

No. _____

IN THE
Supreme Court of the United States

JAMES KEOWN,

Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent

**Appendix to Petition for Writ of Certiorari
to the
Supreme Judicial Court for the
Commonwealth of Massachusetts**

Counsel of Record for Petitioner

Claudia Leis Bolgen
Bolgen & Bolgen
110 Winn Street,
Suite 204
Woburn, MA 01801
(781) 938-5819
claudialb@bolgenlaw.com

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478 Mass. 232
Supreme Judicial Court of Massachusetts,
Middlesex..

COMMONWEALTH

v.

James KEOWN.

SJC-10593

|
Argued February 10, 2017

|
Decided October 23, 2017

Synopsis

Background: Following denial of his motion to suppress, 2008 WL 2675723, defendant was convicted in the Superior Court, Middlesex County, Sandra L. Hamlin, J., of first-degree murder on theory of deliberate premeditation. He appealed.

Holdings: The Supreme Judicial Court, Lowy, J., held that:

[1] affidavit in support of search warrant for search of defendant's computer drew sufficient nexus between suspected criminal activity and item sought in warrant;

[2] warrant for search of defendant's laptop computer adequately described the item to be searched with particularity;

[3] search of defendant's laptop computer, pursuant to warrant, was conducted reasonably; and

[4] any error arising from trial court's decision to admit statements victim made in e-mail messages to show defendant's motive and state of mind was not prejudicial.

Affirmed.

West Headnotes (38)

- [1] **Searches and Seizures**
🔑 Probable or Reasonable Cause

Under the Fourth Amendment to the United States Constitution and its state constitutional counterpart, a search warrant may issue only on a showing of probable cause. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14.

Cases that cite this headnote

- [2] **Searches and Seizures**
🔑 Probable or Reasonable Cause

The probable cause necessary to support the issuance of a search warrant does not require definitive proof of criminal activity. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14.

Cases that cite this headnote

- [3] **Searches and Seizures**
🔑 Necessity for writing; oral presentation or supplementation
Searches and Seizures
🔑 Probable or Reasonable Cause

When determining whether there is probable cause for the issuance of a search warrant, the probable cause inquiry is limited to the four corners of the affidavit, but a magistrate may also consider all reasonable inferences which may be drawn from the information in the affidavit. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14.

1 Cases that cite this headnote

- [4] **Searches and Seizures**
🔑 Probable or Reasonable Cause

An affidavit in support of a search warrant must contain enough information for an issuing magistrate to determine that the items sought are

related to the criminal activity under investigation, and that they reasonably may be expected to be located in the place to be searched at the time the search warrant issues. [U.S. Const. Amend. 4](#); [Mass. Const. pt. 1, art. 14](#).

[Cases that cite this headnote](#)

[5]

Searches and Seizures

🔑 [Scope of inquiry or review, in general](#)

Search warrants should not be subjected to hypercritical analysis, but rather should be interpreted in a realistic and commonsense manner. [U.S. Const. Amend. 4](#); [Mass. Const. pt. 1, art. 14](#).

[Cases that cite this headnote](#)

[6]

Searches and Seizures

🔑 [Scope of inquiry or review, in general](#)

The appellate court, when reviewing whether a magistrate judge had probable cause to issue a search warrant, gives considerable deference to the magistrate's determination of probable cause. [U.S. Const. Amend. 4](#); [Mass. Const. pt. 1, art. 14](#).

[Cases that cite this headnote](#)

[7]

Searches and Seizures

🔑 [Particular concrete applications](#)

Affidavit in support of search warrant for search of murder suspect's computer drew sufficient nexus between suspected criminal activity and item sought in warrant, as needed to establish probable cause for issuance of warrant; affidavit showed suspect's sophistication with computers by noting his employment as web designer, and indicated that suspect had forged contracts and documents from business school, based on

conversations with suspect's former boss, forgeries related specifically to alleged motive, which was that suspect had been lying to victim, his wife, about accomplishments and finances and killed victim to prevent her from finding out and to obtain life insurance benefits, and affidavit specified that victim died from poisoning that likely involved computer research. [U.S. Const. Amend. 4](#); [Mass. Const. pt. 1, art. 14](#).

[Cases that cite this headnote](#)

[8]

Searches and Seizures

🔑 [Probable or Reasonable Cause](#)

Requisite nexus between the crime and the items sought for issuance of a search warrant may be found in the type of crime, the nature of the items sought, the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely to hide items of the sort sought. [U.S. Const. Amend. 4](#); [Mass. Const. pt. 1, art. 14](#).

[Cases that cite this headnote](#)

[9]

Searches and Seizures

🔑 [Places, objects, or persons to be searched](#)

Warrant for search of murder suspect's laptop computer adequately described the item to be searched with particularity, as required to establish probable cause for issuance of search warrant; scope of search authorized by warrant included electronic files on laptop computer related to health or death of victim, who was suspect's wife and died from ethylene glycol (EG) poisoning, other prominent poisoning cases, EG or other poisons, and financial records, life insurance plans, and wills of victim and suspect, and all such categories of evidence were related to means of committing the crime and motive of suspect. [U.S. Const. Amend. 4](#); [Mass. Const. pt. 1, art. 14](#).

[Cases that cite this headnote](#)

[10]

Searches and Seizures

🔑 Scope, Conduct, and Duration of Warrantless Search

Searches of the “many files” on electronic devices, such as computers and smart cellular telephones, must be done with special care and satisfy a more narrow and demanding standard than searches conducted in the physical world. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14.

[Cases that cite this headnote](#)

[11]

Searches and Seizures

🔑 Warrants

Ministerial errors do not nullify search warrants. U.S. Const. Amend. 4.

[Cases that cite this headnote](#)

[12]

Searches and Seizures

🔑 Form and Contents of Warrant; Signature

Absence of search protocols did not mean that warrant for search of murder suspect’s laptop computer lacked particularity. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14.

[Cases that cite this headnote](#)

[13]

Searches and Seizures

🔑 Scope of Search

Search of murder suspect’s laptop computer, pursuant to warrant, for evidence related to his involvement in victim’s death was conducted reasonably; examiners used a list of 50 search terms that was supplemented along the way by

19 additional terms, and while search terms were not part of warrant application, they were squarely related to categories of evidence that were articulated in affidavit and examiner only looked at approximately 325 files of nearly 400,000 found on computer. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14.

[Cases that cite this headnote](#)

[14]

Searches and Seizures

🔑 Execution and Return of Warrants

The manner of the execution of a search warrant must satisfy the ultimate touchstone of reasonableness. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14.

[Cases that cite this headnote](#)

[15]

Criminal Law

🔑 Relevancy in General

Criminal Law

🔑 Relevance

Whether evidence is relevant and whether its probative value is substantially outweighed by its prejudicial effect are matters entrusted to the trial judge’s broad discretion and are not disturbed absent palpable error.

[Cases that cite this headnote](#)

[16]

Criminal Law

🔑 Prejudicial effect and probative value

Prior bad act evidence is inadmissible where its probative value is outweighed by the risk of unfair prejudice to the defendant, even if not substantially outweighed by that risk.

[Cases that cite this headnote](#)

[17]

Courts**Abuse of discretion in general**

An abuse of discretion occurs only where the judge makes a clear error of judgment in weighing the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives.

[Cases that cite this headnote](#)

[18]

Criminal Law**Other Particular Theories of Admissibility**

Trial court did not abuse its discretion in admitting evidence of defendant's use of username, which referenced fictional criminal mastermind, from movie, who supposedly murdered his wife and some of his children, on laptop computer for limited purpose of showing defendant's possession, custody, and control of the computer, in murder prosecution premised on poisoning death of victim, who was defendant's wife; although there may have been other ways to show use and control of computer, it was defendant who chose to use the name as his username, evidence did not focus on who character was or what name meant, and judge instructed jury that evidence was admitted solely on issue of use and control of computer.

[Cases that cite this headnote](#)

[19]

Criminal Law**Custody and conduct of jury**

The court presumes that a jury understands and follows limiting instructions.

[Cases that cite this headnote](#)

[20]

Criminal Law**Homicide, mayhem, and assault with intent to kill**

Evidence regarding defendant's fraud and embezzlement that resulted in termination of his employment, as well as evidence of defendant's forgery of documents and misrepresentations regarding his alleged admission into business school, related directly to defendant's motive, intent, and state of mind and, thus, was admissible prior bad acts evidence in murder case premised on poisoning death of victim, who was defendant's wife; prosecution's theory of case was that defendant killed victim to reap financial benefit of victim's life insurance policy and to conceal their dire financial status, and while some of lies occurred a few years earlier, they were directly connected to reason defendant was fired from his job weeks before victim's death.

[Cases that cite this headnote](#)

[21]

Criminal Law**Purposes for Admitting Evidence of Other Misconduct****Criminal Law****Showing bad character or criminal propensity in general**

Evidence of prior bad acts is not admissible to show a defendant's bad character or propensity to commit the charged crime, but may be admissible if relevant for other purposes such as common scheme, pattern of operation, identity, intent, or motive.

[1 Cases that cite this headnote](#)

[22]

Criminal Law**Factors Affecting Admissibility****Criminal Law****Remoteness**

In order for evidence of prior bad acts to be

admissible, the judge must find that the probative value of the evidence outweighs any undue prejudice to the defendant; to be sufficiently probative the evidence must be connected with the facts of the case and not be too remote in time.

[Cases that cite this headnote](#)

[23]

Criminal Law

🔑 **Homicide, mayhem, and assault with intent to kill**

Prior bad acts may be admissible in a murder case if they are inextricably intertwined with the description of events of the killing.

[Cases that cite this headnote](#)

[24]

Criminal Law

🔑 **Statement and review of evidence**

A judge, when providing jury instructions, may state the evidence and discuss possible inferences to be drawn therefrom.

[Cases that cite this headnote](#)

[25]

Criminal Law

🔑 **Then-existing state of mind or body**

Victim's e-mail messages, spreadsheet on her computer, and internet browsing history, which showed that, just prior to her death, victim was researching her illness and also visiting websites related to her doll-making hobby and was attempting to have a positive outlook on her failing health, were admissible for non-hearsay purpose of refuting defendant's theory that victim committed suicide and showing victim's state of mind, in murder prosecution premised on poisoning death of victim, who was defendant's wife.

[Cases that cite this headnote](#)

[26]

Homicide

🔑 **Cause of death**

A murder victim's state of mind becomes a material issue if the defendant opens the door by claiming that the death was a suicide.

[Cases that cite this headnote](#)

[27]

Criminal Law

🔑 **Hearsay**

Any error arising from trial court's decision to admit statements victim made in e-mail messages to show defendant's motive and state of mind was not prejudicial, in murder prosecution premised on poisoning death of victim, who was defendant's wife; bulk of complained-of statements were admitted into evidence for another permissible purpose, including to show that victim's state of mind was inconsistent with suicide, and their innocuous nature made it unlikely that they would or could have been used improperly by jury.

[Cases that cite this headnote](#)

[28]

Criminal Law

🔑 **Then-existing state of mind or body**

Criminal Law

🔑 **Evidence showing intent, motive, or nature of act**

Out-of-court statements may be introduced to understand the defendant's motive by showing another's state of mind, including friendliness and knowledge, if such issues are material.

[Cases that cite this headnote](#)

Cases that cite this headnote

[29]

Criminal Law

🔑 Evidence showing intent, motive, or nature of act

Homicide

🔑 Motive

A murder victim's state of mind may be material to the defendant's motive, such that out-of-court statements can be introduced to understand the defendant's motive, but only if the defendant knew of the victim's state of mind and, most importantly, would be likely to respond to it.

Cases that cite this headnote

[30]

Criminal Law

🔑 Evidence calculated to create prejudice against or sympathy for accused

Probative value of evidence of laptop computer internet searches, conducted prior to victim's death, on poisons in general and for "antifreeze death human," was not outweighed by the danger of unfair prejudice, even though there was no concrete evidence as to who conducted the searches, in murder prosecution premised on poisoning death of victim, who was defendant's wife; evidence was presented that victim only used laptop computers provided by her employer, and defendant took the laptop computer in question with him when he returned home after victim's death, while leaving a number of other computers and possessions behind. *Mass. Guide to Evid.* §§ 104(b), 901(b)(4).

1 Cases that cite this headnote

[31]

Criminal Law

🔑 Inferences from and Effect of Evidence

The prosecutor may argue for a conviction based on the evidence.

[32]

Criminal Law

🔑 Particular statements, arguments, and comments

Prosecutor's misstatement, during closing argument, incorrectly attributing a computer search for "ethylene glycol death human" to particular computer username, when in fact the search was for "antifreeze death human" and there had not been any evidence as to which username was used to conduct search, was not so great as to create substantial likelihood of miscarriage of justice in murder prosecution premised on poisoning death of victim, who was defendant's wife; jury had been educated that ethylene glycol (EG) was commonly found in antifreeze, and jury had been instructed several times regarding the permitted use of the username in question.

Cases that cite this headnote

[33]

Criminal Law

🔑 Matters Not Sustained by Evidence

Criminal Law

🔑 Statement of evidence

Prosecutors may not misstate the evidence or refer to facts not in evidence.

Cases that cite this headnote

[34]

Criminal Law

🔑 Scope of and Effect of Summing up

Remarks made during closing arguments are considered in the context of the whole argument, the evidence admitted at trial, and the judge's instructions to the jury.

Cases that cite this headnote

[35] Homicide**🔑 Intent or mens rea**

Defendant's intent to kill could be inferred based on his use of poison, in murder prosecution premised on poisoning death of victim, who was defendant's wife.

[Cases that cite this headnote](#)

[36] Weapons**🔑 Dangerous or deadly weapons in general**

Weapons are dangerous per se when they are designed for the offense or defense of persons.

[Cases that cite this headnote](#)

[37] Weapons**🔑 Weapons prohibited**

Whether an item is dangerous as used is a question for the jury.

[Cases that cite this headnote](#)

[38] Homicide**🔑 Malice**

The jury is permitted to infer malice from the use of a dangerous weapon, even in connection with intent to kill malice.

[Cases that cite this headnote](#)

****824 Homicide.** Constitutional Law, Search and seizure, Probable cause. Search and Seizure, Computer, Warrant, Affidavit, Probable cause. Probable Cause. Evidence, Information stored on computer, Relevancy and materiality, Inflammatory evidence, Prior misconduct, Hearsay, State of mind, Motive. Practice, Criminal, Capital case, Motion to suppress, Argument by prosecutor, Instructions to jury. Dangerous Weapon. INDICTMENT found and returned in the Superior Court Department on November 3, 2005.

A pretrial motion to suppress evidence was heard by Sandra L. Hamlin, J., and the case was tried before her.

Attorneys and Law Firms

Claudia L. Bolgen for the defendant.

Jamie M. Charles, Assistant District Attorney, for the Commonwealth.

Eoghan Casey, pro se, amicus curiae, submitted a brief.

Gregory T. Nojeim, of the District of Columbia, & Andrew Crocker & Stephanie Lacambra, of California, & Donald S. Bronstein, Committee for Public Counsel Services, & Chauncey B. Wood, Matthew R. Segal, Jessie J. Rossman, Alexis L. Shapiro, & Margaret L. Sullivan, for Massachusetts Association of Criminal Defense Lawyers & others, amici curiae, submitted a brief.

****825 Present:** Gants, C.J., Lenk, Gaziano, Lowy, & Budd, JJ.

Opinion

LOWY, J.

