiguous remarks. *Id.* They are not required to accept as conclusive any statement or act, no matter how ambiguous, as a sign that a suspect desires to cut off questioning. *Id.*

In considering whether a suspect has clearly invoked the right to cut off questioning, a court reviews not only the words of the criminal defendant, but also the context of the invocation. *State v. Clifton*, *supra*. A suspect need not utter a "talismanic phrase" to invoke his or her right to silence. *Id.* (internal citations omitted). Relevant facts include the words spoken by the defendant and the interrogating officer, the officer's response to the suspect's words, the speech patterns of the suspect, the content of the interrogation, the demeanor and tone of the interrogating officer, the suspect's behavior during questioning, the point at which the suspect allegedly invoked

the right to remain silent, and who was present during the interrogation. *Id.* A court might also consider the questions that drew the statement, as well as the officer's response to the statement. *Id.*

Cox relies in part upon *State v. DeJong*, 287 Neb. 864, 845 N.W.2d 858 (2014). In *State v. DeJong*, the defendant was being questioned about the death of her husband. See *id.* Of relevance, at 3:43 a.m., the defendant, during an interview, stated, "I'm done, I wanna go to sleep. I'm tired." *Id.* At 4:00 a.m., she stated, "I'm getting tired, I'm done, I'm tired." *Id.* At 4:18, she stated "I want a lawyer, please, I'm tired of this." *Id.* After the 4:18 statement, the officers ceased questioning and left the room. *Id.* However, shortly thereafter, the defendant asked for a cigarette and then began giving statements unprompted. *Id.* Upon the defendant's motion to suppress, the district court suppressed the statements between 4:00 a.m. and 4:18 a.m. *Id.* The defendant appealed the district court's failure to suppress statements between 3:43 and 4:00 a.m., following her first statement, "I'm done, I wanna go to sleep. I'm tired." *Id.* The majority of the Supreme Court held that the district court erred in failing to suppress statements after the defendant said, at 3:43 a.m., "I'm done, I wanna go to sleep. I'm tired," because that was an invocation of the defendant's right to silence. *Id.* However, the Court ultimately found that the error was harmless. *Id.* Chief Justice Heavican concurred in the result, but wrote separately because he did not believe the statement "I'm done" was sufficient to unequivocally invoke the right to silence given all of the circumstances of the interview. *Id.*

In contrast to the *DeJong* majority, the Nebraska Supreme Court in *State v. Clifton*, *supra*, held that the defendant's statement "I can't, I can't, I can't," was not an unambiguous invocation of the right to remain silent but, in the context, was an indication of his unwillingness to identify his cohorts. *Id.* Because the Court found that Clifton did not indicate an unwillingness to answer

other questions, it was not an invocation of the right to silence sufficient to require suppression. *Id.*

Considering all of the circumstances in this case, Cox's statements are not an unequivocal and unambiguous invocation of his right to remain silent. In the context of the interrogation and considering the speaking style and body language of the parties, Cox's statements are more indicative of his denial of the detective's suggestions than of any sort of "unequivocal and unambiguous invocation of his right to remain silent." Cox relies on his statements beginning with "I told you what happened, I got nothing, you can go with that--Like I said, you can take my DNA or whatever, but I told you what I told you, I ain't got nothing else to say about it" and "Look, I'm done talking about it, I already told you --". (Ex. 2, 2:28:17-2:28:56). In these statements, Cox does not unequivocally assert that he wants to remain silent or is done talking with Hinsley, but says he's "done talking **about it**." In context, Cox's statement relates to Hinsley's attempts to get Cox to admit that he had phone contact with Rodgers more than once on the day of the shooting. A reasonable officer in Hinsley's position could understand that Cox was refusing to provide additional or differing information about phone contact. This conclusion is supported by Cox's body language and his subsequent willingness to talk about matters other than his phone records without protest. Because there was no unequivocal right to silence, Cox's motion to suppress his statements in his February 26 interview is denied.

2. **Motion to Suppress Cellular Telephone Records**

Cox additionally moves to suppress the phone records obtained through the search warrant containing the language of the Stored Communications Act. The State concedes that the search warrant, although obtained prior to *Carpenter v. United States*, ___ U.S. ___ (June 22, 2018), has

not been remedied post-Carpenter. Accordingly, the State concedes this issue and Cox's motion to suppress these records is granted.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that Defendant's Motion to Suppress Statements is **denied.**

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that Defendant's Motion to Suppress the phone records obtained pursuant to the 2017 search warrant in evidence is **granted.**

DATED this 21st day of November, 2018.

BY THE COURT:

KIMBERLY MILLER PANKONIN
DISTRICT COURT JUDGE

cc: Ann Miller, Amy Jacobsen
Matthew Miller, Natalie Andrews

## CERTIFICATE OF SERVICE

I, the undersigned, certify that on November 26, 2018 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

Matthew J Miller
matthew.miller@douglascounty-ne.gov

Amy G Jacobsen
amy.jacobsen@douglascounty-ne.gov

KETV
NEWS@KETV.com

Date: November 26, 2018 BY THE COURT: John M. Friend
CLERK

FOURTH DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

| | | |
|---|---|---|
| THE STATE OF NEBRASKA,<br><br>Plaintiff,<br><br>vs.<br><br>FORREST COX,<br><br>Defendant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | CASE NO. CR18-1285<br><br><br><br>MOTION TO SUPPRESS #4 |

FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA
DEC 05 2018
JOHN M. FRIEND
CLERK DISTRICT COURT

COMES NOW the Defendant, Forrest Cox, by and through his attorney, Matthew J. Miller, Assistant Public Defender, and moves the Court to suppress and exclude from use against him any and all evidence obtained as a result of a forensic search of cell phone number 402 312-6473, for the following reason:

1. That on November 14, 2018, Omaha Police applied for and obtained a search warrant for cell phone records of the above mentioned phone number;

2. That the application and search warrant is directed to Sprint Corporation, the custodian of the sought after records and information;

3. That the affidavit in support of the search warrant provided insufficient probable cause to believe that evidence of the crime being investigated, to wit the homicide of LaRon Rogers, would be contained in the information requested;

4. That the affidavit in support of the search warrant fails to provide factual information upon which the magistrate could determine the existence of probable cause. Rather, the affidavit is replete with conclusory statements that are not supported by any facts included in the affidavit;

5. That the search warrant lacks specificity and is, in effect, a general search warrant in that it fails to identify the specific items which are the target of the search and allows the police unfettered discretion to search the cell phone records;

6. That the search warrant authorized the release of information between "1/01/2017 to 3/24/2017";

7. That the homicide under investigation in this matter occurred on or about 7:50 p.m. on March 6, 2017;

Appendix E.

8. That as a result of the information derived from the search of the above mentioned cell phone records the State intends to present evidence concerning the use of the cell phone for, among other things, communication and data searches;

9. That absent the information derived from the search of the above mentioned cell phone, the State would be unable to present evidence concerning these communications and data searches.

WHEREFORE, the Defendant prays that the Court suppress and exclude from use against him all evidence obtained and fruits thereof, of a search of the above mentioned cell phone records for the reasons that such search was conducted in violation of the Fourth, Fifth, and Fourteenth Amendments of the Constitution of the United States and Article I, Sections 3, 7, 11, and 12 of the Constitution of the State of Nebraska and 18 U.S.C.A, §2703.

FORREST COX, Defendant

By _____
Matthew J. Miller, #21516
Assistant Public Defender
Attorney for Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the above and foregoing Motion to Suppress was personally served on Ann Miller, Deputy County Attorney, Hall of Justice, by hand delivery to her office, this 5th day of December, 2018.

_____

NOTICE OF HEARING

YOU AND EACH OF YOU ARE HERBY NOTIFIED that a hearing in the above mentioned matter has been set before the District Court at 10:30 a.m., on the 11th day of December, 2018, in Courtroom #408 before the Honorable Judge Kimberly Miller Pankonin.

ORIGINAL

RB# AJ49974

**RETURN AND INVENTORY**

**STATE OF NEBRASKA)**
**)SS**
**COUNTY OF DOUGLAS)**

Officer(s) Ryan HINSLEY #1853, being first duly sworn, deposes and says that, on Wednesday the 14th of November 2018 at 1000 hrs., I served the within warrant and made a diligent search for the property described therein at the place, or person, mentioned therein, and seized and am in possession of the following described property, to wit:

1. Cell phone records/ information from 402-312-6473, for dates 01/01/2017 through 3/31/2017. Received on 11/16/2018.

Said property/ information was downloaded by Detective Ryan HINSLEY #1853, and booked into property as evidence. A copy of the warrant was given to/faxed to Sprint PCS on November 14th , 2018.

DATED this 20th day of November, 2018.

1853
OMAHA NEBRASKA POLICE OFFICER

SUBSCRIBED AND SWORN TO before me this 20th day of November, 2018.

Warrant and inventory returned on this 20th day of November, 2018.

JUDGE OF THE COUNTY COURT
OF DOUGLAS COUNTY, NEBRASKA

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Appendix F.

RB: AJ49974

**IN THE County COURT OF OMAHA, DOUGLAS COUNTY, NEBRASKA**

| | |
|---|---|
| **STATE OF NEBRASKA)** | **SEARCH WARRANT FOR** |
| **)** | **CELLULAR PHONE RECORDS** |
| **COUNTY OF DOUGLAS)** | |

**TO:** OMAHA, NEBRASKA POLICE OFFICER Ryan Hinsley.

This matter came on for hearing on the 14th day of November , 2018, upon the sworn application and affidavit for issuance of a search warrant of Officer Ryan Hinsley, #1853 and the Court, being fully advised in the premises finds as follows:

That the Court has jurisdiction of this matter pursuant to the Sections 29-812, Nebraska Revised Statutes, 1943, as amended.

That based upon the sworn affidavit and application of issuance of a search warrant of Ryan Hinsley dated the 14th day of November , 2018, that there is probable cause to believe that located at Sprint Corporation ,AND/OR the authorized or designated agent for the custodian of records of the electronic communications service provider, the following described records and other information for 402-312-6473, to-wit:

A. The following customer or subscriber account information for each account registered to or associated with 402-312-6473 for the time period 1/01/2017 to 3/24/2017 in Central Standard Time (CST):

1. Subscriber names, user names, screen names, or other identities;

2. Mailing addresses, residential addresses, business addresses, email addresses, and other contact information;

3. Local and long distance telephone connection records, or records of session times and durations;

4. Length of service (including start date) and types of services utilized;

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5. Telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and

6. Means and source of payment for such service (including any credit card or bank account number) and billing records.

B. All records and other information relating to account(s) and time period in Part A, including:

1. Records of user activity for any connections made to or from the account, including the date, time, length, and method of connections, data transfer volume, user name, and source and destination Internet Protocol address(es);

2. All available toll records to include call detail, SMS detail, data sessions, per call measurement data (PCMD), round trip time (RTT), NELOS, cell site and cell site sector information and cellular network identifying information (such as the IMSI, MSISDN, IMEI, MEID, or ESN);

3. Non-content information associated with the contents of any communication or file stored by or for the account(s), such as the source and destination email addresses and IP addresses;

4. Correspondence and notes of records related to the account(s).

5. Current cellular site list, in electronic format, which includes any and all markets, switches, and areas the target phone utilized during the time period listed above.

AND, if found, to seize and deal with the same as provided by law, and to make return of this warrant to me within ten days after receiving the requested information set forth in Part A and Part B.

**YOU ARE, THEREFORE, ORDERED,** pursuant to Nebraska Revised Statue 29-813 that Sprint Corporation will, **within fourteen (14) days of the date of this Order**, turn over to the Omaha, Nebraska Police Department the records and other information as set forth in Part A and Part B.

**IT IS FURTHER ORDERED,** that any other person, device, computer, and/or number that is in communication with the target device shall be considered part of the

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criminal investigation and shall require the disclosure of the data in Part A and Part B from any provider of electronic communications services as defined by Nebraska Revised Statute 86-277. This shall also include the target device roaming or utilizing any electronic communications service provider's network and/or antennas, regardless of carrier or provider.

**IT IS FURTHER ORDERED** that Sprint Corporation or any other person/company, shall not disclose the existence of this search warrant, or the existence of the investigation, to the listed subscriber or to any other person, unless and until authorized to do so by the Court.

**IT IS FURTHER ORDERED,** that execution of the Search Warrant be forthwith during the daytime hours.

**IT IS FURTHER ORDERED,** that Omaha, Nebraska Police Officer Ryan Hinsley , make return of this Search Warrant to me within ten days after receiving the requested information from the electronic communications service provider.

Given under my hand this 14th day of November, 2018.

Judge of the Douglas County Court

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RB: AJ49974

**IN THE County COURT OF OMAHA, DOUGLAS COUNTY, NEBRASKA**

| | | |
|---|---|---|
| **STATE OF NEBRASKA** | ) | **AFFIDAVIT AND APPLICATION FOR** |
| | ) | **ISSUANCE OF A SEARCH WARRANT** |
| **COUNTY OF DOUGLAS** | ) | **FOR CELLULAR PHONE RECORDS** |

The complaint and affidavit of Officer Ryan Hinsley, #1853 on this 14th day of November , 2018, who, being first duly sworn, upon oath says:

That the officer has probable cause to believe, and does believe that there is concealed or kept as hereinafter described, the following property, to wit:

A. The following customer or subscriber account information for each account registered to or associated with 402-312-6473 for the time period 1/01/2017 - 3/24/2017 in Central Standard Time (CST):

1. Subscriber names, user names, screen names, or other identities;

2. Mailing addresses, residential addresses, business addresses, email addresses, and other contact information;

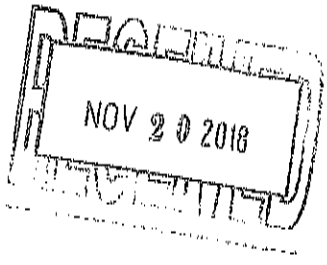
3. Local and long distance telephone connection records, or records of session times and durations;

4. Length of service (including start date) and types of services utilized;

5. Telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address;

6. Means and source of payment for such service (including any credit card or bank account number) and billing records.

B. All records and other information relating to account(s) and time period in Part A, including:



1. Records of user activity for any connections made to or from the account, including the date, time, length, and method of connections, data transfer volume, user name, and source and destination Internet Protocol address(es);

2. All available toll records to include call detail, SMS detail, data sessions, per call measurement data (PCMD), round trip time (RTT), NELOS, cell site and cell site sector information and cellular network identifying information (such as the IMSI, MSISDN, IMEI, MEID, or ESN);

3. Non-content information associated with the contents of any communication or file stored by or for the account(s), such as the source and destination email addresses and IP addresses;

4. Correspondence and notes of records related to the account(s);

5. Current cellular site list, in electronic format, which includes any and all markets, switches, and areas the target phone utilized during the time period listed above.

That said property is concealed or kept in, on, or about the following described place or person, to wit:

Sprint Corporation
Attn: Custodian of Records/Subpoena Compliance
6480 Sprint Parkway
Overland Park, Kansas 66251

That said property is under the control or custody of:

**Custodian of Records**

That the following are the grounds for issuance of a search warrant for said property and the reasons for the officers' belief to wit:

On Monday March 06, 2017 at 1949 hours uniform patrol officers were dispatched to the Ames Ave Convenience Store at 4145 Ames Avenue, Omaha, Douglas County, Nebraska in reference to a shooting. Upon arrival officers located the victim, later identified as LaRon ROGERS (date of birth 8/26/1991) lying in the parking lot suffering

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DOUGLAS COUNTY

from an apparent gunshot wound to the right flank. ROGERS was transported by medics to CHI health (601 North 30th Street) to be treated.

Witnesses at the scene advised they saw two vehicles parked in the far south parking lot at that location. The vehicles were described as a silver Chevy Impala and a white Chevy Impala with no license plates and dark rims. One witness stated he heard a single gunshot and then saw the victim running from the driver's side of the silver Impala, yelling "Call the Police!" Witnesses stated the white Impala with no plates then left the parking lot, driving southbound on 42nd Street, then east bound on Paxton Boulevard.

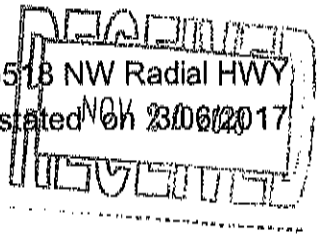
At the scene, detectives and members of the Omaha Police Forensic investigations Unit processed and searched the victim's silver Chevy Impala. Inside the Impala investigators located a glass jar and two plastic bags containing apparent marijuana and two cell phones. The cell phones were submitted to the Omaha Police Digital Forensics Unit to be downloaded.

On Wednesday March 22, 2017 members of the Omaha Police Department homicide unit were notified that ROGERS never regained consciousness and succumbed to his injuries at 0359 hours while in the Intensive Care Unit at CHI Health.

On Thursday March 23, 2017 an autopsy was completed by Dr. ELLIEF and at that time a single projectile was recovered from ROGERS' lower left abdominal cavity. Dr. ELLIEF believed at this time cause of death for ROGERS was complications due to have been shot.

Homicide detectives spoke with the next of kin for ROGERS, identified as Caroline ROGERS (mother) and L.T. THOMAS (father). ROGERS' parents stated they were unaware of any problems he may or may not have been having, but stated while ROGERS was in the ICU his boss came to visit and reported that on 3/06/2017 two unknown black male parties were at ROGERS' job and had contact with him as he was leaving work that day. Caroline advised ROGERS' boss told her ROGERS got off at around 1830 hours that day and that the two unknown black males were reportedly in a white Chevy Impala with no license plates. Caroline stated video surveillance from ROGERS' place of work (Boost Mobile at 5518 NW Radial HWY) was also available for review.

Detectives conducted followed up at the Boost Mobile location at 5518 NW Radial HWY and spoke with ROGERS' supervisor (Chandra KEYS) who stated on 3/06/2017



ROGERS was supposed to work until 2000 hours, but was cut at approximately 1800 hours due to the store being slow. KEYS advised she was told by additional employees (identified as Hope HOOD and Great HTOO) that just before ROGERS left, two black males came up to the store in a white vehicle, spoke with ROGERS briefly, then went into the store. KEYS was able to supply detectives with segments of that video surveillance from 3/06/2017 at approximately 1841 hours showing the two black males inside the store, which HOOD and HTOO were referring to. During an interview with HTOO, he also stated one of the males spoke with him about purchasing a cell phone and left the name "Bubba" and a phone number. HTOO stated he no longer had that phone number available, but stated he had written it down at the Boost Mobile Store. KEYS later located that piece of paper, which revealed the name "Bubba" and phone number 402-312-6473.

During an interview with ROGERS' girlfriend, identified as Allison FRIESZ (dob 10/05/1994), she advised she was aware that ROGERS was selling smaller amounts of marijuana in order to get extra money and believed on the day of initial shooting (3/06/2017) ROGERS had $900 cash on him.

Upon reviewing the video surveillance from Boost Mobile, detectives were immediately able to identify one of the unknown black male parties, from previous investigations, as Forrest COX (dob 7/15/1988). Upon receiving an anonymous tip, the second unknown black male party was identified as Rufus DENNIS (dob 7/19/1977). A data check through OPD records revealed COX had self-reported the phone number 402-321-6473 in 2016.

Upon reviewing the downloaded data from the cell phones recovered in ROGERS' silver Impala, detectives discovered that on 3/06/2017 at 1837 hours ROGERS had sent a text message to 402-312-6473, which he apparently had saved to his cell phone under the name "Bubba". A search for the cell phone provider for the phone number 402-312-6473 revealed it to be active through Sprint Spectrum.

From training, experience and research Affiant Officer is aware that the data stored by cellular network providers can provide invaluable insight for criminal investigations. Cell phones are used for communication, access to information, socialization, research, entertainment, shopping and other functionality. In addition to personal use, cell phones are often used as tools in criminal activity. Affiant Officer is aware of numerous instances where cell phones were used by participants in crimes to communicate via voice and text messaging. Affiant Officer is also aware of instances

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where the cell phone was operating in the background, accessing the cell provider's network, and generating location based data. When a cell phone interacts with the cellular provider's network, it leaves records that allow for the identification of locations where the cell phone accessed the network. These interactions between the cell phone and the network can be created intentionally or accidentally by the user, or automatically by the device itself as part of it's regular functioning.

The records being requested in Part A & B are all invaluable tools when conducting investigations. Phone information, account notes, and user account information can be used to identify and/or confirm the owner of the cell phone. Call detail records can serve to establish familiarity between people involved in an incident. These records contain date and time stamps that can be significant in constructing a timeline of events regarding an investigation. The records also contain phone numbers establishing communication between parties that are invaluable in establishing co-conspirators, witness, and victim, and suspect information.

PCMD, NELOS, RTT data, Cell Site, and Cell Site Sector information are invaluable during an investigation as they can associate the cell phone with being in proximity of a location. Viewing of this data can demonstrate that the device, and thus also it's user, was in a location associated with an incident.

Communication records from SMS and MMS messaging, email, and internet usage can provide insight to establish an individual's level of culpability and knowledge regarding an investigated incident. It is not uncommon for users to send and receive dozens of messages a day which documents a person's activities and can aid in completing the investigation.

Affiant Officer seeks to complete a thorough, unbiased examination of the data stored with the cellular provider which could aid in the investigation.

Affiant Officer is requesting that this Court issue a search warrant for the information provided in Part A and Part B which is stored with Sprint Corporation.

Ryan Hinsley, as Affiant Officer believes that data from the aforementioned cellular phone number will assist in the investigation.

WHEREFORE, the officers pray that a Search Warrant may be issued according to law.

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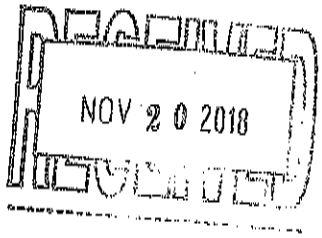
1753

Omaha Police Officer

SUBSCRIBED AND SWORN to me this 14th day of November , 2018.

Judge of the County Court



IN GLAS COUNTY, NEBRASKA

#44 FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA
MAR 12 2019
JOHN M. FRIEND
CLERK DISTRICT COURT

| | | |
|---|---|---|
| THE STATE OF NEBRASKA, | ) | CR 18-1285 |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | ORDER AS TO DEFENDANT'S |
| | ) | MOTION TO SUPPRESS THE |
| FORREST R. COX, III; | ) | NOVEMBER 14, 2018, SECOND |
| | ) | TELEPHONE RECORD SEARCH |
| Defendant. | ) | WARRANT |
| | ) | |

This matter came before the Court for hearing on January 11, 2019, on Defendant's Motion to Suppress. Parties appeared by counsel: Ann Miller, Deputy County Attorney, for the State, and Matthew Miller and Natalie Andrews, Assistant Public Defenders, for Forrest R. Cox, III. Exhibit 5, the affidavit to obtain the search warrant and the search warrant and return and inventory was received into evidence. A briefing schedule was ordered. The matter was taken under advisement upon receipt of the briefs. Being now fully advised in the premises, the Court finds and orders that the motion to suppress is overruled.

## FACTUAL BACKGROUND AND PROCEDURAL HISTORY

### A. Procedural History and Background

In April 2018, the State filed an Information charging Defendant, Forrest R. Cox, III, with count I: Murder in the 1st degree, a class IA felony; count II: use of a deadly weapon (firearm) to commit a felony, a class IC felony; and count III: possession of a deadly weapon by a prohibited person, a class ID felony. On June 14, 2018, Cox filed two motions to suppress. One motion argued that Cox's statements to police officers on February 26, 2018, should be suppressed because they were obtained in violation of Cox's rights under the 5th Amendment of the Constitution of the United States and Article I, Section 12 of the Constitution of the State of Nebraska. The second



Appendix G.

motion argued that evidence obtained from a forensic search of Cox's cellular telephone should be suppressed because the warrant was not supported by probable cause and lacked specificity.

Hearing on Cox's June 14, 2018, motions was held on October 9, 2018. At the hearing, the State adduced testimony from Detective Ryan Hinsley of the Omaha Police Department. The Court additionally received Exhibit 1, a copy of the seal order, affidavit and application for a search warrant for cellular telephone records, and a copy of the signed order under the Stored Communications Act dated March 30, 2017, in addition to Exhibits 2-4, which are not relevant to this motion. The Court took the matter under advisement and on November 21, 2018, issued an order on Cox's June 14, 2018, motions, denying in part and granting in part. The Court denied Cox's motion to suppress his statements but the State conceded that the search warrant for Cox's cellular telephone records, although obtained prior to *Carpenter v. United States*, ___ U.S. ___, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (June 22, 2018), had not been remedied post-*Carpenter*. Accordingly, the State conceded the suppression issue and the Court granted Cox's motion to suppress the cellular telephone records.

**B. Second Search Warrant and Supporting Affidavit**

The State, anticipating the Court's suppression of the telephone records, obtained a remedied second warrant on November 14, 2018, authorizing them to obtain the same exact data that was obtained pursuant to the 2017 order under the Stored Communications Act. The November 14, 2018, search warrant was identical to the initial March 24, 2017, order, except that it included language clarifying that it was issued as a search warrant based upon probable cause and providing additional particularity and specificity. On December 5, 2018, Cox filed a motion to suppress the November 14, 2018, search warrant. A hearing on the motion was held on January 11, 2019. At the hearing the Court received Exhibit 5, a copy of the affidavit and application for

the second search warrant for cellular telephone records, and a copy of the signed warrant dated November 14, 2018.

*1. Warrant Affidavit*

In the warrant affidavit contained in Exhibit 5, the affiant, Detective Hinsley, reports that officers received the March 6 shooting call shortly before 8:00 p.m. (E5, p. 2-3). Upon arrival, officers located Rogers lying in the parking lot suffering from an apparent gunshot wound. (E5, p. 3). Rogers was transported to CHI Health to be treated. (E5, p. 3). Rogers later died from his injury. (E5, p. 3). Witnesses at the scene advised that they had seen a silver Chevy Impala and a white Chevy Impala with no plates and dark rims in the far south corner of a parking lot where the shooting took place. (E5, p. 3). A witness reported hearing a single gunshot and then seeing the victim run from the driver's side of the silver Impala yelling, "Call the Police!" (E5, p. 3). Witnesses then observed the white Impala with no plates leave the scene of the shooting. (E5, p. 3). At the scene of the shooting, officers searched Rogers's silver Impala and located a glass jar and two bags containing marijuana and two cellular telephones. (E5, pp. 3). Rogers's girlfriend advised officers that Rogers was selling marijuana prior to his death and that she believed that on the day of the shooting he had $900 in cash with him. (E5, pp. 4). A search of the victim's cellular telephone revealed that a few minutes before the shooting, Rogers had sent a text message to the telephone number 402-321-6473, which was saved in Rogers's cellular telephone under the name "Bubba."

Officers conducting follow up learned that two males driving a white Chevy Impala with no plates had contacted Rogers at the Boost Mobile store where he worked approximately an hour before the shooting. (E5, p. 4). One of the males had identified himself to another employee as "Bubba" and left the telephone number 402-312-6473. (E5, p. 4). Officers reviewing surveillance

footage of the Boost Mobile store immediately identified one of the males as Cox based on prior investigations. (E5, p. 4). A data check of OPD records showed that Cox had a self-reported telephone number of 402-321-6473. (E5, p. 4). Officers were able to identify the second male as Rufus Dennis. (E5, p. 4).

The Affidavit requested customer records from cellular telephone service providers for an account associated with the telephone number 402-312-6473 for the time period January 1, 2017, to March 24, 2017. (E5, p. 1). The reason for the request was that through training, experience, and research, the Affiant Officer was aware that the data stored by the cellular network providers provide invaluable insight for criminal investigations. (E5, p. 4). Cellular telephones are used for communication, access to information, socialization, research, entertainment, shopping and other functionality. (E5, p. 4). In addition to personal use, cellular telephones are often used as tools in criminal activity. (E5, p. 4). The Affiant Officer was aware of numerous instances where cellular telephones were used by participants in crimes to communicate via voice and text messaging. (E5, p. 4). The Affiant Officer was aware of instances where the cellular telephone was operating in the background, accessing the cell provider's network and generating location data. (E5, p. 4-5).

When a cellular telephone interacts with the cellular provider's network, it leaves records that allow for the identification of locations where the cellular telephone accessed the network. (E5, p. 5). These interactions between the cellular telephone and the network can be created intentionally or by accident by the user, or automatically by the device itself as part of its regular functioning. (E5, p. 5). The Affidavit requested records including: subscriber names, addresses, contact information; telephone connection records; length of service; telephone number or subscriber number or identity including temporarily assigned network addresses; means of payment; user activity records for connections made to or from the account including the date,

time, length, and method of connections, data transfer volume, user name, and source and destination Internet Protocol addresses; all available toll records to include call detail, SMS detail, data sessions, per call measurement data, round trip time, NELOS, cell site and cell site sector information from 1/01/2017 to 3/24/2017 Central Standard Time and cellular network identifying information; non-content information associated with the contents of any communication or file stored by or for the accounts, such as source and destination email and IP addresses; correspondence and notes of records related to the accounts; and the current cellular site list. (E5, pp. 1-2).

The Affiant attested that the aforementioned requests are all invaluable tools when conducting investigations. (E5, p. 5). Telephone information, account notes, and user account information can be used to identify and/or confirm the owner of the cellular telephone. (E5, p. 5). Call detail records can serve to establish familiarity between people involved in an incident. (E5, p. 5). These records contain date and time stamps that can be significant in construing a timeline of events regarding an investigation. (E5, p. 5). The records contain telephone numbers establishing communications between parties that are invaluable in establishing co-conspirator, witness, victim, and suspect information. (E5, p. 5).