***233** The jury convicted the defendant of murder in the first degree on a theory of deliberate premeditation for poisoning his wife, Julie Keown. On appeal, the defendant argues that (1) the trial judge erred in denying a motion to suppress certain computer evidence because the warrant used to obtain the evidence was defective; (2) the trial judge abused her discretion in declining to exclude evidence related to the defendant's computer username and Internet search results, the defendant's prior bad acts, and the victim's statements and electronic mail (e-mail) messages; (3) the prosecutor's closing argument was improper; and (4) the trial judge's instruction to the jury on the inference of malice lowered the Commonwealth's burden of proof. We affirm the defendant's ***234** conviction and decline to grant relief under G. L. c. 278, § 33E.¹

Background. We summarize the facts that could have

been found by the jury and reserve certain details for the discussion of the issues. On September 4, 2004, the defendant took his wife, the victim, to Newton–Wellesley Hospital (hospital), where she lapsed into a coma from which she would never recover. The victim died on September 8 after being removed from life support. The medical examiner concluded that the cause of death was both acute and chronic ethylene glycol (EG) poisoning. EG is a transparent liquid that is used in a variety of different solvents, including antifreeze.

The victim and the defendant were college sweethearts who had been married for seven and one-half years when they moved to Waltham from Missouri in January, 2004. The couple's move was prompted by the defendant falsely telling his wife and his employer that he had been accepted into Harvard Business School. Based on this misrepresentation, the employer, a consulting firm for nonprofit organizations, permitted him to move to Massachusetts and work remotely while he attended classes. The victim, a registered nurse, also reached an agreement with her employer, a health-related software design firm, to allow her to work remotely.

The victim first showed signs of illness in May, 2004. At the end of July—after weeks of flu-like symptoms, diarrhea, nausea, and malaise—she visited a doctor. The doctor prescribed a medication for [gastroesophageal reflux disease](#), which did not alleviate her symptoms. In early August, the victim visited an urgent care facility, where she was diagnosed with [gastritis](#) and continued on the same medication.

The victim's condition continued to deteriorate, and on August 20, 2004, she awoke with slurred speech, an inability to walk, and dizziness. She went to the hospital with the defendant. The doctors at the hospital observed that the victim displayed signs of neurological impairment as well as [abnormal kidney function](#). The doctors did not diagnose EG poisoning at this time but concluded that poisoning of some sort was the likely explanation. During her stay, a doctor asked the victim if she felt safe at home, *235 to which she responded, "Yes, absolutely." Shortly after the victim's discharge on August 23, her parents came for a three-day visit and the group of four drove up to Maine. During the drive, Julie told her mother that the doctors at the hospital **826 had asked her repeatedly, "Are you sure your husband isn't giving you something?" The victim laughed when recounting this for her mother and said she thought the questions were "completely ridiculous." When asked by the victim about these questions on the drive, the defendant said he had been "really getting annoyed" that the doctors kept asking whether the victim had been "getting some kind of

poison."

On the morning of September 4, 2004, the defendant spoke on the telephone with an on-duty doctor at the hospital about the victim's condition. The defendant told the doctor that the victim was confused, had difficulty walking, and had garbled speech. The doctor told the defendant that the victim should be brought back to the hospital immediately, but the defendant did not take the victim to the hospital until after 9 P.M. that night. By the time the victim was seen by a physician she was unconscious. The victim died four days later.

During the victim's hospitalization, a doctor had asked the defendant whether the victim had been swallowing tablets or liquids and whether she was suicidal, which are routine questions in cases that involve toxicity. The defendant said that he had not found anything at home indicating that the victim had swallowed something and that she was not suicidal. When the doctor asked him why he had not immediately taken the victim to the emergency room following his morning telephone conversation with the doctor on September 4, the defendant said that the victim had refused. However, in the waiting room of the intensive care unit while the victim was still alive, the defendant told the victim's mother that the victim may have accidentally consumed a bottle of antifreeze while on a walk. The defendant also told this story on September 7 to a State police trooper, who had become involved after the victim's mother reported to the police that the victim was suffering from EG poisoning. The defendant further informed police that the victim was "talking about death" and had recently purchased chloroform on the Internet. In addition to these inconsistent explanations, the defendant, also on September 7, questioned a medical student assigned to the victim's case about the "hospital's role ... in determining cause of death" and, if ruled an accidental death, whether that would be "the end of the *236 case." On that same day, the defendant allowed Waltham police officers to conduct a search of his residence. The search did not turn up any EG.

Not long after the victim's death, the defendant abandoned his home in Massachusetts, without informing his landlord, and moved back to Missouri at some point in late 2004. He left many personal effects and computer equipment behind but brought a Sony VAIO laptop computer (laptop computer) with him. The defendant remained in Missouri until he was arrested in November, 2005.

Following the arrest, the defendant's mother obtained the laptop computer and mailed it to the defendant's attorney

in Massachusetts. A warrant was issued that authorized the examination of the contents of the laptop computer. The search, which was performed by a computer forensics investigator, yielded important evidence in the Commonwealth's case against the defendant. Prior to trial, the defendant moved to suppress evidence from the search of the laptop computer. The trial judge denied this motion.

At trial, the Commonwealth argued that the defendant had poisoned his wife to hide from her the fact that the couple was on the edge of financial ruin and to reap the benefits of her life insurance policy. In support of this theory, the Commonwealth introduced evidence that the defendant ****827** had embezzled from his employer and forged his admissions letter to Harvard Business School. The employer discovered these frauds in July, 2004, and promptly fired the defendant. Financial records from the end of August, 2004, also introduced in evidence, tended to show that the couple's finances were nearly depleted. In addition, evidence of the victim's e-mail messages sent to friends and acquaintances shortly before her final admission to the hospital supported a conclusion that the victim was not aware that the defendant had been fired, that he had never attended Harvard Business School,² and that they had virtually no money left.

The Commonwealth also introduced the following: evidence that a number of searches had been conducted on the laptop computer while the victim was still alive for queries such as "antifreeze death human" and "poison recipe"; evidence that the taste of EG can be masked by putting it in Gatorade and the defendant had been insistent that the victim drink Gatorade in the ***237** days and weeks before her death; and testimony by the medical examiner that the victim's symptoms throughout the summer suggested that she had been given small doses of EG over a length of time and then a lethal dose prior to her final admission to the hospital. The medical examiner further testified that the victim's manner of death was inconsistent with suicide.

The defendant's position at trial was that the victim's death was the result of either an accident or suicide. The defendant further argued that the victim was aware of the defendant's deceptions, in order to rebut the Commonwealth's theory of motive, namely, that the defendant killed the victim so she would not discover his web of lies. The primary evidence offered of the victim's knowledge of the defendant's lies was that she told some people her husband was at Harvard University to finish his bachelor's degree, and others that he was at Harvard Business School. The jury found the defendant guilty of murder in the first degree on a theory of deliberate

premeditation. The defendant's appeal from his conviction is before us pursuant to [G. L. c. 278, § 33E](#).

Discussion. 1. **The laptop computer warrant.** Prior to trial, the defendant brought a motion to suppress evidence obtained from the search of the laptop computer as well as an additional hard drive.³ That motion was denied and information found during a search of the laptop computer was used at trial. The defendant renews his challenge to the search on three grounds: (1) the search warrant affidavit did not establish probable cause for the search; (2) the warrant failed to describe the items to be seized with sufficient particularity; and (3) the search was conducted in an unreasonable manner.⁴ We conclude that the affidavit in this case established probable cause to search the laptop computer for evidence relating to the victim's death, the warrant described the items to be searched with sufficient particularity, and the search was conducted reasonably.

[1] [2] [3] [4] [5] [6] a. **Probable cause.** The general principles governing our consideration of a claim that probable cause to support a search warrant is lacking are well known. "Under the Fourth Amendment [to the ****828** United States Constitution] and art. 14 [of the Massachusetts Declaration of Rights], a search warrant may issue only on a showing of probable cause." ***238 Commonwealth v. Anthony**, 451 Mass. 59, 68, 883 N.E.2d 918 (2008). "The probable cause necessary to support the issuance of a search warrant does not require definitive proof of criminal activity." *Id.* at 69, 883 N.E.2d 918. The probable cause inquiry is limited to the "four corners of the affidavit," [Commonwealth v. O'Day](#), 440 Mass. 296, 297, 798 N.E.2d 275 (2003), quoting [Commonwealth v. Villella](#), 39 Mass. App. Ct. 426, 428, 657 N.E.2d 237 (1995), but a magistrate may also consider "[a]ll reasonable inferences which may be drawn from the information in the affidavit." [Commonwealth v. Dorelas](#), 473 Mass. 496, 501, 43 N.E.3d 306 (2016), quoting [Commonwealth v. Donahue](#), 430 Mass. 710, 712, 723 N.E.2d 25 (2000). In addition, "[a]n affidavit must contain enough information for an issuing magistrate to determine that the items sought are related to the criminal activity under investigation, and that they reasonably may be expected to be located in the place to be searched at the time the search warrant issues." [Commonwealth v. McDermott](#), 448 Mass. 750, 767, 864 N.E.2d 471, cert. denied, 552 U.S. 910, 128 S.Ct. 257, 169 L.Ed.2d 188 (2007), quoting [Commonwealth v. Cinelli](#), 389 Mass. 197, 213, 449 N.E.2d 1207, cert. denied, 464 U.S. 860, 104 S.Ct. 186, 78 L.Ed.2d 165 (1983). Search warrants should not be "subjected to hypercritical analysis," but rather should be "interpreted in a realistic and commonsense manner." [Anthony](#), *supra* at 69, 883 N.E.2d

918, quoting [Donahue, supra](#). “Importantly, ‘[w]e give considerable deference to a magistrate’s determination of probable cause.’ ” [Dorelas, supra](#), quoting [McDermott, supra](#).

^[7]The defendant’s probable cause argument focuses on a supposed insufficient nexus between the suspected criminal activity (murder) and the items sought (the laptop computer).⁵ We disagree.

^[8]Nexus between the crime and the items sought “may be found in ‘the type of crime, the nature of the ... items [sought], the extent of the suspect’s opportunity for concealment, and normal inferences as to where a criminal would be likely to hide [items of the sort sought].’ ” [Anthony, 451 Mass. at 70, 883 N.E.2d 918](#), quoting [Cinelli, 389 Mass. at 213, 449 N.E.2d 1207](#).

Here, the affidavit drew sufficient nexus between the suspected *239 criminal activity and the items sought by the warrant. First, the affidavit established the defendant’s sophistication with computers by noting he had been employed as a Web designer. The affidavit also established that the defendant had forged contracts and documents from Harvard Business School, based on the affiant’s conversation with the defendant’s former boss. One could reasonably infer that he created these forgeries by using a computer. See [Donahue, 430 Mass. at 712, 723 N.E.2d 25](#). Second, these forgeries relate specifically to the motive alleged in the affidavit: that **829 the defendant had been lying to his wife about his accomplishments and their finances and killed her to prevent her from finding out about these deceptions and to obtain her life insurance benefits. Third, the affidavit specified that the victim had died from EG poisoning, which the affiant noted, based on his nearly twenty years of investigatory experience, would likely have involved research that a computer savvy person like the defendant would have conducted online in 2004. Accordingly, the connection between the search of the computer and the suspected criminal activity was sufficient. Contrast [Commonwealth v. White, 475 Mass. 583, 591–592, 59 N.E.3d 369 \(2016\)](#) (no nexus between criminal activity of armed robbery and shooting suspect’s cellular telephone where only connection made in affidavit was affiant’s assertion, based on his experience, “that, given the type of crime under investigation, the device likely would contain evidence”).

^[9] ^[10]b. Particularity. Under the Fourth Amendment, warrants must “particularly describ[e] the place to be searched, and the persons or things to be seized.” Article 14 requires warrants to be “accompanied with a special designation of the persons or objects of search, arrest, or

seizure.” This particularity requirement “both defines and limits the scope of the search and seizure, thereby protecting individuals from general searches, which was the vice of the pre-Revolution writs of assistance.” [Preventive Med. Assocs., Inc. v. Commonwealth, 465 Mass. 810, 830, 992 N.E.2d 257 \(2013\)](#), quoting [Commonwealth v. Balicki, 436 Mass. 1, 8, 762 N.E.2d 290 \(2002\)](#). Searches of the “many files” on electronic devices, such as computers and smart cellular telephones, “must be done with special care and satisfy a more narrow and demanding standard” than searches conducted in the physical world. [Dorelas, 473 Mass. at 502, 43 N.E.3d 306](#).

The defendant claims that the warrant for the laptop computer lacked particularity in general, and also was an impermissible general warrant because it contained a typographical error and lacked an articulated search protocol. We disagree.

*240 The warrant adequately described the items to be searched with sufficient particularity. The scope of the search authorized by the warrant included electronic files on the laptop computer related to the health or death of the victim; other prominent poisoning cases; EG or other poisons; and the financial records, life insurance plans, and wills of the victim and the defendant. As discussed [supra](#), the affidavit accompanying the warrant established probable cause to search for evidence on the laptop computer relating to the defendant’s role in his wife’s death. These categories of evidence were related to the means of committing the crime and the motive of the defendant, and provided sufficient guidance to the examiners so that they were not on a fishing expedition. See [McDermott, 448 Mass. at 770, 864 N.E.2d 471](#).

^[11]The typographical error in the affidavit identified by the defendant does not change our conclusion about the affidavit’s adequate particularity. As written, the affidavit requested the authority to search the laptop computer for Internet-activity-related “computer files of the type described in Paragraph 2 of this affidavit.” Paragraph 2 simply described the items to be searched (i.e., the laptop computer). It was obvious that this incongruous and nonsensical cross reference was the result of a typographical error, and any reasonable magistrate would have recognized that fact. “[M]inisterial errors do not nullify search warrants.” [Commonwealth v. Ocasio, 434 Mass. 1, 4, 746 N.E.2d 469 \(2001\)](#), quoting **830 [Commonwealth v. Pellegrini, 405 Mass. 86, 88, 539 N.E.2d 514, cert. denied, 493 U.S. 975, 110 S.Ct. 497, 107 L.Ed.2d 501 \(1989\)](#).⁶

^[12]Nor does the absence of search protocols mean the

warrant lacked particularity for purposes of the Fourth Amendment and art. 14. This court has specifically declined to require search protocols in the past. [McDermott](#), 448 Mass. at 776, 864 N.E.2d 471 (“Advance approval for the particular methods to be used in the forensic examination of the computers and disks is not necessary”). However, the proliferation of technology over the ten years since we decided [McDermott](#) and the eleven years since the search warrant in this case was executed has heightened the concern regarding searches of electronic devices. See *241 [Riley v. California](#), — U.S. —, 134 S.Ct. 2473, 2489–2490, 189 L.Ed.2d 430 (2014). We recognized this concern in [Dorelas](#), 473 Mass. at 502, 43 N.E.3d 306 (“more narrow and demanding standard” required for searches of electronic devices). We have further expressed concern about the lack of formal guidelines in the Commonwealth for executing search warrants for digital evidence, [Commonwealth v. Molina](#), 476 Mass. 388, 398–399, 71 N.E.3d 117 (2017), but noted that the Attorney General’s existing digital evidence guide is helpful.⁷ If the Commonwealth were to offer such guidelines in its warrant applications, it would certainly help address particularization and reasonableness concerns. Cf. Kerr, [Executing Warrants for Digital Evidence: The Case for Use Restrictions on Nonresponsive Data](#), 48 Tex. Tech. L. Rev. 1, 18 (2015) (“The best way to minimize the unwarranted intrusions upon privacy for computer searches is to impose use restrictions on the nonresponsive data revealed in the course of the search”). While recognizing that the searches of electronic devices present major constitutional hazards, see [Riley](#), *supra*, in the context of this case, where the search was conducted reasonably (see discussion *infra*), and took place more than a decade ago in an entirely different technological landscape, we do not conclude that the laptop computer warrant lacked particularity because it did not include ex ante search protocols. See [Molina](#), *supra* at 397, 71 N.E.3d 117; [McDermott](#), *supra*.

^[13] ^[14] c. Reasonableness. Although not squarely raised in the defendant’s brief, we conclude that the search was conducted reasonably. The manner of the execution of a search warrant must “satisfy the ‘ultimate touchstone’ of reasonableness.” [Molina](#), 476 Mass. at 397, 71 N.E.3d 117, citing [Commonwealth v. Entwistle](#), 463 Mass. 205, 213, 973 N.E.2d 115 (2012), cert. denied, 568 U.S. 1129, 133 S.Ct. 945, 184 L.Ed.2d 736 (2013). Here, the examiners used a list of fifty search terms that was supplemented along the way by nineteen additional terms. While these search terms were not part of the warrant application, they are squarely related to the categories of evidence that were articulated in the affidavit.⁸ Lastly, the examiner **831 only looked closely at approximately 325

files of the nearly 400,000 found on the laptop computer. We are satisfied that the search was conducted in a reasonable manner.

*242 In sum, the warrant authorizing the search of the laptop computer adequately established probable cause, was sufficiently particularized, and was executed reasonably.

2. Motions in limine. Prior to trial, the defendant filed several motions in limine arguing that certain evidence should be excluded from trial. On appeal, the defendant argues that the judge abused her discretion in denying the motions relating to the following evidence, which was admitted at trial: (a) the defendant’s use of the computer username “Kaiser Soze”; (b) certain prior bad acts of the defendant; (c) the victim’s statements and e-mail messages; and (d) incriminating searches performed on the laptop computer using the search engine Google (Google searches).

^[15] ^[16] ^[17] “Whether evidence is relevant and whether its probative value is substantially outweighed by its prejudicial effect are matters entrusted to the trial judge’s broad discretion and are not disturbed absent palpable error.” [Commonwealth v. Sylvia](#), 456 Mass. 182, 192, 921 N.E.2d 968 (2010), quoting [Commonwealth v. Simpson](#), 434 Mass. 570, 578–579, 750 N.E.2d 977 (2001).⁹ An abuse of discretion occurs only where the judge makes “‘a clear error of judgment in weighing’ the factors relevant to the decision ..., such that the decision falls outside the range of reasonable alternatives.” [L.L. v. Commonwealth](#), 470 Mass. 169, 185 n.27, 20 N.E.3d 930 (2014).

^[18] a. “Kaiser Soze”. At trial, the judge permitted the Commonwealth to introduce evidence of the defendant’s use of the username “Kaiser Soze” on the laptop computer to show the defendant’s possession, custody, and control of the device. Kaiser Soze is a fictional character from the 1995 crime film, “The Usual Suspects,” who is a criminal mastermind and supposedly murdered his wife and some of his children rather than allow them to be kidnapped. The Usual Suspects (Metro–Goldwyn–Mayer Studios Inc. 1995).

The defendant argues that the decision to allow evidence of this name was an abuse of the judge’s discretion because the name was unduly prejudicial and there was other, less inflammatory evidence showing the defendant’s use of the laptop computer.¹⁰

^[19] *243 The judge did not abuse her discretion in allowing the “Kaiser Soze” evidence to be admitted at

trial for the limited purpose of showing the defendant's possession, custody, and control of the laptop computer. Although there may have been other ways to show the use and control of the computer, it was the defendant who chose to use the name of a fictional criminal mastermind as his username. ****832** Further, the evidence did not focus on who Kaiser Soze was, or what that name meant. Instead, the only "Kaiser Soze" evidence admitted was that the name was used as the name of a wireless network on the defendant's work computer when he returned to Missouri following the victim's death, and that the name was a username on the laptop computer, under which a number of incriminating Google searches were performed. In addition, the judge instructed the jury that the "Kaiser Soze" evidence was "admitted solely on the issue of the use and control of the computers." The judge also repeated a version of this instruction after telling the jury that those familiar with the character Kaiser Soze could not describe the character to those unfamiliar with the film in response to a question from the jury. "We presume that a jury understand and follow limiting instructions." See [Donahue](#), 430 Mass. at 718, 723 N.E.2d 25.

^[20]b. Prior bad acts. At trial, the Commonwealth was allowed to present two instances of the defendant's prior misconduct to show his state of mind, motive, and intent, as well as give context to the victim's death. These two prior bad acts involved the fraud and embezzlement that resulted in his termination from his employment and his forgery of documents and misrepresentations regarding his alleged admission to Harvard Business School.

^[21] ^[22] ^[23] "Evidence of prior bad acts is not admissible to show a defendant's bad character or propensity to commit the charged crime, but may be admissible if relevant for other purposes such as common scheme, pattern of operation, identity, intent, or motive." [Commonwealth v. Oberle](#), 476 Mass. 539, 550, 69 N.E.3d 993 (2017), citing [Commonwealth v. Carriere](#), 470 Mass. 1, 16, 18 N.E.3d 326 (2014). Such evidence may also be used if relevant to the defendant's state of ***244** mind. [Commonwealth v. Gonzalez](#), 469 Mass. 410, 420, 14 N.E.3d 282 (2014). The judge must find that the probative value of the evidence outweighs any undue prejudice to the defendant. See [Crayton](#), 470 Mass. at 249 n.27, 21 N.E.3d 157. "To be sufficiently probative the evidence must be connected with the facts of the case [and] not be too remote in time." [Commonwealth v. Butler](#), 445 Mass. 568, 574, 839 N.E.2d 307 (2005), quoting [Commonwealth v. Barrett](#), 418 Mass. 788, 794, 641 N.E.2d 1302 (1994). Further, prior bad acts may be admissible if they are "inextricably intertwined with the description of events ... of the killing." [Commonwealth v. Marrero](#), 427 Mass. 65, 67,

691 N.E.2d 918 (1998), quoting [Commonwealth v. Bradshaw](#), 385 Mass. 244, 269, 431 N.E.2d 880 (1982).

The defendant argues that these acts should not have been admitted because "there was no nexus between the lies and the murder" and that they were too remote in time from the murder.

The Commonwealth's theory of the case was that there was a clear connection between the lies and the murder. The Commonwealth theorized that the defendant killed his wife to reap the financial benefit of the victim's life insurance policy and to conceal their dire financial status. Under this theory, the lies that caused the defendant to lose his job—and thus put him and the victim on the edge of financial ruin—went directly to the defendant's motive, intent, and state of mind. The prior acts were also not too remote in time. Some of the lies occurred in 2002 and 2003, but they were directly connected to the reason the defendant was fired from his job weeks before the victim's death.

^[24] The judge did not abuse her discretion in determining that the danger of undue prejudice from these prior acts did ****833** not outweigh their probative value. Moreover, the judge specifically instructed the jury that they were not permitted to use these past events to decide that the defendant had a "criminal personality,"¹¹ and the jury are presumed to have followed the judge's instruction. [Donahue](#), 430 Mass. at 718, 723 N.E.2d 25.

***245** c. Victim's statements and Internet browsing history. The defendant argues that the admission of certain statements of the victim contained in e-mail messages, as well as the admission of the victim's Internet browsing history shortly before her death, was improper. The defendant objected to the admission of this evidence at trial, so we review for prejudicial error. [Commonwealth v. Cruz](#), 445 Mass. 589, 591, 839 N.E.2d 324 (2005).

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted in the statement. See [Mass. G. Evid. § 801\(c\)\(2\)](#) (2017). If a statement is offered for any purpose other than for its truth, it is not hearsay. See P.C. Giannelli, *Understanding Evidence* 446 (4th ed. 2013). When determining whether a statement is offered for its truth, one must ask, "How is this statement relevant to the case?"

The evidence in question, which will be outlined below, was introduced for two purposes: (1) to show that the victim's state of mind was inconsistent with suicide; and (2) to evaluate the defendant's motive and state of mind. The judge instructed the jury that they were to use the

victim's statements—other than those given to health care providers—for these limited purposes.

^[25]i. Victim's state of mind inconsistent with suicide. At trial, the Commonwealth introduced evidence to show that the victim's state of mind was inconsistent with suicide. This evidence included the following: a spreadsheet found on the victim's laptop computer, last accessed on September 1, 2004, that listed questions relating to [kidney disease](#) and pregnancy options; the victim's Internet browsing history from September 4, which showed that she was researching her illness and also visiting Web sites related to her doll-making hobby; and e-mail messages from the victim to friends and acquaintances sent over the course of the week leading up to her final hospitalization on September 4 in which she used phrases that showed that she had (or attempted to have) a positive outlook on her failing health.¹² Because we conclude that these statements were properly admitted to show that the victim's state of mind was inconsistent with suicide, we do not reach the question of prejudice.

^[26]“A murder victim's state of mind becomes a material issue if the defendant opens the door by claiming that the death was a suicide” ****834 *246** [Commonwealth v. Magraw](#), 426 Mass. 589, 594, 690 N.E.2d 400 (1998). The defendant argued in both his opening and closing statements that the victim may have ingested EG in an attempt to commit suicide, and thus opened the door to the admission of the victim's statements and Internet browsing history to show the victim's state of mind. See [Commonwealth v. Silanskas](#), 433 Mass. 678, 697–698, 746 N.E.2d 445 (2001). The victim's e-mail messages and searches on the Internet were not offered to prove the truth of the matters contained in these statements. Rather, the statements were admissible to refute the defendant's theory that the victim committed suicide.

The victim's e-mail messages, spreadsheet, and Internet browsing history “tended to disprove a suicide,” [id.](#) at 698, 746 N.E.2d 445, as they could be understood to indicate that the victim was seeking a diagnosis and treatment for her condition, and engaged in activity that brought her pleasure, rather than trying to die.¹³ The judge did not abuse her discretion in admitting the victim's statements, not for their truth, but for the purpose of showing that her state of mind was inconsistent with suicide.

^[27]ii. Evaluating the defendant's motive and state of mind. On appeal, the defendant argues that three of the victim's statements contained in e-mail messages were improperly introduced to show the defendant's motive and state of mind. These statements are: a January 20, 2004, message

from the victim to the defendant that indicates she was unaware of his embezzlement from his employer; a September 3, 2004, message from the victim to an acquaintance where the victim describes the defendant as a “wonderful person” who was going to school and working full time; and a September 1, 2004, message from the victim to a friend that contained a statement of the victim that the defendant “keeps wanting me to drink Gatorade.”¹⁴

^[28] ^[29]Out-of-court statements may be introduced to understand the defendant's motive by showing another's state of mind, including friendliness and knowledge, if such issues are material. See ***247** [Commonwealth v. Caldron](#), 383 Mass. 86, 91, 417 N.E.2d 958 (1981). A murder victim's state of mind may be material to the defendant's motive, “but only if the defendant knew of the victim's state of mind and, most importantly, ‘would be likely to respond to it.’ ” [Magraw](#), 426 Mass. at 594, 690 N.E.2d 400, quoting [Commonwealth v. Qualls](#), 425 Mass. 163, 167, 680 N.E.2d 61 (1997).

Here, the judge stated in her final charge to the jury that one of the limited uses of the victim's statements was to “evaluat[e] the defendant's motive.” We conclude, however, that if this was error, it was not prejudicial. The bulk of the complained-of statements were admitted in evidence for another permissible purpose (i.e., to show that the victim's state of mind was inconsistent with suicide), and their innocuous nature makes it unlikely that they would (or could) have been used improperly by the jury. Contrast [Magraw](#), 426 Mass. at 596–597, 690 N.E.2d 400 (error ****835** to allow testimony that murder victim, who was defendant's wife, said that she feared she would be found dead in manner that made her death appear to be accident).

^[30]d. Google searches on the laptop computer. The defendant argues, as he did in a motion in limine and at trial, that the judge improperly admitted evidence of a number of Google searches conducted on the laptop computer, because there was no concrete testimony about who conducted the searches and, thus, their probative value was substantially outweighed by the danger of unfair prejudice.

The complained-of searches occurred prior to the victim's death and involved searches on poisons in general and also one for “antifreeze death human.” This latter search occurred on August 18, 2004. There was no evidence offered on who conducted these searches as they all occurred under the username “JKeown,” which could stand for either Julie or James Keown, and was another username on the laptop computer, aside from “Kaiser

Soze.”

The judge did not abuse her discretion in admitting evidence of the Google searches that occurred on the laptop computer prior to the victim’s death. Evidence was presented that the victim only used laptop computers provided by her employer, and the defendant took the laptop computer with him when he returned to Missouri while leaving a number of other computers and possessions behind. Although there was no direct evidence that the defendant conducted the incriminating searches, a jury could reasonably infer that it was the defendant who conducted the *248 searches. See [Commonwealth v. Purdy](#), 459 Mass. 442, 451, 945 N.E.2d 372 (2011); [Commonwealth v. Vera](#), 88 Mass. App. Ct. 313, 317 n.3, 36 N.E.3d 1272 (2015). See also Mass. G. Evid. §§ 104(b), 901(b)(4). The probative value of this evidence was not substantially outweighed by the danger of unfair prejudice.

3. Closing argument. The defendant argues that the Commonwealth’s closing argument was improper because the argument (a) used the victim’s statements for their truth and (b) incorrectly attributed one of the incriminating searches on the laptop computer to the “Kaiser Soze” username. The defendant raises these arguments for the first time on appeal, so we review these claims to determine whether there was a substantial likelihood of a miscarriage of justice. [Commonwealth v. Nardi](#), 452 Mass. 379, 394, 893 N.E.2d 1221 (2008).

^[31]a. Victim’s statements. During closing argument, the prosecutor made a number of references to statements contained in the victim’s e-mail messages sent in the days before she slipped into a coma. The statements used by the prosecutor pertained to the victim’s research of her medical condition, and her expressions of hope to friends and acquaintances. At trial, evidence of the victim’s statements was admitted for a permissible purpose. See part 2.c, *supra*. See also [Magraw](#), 426 Mass. at 594, 690 N.E.2d 400. The prosecutor was plainly not reciting these statements for their truth, but rather to show that the victim’s state of mind was inconsistent with suicide—the very purpose for which the statements were admitted. The prosecutor may argue for a conviction based on the evidence. [Commonwealth v. Kozec](#), 399 Mass. 514, 516, 505 N.E.2d 519 (1987). There was no error.

^[32] ^[33] ^[34]b. Reference to “Kaiser Soze” username. During his closing, the prosecutor referred to the “Kaiser Soze” username on the laptop computer five times over the course of two transcript pages. These references incorrectly attributed a search for “ethylene glycol death *836 human” that occurred on August 18 to the “Kaiser

Soze” username. Prosecutors may not “misstate the evidence or refer to facts not in evidence.” [Kozec](#), 399 Mass. at 516, 505 N.E.2d 519. “However, ‘[r]emarks made during closing arguments are considered in the context of the whole argument, the evidence admitted at trial, and the judge’s instructions to the jury.’ ” [Commonwealth v. Walters](#), 472 Mass. 680, 703, 37 N.E.3d 980 (2015), quoting [Commonwealth v. Gonzalez](#), 465 Mass. 672, 680, 991 N.E.2d 1036 (2013).

There were two errors regarding this reference. First, the search was actually for “antifreeze death human.” The jury, however, *249 had been educated that EG was commonly found in antifreeze. This minor misstatement did not cause a substantial likelihood of a miscarriage of justice. See [Commonwealth v. DaSilva](#), 471 Mass. 71, 83, 27 N.E.3d 383 (2015) (error in misstating timing by one minute did not result in substantial likelihood of miscarriage of justice).

Second, there was no evidence under which username this search occurred. The prosecutor’s statement attributing the search to the “Kaiser Soze” username was improper. The prosecutor’s statement, however, was directing the jury to draw the fair inference that the search was conducted by the defendant. See [Commonwealth v. Francis](#), 450 Mass. 132, 142, 876 N.E.2d 862 (2007). The statement did not attempt to use the “Kaiser Soze” username for an impermissible purpose. The jury were instructed by the judge several times regarding the permitted use of the “Kaiser Soze” username, and were further instructed “both before and after closing arguments that the arguments of counsel are not evidence, and that, if either party referred to facts not in evidence during closing, the jury should disregard them.” [Walters](#), 472 Mass. at 703, 37 N.E.3d 980. The jury are presumed to have followed the judge’s instructions. See [Donahue](#), 430 Mass. at 718, 723 N.E.2d 25. The prosecutor’s misstatement was not so great that it created a substantial likelihood of a miscarriage of justice. See [Walters](#), *supra*.