PCMD, NELOS, RTT data, "Cell Site", and "Cell Site Sector" information are invaluable during an investigation as they can associate the cellular telephone with being in proximity of a location. (E5, p. 5). Viewing of this data can demonstrate that the device, and thus also its user, was in a location associated with an incident. (E5, p. 5).

After a hearing on the search warrant application, the County Court for Douglas County issued a "Search Warrant for Cellular Phone Records." (E5, p. 7). The County ordered, "pursuant

to Nebraska Revised Statute 29-813" that Sprint Corporation turn over the requested records to the Omaha Police Department. (Exhibit 5, p. 8).

## STANDARD OF REVIEW

A ruling on a motion to suppress is a question of fact to be determined by the trial court as the finder of fact. *State v. Tucker*, 262 Neb. 940, 946, 636 N.W.2d 853, 859 (2001). On a claim of insufficiency of the affidavit supporting the issuance of a search warrant, the trial court's ruling on a motion to suppress will be upheld unless its findings are clearly erroneous. *State v. Ball*, 271 Neb. 140, 150, 710 N.W.2d 592, 602 (2006). The State bears the burden of proof at a suppression hearing, but that burden is only by a preponderance of the evidence. *United States v. Matlock*, 415 U.S. 164, 177 n. 14, 94 S. Ct. 988, 996 (1974).

## ANALYSIS

### A. Probable cause to issue the search warrant.

The Fourth Amendment to the U.S. Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures ...," and further provides that "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." See, also, Art. 1, § 7 of the Nebraska Constitution. Cox argues that the search warrant was not supported by an affidavit that established probable cause.

The U.S. Supreme Court in *Riley v. California*, 134 S.Ct. 2473, 189 L.Ed. 2d 430 (2014) held that the police generally may not, without a warrant, search digital information on a cellular telephone seized from an individual who has been arrested. The Court reasoned that a search of digital information on a cellular telephone does not further the government interests identified in other cases authorizing the search of a person and his or her effects incident to an arrest, which

interests include addressing the threat of harm to officers and preventing the destruction of evidence. See *Riley v. California*, 134 S.Ct. 2473, 189 L.Ed. 2d 430 (2014) cited in *State v. Henderson*, 289 Neb. 271, 854 N.W. 2d 616 (2014). Recently, the United States Supreme Court held that an individual maintains a reasonable expectation of privacy in the Cell Site Location Information (CSLI) records maintained by their wireless carriers. *Carpenter v. United States*, ___ U.S. ___, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018). Governmental acquisition of these records during a criminal investigation is a search under the meaning of the 4th Amendment. *Id.*

A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. *State v. March*, 265 Neb. 447, 658 N.W.2d 20 (2003). Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found. *Id.* In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, a court applies a "totality of the circumstances" test. *Id.* The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause. *Id.* In evaluating the sufficiency of an affidavit used to obtain a search warrant, a court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit. *Id.*

The affidavit presented to the issuing court is an affidavit that is detailed and specific. By reading the affidavit the County Court Judge knew that on the evening of March 6, 2017 LaRon Rogers was shot at 4145 Ames Avenue, Omaha, Nebraska, and died shortly thereafter. Witnesses at the scene of the shooting reported observing two Chevy Impalas parked at the location of the shooting, one silver and one white. One witness stated that he heard a single gunshot and then saw Rogers run from the driver's side of the silver Impala, yelling "Call the Police!" Witnesses also

stated that the white Impala, without plates, then drove away. Detectives at the scene searched Rogers's silver Impala and found marijuana and two cellular telephones. A police interview with Rogers's girlfriend revealed that she was aware Rogers was selling marijuana to get extra money and she believed that on the day of the shooting Rogers had $900 in cash on his person. (Exhibit 5).

The affidavit also described how Rogers's parents reported to detectives that his supervisor at Boost Mobile had told them that on March 6, 2017, two black males came to visit Rogers at work and had contact with him as he was getting off early for the day. Rogers's supervisor also reported that the two men arrived in a white Chevy Impala without plates. In a detective's follow-up conversations with Rogers's supervisor, the supervisor provided video surveillance footage of the two black males speaking with another employee. This other employee, identified as Great Htoo, told detectives that one of the men spoke with Rogers outside the store before entering and asking about purchasing a telephone, leaving the name "Bubba" and the number 402-321-6473. While viewing the surveillance from Boost Mobile, detectives immediately recognized one of the men as Forrest Cox from previous investigations. Police records revealed Cox had self-reported the number 402-321-6473 in 2016. (Exhibit 5).

Finally, the affidavit shows that upon reviewing the downloaded data from the cellular telephones recovered in Rogers's Impala, detectives discovered that on March 6, 2017, Rogers sent a text message to 402-321-6473 saved as "Bubba" approximately 30 minutes after Rogers left work. (Exhibit 5).

The affidavit provides the necessary details to establish probable cause to believe that evidence of a crime would be found in the cellular telephone records requested in the affidavit. The affidavit contains sufficient detail to establish probable cause that that LaRon Rogers was shot

and was murdered and that Cox was connected to those crimes. It also establishes through the affiant's experience why the types of records requested are likely to produce valuable evidence in a murder investigation.

Applying the totality of the circumstances test, the Court finds the issuing magistrate had a substantial basis for finding that the affidavit established probable cause to believe that evidence of a crime would be found in the particular cellular telephone records requested regarding telephone number 402-312-6473 associated with Cox. The four corners of the affidavit is sufficient to establish probable cause to issue the search warrant. (Exhibit 5).

**B. Particularity and scope of the search warrant.**

The U.S. Supreme Court in *Riley v. California*, 134 S.Ct. 2473, 189 L.Ed. 2d 430 (2014) held that "cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on the arrestee's person." 134 S.Ct. at 2489 cited in *State v. Henderson*, 289 Neb. 271 at 289, 854 N.W. 2d 616 (2014). The Supreme Court in *Riley v. California* noted such quantitative and qualitative differences include the "immense storage capacity" of cellular telephones, their "ability to store many different types of information," their functioning as "a digital record of nearly every aspect of their [owners'] lives," and their ability to "access data located elsewhere." 134 S.Ct. at 2489-90 cited in *State v. Henderson*, 289 Neb. 271, at 289 854 N.W. 2d 616 (2014). The Nebraska Supreme Court in *State v. Henderson*, held "Given the privacy interests at stake in a search of a cell phone as acknowledged by the Court in *Riley* similar to our reasoning in *Sprunger*, we think that the Fourth Amendment's particularity requirement must be respected in connection with the breadth of a permissible search of the contents of a cell phone." See *State v. Henderson*, 289 Neb. 271, at 289, 854 N.W. 2d 616 (2014). The Nebraska Supreme Court concluded that a "warrant for the search of the contents of a cell phone must be sufficiently

limited in scope to allow a search of only that content that is related to the probable cause that justifies the search…A warrant satisfies the particularity requirement if it leaves nothing about its scope to the discretion of the officer serving it. That is, a warrant whose authorization is particular has the salutary effect of preventing overseizure and oversearching." *Id.*

The warrants in *State v. Henderson*, did not refer to the specific crime being investigated or to the information encompassed by their authorization. See *State v. Henderson*, 289 Neb. 271, at 289-90 854 N.W. 2d 616 (2014). The warrant in *State v. Henderson*, authorized a search of "any and all information" and "although the warrant listed types of data, such as cell phone calls and text messages, they concluded with a catchall phrase stating that they authorized a search of 'any other information that can be gained from the internal components and/or memory Cards'." *State v. Henderson*, 289 Neb. 271, 854 N.W. 2d 616 (2014) (*holding* the search warrants did not comply with the particularity requirement because they did not sufficiently limit the search of the contents of the cellular telephone).

In this case the particular records that were requested are:

1. Subscriber names, user names, screen names, or other identities;
2. Mailing addresses, residential addresses, business addresses, email addresses, and other contact information;
3. Local and long distance telephone connection records, or records of session times and durations;
4. Length of service (including start date) and types of services utilized;
5. Telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address;

6. Means and source of payment for such service (including any credit card or bank account number) and billing records;
7. Records of user activity for any connections made to or from the account, including the date, time, length, and method of connections, data transfer volume, user name, and source and destination Internet Protocol address(es);
8. All available toll records to include call detail, SMS detail, data sessions, per call measurement data (PCMD), round trip time (RTT), NELOS, cell site and cell site sector information and cellular network identifying information (such as the IMSI, MSISDN, IMEI, MEID, or ESN);
9. Non-content information associated with the contents of any communication or file stored by or for the account(s), such as the source and destination email addresses and IP addresses;
10. Correspondence and notes of records related to the accounts; and
11. Current cellular site list, in electronic forma, which includes any and all markets, switches, and areas the target telephone utilized during the time period listed above.

(Exhibit 5).

The warrant specifically referred to the March 6, 2017, incident where Rogers was shot at 4145 Ames Avenue, Omaha, Nebraska, and died shortly thereafter. As discussed above, the warrant affidavit establishes probable cause to believe evidence of this crime would be found in Cox's cellular telephone records.

Not only was the Affiant particular in the scope of the request for the search warrant but he explained why the request was invaluable for the investigation. The affiant attests that the aforementioned requests are all invaluable tools when conducting investigations. Telephone

information, account notes, and user account information can be used to identify and/or confirm the owner of the cellular telephone. Call detail records can serve to serve to establish familiarity between people involved in an incident. These records contain date and time stamps that can be significant in construing a timeline of events regarding an investigation. The records contain telephone numbers establishing communication between parties that are invaluable in establishing co-conspirators, witness, victim, and suspect information.

PCMD, NELOS, RTT data, Cell Site, and Cell Site Sector information are invaluable during an investigation as they can associate the cellular telephone with being in proximity a location. Viewing of this data can demonstrate that the device, and thus also its user, was in a location associated with an incident.

The Court concludes that the search warrant referred to the specific crimes being investigated and to the type of information encompassed by their authorization. The Court concludes that the search warrant was limited in scope and content. There were no catch all phrases used in the affidavit or the resulting warrant. Consequently the search warrant affidavit was sufficiently particular and therefore the warrant met the Fourth Amendment particularity requirement.

**C. Even lacking probable cause, the good faith exception allowed law enforcement to execute the search warrant while relying on the affidavit in good faith.**

Cox argues that the good faith exception to suppression would not apply in this case. The Court disagrees. That a Fourth Amendment violation occurred does not necessarily mean that the exclusionary rule applies. *Herring v. United States*, 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009) cited in *State v. Sprunger*, 283 Neb. 531, 811 N.W. 2d 235 (2012). The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its

commands. *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185 (1995) cited in *State v. Sprunger*, 283 Neb. 531, 811 N.W. 2d 235 (2012). The exclusion of evidence obtained in a violation of the Fourth Amendment is "'not a personal constitutional right.' " State *v. Brown*, 302 Neb. 53, 61 921 N.W.2d 804, 811 (2019), (internal citations omitted). Rather, the exclusionary rule operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect. *Id.*; see, also, *State v. Hoerle*, 297 Neb. 840, 901 N.W.2d 327 (2017). The U.S. Supreme Court held that "for the exclusionary rule to apply, the benefits of its deterrence must outweigh its costs." *Herring v. United States*, 555 U.S. 135, 129 S. Ct. 695, 172 L.Ed.2d 496 (2009) cited in *State v. Sprunger*, 283 Neb. 531, 811 N.W. 2d 235 (2012). The good faith exception provides that even in the absence of a valid affidavit to support a search warrant, evidence seized under the warrant need not be suppressed when police officers act in objectively reasonable good faith in reliance upon the warrant. *State v. Tompkins*, 272 Neb. 547, 723 N.W. 2d 344 (2006), *modified on denial of rehearing* 272 Neb. 865, 727 N.W.2d 423 (2007).

The suppression of evidence is appropriate if one of four situations exist:

1. The magistrate or judge, in issuing the warrant, was misled by information in an affidavit that the affiant knew was false or would have known was false except for her/his reckless disregard for the truth;
2. The issuing magistrate wholly abandoned his judicial role;
3. The supporting affidavit was so lacking in indicia of probable cause as to render an official belief in its existence entirely unreasonable; or
4. The warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid.

See *United States v. Leon*, 468 U.S. 897 at 922, 104 S.Ct. 3405 (1984).

The Nebraska Supreme Court stated that when a court evaluates "whether the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, an appellate court should address whether the officer, considered as a police officer with a reasonable knowledge of what the law prohibits, acted in objectively reasonable good faith in relying on the warrant. *State v. Hill*, 288 Neb 767 (2014). In assessing the "good faith" of an officer conducting a search under a warrant, an appellate court must look to the totality of the circumstances surrounding the issuance of a warrant, including information not contained in the four corners of the affidavit. *State v. Tyler*, 291 Neb. 920 (2015). Additionally, officers are assumed to have a reasonable knowledge of what the law prohibits. In *United States v. Leon*, it was held that under circumstances where evidence is sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause, an officer's reliance on the magistrate's determination of probable cause is objectively reasonable and the application of the extreme sanction of exclusion is inappropriate. See *United States v. Leon*, 468 U.S. 897 at 922, 104 S. Ct. 3405 (1984).

In reviewing the affidavit in Exhibit 5, the Court finds that the law enforcement officers executing the search warrant to obtain Cox's cellular telephone records associated with telephone number 402-321-6473 acted in an objectively reasonable good faith manner in relying on the warrant to obtain Cox's telephone records. The Court finds that the affidavit did not lack the indicia of probable cause. See *State v. Edmundson*, 257 Neb. 468 (1999) (*holding* the affidavit lacked the indicia of probable cause, however the officers objectively relied in good faith on the affidavit to execute the search warrant. The Supreme Court affirmed the District Court based on the Officer's objective reliance on the good faith exception); See *State v. David*, 260 Neb. 417, 618 N.W. 2d 418 (2000).

In this case, no false or misleading information was used to obtain the search warrant. See *State v. Shock, 11 Neb. App. 451 (2002)*(where false and misleading information was used to obtain the search warrant, and the Court Appeals ruled that the officers could not objectively rely upon the good faith exception). Detective Hinsley can objectively rely upon the good faith exception because he never provided false or misleading information to obtain the search warrant.

Cox also argues that because the "curative" second search warrant was issued after *Carpenter,* cases applying the good faith exception to CSLI data obtained pre-*Carpenter* via court orders under the Stored Communications Act are not relevant to the determination of whether good faith applies in this case.

The Court agrees. The Court notes that the week following the hearing in this case, the Nebraska Supreme Court released *State v. Brown,* 302 Neb. 53 (2019). *State v. Brown* involves the denial of a motion to suppress evidence obtained pre-*Carpenter* under the Stored Communications Act. The Nebraska Supreme Court held that the CSLI evidence in *Brown* was obtained in violation of the defendant's Fourth Amendment rights, but that the good faith exception applied because the evidence was obtained relying on binding appellate precedent. *State v. Brown, supra.*

While this line of reasoning may have applied to the first court order obtaining the cellular telephone records, the State did not make a good faith argument and the records were suppressed. In assessing that good faith would apply in this case, this Court relies not on cases involving pre-*Carpenter* searches, but on the test from *State v. Leon,* above, for searches conducted pursuant to warrants. Under the *State v. Leon, supra,* analysis, good faith would apply to this search if the warrant were found to be effective.

**D. Additionally, the information obtained by the November 14, 2018 search warrant is not a fruit of the poisonous tree because it is an independent source.**

At the Suppression Hearing, Cox argued that because the cellular telephone records were previously obtained via a court order in violation of his Fourth Amendment right and subsequently suppressed, the State should be barred from introducing the same records obtained via the curative search warrant. In other words, Cox argues that the State should not receive a "second bite at the apple."

Evidence obtained as the direct or indirect "fruit" of an illegal search or seizure, "the poisonous tree," is inadmissible in a state prosecution and must be excluded. See *In re Interest of Ashley W.*, 284 Neb. 424, 821 N.W. 2d 706 (2012), cited in *State v. Oliveira-Coutinho*, 291 Neb. 294, 325, 865 N.W. 2d 740, 765 (2015). To determine whether the evidence is a "fruit" of the illegal search or seizure, a court must ask whether the evidence has been obtained by exploitation of the primary illegality or whether it has instead been obtained by means sufficiently distinguishable to be purged of the primary taint. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407 (1963), cited in *Oliveira-Coutinho*, 291 Neb. at 325, 865 N.W. 2d at 766. There are three exceptions to the exclusionary rule: independent source doctrine, inevitable discovery doctrine, and attenuated connection doctrine.

Pursuant to the "independent source doctrine" the challenged evidence is admissible if it came from a lawful source independent of the illegal conduct. *U.S. v. Reinsholz*, 245 F.3d 765 (8th Cir. 2001), cited in *Oliveira-Coutinho*, 291 Neb. at 325, 865 N.W. 2d at 766. The United States Supreme Court has previously extended the "independent source doctrine" to allow admission of evidence in situations where evidence was initially discovered during an unlawful search and

subsequently discovered by an independent, lawful search. See *Murray v. United States*, 487 U.S. 533, 535, 108 S. Ct. 2529, 2532, 101 L. Ed. 2d 472 (1988).

In *Murray v. United States, supra*, federal agents illegally entered a warehouse and observed bales of marijuana in plain view. Agents subsequently applied for a warrant to search the warehouse, making no reference to their prior entry or the evidence they observed during the entry. *Id.* When a warrant was issued approximately 8 hours later, the officers reentered the warehouse, seized the marijuana, and it was later used at trial. *Id.* The United States Supreme Court held that the independent source doctrine would allow admission of the evidence seized pursuant to execution of the warrant so long as the district court determined as a matter of fact that the search pursuant to the warrant "was in fact a genuinely independent source of the information" at issue. *Id.*

In this case, the cellular telephone records and data contained in the second search warrant is housed and collected by Sprint Corporation and is entirely independent from any taint of the first improper search. The second search warrant was properly executed under *Carpenter v. United States* and lawfully obtained information from Sprint Corporation which was wholly independent from that of the initial search. While the evidence obtained was the same in both the first and second searches, the independent source doctrine provides that because the evidence was later discovered by an independent, lawfully executed second search, it is admissible.

Because this Court determines that the second search warrant was genuinely independent of the taint of the first lawful search, the prior illegal search does not prevent admission of the evidence.

## CERTIFICATE OF SERVICE

I, the undersigned, certify that on March 15, 2019 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

Matthew J Miller
matthew.miller@douglascounty-ne.gov

Amy G Jacobsen
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KETV
NEWS@KETV.com

Date: March 15, 2019 BY THE COURT: John M. Friend
CLERK

FOURTH DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

| | |
|---|---|
| STATE OF NEBRASKA, Plaintiff, vs. FORREST R . COX, III, Defendant. | Case No. CR 18-1285 |

**BILL OF EXCEPTIONS**
VOLUME I
(Page 1 to 359 inclusive)

BILL OF EXCEPTIONS

PROCEEDINGS held before the HONORABLE KIMBERLY MILLER PANKONIN, District Judge of the Fourth Judicial District, on the following dates:

October 9, 2018
November 20, 2018
December 11, 2018
January 11, 2019
April 25, 2019
May 13, 2019 through May 21, 2019
August 8, 2019,

Sitting in and for the County of Douglas.

APPEARANCES

The State of Nebraska appeared by MS. ANN MILLER and MS. AMY JACOBSEN, Deputy County Attorneys, of Omaha, Nebraska.

The Defendant appeared in person and by MR. MATTHEW MILLER and MS. NATALIE ANDREWS, Assistant Public Defender, of Omaha, Nebraska.

Debi L. Patzner
Official Court Reporter
Hall of Justice
Courtroom #409
Omaha, Nebraska 68183-0410

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* * * * * * * * *

STATE OF NEBRASKA )
) ss:
DOUGLAS COUNTY )

C E R T I F I C A T E

I, DEBI L. PATZNER, Official Court Reporter in the District Court of Nebraska for the Fourth Judicial District, do hereby certify that as such official reporter, I was present at and reported in machine shorthand the above and foregoing proceedings had on the date above set out before the HONORABLE KIMBERLY MILLER PANKONIN, District Judge, sitting in and for the County of Douglas.

I further certify that the within and following bill of exceptions is correct and complete, and contains all matters required to be included herein pursuant to the praecipe filed on August 14, 2019, and the rules of the Supreme Court of the State of Nebraska; that said bill of exceptions consists of:Motion to Suppress held October 9, 2018 16

Motion to Continue held November 20, 2018

Motion to Suppress held January 11, 2019

Hearing on Sequestration held April 25, 2019

Jury Trial Held May 13th through May 21st, 2019

Sentencing Hearing August 8, 2019

That the cost of said bill of exceptions is $_____ an amount permitted to be charged by Neb. Rev. Stat section 25.1140.09.

Dated this _____day of _____, 2020.

DEBI L. PATZNER
OFFICIAL COURT REPORTER
HALL OF JUSTICE
Courtroom #409
Omaha, Nebraska 68183-0410
(402)444-5581

(At 1:45 p.m. on October 9, 2018, in the District Court of Douglas County, Nebraska, before the HONORABLE KIMBERLY MILLER PANKONIN, District Judge, with MS. ANN MILLER and MS. AMY JACOBSON, appearing as counsel for the State and MR. MATTHEW MILLER and MS. NATALIE ANDREWS, appearing as counsel for the Defendant, and the defendant being present in person, the following proceedings were had:)

THE COURT: We are here in the matter of State of Nebraska vs. Forrest R. Cox, III. This is under Case Number CR 18-1285. Would the parties enter their appearances.

MS. MILLER: Ann Miller and Amy Jacobson, Deputy County Attorneys, on behalf of the State.

MR. MILLER: Matt Miller and Natalie Andrews on behalf of Forest Cox.

THE COURT: Okay. Mr. Miller, I show we're here today on your two motions to suppress, is that correct?

MR. MILLER: That's correct.

THE COURT: And are both parties ready to proceed?

MS. MILLER: Yes, Your Honor.

MR. MILLER: Yes, Your Honor.

THE COURT: Do the parties wish to make any

openings or just start with the evidence?

MS. MILLER: State doesn't need to make an opening, Your Honor.

MR. MILLER: Neither does the defense.

THE COURT: You may proceed.

MS. MILLER: State would call Detective Hinsley.

THE COURT: I'll have you come to the witness stand, please watch your step.

RYAN HINSLEY,

witness herein, after being first duly sworn to tell the truth was examined and testified as follows:

DIRECT EXAMINATION

BY MS. MILLER:

THE COURT: Please adjust the microphone and chair and state and spell your full name for the record?

A. Ryan, R-Y-A-N. Hinsley, H-I-N-S-L-E-Y.

Q. Mr. Hinsley, how are you employed?

A. I am employed through the City of Omaha Police Department.

Q. How long have you been with the City of Omaha Police Department.

A. Approximately fourteen years.

Q. And in what capacity are you employed with the police department?

A. I'm a detective within the homicide unit.
Q. And how long have you been a detective in the homicide unit?
A. Approximately five and a half years.
Q. Prior to your service in the homicide unit as a detective, what if any other positions did you hold in your tenure at the Omaha Police department?
A. Let's see, I did uniform patrol, then as a detective I worked in our north/south investigations, which was burglary, auto theft, misdemeanor assaults. I then became a regional detective doing high profile crimes, such as felony assaults and robberies and then homicide.
Q. In the homicide unit, just explain briefly for us how it works in conjunction with other units, specifically, with the assault unit?
A. So, assault unit typically works all felony and misdemeanor assaults that don't lead to death. Homicide unit will take sometimes felony assaults that the party is likely going to pass away from their injuries, but most of the time we just take over cases once the victim in the incidence die. From there we work with a team of four detectives, typically with a sergeant and there's three teams.
Q. And just describe in general the process that the homicide unit goes through when they're investigating a

crime.

A. So, on your typical investigation what you would have is being called out to the scene, witness interviews, then possible suspect interviews, a series of search warrants written for anything from cellphones, Facebook, properties. And then once we're at a point where an arrest warrant is issued, follow it from there.

Q. Specifically, walk me through the process of -- in the obtaining of a search warrant for a telephone?

A. Determining that the number, which provider that it's hosted through, the party that that number is believed to belong to, then from there search warrant and an affidavit will be drafted, presented to a county court judge. Once it is signed off, a copy of that is sent off to the cellphone provider. And then the data is returned to us and booked into property.

Q. And just to be nit-picky, when you said number, are you referring to a cellphone number?

A. I am.

Q. Do you review the information that you receive from the telephone provider?

A. We do.

Q. And what happens after that is reviewed along with any other witness interviews?

A. A series of things. We'll have the data sometimes

plotted to determine where a number or a telephone was at on a specific date and time. The data itself, like I said, is booked into property. And then we'll do further follow-up regarding suspect interviews, question them about phone activity on certain dates.

Q. Were you involved in the investigation of a shooting that took place on or about March 6th, 2017, at 4145 Ames Avenue?

A. I did become involved in that investigation.

Q. And when did you become involved in that investigation?

A. I believe the actual day is March 22nd, 2017.

Q. And why is it on that day you became involved in the investigation?

A. Initially, the case was assigned to our felony assault detective, Johnny Palermo. After Mr. Rogers succumbed to his injuries at the hospital the case was reassigned to myself.

Q. And I want to back you up. You said Mr. Rogers succumbed to injuries. Can you please give Mr. Rogers' full name?

A. It was Laron, L-A-R-O-N, Rogers.

Q. And when you say he succumbed to the injuries, what injuries did he receive?

A. He was shot to his right flank. Was put into a medically induced coma and never woke up from said coma.

And died on the 22nd of March.
Q. At which point you became involved in the investigation?
A. That's correct.
Q. And on March 22nd from then on what did you do with regard to this investigation?
A. On that date, I believe myself and Detective Backora began by doing follow-up with Mr. Rogers' parents, being LT Thomas and Caroline Rogers. At which time they provided information and just continued follow-up from there.
Q. Okay. Walk us through very briefly the investigation of Mr. Rogers' death?
A. I'm sorry of his what?
Q. Walk us through briefly your investigation as it related to Mr. Rogers' death.
A. Death. Okay. I couldn't hear you, there was background.
Q. All right.
A. So, after speaking to his parents, they provided myself and Detective Backora information that the 6th of March 2017, Mr. Rogers was working at the Boost Mobile store at approximately 51st and Northwest Radial Highway. They also had information that Mr. Rogers had contact with two black males while at Boost Mobile and that the manager of the Boost Mobile reportedly had video of the

encounter with the two parties.

From there we followed up with the manager of the Boost Mobile store. Obtained video surveillance from the Boost Mobile location and were able to identify those two black male individuals from the video.

Q. What were their names?

A. We had Forrest R. Cox and Rufus Dennis.

Q. Is the individual by the name of Forrest R Cox present in the courtroom today?

A. He is.

Q. Can you please point to him and identify an article of clothing that he's wearing?

A. Yes, he's seated to my right at the defense table wearing the orange jumpsuit.

MS. MILLER: Your Honor, at this time let the. record reflect that Detective Hinsley has identified Forrest R. Cox.

THE COURT: The record will so reflect.

Q. After you obtained the name of Forrest R Cox and Rufus Dennis, what did you do next?

A. We also spoke to an employee a Boost Mobile by the name of Great Htoo. H-T-O-O. Who was able to provide us a piece of paper and on that piece of paper was a handwritten note from Forrest Cox with the nickname Bubba and a phone number of 312-6473.

Based on that information, I believe on the 24th of March, I drafted a search warrant for that number to Sprint to obtain the cellphone records for Forrest Cox and the number 402-312-6473.

Q. Why?

A. Well, also looking at the victim's cellphone -- so, the victim is shot I believe at 19:47 hours. By going through the victim's cellphone he last had contact with Forrest Cox via a phone call at -- I'm sorry the number belonging to Forrest Cox of 312-6473 at 17:45 hours. So, two minutes prior to the shooting Mr. Cox's phone was in contact with Mr. Rogers' phone? Also I was able to -- (interrupted)

Q. I apologize. I'm going stop you there. Maybe my notes are incorrect. But I believe you said the victim was shot at 19:47? And then you said they last had contact at 17:45, two minutes prior?

A. I'm sorry, yes. They had last contact at 19:45 hours.

Q. Which would be 7:00 p.m., is that right?

A. Correct.

Q. All right. All right. And I interrupted you, so I apologize. After you determined that the phone number 312-6473 had last had contact with Mr. Rogers' phone two minutes prior to the shooting, what happened next?

A. We were also able to review video surveillance from the

BJ's Convenience store as well as the Ames Avenue Convenience store located in the proximity of 42nd and Ames, which shows at approximately 19:47 hours a white sedan believed to be a Chevy Impala exiting the parking lot headed south bound.

Witness statements given at the scene were that there was a silver Chevy Impala belonging to Mr. Rogers and a white Chevy Impala parked next to Mr. Rogers. Witnesses heard a single gunshot and then saw the white Impala flee the parking lot at a high rate of speed.

Q. Through the course of your investigation were you able to determine if this white Impala -- or who the -- let me retract my question and ask a better one.

In the course of your investigation were you able to determine what if any connection the white Impala had to this case?

A. I did.

Q. And what if anything did you learn?

A. I was able to discover that Deanna Dennis. D-E-A-N-N-A. D-E-N-N-I-S. The mother of Rufus Dennis has a white Chevy Impala registered to her name, which was the vehicle that Rufus Dennis self-reported driving on that date. As well as a witness at Boost Mobile advised the parties Rufus Dennis and Forrest Cox were driving while at the Boost Mobile store when they had contact with Mr.

Rogers.

Q. And Mr. Dennis reported -- Mr. Rufus Dennis reported self driving that vehicle on March 6th, is that right, 2017?

A. Yes, he advised that around that time period he was driving that white Impala.

Q. Did he say whether or not he allowed other people to drive that Impala?

A. No, he advised that he and his mother were the only two that drove that vehicle.

Q. With regard to the phone number 402-312-6473, did you do anything with regard to your standard procedures of trying to access the cellphone records?