^[35]4. Jury instruction. The defendant argues that the judge’s instruction to the jury, permitting them to infer an intent to kill based on the use of poison, impermissibly lowered the Commonwealth’s burden of proof in violation of his due process rights. The defendant objected to the jury instruction at trial, so we review for prejudicial error. [Cruz](#), 445 Mass. at 591, 839 N.E.2d 324.

Specifically, the defendant claims that the jury should not have been permitted to infer an intent to kill from the use of EG because it is not “dangerous per se.” Contrasting the use of EG with the use of a weapon that is dangerous per se (e.g., a firearm), the defendant claims that the

judge's instruction allowed the jury to infer an intent to kill even though the use of EG against another more readily equates to an "intent to harm." We disagree.

^[36] ^[37] We have held that certain weapons, such as firearms and daggers, are dangerous per se for purposes of G. L. c. 265, § 15A (assault and battery by means of dangerous weapon). See [Commonwealth v. Appleby](#), 380 Mass. 296, 303, 402 N.E.2d 1051 (1980). Weapons are dangerous per se when they are "designed for the offense or defense of persons." [Id.](#) Other items that are not dangerous weapons per se may, however, qualify as dangerous weapons as *250 used. See [id.](#) at 304, 402 N.E.2d 1051, and cases cited; [Commonwealth v. Farrell](#), 322 Mass. 606, 615, 78 N.E.2d 697 (1948). See [Commonwealth v. Lord](#), 55 Mass. App. Ct. 265, 269 n.7, 770 N.E.2d 520 (2002) ("The degree of bodily harm that a weapon must be capable of inflicting is the same, whether the weapon **837 is inherently dangerous or dangerous as used. The primary difference between weapons in these two categories is in their design and purpose"). Whether an item is dangerous as used is a question for the jury. See [Appleby](#), [supra](#) at 305, 402 N.E.2d 1051; [Farrell](#), [supra](#).

^[38] The "jury are permitted to infer malice from the use of a dangerous weapon," [Commonwealth v. Guy](#), 441 Mass. 96, 107, 803 N.E.2d 707 (2004), "even in connection with first prong ('intent to kill') malice." [Commonwealth v. Perez](#), 444 Mass. 143, 153, 825 N.E.2d 1040 (2005), citing [Guy](#), [supra](#). This is so even when the jury are

instructed that a dangerous weapon is an item that is capable of causing serious injury (in addition to death) because it is a reasonable inference that one who attacks another with an item that is capable of causing serious injury intends to kill that person. See [Perez](#), [supra](#) (malice may be inferred from use of dangerous weapon). See also [Commonwealth v. Albert](#), 391 Mass. 853, 860–861, 466 N.E.2d 78 (1984) ("Certainly, the jury were entitled to infer malice from the intentional use of a deadly weapon, so long as the judge's instructions did not compel them to do so"). Here, the judge's instruction properly instructed the jury on the use of dangerous weapons. There was no error.

Conclusion. We have reviewed the entire record on both the law and the facts pursuant to our obligation under G. L. c. 278, § 33E. We conclude that the defendant is not entitled to relief, as the interests of justice do not require the entry of a verdict of a lesser degree of guilt or a new trial.

Judgment affirmed.

All Citations

478 Mass. 232, 84 N.E.3d 820

Footnotes

- 1 We acknowledge the amicus brief of the Massachusetts Association of Criminal Defense Lawyers, the Committee for Public Counsel Services, the American Civil Liberties Union of Massachusetts, the Center for Democracy & Technology, and the Electronic Frontier Foundation; and the amicus brief of Professor Eoghan Casey.
- 2 The defendant took one class at Harvard University Extension School in the spring of 2004.
- 3 For ease of reference we refer to both devices collectively as the "laptop computer."
- 4 The defendant does not squarely raise an argument on reasonableness grounds on appeal, but we analyze the issue nonetheless.
- 5 The defendant also argues that the judge used the wrong test to evaluate probable cause. The defendant is correct that, in addition to the traditional probable cause rubric, the judge employed the [Aguilar–Spinelli](#) test, which is typically used to determine probable cause when an unnamed informant is involved. See generally [Spinelli v. United States](#), 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); [Aguilar v. Texas](#), 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). See also [Commonwealth v. Upton](#), 394 Mass. 363, 374–375, 476 N.E.2d 548 (1985). That the judge added an additional—albeit unnecessary—layer of analysis to her nearly 120–page ruling on the defendant's motion to suppress does not undermine her resolution of the probable cause issue.
- 6 The obviousness that this was a typographical error was confirmed by the affiant's testimony that instead of referring to the paragraph describing the items to be searched, the cross reference should have been to paragraphs pertaining to the victim's health, EG, and financial records. The motion judge credited this testimony, and also credited the affiant's testimony that the search was actually conducted in accordance with the correct parameters.

- 7 See Office of the Attorney General, Massachusetts Digital Evidence Guide (June 9, 2015), <http://www.mass.gov/ago/docs/cybercrime/ma-digital-evidence-guide.pdf> [<https://perma.cc/WN9C-NJNY>].
- 8 As an example, the search terms included murder, death benefit, antifreeze, and widower, along with a number of names of potential poisons.
- 9 Prior bad act “evidence is inadmissible where its probative value is outweighed by the risk of unfair prejudice to the defendant, even if not substantially outweighed by that risk.” [Commonwealth v. Crayton](#), 470 Mass. 228, 249 n.27, 21 N.E.3d 157 (2014).
- 10 The defendant also argues that the judge abused her discretion in admitting the “Kaiser Soze” evidence because she was not familiar with the motion picture and instead relied on her law clerks’ and the prosecutor’s descriptions of the character. The defendant does not argue, however, that the prosecutor’s description of the character to the judge during the motion hearing was inaccurate in any way. Indeed, the defendant quotes this description in his brief to explain his theory of prejudice related to the use of the “Kaiser Soze” name. Not watching the motion picture, and instead relying on an undisputed description of the Kaiser Soze character, was not an abuse of discretion.
- 11 The defendant argues that by referring specifically to “Harvard Business School” and the name of his employer in the final jury instruction, the judge impermissibly drew the jury’s attention to the prior bad acts. The defendant objected to this following the instructions, and the judge stated that she felt the instruction “would not have been intelligible to [the jury]” without referring to the two institutions. The judge did not speak about specific conduct in her charge and instead referred to “certain conduct and acts of the defendant pertaining to the Harvard Business School [and his employer].” This instruction was proper. “A judge may state the evidence and discuss possible inferences to be drawn therefrom.” [Commonwealth v. Perez](#), 390 Mass. 308, 319, 455 N.E.2d 632 (1983).
- 12 For example, the victim used the phrase “knock on wood” when she stated that the medication she was on was making her feel better.
- 13 The Commonwealth also presented direct evidence on the victim’s state of mind in the form of testimony from two of her friends to the effect that the victim was happy and ready to battle her illness.
- 14 This statement was cumulative of other evidence: the victim’s mother recalled seeing a bottle of Gatorade in the victim and defendant’s refrigerator and, more importantly, the victim’s friend testified that during a telephone conversation with the victim in August, 2004, the defendant yelled to her in the background, “Tell Julie to drink her Gatorade,” in an apparent attempt to get the friend to convince the victim to drink Gatorade. Further, the evidence of the defendant’s guilt was overwhelming.

SEARCH WARRANT

G.L. c. 273, §§ 1-7

TRIAL COURT OF MASSACHUSETTS

DISTRICT

COURT DEPARTMENT

WALTHAM

DIVISION

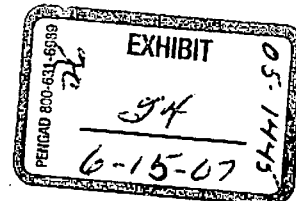
SEARCH WARRANT DOCKET NUMBER

0651 SW 0037

TO THE SHERIFFS OF OUR SEVERAL COUNTIES OR THEIR DEPUTIES, ANY STATE POLICE OFFICER, OR ANY CONSTABLE OR POLICE OFFICER OF ANY CITY OR TOWN, WITHIN OUR COMMONWEALTH:

Proof by affidavit, which is hereby incorporated by reference, has been made this day and I find that there is PROBABLE CAUSE to believe that the property described below:

- ☐ has been stolen, embezzled, or obtained by false pretenses.
- ☐ is intended for use or has been used as the means of committing a crime.
- ☐ has been concealed to prevent a crime from being discovered.
- ☐ is unlawfully possessed or concealed for an unlawful purpose.
- ☒ is evidence of a crime or is evidence of criminal activity.
- ☐ other (specify) _____



YOU ARE THEREFORE COMMANDED within a reasonable time and in no event later than seven days from the issuance of this search warrant to search for the following property:

See Addendum A, attached + incorporated herein

RECEIVED

JUN 15 2006

WALTHAM DISTRICT COURT

☒ at:

Evidence locker, Mass. State Police Detective Unit
40 Thorndike St., Cambridge, Ma.

which is occupied by and/or in the possession of: Mass. State Police

☐ on the person or in the possession of:

You ☐ are ☒ are not also authorized to conduct the search at any time during the night.

You ☒ are ☐ are not also authorized to enter the premises without announcement.

You ☐ are ☒ are not also commanded to search any person present who may be found to have such property in his or her possession or under his or her control or to whom such property may have been delivered.

YOU ARE FURTHER COMMANDED if you find such property or any part thereof, to bring it, and when appropriate, the persons in whose possession it is found before the

Waltham

Division of the

District

Court Department.

DATE ISSUED

June 8, 2006

FIRST OR ADMINISTRATIVE JUSTICE

WITNESS: Gregory C. Flynn

SIGNATURE OF JUSTICE, CLERK-MAGISTRATE OR ASSISTANT CLERK

X

Denise Rippin

PRINTED NAME OF JUSTICE, CLERK-MAGISTRATE OR ASSISTANT CLERK

Denise Rippin

A search warrant must be executed as soon as reasonably possible after its issuance, and in any case may not be validly executed more than 7 days after its issuance. The executing officer must file his or her return with the court named in the warrant within 7 days after the warrant is issued. G.L. c. 27E, §24.

This search warrant was issued on June 8th 2006 18, and I have executed it as follows:

The following is an inventory of the property taken pursuant to this search warrant:

1. One Sony Viao notebook computer Model # PCG-672R Serial # 3000256
2. One Western Digital hard drive Model # 400EB-00CPFO
3. Information from items 1 + 2 have been acquired, by a forensic search.
4. The information from this search is currently at the SID Unit. of
5. the Middlesex District Attorney's Office. An itemization of recovered
6. files to be provided in the course of discovery.
7. _____
8. _____
9. _____
10. _____
11. _____
12. _____
13. _____
14. _____
15. _____
16. _____
17. _____
18. _____
19. _____
20. _____

(attach additional pages as necessary)

This inventory was made in the presence of: Andrew Winrow

I swear that this inventory is a true and detailed account of all the property taken by me on this search warrant.

SIGNATURE OF PERSON MAKING SEARCH X <u>James M. Connolly</u>	DATE AND TIME OF SEARCH <u>6-9-06 12:00 PM</u>	SWORN AND SUBSCRIBED TO BEFORE X <u>William H. Abbott</u> Signature of Justice, Clerk, Magistrate or Assistant Clerk
PRINTED NAME OF PERSON MAKING SEARCH <u>James M. Connolly</u>	TITLE OF PERSON MAKING SEARCH <u>Det. Lieutenant</u>	DATE SWORN AND SUBSCRIBED TO <u>6-15-06</u>



NAME OF APPLICANT

JAMES CONNOLLY

DISTRICT

COURT DEPARTMENT

WALTHAM

DIVISION

POSITION OF APPLICANT

Mass. State Police Detective Lieut.

SEARCH WARRANT DOCKET NUMBER

06 CR 0037

I, the undersigned APPLICANT, being duly sworn, depose and say that:

1. I have the following information based upon the attached affidavit(s), consisting of a total of 13 pages, which is (are) incorporated herein by reference.

2. Based upon this information, there is PROBABLE CAUSE to believe that the property described below:

- ☐ has been stolen, embezzled, or obtained by false pretenses.
☐ is intended for use or has been used as the means of committing a crime.
☐ has been concealed to prevent a crime from being discovered.
☐ is unlawfully possessed or concealed for an unlawful purpose.
☒ is evidence of a crime or is evidence of criminal activity.
☐ other (specify) _____

TELECOPY

MICHELE J. STRONG
CLERK/MAGISTRATE

3. I am seeking the issuance of a warrant to search for the following property (describe the property to be searched for as particularly as possible):

SEE ADDENDUM A, attached + incorporated herein.

COPY

4. Based upon this information, there is also probable cause to believe that the property may be found (check as many as apply):
☒ at (identify the exact location or description of the place(s) to be searched):

EVIDENCE LOCKER, MASS. STATE POLICE DETECTIVE UNIT, 40 THORNDIKE ST., CAMBRIDGE, MASS.

which is occupied by and/or in the possession of: MASS. STATE POLICE

☐ on the person or in the possession of (identify any specific person(s) to be searched):☐ on any person present who may be found to have such property in his or her possession or under his or her control or to whom such property may have been delivered.

THEREFORE, I respectfully request that the court issue a Warrant and order of seizure, authorizing the search of the above described place(s) and person(s), if any, to be searched, and directing that such property or evidence or any part thereof, if found, be seized and brought before the court, together with such other and further relief that the court may deem proper.

- ☐ have previously submitted the same application.
☒ have not previously submitted the same application.

PRINTED NAME OF APPLICANT

JAMES CONNOLLY

SIGNED UNDER THE PENALTIES OF PERJURY

X

Signature of Applicant

SWORN AND SUBSCRIBED TO BEFORE

X

Signature of Justice, Clerk-Magistrate or Assistant Clerk

DATE

6-8-06

AFFIDAVIT OF LIEUTENANT JAMES CONNOLLY

I, James Connolly, being duly sworn, depose and say under the pains and penalties of perjury that the following is true to the best of my knowledge and belief.

1. I am a Detective Lieutenant with the Massachusetts State Police Detective Unit based out of the Middlesex District Attorney's Office in Cambridge, Massachusetts. I currently am in charge of this Unit. I have a Master's Degree in Criminal Justice from Westfield State College. I have been a police officer for 24 years and have been assigned to my present position since February of 2005. I have been with the Unit for over 18 years. I have received specialized training in the areas of crime scene searches, homicide investigation, search and seizure, evidence collection, and preservation from the Massachusetts Criminal Justice Training Council, the Middlesex District Attorneys Office, FBI, New England State Police Information Network, New England State Police Administrators' Conference, and the Medical Examiner's Office. Over the course of my career, I have participated in the investigation of over 100 homicides. I also have participated in and have served as a search warrant affiant over 100 times. In addition, I have testified in my capacity as a Detective before the District and Superior Courts of the Commonwealth of Massachusetts over 100 times, and in Courts of the states of New York and New Hampshire.

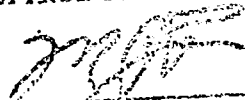
2. I believe that I have probable cause to believe that the crimes of murder (Mass. Gen. Laws c. 265, § 1) and use of a poisonous substance, to wit: ethylene glycol (Mass. Gen. Laws c. 266, § 102A½) have occurred and that evidence of those crimes will be found within the electronic files located in the following items, which currently are located within the locked evidence locker of the Mass. State Police Detective Unit located at 40 Thorndike Street, Cambridge, Mass. The items sought to be searched are:

1. a Sony Viao notebook computer, Model # PCG-672R, Serial # 3000256; and
2. a Western Digital W D Protégé Enhanced IDE Hard Drive, Model # WD 400EB-00CPFO.

My belief is based upon my own investigation as well as conversations with detectives from the Waltham, Mass. police department.

3. On September 8, 2004, Ms. Julie Keown (the victim), aged 31, died at the Newton-Wellesley Hospital in Massachusetts. According to hospital officials and medical personnel, including her treating physicians, she died as a

A TRUE COPY ATTEST



MICHAEL J. FINUCANE
CLERK/MAGISTRATE

result of poisoning from ethylene glycol (hereinafter referred to as "EG"). Prior to 2004, the victim had always been a very healthy person. She was trained as a Registered Nurse and had previously practiced in an Intensive Care Unit. The victim is survived by her husband, James Keown (dob 5/17/74) who currently is in custody in Cambridge, Massachusetts; by her parents, John and Nancy Oldag of Plattsburg, Missouri; and by her brother Chad Oldag of Liberty, Missouri.

4. EG is a synthetic liquid substance that is common in many consumer products, such as anti-freeze, de-icing solutions, printer's ink, stamp pads, and ballpoint pen ink. EG is widely sold in grocery stores and automobile supply stores. It is clear, odorless, and has a sweet taste. Accidental ingestion of small amounts of EG (for example by putting fingers in the mouth after changing anti-freeze) are not likely to cause serious injury or death. On the other hand, ingesting larger amounts of EG causes metabolic, respiratory, cardiac, and renal problems that can result in death. EG breaks down quickly in the body; therefore, EG is difficult to detect, even though symptoms of poisoning by EG may be present. A delay in treatment may result in the EG's going undetected. Death can result from small amounts of EG ingested over a period of time. This manner of poisoning by EG results in a painful and protracted death. Also, I have investigated hundreds of deaths and although some of these included people who committed suicide by ingesting various poisons, I have never investigated a case where a person has poisoned himself or herself slowly over three months. Additionally, I have learned that the victim was very concerned about her parents' visiting her during the time she was ill because this particular timeframe was harvest time, the most important time of the year for them. For these reasons, in my opinion, an individual who wished to commit suicide would not choose this method.

5. The victim grew up on a farm in Missouri. At the time of her death, she had been married to Keown for eight years. Up until January of 2004, the victim and Keown had lived in the Midwest, most recently in Liberty, Missouri. In January of 2004, they relocated to the Boston area and rented an apartment at 52 School Street in Waltham (a suburb of Boston). They were paying \$2,000 per month for rent. Keown told his friends and in-laws that they were moving to the Boston area so that he could pursue a Master's Degree in Business Administration at Harvard University. He said that Harvard had granted him a "diversity scholarship" for non-traditional students. I have learned through my investigation that Keown did not finish his bachelor's degree at William Jewell College. The victim was upset about relocating. She even told a friend that she was considering divorcing her husband over it. Nonetheless, she

accompanied Keown to the Boston area. By moving to Boston, the victim left behind her family in Missouri. After the move, the victim worked from home for a Kansas City-based company called Cerner which designed software for hospitals. I know from my years of police work that a common modus operandi of husbands who abuse their wives (or boyfriends who abuse their girlfriends) is to isolate them from their family and caring friends who otherwise would be available to assist them.

6. In early June of 2004, 5 months after the move, the victim developed flu-like symptoms, including nausea and vomiting. She was tired all the time and suffered from persistent nausea, vomiting, and diarrhea. Later in June, the victim visited her parents in Missouri. Her parents noticed that she did not look well. However, the victim said that she felt much better while she was with them in Missouri compared to how she had been feeling while in Waltham.

7. On August 3, 2004, 8 months after the move, the victim went to see Dr. Richard Daley in Waltham, Mass. She presented with a rash on her legs, an upset stomach, heartburn, indigestion, nausea, diarrhea, and belching. She reported that since June, she had flu-like symptoms such as nausea and vomiting, without any fever. Dr. Daley referred her to Dr. Dennis Lee for an endoscopy. The victim's stomach appeared inflamed, and she appeared to have severe gastritis. Doctors gave her Prilosec.

8. In the following days, the victim suffered from dizziness and increased and violent vomiting. She told her parents she thought it was from the Prilosec. However, I learned in my investigation that Prilosec does not typically cause the sort of extreme side effects that afflicted the victim. In addition, doctors at the Newton-Wellesley Hospital determined that her symptoms were not attributable to the Prilosec.

9. The following week, the victim had a telephone conversation with her mother in Missouri. The victim told her mother that she was experiencing slurred speech, loss of motor skills, clumsiness, and she felt "drunk."

10. On August 20, 2004, the victim went to the Newton-Wellesley Hospital. This time, the victim was very sick, her speech was slurred, her body was limp, and she could barely walk. She had felt in extremely poor health since her earlier visit to Dr. Daley on August 3rd, with increased fatigue, decreased appetite, nausea, vomiting, diarrhea, feelings of vertigo, garbled speech, and lack of motor control. She was admitted to the hospital for four days. After reviewing various tests, Dr. Julia Neuringer (a nephrologist) determined that the victim was suffering from

renal failure, severe metabolic acidosis, gastritis, and her bicarbonate was very low. Doctors told her that in the future she would need kidney dialysis. The victim was very upset about her condition. I learned from my discussions with medical personnel and my own research that the victim exhibited all the characteristics of poisoning by EG: metabolic acidosis, central nervous system depression, gastro-intestinal upset, respiratory problems, and renal failure. At this time, medical personnel were not sure what was causing the victim's symptoms.

11. After the victim was discharged from the hospital, her parents flew up from Missouri to see her. They stayed for a few days. During their visit with the victim and Keown, the victim looked good, but tired. The victim's mother noticed Gatorade in the refrigerator at the Waltham apartment.

12. The victim saw Dr. Daley again on August 31, 2004. She felt awful, had been suffering diarrhea, and heard a buzzing sound in her head. Additional testing confirmed that her kidneys were abnormal.

13. At around 11:00 A.M. on September 4, 2004, Keown spoke with Dr. Pisorska by telephone. He told the doctor that the victim was not doing well and had diarrhea. Dr. Pisorska instructed Keown to take the victim to the hospital right away. Dr. Pisorska telephoned the hospital several times during that day to check for her arrival, but Keown did not take her to the hospital until after 9:00 p.m.

14. Keown told police that on September 4, 2004, he went to the CVS Pharmacy on Main Street, Waltham, to inquire of the pharmacist as to whether the victim's symptoms were the result of her medications. However, a review of the CVS surveillance videotapes shows that Keown was not present in CVS on that date.

15. In the period between August 29 and September 3, 2004, the victim complained to her friend Heather LeBlanc that Keown was insisting that she drink grape Gatorade. The victim did not like Gatorade, but her husband told her that she needed the "electrolytes" from that drink. I know that EG is well-disguised in Gatorade because of the relative sweetness of both of those liquids. Further, in May of 2004, one month before the victim started to get sick, Court TV aired nation-wide, live coverage of another case (Georgia v. Lynn Turner) where a wife was tried for poisoning her husband by means of EG. The live coverage included the testimony of the Medical Examiner, Dr. Brian Frist. As part of his televised testimony, Dr. Frist demonstrated that a lethal amount of anti-freeze can be added to lemon-lime Gatorade, among other foods and beverages, without changing its appearance.

16. On September 4, 2004, the day the victim was admitted to the hospital in very poor condition, Keown told her parents over the phone that she was in the hospital after exhibiting a limp body and slurred speech at home. He also told them that a breathing tube had been inserted, that her heart stopped, and that she was in a coma.

17. At 6:30 A.M on September 5th, medical personnel began to administer fomezipole to the victim. Fomezipole is an antidote to ethylene glycol.

18. Also on September 5th, the victim's parents flew to Boston. During the car ride from Logan airport to the Newton-Wellesley Hospital, they had a cell phone conversation with Keown. He told them that ethylene glycol, commonly found in anti-freeze, had been found in the victim's body.

19. Upon their arrival at the hospital, the parents asked Keown how the victim could have gotten ethylene glycol in her system. To this, Keown answered that the previous Friday evening he noticed the victim was missing from their house. He said that he looked through the house for her, did not find her, went outside, checked the yard, and saw her walking back home. He told the parents that when he asked her where she had been, she answered that she went for a walk in the park because it makes her body feel better. Keown also told the parents that while she was out for this walk, she may have been "spacey" and found a pop or Gatorade bottle with anti-freeze in it from someone cleaning out a radiator, and mistakenly drank it. Keown told investigators this same thing as well. It was later learned that Keown told a similar story to a friend and former co-worker of Julie Keown, except that Keown told him that when he went to look for Julie on Friday night, he found her sitting on a curb drinking from a bottle of Gatorade.

20. The victim did not recover. She was pronounced dead at 1:30 P.M. on September 8, 2004. At the hospital, Keown asked intern Kevin Rankin, "If the hospital rules Julie's death accidental, is that the end of the investigation?"

21. On the afternoon of the victim's funeral, Keown went go-cart riding with his friend Mike Webb. Shortly after the funeral, Keown asked his friend Dr. Willmore how long he should wear his wedding ring and also discussed getting "fixed up" with someone. He showed interest in an attractive woman. Keown said that he planned to wait until after the holidays to start dating. Keown also said that he might get arrested but if the case went to trial he would get off because the evidence was circumstantial. Also,

during this time, Keown told his friends that he might move to Prague and stay there until his money ran out.

22. Following the victim's death, Keown told his mother-in-law that a friend of his had told him that there was a condition whereby EG can naturally appear in one's body. The mother-in-law attempted to follow up with Keown's friend but was unable to locate him. Subsequently, Waltham Police Detective Jon Bailey spoke with Keown's friend who indicated that he had not had this conversation with Keown. Investigators did learn that there is a genetic disease called methylmalonic acidemia where a substance in the body called propionic acid can be misidentified as EG. However, this genetic disorder almost always results in death in early childhood.

23. Keown had been under a considerable amount of financial strain for a lengthy period of time before the victim's death. As of September 4, 2004, he had virtually no assets. According to his friends and in-laws, he consistently lived beyond his means and spent money "like crazy." The victim, however, did not know about their dire financial situation. In fact, she told her father that while in the Boston area, they were putting aside \$1,500.00 per month in savings.

24. The victim was insured through her employer (Cerner) in the amount of \$250,000. Keown was the beneficiary. From my years of police work, I have personal knowledge, based upon my experience and training, that perpetrators of the crime of murder are often motivated by the possibility of financial gain. I also know that individuals (like Keown) who lack the ability to achieve a high earning capacity are often driven to desperate means to continue to support the lifestyle to which they have become accustomed and to which they aspire.

25. An analysis of the financial records of James and Julie Keown reveal that during the time period from December of 2003 through September 4, 2004 they spent approximately \$3,000.00 more than they earned. As of August 1, 2004, the balance in a joint credit union account at Community America Credit Union was \$5.44; as of September 3, 2004, the balance in a joint bank account at First Bank of Missouri was \$120.93; and as of September 1, 2004, the balance in a joint bank account at Watertown Savings Bank was \$7.24.

26. In 2002, Keown had been hired by "The Learning Exchange," located at 3132 Pennsylvania Avenue in Kansas City, Missouri. The Learning Exchange has about 40 employees and provides consulting services to educational non-profits, primarily in the form of curriculum development. According to Tammy Blossom (the President and CEO) and JoLynn Bethke (the Managing Director), Keown was

responsible for "business development" for the company, including Web design. In this capacity, Keown had access to and regularly worked on the company's computer system using a personal computer workstation as well as a Toshiba laptop personal computer.

27. Keown had all of his personal mail delivered to the Learning Exchange. He told his employers that he did this because his home had been burglarized. However, there are no police reports of any burglary at Keown's home.

28. While he worked at the Learning Exchange, Keown earned a modest salary - \$50,000 per year. Nonetheless, he routinely picked up the entire tab for the employees' weekly happy hour at a local tavern by placing the bill on his credit card and routinely picked up lunch expenses for another colleague as well. Although some employees brought their spouses to the weekly happy hour event, Keown never brought the victim and when asked about it, he told his co-workers that she was sick.

29. In November or December of 2003, Keown approached his superiors at the Learning Exchange and proposed that he re-locate to the Boston area to attend the MBA program at Harvard, but still remain a salaried employee of the Learning Exchange and work remotely. As part of his proposal, Keown presented the arrangement as mutually beneficial and said that he would develop the business and marketing plans for the Learning Exchange as his case study assignment at Harvard. Ms. Blossom agreed to the proposal. Ms. Blossom told me that she later learned that the Harvard forms that the defendant showed her when he made his proposal displayed forged signatures, and that the class schedules he showed her were fake.

30. I learned that Keown was never enrolled at Harvard University, did not receive any scholarship funds from Harvard, and did not have an undergraduate degree that would have permitted him to enter an MBA program in the first place. However, Keown did register for a single course at the "Harvard University Extension Program." The Harvard Extension program is a part-time evening adult education program that operates on an open enrollment basis. There are no admissions criteria. Although its enrollees come from several New England states, it is unheard of for an individual to relocate to the Boston area merely to attend a course or courses in this adult education program.

31. The Learning Exchange fired Keown on July 9, 2004. Keown had hired a contractor to make a web design for the company. The Learning Exchange did not authorize or know of this arrangement, and Keown forged the contract with the contractor. The victim made statements to a friend

indicating that up until the time of her death in September, 2004, she did not know that Keown had been fired.

32. Further, Keown forged Ms. Blossom's signature on his rental agreement for the Waltham apartment. He told his landlord, falsely, that the Learning Exchange was going to pay his rent. On his rental agreement, he also represented himself as a Vice President of the Learning Exchange. However, Ms. Blossom had repeatedly refused Keown's requests for this job title.

33. Ms. Blossom later learned that Keown stole about \$10,000 to \$15,000 from the Learning Exchange, and engaged in other illicit behavior of a financial nature that would cost the company between \$50,000 and \$100,000.

34. Keown had a Jaguar for about two years. He told his friends and in-laws that Aristocrat Motors gave him the Jaguar to compensate him for a Web design job he performed for them. However, Keown abruptly stopped driving the Jaguar and did not like to speak about it. My investigation shows that the Jaguar was repossessed for non-payment in approximately September of 2003. A check with Aristocrat Motors revealed that the vehicle was financed and the arrangement described by Keown never existed.

35. My investigation also shows that although Keown had been hired as a web designer on numerous occasions, he had no instruction or training in this area and appeared not to have the requisite skills.

36. As further evidence of Keown's financial crisis, I learned that in August of 2004, the victim and Keown went on a week-long vacation in North Carolina with two other couples, Dr. and Mrs. Theodore Willmore and Mr. and Mrs. Michael Webb. Dr. Willmore fronted Keown \$700 for the trip. Keown was supposed to mail a check to reimburse Dr. Willmore before the vacation. During the vacation, Dr. Willmore mentioned to Keown that he had not received the check. Keown wrote a check for \$540.00 to Dr. Willmore and said that he was going to cancel the first check. Instead, Keown canceled the second check and Dr. Willmore was not reimbursed. Dr. Willmore decided not to bring up the subject again, and simply to pay for the trip for the victim and Keown.

37. The July and August rent checks that Keown gave the landlord for the Waltham apartment bounced. Keown asked the landlord whether he could pay September's rent with the deposit for the last month's rent he had previously placed on the apartment. The November and December rents were paid on December 27, 2004 with a cashier's check and a personal check from Betty Keown (James Keown's mother). As of January 4, 2005, the January rent had not been paid.

38. I have learned that on September 17 & 20, 2003; October 20, 2003; January 16, 2004; May 26, 2004; and June 5, 2004, Court TV aired segments on its "Forensic Files" series dealing with an Oklahoma murder case in which Dennis Hellar confessed to murdering his wife by slowly adding small drops of anti-freeze to her drinks, making her sick over a period of eight months before she eventually died. Although the victim in the Hellar case, like the victim here, sought treatment at the hospital over the course of the eight months preceding her death, no diagnosis was made until it was too late to save her. This show was broadcast nationally. The initial broadcast was aired only three and one half months before Keown and the victim moved to the Boston area. According to the victim's parents, Keown and the victim had cable in Liberty, Missouri and in Waltham, Massachusetts.