A. Yes, I was first able to determine that the number was active as a Sprint Spectrum, being Sprint, PCS cellphone number. From there I drafted the search warrant affidavit for that number. And sent it, I believe, electronically to Sprint.

Q. And the information we've discussed here today was the information that you used as the basis of that affidavit?

A. Yes, Ma'am.

MS. MILLER: Your Honor, I'm offering what has been marked Exhibit Number 1, which is a certified copy of that search warrant.

MR. MILLER: No objection.

THE COURT: 1 is received.

(Exhibit Number 1 is/are made a part of this bill of exceptions and is/are found in a separate volume of exhibits.)

Q. And you told us earlier about what happens when you have cell phone records. Did this same process continue in this particular case?

A. It did.

Q. So, once you got your cellphone records returned, what if anything did you do with that information?

A. I turned the records over -- well, booked a copy into property, but then took a copy of the records and had Nicholas Herfordt with the Omaha Police Department in our digital forensics plot the data specifically for March 6th, 2017.

Q. And what if anything did that plotting tell you?

A. The important part was that 19:45 hours, being the phone call between that of Forrest Cox's cellphone and Laron Rogers' cellphone, the phone number 312-6473 is in the general proximity of 42nd and Ames.

Q. What happened next in the course of your investigation.

A. Following that I issued a -- well I attempted to locate Forrest Cox at addresses that he had on file through

prior police contacts. We were unable to locate him and issued what's called a locate warrant within the Omaha Police Department for that party.

Q. What's a locate warrant mean?

A. It's an internal piece of paper that inputs into our system showing that if the party has any contact with police, which unit specifically is attempting to contact this person.

Q. And what happened next?

A. Jumping forward to -- it would February 26th, 2018, I got a call from my boss at the time, Sergeant Joe Wherry advising that Forrest Cox was a I believe a passenger in a vehicle and was being detained for an open container. Actually, I'll back up. In the process of waiting for Mr. Cox to be found, I went and drafted a buccal order, a DNA order. And had that signed by a county court judge in order for the collection of Mr. Cox's DNA to be gathered once he was located.

Q. Do you recall the date that you obtained that order?

A. I don't off hand?

Q. Was it some time before February 26thm 2018?

A. That's correct?

Q. So, on February 26th, 2018, you were advised that Mr. Cox was a passenger in a vehicle and was being detained?

A. Yes, Ma'am.
Q. Did you have an opportunity to speak with Mr. Cox on that date?
A. I did.
Q. And how did that come about?
A. Mr. Cox was transport to OPD Central Station. At that time I was actually -- it was a regular work day, but I was off. And I was -- I came in to conduct that interview with Mr. Cox.
Q. What time did that interview take place?
A. I believe at approximately 2:00 p.m. Let me give you an exact time here. I believe I met with him at 2:18 hours p.m.
Q. How long did your conversation with Mr. Cox take?
A. I believe approximately 45 minutes.
Q. Is it fair to say that it ended a little after 3:00 o'clock?
A. Yes, Ma'am.
Q. Again on February 26th, 2018?
A. Yes Ma'am.
Q. When you met with Mr. Cox did you advise him of his rights?
A. I did.
Q. And just walk us through how that process took place?
A. I read them off the Omaha Police Department rights

advisory form, going one question at a time, asking the party yes or no to those questions, as they either give an answer in the affirmative or the negative, I would write that down on the rights advisory form.

Q. And is this entire process audio and video recorded?

A. It is.

Q. And how is it audio and video recorded?

A. You know, I don't know the name of the system anymore, but it is a -- there's a camera on the ceiling and a camera on the wall. Simply starts by us hitting a button. We can then download the data, place it onto a DVD, and then we book that DVD into property.

Q. Showing you what's been marked as Exhibit 2 and Exhibit 4 for identification. Can you just tell the Court what Exhibits 2 and 4 are?

A. Yes. Exhibit 2 is a DVD that I created and reviewed as of yesterday to ensure that it is a working copy of the interview with Mr. Cox on February 26th, 2018.

Q. Is it a full and complete interview of Mr. Cox?

A. It is.

Q. Okay. And Exhibit 4?

A. Exhibit 4 is a copy of the Omaha Police Department rights advisory form that is in my handwriting that I would have completed on February 26th while in the interview room with Mr. Cox.

Q. And is that an accurate copy of the rights advisory form that filled out?
A. It is.
MS. MILLER: Your Honor, at this time I offer Exhibits 2 and 4 into evidence?
MR. MILLER: No objection.
THE COURT: No objection?
MR. MILLER: No objection.
THE COURT: 2 and 4 are received.
(Exhibit Numbers 2 and 4 is/are made a part of this bill of exceptions and is/are found in a separate volume of exhibits.)
Q. Detective, you had an opportunity to review Exhibit Number 2, which was the interview of Mr. Cox, right?
A. Yes, Ma'am.
Q. And in that interview at any time did Mr. Cox actually admit to shooting Mr. Rogers?
A. He did not.
Q. Okay. What information, if any, did you receive from Mr. Cox in that interview that is of significance to you investigation?
A. He was able to confirm during the time period of March 2017 that he did in fact have the phone number 402-312-6473. He advised that he was actually at the

Boost Mobile store on that date to turn that phone on and that on that date he had his phone. He also advised that -- (interrupted)

MS. MILLER: I'm going to stop you there. You said on that date? What date.

A. I'm sorry. March 6th, 2017.

Q. Thank you. What else did he advise?

A. Mr. Cox stated that he in fact was at the Boost Mobile store with a party by the name of Rufus Dennis. Acknowledged knowing that officers had video of that incident. Also stated that after leaving Boost Mobile he was dropped off, I believe, at his brother Rashad Mackin's house near 58th and Brown. And then was picked up by a female party by the name of Lateah Carter. And went to Lateah Carter's house near 18th and Grace streets where he spent the remainder of the evening with her until the next morning.

And then lastly, the importance of it, would be that he when asked if he was in the area of 42nd and Ames Avenue on March 6th, 2017, he denies being anywhere in the area of that location.

Q. At any point during your interview with Mr. Cox that took approximately 45 minutes, did you ever leave the room?

A. I believe I do.

Q. Okay. And why did you leave the room?
A. I believe at one point -- I believe I leave the room two times. Once was to get the kits to collect DNA. So, I actually had an order -- a DNA order out for Mr. Cox in another homicide investigation. That was involving a party by the name Malik Stelly, who was an acquaintance of Mr. Cox. And during that investigation I determined Mr. Cox was with Malik Stelly around the time of another homicide.

So, for that I needed his DNA. So, for this case and that case I step out of the room, collect the DNA -- or I'm sorry -- come back in with the DNA kit, collect it. The second time I leave the room I believe I stepped out momentarily to speak with my boss if there's any follow up questions that he wanted me to gather. And then I come back in and finish the interview.
Q. So, let's take the first one. Did Mr. Cox comply with the DNA order?
A. He complied with both of them.
Q. Okay. And when you came back in the second time did you ask Mr. Cox any other questions?
A. I did. That's when I asked him the question if he was in area of 42nd and Ames on the date of March 6th, 2017.
Q. At any time during the course of your conversation with Mr. Cox did he ever ask to speak to his attorney?

A. He did not.
Q. Did he ever try to stop the interview that you were conducting with him?
A. The only thing Mr. Cox says at one point is he's done. And I can probably give you an exact time, but he continues to answer questions after saying he's done.
Q. Of course this conversation would be on Exhibit Number 2, is that right?
A. It is.
Q. And can you please tell us what time approximately that statement was made.
A. I can. Let me so if I can find it.
Q. If you'd like to look at your report.
A. You know I thought I noted the time in here, but I did not. I'm sorry.
Q. Okay. Was Mr. Cox under arrest at the time he was speaking with you?
A. I believe technically uniform officers had him under arrest for the open container, but not for the homicide.
Q. What happens after you concluded your interview with Mr. Cox?
A. He was release from OPD Central Station and I believe he was just cited for the open container.
Q. Do you have any other contact with Mr. Cox after February 26th, 2018?

A. I did?
Q. And when and how was that?
A. Following the interview with Mr. Cox an arrest warrant was drafted and presented to the County Attorney's office. At that time a first degree murder was issued for Mr. Cox. On March 8th, 2018, when Mr. Cox was found by our fugitive unit he was brought back down to OPD Central Station and I met with him at that time.
Q. Did you advise Mr. Cox of his rights again on March 8th, 2018?
A. I did not.
Q. Why not?
A. Asked Mr. Cox, I told him that based on the statement he had this was his opportunity now even though the warrant was issued if he wanted to come in and clarify any information. Mr. Cox simply stated he wanted to be booked on it. If he could book him. And so I complied with that request and booked him on the warrant.
Q. So, he didn't provide any other information to you?
A. He did not.
Q. And again was this albeit brief interview on March 8th, 2018, audio and video recorded?
A. It was.
Q. And then booked into property?
A. It was.

Q. Have you had a chance to review that audio and video recording of that interview?
A. I have.
MR. MILLER: I'm showing you what's been marked as State's Exhibit number 3 for identification. Can you please tell the Court what Exhibit Number 3 is?
A. Yes, it is a copy of the interview on March 8th, 2018, that I made regarding the interview with Forrest Cox that I have reviewed.
Q. And is it a true and accurate copy of the short interview you had with Mr. Cox on March 8th, 2018?
A. It is.
MS. MILLER: Your Honor, at this time I would offer Exhibit Number 3.
MR. MILLER: No objection.
THE COURT: 3 is received.
(Exhibit Number 3 is/are made a part of this bill of exceptions and is/are found in a separate volume of exhibits.)
MS. MILLER: May I have a moment, Your Honor.
THE COURT: You may.
Q. Did all events that you've testified about take place in Douglas County, Nebraska?
A. They did.

MS. MILLER: I have no further questions for this witness, Your Honor.

THE COURT: Any cross examination?

CROSS EXAMINATION

BY MR. MILLER:

Q. Detective Hinsley, the shooting occurred on March 6th, 2017, correct?

A. Yes, sir.

Q. And then Mr. Rogers passed away on March 27th, 2017?

A. Yes, sir.

Q. Prior to Mr. Rogers passing away was Forrest Cox's name -- did it come up in the investigation?

A. Prior to March 22nd, I don't believe it was. Like I said, the investigation was being conducted by Johnny Palermo. And when I asked him for what he had done on the case it was pretty much nothing.

Q. So, then when Mr. Rogers passes away on March 22nd, that's when you're reassigned to the case and start your investigation, is that right?

A. Yes, sir.

Q. And when in relationship to March 22nd did Forrest Cox's name come up in the investigation?

A. I believe it was either on the 22nd or the 23rd.

Q. So, it was either the same day that you were assigned or the day after?

A. Yes, sir.
Q. And then the application for the search warrant on that phone number associated with Mr. Cox was March 24th, 2017?
A. Yes, sir.
Q. And any information inside that affidavit would have been information that was collected prior to March 24th, correct?
A. Yes, sir.
Q. All right. What -- what -- is it fair to say that the bulk of the investigation in this case took place in March of 2017?
A. I would say late March or early April, yes, sir.
Q. And what investigation was done from April of 2017 after?
A. I want to say there was some interviews with some witnesses attempting to locate Forrest Cox was a big part of it. Prior to that I had presented the case to Don Kline and Brenda Beadle and they wanted -- (interrupted)
Q. When was that?
A. I believe it was April of 2017. They also wanted a -- they wanted to know what Mr. Cox's statement was going to be towards us before we pursued anything in the case.
Q. So, you presented the County Attorney with the case

wanting them to file charges against Mr. Cox, correct?
A. Possibly, if they thought the case was at a point where if could be prosecuted.
Q. In April of 2017 you wanted them to file charges of first degree murder against him?
A. Well, you know, looking back that far, I know we presented it a series of three times. There was another time when an individual by the name of Tobias Swift was interviewed and gave a statement. Following that we also presented the case again.

And it is not uncommon in homicide investigations to present the case early on to the County attorneys for them to have an understanding on where the case is at, so as it develops we're not starting from zero and going forward.

Q. But at all points when it's presented to the County Attorney's office you were told that they weren't going to file and that you needed to talk to Forrest Cox first?
A. That is correct.
Q. When did this locate go out for -- this locate warrant go out for Mr. Cox?
A. It would have been March 2017.
Q. So, when you had -- basically, when you identified him as a suspect you wanted to talk to him and so you put

this locate warrant out for him?
A. Yes, sir.
Q. That means that if he comes into contact with any law enforcement they'll detain him until you can investigate -- or talk to him?
A. In theory, yes.
Q. So, based on your conversations with the County Attorney's office -- well, let me back up.

So then February 26th, of 2018, then when Forrest Cox is then detained by Omaha Police Department and brought down to be interviewed by you, correct?
A. Yes, sir.
Q. And prior to that date you had been told by the County Attorney's office that they weren't going to file on Forrest unless you got a statement against him that you could disprove, correct?
A. That's not what they said. They just wanted to know what he had to say.
Q. Well, didn't you testify at prelim about this?
A. You could remind me, I don't recall.
Q. We had a prelim on this case?
A. We did, yes.
Q. Up in county court, correct?
A. We did.
Q. And you testified at that?

A. I did.
Q. And do you deny telling me at that time that the County Attorney -- that they wanted to basically get Forrest, catch him in a lie, so that they could charge him?
A. I would be shocked if my statement was we wanted to catch him in a lie. So, I don't know without reviewing the transcripts of that, I can't tell you what I exactly said in that prelim back in it would be April now.
Q. All right. Well, that may not have been what you specifically said, but that was your mindset, wasn't it? When you went into the interview on February 26th, 2018, correct?
A. No. Mr. Cox could have came forward and told me other information that I could have proved as being credible, too.
Q. All right. Well, you hadn't spoken to Lateah Carter prior to February 26th, 2018, had you?
A. I had not no. That was the first time her name came up was when I spoke to Mr. Cox.
Q. All right. During the interview of Mr. Cox on February 26th, at the two hour -- or excuse me, at the 2:37 p.m. mark, do you recall telling him all I have to do now is prove that you're lying to me and they'll charge you?
A. I do recall that.
Q. Okay. So, your mindset going into that interview based

on talking with the County Attorney was we've got to catch him in a lie in this interview so we can charge him with first degree murder, correct? I mean your own words said that?

A. Yeah, but we also sat a lot in our interviews that, you know, you're trying to illicit a statement through deceit. Whether that's true or not --

Q. At that point you'd already gotten -- you'd already elicited the statements from him.

A. But also, had he changed his story and given me something more truthful from what I can prove through the evidence, the interview probably would have continued to see where else it would have led.

Q. But the things we do know for sure, you presented this case to the County Attorney's office three times prior to February 26th, 2018?

A. That's fair.

Q. All three times they denied filing charges until you spoke with Cox -- with Forrest Cox, correct?

A. That probably fair.

Q. And during that statement -- or during that interview with him you made a statement, all I have to do is prove that you're lying and they'll charge you.

A. I did say that, yes, sir.

Q. Who is they?

A. It would be the County Attorney's office.
Q. Yet you don't want to say that your mindset going into that interview was I need to get something I can use against him, catch him in a lie, so they'll charge him?
A. I mean, to stay what my mindset was six months ago, I can't testify to that. But I would have preferred for him to come in and give a statement that benefited him more than it would have hurt him.
Q. And based on those conversations with the County Attorney's office, you were going to get a statement from him no matter what, correct?
A. Well, if he requested an attorney I wouldn't have been able to get a statement.
Q. Well, he did numerous times, he wanted to stop?
A. Just one time he said I want to.
Q. Just one time?
A. I believe so.
Q. Okay.
A. He says I'm done.
Q. Okay. At the 2:28:50 mark he says, look, I'm done talking about this. And you cut him off, you ignored him, and you kept going.
A. Sounds about right.
Q. And at 2:28:50 mark at the 2:30:52 mark he says look, I'm not about to go over nothing. Again you cut him

off. Ignore him. And continue asking him questions. So, that's at least twice?

A. Well, your first question was he said that he wanted to stop. For him to say I'm not answering something and requesting an attorney are two different things. I think we both agree on.

Q. Saying, look, I'm not about to go over nothing with you is not him wanting to stop talking to you?

A. Well, he continued to talk and not request an attorney.

Q. Because you interrupted him, didn't you? You didn't let him stop. You kept asking him questions?

A. Correct.

Q. You did the same thing the time before when he says look, I'm done talking about it. And you interrupted him while he was saying that and continued to talk to him, didn't you?

A. That is correct.

Q. You didn't clarify what he meant by that, did you?

A. No.

Q. Now, when -- on February 26th of this year Forrest Cox was not there at the police station voluntarily, was he?

A. I mean -- I mean probably not, no. I can't imagine that he was -- I mean he alluded coming in for a year. I can't imagine on February 26th he wanted to come in and give a statement.

Q. Well, you had the locate warrant for him?
A. Correct.
Q. And you had this DNA order for him?
A. Correct.
Q. So, he was detained, was he not?
A. He was. And based on the fact that he had, I believe, an open container that day.
Q. You didn't call him up that day and he came down and said I'll talk to you, did you?
A. No.
Q. Now, prior to him being placed in the interview room that day, you collected his cellphone from him that day, didn't you?
A. I believe uniform officers took it from him.
MR. MILLER: Could I have a moment, Judge?
THE COURT: You may.
Q. The interview on February 26th of this year with Mr. Cox is when he tells you that he's with Lateah Carter on the night of the shooting, correct?
A. That is correct.
Q. And it is only after that point do you interview Lateah Carter, correct?
A. That is correct.
Q. When was that interview?
A. You know, early March 2018, I don't know the exact date.

Q. And then early March 2018 is then when you got the arrest warrant for Forrest Cox for first degree murder, correct?
A. That's correct.
Q. And did you get that arrest warrant after speaking with the County Attorney's office then?
A. I did.
Q. And you told them that you think that you had caught Forrest Cox in a lie, correct?
A. No, I drafted an arrest affidavit and presented it, I believe, to Brenda Beadle who reviewed it and from there she decided to pursue the first degree murder warrant.
Q. And the only difference between that and what you presented on that day and what you previously presented was this information from Lateah Carter where she says Forrest Cox wasn't with her that night, correct?
A. I'm trying to remember back to the arrest affidavit. I can't even say for certain if her statement was in the arrest affidavit.
Q. Well, something different would have had to be in it?
A. I believe the -- I know we added in the part that he was interviewed on the 26th. And that on that date he denied being in the area of 42nd and Ames, but confirmed to having that phone and phone number.
Q. The interview room that Mr. Cox was in on February 26th,

2018, was he able to come and go that room freely? I mean he open the door on his own and get out?

A. Yeah, he can. It is unlocked. It is a fire code you can't lock somebody in a room. So, I have had people get up and walk out of the police station before. So, I mean, the door is shut but it is accessible to open.

Q. And if Forrest got up that day and walked out would you have detained him?

A. The uniform officers would have cause to. I wouldn't have for my stuff.

Q. What level is it on? What floor of the police station is it on?

A. It's considered the fourth floor, but it's actually the third floor, because our basement or sub-basement is considered floor one. So, it's on floor three.

Q. How would you have to get out of the police station?

A. You could walk to any stairwell that's marked as a fire, and every door you can get out, you just need a key card to get back in. So, I mean, I've had people get out of the interview rooms, walk straight to where they see sunlight, go through the door and take the elevator down. I mean, I followed them out just to make sure that they get out of the station, but ---

MR. MILLER: No further questions, Judge.

THE COURT: Any redirect?

MS. MILLER: Yes, Your Honor.

REDIRECT EXAMINATION

BY MS. MILLER:

Q. I just want to clarify. You stated that when Mr. Cox was detained on February 26th, 2018, a cellphone was recovered on his person, is that right?

A. I believe one was.

Q. Was that the same cellphone that we've been talking about, the 402-312-6473 number?

A. It was not.

Q. And did you ask him about that particular phone number and whether he still had that phone?

A. I did.

Q. And that was during the interview on Exhibit number 2?

A. Correct.

Q. And did he say he lost it?

A. He did.

MS. MILLER: I have no further questions for this witness, Your Honor.

MR. MILLER: Nothing further.

THE COURT: All right. You may step down.

THE WITNESS: Thank you, Ma'am.

THE COURT: May this witness be excused?

MS. MILLER: Yes, Your Honor.

MR. MILLER: Yes, Your Honor.

THE COURT: You may be excused. Thank you.

THE WITNESS: Thank you, Ma'am.

MS. MILLER: The State has nothing further.

THE COURT: Do you rest?

MS. MILLER: Yes.

THE COURT: Mr. Miller?

MR. MILLER: We have no evidence, Your Honor.

THE COURT: Okay. Both sides rest. Do the parties wish to make argument or submit written argument?

MS. MILLER: Written argument, Your Honor.

MR. MILLER: Judge, we'll submit written argument, but I do want to point out a few things for you to be aware of by watching the video of this interview.

At the 2:22:10 mark, when Mr. Cox is being advised of his rights, he's asked are you -- you know, the final question, are you willing to talk to me now. And Mr. Cox answers I'm willing to give my DNA. And we point that out because Mr. Cox at that time right away when he's read his rights shows reluctance to speak with officers.

As previously pointed out at the 2:28:50 mark he says, look, I'm done talking about it. Detective Hinsley cuts him off, ignores him, and continues to

interrogate him.

At the 2:30:30 mark, Hinsley tells him I have enough probable cause to charge you. Mr. Cox becomes frustrated and says, man I -- and again Hinsley cuts him off, won't let him say what he wants to say at that time.

And then from that point until the 2:32:52 mark continues to cut off and interrupt Mr. Cox when he's trying to assert that he doesn't want to speak any longer.

This culminates in that frame at the 2:32:32 second mark where he says, look, I'm not about to go over nothing. And Hinsley cuts him off again and continues to ask -- he asks the question, what brothers were you with.

So, he continued to ignore his requests that he had nothing more to say. And then Judge, obviously, I've already pointed out that at the two hour -- or excuse me -- 2:37:02 mark, where Hinsley after continually interrupting him and not letting him, you know, say that he doesn't want to talk anymore. As soon as he gives his final statement to him, he says, all I have to do now is prove that you're lying to me and they'll charge you.

So, those are important pieces of it, too, Judge.

So, everything else we'll submit in a brief.

THE COURT: Okay. How long do the parties -- do you want simultaneous submissions or -- and how long are you requesting. Let's get a briefing schedule.

MS. ANDREWS: I need ten days, Judge.

THE COURT: Ten days.

MS. MILLER: Is it all right if we reply to theirs, Your Honor? Thank you.

THE COURT: So, ten days for Defendant and --

MS. MILLER: We just need a week after.

THE COURT: A week after. Okay. Is there anything else we need to take up on the record at this time?

MR. MILLER: No, Your Honor.

THE COURT: From the State.

MS. MILLER: No, Your Honor.

THE COURT: Thank you. We're adjourned.

* * * * * * * * *

(On November 20th, 2018, in the District Court of Douglas County, Nebraska, before the HONORABLE KIMBERLY MILLER PANKONIN, District Judge, with MS. ANN MILLER and MS. AMY JACOBSON, appearing as counsel for the State and MR. MATTHEW MILLER and MS. NATALIE ANDREWS, appearing as counsel for the Defendant, and the defendant being present in person, the following proceedings were had:)

THE COURT: We are here in the matter of the State of Nebraska vs. Forrest R. Cox, III. Case Number CR 18-1285. Would the parties enter their appearances.

MS. MILLER: Ann Miller and Amy Jacobsen, Deputy County Attorneys on behalf of the State.

MR. MILLER: Matt Miller and Natalie Andrews on behalf of Mr. Forrest Cox.

THE COURT: And how are we proceeding today, Mr. Miller?

MR. MILLER: Judge, right now this case is set for trial on December 3rd. We are asking and making an oral motion to continue that sentencing -- or excuse me -- that trial date. There's been some new information in the form of a search warrant that needs to be addressed. And the defense was -- we need adequate time to prepare a defense depending on what the Court's rulings on that new motion -- or excuse me --

new search warrant. And so for that reason we're asking for a continuance of the trial date.

THE COURT: Is that correct, Mr. Cox?

MR. COX: Yes.

THE COURT: Okay. Does the State have a position?

MS. MILLER: The State has no objection to the continuance, Your Honor.

THE COURT: And in looking at the Court's calendar the first available trial date would be May 13th, 2018, to continue this matter. Do you and your client still wish the court to continue the matter till May 13th, 2018, Mr. Miller?

MR. MILLER: Yes, Your Honor.

THE COURT: Is that correct, Mr. Cox?

MR. COX: Yes.

THE COURT: I am granting your motion to continue. I'm continuing trial in this matter to May 13th, 2018 for five days. Mr. Miller, you indicated that there's an additional search warrant that has -- that needs to be addressed by this court. Are you planning on filing a motion?

MR. MILLER: Yes, Judge.

THE COURT: Okay. We will hear that motion to suppress on December 11th, 2018 at 10:30 a.m. Does that

date work for you, Mr. Miller?

MR. MILLER: Yes, Your Honor.

THE COURT: Ms. Miller or Ms. Jacobsen?

MS. MILLER: Yes, Your Honor.

THE COURT: All right. Is there anything further we need to take up on the record at this time?

MS. MILLER: Your Honor, the State would just point out we did file motions to endorse electronically today. And I just wanted to bring that to the Court's attention and have it address if at all possible.

THE COURT: Mr. Miller, have you had the opportunity to review the requests for endorsements?

MR. MILLER: Judge, it's evidently been filed. I haven't seen it yet, but if it's -- I'm sure it's the standard endorsement, so we don't have an objection to it.

THE COURT: Okay. Leave is granted for the additional endorsements. Will you submit an order, Ms. Miller?

MS. MILLER: Yes, Your Honor.

THE COURT: Okay. Anything else?

MR. MILLER: I don't believe so, no.

MS. MILLER: No, Your Honor.

THE COURT: Okay. We're adjourned.

* * * * * * * * *

(On January 11th, 2019, in the District Court of Douglas County, Nebraska, before the HONORABLE KIMBERLY MILLER PANKONIN, District Judge, with MS. ANN MILLER and MS. AMY JACOBSON, appearing as counsel for the State and MR. MATTHEW MILLER and MS. NATALIE ANDREWS, appearing as counsel for the Defendant, and the defendant being present in person, the following proceedings were had:)

THE COURT: We are here in the matter of the State of Nebraska vs. Forrest R. Cox, III. Case Number CR 18-1285. Would the attorneys enter their appearances?

MS. MILLER: Ann Miller, Deputy County Attorney on behalf of the State.

MS. ANDREWS: Natalie Andrews and Matt Miller on behalf of Forrest Cox who is present before the Court.

THE COURT: I show we're here today for Defendant's motion to suppress that was filed December 5th, 2018, is that correct?

MS. ANDREWS: Yes, Judge.

THE COURT: Are both sides ready to proceed.

MS. MILLER: We are, Your Honor.

THE COURT: All right. You may proceed.

MS. MILLER: Your Honor, the State is going to

begin this motion to suppress hearing by re-offering Exhibit Number 1. This was previously received by the Court on October 9th, 2018. And just for the record, it is a certified copy of a March 30th, 2017 filing in the district court for a search warrant in regards to telephone number 402-312-6473.

And at this time the State would offer what's been previously marked as State's Exhibit Number 5 for identification. This was filed in criminal court on November 20th, 2018. This is an affidavit and application for issuance of a search warrant for cellular phone records. Again, for that same phone number in Exhibit Number 1, 402-312-6473, for the time period from January 1st, 2017 to March 24th, 2017.

At this time I would reoffer Exhibit Number 1 and offer Exhibit Number 5.

THE COURT: Any objection?

MS. ANDREWS: Your Honor, I have no objection to Exhibit Number 1. However, I do have an objection to Exhibit Number 5. And I realize it is rather unusual but if the Court will allow me to make my argument as to the objection until after the questioning of the detective.

THE COURT: Okay.

MS. ANDREWS: Thank you.

THE COURT: So, I will reserve ruling on Exhibit 5.

MS. ANDREWS: Thank you.

THE COURT: You may proceed.

MS. MILLER: Your Honor, that's all the evidence the State has at this time for this motion. So, I guess I'll put Detective Hinsley on the stand so that we can proceed with the questioning as to Exhibit Number 5 which needs to be offered for our hearing.

RYAN HINSLEY,

witness herein, after being first duly sworn to tell the truth was examined and testified as follows:

DIRECT EXAMINATION

BY MS. ANDREWS:

Q. Detective, can you please state your name and spell your last name for the record?

A. It's Ryan. R-Y-A-N. Hinsley. H-I-N-S-L-E-Y.

Q. Detective Hinsley, how long have you been a member of the Omaha Police Department.

A. Approximately 14 years.

Q. And of those 14 years how long have you been a detective?

A. Sorry. Approximately eight years.

Q. And have those entire eight years been with the homicide unit?

A. They have not.
Q. What unit was that previously?
A. I did time in our -- at the time it was north/south investigations. Now it is our auto theft burglary unit. Major crimes as a regional detective. And then five and a half years in homicide.
Q. Fair to say that in your eight years as a detective regardless of the department that you have been responsible for executing search warrants?
A. Yes, Ma'am.
Q. As well as submitting them for the court's approval with respect to probable cause?
A. Yes, Ma'am.
Q. Thank you.

MS. ANDREWS: May I approach to retrieve the exhibits, Your Honor?

THE COURT: You may. Would you like both of them?

MS. ANDREWS: Yes, please.

Q. Detective, I'm handing you Exhibit 1 as well as 5.
A. Okay.
Q. Now, in this particular case you were asked at the direction of the County Attorney to remove certain language from Exhibit Number 1 before you produced Exhibit Number 5, correct?