39. I also have experience and knowledge of other highly publicized cases where a husband is driven to murdering his wife when he is on the brink of having his lies discovered. For instance, in August of 2004, in Utah, an individual named Mark Hacking was arrested after confessing to murdering his wife. Before the murder, Hacking and his wife were planning to move to North Carolina where he supposedly had been accepted to medical school. However, it was discovered that Hacking lied about medical school and lied about having graduated from the University of Utah. When his falsehoods were on the verge of discovery, he murdered his wife.

40. On November 3, 2005, a grand jury sitting for the County of Middlesex, Massachusetts returned a first degree murder indictment against James Keown for the murder of his wife Julie Keown.

41. On November 7, 2005, James Keown was arrested in Jefferson City, Missouri and charged with the murder of his wife.

42. James Keown was arraigned in Jefferson City, Missouri on a fugitive from justice warrant and waived rendition to the Commonwealth of Massachusetts. On November 10, 2005, James Keown was arraigned in Cambridge, Massachusetts for the murder of his wife. A plea of not guilty was entered and Keown is currently held without bail in the Cambridge, Massachusetts jail. He is represented by Attorney J.W. Carney, Jr.

43. On November 17, 2005, I spoke by telephone to Brian Wilson, the program director at Radio Station KLIK AM 1240 in Jefferson City, Missouri, where Keown had been working as a disc jockey from December of 2004 until the time of his arrest. Keown was at work at the radio station

when authorities placed him under arrest. Mr. Wilson told me that some time during the week of November 7, 2005, he contacted Keown's mother (Elizabeth Keown) and told her to come to the radio station to retrieve Keown's belongings that he had left behind at the time of his arrest. Employees at the station placed Keown's personally owned Sony Viao notebook computer, Model # PCG-672R (which he was known to use) into its laptop case, and further boxed up additional items and financial papers that belonged to Keown. In all, there were four cardboard boxes filled with Keown's belongings, one laptop computer in a laptop case, and a second laptop case filled with documents and other items. Keown's mother retrieved these items on the afternoon of November 18, 2005.

44. On or around November 22, 2005, a search warrant was executed at the home of Keown's mother located at 2825 Covey Lane, Jefferson City, Missouri, seeking to seize the items she had retrieved from Keown's office. During execution of the warrant, Keown's mother informed Jefferson City Police Detective Carla Kilgore that she had in fact mailed the Sony Vaio notebook computer and a separate hard drive that she had retrieved from the radio station and also belonged to Keown to Keown's attorney in Massachusetts (Attorney Carney). Keown's mother provided Detective Kilgore with an insured mail receipt showing that the items were mailed to Attorney Carney's office in Boston. On December 7, 2005, the Commonwealth filed a motion (attached and incorporated herein as Addendum B) requesting that the court order Attorney Carney to turn over to the prosecution the Sony Vaio computer and the hard drive. After a hearing on January 4, 2006, with Justice Geraldine S. Hines presiding, the motion was allowed as agreed upon. Consequently, on January 4, 2006, Mass. State Police Trooper Michael Banks went to Attorney Carney's office and Attorney Carney's assistant provided Trooper Banks with a bag containing the Sony Vaio notebook computer described above, a floppy drive, and various personal papers that Keown's mother had sent to him. The hard drive was not, however, provided. Subsequently, on or around January 5, 2006, Assistant District Attorney Lynn Rooney telephoned Attorney Carney and informed him that he had not provided the hard drive; rather he had given a floppy disk drive, which is similar in appearance to an external hard drive. Attorney Carney informed the Commonwealth that after receiving ADA Rooney's telephone message, he called Keown's mother who subsequently sent the hard drive to Attorney Carney's office. As a result, Attorney Carney gave the hard to the prosecution, and both items (the Sony Vaio notebook computer and the hard drive) currently are stored in the evidence locker at the Mass. State Police Detective Unit, 40 Thorndike Street, Cambridge, Mass. By previous agreement of the prosecutor and Attorney Carney, Assistant Attorney General Kurt Schwartz will review the items for any

attorney-client documentation stored on the electronic files and segregate those files for potential future litigation.

45. I know from my years investigating serious crimes, including homicides, that perpetrators often use the Internet to research and, in effect, trouble shoot murder plans. I further know that once the crime has been accomplished, perpetrators often use the computer and the Internet in an ongoing attempt to research and review materials in their efforts to continue to cover up and conceal the crime. I also know that significant information exists on the Internet on the subject of poisoning by EG, and that news articles also exist on the Internet on murders committed by means of poisoning by EG. I have learned that Internet users often electronically download and store information accessed via the Internet, and often electronically store emails, both on the hard drive of their personal computer and on other computer storage media (CDs and diskettes) and often print out documents for safekeeping for long periods of time. I also know that individuals such as Keown who are computer literate often store their personal financial information, including their wills, electronically on computer files. Such data may remain resident in the computer's storage media even if has been "deleted." This is so because a computer does not actually erase the files from its hard drive when a user "deletes" them; rather, the computer simply marks that area of its storage media as available to be overwritten with new data if necessary. Typically, space that is consumed by "deleted" data is not overwritten until all other unconsumed space is first consumed. This fact is important in law enforcement because it means that so-called "deleted" files or data are, in fact, often still present on the computer's storage media and can be recovered months, years, and even decades later.

46. Because of the technical expertise needed to successfully execute a search of computer hard drives and associated electronic storage media, it is necessary to have the assistance of a qualified computer forensics and hardware expert search the system without altering evidence or inadvertently deleting evidence, while at the same time minimizing the intrusiveness of the search. Therefore, I request permission for a trained, experienced computer forensics specialist and law enforcement specialist, to assist with the technical aspects of the electronic search.

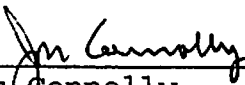
47. For all of the above reasons, I seek permission to seize the previously referenced Sony Vaio notebook computer and the previously referenced hard drive and search for the following electronic files. A detailed itemization of the electronic files recovered will be provided to the defense in the course of discovery.

- a. Any electronic file relating to the health and/or death of Julie Keown;
- b. Any electronic file relating to ethylene glycol, anti-freeze, poisoning, kidney dysfunction, gastritis, propionic acid, methylmalonic acidemia, the Hellar case, the Turner case, Harvard University, and/or the Harvard University Extension Program;
- c. Any electronic file relating to personal financial records, statements, ledgers, tax returns or any other records reflecting Keown's financial transactions and financial condition;
- d. Any electronic file relating to life insurance policies or any other preparations made by or on behalf of Julie Keown for her death;
- e. Any electronic file and/or computer application software relating to the preparation of a will by or on behalf of Julie Keown and/or James Keown;
- f. Any electronic file paper document specifically pertaining to the Internet activity of Keown (including, but not limited to file menus, Internet navigation directories and logs, "cookies" sent from Internet sites, "cache" directories and files, temporary Internet directories and files, and electronic mail logs) which may identify, trace or record the fact, date, time, modification, alteration, transmission and/or receipt via the Internet (or other computer-to-computer transmission mode) of any computer files of the type described in Paragraph 2 of this affidavit.
- g. Any installed computer application software, and any related data files, which are used to perform functions concerning the processing, organization or storage of financial and/or banking records relating to Keown, particularly those data files containing personal financial records, statements, ledgers, tax returns and notations reflecting Keown's financial transactions and financial condition. These types of documents or related computer data files also include, but are not limited to bills, receipts and records pertaining to the purchase and sale of goods and services (including the purchase or lease of real property and automobiles), credit card statements, monthly bank statements and records of bank deposits and withdrawals, loan documents and other documents evidencing debt, investment account statements and

records of purchases and sales of stocks, certificates of deposit, bonds and other financial investments, tax returns, statements of income and gains including income from employment, statements of dividends and interest, and safe deposit box lease records.

- h. Any installed computer application software, and any related data files, which are used to track daily activities and appointments, such as software used for creating or maintaining electronic calendars, date books, and to-do lists.
- i. Any installed computer application software and related data files and password files used to encrypt, decrypt and/or erase computer files.
- j. Any installed computer application software, and any related data files that will be necessary to detect and or access and read any of the computer files or applications described above.
- k. Any computer file or data demonstrating the creation of, editing of, access to, and/or control of any of the above files or applications and the date and time of any such creation, editing, access or exercise of control.

Signed under the pains and penalties of perjury this 8th
day of ~~May~~ ^{June} 2006.


James Connolly
Lieutenant, Massachusetts State Police

Before me this _____ day of May, 2006.

Associate Justice
Massachusetts Superior Court
Commonwealth of Massachusetts


MICHAEL J. FINUCANE
CLERK/MAGISTRATE

ADDENDUM A

I seek to search for the following electronic files stored on a Sony Viao notebook computer, Model # PCG-672R, Serial # 3000256; and a Western Digital W D Protégé Enhanced IDE Hard Drive, Model # WD 400EB-OOCFFO:

- a. Any electronic file relating to the health and/or death of Julie Keown;
- b. Any electronic file relating to ethylene glycol, anti-freeze, poisoning, kidney dysfunction, gastritis, propionic acid, methylmalonic acidemia, the Hellar case, the Turner case, Harvard University, and/or the Harvard University Extension Program;
- c. Any electronic file relating to personal financial records, statements, ledgers, tax returns or any other records reflecting Keown's financial transactions and financial condition;
- d. Any electronic file relating to life insurance policies or any other preparations made by or on behalf of Julie Keown for her death;
- e. Any electronic file and/or computer application software relating to the preparation of a will by or on behalf of Julie Keown and/or James Keown;
- f. Any electronic file paper document specifically pertaining to the Internet activity of Keown (including, but not limited to file menus, Internet navigation directories and logs, "cookies" sent from Internet sites, "cache" directories and files, temporary Internet directories and files, and electronic mail logs) which may identify, trace or record the fact, date, time, modification, alteration, transmission and/or receipt via the Internet (or other computer-to-computer transmission mode) of any computer files of the type described in Paragraph 2 of this affidavit.
- g. Any installed computer application software, and any related data files, which are used to perform functions concerning the processing, organization or storage of financial and/or banking records relating to Keown, particularly those data files containing personal financial records, statements, ledgers, tax returns and notations reflecting Keown's financial transactions and financial condition. These types of documents or related

MICHAEL J. FINUCANE
CLERK/MAGISTRATE

ATTESTATION

computer data files also include, but are not limited to bills, receipts and records pertaining to the purchase and sale of goods and services (including the purchase or lease of real property and automobiles), credit card statements, monthly bank statements and records of bank deposits and withdrawals, loan documents and other documents evidencing debt, investment account statements and records of purchases and sales of stocks, certificates of deposit, bonds and other financial investments, tax returns, statements of income and gains including income from employment, statements of dividends and interest, and safe deposit box lease records.

- h. Any installed computer application software, and any related data files, which are used to track daily activities and appointments, such as software used for creating or maintaining electronic calendars, date books, and to-do lists.
- i. Any installed computer application software and related data files and password files used to encrypt, decrypt and/or erase computer files.
- j. Any installed computer application software, and any related data files that will be necessary to detect and or access and read any of the computer files or applications described above.
- k. Any computer file or data demonstrating the creation of, editing of, access to, and/or control of any of the above files or applications and the date and time of any such creation, editing, access or exercise of control.

17 SEP 1991
MICHAEL J. HIRSHMAN
CLERK/MAGISTRATE

ADDENDUM B

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT DEPARTMENT
DOCKET NO. 2005-1445

*2005 Dec. 7,
Filed in Court.*

COMMONWEALTH

V.

JAMES KEOWN

*2006 Jan. 4,
Affidavit sworn, returned
as agreed upon.*

Hunter, J.

COMMONWEALTH'S MOTION FOR AN ORDER
TO TURN OVER CERTAIN ITEMS OF THE DEFENDANT'S
PERSONAL PROPERTY IN THE CUSTODY OF THE DEFENDANT'S ATTORNEY

The Commonwealth hereby moves for an order to the defendant's attorney to turn over to the Commonwealth items of the defendant's personal property that were specified in a search warrant issued on November 22, 2005 by the Circuit Court of Cole County, Missouri (attached as Exhibit A) and a computer hard drive not specified in the warrant. At the request of the defendant's attorney, J. W. Carney, the defendant's mother mailed these items to him on or about November 18, 2005. Affidavit of Lieutenant James Connolly (attached hereto as Exhibit B) ¶ 45

As grounds for this motion, the Commonwealth states:

1. The search warrant issued on November 22, 2005 covered personal property of the defendant that had been at his workplace, KLIK Radio, Jefferson City, Missouri, after his arrest on November 7, 2005. As set forth in the Affidavit of Lieutenant Connolly, Brian Wilson, the program director at Radio Station KLIK, told Lieutenant Connolly that, during the week of November 7, 2005, he called the defendant's mother, Elizabeth

13

(B)
35a

Keown, and asked her to come to the radio station to retrieve the defendant's belongings that were left behind following his arrest. Affidavit ¶ 43. "Employees at the station placed Keown's personally owned Sony Viao laptop computer (which he was known to use) into its laptop case, and further boxed up additional items that belonged to Keown. Some of these items included documents, including what Mr. Wilson described . . . as financial papers. In all, there were four cardboard boxes filled with Keown's belongings, one lap top computer in a laptop case, and a second laptop case filled with documents and other items." Affidavit ¶ 43. The defendant's mother "retrieved these items on the afternoon of November 18, 2005." Affidavit ¶ 43.

2. When police in Jefferson City executed the search warrant on November 22, 2005, the defendant's mother informed Detective Carla Kilgore that she had, at the request of the defendant's attorney, mailed the laptop computer and documents retrieved from the defendant's office to the defendant's attorney in Boston on November 18, 2005. Affidavit ¶ 45. In addition, the defendant's mother informed Detective Kilgore that, in addition to the laptop computer, a computer hard drive was among the items of personal property she retrieved from KLIK and sent to the defendant's attorney. Affidavit ¶ 46.

3. The laptop computer and its peripherals, including CDs and diskettes, and paper documents that were boxed and taken from the defendant's office were items authorized to be seized from the defendant's mother's home by the November 22, 2005 search warrant. See Exhibit A. Those items, which were not privileged when in the defendant's possession or his mother's, are now in the custody of the defendant's attorney. The Commonwealth, accordingly, seeks an order that the defendant's attorney, J. W. Carney, turn over forthwith the laptop computer and its peripherals, including CDs

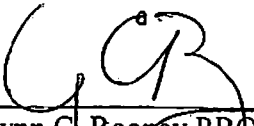
Michael J. Finnegan
Clerk/Magistrate
A TRUE COPY

and diskettes, and the paper documents that were boxed and taken from the defendant's office to Lieutenant James Connolly of the Massachusetts State Police Detective Unit.

4. The hard drive that the defendant's mother told the Missouri officers she had also sent to the defendant's attorney was not specified in the November 22, 2005 search warrant because investigators were not aware it existed, having inquired of Brian Wilson about it and having been told that the defendant did not have a computer hard drive in his office or among his personal property at KLIK. Affidavit ¶ 46. For the reasons set forth in the Affidavit of Lieutenant James Connolly that support probable cause to seize and search the laptop computer, Affidavit ¶ 47, there is also probable cause to believe that evidence of the crimes of murder and use of a poisonous substance will be found on the hard drive that the defendant's mother sent to his attorney. Accordingly, the Commonwealth seeks an order that the defendant's attorney turn over forthwith the hard drive received from the defendant's mother to Lieutenant James Connolly of the Massachusetts State Police Detective Unit.