A. I was asked to change the -- I believe the statute number and upon consulting with the County Attorney's office, what was decided to be done is to keep the body of the affidavit, meaning the probable cause for the affidavit the same, but use the updated version of the cell phone search warrant that I was now using, with the new statute for the warrant itself.

Q. This statute that you're mentioning, are you familiar with it also being referred to as the Federal Stored Communications Act?

A. Yes.

Q. Okay. Now, how many times have you applied for cell phone records under the Federal Stored Communications Act approximately?

A. You know, I can't testify to that, because I know since it's been updated a few years ago. Ballpark maybe 50.

Q. Fair. And how many times when you apply for cellphone records under the Federal Stored Communications Act, of those 50 times were they approved by the county court judge?

A. Every time.

Q. Now, have you had other cases akin to this particular one where you had to obtain a subsequent warrant removing the Federal Stored Communications Act language?

A. I personally have not. Other people I work with

directly have.

Q. Okay. So, you were familiar at least with this practice?

A. I knew that it was occurring, yes.

Q. Now, in this particular case, if I can direct your attention to Exhibit Number 5?

A. Okay.

Q. In addition to removing the language with respect to the Federal Stored Communications Act, didn't you also add approximately a page of boilerplate language?

A. Likely through the course of the template being updated it has been added versus the one from 2017. Now, on the day that I resubmitted this it is not the day that I added that language.

THE COURT: It is not the day what?

A. It is not the day that I actually typed in the new language.

THE COURT: Okay. Thank you.

Q. But you would agree with respect to Exhibit Number 5, that from the last paragraph on page four of the affidavit until approximately the second to last full paragraph of the affidavit on page 5, that this all consists of additional language that was not within Exhibit Number 1, correct?

A. I would agree with you on that.

Q. Okay. The new search warrant, Detective, Exhibit Number 5 was obtained on November 14th, 2018, correct?
A. Let me verify that. That is correct.
Q. So, that was more than a year and a half after you obtained the initial warrant, Exhibit Number 1, for the cell phone number 402-312-6473?
A. That is correct.
Q. And with respect to that initial warrant, Exhibit Number 1, you testified in a motion hearing in October of 2018, correct?
A. That sounds correct.
Q. So, you acquired this new search warrant approximately a month after the motion hearing?
A. That is correct.

MS. ANDREWS: I have no further questions. Thank you, sir.

THE COURT: Any questions?

MS. MILLER: Just a couple follow up, Your Honor. Thank you.

CROSS EXAMINATION

BY MS. MILLER:

Q. When it was requested by the County Attorney's Office to obtain a new search warrant, and I'm showing you Exhibit Number -- or what's been marked as Exhibit Number 5, why was additional information added with regard to your

template on the -- pages 4 through 5 that were discussed previously?

A. Well, much like as anything changes, it is just new information that since March of 2017, the cellphone industry has changed. We can -- we can request different data as well as kind of just the best verbiage that working with our digital forensics unit we had come up with. So, from March of 2017, that was the best verbiage and data that I was requesting versus November 14th, 2018. So, a year and a half later, we've kind of amended our language as well as now we know we can ask for different things within the cellphone data.

Q. As far as that cellphone data goes is that cellphone data something that is static or does that evidence become stale at some point?

A. No, the evidence is always the same. It is the provider that always holds on to the same information. It is just how we ask for it that changes.

Q. And before signing any of your affidavits do you read all of the language that either you've included or that was supplied in the template?

A. I do.

Q. Do you regularly make any changes or updates to that information?

A. I do.

Q. And did you review Exhibit 5 before signing it?
A. I did.
Q. And was everything current and accurate as to the best of your knowledge on the date in time in which you signed it?
A. It was.
Q. And that was on November 14th, 2018?
A. Yes, Ma'am.

MS. MILLER: I have no further questions at this time.

THE COURT: Anything further?

MS. ANDREWS: Just a couple, Your Honor. Thank you.

REDIRECT EXAMINATION

BY MS. ANDREWS:

Q. Detective, when you indicated that you amended our language or we amended our language. Is our a reference to the Omaha Police Department?
A. It is a reference to members of the homicide unit along with our digital forensics unit. We regularly get together and discuss Facebook warrants, cellphone warrants. Typically, Oscar Diegez and Nick Herfordt who are in our digital forensics unit keep up on the latest verbiage that you want to put in for data that we can collect. So, we do work with them a lot of the times

they'll send us updates to what we the want to start putting into our warrants and to start asking for these correctly.

Q. Okay. And each of those units that you are referencing are within the Omaha Police Department, correct?

A. That is correct.

Q. And none of that initial language had facts specific to the investigation in this particular case, correct?

A. Nothing I changed within the two had anything to do with the case.

Q. Thank you, Detective.

A. Yes, Ma'am.

THE COURT: Anything further?

MS. MILLER: No, Your Honor.

THE COURT: All right.

MS. ANDREWS: With respect to my objection. Thank you, Your Honor.

THE COURT: Okay.

MS. ANDREWS: Your Honor, I am objecting to Exhibit Number 5 in its entirety. The basis being my client's fundamental due process right to a fair trial. In this particular case, Your Honor, as we've discussed this Court has already ruled on Exhibit Number 1. The first search warrant for this particular cellphone in this case. And in this Court's November 21st order, it

was determined that the search of the cellphone was unlawful. Therefore, the evidence that the State had acquired against Mr. Cox would be the fruit of the poisonous tree. That being the initial unlawful search and seizure of this particular cellphone.

For that reason, I am asking the Court to consider sustaining my objection and not allowing Exhibit Number 5 to even be offered and considered by this Court, because I think it would deprive him of his right to a fair trial.

In these cellphone cases that have come about, Your Honor, in the last approximately five years, as Carpenter was decided in June of 2018 and Riley was decided in 2014. What the Court has made clear is that it is not applying any new rule or exception with respect to cellphones. Rather, what the Court decided to do in Riley with respect to content information on cellphones and in Carpenter with respect to CSLI data on cellphones is to simply apply the same principals and words of the Fourth Amendment that have always been in place.

And I think that the difficulty here at trial levels, where we do not have the benefit of reviewing cases solely and from afar and just not on paper, is adjusting our mindset from the traditional scenarios

where search warrants are applied for and executed to the more modern scenarios where search warrant are applied for and executed such as with cellphones.

The reason I bring that up is because in Riley the Court indicated that typically law enforcement's search of a cellphone is in fact more exhaustive and intrusive than a search of a residence.

And I'm confident, for example here, if I were objecting to a subsequent search warrant, let's say of Mr. Cox's residence. If there had been a search warrant applied for and as a result let's say law enforcement found a firearm within a backpack. If the Court following that motion hearing had ruled the search warrant was insufficient under the Fourth Amendment either for probable cause or for failing to meet the particularity requirement or a combination thereof, I'm confident this Court would not allow the State to then hold on to that fruit of the poisonous tree, the evidence unlawfully obtained under the Fourth Amendment. And simply apply for a new search warrant until they got it right.

The same should apply here. If this is allowed, Your Honor, unfortunately what occurs is the Fourth Amendment is rendered meaningless. It is meaningless if after the Court rules in a defendant's is favor with

respect to a search warrant, the State can continue to have law enforcement apply and then execute a subsequent search warrant on the evidence that was already unlawfully obtained.

So, for those reasons, Your Honor, I am asking the Court to sustain my objection with respect to Exhibit Number 5.

And if the Court would like briefing on the matter, I'm happy to submit that on that particular issue. And if Court is not inclined to sustain my objection as to Exhibit Number 5, I'd ask the Court alternatively consider sustaining my objection with respect to the additional information that Detective Hinsley indicated was added from the new template, which starts on the bottom paragraph of the fourth page of the affidavit and concludes the second to last full paragraph on the fifth page of the affidavit. Thank you, Judge.

THE COURT: Ms. Andrews, wouldn't you agree with the Court that the records here sought are something that are not fluid and would not have changed as opposed to things found in a home search in 2017 and a search in 2018?

MS. ANDREWS: Well, I think, Your Honor, what we're still talking about here is physical evidence in the sense that it's a cellphone. And further it is then

documents that can either be presented or digital. The same as it would be as if there was a search conducted of a home in which a firearm was obtained. Both items would be in police custody for the duration of the case and when the Court was ruling on the respective motions. The same would be true with respect to whether it was information from a cellphone provider, such as Sprint or Verizon, whatever the case maybe.

And moreover, Your Honor, in the original exclusionary rule case, Wong Sun vs. The United States. The Court makes it very clear here that the exclusionary rule applies equally to evidence that is tangible, intangible, physical, as well as verbal. So, I do not think that there is a distinction here.

THE COURT: Okay. Does the State wish to respond?

MS. MILLER: Well, Your Honor, I think we have a couple different issues going on. And so I just want to step back and just walk the Court through this. The entire reason Exhibit Number 5 was even applied for was because the United States vs. Carpenter decision came down. And I know that Ms. Andrews spent some time with Detective Hinsley asking him some questions with regards to that, but it essentially rendered the original search warrant, which is what it was classified as, which of

course courts have determined was not an official search warrant as when seeking a probable cause determination by a magistrate or county court bench. That was Exhibit Number 1.

The State completely contends that cellphone records are completely separate than applying for a search warrant to a home, because those items are static.

And I think that there's a really important distinction here, because the State isn't saying that the cellphone records that were obtained as a result of Exhibit Number 1 are being kept and those are the records that are going to be used if the Court allows the second search warrant, Exhibit Number 5 to be accepted. In fact, we're saying no. Exhibit Number 1 is something separate. Those records are separate. Exhibit Number 5 is asking for the exact same records, because it is a static type piece of evidence. Those records were not kept and maintained in Mr. Cox's possession. They were in fact kept in Sprint Corporation's possession. Those records obtained under the new search warrant, Exhibit Number 5, would then be used, marked, and offered in court or relied upon in court. Detective Hinsley made it very clear that nothing in the affidavit contained in Exhibit Number 5,

none of the additional information or any of the body of the affidavit when it comes to substance related to the actual case at bar was in any way different from the first exhibit. And I stress that, because that means that there was no fruit of the poisonous tree that was used or applied for when getting the second search warrant, which we're calling Exhibit Number 5.

I could see an argument if somehow Detective Hinsley's information that was placed in the second affidavit, Exhibit Number 5, derived from information that he received after reviewing the cellphone records he received from Sprint Corporation in response to Exhibit Number 1. But that's not the case.

He's testified that the information contained in his affidavit in Exhibit Number 5 is the exact same information that he used to obtain Exhibit Number 1.

As for the dicta and other template language, well, this is a new cellphone search warrant. And this new search warrant can contain whatever information the detective feels is important to meet the probable cause threshold to obtain a new search warrant from the magistrate or county court bench.

We specifically -- we being the State -- requested that the body in that information contained in the affidavit remain the same, so that there was no risk of

having any potential tainted fruit of the poisonous tree information contained in this second new affidavit so that it remained pure.

But at the end of the day the Omaha Police Department was relying on an good faith basis when they were trying to comport with the United States vs. Carpenter, when they sought a new separate search warrant that comported with all of the requirements of Carpenter. In fact, I would allege exceeded it with some of the additional information provided. None of it relied on anything that was obtained from the first search warrant or any of the information. So, there's no fruit of the poisonous tree argument.

All of the information that is now going to arise from the search warrant, Exhibit Number 5, will be the information that the State is relying upon in the -- in further court proceedings. So, there's no issue regarding any tainted evidence.

And at the end of the day as far as the sufficiency of the search warrant and whether it is too expansive and whether it allows too much, those would all be issues that I would contend would be for the motion to suppress and not for just this Court's acceptance of Exhibit Number 5, which the State feels there's proper foundation laid and should be accepted as far as this

proceeding.

THE COURT: Okay.

MS. MILLER: Thank you.

THE COURT: Ms. Andrews, anything further?

MS. ANDREWS: The only thing I guess that I would clarify, Your Honor, is I am in no way arguing or alleging that what Detective Hinsley said here today was dishonest about what's in the body of Exhibit Number 5. The only thing that I'm saying that is so critical for this Court's consideration, akin to my example if this were done within the residence, is regardless of whether it is in my client's possession or law enforcement's possession or Sprint's possession, if you compare several pages of Exhibits Numbers 1 and 5, this is the exact same evidence. The exact same cellphone records.

If this Court has already deemed to be obtained unlawfully because the first one did not comport with Carpenter.

And if the Court overrules my objection to Exhibit Number 5, I will certainly address it in my brief, but the good faith doctrine may have applied to Exhibit Number 1, but it was not raised by the State at the time before Carpenter was in place. Carpenter as we all know went into effect in June of 2018. This particular warrant that we are discussing here today was executed

five months after Carpenter went into effect.

And according to the Supreme Court of Nebraska in State vs. Tillman Henderson, officers are assumed to have a reasonable knowledge of what the law prohibits. And as a result the good faith doctrine cannot be applied with respect to Exhibit Number 5.

But as I stated I'd be happy to discuss that in my brief.

THE COURT: Okay. Is there -- do you need a ruling on Exhibit 5 now before you brief?

MS. ANDREWS: Not if the Court would like me to explain it further or further reserve it for a later time.

THE COURT: Reserve it for what?

MS. ANDREWS: I didn't know if the Court was going to rule from the bench or not. I'd be happy to submit a brief on the issue if you'd like.

THE COURT: As to the admissibility of Exhibit 5. I understand and appreciate the argument, but I think it is going to go more to whether it is a valid search warrant. So, I'm going to overrule your objection and allow Exhibit 5 in for consideration of this motion. And would entertain -- is there any further evidence or anything that we need to take up at this time or do the parties want to submit legal

authority and legal briefs?

(Exhibit Number 5 is/are made a part of this bill of exceptions and is/are found in a separate volume of exhibits.)

MS. ANDREWS: I would like to submit a brief, Your Honor. Thank you.

THE COURT: All right. So, I will take the motion under advisement. And Ms. Andrews and Ms. Miller, how long would you like to -- to have the Court allow you for a briefing schedule?

MS. MILLER: I know that Ms. Andrews addressed a portion of this issue in her brief with regard to our last set of motions, but I know that she does want to expand on that. So, I'll let her decide how long she needs.

MS. ANDREWS: Would the Court be acceptable two weeks from today's date.

THE COURT: Absolutely.

MS. ANDREWS: Thank you.

THE COURT: All right. And then --

MS. MILLER: I'll wait a week after.

THE COURT: A week for a reply. Okay. Counsel, do we need to take up anything else on the record at this time.

MS. ANDREWS: No, Judge, thank you.

MS. MILLER: Thank you, Your Honor.

THE COURT: We're adjourned. Thank you.

* * * * * * * *

(On April 25th, 2019, in the District Court of Douglas County, Nebraska, before the HONORABLE KIMBERLY MILLER PANKONIN, District Judge, with MS. AMY JACOBSON, appearing as counsel for the State and MR. MATTHEW MILLER, appearing as counsel for the Defendant, and the defendant being present in person, the following proceedings were had:)

THE COURT: You may be seated. We're here in the matter of the State of Nebraska vs. Forrest R. Cox, III. This is under case number CR 18-1285. Would the parties enter their appearances.

MS. JACOBSEN: Amy Jacobsen, Deputy County Attorney for the State.

MR. MILLER: Matt Miller, Assistant Public Defender on behalf of Mr. Cox.

THE COURT: Mr. Cox, this matter is set for trial by jury on May 13th of 2019. I wanted to have a hearing today to determine whether you -- you want to have the jury sequestered when they go to deliberate or do you want to waive the right to have the jury

FILED

May 28, 2020
IMAGE ID N20149D01NSC, FILING ID 0000015335

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

S-19-000780

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

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THE STATE OF NEBRASKA,

Appellee,

vs.

FORREST COX, III.

Appellant.

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APPEAL FROM THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

Honorable Kimberly Miller Pankonin, District Court Judge

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# BRIEF OF APPELLANT

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Appendix I

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## TABLE OF AUTHORITIES

**Cases Cited**

**Statutes Cited**

## STATEMENT OF JURISDICTION OF APPELLATE COURT

This is an appeal by Forrest R. Cox, III, (hereinafter "Mr. Cox"), in which he was found guilty of count I, murder in the first degree and count II, use of a deadly weapon (firearm) to commit a felony, and count III, possession of a deadly weapon by prohibited person under CR 18-1285. These guilty verdicts were issued following a jury trial in front of the Honorable Kimberly Miller Pankonin in the District Court of Douglas County that concluded on May 21, 2019. On August 8, 2019, Appellant was sentenced to a term of life imprisonment on count I, murder in the first degree, and a term of 25 to 30 years imprisonment on count II, use of a deadly weapon to commit a felony, and 40 to 45 years on count III, possession of a deadly weapon by a prohibited person. The sentences were ordered to run consecutively. The Appellant was given credit for 518 days served.

This appeal is authorized by the Nebraska Constitution, Article I, Section 23 and Nebraska Revised Statutes §§ 25-1912 (Reissue 2016), 29-2301 (Reissue 2016), and 29-2306 (Reissue 2016). The Notice of Appeal was filed on August 14, 2019, and an Order Allowing Defendant to Proceed *In Forma Pauperis* was signed by the district court judge on August 15, 2019.

## STATEMENT OF THE CASE

### (a) Nature of the Case

This case was a criminal prosecution of Appellant for the crimes of count I, murder in the first degree, charged in the alternative of premediated murder and felony murder, and count II, use of a deadly weapon to commit a felony, and count III, possession of a deadly weapon by a prohibited person.

### (b) Issue Presented to the Court Below

The issue presented to the Court below was whether Appellant was guilty of the offenses

charged beyond a reasonable doubt.

**(c) How the Issue Was Decided and Judgment Entered**

Following a jury trial, Appellant was found guilty of count I, murder in the first degree, and count II, use of a weapon to commit a felony, and count III, possession of a deadly weapon by a prohibited person. The district court sentenced Mr. Cox as to count I, to life imprisonment, a term of imprisonment of not less than 25 years nor more than 30 years imprisonment on count II, and a term of not less than 40 years imprisonment nor more than 45 years imprisonment on count III.

**(d) The Scope of Review**

To review a trial court's ruling on a motion to suppress based upon a claimed Fourth Amendment violation, an appellate court applies a two-part standard of review. Historical facts are reviewed for clear error. However, whether those facts trigger protections provided for by the Fourth Amendment or constitute violations thereof is a question of law to be reviewed independently of the trial court's determination. *State v. Sprunger*, 283 Neb. 531, 536, 811 N.W.2d 235, 241 (2012).

Upon review of a motion to suppress based upon the involuntariness of a statement, wherein the claim is that it was elicited in violation of the safeguards established in *Miranda v. Arizona*, 384 U.S. 436 (1966), an appellate court must apply a two-part standard of review. A trial court's findings with respect to historical facts are reviewed for clear error. The issue as to whether these facts were sufficient to meet constitutional standards is a question of law, and thus is reviewed "independently of the trial court's determination." *State v. Juranek*, 287 Neb. 846, 848, 844 N.W.2d 791, 796 (2014).

## ASSIGNMENTS OF ERROR

I. THE TRIAL COURT SHOULD HAVED SUSTAINED THE MOTION TO SUPPRESS EVIDENCE ACQUIRED AS A RESULT OF THE EXECUTION OF A GENERAL SEARCH WARRANT, LACKING IN AN EVIDENTIARY NEXUS TO THE CELLULAR PHONE AND PARTICULARITY.

II. THE STATE DID NOT MEET ITS BURDEN TO ESTABLISH THE GOOD FAITH DOCTRINE SHOULD BE APPLIED TO THE EVIDENCE ACQUIRED AS RESULT OF THE SEARCH WARRANT OF THE CELL PHONE, AS IT WAS EXEXCUTED SUBSEQUENT TO *CARPENTER* AND AMOUNTS TO A GENERAL WARRANT, ONE THAT A REASONBLE OFFICER WOULD KNOW TO BE ILLEGAL.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN OVERRULING APPELLANT'S OBJECTION AND MOTION TO SUPPRESS AS THE SEARCH WARRANT FOR THE CELLUAR PHONE, EXHIBIT 5, WAS TAINTED BY THE INITIAL UNLAWFUL SEARCH OF THE CELLULAR PHONE DATA.

IV. THE LIMITED FACTS BEFORE THE COURT REVEAL THAT THE TRIAL COURT INCORRECTLY ANALYZED AND APPLIED THE INDEPENDENT SOURCE DOCTRINE.

V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN APPLYING THE INDEPENDENT SOURCE DOCTRINE TO EXHIBIT 5, THE SUBSEQUENT SEARCH WARRANT FOR THE CELLULAR RECORDS, WHEREIN THE BURDEN TO SET FORTH THIS DOCTRINE BELONGS TO THE STATE, WHO FAILED TO RAISE IT AT THE TRIAL LEVEL.

VI. LAW ENFORCEMENT ACQUIRED STATEMENTS FROM THE DEFENDANT IN VIOLATION OF HIS FIFTH AMENDMENT RIGHTS PURSUANT TO *MIRANDA*,

THEREFORE THE MOTION TO SUPPRESS HIS STATEMENTS SHOULD HAVE BEEN SUSTAINED BY THE TRIAL COURT.

## PROPOSITIONS OF LAW

I. In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection. The Government's acquisition of the cell-site records here was a search under that Amendment. *Carpenter v. U.S.*, _____ U.S. _____, 138 S.Ct. 2206 (2018).

II. "The 'good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite a magistrate's authorization.' Officers are assumed to 'have a reasonable knowledge of what the law prohibits.'" *State v. Sprunger*, 283 Neb. 531, 542, 811 N.W.2d 235, 245 (2012).

III. "The exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.'" *Segura v. U.S.*, 468 U.S. 796, 104 S.Ct. 3380 (1984).

IV. "The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue…This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." *Murray v. U.S.*, 487 U.S. 522, 542, 108 S.Ct. 2529, 2536 (1988).

V. "The U.S. Supreme Court has explained that once the right to cut off questioning has been invoked, the police are restricted to 'scupulously honoring that right. This means, among

other things, that there must be an appreciable cessation of the interrogation. However, before the police are under such a duty, the invocation of the right to cut off questioning must be 'unambiguous,' 'unequivocal,' or 'clear.'" *State v. Rogers*, 277 Neb. 37, 52, 760 N.W.2d 35, 50 (2009).

## STATEMENT OF FACTS

On March 6, 2017, Chandra Keyes (hereinafter "Ms. Keyes") was the manager at the Boost Mobile store where Mr. Laron Rogers (hereinafter "Mr. Rogers") was employed as a customer service representative. (702:3-703:24). Mr. Great Htoo, another employee of the Boost Mobile, worked with Mr. Laron Rogers on March 6, 2017, during the second shift that commenced in the afternoon. (728:9-21). During this shift, Mr. Rogers asked Mr. Htoo if he could borrow $100. (725:10-20). Mr. Htoo did not provide Mr. Rogers with the money, as he believed Mr. Rogers to be joking. (725:10-20).

Ms. Hope Hood, another manager of a different Boost Mobile store, took an opportunity to pick up two phones from the Boost Mobile store on Northwest Radial Highway so that she could visit her good friend, Mr. Rogers, during his shift. (733:9-735:4, 14-24; 758:1-3). Upon arrival, Ms. Hood met Mr. Rogers in his vehicle, where the two chatted and smoked marijuana. (740:1-11; 758:1-5). During this interaction, Ms. Hood observed her friend to be less talkative and he communicated that he was feeling stressed. (759:4-14). Further, Mr. Rogers conveyed to her that he "felt like he was falling behind" and stated, "I feel like I'm never going to catch up to myself." (759:15-21). Moreover, Mr. Rogers asked her to borrow money, which she did not provide to him. (740:15-20).

Ms. Hood knew Mr. Rogers to be a marijuana dealer. (734:3-15; 749:15-18; 757:13-15). She informed law enforcement that Mr. Rogers reported to her, while in the Boost Mobile parking

lot, that he owed his "plug" (drug supplier) money. (759:22-761:5; 902:5-9).

At some point during this conversation, Ms. Hood observes a vehicle enter the parking lot of Boost Mobile on Northwest Radial Highway. (741:6-15). There were two men inside of the vehicle, one of which she recognizes as Mr. Forrest Cox. (741:3-742:4). According to Ms. Hood, the driver was a bald, stocky male, who did not approach the vehicle. (741:3-15). Instead, he stood in front of the vehicle, without saying a word. (749:1-8; 762:4-14).

Upon Mr. Cox's approach to the driver side of the vehicle, Mr. Rogers greeted the taller male, Mr. Cox, as "cuz." (748:18-25; 763:4-12). To Ms. Hood, it seemed like Mr. Rogers had just seen an old friend. (749:1-11). The two men engaged in a conversation, wherein they exchanged phone numbers and had a back-and-forth over "two twos." (763:17-22; 764:14-24). Ms. Hood understood this as a conversation over ounces of marijuana. (763:13-26; 765:11-16). Further, she saw a white lidded container of marijuana that Mr. Rogers displayed in the vehicle. (763:23-764:13). Mr. Rogers displayed this white lidded container to Mr. Cox during their conversation over marijuana. (745:17-746:11; 763:23-764:13). This same white lidded container of marijuana was recovered by law enforcement, following the shooting, in the same condition as Ms. Hood observed in the Boost Mobile parking lot. (763:23-764:13).

Tha evening, a gentleman entered the Boost Mobile store, inquiring about a particular phone. (726:19-727:11). Mr. Htoo physically identified Mr. Forrest Cox, during the course of the trial, as the individual who left the blue post-it note written with a name and number it. (726:1-18; 727:22-25; Exhibit 118). The blue post-it contained the writing "B", "Bubba" with the numbers "312-6473". (Exhibit 118). Ms. Keyes provided a sticky note to law enforcement. (718:1-20).

Upon review of the surveillance video from Boost Mobile, Detective Ryan Hinsley (hereinafter "Detective Hinsley") identified the other male from the white Impala as Mr. Rufus

Dennis (hereinafter "Mr. Dennis"). During the course of his interview, Mr. Dennis indicated that he did have access to his mother's white Impala, yet clarified that he did not own the vehicle. (774:19-775:13). Thereafter, Detective Hinsley made efforts to locate the white Impala. (775:2-4) This was accomplished by having Mr. Dennis lead him to the vehicle. (775:2-20; 837:1-10). Mr. Dennis refused to accompany the detective in his vehicle, and instead, had Detective Hinsley follow him in a vehicle driven by his mother. (775:2-20; 837:1-10; 905:4-12).

As a result, law enforcement was able to process the white Impala with the assistance of its Forensic Investigations Unit. (784:16-25; 847:3-850:6). While doing so, law enforcement discovered a steering wheel cover. (Exhibit 87; 787:11-21). Also within the vehicle, law enforcement observed and collected a partially open ProElite box of license plate fasteners. (790:19-791:9; Exhibit 119). Further, there was an AutoZone receipt collected from the inside of the vehicle dated 3/15/2017 with a plate number UEK 803. (Exhibit 101, 116; 795:19-796:18). Additionally, law enforcement also collected and observed the registration for the white Impala, belonging to Ms. Deanna Dennis, the mother of Mr. Rufus Dennis. (Exhibit 104; 798:8-14; 835:14-836:3).

During the course of Detective Hinsley's interrogation of Mr. Dennis on March 27, 2017, the same month as the shooting, Mr. Dennis was shown a photo of Mr. Rogers. (835:14-836:10). Mr. Dennis denied to the detective that he had ever seen Mr. Rogers in his life. (835:14-836:10; 1116:8-22). Further, Mr. Dennis initially denied being at Boost Mobile on March 6, 2017, with Mr. Cox. (836:4-25). It was only *after* the detective showed Mr. Dennis photos and surveillance video from Boost Mobile did he admit that he was at Boost Mobile on March 6, 2017. (836:4-25).

On March 6, 2017, LT Thomas's son, Mr. Laron Rogers, returned home from his shift at Boost Mobile on somewhere between 5:30 p.m. and 6:15 p.m. (693:19-24; 695:12-22). While at

home, and before leaving the residence again, Mr. Rogers asked his father, Mr. Thomas, for "some change." In response to this request, before Mr. Rogers left the house, Mr. Thomas provided his son two $100 bills. (696:14-697:18).

During the course of the day, Mr. Rogers made two visits to his bank, SAC Federal Credit Union. (912:6-932:9, Exhibits 120-121). Mr. Rogers made two withdrawals on the day of the shooting, one for $120 cash and the other for $821.89. (912:6-932:9; Exhibits 120-121). The first withdrawal was made at 1:49 p.m. on March 6, 2017. (912:6-932:9; Exhibits 120-121). The second withdrawal was made by Mr. Rogers that evening, at 6:56 p.m. (912:6-932:9; Exhibits 120-121). In each instance, Mr. Rogers had a remaining balance in his accounts of nearly the minimum permitted by the bank, which is five dollars. (912:6-932:9; Exhibits 120-121).

Jeffrey Hammock, an employee at the Ames Avenue Convenience Store, located at 42nd at Ames Avenue in Omaha, was working on the evening of March 6, 2017. (435:22-436:5; 438:19-25). The music was on inside of the convenience store. (446:5-12). Mr. Hammock did not hear a gunshot, but rather learned of a shooting from a customer. (446:5-15). In response, with his phone in hand, Mr. Hammock ran outside and approached the individual on the ground, who he observed to be one of his regular customers. (446:13-447:14). This customer was Mr. Laron Rogers. (446:18-447:10). Mr. Rogers was lying face down on the ground, repeatedly stating, "it hurts, it hurts." (439:16-440:12; 448:10-19). Accordingly, Mr. Hammock called "911." (444:9-445:21).