Respectfully Submitted
For the Commonwealth

MARTHA COAKLEY
DISTRICT ATTORNEY


Lynn C. Rooney BBO # 555399
Assistant District Attorney
40 Thorndike Street
Cambridge, MA 02141
617-679-6500

RECEIVED
CLERK/MAGISTRATE
JAN 11 2006

Dated: December 7, 2005

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CRIMINAL ACTION
No. 05-1445-001

*2008 March 25
filed in Court*

COMMONWEALTH

vs.

JAMES KEOWN

FINDINGS, RULINGS AND ORDER
ON DEFENDANT'S MOTION TO SUPPRESS

Prior Proceedings

On November 3, 2005 the defendant was indicted for Murder in the First Degree. Arraignment was on November 10, 2005. Attorney J.W. Carney, Jr. was appointed to represent the defendant and continued to represent the defendant until he was allowed to withdraw on November 20, 2006 because he became an essential witness in the case.

New counsel were appointed on November 30, 2006. On May 28, 2007 counsel filed the motion presently before the Court which was heard on seven dates -- June 11, 12, 15, 27 and 28, 2007, July 27, 2007, and August 4, 2007. On September 4, 2007 the Commonwealth filed its opposition to the defendant's Motion to Suppress. Counsel for the defendant had filed memorandum of law, an appendix in support of the motion and affidavits of the defendant, his mother and attorney J.W. Carney, Jr.

Over the course of the motion hearing, eleven witnesses testified concerning the different motion issues.

Findings of Fact

Based upon a consideration of the material and credible evidence and reasonable inferences drawn therefrom, the Court finds the following facts:

Detective Reed Buente (Buente) a twenty six year veteran of the Kansas City Missouri Police Department, and a detective for twenty of those years assigned to the Career Criminal Unit was contacted in late 2004 by Lieutenant James Connolly (Connolly) of the Massachusetts State Police who needed help getting a search warrant in Kansas City, Missouri to seize certain property from the Learning Exchange where the defendant had been previously employed.

The initial contact to Buente was from Sergeant Hugh Fowler (Fowler) of the Missouri State Highway Patrol who asked him shortly before Christmas to assist Connolly. The Career Criminal Division of the Kansas City Police Department is made up of local and federal agencies and in addition to targeting violent and repeat offenders, also assists outside agencies.

Right after Christmas, Connolly contacted Buente and gave him a brief synopsis of the case and told Buente what he needed. Buente and Connolly had several contacts by telephone and e-mail.

In January 2005, Buente applied for a search warrant. Connolly e-mailed Buente an affidavit (an attachment to an e-mail) concerning the circumstances of the case involving the defendant. Buente cut and pasted Connolly's affidavit on the form that the courts in Jackson County, Missouri require. The information in the affidavit filed in this case came directly from Connolly's e-mail which Buente cut and pasted adding a line that this information was told orally and in the e-mail to Buente by Connolly. Connolly never signed the affidavit. Buente signed it swearing to Connolly's affidavit. The exact words incorporated in the affidavit were Connolly's. Hearsay information if relevant is commonly included in affidavits. Buente then took this form to the Missouri prosecutor

had him read and sign it. Thereafter Buente took it to the Jackson County judge who signed the warrant. A certified copy of the search warrant, the attached affidavit/application and the search warrant return were marked as Exhibit 1.

Buente described the standard legal process in obtaining a search warrant in Kansas City, Missouri. First a warrant and application and affidavit is prepared on a templet provided and required by the court. The language is standard and the first, second and fourth paragraphs are template and everything else is filled in by the law enforcement officer applying for the warrant. After the warrant is prepared, his sergeant reviews it and after his approval the documents go to the prosecuting attorney's (district attorney) office for review. If the prosecutor approves it, the warrant including the application and affidavit goes to a judge for review and if approved is issued. Buente is sworn during the process before the judge. If the prosecutor does not approve the document, it is not sent to the judge. If not approved by the judge the search warrant does not issue. This procedure is the same procedure followed in Massachusetts.

On January 18, 2005, Buente obtained the search warrant following the above enumerated legal process and thereafter filed the warrant at the criminal records department at the county courthouse. After filing the warrant, Buente again pursuant to legal process keeps the original and makes copies of the original, the warrant and affidavit and takes it back to his office.

The warrant was executed the next day on January 19, 2005, by Buente, Connolly, and Jon Bailey (Bailey) of the Waltham Police Department. Buente presented it to JoLynn Bethke (Bethke) who at the time was President and CEO of the Learning Exchange and Tammy Blossom (Blossom)

the office manager.¹ Buente had a copy of the search warrant, the return receipt to be filled out but not the affidavit with him. The defendant had worked for the Learning Exchange from 2002 until he was terminated in July, 2004. From February 2004 he was working remotely for them from Massachusetts. Blossom had met with Connolly and Bailey in November of 2004.

When the search warrant was executed on January 19, 2005, Byeth and Blossom who were expecting them took the police to an office where boxes containing the defendant's property were laid out on a table. Blossom had essentially gone through those possessions after attempting contact with the defendant because they needed the office for a new employee. Police took the defendant's property after inventorying it at the scene and leaving a copy of the return receipt plus a copy of the search warrant at the Learning Exchange. Police took the property seized back to their office at the Kansas City Police Department. Connolly and Bailey then took the items pursuant to the warrant -- laptop computers, some CD's and some papers -- and Buente wrote a property slip and signed the property over to them. The other property of the defendant was placed in the Kansas City Police Department's property room for safekeeping and still remains there. The Learning Exchange told police they did not want the property at their office anymore and to take everything. Buente took what was the subject of the warrant as well as the rest of the property for safekeeping.

On May 18, 2005, Buente returned to the Learning Exchange with a consent form authorizing a search of the Learning Exchange server which Connolly had faxed to him. (Exhibit 2). The defense is not seeking to suppress anything obtained as a result of that consent search.

In 2002, the defendant was hired by Blossom as their director of marketing. His primary

¹ The Learning Exchange is a non-profit, educational group that did educational consulting around the country and worked with school districts, museums and educational programs.

responsibilities were to help market the Learning Exchange and work on their website. Sometime in the fall of 2003, the defendant approached Blossom about his prospective attendance at Harvard University to pursue an MBA. They had multiple discussions and she was supportive and helpful to him as she herself had a Master's degree. Discussions began in the fall of 2003 and the defendant wanted to begin classes in January, 2004. The defendant provided Blossom with a course schedule and a letter from the Dean of Harvard Business School. Blossom arranged for him to work remotely from Boston and allowed him to keep his job. She set up a mobile phone system to facilitate his talking frequently with the Learning Exchange. The defendant began working remotely from Boston in February, 2004. Blossom regularly conversed with him regarding his responsibilities and paid him until July 2004 when he was terminated. Blossom terminated him after discovering he was stealing money from the Learning Exchange through a series of fake contracts, and that he had forged the letter from the Dean of Harvard Business School. Further investigation revealed that there were forged reference documents on his computer presented when the Learning Exchange hired him. As a result Blossom and the Learning Exchange attorney, and two employees called the defendant on the telephone and fired him. He was also sent a termination letter. At the time the defendant had property at the Learning Exchange left in an office they had set up for him so that he could consolidate his personal items prior to his move to Boston. The defendant had left a Toshiba laptop computer as he had purchased a new computer before he went to Boston, a great deal of personal mail, some addressed only to him and some addressed only to his wife Julie, a bag and some other items including CDs, eyeglasses, MP-3 players, pieces of carpet, notebook and some little odds and ends. The electronics files within a hard drive and work station were not seized. While at the Learning Center no attempt was made to open up or access the laptop computer. As far as the

personal mail. Blossom found out from their receptionist, shortly after the defendant was terminated that the defendant said he had personal mail sent to the Learning Exchange because mail was being stolen from his mailbox at home. The mail was addressed to him or to Julie his wife at the Learning Exchange. When the defendant left he took intellectual property belonging to the Learning Exchange -- logos, articles and photos of their programs around the country. When he was fired the Learning Exchange sent the defendant a letter requesting the return of all their intellectual property as well as the key he had to their office within a certain time frame and offered to pay for him to return it. The defendant was reminded of his property and asked if he wanted it. In July 2004, the Learning Exchange heard nothing from the defendant. In August 2004, Blossom sent the defendant an e-mail copying their attorney reminding him that he had not returned the intellectual property. The defendant e-mailed Blossom apologizing for not returning their property, saying he was busy because his wife was in the hospital suffering from renal failure, and that he would try to get the material to Blossom as soon as possible. That was the last time Blossom or anyone at the Learning Exchange heard from the defendant. She had informed her staff due to the circumstances of the defendant's termination that no one was to speak to him and any contact was to be reported to her immediately. The defendant never contacted Blossom or anyone else at the company. By the time Connolly and Bailey appeared with the search warrant on January 19, 2005, Blossom's state of mind was that the defendant had abandoned his property. Property was seized pursuant to the warrant. The remaining property was taken by the police for safekeeping. The defendant had abandoned all this property. The property was seized pursuant to a valid search warrant. The fact that Buente had no first hand information about the contents of Connolly's affidavit did not invalidate the warrant given the history of the manner in which the warrant was obtained which was legal under Missouri

and Massachusetts law. Buente did not include any of his background and experience. In Missouri the only time such information is included is in a Federal warrant. Buente did include the background and experience provided by Connolly.

Carla Kilgore (Kilgore) a sergeant in the Jefferson City, Missouri Police Department who had been a police officer for eleven years, six of those as a detective, was contacted by Connolly on November 7, 2005 in person for assistance with the arrest of the defendant. Connolly was accompanied by Bailey and a Federal Marshall. Connolly presented Kilgore with a warrant for the arrest of the defendant for murder in the first degree in Massachusetts. Kilgore and another female officer went with Connolly and Bailey to the defendant's place of employment at radio station KLIK in Jefferson City, Missouri where the defendant was placed under arrest. The next contact Kilgore had with Connolly was when he contacted her on November 22, 2005 in regards to assisting him with obtaining a search warrant for a Sony Viao notebook computer and its peripherals located at 2825 Covey Lane Jefferson City, Missouri, the home of defendant's mother. Connolly gave her the background by telephone and e-mails. Connolly, as he had done with Buente, sent Kilgore two documents by e-mail -- an affidavit unsigned by Connolly (Exhibit 3) and an unsigned affidavit templet (Exhibit 4). Connolly believed based upon his experience with Buente, that Kilgore would use these documents in obtaining the search warrant.

Kilgore did not submit a cut and paste copy of Exhibit 4 in applying for this warrant. Connolly specifically asked Kilgore to use the documents (Exhibits 3 and 4) in obtaining that warrant. After receiving those documents, Kilgore immediately went to their prosecuting attorney's office (district attorney's office), and explained the situation to an assistant prosecutor Kurt Valentine (Valentine). A search warrant was drawn up based on this affidavit and the application

for the search warrant. (Exhibits 3 and 4).

As indicated previously, in Missouri, a warrant cannot be obtained unless a police officer goes to an assistant district attorney. Kilgore presented Valentine with both documents provided her by Connolly. (Exhibits 3 and 4). Further Kilgore verbally communicated the information concerning what was happening with Connolly in the investigation. Valentine typed up the search warrant, application and affidavit. Kilgore and Valentine signed the application and together these documents were presented to a judge. Kilgore was sworn and presented the judge with Connolly's affidavit (Exhibit 3), the application for a search warrant (Exhibit 5) and the search warrant (Exhibit 6). In Missouri, the application and an affidavit signed by police (Kilgore) are incorporated in one document.

Kilgore took Exhibit 3 with her to the prosecutor's office to apply for the search warrant. The search warrant she obtained was based on Connolly's affidavit. (Exhibit 3). She decided not to use Exhibit 4 as it was inaccurate as applied to her. Exhibit 5 is the search warrant application and incorporated her affidavit which Kilgore and Valentine signed on the second page. The warrant itself, was also prepared by the prosecutor's office and signed on November 22, 2005 at 1:30 p.m. by a judge. (Exhibit 6). The return is also attached.

On November 22, 2005 the same day, the warrant was executed in the late afternoon by Kilgore who went with a uniformed officer and a deputy from Cole County. The address of 2825 Covey Lane, Jefferson City, Missouri is actually in Cole county so she took a deputy from Cole County to execute the warrant. Kilgore along with other officers went to the front door and knocked but did not receive an answer. The deputy and uniformed officer stayed at the front door and Kilgore walked around the perimeter of the residence to see if entry could be accomplished by open doors

or open windows. Kilgore located an unlocked back sliding glass door which was three or four steps directly behind the house on a deck. Kilgore opened the unlocked glass door, announced her presence and stated that she was serving a search warrant. No one responded. She opened the front door admitting the other officers and began to search the residence. Kilgore started on the top floor in two bedrooms. One was a large master bedroom with a large bathroom and walk-in closet. Pursuant to the search warrant requested by Connolly she was looking for items retrieved from the defendant's place of business at radio station KLIK which were supposed to be contained in four boxes and include business items including a computer or laptop. She was able to locate two boxes without lids that seemed to be related to business type materials in the bedroom to the right in a closet area underneath hanging clothes. She brought the boxes downstairs to the main level of house. After searching the rest of the residence Kilgore was unable to find the laptop or the other two boxes.

Kilgore in an effort to obtain the other two boxes found a telephone number for the defendant's sister who set up a three-way call to the defendant's mother, whose home they were searching. Mrs. Keown said by telephone she was grocery shopping and would be there shortly to assist police. Ten or fifteen minutes later Mrs. Keown arrived. Kilgore explained she was looking for four boxes belonging to the defendant that Mrs. Keown had retrieved from the radio station. Mrs. Keown told her two of the boxes were upstairs and took Kilgore to the bedroom where she had already retrieved the two boxes. When asked by Kilgore about the other two boxes Mrs. Keown replied to the effect that she had beaten them to it and the two boxes (one containing the Sony Viao laptop computer and the other containing financial paperwork") had already been sent to her son's attorney, J.W. Carney, Jr. (Carney), in Massachusetts. Kilgore asked Mrs. Keown if she had any

evidence to support her statement and she provided a receipt from the post office of the items she sent to Massachusetts which Kilgore seized. (Exhibit 7).

The two boxes seized by Kilgore contained miscellaneous items -- picture frames, a desktop nameplate, business cards, miscellaneous items hung in or placed in an office. In a second upstairs bedroom, Kilgore saw a desktop computer which Mrs. Keown said wasn't hooked up and that no one used it. This bedroom appeared to be used as an office. The monitor was in one area and the hard drive in another. Kilgore did not seize this computer.

Counsel stipulated that the unsigned affidavit of Connolly is not part of the court file in Jefferson City, Missouri.

In paragraph 3 of Kilgore's affidavit she indicates that after the defendant was arrested in Jefferson City, Missouri and charged with the murder of his wife in Massachusetts, he called his mother to go to the radio station and retrieve the "Sony Viao laptop computer and its peripherals, including CD's and diskettes and various paper documents that were boxed and taken from James Keown's office at KLIK radio." (Exhibit 5). Other than having first hand knowledge of the defendant's arrest, paragraphs 3, 4 and 5 was information obtained from Connolly. The return indicates that items seized were "picture frames, books, blanket, toy car, 2 folders, misc. papers, 1 cell phone, music CD's, various other CD's." (Exhibit 6).

Mrs. Keown indicated the defendant was living with her at 2825 Covey Lane² Jefferson City, Missouri in November 2005 when he was arrested at KLIK in Jefferson City. He had been living with her at that address for approximately eleven months since December 2004 or January 2005 after

² The Transcript Volume II incorrectly transcribes her address at 2228 Cubby Lane (pp. 105, 107) and 2825 Cubby Lane (p. 133).

he moved back from Boston. The large upstairs bedroom where Kilgore found the two boxes was his bedroom, and the bedroom across the hall where the desk top computer was located was used as an office. Kilgore thought it looked more like a storage room.