Mr. Hammock knew Mr. Rogers to drive a 2007 or 2008 grey Impala, which he observed parked in the lower lot of the convenience store following the shooting. (441:19-442:15; 448:20-449:2). This was a lot, per Mr. Hammock, that folks knew to avoid, at least after dark, as it was a regular spot for drug deals to occur. (448:24-449:9). As an employee of the convenience store for a number of years, Mr. Hammock knew Mr. Rogers to sell, at the very least, small amounts of

marijuana. (447:15-448:90).

Moments prior to the shooting, surveillance video of the dark, lower lot seemed to depict a white sedan pulling into the parking lot with headlights illuminated. (Exhibit 135; 813:8-20; 814:5-10). This was based upon law enforcement's own observation. (813:8-20; 814:5-10; 841:25-842:12). It was not formed by anyone associated with manufacturing or design from the Chevrolet Corporation, nor was it the opinion of any individual associated with a local Chevrolet dealership. (841:25-842:12).

Mr. Charles Moore (hereinafter "Mr. Moore") was a patron at the Ames Avenue convenience store on the evening of March 6, 2017. (499:1-10). While Mr. Moore did not hear a gunshot, he did observe a white vehicle speed out of the south parking lot, turning left, down 42nd Street. (505:12-14, 22-24; 508:4-15). Mr. Moore believed that the white car was somewhere between a 2001 and 2004 Chevrolet Impala. (507:3-17). This belief was based upon years of experience detailing vehicles. (507:3-17). Mr. Moore did not observe the vehicle to have license plates, although in transits may have been displayed on the vehicle. (508:19-509:5). The only vehicle remaining in this lot was a purple or maroon Pontiac. (503:19-24).

Immediately thereafter, Mr. Moore observed a heavy, black man staggering up from the south lot, shouting, "call the police, call the police." (501:10-16; 508:10-18). Another individual went inside the store to retrieve the cashier, asking him to call the police. (501:22-502:3). Mr. Rondo Green (hereinafter "Mr. Green"), also a customer at the convenience store on this evening, made a similar observation of a male staggering up from the dimly lit, south parking lot. (511:17-513:11; 519:20-520:23). The man was staggering or falling down in such a way that, at first, Mr. Green believed him to be high or drunk. (511:17-513:11). Initially, Mr. Green reported to law enforcement that he believed he saw a small, dark vehicle leaving that south lot. (841:8-24). This

vehicle, Mr. Green conveyed to law enforcement, was *not* an Impala. (841:8-24).

Upon firefighter paramedic Bernard Wierzbicki's (hereinafter "paramedic Wierzbicki") arrival to the convenience store parking lot, Mr. Rogers was in stable condition by the paramedic's standards. (459:19-460:2). Mr. Rogers was able to communicate with the first responders. (456:3-23; 462:4-9). Mr. Rogers was alert, by paramedic Wierzbicki's assessment, to person, place, time and event. (462:13-15). Further, Mr. Rogers was able to communicate on scene that he had been shot. (456:3-23).

Mr. Rogers was transported to the hospital, during which time Omaha Police Officer Bradley Nielsen (hereinafter "Officer Nielsen") rode in the ambulance with him. (538:13-539:11). During the ambulance ride to the hospital, Mr. Rogers did not make any statements to Officer Nielsen. (539-:21-23). Officer Nielsen did inquire who shot Mr. Rogers, to which he did not receive a response from Mr. Rogers. (545:15-19).

Mr. Rogers' clothing was collected by law enforcement on this particular evening. (540:10-544:24). Inside of his wallet, law enforcement discovered three $2 bills. (540:10-544:24). Further, inside of the front jeans pocket, law enforcement collected 2.27 grams of cocaine. (891:1-892:11; Exhibit 71).

Mr. Rogers' vehicle was processed by the Forensic Investigations Unit of the Omaha Police Department on the evening of the shooting. (548:4-550:7; 850:15-852:15). The Forensic Investigations Unit did not swab any of the markings for what was "apparent blood" in or near his vehicle to confirm if the observed substance was or was not, in fact blood. (548:4-595:12). The interior and exterior of Mr. Rogers' vehicle was swabbed for DNA. In addition, the vehicle was processed for fingerprints. (583:20-588:5). The Forensic Investigations Unit was able to lift fingerprints from the vehicle, concluding that a comparison revealed prints belonging to Mr.

Rogers were detected. (583:20-588:5).

Law enforcement also located narcotics within Mr. Rogers' vehicle. (617:18-20; Exhibit 43). The narcotics were not visible from the outside of the vehicle. (617:18-618:4). According to Detective Justin Rudloff (hereinafter "Detective Rudloff"), the amount of marijuana recovered in Mr. Rogers' vehicle was beyond a mere user amount—it was an amount reflective of distribution. (618:22-619:8). The amount of marijuana recovered from Mr. Rogers' vehicle amounted to approximately four ounces. (624:19-22; 850-15-852:15). In addition, a number of clean, clear plastic baggies were recovered from his vehicle by law enforcement following the shooting. (625:2-4).

Photographic "stills" were collected from the video surveillance camera at AutoZone, store number 6224, in Omaha, Nebraska, from March 15, 2017, approximately a week and a half after the shooting. (863:8-871:11). These stills depicted an adult, black male entering the store and then making a purchase of a steering wheel cover. (863:8-871:11; Exhibits 111-115). Detective Hinsley identified this adult, black male as Mr. Cox. (1104:18-1107:24).

Following the shooting, law enforcement discovered that a 2004 white Chevrolet Impala was sold at a local auto sales shop on North 24th Street in Omaha, Nebraska. (899:2-900:18). This vehicle was sold "quickly." In fact, it was sold the day following the shooting, on March 7, 2017. (899:2-13). Law enforcement did little to no follow up with respect to where that vehicle had come from or who it had been sold to. (899:2-900:18; 910:3-13). Instead, all law enforcement could account for was that it was purchased by a female. (899:2-21).

Eventually, law enforcement made efforts to locate Mr. Forrest Cox by placing a "locate" out him. (831:19-832:4; 1090:204). Detective Hinsley was able to make contact with Mr. Cox as a result of a traffic stop for an unrelated matter to the shooting of Mr. Rogers. This occurred nearly

a year after the incident, on February 26, 2018, at Omaha Police Department Central Station. (833:8-12; 1090:7-11). During the course of the interrogation, Mr. Cox reported to law enforcement that he did see Mr. Rogers on the day of the shooting at Boost Mobile. (1115:25-1116:7; E162). Mr. Cox explained that he was familiar with Mr. Rogers after having worked together at Manheim. (1116:3-4). Further, Mr. Cox recalled being at Boost Mobile with Mr. Dennis. (1117:7-10; E162). In his interrogation nearly a year after the shooting, Mr. Cox denied being anywhere near the area of 42nd and Ames Avenue on the evening in question. (E162). Mr. Cox reported to the detective that he believed he was with Ms. Lateah Carter-Thomas at her residence, where the two spent the evening together. (E162). From a review of the phone records, the detective discovered that Mr. Cox had been in contact with a number of females that day on the cellular phone registered in his name, however from a review of the call detail records, the detective could not find any contact with Ms. Carter-Thomas on March 6, 2017. (1102:2-25).

Detective Nick Herfordt (hereinafter "Detective Herfordt") of the Digital Forensics Unit, was responsible for processing cellular phones in the criminal investigation. (942:11-23). From his investigation, he was able to review the one text message between the phones attributed to Mr. Rogers and Mr. Cox. It was a text message from Mr. Rogers' phone to Mr. Cox's phone on March 6, 2017, sent at 6:37:38 p.m. that states, "This Ronno." (957:14-958:20; 993:12-996:1; Exhibits 138, 152, 153). Moreover, there were four completed calls made between the phone number registered to Mr. Rogers and the phone number registered to Mr. Cox between 7:23 p.m. and 7:45 p.m. on March 6, 2017. (996:2-20). The call detail records of the phone registered to Mr. Cox, as plotted by Detective Herfordt, provided cellular site location information of approximately 42nd and Ames Avenue during the phone calls at 7:36 p.m. and 7:45 p.m. Thereafter, at 7:57 p.m., the cellular tower used by the number registered to Mr. Cox was in use of the cellular tower near 72nd

and Ames Avenue, with an estimated distance of 1.22 miles from the most recent tower used at 42nd and Ames Avenue, where the Ames Avenue Convenience Store is located. (1036:2-24).

When a "transaction" occurs on a cellular phone, the phone will "communicate" with the tower that the device has the best relationship with. (971:17-23; 998:18-25). This is not necessarily the closest tower, as it could be affected by the volume of calls at the time, geography, or extreme surges of electricity. (971:14-23; 998:18-25; 999:1-21; 1048:3-25). In this event, the phone will register or communicate with another tower. (1049:3-12). Specifically, in Omaha, Nebraska, this would likely be within approximately a mile. (1049:3-12).

Detective Herfordt, during the course of the investigation, also took the opportunity to review the cellular records for the phone number registered to Mr. Dennis around the time of the homicide. (1045:17-1046:20; 1052:3-1053:25). This analysis was done at the direction of Detective Hinsley. (1045:17-1046:20; 1052:3-1053:25). Despite his efforts, the detective was unable to retrieve any cellular site location information from said records as there was complete inactivity on this cellular phone a half hour to an hour before *and* after the shooting. (1045:17-1046:20; 1052:3-1053:25). Namely, Mr. Dennis' cellular phone was deplete of activity from 6:46 p.m. to 8:04 p.m. on March 6, 2017. (1123:2-16). This complete lack of records could have simply been attributable to nonuse of the phone. (1052:3-1053:25). However, it also could have been due to a user manually turning off the cellular phone or placing the phone in "airplane mode" during this timeframe surrounding the homicide. (1052:3-1054:12). In airplane mode, a cellular phone will not transmit or receive a signal. (1054:4-12). Nonetheless, it was unusual for this particular number as there was regular activity from November 2, 2016, all the way through March 27, 2017. (1123:2-16).

Furthermore, Detective Herfordt analyzed the cellular site location information for the

phone number registered to Mr. Laron Rogers in the hours leading up to the shooting. From this analysis, he was able to discern that the cellular site location information revealed the phone may have been in the general area of 73rd and Graceland Drive, nearly the Skyline Retirement Community, at 7:16 p.m. on March 6, 2017, the day of the shooting. (1058:18-1060:17; Exhibit 169). Detective Herfordt analyzed a total of *six* calls that communicated with this particular tower, located at 7350 Graceland Drive, starting at 7:16 p.m. Subsequently, there were calls connecting to this tower at 7:22 p.m., 7:23 p.m., 7:30 p.m., 7:36 p.m., and 7:41 p.m. (1060:18-1061:11).

This same cellular tower, tower 609, was in use by another number Detective Herfordt was asked to assess by Detective Hinsley during the same timeframe—a number attributed to a Mr. William McNeal. (1061:18-1063:10). During the course the investigation, Detective Hinsley discovered that at the time of the homicide, Mr. McNeal was Mr. Rogers' "plug." (1120:14-1121:17). In other words, Mr. McNeal supplied Mr. Rogers with the marijuana that he distributed. (1120:14-1121:17). Detective Hinsley's investigation further revealed that on the day of the shooting, Mr. Rogers owed Mr. McNeal, his supplier, some money to a point where he seemed desperate. (1120:14-1121:17).

In total, Detective Herfordt plotted seven phone calls from the phone registered to Mr. McNeal between 5:00 p.m. and 7:57 p.m. on March 6, 2017. (1063:1-21). Specifically, Detective Herfordt believed the cellular phone to be located nine-tenths of a mile from the tower during these seven calls. (1063:1-21). The distance between the subject tower, 609, and the registered address for the phone associated with Mr. McNeal is a little under a mile by Detective Herfordt's calculation. (1063:6-1068:8; Exhibit 170).

Ms. Lareah Carter-Thomas, a "friend" of Mr. Forrest Cox, did not recall seeing Mr. Cox on March 6th or 7th of 2017. (1081:2-11). Albeit, there would be times in which Mr. Cox would

spend the night at her residence. (1081:2-11). Furthermore, when Ms. Carter-Thomas was interviewed by Detective Hinsley approximately a year after the shooting, she reported she could not recall if she was with Mr. Cox on the evening of the shooting. (1084:-1086:8).

Dr. Michelle Elieff (hereinafter "Dr. Elieff"), a forensic pathologist, conducted the autopsy of Laron Rogers. (641:6-11). During the course of the autopsy, Dr. Elieff observed a gunshot entrance wound on Mr. Roger's back, right side in the hip area. (649:4-9). The gunshot traveled from the back to the front, right to left, at a slightly downward trajectory. (656:21-657:5). Upon conducting the autopsy, Dr. Elieff was able to determine to a reasonable degree of medical certainty that the cause of death to Mr. Rogers was a gunshot wound of the lower torso. (663:11-18).

## SUMMARY OF ARGUMENT

On *de novo* review on the matter, this Court should reverse the holding of the trial court in denying the motion to suppress cellular records as the search warrant, which set forth in its affidavit that there was a text message sent by the deceased more than an hour before the shooting, as it was unsupported by probable cause to believe that evidence of the crime would be found on the cellular phone and further failed to particularly describe the evidence to be searched and seized. Moreover, it was reversible error for the trial court to apply the good faith doctrine as the search warrant for the cellular phone amounted to a general search warrant. It was also reversible error for the trial court to overrule the objection and deny the motion to suppress wherein the cellular records are derivative of the initial unlawful search. In addition, the trial court incorrectly applied, on its own motion, the independent source doctrine without making the requisite factual determinations of this Fourth Amendment exception. Finally, reversal of Mr. Cox's convictions is warranted as the trial court erred in denying the motion to suppress statements, acquired contrary to the protections

guaranteed by *Miranda*.

## ARGUMENT

### I. THE TRIAL COURT SHOULD HAVE SUSTAINED THE MOTION TO SUPPRESS EVIDENCE ACQUIRED AS A RESULT OF THE EXECUTION OF A GENERAL SEARCH WARRANT, LACKING IN AN EVIDENTIARY NEXUS TO THE CELLULAR PHONE AND PARTICULARITY.

The Fourth Amendment of the United States Constitution provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures…," and further guarantees "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" (emphasis added). Consequently, the execution of a search warrant without probable cause violates the Fourth Amendment. *State v. Sprunger*, 283 Neb. 531, 537, 811 N.W.2d 235, 242 (2012). Therefore, in order for a search warrant to be valid, it must be supported by an affidavit that establishes probable cause. *Id.*

Probable cause sufficient to justify the issuance of a search warrant exists when there is "a fair probability that contraband or evidence of a crime will be found." *Id.* at 537, 811 N.W.2d at 242. The Nebraska Supreme Court has made clear, that in order to establish the requisite probable cause for issuance of a warrant, "it must be probable that (1) the described items are *connected* with criminal activity and (2) they are to be found in the place to be searched." *Id.* at 540, 811 N.W.2d at 244 (emphasis added). In evaluating the sufficiency of an affidavit, the reviewing court is limited to the circumstances and information contained within the four corners of the affidavit. *Id.* at 540, 811 N.W. 2d at 243-244.

The Fourth Amendment requirement of probable cause is closely related to the requirement

of particularity. *Id.* at 540, 811 N.W.2d at 243. According to the Nebraska Supreme Court, "[t]he Founding Fathers' abhorrence of the English King's use of general warrants---which allowed royal officials to engage in general exploratory rummaging in a person's belongings---was the impetus for the adoption of the Fourth Amendment. Simply put, the Fourth Amendment prohibits 'fishing expeditions.'" *Id.* Furthermore, the purpose of this particularity requirement, in part, "is to prevent 'the issuance of warrants on loose, vague or doubtful bases of fact.'" *Id.*

The Court in *Stanford v. State of Texas*, 379 U.S. 476, 478-479 (1965), emphatically rejected the validity of a search warrant for its lack of particularity wherein law enforcement was permitted to search the defendant's residence for "...books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings, and other written instruments concerning the Communist Party of Texas..." The basis for the application of the search warrant was that law enforcement had "received information from two credible persons" that the defendant had in his possession books and records of the Communist Party, which was in violation of Suppression Act. *Id.* at 477-478.

The Court, in finding the warrant unconstitutional, described the words of the Fourth Amendment as "precise and clear." *Id.* at 481. Further, the Court explained that the words in the Fourth Amendment "...reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, house, papers, and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant." *Id.* The purpose of this specific language, the Court noted, was to prevent the type of *blanket authority* that had been permitted under the Crown for officers "to search where they pleased for goods imported in violation of the British tax laws." *Id.* (emphasis added). The particularity requirement of the Fourth Amendment "...makes general searches under them impossible and

prevents the seizure of one thing under a warrant describing another." *Id.* at 485 (citing *Marron v. U.S.*, 275 U.S. 192, 196 (1927)). Consequently, the Court held,

> [t]he point is that it was not any contraband of that kind which was ordered to be seized, but literary material—'books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas...The indiscriminate sweep of that language is intolerable. To hold otherwise would be false to the terms of the Amendment, false to its meaning, and false to its history.

*Id.* at 486.

Recently, the Court has determined in *Riley v. California*, 134 S.Ct. 2473 (2014), that these Fourth Amendment protections extend to the search of the digital contents of a cellular phone. The Court refused to extend the search incident to arrest doctrine to cellular phones, reasoning that neither officer safety nor destruction of evidence—data from the phone—was at issue. *Id.* at 2484-2486. Further, in support of this conclusion, the Court explained that cell phones differ both quantitatively and qualitatively from other objects that may be found on an arrestee's person. *Id.* at 2489. Namely, the most notable distinguishing feature of a cell phone as opposed to other objects that might be kept on an arrestee's person is the "immense storage capacity." *Id.* At the time this opinion was published, the Court determined that the top-selling smart phone had the capacity to store "*millions* of pages of text, thousands of pictures, or hundreds of videos." *Id.* (emphasis added). Thus, the Court held, "[t]he fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought." *Id.* at 2495.

In doing so, the Court acknowledged its precedent:

> In 1926, Learned Hand observed…that it is 'a totally different thing to search a man's pockets and use against him that they contain, from ransacking his house for everything which may incriminate him.' If his pockets contain a cell phone, however, that is no longer true. Indeed, *a cell phone search would typically expose to the government far more than the exhaustive search of a house*…

*Id.* at 2490-2491 (emphasis added).

Therefore, the Court determined "[o]ur answer to the question of what police do before searching a cell phone…is accordingly simple—get a warrant." *Id.* at 2495. These Fourth Amendment protections, however, apply not only to the substantive content of a cell phone, but to cell-site location information (hereinafter "CSLI") data of a cell phone as well. *Carpenter v. United States*, 585 U.S. ____, 138 S.Ct. 2206 (2018).

The Court in *Carpenter* refused to apply the exception to the Fourth Amendment of the third party doctrine to CSLI, holding that an individual has a reasonable expectation of privacy "in the record of his physical movements as captured through CSLI." *Id.* In support of its holding that a reasonable expectation of privacy exists, the Court reasoned, "…the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" *Id.* (quoting *United States v. Jones*, 565 U.S. 400, 412 (2012)(opinion of Sotomayor, J.)). As a result, when law enforcement obtains CSLI data from an individual's wireless carrier, this constitutes a search pursuant to the Fourth Amendment. *Id.*

Further, the Court explained, "[h]ere the progress of science has afforded law enforcement a powerful new tool to carry out its important responsibilities. At the same time, this tool risks Government encroachment of the sort the Framers, 'after consulting the lessons of history,' drafted

the Fourth Amendment to prevent." *Id.* (citing *United States v. Di Re*, 332 U.S. 581, 595 (1948)). As a result, the Court held "[i]n light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection…," the Fourth Amendment protects such an invasion, generally necessitating a search warrant. *Id.*

The Nebraska Supreme Court determined in *State v. Sprunger*, that the affidavit submitted in support of the search warrant of the defendant's computers did not establish probable cause. 283 Neb. at 538, 811 N.W.2d at 243. In *Sprunger*, law enforcement was conducting an investigation regarding a credit card fraud for the purchase of computer equipment. *Id.* at 533, 811 N.W.2d at 239. The computer equipment was sent to an address in the State of New Jersey. *Id.* However, law enforcement discovered that the Internet protocol (IP) address used for the purchase belonged to an apartment in Nebraska. *Id.* This apartment was that of the defendant's. *Id.* Thereafter, law enforcement obtained a searched warrant allowing for the seizure of "[a]ny and all computer equipment" that was in the defendant's apartment. *Id.* at 534, 811 N.W.2d at 240. When officers were executing this search warrant, the deputies discovered additional facts that led them request a second search warrant. *Id.*

Specifically, law enforcement found it pertinent in establishing probable cause for the second warrant that when the defendant was informed that deputies were taking his computers, the defendant asked if he could first delete some files. *Id.* He was denied permission by law enforcement. *Id.* Subsequently, deputies asked the defendant if he had child pornography on his computers, which the defendant denied. *Id.* Several days later, the defendant's attorney contacted the deputies, inquiring about the child pornography case that was being investigated. *Id.* The defendant's lawyer stated to deputies that the defendant had told him "his computers had been taken to look for Child Pornography." *Id.* It was these additional facts—the defendant's request to

delete files on his computer and the call from the defendant's attorney—that led law enforcement to apply for a second search warrant. *Id.*

The county court authorized the second warrant so that law enforcement could search the computers for evidence of child pornography. *Id.* As a result of this search, the defendant was charged with 20 counts of Possession of Child Pornography. *Id.* The State did not contend that law enforcement discovered or would have discovered the child pornography as a result of the first search warrant, which was an investigation of the credit card fraud. *Id.* at 537-538, 811 N.W.2d at 242. Therefore, the validity of the search of the defendant's computer that resulted in the discovery of child pornography hinged upon the second search warrant. *Id.* at 538, 283 Neb. at 242.

Upon *de novo* review, the Nebraska Supreme Court determined that these additional facts discovered by law enforcement during the execution of the initial search warrant did *not* establish probable cause sufficient to support the issuance of the second search warrant of the defendant's computer. *Id.* at 538, 811 N.W.2d at 243. The court first analyzed the communication between law enforcement and the defendant's attorney, finding "[t]he fact that Sprunger's lawyer called the deputies about their investigation does not establish that Sprunger had admitted to possessing child pornography." *Id.* Further, the court determined that this inquiry did not establish probable cause, it was not a suggestion that the defendant had committed a crime, but rather was simply a reflection of the deputy's statement. *Id.* This did not "add to a finding of probable cause to search for child pornography." *Id.*

The Nebraska Supreme Court also rejected the contention that probable cause existed based upon the defendant's request to delete files before law enforcement seized his computers. *Id.* at 540, 811 N.W.2d at 244. In support of its conclusion, the court acknowledged that "[i]t is true that the fact Sprunger asked to delete some files *might have raised a suspicion*," but nonetheless

determined that this suspicion did not amount to probable cause. *Id.* (emphasis added). The court provided that if the search of the defendant's computer had been allowed, "[t]heir search would have amounted to a rummaging through a treasure trove of information." *Id.*

Moreover, in its rationale, the court set forth, "'[t]he modern development of the personal computer and its ability to store and intermingle a *huge array* of one's personal papers in a single place increases law enforcement's ability to conduct a wide-ranging search into a person's private affairs.' *It thus makes the particularity and probable cause requirements all the more important.*" *Id.* at 540-541, 811 N.W.2d at 244 (citing *Mink v. Knox*, 613 F.3d 995, 1010 (10th Cir. 2010))(emphasis added). Accordingly, the Nebraska Supreme Court determined that the affidavit underlying the search warrant did not establish a fair probability that particular evidence of child pornography would be found. *Id.* See *U.S. v. Schutz*, 14 F.3d 1093 (6th Cir. 1994)("While an officer's 'training and experience' may be considered in determining probable cause…it cannot substitute for the lack of evidentiary nexus…prior to the search").

The Tenth Circuit Court of Appeals has repeatedly warned of and emphasized in the importance of the particularity requirement when an electronic device is the subject of a search. See *U.S. v. Otero*, 563 F3d 1127, 1132 (10th Cir. 2009); *U.S. v. Walser*, 275 F.3d 981, 986 (10th Cir. 2001); *U.S. v. Carey*, 172 F.3d 1268, 1275-1276 (10th Cir. 1999).

The Tenth Circuit Court of Appeals reversed the defendant's convictions in *United States v. Carey* because the seizure of the child pornography on the computer was beyond the scope of the search warrant. 172 F.3d at 1276. In *Carey*, the defendant was under investigation for narcotics sales. *Id.* at 1270. A search warrant was obtained allowing law enforcement to search the defendant's computers "for 'names, telephone numbers, ledger receipts, addresses, and other documentary evidence pertaining to the sale and distribution of controlled substances." *Id.* at 1270.

Upon examining the hard drives, the detective discovered numerous "JPG" files with sexually suggestive titles. *Id.* at 1271. The detective opened one of these files and discovered it was child pornography. *Id.* Ultimately, as a result of this search, the defendant was charged with and convicted of "possessing a computer hard drive that contained three or more images of child pornography produced with materials shipped in interstate commerce." *Id.* at 1270.

Ultimately, the Tenth Circuit Court of Appeals held that law enforcement must specify within a search warrant which types of files are sought for search and seizure. *Id.* at 1275. Because law enforcement failed to do so, and the "seizure of the evidence upon which the charge of conviction was based was a consequences of an unconstitutional *general* search," the court reversed and remanded the defendant's conviction for the Fourth Amendment violation. *Id.* at 1276 (emphasis added).

The District of Columbia Circuit Court of Appeals in *United States v. Griffith*, 867 F.3d 1265 (D.C. Cir. 2017), reversed the judgment of the district court and vacated the defendant's conviction wherein the search warrant was unsupported by probable cause, which allowed law enforcement to *unlimitedly* search and seize the defendant's cell phone. In doing so, the D.C. Circuit Court of Appeals recognized precedent that has long distinguished between an arrest warrant and a search warrant. *Id.* at 1271 (citing *Steagald v. U.S.*, 451 U.S. 204, 212-213 (1981)). Thus, the court held "[r]egardless of whether an individual is validly suspected of committing a crime, an application for a search warrant concerning his property or possessions must demonstrate cause to believe that 'evidence is likely to be found at the place to be searched.'" *Id.* (citing *Groh v. Ramirez*, 540 U.S. 551, 568 (2004).

In the affidavit underlying the search warrant in *Griffith*, law enforcement set forth that a shooting had occurred between to rival gangs as a result of a conflict. *Id.* at 1268. The defendant

was a member of one of the rival gangs. *Id.* More importantly, he was suspected of being the driver of the getaway car, which surveillance video had captured circling the scene of the shooting. *Id.* at 1268-1269. This surveillance video also led law enforcement to discover that a matching vehicle to the one depicted in the video was registered to the defendant's mother, who confirmed that the defendant had been the principal user of the vehicle at the time of the shooting. *Id.* at 1269. Further, while the defendant was incarcerated on unrelated charges, a number of his jail phone calls were recorded. *Id.* Of particular note were two phone calls, one made on the day his mother was interviewed by law enforcement where the defendant stated, 'man you know it's about that,' while speaking to another suspect in the shooting and the other call where the two individuals briefly discussed a "whip" (slang for car). *Id.* All of this information was set forth in the ten-page affidavit supporting the search warrant, wherein the affiant—a 22-year veteran of the police department—additionally opined his belief that the defendant was the getaway driver. *Id.* Nonetheless, the D.C. Circuit Court of Appeals held the search warrant was unsupported by probable cause and unduly broad. *Id.* at 1271.

In reaching its holding, the court again relied on precedent as established by the United States Supreme Court, and opined, "[t]here must, of course, be a nexus…between the item to be seized and criminal behavior." *Id.* (citing *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967)). The court rejected that such a nexus existed as there was no reason to believe contained within the affidavit to believe that the defendant owned a cell phone or that any cell phone he possessed would contain incriminating evidence of his suspected offense. *Id.* at 1272-1273. Accordingly, the court held "[b]ecause a cell phone, unlike drugs or other contraband, is not inherently illegal, there must be reason to believe that a phone may contain evidence of the crime." *Id.* at 1274. As there was no reason for such a belief, the warrant was deemed constitutionally

invalid. *Id.* at 1278.

A number of courts have concluded that a search of an electronic device "gives rise to *heightened particularity concerns*." See *U.S. v. Galpin*, 720 F.3d 436, 446-447, 449-450 (2nd Cir. 2013); See *U.S. v. Payton*, 573 F.3d 859, 861-865 (9th Cir. 2009); *State v. Keodara*, 364 P.3d 777, 781 (Wash. Ct. App. 2015); *State v. Griffith*, 120 P.3d 610, 614 (Wash. Ct. App. 2005). The Court of Appeals of Washington held in *State v. Keodara* the search warrant of the defendant's cell phone to be unconstitutional as it was a general warrant and impermissibly overbroad. 364 P.3d at 781-782. The defendant was involved in a shooting, for which he was ultimately convicted of first degree murder, three counts of first degree assault, and unlawful possession of a firearm. *Id.* at 780. However, prior thereto, the defendant was apprehended for an unrelated incident, at which time law enforcement seized his cellular phone. *Id.* at 778. The cellular phone was located within a vehicle along with illegal narcotics and drug paraphernalia as a result of a traffic stop. *Id.* at 779.

A search warrant was obtained to search the defendant's phone based upon an officer's *extensive training and experience with gangs* that those so affiliated frequently use their cellular phones to take and store photographs of illegal activity. *Id.* at 778 (emphasis added). As a result of this search, text messages and photographs were obtained from the defendant's phone that were used as evidence against him during the course of trial. *Id.* at 778-779.

The Court of Appeals of Washington rejected the validity of the warrant, reasoning, "[w]ithout evidence linking Keodara's (defendant's) use of his phone to any *illicit* activity, we find the affidavit to be insufficient under the Fourth Amendment." *Id.* at 782 (emphasis added). Further, the court explained, "*...more is required or the necessary nexus than the mere possibility of finding records of criminal activity.*" *Id.* (emphasis added). The State's argument—that the affiant officer's "wealth of specific experience and training" with gangs created the evidentiary nexus

between the evidence and the defendant's phone—was unequivocally rejected. *Id.* at 782-783.

Moreover, not only was the warrant lacking in probable cause, but it failed as to the particularity requirement of the Fourth Amendment as well. *Id.* at 783. First, the warrant failed to establish a limit as to what type of information or data could be searched on the cellular phone. *Id.* Second, there was no temporal limit as to the information that was to be searched as a result of the warrant. *Id.* Third, the warrant was not sufficiently particular merely because it limited the search to evidence of certain enumerated crimes. *Id.* Consequently, the court held the warrant was overbroad, lacking in probable cause and particularity. *Id.*

Similarly, the Supreme Court of Massachusetts in *Commonwealth v. White*, affirmed the decision of the trial court, rejecting the validity of the search warrant for the defendant's cellular phone for its failure to satisfy the probable cause nexus requirement of the Fourth Amendment. 59 N.E.3d 369, 376-377 (Mass. 2016). In *White*, at the time the defendant's cell phone was searched and seized, law enforcement had sufficient reason to believe that the defendant was one of three suspects involved in a felony and in fact charge as well as arrest him for that offense. *Id.* at 373. Nonetheless, law enforcement "had no information that the cellular telephone had been used to plan, commit, or cover up the crime, or that it contained any evidence of the crime." *Id.* at 371. Rather, the detective was aware from his training and experience, that cell phones are frequently used when an offense involves multiple perpetrators and thus cell phones often contain useful information with respect to the criminal investigation. *Id.* at 371-373.

In affirming the ruling of the trial court, the Supreme Court of Massachusetts stressed the distinction under the Fourth Amendment between probable cause to suspect and arrest a defendant of a crime as opposed to probable cause to search and seize the same suspect's cellular phone. *Id.* at 376-377. Further, the court elaborated that such a distinction is critical because in order to satisfy

the probable cause requirement of the Fourth Amendment, the government must demonstrate the existence of a nexus between the crime alleged and the item to be searched and/or seized. *Id.* at 374-376. While the burden on the government to establish such a nexus need not be established beyond a reasonable doubt, the court reiterated that "'[s]trong reason to suspect is not adequate.'" *Id.* at 375 (citing *Commonwealth v. Kaupp*, 899 N.E.2d 809 (Mass. 2009); *Commonwealth v. Upton*, 476 N.E.2d 548 (Mass. 1985). Moreover, in support of its holding, the court reasoned that while the experience and expertise of law enforcement may be considered in the nexus determination, said experience and expertise does not alone provide the requisite nexus between the criminal activity and the cellular phone to be searched. *Id.* This boilerplate training and experience, according to the court, cannot satisfy the nexus requirement as the Fourth Amendment requires the existence of particularized evidence related to a criminal offense. *Id.* (citing *Commonwealth v. Dorelas*, 473 Mass. 469, 502 (2016)(police knew that defendant had been receiving phone calls and text messages on his cellular phone; probable cause to search telephone for "particularized evidence")).

Lastly, the court emphatically rejected the government's position that whenever probable cause exists to arrest a suspect for an offense and law enforcement has the knowledge and experience to aver that a cellular phone would likely contain evidence of the particular criminal offense, a nexus exists with that suspect's cellular phone. *Id.* 377. In doing so, the court provided that if the government's position was accurate, then it would be rare wherein an individual's cell phone would not be subject to search and seizure following an arrest for a criminal offense. This, in turn, the court reasoned would destroy the separate and significant privacy interests an individual has under the Fourth Amendment. *Id.* Thus, the court concluded that the search warrant lacked the requisite nexus for probable cause to search and seize the defendant's cell phone, despite

the existence of probable cause to arrest the defendant for murder. *Id.* at 377-378.

Likewise, the Delaware Supreme Court in *Buckham v. State*, reversed the defendant's conviction wherein "...the scope of the warrant so far outruns that probable cause finding—and is so lacking in particularity relative to that probable cause finding—that it qualifies as plain error." 185 A.3d 1 (Del. 2018). In *Buckham*, law enforcement acquired a search warrant for the defendant's cellular phone upon his arrest for attempted first degree murder. *Id.* at 5-6. This warrant acquired for the defendant's phone authorized law enforcement to search for GPS location data (also known as cellular site location data, "CLSI"), as well as for any stored content data for evidence of "Attempted Murder 1st Degree." *Id.* at 6, 15. The warrant application set forth that the probable cause nexus between the phone and the criminal offense for which the defendant was arrested was that the phone was on the defendant's person when he was arrested for attempted first degree murder, law enforcement was aware that the defendant had been posting on social media about his impending arrest (as the warrant had been outstanding for six weeks), that GPS data would be useful to police in their investigation as to where the subject firearm was located as it was unknown where the defendant had been residing for the six weeks since the warrant had been issued for his arrest, and that criminals often use cell phones to discuss their criminal activity. *Id.* at 15-16. The Delaware Supreme Court, on plain error review of the warrant (as the defendant failed to raise the matter in the lower appellate court) determined that the search warrant and underlying application did not amount to probable cause to believe that evidence of the crime would be found on the phone. *Id.* at 16. Namely, the court set forth, "[p]articularly unpersuasive was the statement that 'criminals often communicate through cellular phones' (who does in this day and age?")..." *Id.* at 17. Moreover, the court held that while the defendant's commentary on his social media may have been pertinent to his arrest warrant, that did not provide a probable

cause nexus as to why the cell phone would contain evidence of the crime itself, attempted first degree murder. *Id.* Furthermore, the search warrant failed the particularity requirement as well, allowing law enforcement to search *all* data (content and CSLI) on the phone without any sort of temporal limitation. *Id.* at 19. Lastly, because "the prosecution's case against Buckham was not iron-clad," the Delaware Supreme Court reversed the defendant's convictions and remanded the matter for new trial. *Id.* at 20.

In the matter before this Court on *de novo* review, the indiscriminate sweep of the language contained within the Affidavit and Search Warrant for the cellular phone records of 402-312-6473 is intolerable, and to hold otherwise, would be false to the terms, meaning, and history of the Fourth Amendment. There is no fair probability articulated within the warrant and supporting affidavit for the cellular phone that evidence of a crime will be found. Instead, the State relied upon boilerplate language based upon the detective's training and experience to establish an evidentiary nexus between the subject cellular phone and the criminal investigation. This reliance, as discussed above in a number of cases, is inadequate in itself to satisfy the nexus requirement of the Fourth Amendment and therefore, on *de novo* review of the matter, this Court should find the trial court committed reversible error in denying the motion to suppress.

The affidavit merely provides that Mr. Cox may have had contact with the deceased, Mr. Laron Rogers, on the day that he was shot, *more than an hour* beforehand. An allegation that is hardly even reason to suspect that Mr. Cox was involved in the commission of a crime, let alone that evidence of a crime will be found on a cell phone.

On the day in dispute, law enforcement was dispatched to the Ames Ave Convenience Store at 1949 hours, where Mr. Rogers was located suffering from an apparent gunshot wound. Varying information was provided to law enforcement as to what time Mr. Rogers was released

from work on this particular date, there was reason to believe it was between 1800 and 1830 hours. Near the time Mr. Rogers left work, he was visited by two individuals, one of which was later identified by law enforcement as Mr. Forrest Cox. A data check was conducted on Cox, revealing he had self-reported a phone number of 402-*321*-6473. However, this was reported approximately *one year* prior to the shooting of Mr. Rogers, as this was—according to the Affidavit—self-reported in the year 2016. (E5, pg. 4).

Law enforcement acquired the cell phones located in Mr. Rogers' vehicle on the evening that he was shot. A data download of the phone revealed that *Mr. Rogers* had sent a text message at 1837 hours--more than an hour before he was shot—to the number 402-312-6473, which Mr. Rogers had saved as the contact number for "Bubba." (E5, pgs. 2,4). Bubba was also the name provided to an employee at Boost Mobile, the place of employment for Mr. Rogers, around 1841 hours, along with the phone number 402-312-6473. This individual expressed an interest in purchasing a cell phone. (E5).

First and foremost, according to the information provided within the four corners of the Affidavit, the phone number that Mr. Cox self-reported to law enforcement in 2016 *differs* from the number provided to an employee at Boost Mobile and that was the subject of an outgoing text message by Mr. Rogers. This distinction, in and of itself, should render this Search Warrant for 402-312-6473 invalid as it fails the Fourth Amendment in each particularity and probable cause.

Second, while law enforcement may have recognized one of the two black males in the surveillance videos as Mr. Cox, the Affidavit fails to set forth whether the individual that provided the number of 402-312-6473 and the name "Bubba" was Mr. Cox or the other black male. Therefore, there is no established correlation within the Affidavit between "Bubba," Mr. Cox, and this cell phone number since the self-reported number by Mr. Cox and the one provided to the

employee is not the same.

Yet, even assuming there was such a correlation contained in the Affidavit, this Search Warrant is so lacking in probable cause that evidence of a crime will be found therein and particularity in describing where and what evidence of a crime may be searched and seized, that it must be rendered invalid pursuant to the Fourth Amendment by this Court. For sake of argument, *if* the Affidavit had established that this phone number of 402-312-6473 was registered to Mr. Cox, it still fails in several respects in establishing probable cause to believe evidence of a crime will be found in the phone records for this number. The only information set forth in the *Affidavit* about that particular number regarding the day in question was that *Mr. Rogers* had sent a text message to 402-312-6473. This message was sent at 1837 hours, a time which, according to the video surveillance and the employees at Boost Mobile as recounted in the Affidavit, Mr. Rogers may have still been at work. After all, according to video surveillance—as set forth in the underlying Affidavit—the two males that spoke with Mr. Rogers as he was leaving work were inside of the store at approximately 1841 hours. Therefore, at 1837 hours, at which time this message was sent, he may have still been conversing with these individuals before leaving his place of employment.

However, what is known is that law enforcement was not dispatched to this location of the Boost Mobile Store for the shooting of Mr. Rogers. Further, it is known from the Affidavit that law enforcement was dispatched to another location, Ames Avenue Convenience Store, at 1949 hours—*more than an hour later*. Therefore, the fact that a text message was sent from Mr. Rogers to 402-312-6473, a time at which he may still have been at work, does not provide probable cause to believe that the phone for that number will contain evidence of the crime.

Mr. Cox was not reported—within the Affidavit—to be at the scene of the shooting, nor was it reported that a text message was sent to the victim from the a phone number registered to

Mr. Cox immediately prior to or near the time of the shooting. At most, the Affidavit merely reveals the two individuals may have had in-person contact at Mr. Rogers' place of employment *over an hour* before he was shot *at a different location*.

Moreover, the fact that a text message was sent does not, in turn, reveal that a text message was received. The Affidavit did not contain such information. Nor to mention, the Affidavit fails to establish whether this phone number was active on the day of the shooting. It also does not provide whether Mr. Cox had any cell phone whatsoever in his possession on this particular date. After all, even if the Affidavit did establish that Mr. Cox and "Bubba" is the same individual, Mr. Cox was reportedly in Boost Mobile inquiring about purchasing a cell phone. While this individual did leave a phone number, this did not establish that he possessed a cell phone that was functioning and in working order. Additionally, as mentioned above, this number does not match the one that law enforcement noted as "self-reported" by Mr. Cox.

Further, it is bothersome that within the Affidavit, law enforcement fails to set forth the contents of the text message sent on the cell phone belonging to Mr. Rogers. If this text message sent at 1837 on the day of the shooting contained information that was even *slightly* relevant, surely its contents would be set forth in the supporting Affidavit. Yet, the contents of this text message were omitted entirely, even though at the time of the application of this search warrant, law enforcement possessed and had access to the phone belonging to the victim, Mr. Rogers. This, in itself, is an admission that there was no information pertinent to this criminal investigation within the text message in question.

In addition, this search warrant is overbroad and allows for the undue rummaging that the Fourth Amendment was enacted to preclude. Any evidence obtained as a result of this general search warrant was unsupported by probable cause and lacking in particularity.

Although technology developed significantly since the Court decided *Stanford*, law enforcement is simply required to abide by the Fourth Amendment, of which the terms and meaning have remained the same. The Court in *Riley* cautioned that digital searches provide access to "far *more* than the exhaustive search of a house…" Consequently, because this search warrant allows for the type of "fishing expedition" the Fourth Amendment was designed to prevent, this search warrant should be deemed unconstitutional by this Court.

Much like in *Stanford*, the indiscriminate sweep of the language in the search warrant for the cell phone is intolerable. The affidavit in support thereof does not provide how this evidence sought is related to any illicit activity. Instead, this search warrant is akin to the one in *Stanford*, wherein law enforcement was permitted to engage in undue rummaging of the defendant's residence for any sort of documentation evidencing that he was committing a crime, in violation of the Suppression Act. Yet, unlike in *Stanford*, there is not even information from "two credible persons" that Mr. Cox was committing a crime. Instead, there is information that Mr. Cox may have had face-to-fact contact with Mr. Rogers on the day of his death, arriving in a vehicle similar to the suspect vehicle, nearly an hour before the shooting. This search warrant that permits law enforcement to search both the contents and CSLI data of the cell phone records cannot pass constitutional muster.

While the fact that Mr. Cox might have had contact with Mr. Rogers on the day of the shooting upon exiting a vehicle that was similar to the suspect vehicle may have raised suspicion, just as it did not amount to probable cause in *Sprunger* when the defendant asked law enforcement if he could delete some files from his computer before it was removed from his residence by deputies for a child pornography investigation, it does not amount of probable cause to believe that evidence of a crime will be found on the *cell phone* here in this homicide investigation.

Consequently, it was reversible error for the trial court to determine that the warrant was supported by probable cause, in part, because "[t]he affidavit contains sufficient detail to establish probable cause that Laron Rogers was shot and was murdered and that *Cox was connected to those crimes*." (Order as to Defendant's Motion to Suppress the November 14, 2018, Second Telephone Record Search Warrant, filed March 12, 2019, pgs. 8-9)(emphasis added). Neither this Court nor the Court of Appeals has ever held that probable cause to arrest an individual, in turn, provides probable cause to search an individual's cellular phone. For that matter, neither has the United States Supreme Court, at least explicitly.

As the D.C. Circuit Court of Appeals warned in *Griffith*, the Massachusetts Supreme Court in *White*, and the Supreme Court of Delaware in *Buckham* in addressing this issue, the law provides a clear distinction between probable cause supporting an *arrest* warrant as opposed to probable cause supporting a *search* warrant for the suspect's *cellular* phone. There must be a showing within a search warrant that evidence is likely to be found at the place to be searched, with a nexus between the item(s) seized and the criminal behavior. This nexus requires more than a "*mere possibility*" that evidence of a crime will be found. It is indisputably inadequate for a warrant to be upheld simply because of law enforcement's desire to discover a suspect's likely location through CSLI data in its investigation, which the court emphatically rejected in *Buckham*. The Fourth Amendment demands more than the mere possibility of finding records of criminal activity, and to hold otherwise, would allowing for law enforcement to engage in the general exploratory rummaging in a person's belongings that the Fourth Amendment was designed to prevent.

Moreover, this search warrant fails in particularity as there is no guide or control provided to the judgement of the executing officer. Rather, this search warrant provides law enforcement with the type of blanket authority that was allowed for under the Crown. While the search warrant

articulates the types of files to be searched, it *fails* in specificity as it provides law enforcement blanket authority to search wherever they pleased within the cell phone records. The words of the Fourth Amendment are precise and clear. This search warrant fails to abide by these words, and consequently the Defendant's Motion to Suppress should be sustained by this Court.

## II. THE STATE DID NOT MEET ITS BURDEN TO ESTABLISH THE GOOD FAITH DOCTRINE SHOULD BE APPLIED TO THE EVIDENCE ACQUIRED AS RESULT OF THE SEARCH WARRANT OF THE CELL PHONE, AS IT WAS EXECUTED SUBSEQUENT TO *CARPENTER* AND AMOUNTS TO A GENERAL WARRANT, ONE THAT A REASONBLE OFFICER WOULD KNOW TO BE ILLEGAL.

Even when a search warrant is invalid, the exclusionary rule only applies when its application will further its remedial purpose. *State v. Hill*, 288 Neb. 767, 788-789, 851 N.W.2d 670, 687 (2014). For the exclusionary rule to apply, "the benefits of its deterrence must outweigh its costs." *State v. Sprunger*, 283 Neb. 531, 541, 811 N.W.2d 235, 245 (2012). Therefore, the good faith exception provides that evidence seized pursuant to an invalid affidavit and search warrant will not be suppressed if law enforcement "act in objectively reasonable good faith in reliance upon the warrant." *Id.* at 542, 811 N.W.2d at 245. Thus, the exclusionary rule is only appropriate if (1) the judge or magistrate in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for a reckless disregard for the truth, (2) the issuing judge or magistrate wholly abandoned his or her detached and neutral role, (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence unreasonable, or (4) the warrant is so facially deficient that the officer executing the warrant cannot reasonably presume it is valid. *Hill*, 288 Neb. at 789-790, 851 N.W.2d at 688. It is State that has the burden to show that the good faith exception applies. *State*

*v. Tompkins*, 272 Neb. 547, 552, 723 N.W.2d 344, 348 (2006)(citing *U.S. v. Leon*, 468 U.S. 897, 924 (1984)).

A judge who acts as an adjunct law enforcement officer cannot provide valid authorization for a search that would be unconstitutional but for the existence of a warrant. *U.S. v. Leon*, 468 U.S. 897, 914 (1984). The Court in *United States v. Leon* emphasized that courts must insist that "the magistrate purport to 'perform his neutral and detached function and not serve merely as a rubber stamp for the police." *Id.* (citing *Aguilar v. Texas*, 378 U.S. 108, 111 (1976)).

In evaluating whether the official belief of law enforcement executing the warrant is reasonable, an appellate court should assess whether the police officer, considered as an officer with reasonable knowledge of what is prohibited by law, acted in reasonable good faith in relying on the warrant. *Id.* This good faith must be evaluated by the reviewing court by looking at the totality of the circumstances surrounding the issuance of a warrant, including information possessed by the officers, but not contained within the four corners of the affidavit. *Id.*

The Nebraska Supreme Court, in *Sprunger*, refused to apply the good faith doctrine because of the "obvious Fourth Amendment violation." 283 Neb. at 544, 811 N.W.2d at 246. The search warrant was not only lacking probable cause, but also failed to "create of a likelihood of finding any *particular* evidence on the computers." *Id.* at 543, 811 N.W.2d at 245 (emphasis added). In support of its holding, the court explained that a reasonable officer would certainly know that a *general* search warrant illegal. *Id.* at 543, 811 N.W.2d at 246 (emphasis added). Therefore, the court concluded, "...to ignore such a blatant lack of probable cause would set a low bar for future police conduct." *Id.* at 544, 811 N.W.2d at 246.

In a parallel manner to the Nebraska Supreme Court in *Sprunger*, the Ohio Supreme Court, in *State v. Castagnola*, refused to apply the good faith exception to the exclusionary rule. 46 N.E.3d

638, 659 (Ohio 2015). In rejecting to apply this doctrine, the court acknowledged the purpose of the exclusionary rule, to deter police misconduct, and recognized that it "should not be applied when 'the official action was pursued in *complete* good faith' because it would have no deterrent effect." *Id.* at 660 (citing *U.S. v. Leon*, 468 U.S. 897, 906 (1984)). Nonetheless, the Ohio Supreme Court determined it would be inappropriate to apply because, "[t]he affidavit was so lacking in indicia of probable cause and the warrant was so facially deficient in failing to particularize the items to be searched for on Castagnola's computer that the detective could not have relied on it in objective good faith." *Id.*

Further, the court explained, "[q]uite simply, the search-warrant affidavit was not based on evidentiary fact. It was based on layered inferences. Moreover, the search warrant failed to particularly describe the items to be searched for on Castagnola's computer with as much specificity as the detective's knowledge and the circumstances allowed." *Id.* Moreover, the Ohio Supreme Court determined that what was, perhaps, most telling that the warrant request was flawed was in the detective's testimony at the suppression hearing where he described the defendant's incriminating text messages to man he barely knew, and figured that if had been that blatant in talking about the crime he committed, that there would *probably* be other items within the defendant's house that would be of evidentiary value. *Id.* at 661 (emphasis added). The court stressed that "[a] search cannot depend on mere suspicion." Finally, the Ohio Supreme Court declared that this was a "difficult case," admitting that the evidence obtained implicating the defendant (child pornography) was "horrifically objectionable," but refused to apply the good faith exception nevertheless. *Id.* The court expounded, "[t]here is always a temptation in criminal cases to let the end justify the means, but as guardians of the Constitution, we must resist the temptation." *Id.*

In *United States v. Weaver*, the Sixth Circuit Court of Appeals reversed the defendant's firearm convictions, finding that the boilerplate language of the affidavit underlying the search warrant to be "bares bones," and thus holding the good faith doctrine to be inapplicable. 99 F.3d 1372, 1374-1381 (6th Cir. 1996). The affidavit contained boilerplate language with respect to the unlawful distribution of marijuana, generic information about the subject residence, as well as unconfirmed information from an unnamed confidential informant. *Id.* at 1375-1376. In addressing the boilerplate language of the affidavit, the court recognized that affidavits are often drafted "by nonlawyers in the midst and haste of a criminal investigation," yet refused to dismiss that affidavits must reflect the particular case at hand. *Id.* at 1378. According to the court, "[t]he use of generalized boilerplate recitations designed to meet all law enforcement needs for illustrating certain types of criminal conduct engenders the risk that insufficient 'particularized facts' about the case or the suspect will be presented for a magistrate to determine probable cause." *Id.* (citing *In re Young*, 716 F.2d 493, 500 (8th Cir. 1983)(holding unacceptable an FBI affidavit of 'broad, boilerplate statement describing in a general way' applications, reports, and records commonly kept in bail bond operation)).

The search warrant, as presented, contained boilerplate language along with minimal particularized information of an *incriminating* nature, along with *conclusory* statements of the affiant's belief as to probable cause of criminal activity. *Id.* at 1379. Law enforcement took no steps to corroborate the informant's claims with respect to criminal activity, but rather only confirmed *innocent* facts that was, according to the court, insignificant. *Id.* (citing *U.S. v. Gibson*, 928 F.2d 250, 252-253 (8th Cir. 1991)(insufficient showing of probable cause when officer only corroborated 'innocent details' of utility records for account name, revenue agency for physical description, and car titles, and '[t]here was neither surveillance nor observation of unusual civilian

or vehicular traffic at the address, nor were there very short visits characteristic of drug trafficking.')). Thus, even assuming the information of the confidential informant was reliable, the court's review of the affidavit "reveals of a paucity of particularized facts indicating that a search of the…residence 'would uncover evidence of wrongdoing.'" *Id.*

The Sixth Circuit recognized the definition provided by the United States Supreme Court of a "bare bones" affidavit as one "…that states suspicions, beliefs, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge…" *Id.* at 1378. As the search warrant was merely supported by a "bare bones" affidavit, the court determined the evidence seized at the residence should be suppressed as a "…a reasonably prudent officer would have sought greater corroboration to show probable cause and therefore do not apply the *Leon* good faith exception on the facts of this case." *Id.* at 1381. Finally, in support of its holding the Sixth Circuit Court of Appeals set forth, "[t]he Fourth Amendment does not require an officer to reinvent the wheel with each search warrant application. Nonetheless, because of the threat of generalization when particular facts are necessary, we remain concerned about boilerplate language in affidavits or search warrants." *Id.* at 99 F.3d at 1381.

The Third Circuit Court of Appeals in *United States v. Goldstein* determined it was appropriate to extend the good faith doctrine to the government's search warrant of the defendant's cell phone where the search warrant for CSLI data was executed *prior* to Court's decision in *Carpenter*. ___ F.3d ___, No. 15-4094, 2019 WL 273103, at *1 (3rd Cir. 2019). The defendant in *Goldstein* was arrested for his involvement in a kidnapping scheme. *Id.* at *1. In an effort to find further evidence of his involvement, the government acquired a court order pursuant to the Federal Stored Communications Act ("FSCA"), compelling the defendant's phone carrier to produce 57 days' worth of CSLI data. *Id.* This CSLI data placed the defendant in the vicinity of the scene of

the kidnapping. *Id.* at *2. Ultimately, following a trial, the defendant was convicted and sentenced to 96 months in prison. *Id.*

Upon applying *Carpenter*, the Third Circuit Court of Appeals determined the CSLI data was acquired in contravention to the defendant's Fourth Amendment rights. *Id.* Nevertheless, the court determined the exclusionary rule was not applicable and rather the good faith doctrine should control as the government—at the time of the search—was acting in objectively reasonable reliance on a statute as well as then-binding appellate precedent. *Id.* at *2-3. In reaching said holding, the Third Circuit relied on precedent of the United States Supreme Court—namely, *Illinois v. Krull*, 480 U.S. 340 (1987), and *Davis v. United States*, 564 U.S. 229 (2011). *Id.* In *Krull*, the Court determined that the good faith doctrine should apply where "a search is executed pursuant to a statute that was valid at the time of the time of the search but later declared unconstitutional." *Id.* at *3. In like manner, the Court in *Davis* held that the good faith doctrine also should apply "when a search is conducted based upon reasonable reliance on *then-binding* appellate precedent..." *Id.* (emphasis added). At the time of the government search in *Goldstein*, the FSCA was still valid and further Third Circuit precedent provided that an individual does not have a reasonable expectation of privacy in CSLI data pursuant to the Fourth Amendment. *Id.* The Court's opinion of *Carpenter* was published *after* the search was executed in *Goldstein*. *Id.* Thus, the Third Circuit Court of Appeals held the good faith doctrine applied. *Id.* at *2-4.

In doing so, the court rejected the defendant's position that with respect to the good faith doctrine there is a difference in its application based upon who the state actor is, whether it be the prosecutor or law enforcement. *Id.* at *4. Rather, the court opined, the relevant inquiry is simply whether the government, regardless of who the state actor is, objectively reasonable relied on then-binding appellate precedent or statute at the time the search was executed. *Id.* at *2-4. As a result,

the Third Circuit affirmed the denial of the defendant's motion to suppress. *Id.* at *4.

Lastly, the court noted that it was "in good company," as several other sister circuit courts have also held that the good faith doctrine should be extended where the government search for CSLI data occurred *prior* to the Court's decision in *Carpenter*. *Id.* at *3; See *U.S. v. Zodhiates*, 901 F.3d 1378 (2nd Cir. 2018); *U.S. v. Christian*, 737 Fed.Appx. 165 (4th Cir. 2018); *U.S. v. Curtis*, 901 F.3d 846 (7th Cir. 2018); *U.S. v. Joyner*, 899 F.3d 1199 (11th Cir. 2018); See also *U.S. v. Remus*, 2018 WL 4976725 (U.S. Dst. Ct. of Neb. Sept. 27, 2018).

The good faith doctrine was not established to circumvent or render meaningless the Fourth Amendment but rather for application wherein the government acts upon an objectively reasonable belief that its conduct comports with the law. The Supreme Court of Florida applied the same analysis as the Third Circuit Court of Appeals in *State v. Ferrari*, ___ So.3d ____, No 4D14-464, 2018 WL 6132264 (Fla. 2018), wherein the court held the state could not meet the requirements off the good faith exception to the Fourth Amendment exclusionary rule. In *Ferrari*, law enforcement acquired the cell phone records of the defendant by means of a subpoena in 2001. *Id.* at *6. At trial, an FBI agent testified about these cell records, specifically the defendant's historical CSLI data. *Id.*

According to the Florida Supreme Court, it was reversible error for the trial court to deny the defendant's motion to suppress as "[t]he 'good faith' exception avoids the exclusion of the results of a warrant less search where the police conduct an objectively reasonable search based upon binding decision as law, *see Davis v. United States*, 564 U.S. 229, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), or in reasonable reliance on an applicable statute, even if that statute is later held to be unconstitutional, *see Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987)." *Id.* at *7. At the time the search was executed in 2001, there was no binding precedent in

existence "that CSLI data was not within Fourth Amendment protections and thus exempt from the warrant requirement." *Id.* The trial court improperly relied on precedent from 2009, which predated the motion to suppress hearing, yet post-dated the *search* by nearly a decade. *Id.* The relevant inquiry with respect to application of the good faith doctrine is the time of the search, and thus the Florida Supreme Court determined it was error for the trial court to apply the exception. *Id.* Further, the detective did not cite any statute within the request for issuance of the subpoena, and even though a relevant statute existed at the time within the state, the government failed to comply with its terms. *Id.* Consequently, the Florida Supreme Court held "the good faith exception to the exclusionary rule does not apply because the State was not relying on binding precedent or clearly applicable statutes in obtaining the data." *Id.* at *8.

Most recently, this Court in *State v. Leandre Jennings*, 305 Neb. 809 (Filed May 15, 2020), held the exclusionary rule was inappropriate for application as law enforcement acted in reasonable reliance on the Federal Stored Communications Act. In *Jennings*, law enforcement obtained a court order for the defendant's cellular records pursuant to the Federal Stored Communications Act (hereinafter "FSCA"). *Id.* These records were obtained 18 months *prior* to the United States Supreme Court decision of *Carpenter*. *Id.* Thus, the relevant case law at the time the records were acquired by law enforcement consisted of *State v. Jenkins*, 294 Neb. 684, 884 N.W.2d 429 (2016), wherein this Court rendered a holding that the FSCA did not violate the Fourth Amendment. *Id.* As a result, the good faith exception doctrine as set forth in *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160 (1987), was controlling in *Jennings*. *Id.*

In the matter presently before the Court, the State did not meet its burden in demonstrating the good faith doctrine applies in light of the obvious Fourth Amendment violations. As in *Sprunger*, this search warrant of the cell phone amounts to general warrant—limitless as to the

contents of information to be searched and seized. The warrant allows law enforcement to search each the substantive contents of the phone, as controlled by *Riley*, as well as CSLI data, protected by *Carpenter*.

Moreover, akin to *Sprunger*, there is no likelihood presented in this warrant that particular evidence will be discovered on the subject cell phone. After all, here, law enforcement searched and seized the victim's cell phone, Mr. Laron Rogers, prior to application for this search warrant. As a result, law enforcement was aware that Mr. Rogers' phone had seemingly been in contact with the phone law enforcement believed to belong to the Mr. Cox over an *hour* before the shooting. Certainly, had the contents of this *sole* text message from Mr. Rogers to purportedly Mr. Cox revealed criminal activity of any nature, then the words of this text message certainly would have been included in the underlying affidavit. Yet, there was no mention *whatsoever* as to what the contents of this singular text message contained.

Moreover, if this is adequate to establish a "fair probability" that evidence of a crime will be found, then surely the State applied for a search warrant of each and every cell phone number that Mr. Rogers' phone had contact with on the afternoon and evening of the shooting. The lack of such applications is unquestionably a circumstance for this Court to consider in reviewing the totality of the circumstances surrounding the issuance of this search warrant and ultimately, in determining, that the good faith doctrine cannot be applicable.

Further, as in *Castagnola*, the good faith doctrine is not appropriate in the present matter as the affidavit was not based on evidentiary fact, but rather layered inferences. These inferences, as in the Sixth Circuit case of *Weaver*, went unconfirmed and uncorroborated by law enforcement, aside from innocent details. Here, law enforcement learned from Mr. Rogers' parents, who had spoken to Mr. Rogers' boss, that Mr. Rogers had contact with two black males the afternoon of

the shooting. This most certainly is layered information, as well as hearsay within hearsay. In an effort to corroborate this information, law enforcement responded to his place of employment and were able to review video surveillance. *However*, through this video surveillance at his place of employment, law enforcement simply corroborated the innocent fact that Mr. Cox was inside the Boost Mobile Store at 1841 hours on the day of the shooting. Further, law enforcement was able to confirm through the supervisor at Boost Mobile that Mr. Rogers was supposed to work until 2000 hours on the day of the shooting, but instead was cut at approximately 1800 hours due to the store was being slow. First, neither fact confirmed by law enforcement establishes that Mr. Cox even had contact with Mr. Rogers at Boost Mobile. Second, assuming the text message sent from Mr. Rogers was to a phone belonging to Mr. Cox, this subject text message was sent at *1837* hours on the day of the shooting—four minutes before Mr. Cox entered the store and half an hour after Mr. Rogers was reported to have been "cut" by the supervisor. Thus, law enforcement was unable to corroborate that the two men had in fact made contact in person on the day of the shooting. The information that the supervisor reported about Mr. Rogers speaking with these two black males outside of the store was relayed to her through another employee, and thus was hearsay within hearsay that went unconfirmed, as it was not depicted on the video surveillance. Even so, even had this been confirmed it would amount to another innocent detail, which according to the Sixth Circuit as well as the Eighth Circuit, is insignificant and weighs in favor of finding of a "bare bones" affidavit, wherein there are only conclusions, suspicions, and boilerplate language as to any criminal activity.

The only potentially incriminating information relayed to law enforcement involved white Impala being present at Boost Mobile, which was the same or similar to the description to the subject vehicle in the homicide investigation. Yet, any connection between that vehicle and Mr.

Cox was also a layered inference, or hearsay within hearsay, that went uncorroborated and unconfirmed. Law enforcement did not learn of this information from a direct witness nor confirm as much on video surveillance. Although, even assuming law enforcement had taken such an additional step, this information would be helpful and relevant in the application for an arrest warrant or perhaps even for a search warrant of the vehicle, yet provides no fair probability that evidence of the shooting will be found on a cell phone.

The *only* information provided within the affidavit as to how cell phones are related to a criminal investigation is within the page of boilerplate language, none of which contains particularized facts about this particular investigation or this particular cell phone. Certainly, an officer with reasonable knowledge of what is prohibited by the law is more than aware of such differences in warrants. As a result, official belief of law enforcement in this particular search warrant for the cell phone is unreasonable, and consequently this Court should hold the good faith doctrine not applicable.

Lastly, there is no correlation between the opinion rendered by the United States Supreme Court in *Carpenter* and application of the good faith doctrine for this particular search warrant. As discussed above, a significant number of the federal circuit courts of appeals have determined that the good faith doctrine should be applied where the search occurred *prior* to the filing of *Carpenter* wherein law enforcement acted in reliance upon the FSCA.

Most importantly, this Court has recently addressed this very issue in *Jennings* wherein law enforcement relied upon the FSCA in its application for cellular records. Yet, the matter is distinguishable from *Jennings* as, in this case, the first search of the cellular records is not before the Court for review as the State conceded at the trial level its initial search—executed *prior* to the publication of *Carpenter*—was unlawful. (Order on Defendant's Motions to Suppress, filed

November 21, 2018, pgs. 13-14). As the trial court noted in its order, the State also failed to raise the good faith doctrine with respect to the initial search when it conceded as to the illegality. (Order on Defendant's Motions to Suppress, filed November 21,2018, p. 15). Instead, the prosecution applied for the cellular records nearly six months after *Carpenter* and a full 20 months following the initial application to search the cellular records. (E1, E5). Therefore, unlike *Jennings*, *Krull* is not controlling in this particular case as at the time of the application and execution of the subsequent search warrant, *Carpenter* had been in effect for approximately half a year.

Furthermore, although not explicitly addressed in *Jennings* (albeit referenced by citation to *State v. Brown*, 302 Neb. 53, 921 N.W.2d 804 (2019)), due to the timing of the searches in this particular case, *Davis v. United States*, 564 U.S. 229, 131 S.Ct. 2419 (2011), is not applicable here either so as to extend the good faith doctrine because *Jenkins* was no longer the controlling precedent upon publication of *Carpenter* as to the lawfulness of the FSCA under the Fourth Amendment. Thus, the good faith doctrine is not applicable as the relevant temporal inquiry is the time of the application and search, not the time of the offense subject to criminal investigation. Consequently, the trial court committed reversible error in its determination that that the State had met its burden in establishing the application of the good faith doctrine in this particular case before the Court.

## III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN OVERRULING APPELLANT'S OBJECTION AND MOTION TO SUPPRESS AS THE SEARCH WARRANT FOR THE CELLUAR PHONE, EXHIBIT 5, WAS TAINTED BY THE INITIAL UNLAWFUL SEARCH OF THE CELLULAR PHONE DATA.

The exclusionary rule "is a judicially prescribed remedial measure..." *Segura v. U.S.*, 468 U.S. 796, 804 (1984). This remedial measure accepts the premise that "the way to ensure such

[constitutional and statutory] protections is to exclude evidence seized as a result of such violations notwithstanding the high social cost of letting persons obviously guilty go unpunished for their crimes." *Nix v. Williams*, 467 U.S. 431, 443, 104 S.Ct. 2501, 2508 (1984). Thus, the Court has elaborated that because of this rationale, "...the prosecution is not to be put in a better position than it would have been in if no illegality had transpired." *Id.*

According to the United States Supreme Court, "the exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure...but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.'" *Segura*, 468 U.S. at 796-797. Furthermore, the exclusionary rule extends to the direct as well as indirect products of unconstitutional conduct. *Id.* at 804 (citing *Wong Sun v. U.S.*, 371 U.S. 471, 484, 83 S.Ct. 407, 406 (1963)).

Yet, not all evidence is the "'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." *Wong Sun v. U.S.*, 371 U.S. 471, 488, 83 S.Ct. 407, 417 (1963). Instead, the test is "whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.*

The Court in *Silverthorne Lumber Company v. United States* held it would be contrary to allow the government to use the evidence---documents and copies thereof---in *any* sense wherein it was initially obtained by means of an unlawful search and seizure. 251 U.S. 385, 40 S.Ct. 182 (1920). Frederick Silverthorne and his father were detained pursuant to an indictment for a number of hours while law enforcement entered their company office and "made a clean sweep of all the books, papers and documents found there." *Id.* at 390, 40 S.Ct. at 182. The Silverthornes applied for a return of all books, papers, and documents seized by the government, to which the

government opposed as this evidence was in use before the grand jury. *Id.* at 391, 40 S.Ct. at 182. Thereafter, copies and photographs were made by the government of the evidence acquired and "a new indictment was framed based upon the knowledge thus obtained." *Id.* The trial court ordered the original books, papers and documents be returned to the Silverthornes, yet "impounded the photographs and copies." *Id.* Subsequently, the trial court approved subpoenas issued by the government to produce the original documents, books, and papers even though the court determined the evidence had been seized in violation of the Silverthornes' constitutional rights. *Id.* The Silverthornes refused and were found to be in contempt. *Id.*

The Court, in *Silverthorne*, emphatically rejected the government's position that it could, basically, have another bite at the apple after the illegal search and seizure occurred of the documents, books, and papers. *Id.* Namely, the Court set forth the absurdity of the government's argument, "[i]t is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act." *Id.* The prosecution's position, according to the Court, "...reduces the Fourth Amendment to a form of words." *Id.* at 392, 40 S.Ct. at 183. Further, the Court provided in its rationale that, "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but rather that it shall not be used at all." *Id.*

In the case before the Court on appeal, law enforcement acquired a subsequent warrant for the very same cellular records—namely CSLI data—only *after* using the initial evidence to plot the data, thereby establishing that the phone at issue was in the area of the homicide at the time it

occurred. Detective Hinsley drafted a search warrant for the number he *believed* belonged to Mr. Cox. (23:1-4)(emphasis added). Detective Hinsley had not—at the time of drafting and obtaining the initial search warrant—interrogated Mr. Cox regarding the date of the offense or the phone number he had been using at that time.

Once the cell phone records were returned to the detective from the cellular phone provider, Detective Hinsley booked one copy of the records into property as well as took another copy to Nicholas Herdfordt of the Omaha Police Department. (26:11-17). The purpose of providing a copy of the cellular records to Detective Herdfordt was for him to *plot the data* from the cellular phone for the date of the homicide. (26:11-17)(emphasis added). From this plotting by Detective Herdfordt, Detective Hinsley discovered that the cellular phone was in the general proximity of 42nd and Ames minutes prior to the homicide. (26:11-22; 842:13-843:4). Subsequently, based upon this information, Detective Hinsley ensued to make contact with Mr. Cox. (26:18-27:3).

The initial search warrant for the cellular records was drafted on March 24, 2017, and filed March 30, 2017. (E1). A suppression hearing regarding this search warrant (E1) took place October 9, 2018. (Order on Defendant's Motions to Suppress, filed November 21,2018; 16:1-50:17). Following the hearing, the State conceded that the search warrant for the cellular phone records was unlawful pursuant to Fourth Amendment, specifically under *Carpenter*, and thus the Court granted the motion to suppress with respect to this evidence. (Order on Defendant's Motions to Suppress, filed November 21, 2018, pgs. 13-14). The trial court *filed* its order granting the motion to suppress cellular records on November 21, 2018. (Order on Defendant's Motions to Suppress, filed November 21, 2018). The day prior to the filing of the order, Detective Hinsley applied for the subsequent search warrant for cellular records. (E5). The face of the subsequent warrant reflects it was drafted approximately within this same week—November 14, 2018. (E5).

Therefore, the detective drafted the subsequent warrant (E5) a full 600 days or nearly 20 months after drafting the original application for cellular records (E1).

Therefore, because this plotting data or "CSLI" was within law enforcement's knowledge having been relevant to its investigation, this evidence was *not* obtained independently of the initial search. Rather, it was wholly connected to and a derivative of the initial unlawful search of the cellular records. Moreover, Exhibit 5 was a derivative of the illegality—the initial search of the cellular records—as upon the State's concession to the motion to suppress, the detective *bolstered* the body of his warrant affidavit by including an *entire* page of template language. (59:5-25). This template language encompassed an extensive explanation as to the importance of cellular records in criminal investigations. Further, while at first blush one page may not seem consequential, it is certainly significant in light of the fact that affidavit of Exhibit 5, in its entirety, is merely six pages. Of those six pages, the final page simply contains signature from the approving judge. Thus, the substance of the affidavit is a mere five pages, one of which was *additional* upon the State's concession of the illegality of the initial search of the cellular records conducted pursuant to the initial search warrant, Exhibit 1.

The State, per the Court's order with respect to the motion filed for Exhibit 1, conceded that the initial search warrant was unlawful pursuant to *Carpenter v. United States*, ____ U.S. ___, 138 S.Ct. 2206 (2018). What's more, Detective Hinsley made clear that he applied for the subsequent warrant—Exhibit 5—at the direction of the County Attorney. (57:22-58:7). He did *not* provide that he would have done this subsequent warrant for any other reason than because he was told to do so by the prosecution. (56:15-63:14). This notion is furthered by the fact that Detective Hinsley, in offering an explanation as to the additional template language in Exhibit 5, offered that he did not create this language as to the importance of cellular records in criminal investigations

for this specific case. (57:20-61:12; 63:7-11). Instead, Detective Hinsley explained that he had previously prepared this language. (59:8-17).

He further offered that members of the Omaha Police Department meet frequently to discuss developments in technology and the law related thereto. (62:16-63:11). Yet, neither the boilerplate language nor the knowledge obtained through meetings at the police department were reasons offered by the detective for applying for the subsequent warrant. (56:15-63:14). Thus, Exhibit 5 was not applied for and acquired separately and distinctly from Exhibit 1. Rather, it was obtained because of the illegality of the search conducted pursuant to Exhibit 1. As a result, according to the Court in *Nardone*, Exhibit 5 is subject to the exclusionary rule as it is a derivative of the initial illegality.

## IV. THE LIMITED FACTS BEFORE THE COURT REVEAL THAT THE TRIAL COURT INCORRECTLY ANALYZED AND APPLIED THE INDEPENDENT SOURCE DOCTRINE.

The Court in *Segura v. United States* held "...the evidence discovered during the subsequent search of the apartment the following day pursuant to the valid search warrant issued *wholly* on information known to the officers before the entry into the apartment need not have been suppressed as "fruit" of the illegal entry because the warrant and the information on which it was based were *unrelated* to the entry and therefore constituted an independent source for the evidence..." 468 U.S. 796, 799 (1984)(emphasis added). It was undisputed in *Segura* the law enforcement conducted an illegal, warrantless entry into Segura's apartment whereupon items indicative of drug trafficking were observed in plain view. *Id.* at 804. Thus, the only issue on appeal was "whether, because of an earlier illegal entry, the Fourth Amendment requires suppression of the evidence seized later from a private residence pursuant to a valid search warrant

which was issued on information obtained by the police before the entry into the residence." *Id.* at 797-798.

At the time of the illegal entry in *Segura*, law enforcement was already in the process of acquiring a search warrant for the residence. *Id.* The reason for the delay was solely due to the "lateness of the hour" as law enforcement sought authorization for a search warrant between 6:30 and 7:00 p.m. *Id.* at 800. Thus, due to "administrative delay," the search warrant was not presented to the magistrate until 5 p.m. the following day. *Id.* at 801. It was executed around 6 p.m., an approximate 19 hours after the initial unlawful entry in which a scale, jars of lactose, and numerous small cellophane bags were observed within the residence. *Id.* As a result of the search pursuant to the warrant, law enforcement discovered approximately three pounds of cocaine, ammunition, more than $50,000 cash, and records of narcotics transactions. *Id.*

The Court, in its opinion, reasoned that the drugs and other items were not "fruit" of the illegality because, the facts did not support that "but for" the illegality, law enforcement would not have searched and seized the evidence at issue. *Id.* at 811, 815. Specifically, the Court provided, "...the initial entry—legal or not—does not affect reasonableness of the seizure. Under either method—entry and securing from within or a perimeter stakeout—agents control the apartment pending arrival of the warrant; both an internal securing and a perimeter stakeout interfere to the same extent with the possessory interests of the owners." *Id.* at 811.

Nonetheless, even where the facts did not support the first prong of "but for" causation of the exclusionary rule, the Court proceeded in its analysis of the independent source doctrine. *Id.* at 813-814. The Court determined the drugs and other items were not "fruit" as none of the information within the search warrant "was derived from or *related* in any way to the initial entry into petitioners' apartment; the information came from sources *wholly unconnected* with the entry

and was known to the agents well before the entry." *Id.* at 814 (emphasis added). As a result, suppression was not justified of the evidence seizure following execution of the search warrant. *Id.* at 815.

The Court in *Murray v. United States* vacated the judgment and remanded the matter to the trial court where the record did not support a factual finding as to whether law enforcement's decision to seek the search warrant was prompted or affected by the drugs observed in the warehouse during the initial unlawful entry. 487 U.S. 533, 542-544, 108 S.Ct. 2529, 2536 (1988). In *Murray*, law enforcement conducted a warrantless entry into a warehouse where the officers observed numerous burlap-wrapped bales of marijuana. *Id.* at 535, 108 S.Ct. at 2532. Thereafter, law enforcement applied for a search warrant without including any information as to its unlawful entry or what had been observed during the unlawful entry and without making mention of said observations to the Magistrate. *Id.* at 535-536, 108 S.Ct. at 2532. Upon issuance of the search warrant, law enforcement reentered the warehouse and seized 270 bales of marijuana as well as records listing customers for whom the bales of marijuana were destined. *Id.*

The Court, in its opinion, made clear that there is not a sound rationale for a distinction in application of the independent source doctrine between tangible and intangible evidence. *Id.* at 541-542, 108 S.Ct. at 2535. In support of this premises, the Court explained:

> The independent source doctrine does not rest upon such metaphysical analysis, but upon the policy that, while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied. So long as a later, lawful seizure is genuinely independent of an earlier, tainted (which may well be difficult to establish where the seized goods are kept in the police's possession) there is no reason why the independent source doctrine

should not apply.

*Id.* at 542, 108 S.Ct. at 2535.

Moreover, the Court clarified that the independent source doctrine involves a *factual* inquiry into whether the search pursuant to the warrant was "in fact a genuinely independent source" of the evidence at issue. *Id.* at 542, 108 S.Ct. at 2536. According to the Court, this would not be the case "if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry or in information obtained during the entry was presented to the Magistrate and affected his decision to issue the warrant." *Id.*

Thus, in *Murray*, though the trial court made a determination that the agents did not include any observations during the initial entry into the application for the search warrant nor reveal their warrantless entry to the Magistrate, the Court found the record to be deplete of any finding "that the agents would have sought a warrant if they had not earlier entered the warehouse." *Id.* at 543, 108 S.Ct. at 2536. Consequently, the judgment was vacated and the matter was remanded to the trial court for a determination of whether the officers' decision to seek the search warrant was prompted by the unlawful entry for purposes of analysis of the independent source doctrine. *Id.* at 543-544, 108 S.Ct. at 2536.

In the case before this Court, the record is, at best, deplete of a factual determination as to whether or not Detective Hinsley's decision to seek the subsequent search warrant of the cellular records was in any way prompted or affected by what he had discovered as a result of the initial unlawful search of the cellular records. In fact, the trial court's order, in applying the independent source doctrine on its own motion, does not contain any facts whatsoever relevant to the analysis. (Order denying Motion to Suppress, filed March 12, 2019, p. 16-17). Rather, at best, in the section of the order applying the independent source doctrine, the trial court acknowledged that "the

evidence was the same in both the first and second searches…," yet concluded, without factual support "[t]he second search warrant was properly executed under *Carpenter v. United States* and lawfully obtained information from Sprint Corporation which was wholly independent from that of the initial search. " (Order denying Motion to Suppress, filed March 12, 2019, p. 17). This finding, however, does not at all provide the level of factual analysis warranted by the independent source doctrine to assess whether the officer's decision to seek the warrant was prompted or affected by what he had learned from the initial search or if information obtained during the initial search was presented to the issuing judge. Consequently, this Court should reverse Mr. Cox's conviction and remand the matter for further factual findings as was done in *Murray*.

Although the record is devoid of a factual determination as to law enforcement's motive as required by *Murray*, it is pertinent for this Court to consider that the available record reveals that the independent source doctrine should *not* be applied to the present case. Namely, during the suppression hearing held on October 9, 2018, Detective Hinsley testified that as a result of the initial search, law enforcement discovered through the cellular records at issue that the phone was in the area of a homicide during the shooting. It is difficult to conceptualize, therefore, how it could be possible that Detective Hinsley's decision to seek the subsequent warrant was not *at all* prompted by the discovery of this cellular site location information. Rather, the record available to this Court reveals that law enforcement's decision to seek the search warrant was prompted and connected to the initial illegality. The limited facts presented on this topic suggest that unlike *Segura*, law enforcement was *not* in the process of acquiring a search warrant for the cellular records when the initial illegality occurred. Instead, the only available facts provide that the subsequent search occurred approximately 20 months after the initial search was executed. (E1, E5).

After all, in drafting and applying for the cellular records again at the direction of the county attorney, Detective Hinsley did not simply leave the affidavit and application in a similar fashion with the exception of a few minor changes (such as "order" to "warrant" and/or removing language regarding the FSCA). Rather than leaving the affidavit largely the same, he added an *entire page* to the affidavit in an effort to ensure its approval. As aforementioned, this entire page containing a thorough explanation as to the importance of cellular records in criminal investigations is consequential in light of the fact that the affidavit of Exhibit 5 is simply six pages—the final page being signatures from the approving judge.

What's more, the county attorney made clear in the second suppression hearing that she directed the detective *not* to change the contents of the affidavit aside from eliminating the language regarding the Federal Stored Communications Act. (69:23-70:3).

In addition, the timing is imperative for this Court's consideration with respect to the independent source doctrine analysis. The State—either by means of the county attorney or law enforcement did *not* seek a search warrant for the cellular records immediately upon or near in time to the release of *Carpenter*. In fact, the initial suppression hearing in this case took place in the interim. Instead, nearly a *month* after the suppression hearing, a full five months after *Carpenter* was published by the United States Supreme Court, and in the same week as the prosecution's concession to the motion to suppress the cellular records did the State finally apply for a search warrant. Thus, from the available record, there is not sufficient support to make a finding that law enforcement's decision to seek the second search warrant was not prompted or affected by what was discovered as a result of the initial unlawful search.

While the record allows for an examination of Exhibit 5 to assess whether law enforcement included any information from the initial search in its application and affidavit, it does not provide

any factual determination as to any communications that the officer may have had with the issuing county court judge. Therefore, as the independent source doctrine requires a factual finding as to *both* inquiries, as well as an inquiry into the motivation of the officer who sought the search warrant, this Court should reverse and remand for further proceedings as the State did not meet its burden in proving application of this exception to the exclusionary rule when the Court raised it on its own accord.

## V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN APPLYING THE INDEPENDENT SOURCE DOCTRINE TO EXHIBIT 5, THE SUBSEQUENT SEARCH WARRANT FOR THE CELLULAR RECORDS, WHEREIN THE BURDEN TO SET FORTH THIS DOCTRINE BELONGS TO THE STATE, WHO FAILED TO RAISE IT AT THE TRIAL LEVEL.

The burden to establish by a preponderance of the evidence that information inevitably would have been discovered by lawful means or independently was acquired by lawful means belongs to the prosecution. *Nix v. Williams*, 467 U.S. 431, 444, 104 S.Ct. 2501, 2509 (1984); *Nardone v. U.S.*, 308 U.S. 338, 342 (1939). Thus, it was reversible error for the trial court in the case pending before to the Court to set forth an exception to the exclusionary rule, on its own accord, that the State had the burden to raise and prove by a preponderance of the evidence. *Id.*; See *State v. Tompkins*, 272 Neb. 547, 723 N.W.2d 344 (2006).

Furthermore, unlike the exclusionary rule exception of the good faith doctrine, the analysis of the independent source doctrine does *not* involve "an examination of the same facts as the probable cause inquiry." See *State v. Kruse*, 303 Neb. 799, 811, 931 N.W.2d 148, 157 (2019)(holding the record was sufficient for the appellate court to analyze whether the State met its burden with respect to the good faith doctrine as its application ordinarily includes examination

of the same facts as the probable cause inquiry)(emphasis added). Rather, the analysis required in application of the independent source doctrine involves a factual inquiry into the motivation for the subsequent search and seizure. *Nix v. Williams*, 487 U.S. 533, 542, 108 S.Ct. 2529, 2536 (1988).

The Fifth Circuit Court of Appeals in *United States v. Hassan*, 83 F.3d 693 (5th Cir. 1996), held it was reversible error wherein the trial court rendered a conclusion as to the applicability of the independent source doctrine without making a *factual* determination as to how the illegal search affected or motivated the officers' decision to obtain the search warrant. In *Hassan*, the State filed an interlocutory appeal upon the trial court's suppression of all evidence, finding the independent source doctrine to be inapplicable. *Id.* at 695. At the motion hearing, the government failed to raise the independent source doctrine. *Id.* Yet, after the trial court issued an order suppressing all evidence seized pursuant to the warrantless entry, the prosecution filed a motion for reconsideration, arguing for the first time that the independence source doctrine was applicable. *Id.* In response, the trial court denied the prosecution's request for further hearing to develop evidence on the independent source doctrine and further concluded that the exception was inapplicable to the case. *Id.*

The Fifth Circuit Court of Appeals held it was not an abuse of discretion for the trial court to deny the prosecution's motion for reconsideration, yet it was reversible error to make a determination of the inapplicability of the independent source doctrine without making any factual finding as to if law enforcement was affected or prompted to procure a search warrant based upon what was observed during the unlawful entry. *Id.* at 696-697. Instead, the trial court merely addressed whether there was probable cause in the warrant affidavit when purged of the tainted information gained as a result of the unlawful entry. *Id.* at 697. Thus, as the determination of

probable cause does not end the independent source doctrine analysis, the Fifth Circuit Court of appeals remanded the factual matter as to the officer's motivation to the trial court. *Id.* at 699. Finally, the Fifth Circuit Court of Appeals suggested that in making a determination as to this factual prong, the lower court "may wish to consider such factors as the precise nature of the information acquired after the illegal entry, the importance of this information compared to all the information known to agents, and the time at which the officers first evinced an intent to seek a warrant." *Id.*

As provided in the argument above, the facts set forth in the record are insufficient, even when viewed in totality, to support application of the independent source doctrine. The State failed to raise this exception to the exclusionary rule. Instead, the prosecution argued that Exhibit 5 was supported by probable cause and, alternatively, if it was not supported by probable cause, that Detective Hinsley executed the search warrant in good faith reliance on *Carpenter*. Nonetheless, the trial court, in its Order filed March 12, 2019, denying the motion to suppress, determined on its own that the independent source doctrine was applicable. As in *Hassan*, there was no factual finding in the trial court's order as to Detective Hinsley's motivation in procuring the search warrant, Exhibit 5, for the cellular records. There was no mention in the order as to how Detective Hinsley, in fact, was affected or prompted by what was discovered during the course of the initial unlawful search of the cellar records—an illegality that the State conceded in the court below. Thus, as the trial court improperly applied an exception to the exclusionary rule on its own accord, this Court should reverse this case and remand the matter for new trial.

## VI. LAW ENFORCEMENT ACQUIRED STATEMENTS FROM THE DEFENDANT IN VIOLATION OF HIS FIFTH AMENDMENT RIGHTS PURSUANT TO *MIRANDA*, THEREFORE THE MOTION TO SUPPRESS HIS STATEMENTS SHOULD HAVE

**BEEN SUSTAINED BY THE TRIAL COURT.**

In order to secure the Constitutional privilege against self-incrimination, the Court held in *Miranda v. Arizona*, 384 U.S. 436 (1966), that statements may not be used if derived during the course of custodial interrogation unless the prosecution demonstrates that proper procedural safeguards were used. "'Custodial' does not require an arrest, but refers to situations where a reasonable person in the defendant's situation would not have felt free to leave..." *State v. Rogers*, 277 Neb. 37, 52, 760 N.W.2d 35, 54 (2009). Specifically, *Miranda* requires "law enforcement to give a particular set of warnings to a person in custody before interrogation: that he has the right to remain silent, that any statements he makes may be used as evidence against him, and that he has the right to an attorney, either retained or appointed." *State v. Juranek*, 287 Neb. 846, 852, 844 N.W.2d 791, 799 (2014)(quoting *State v. Nave*, 284 Neb. 477, 492, 821 N.W.2d 723, 735 (2012)).

These warnings mandated by *Miranda* are "'an absolute prerequisite to interrogation,' and 'fundamental with respect to the Fifth Amendment privilege.'" *Juranek*, 287 Neb. at 856-857, 844 N.W.2d at 801 (quoting *Miranda*, 384 U.S. at 468). Yet, "the expedient of giving an adequate warning as to the availability of the privilege [is] so simple." *Id.* For purposes of *Miranda*, interrogation not only includes "express questioning" but also refers "to any words or actions on the part of the police...that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Juranek*, 287 Neb. at 852-853, 844 N.W.2d at 799.

*Invocation of Right to Remain Silent*

The safeguards of *Miranda* "assure that the individual's right to choose between speech and silence remains unfettered throughout the interrogation process." *State v. DeJong*, 287 Neb. 864, 883, 845 N.W.2d 858, 874 (2014). The individual has the right to "control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation." *Id.* If the

individual indicates that he or she wishes to remain silent or that he or she wants an attorney, the interrogation must cease. *Id.*

On the other hand, law enforcement is not required to accept as conclusive *any* statement or act, no matter how ambiguous, as an indication that an individual desires to cease questioning. *State v. Rogers*, 277 Neb. 37, 64, 760 N.W.2d 35, 58 (2009)(emphasis added). Instead, officers are bound to cut off questioning when the suspect makes a statement that, considered under the circumstances in which it is made, a reasonable police officer would have understood to be a request to terminate all questioning. *Id.* Thus, to effectively invoke the protections of Miranda, the suspect's invocation of the right to remain silent must be "unambiguous, unequivocal, or clear." *Id.*

In analyzing whether a suspect has clearly invoked this right, courts review the context of the invocation in addition to the words used by the individual. *Id.* This context includes words spoken by the defendant and the interrogating officer, the interrogating officer's response to a defendant's statements, speech patterns of the defendant, the content of the interrogation, the demeanor and tone of the interrogating officer, as well as the suspect's behavior during questioning, the point at which a defendant is alleged to have invoked the right to remain silent, and who was present during the interrogation. *Id.* A court might also consider the questions that drew the statement, as well as the officer's response to the statement. *Id.* at 64-65, 760 N.W.2d at 58.

The Nebraska Supreme Court in *State v. DeJong* held that the defendant's statement that she was "done," "tired," and "wanted to go to sleep" was an invocation of her right to remain silent. 287 Neb. at 869, 884, 845 N.W.2d at 865, 874. The court, in support of this holding, explained that not only should a reasonable officer understood the defendant's statements to be an

invocation of the right to remain silent, but it seems that the interrogating officer did in fact understand what was occurring, as he the officer immediately interrupted the defendant and began asking questions about a new topic. *Id.* at 884, 845 N.W.3d at 874.

Similarly, in *State v. Bauldwin*, the Nebraska Supreme Court determined that the defendant unequivocally invoked the right to remain silent when he stated, "I've given you what I'm gonna give you." 283 Neb. 678, 691, 811 N.W.2d 267, 281 (2012). In its rationale, the court provided that the defendant's statement "was not prefaced with words of equivocation, such as 'I think,' 'maybe,' or 'I believe.'" *Id.* Moreover, when viewed in the context it was made, the statement could not reasonably be interpreted to show that the defendant was merely finished with "his colloquy of events." *Id.* Rather, this statement was made in response to the officer's inquiry for the defendant to give his take as to what occurred that weekend—thus it was an expression of a desire to end the interrogation completely. *Id.*

As an initial matter, despite limited testimony provided during the suppression hearing by Detective Ryan Hinsley (hereinafter "Detective Hinsley") that Mr. Cox was free to leave, his communication that was video recorded clearly reveals that Mr. Cox was in custody for purposes of *Miranda* on February 26, 2018, when he was interrogated by the detective. (E2). Namely, prior to providing an advisement to Mr. Cox of his rights, Detective Hinsley stated to Mr. Cox in an interrogation room at Omaha Police Department Headquarters:

"So ultimately what happened is because I couldn't just get you down here under a locate, what I did was get active DNA orders for you from a judge. So, it gave us a right to detain you in order to bring you down here to get your DNA, ok?"

(E2, 2:18:48 P.M.).

Further, immediately thereafter, Detective Hinsley stated:

"So what I would like to do is talk to you in general, then get your DNA, and then we'll get you out of here, ok?"

(E2, 2:19:08 P.M.).

In light of this communication, a reasonable person in the position of Mr. Cox at the time of this interrogation on February 26, 2018, would not have felt free to simply leave the interrogation room prior to speaking with Detective Hinsley. Nor would a reasonable person fell free to leave in light of the circumstances surrounding how this interrogation came about. Mr. Cox was transported by members of the Omaha Police Department to the station, where he was interrogated in a closed room, located on the third floor of police headquarters. (45:25-46:13). This occurred following a traffic stop where Mr. Cox was charged with the offense of Open Container.

By Detective Hinsley's own admission, Mr. Cox was not at the police station voluntarily, as he had been declining to provide a statement to law enforcement for approximately a year. (43:20-25). Namely, Detective Hinsley revealed that despite his efforts, the detective was unable to locate Mr. Cox. (26:2-27:3). As a result, Detective Hinsley issued a locate warrant for Mr. Cox. (26:23-27:3). Moreover, in an effort to make contact with Mr. Cox in order to obtain a statement regarding the homicide, Detective Hinsley drafted a buccal order or DNA order so that Mr. Cox's DNA could be collected by law enforcement. (26:23-27:22).

According to Detective Hinsley, had Mr. Cox tried to walk out of that third floor interrogation room on February 26, 2018, he would have been detained by the uniform patrol officers that cited him with the offense of open container. (33:16-23; 46:7-10). Uniform patrol officers who waited to provide a citation to Mr. Cox until *after* Detective Hinsley had an opportunity to speak with him as a result of a locate warrant. (26:23-28:9). Thus, while Detective Hinsley was speaking with Mr. Cox, he was under arrest for open container. (33:16-23). Detective

Hinsley clarified that a "locate warrant" serves the purpose of detaining an individual until the particular department has had an opportunity to investigate or interrogate an individual. (38:24-39:6; 26:24-27:8). This particular locate was issued by Detective Hinsley for Mr. Cox in March of 2017, nearly a year prior to the interrogation date. (38:21-23).

On the date of the initial interrogation, Detective Hinsley was not scheduled to work and was out of the office. (27:9-28:9). Mr. Cox was transported to Omaha Police Department Central Station, where he was met by Detective Hinsley, who came in to work to conduct the interrogation of Mr. Cox. (28:2-15). By Detective Hinsley's own definition, Mr. Cox was "detained" on February 26, 2018, at the police station for the locate warrant, the DNA order, as well as the open container violation. (43:20-44:10). Thus, the interrogation was custodial in nature for purposes of analysis under *Miranda*.

This Court should sustain the Motion to Suppress the Statements of Mr. Cox during his February 26, 2018, interrogation as his statements were acquired in contravention of his constitutional rights. First, when the detective asked Mr. Cox if he was willing to waive his rights, Mr. Cox did not opt to do so. Rather, he indicated he was willing to provide his DNA. (E2, 2:22:11 P.M.). In response, Detective Hinsley asked Mr. Cox, "Are you willing to sit here and let me ask you some questions?" Mr. Cox replied, "Yeah, you can ask me some questions." (E2, 2:22:16 P.M.). Mr. Cox never articulated that he was willing to waive his rights pursuant to *Miranda* in order to speak with Detective Hinsley.

After several minutes and upon the detective asking Mr. Cox numerous questions about Mr. Laron Rogers and the homicide, Mr. Cox told Detective Hinsley, "I told you what happened…I got nothing, you can go with that. Like I said, you can take my DNA or whatever, but I told you what I told you and I ain't got nothing else to say about it." (E2, 2:28:22 P.M.). Detective Hinsley

ignores this statement by Mr. Cox and proceeds to discuss the phone records with him.

In response, Mr. Cox states, "Look, I'm done talking about it." (2:28:50). Yet, the detective ignores the statement by Mr. Cox again and interrupts Mr. Cox, stating, "Well, here, let me just show you this…" (E2, 2:28:52 P.M.). Detective Hinsley indicates he would like to tell Mr. Cox about his case, changing the topic from cell phone records to how the detective believes he knows who the shooter is. When Mr. Cox tries to speak, the detective tells him to "hang on," again inquiring for further information from Mr. Cox as it is related to the death of Mr. Rogers. (E2, 2:29:07 P.M.)

Thereafter, Detective Hinsley tells Mr. Cox he has probable cause and evidence pointing to Mr. Cox. He presses on with the interrogation, telling Mr. Cox that his statement will not help himself as he has provided it thus far. *Again*, Mr. Cox informs the detective, "Look I'm not about to go over nothing. I told you, (interruption from Detective Hinsley with a further question) I told you." (E2, 2:32:53 P.M.). Detective Hinsley repeats his question and continues with the interrogation, once again ignoring what Mr. Cox has stated to him.

Moreover, during the course of the suppression hearing, Detective Hinsley admitted that he repeatedly interrupted Mr. Cox in the interrogation on February 26, 2018, so as to avoid the interrogation coming to an end by continuing to ask Mr. Cox questions. (42:9-43:19). Upon Mr. Cox informing the detective that he was "done" and wanted to "stop," not only did Detective Hinsley push through the interrogation but he did not ask for clarification from Mr. Cox either. (42:9-43:19).

In fact, according to the detective, "…we sa[y] a lot in our interviews that, you know, you're trying to illicit a statement through deceit." (41:5-7). During the interrogation, Detective Hinsley told Mr. Cox, "…all I have to do is prove that you're lying and they'll charge you." The

county attorney's office, per Detective Hinsley, had declined to file charges against Mr. Cox *three* times prior to this interrogation. (40:25-41:24).

All statements provided by Mr. Cox should be suppressed as Mr. Cox made multiple declarations that a reasonable police officer would have understood to be a request to terminate all questioning. Mr. Cox was repeatedly "unambiguous, unequivocal, and clear" in his requests to terminate questioning. In the context of the interrogation, wherein Detective Hinsley told Mr. Cox that he was not free to leave until his DNA was acquired, Mr. Cox expressed his desire to end the interrogation completely when he said, "I told you what happened…I got nothing, you can go with that. Like I said, you can take my DNA or whatever, but I told you what I told you and I ain't got nothing else to say about it." (2:28:22). At this point in the interrogation, Detective Hinsley was bound to cut off questioning.

As in *DeJong* wherein the defendant stated she was "done," this language was of such a nature that a reasonable officer should understand the statement as an invocation of his right to remain silent. This statement provided by Mr. Cox to the detective is also analogous to that in *Bauldwin*, where the defendant expressed, "I've given you what I'm gonna give you." This Court should find, as the Nebraska Supreme Court did in *Bauldwin*, that Mr. Cox's statement "was not prefaced with words of equivocation, such as 'I think,' 'maybe', or 'I believe.'" Rather, his language was unequivocal and clear.

Furthermore, also akin to *DeJong*, not only should a reasonable officer understand this statement as a request to terminate all questioning, but it seems that Detective Hinsley, in particular, did understand this request, as he continued to interrupt Mr. Cox or ignore his statement, changing the topic of conversation when he made such a request. As a result, the State did meet its burden in establishing that Mr. Cox's statements obtained on February 26, 2018, during the

interrogation with Detective Hinsley were obtained lawfully, and thus this Court should reverse the order of the trial court.

## CONCLUSION

The trial court committed reversible error in denying the motion to suppress cellular records and overruling defense's objection to the search warrant as cellular site location information was acquired contrary to the guarantees provided by the Fourth Amendment. Further, the independent source doctrine was incorrectly applied by the trial court, on its own accord, without making the necessary factual determinations this exception to the exclusionary rule demands. It was, in addition, reversible error for the trial court to deny the motion to suppress statements as Mr. Cox clearly and unequivocally conveyed his request to terminate all questioning in contravention to his rights as provided by *Miranda*. For each and all of these reasons, the Appellant respectfully requests this Court reverse his convictions and remand for new trial.

Respectfully Submitted,

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# Certificate of Service

I hereby certify that on Thursday, May 28, 2020 I provided a true and correct copy of this *Brief of Appellant Cox* to the following:

State of Nebraska represented by Douglas J Peterson (18146) service method: Electronic Service to **pat.selk@nebraska.gov**

Signature: /s/ Natalie M. Andrews (25720)

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NEBRASKA SUPREME COURT
COURT OF APPEALS

No. S-19-0780

IN THE NEBRASKA SUPREME COURT

STATE OF NEBRASKA,

Appellee,

v.

FORREST R. COX, III.,

Appellant.

APPEAL FROM THE DISTRICT COURT
OF DOUGLAS COUNTY, NEBRASKA

The Honorable Kimberly M. Pankonin , District Judge

# BRIEF OF APPELLEE

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Appendix J.

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### CASES



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## Statement of the Case

### A. Nature of the Case

Following a jury trial, Cox was convicted of First Degree Felony Murder, Use of a Deadly Weapon (Firearm) to Commit a Felony, and Possession of a Deadly Weapon (Firearm) by a Prohibited Person. See (T1–T2); (T123); (1243:17–1245:11). The district court subsequently sentenced Cox to life in prison on the Murder charge, 25 to 30 years' imprisonment on the Use charge, and 40 to 45 years' imprisonment on the Possession charge, with all of the sentences to be served consecutively. See (T134–T136).

### B. Issues Before the District Court

As relevant here, the issues before the district court were the proper dispositions of Cox's motions to suppress his cell phone records (and any evidence derived from those records) and his statements to law enforcement. See, generally, brief of appellant.

### C. How the Issues Were Decided in the District Court

The district court denied/overruled Cox's motions to suppress. See (T32–T33); (T54–T68); (T69–T70); (T71–T88).

### D. Scope of Review

Whether a party preserves an issue for appellate review presents a question of law that an appellate court reviews de novo. See *State v. Ortega*, S-14-0782 (memorandum opinion filed July 13, 2016) (collecting cases).

In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment or the safeguards established by the U.S. Supreme Court in *Miranda*, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But

whether those facts trigger or violate Fourth Amendment or Fifth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination. See *State v. Schriner*, 303 Neb. 476, 929 N.W.2d 514 (2019).

## Propositions of Law

### I.

When a motion to suppress is overruled, the defendant must make a specific objection at trial to the offer of the evidence which was the subject of the motion to suppress in order to preserve the issue for review on appeal.

See *State v. Piper*, 289 Neb. 364, 855 N.W.2d 1 (2014).

### II.

Stated another way, a failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal.

See *State v. Montoya*, 305 Neb. 581, 941 N.W.2d 474 (2020).

## Statement of Facts

### CHARGES

The State charged Cox with First Degree Murder (Premeditated or Felony) under Neb. Rev. Stat. § 28-301 (Reissue 2016), a Class IA felony, Use of a Deadly Weapon (Firearm) to Commit a Felony under Neb. Rev. Stat. § 28-1205 (Reissue 2016), a Class IC felony, and Possession of a Deadly Weapon (Firearm) under Neb. Rev. Stat. § 28-1206 (Reissue 2016), a Class ID felony. See (T1–T2). The charges were in relation to the March 6, 2017, shooting of Laron Rogers, who subsequently died from his injuries on March 22, 2017. See (T1–T2); (669:7–19); (1197:16–1198:7).

## PRE-TRIAL PROCEEDINGS

Before trial, Cox moved to suppress (1) his statements to law enforcement from February 26, 2018, on the ground that they were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and (2) his cell phone records from January 1, 2017, to March 24, 2017, (and any evidence derived from those records), obtained by law enforcement via an order under the federal Stored Communications Act, on the ground that they were obtained in violation of the Fourth Amendment. See (T32–T33); (T34–T36); (T54–T68). At a hearing on Cox's motions, the State adduced testimony from Detective Ryan Hinsley and offered into evidence a copy of the application for the order to obtain Cox's cell phone records (Exhibit 1), as well as video recordings of Hinsley's interviews with Cox from February 26, 2018, and March 8, 2018 (Exhibits 2 and 3) and a copy of the *Miranda* rights advisory form from the first interview (Exhibit 4). See (16:9–50:17).

About a month later, before the district court had ruled on Cox's motions, the State applied for a search warrant to again obtain Cox's cell phone records from January 1, 2017, to March 24, 2017. See (E5). The records obtained were the exact same records previously obtained by the State. See (68:17–18); (71:13–15); (E1); (E5).

Thereafter, in a written order, the district court denied Cox's motion to suppress his statements, but granted Cox's motion to suppress his cell phone records (those obtained under the earlier order) and any evidence derived from those records. See (T54–T68). In denying Cox's motion to suppress his statements, the district court determined that Cox had voluntarily waived his *Miranda* rights at the beginning of the February 26, 2018, interview and that he had not thereafter unequivocally invoked his right to remain

silent. See (T62–T66). In granting Cox's motion to suppress his cell phone records (and any evidence derived from those records), the district court accepted the State's concession on the issue. See (T65–T66). Presumably, the State conceded the issue because the order used to obtain the cell phone records was unlawful under *Carpenter v. U.S.*, ___ U.S. ___, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018). The State should not have conceded the issue, however, since the good faith exception to the exclusionary rule would have applied. See *State v. Jennings*, 305 Neb. 809, 942 N.W.2d 753 (2020).

But in any event, following the district court's ruling, and in response to the State's having again obtained (via the later search warrant) his cell phone records from January 1, 2017, to March 24, 2017, Cox filed a second motion to suppress those records, and any evidence derived from those records, on the ground that they were obtained in violation of the Fourth Amendment. See (T69–T70); (T71–T78). At a hearing on Cox's motion, the State adduced testimony from Hinsley and offered into evidence copies of the earlier application for the order to obtain Cox's cell phone records (Exhibit 1), as well as the later application for the search warrant to obtain Cox's cell phone records (Exhibit 5). See (54:9–74:3).

Thereafter, the district court overruled Cox's motion. See (T71–T88). In overruling Cox's motion to suppress his cell phone records, and any evidence derived from those records, the district court determined that (1) the affidavit supporting the search warrant established probable cause, (2) the search warrant itself was sufficiently particular and not overbroad, (3) regardless, the good faith exception would apply, and (4) the cell phone records were not "fruit of the poisonous tree" because although they were the same

records previously suppressed, they were obtained through an independent source, that being the search warrant. See (T71–T88).

## TRIAL EVIDENCE

At trial, the State called various witnesses to testify and offered into evidence numerous exhibits. See (77:14–1169:3). Cox did not call any witnesses, but did offer into evidence a few exhibits. See (1169:4–1170:14). A brief summary of the most relevant evidence adduced is set forth below.

On March 6, 2017, at around 7:49 p.m., officers responded to reports of a shooting at a combination gas station and convenience store in Omaha, Nebraska. See (435:11–442:15); (469:6–471:19); (532:20–533:20). When the officers arrived, they found Rogers, shot, on the ground in the parking lot. See (455:17–459:11); (532:20–533:17). The paramedics arrived shortly thereafter and transported Rogers (who, after initial treatment, appeared stable) to the hospital. See (453:1–458:23). An officer rode with Rogers in the ambulance and asked him who shot him, but Rogers did not answer. See (545:7–25).

At the scene, the officers spoke with various witnesses, including Robert Haley and Charles Moore. See (482:22–25); (606:18–25). Haley said that he was at the gas station filling up his car when he noticed two or three other cars in the parking lot, one of which was a white Chevy Impala. See (486:15–490:19). Haley noted that the Impala had tinted windows and did not have license plates. See (492:12–493:6). According to Haley, there was a man (Rogers) leaning into the Impala "like as if they were talking with someone or possibly doing something wrong, I don't know." See (489:18–490:19). Shortly after seeing this, Haley heard a gunshot and saw Rogers walk toward him, yelling, and

collapse on the ground. See (490:20–492:11). Thereafter, Haley saw the Impala speed off. See (491:9–493:6).

Moore, who was with Haley at the time, said that as he was leaving the convenience store, he heard someone say to call the police and he saw a man (Rogers) stagger and fall to the ground. See (500:20–501:20). Moore also saw what he believed to be a white Chevy Impala peel out of the parking lot and speed off. See (502:12–21). Like Haley, Moore noted that the Impala had tinted windows and did not have license plates. See (502:22–503:7). And Moore was very familiar with the makes and models of cars, as at the time, he detailed cars. See (503:11–15).

After the officers secured the scene, the forensic technicians processed it. See (534:10–535:4); (549:14–551:11). One of the technicians downloaded surveillance video from the premises, but according to one of the officers, it was not of much help. See (551:5–552:25); (611:3–612:5). The technicians also photographed the scene and processed Rogers' car, which was a silver Chevy Impala. See (440:15–21); (553:1–3); (567:22–568:6); (614:19–24); (738:7–10); (E19–E23). Inside Rogers' car, there were about 4 ounces of marijuana (which were not in plain view, see (617:18–618:4)), as well as a digital scale, baggies, and two cellphones. See (573:14–581:18); (624:14–22); (850:15–852:15). At the time, the crime was not being investigated as a homicide (since Rogers had not been killed), so the processing of the scene was not as extensive as it could have been; for example, the technicians did not swab apparent blood in the parking lot. See (553:4–21); (559:23–561:5).

Later, however, on March 22, 2017, Rogers died from his injuries. See (669:7–19); (1197:16–1198:7). At that point, the case was turned over to the homicide division and

assigned to Hinsley and Detective Matthew Backora. See (669:7–19). Hinsley's first step was to review the case file and collected evidence. See (669:18–670:14). After doing so, Hinsley determined that the surveillance video that had been collected was insufficient, so he collected additional surveillance video from the premises, as well as from another nearby business. See (669:18–674:12). The newly obtained surveillance video confirmed that the suspect vehicle was a white Chevy Impala. See (806:9–831:9).

Hinsley's next step was to speak with Rogers' parents, who told him that as of March 6, 2017, Rogers was living with them and working at a Boost Mobile store located at approximately 56th and Northwest Radial Highway. See (674:13–675:24). Additionally, Rogers' father told Hinsley that he had last seen Rogers 10 to 15 minutes before the shooting, at their house. See (675:25–677:3).

After speaking with Rogers' parents, Hinsley went to the Boost Mobile store and spoke with the store manager, Chandra Keyes, as well as Great Htoo, an employee at the store. See (677:4–24). Keyes played Hinsley three short video clips from inside the store on March 6, 2017, that showed Rogers interacting with two black men that she suspected and who had been driving a white Chevy Impala. See (678:9–17); (766:11–22); (E140). After viewing the video clips, Hinsley was able to personally identify one of the men that day as Cox and was able to identify the other man the next day as Rufus Dennis. See (688:4–690:19). Additionally, Htoo gave Hinsley a post-it note with the name "Bubba" and the phone number 402-312-6473 on it, which Htoo said he got from one of the men (Cox) after speaking with him in the store that day. See (726:1–727:11); (E118). Further investigation revealed that Cox's nickname was "Bubba." See (688:4–10).

According to Htoo, Rogers left work early on March 6, 2017, a little after 6:00 p.m., though he apparently hung around in the parking lot for a while after. See (728:9–730:17). Hope Hood, a friend of Rogers, said that Rogers was with her in his car, where they smoked marijuana and did some catching up. See (737:21–740:2). Hood explained that Rogers both smoked and dealt marijuana. See (734:5–15). While they were in Rogers' car, two men (Cox and Dennis) pulled up and parked a few stalls down from them in a white Chevy Impala that had no license plates, only in-transits. See (766:11–22). Cox and Dennis then approached Rogers in his car and Cox spoke with him about buying something like a pound of marijuana for a party. See (741:3–742:4); (744:20–745:20); (761:6–764:24); (E162, 2:44:00–2:44:30 p.m., 2:47:30–2:47:50 p.m.). There apparently was some (amicable) disagreement, after which Rogers told Cox that he did not have the amount that he was looking for, but that he could get it. See (745:21–746:11). Thereafter, Rogers and Cox exchanged phone numbers and Cox and Dennis went inside the Boost Mobile store to get a phone. See (746:12–24). At that point, it was around 6:30 p.m. and Hood drove away, as did Rogers. See (747:25–747:18); (768:6–22).

The investigation also revealed that Rogers owed his drug supplier money and that, therefore, Rogers was collecting money that day. See (1120:9–1121:17). Bank records showed that Rogers made two withdrawals earlier that day, one for $120 and the other for $821.89. See (922:20–935:5). Also, Rogers' father gave him $200 at the house. See (696:5–698:2). The money was not recovered. See (1188:21–1192:14).

On March 27, 2020, Hinsley spoke with Dennis. See (775:2–8). When Hinsley asked Dennis if he owned an Impala, Dennis said that he did not, but that he had access to one through his mother. See (775:9–13). Thereafter, Dennis and his mother took

Hinsley to where the Impala was parked, which was at 54th and Browne. See (776:1–778:4). Hinsley impounded the car, which was then processed. See (591:17–592:1); (781:16–782:21). The car had license plates, but the license plate screws looked new and there were what appeared to be glue marks from in-transit stickers in the window. See (780:21–24); (783:16–786:8). Additionally, there was a steering wheel cover, two remaining license plate screws in the packaging, and a receipt from AutoZone dated March 15, 2017. See (786:16–791:9); (795:5–797:9). Follow-up investigation revealed that Cox had purchased the steering wheel cover on that date. See (863:8–876:21); (1104:15–1107:24). Also, the Impala was parked near the location of Cox's brother's house. See (1103:20–1104:14).

The officers also examined Rogers' cell phones and analyzed Rogers' cell phone records for the period of January 1, 2017, to March 6, 2017, as well as Cox's cell phone records for the period of January 1, 2017, to March 24, 2017. See (E143–E146); (E147–E150); (681:18–682:16). Rogers' cell phone contained a text message sent to Cox's cell phone at 6:37 p.m. on March 6, 2017, saying "This Ronno." See (957:12–958:20); (993:12–996:1). Additionally, the cell phone records showed that there were numerous phone calls between Rogers' and Cox's cell phones in the time leading up to the shooting. See (996:2–998:11); (1034:12–1037:11); (E152–E153). Also, there were no other contacts between the two cell phones before that (since January 1, 2017). See (1069:24–1070:15). Finally, analysis of Cox's location data for the phone calls indicated that he was in the area of the shooting during the relevant period. See (1034:12–1037:11); (1039:16–1044:4); (E156–E161). Analysis of Cox's location data for other later phone calls also

showed that he was not in the area of his later alibi, discussed in more detail below. See (1108:9–20).

Hinsley sought to locate Cox but was not able to do so until February 26, 2018, at which time Hinsley interviewed him at the station. See (831:19–833:19); (1089:23–1090:13). During the interview, Cox acknowledged that his phone number at the time was 402-312-6473, that he knew Rogers, that he met with Rogers that day (with Dennis), and that he wanted to purchase something like a pound of marijuana for a party. See (1115:25–1117:21); (E162). But Cox denied having anything to do with Rogers' killing and claimed that he was with "a female," Lateah Carter Thomas, at her house that evening. See (1101:25–1103:14); (E162). As noted above, however, analysis of Cox's location data for other later phone calls showed that to be a lie. See (1087:15–1088:25); (1108:9–20). And Carter Thomas said that she did not recall seeing Cox on March 6 or 7, 2017, and that she did not recall seeing him until a few days after Rogers' funeral, which took place on March 31, 2017. See (1080:17–1082:19).

VERDICT AND SENTENCES

Toward the end of the trial, the State abandoned its theory of premeditated murder and proceeded solely on the theory of felony murder (with the underlying felony being the robbery of money or drugs or both). See (1162:25–1163:14); (1188:21–1193:14). After the parties' closing arguments, the district court submitted the case to the jury. See (1185:14–1243:7). Following its deliberations, the jury found Rogers guilty on all counts. See (T123); (1243:17–1245:11). The district court subsequently sentenced Cox to life in prison on the Murder charge, 25 to 30 years' imprisonment on the Use charge, and 40 to

45 years' imprisonment on the Possession charge, with all of the sentences to be served consecutively. See (T134–T136).

Cox appealed.

## Argument

### I.

### Assigned Errors 1 through 5

In his first five assigned errors, Cox argues (for various reasons) that the district court erred in overruling his motion to suppress his cell phone records and any evidence derived from those records. See brief of appellant, at 3, 16–59. Cox, however, failed to object to the key testimony regarding those records, as well as to a critical demonstrative exhibit used during that testimony, and thus waived his right to assert prejudicial error on appeal based on the district court's overruling his motion.

When a motion to suppress is overruled, the defendant must make a specific objection at trial to the offer of the evidence which was the subject of the motion to suppress in order to preserve the issue for review on appeal. See *State v. Piper*, 289 Neb. 364, 855 N.W.2d 1 (2014). Stated another way, a failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal. See *State v. Montoya*, 305 Neb. 581, 941 N.W.2d 474 (2020).

The State acknowledges that Cox objected to the cell phone records themselves, as well as other exhibits analyzing the information. See (979:18–981:19); (992:11–993:5); (1039:16–1040:3). But Cox did not object to the key testimony about the cell phone records or to the use of a critical demonstrative exhibit during that testimony. Specifically,

Cox did not object to Nick Herfordt's testimony regarding his analysis of the cell phone records, or to his use of Exhibit 155 as a demonstrative exhibit during that testimony. See (1012:13–1014:7); (1034:12–1037:22); (1040:8–1045:16); (E155). Thus, Herfordt testified, without objection, regarding each of the phone calls between Cox's cell phone and Rogers' cell phone, as well as the approximate location of Cox's cell phone for each phone call. See (1012:13–1014:7); (1034:13–1037:22); (1040:8–1045:16); (E155). Accordingly, the State submits that Cox waived his right to assert prejudicial error on appeal based on the district court's overruling his motion to suppress.

## II.

### ASSIGNED ERROR 6

In his sixth assigned error, Cox argues that the district court erred in denying his motion to suppress his statements to law enforcement from February 26, 2018. See brief of appellant, at 3–4, 59–67. Cox, however, failed to object to the testimony about those statements and thus waived his right to assert prejudicial error on appeal based on the district court's denying his motion.

The relevant propositions of law were set forth previously. See *supra*, at 11.

The State acknowledges that Cox objected to the video recording of the February 26, 2018, interview containing his statements. See (1097:3–22); (E162). But Cox did not object to Hinsley's testimony about the interview and Cox's statements made within it. See (1089:22–1123:16). Thus, Hinsley testified, without objection, regarding the majority of Cox's incriminating statements, including (among others) that his phone number at the time was 402-312-6473, that he knew Rogers and saw him that day, that he was with Dennis, that his brother lived in the area where the white Chevy Impala was found, and

that he claimed as an alibi that he was with Carter Thomas. See (1089:22–1123:16). Accordingly, the State submits that Cox waived his right to assert prejudicial error on appeal based on the district court's denying his motion to suppress.

## Conclusion

For the reasons noted above, the appellee respectfully requests that this Court affirm the judgment of the district court.

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# Certificate of Service

I hereby certify that on Tuesday, July 21, 2020 I provided a true and correct copy of this *Brief of Appellee State* to the following:

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