About a week after the defendant was arrested Mrs. Keown had received a telephone call from Stephanie Boltz (Boltz) of KLIK telling her the defendant had left some personal belongings at the radio station and she could come by and pick them up. She went to pick them up that afternoon. There was one box unsealed with a laptop computer, a little car, books and papers. There were separate tall pictures which would not have fit in the box. A week or so later Boltz called again and indicated the Columbia office of the radio station had two filled boxes of the defendant's belongings and she could come and pick them up at the Jefferson City station. The additional boxes had been left by Brian Wilson (Wilson) her son's boss. These two boxes were sealed. In total Mrs. Keown picked up three boxes from KLIK. She took the boxes home and put them upstairs in her son's walk-in closet. Sometime after picking up the boxes Mrs. Keown received a telephone call from J.W. Carney, Jr. (Carney) her son's Boston lawyer. He asked her to send the laptop computer, the hard drive out of her son's bedroom and some papers. She understood Carney to mean by hard drive the box out of the desktop computer. After she had her daughter's fiancé remove it with a screwdriver, she mailed it with the laptop and papers to Carney on November 18, 2005 (Exhibit 7). A month or so later, Carney called again and said she had not sent the hard drive out of the desktop computer but in fact had sent the wrong item -- a disc. She then took the desktop computer to a store across from the courthouse and had the hard drive removed and put in a mailing envelope. She took the envelope to Staples and mailed it to Carney on January 5, 2006 (Exhibit 15 - photocopying Staples shipping receipt).

When the defendant first moved back to Missouri in December 2004 he lived at Library Lost West 127 West 10th Street, Kansas City, Missouri where he rented an apartment. Mrs. Keown's name appeared on the lease but she indicated she never signed the lease (Exhibit 16) and denied that the signature on the lease was hers. She believed it was her son's handwriting and said he had permission to use her name.

Lieutenant Edward Forster (Forster) is a lieutenant with the Massachusetts State Police assigned to the Middlesex District Attorney's Detective Unit for approximately nineteen and a half years. He works on homicide cases, overdoses, suspicious deaths and suicides. In early September 2004, Forster was assigned to investigate the Julie Keown case. The State Police were contacted on September 7, 2004 in the late afternoon hours by the Waltham Police Department. As a result he responded to the Newton-Wellesley Hospital where he met Connolly. They learned Julie Keown was in critical condition suffering from ethylene glycol poisoning and was not going to live. After talking to Waltham police officers he interviewed the defendant along with Sergeant Brian Lambert (Lambert) of Waltham Police Department. Other officers interviewed other hospital personnel. The interview was from around 6:30 p.m. until 8:30 p.m. in a hospital-type conference room with tables and several chairs. The interview was a general interview in an effort to determine the circumstances surrounding Julie Keown's illness and not in any way an interrogation. He did not read Keown Miranda rights as he was not a suspect. The defendant was not charged until the November 3, 2005 indictment. He was arrested on November 7, 2005. At the interview Keown knew he was free to leave at any time. The interview covered basic background information about their move to Massachusetts and his wife's medical issues. At the end of the interview, Forster asked James Keown if they could look in his home. Keown freely and voluntarily signed the Waltham Police

Department Consent to Search form at 8:10 p.m. on September 7, 2004. (Exhibit 17). He was informed of his right to refuse to allow the search without a search warrant. He signed the form in front of them thereby waiving the search warrant and authorizing the police to take possession of any material connected in any way with their investigation. Keown's demeanor was cooperative but upset. During the interview he voluntarily and freely provided information to the police officers to assist their investigation. There were no police threats or promises. At the time the consent was obtained this was not a murder investigation but a general investigation as to whether what happened to Julie Keown was an accident, a suicide or a homicide.

That night, police met the defendant and a friend at 52 School Street, Waltham. The defendant provided them with the keys to gain access. Forster and other officers went in knowing they were looking for evidence of any ethylene glycol, that it is common in antifreeze. Police seized several bottles -- an empty Sprite bottle out back in a barrel on the deck, and several bottles from the refrigerator including a water bottle and another Sprite bottle. In the course of the search, photographs were taken by the Waltham Police Department. (Exhibits 18 and 19 -- two bedroom photographs). During this investigation and seizure of items, the defendant was in the area. At no time did the defendant limit Forster's or other officers search in any way. Forster also searched the defendant's vehicle, an Expedition, parked in the driveway after asking the defendant if he could search it and receiving his voluntary consent. The defendant was cooperative and initialed a sentence added to the end of the consent form which was "and also my car." (Exhibit 17). Forster found a couple of eyedroppers in the back sleeve of the Expedition. James Keown said they were for a cat. Forster did not seize the eyedroppers as he was satisfied with the answer. Police finished and left the house.

Forster had left his telephone numbers with James Keown. At around eight o'clock the next morning on September 8, 2004, Keown called Forster on his cell phone. Keown told Forster he had forgotten that Julie Keown was talking about whether it hurt when you die, that she had purchased 250 milliliters of chloroform in May on the computer, and he did not know if she received it. He was cooperative. Forster passed the information on to Connolly and arrangements were made to follow up on this information. Forster participated in the arrangements but never went to the house.

Another time on September 24, 2004, James Keown gave him some items -- a nail polish cosmetic kit saying it was unusual because his wife did not use nail polish. The conversation was initiated by the defendant, and the items voluntarily provided.

Prior to Forster's arrival at the hospital, Julie Keown's family came to the Waltham Police Station making allegations of poisoning, and thus initiating the investigation. Forster was aware through another police officer that other members of the victim's family had already been at 52 School Street looking for ethylene glycol.

James M. Connolly (Connolly), a Massachusetts State Police Officer for twenty-five years is currently the commanding officer of the Middlesex County Detective Unit. On September 7, 2004 he was assigned to investigate the apparent poisoning of Julie Keown. He responded to the Newton-Wellesley Hospital and saw that Forster and three officers from the Waltham Police Department were present.

He had a conversation with a hospital administrator named Lynn Nutti (Nutti) and with Waltham police officers. At this point his basic understanding of the investigation was that several family members went to the Waltham Police Department because their daughter Julie Keown was currently in an Intensive Care Unit suffering from the effects of ethylene glycol poisoning. Her

prognosis was that she would probably die. Connolly confirmed this information. James Keown was present at the hospital. Connolly, Forster and Waltham police officers interviewed Jack and Nancy Oldag (Oldag), her brother Chad, two friends Layla Willmore (Willmore), and Heather LeBlanc (LeBlanc) whom Connolly interviewed personally in the Newton-Wellesley Hospital Administrative offices, as well as a doctor named Rankin. Separate interviews of various people were being conducted at the hospital in separate locations.

Thereafter Connolly, Forster, Lambert, Bailey and Detective Steve Toronto (Toronto) went to 52 School Street Waltham. Connolly was aware when he went to 52 School Street in Waltham that Forster had obtained a signed consent to search form from Keown. 52 School Street was a duplex. Police looked through the house for products that might contain ethylene glycol or antifreeze. Waltham Police Officer Lucas Hernandez (Hernandez) took photographs. The defendant was present during the search and did not in any way limit or object to the search in any way. The defendant's demeanor was quiet, cooperative and he voluntarily assisted the police. After the search, items were secured.

The next day -- September 7, 2004 -- Connolly had a conversation with Forster as a result of which he met the defendant at 52 School Street to recover two Dell laptops that his wife had worked on. The defendant signed a consent to search form from the Waltham Police Department indicating he was voluntarily giving police these two computers (Exhibit 20). Exhibit 20 was signed on September 8, 2004 at 12:08 p.m. by the defendant at his residence at 52 School Street, Waltham. They had a brief conversation with the defendant regarding the laptops. Keown voluntarily gave Connolly two laptops and two power cords after reading and signing Exhibit 20. He was very cooperative and quiet.

Julie Keown died later that day when she was taken off life support approximately an hour and a half later. Connolly and other police started conducting an investigation into the circumstances of Julie Keown's death. On September 9, 2004 an autopsy was performed resulting in a finding that she died as a result of ethylene glycol poisoning. Oxalate crystals were found in her kidneys and brain.

During the course of his investigation Connolly enlisted the aid of various law enforcement agencies. On November 7, 2004 he traveled to Kansas City, Missouri relative to a claim that the defendant had been assaulted in a parking lot. At that time he did not seek assistance from law enforcement other than speaking to them. During the time he was in Missouri he interviewed fifteen to twenty people. After speaking to persons at the Learning Exchange, he returned to Massachusetts and with the aid of a Middlesex Assistant District Attorney he prepared a search warrant and an affidavit. Thereafter not knowing who to contact for assistance he called the Criminal Investigation Unit of the Massachusetts State Police who provided him with the name of a person in the Missouri Highway Patrol. After Connolly made this contact, he was referred to Detective Reed Buente (Buente). He contacted Buente and had several telephone conversations with him prior to obtaining the search warrant. (Exhibit 1). Connolly basically informed Buente of his investigation, and what he wanted to do, and e-mailed Buente a copy of his affidavit covering some fourteen pages, and a form the appellate team gave him to assist Missouri to piggyback Connolly's affidavit to the one in Missouri. Neither form was signed. He also sent Buente several police reports. The affidavit and appellate form were not signed because Buente told Connolly he was going to cut and paste Connolly's information and provide his own (Buente's) affidavit. Buente arranged for the warrant as indicated in the prior findings of fact. On January 18, 2004, Connolly and Bailey traveled to

Missouri to participate and be present when the search warrant was conducted at the Learning Exchange. Between his initial interviews at the Learning Exchange in November, 2004 until the time the search warrant was executed on January 19, 2005, Connolly and other Massachusetts police were still conducting their investigation. At the time the defendant was in the Kansas City area. Items recovered from the Learning Exchange are as enumerated by Buente in the return. (Exhibit 1). Bethke had boxed the items and gave them to police. There were items in the boxes they were not seeking but since the Learning Exchange were going to throw them out, and had been cooperative, police took them for safekeeping. Bailey transported the Toshiba laptop by plane and the CD's were eventually sent to Massachusetts police. The items not sought were left with the Kansas City Police Department.

The Toshiba laptop was secured in their evidence locker. At a later time this Toshiba laptop and the two Dell laptops provided voluntarily by the defendant were given to Trooper David McSweeney (McSweeney) to be searched. McSweeney is a forensic computer expert assigned to the Norfolk CPAC. Connolly also gave McSweeney a copy of the search warrant and the affidavit and a list of search terms. To guide in the search of all three computers, the search terms were provided in the affidavit based on what they had learned from their investigation.

Connolly was involved in the execution of the search warrant at 52 School Street in Waltham. Bailey had contacted Connolly and told him about a conversation he had with the defendant's landlord. As a result of the conversation and the landlord's observations, they obtained a search warrant for 52 School Street. On March 4, 2005 execution of the search warrant resulted in the seizure of a bag of marijuana, some computers and the peripherals, CD's and some other property. The search warrant and the affidavit of Bailey with Addendum A and B are contained in

In November of 2005, the defendant was indicted, and an arrest warrant was issued (Exhibit 22) -- certified copy of the docket) by the Massachusetts Superior Court. Connolly traveled with Bailey to Jefferson City, Missouri. He, Bailey and United States Marshalls went to the Jefferson City police station. Because Connolly's investigation revealed that the defendant was very influential in the community he gave no prior notification of the arrest warrant to Missouri law enforcement for fear the defendant would flee if given advance notice of their arrival. He teamed up with United States Marshalls because Connolly didn't know if jurisdictional issues would arise where the defendant was physically located. At the Jefferson City Police Department, Connolly informed the lieutenant in charge of investigations as to why he was there. The lieutenant assigned two police officers -- Detective Carla Kilgore (Kilgore) and Patrolwoman Julie Sparks (Sparks) to assist them. They all went to the defendant's place of employment at WKLK radio station around 9:30 a.m. or 10:00 a.m. on November 7, 2005 and arrested the defendant for the murder of his wife. At the time Connolly met the station manager Brian Wilson (Wilson).

The defendant was transported first to the Jefferson City Police Department, and then brought to the Superior Court, where he was arraigned and waived extradition. He was transported back to Massachusetts and arraigned in the Middlesex Superior Court on November 10, 2005, for the murder of his wife. He pleaded not guilty and was held without bail.

The investigation continued. In mid-November 2005, Bailey received information from Betsy Dudenhoeffer (Dudenhoeffer) who was friendly with the defendant. Bailey told Connolly about the information. Connolly then contacted Wilson on November 17, 2004 who informed Connolly after his arrest that the defendant's mother, had picked up his property which the radio

station had put in boxes. Among the items included was a Sony Viao computer and financial records. The circumstances under which Mrs. Keown picked up the property were conflicting as to whether the radio station contacted her or she contacted the radio station. Connolly asked Wilson if there was a hard drive that the defendant had used from his computer at work. Connolly was aware of both the Sony Viao computer and a hard drive based upon what Bailey had learned from Dudenhoeffer. Wilson confirmed there was a Sony Viao but said there was no hard drive.

As a result of obtaining this information Connolly prepared another affidavit for a search warrant. He spoke to Kilgore on November 21 and 22, 2004 explained he would like her to obtain a search warrant and recover the items he listed in the search warrant and the addendum. He then e-mailed her Exhibits 3 and 4. Exhibit 4, the piggyback form is basically the same form tailored to Kilgore as the affiant. Exhibit 3 is a different and longer affidavit because it contains information learned in the ongoing investigation since the affidavit sent to Buente.

Connolly e-mailed the affidavit (Exhibit 3) and piggyback form (Exhibit 4) to Kilgore so she could attach it and incorporate it into the application for the search warrant. The procedure was the same one Connolly had followed with regard to the prior search warrant obtained by Buente. Connolly's expectation was that she would obtain a search warrant based on his affidavit by either incorporating it, or including by cutting and pasting the contents as Buente had.

Connolly was not present for the execution of the warrant at Mrs. Keown's home. He was concerned, (unlike the items recovered from the Learning Exchange, which was cooperating), that potential evidence might be destroyed and wanted no delays caused by his traveling to Missouri as he had information there had been an attempt to hide it from police. He did not have time to organize his travel quickly enough between November 17, 2005 when he learned about the items

from Wilson and November 21 or 22, 2005 when he talked to Kilgore. Kilgore obtained the warrant on November 22, 2005 at 1:30 p.m. and executed it within an hour. (Exhibit 5). Connolly spoke to Kilgore after she executed the warrant and asked her what items she received and in particular whether she had received the Sony Viao computer. Kilgore said she had a conversation with Mrs. Keown who told her she mailed the Sony Viao and the hard drive to Carney. The hard drive was not part of the original warrant application. Wilson had told Connolly there was no hard drive among the defendant's possessions.

Connolly then told Assistant District Attorney Lynn Rooney (Rooney) and as a result Rooney had a series of conversations with Carney. On December 7, 2005, the Commonwealth filed the Commonwealth's Motion for an Order to Turn Over Certain Items of the Defendant's Personal Property in the Custody Of The Defendant's Attorney (The Commonwealth's Motion) (with Exhibit 5 - Affidavit of Kilgore; Exhibit 6 - Kilgore's Search Warrant; Exhibit 3 - Affidavit of Connolly e-mailed to Kilgore with additional information obtained as a result of the Kilgore warrant execution attached as Exhibit A and B respectively). The Motion and attachments (Paper 13) are marked as Exhibit 23. The additional information in Connolly's affidavit attached as Exhibit B is in paragraphs 44, 45 and 46.

On January 4, 2006 after a hearing the Motion (Exhibit 23) was agreed upon and allowed. A court order was obtained regarding property in Carney's custody. Trooper Michael Banks (Banks) picked up the Sony Viao computer and what they thought at the time was a hard drive. Connolly examined the box. The Sony Viao was there but Connolly told Rooney what he thought was a hard drive was actually an external floppy drive. Sometime later Rooney provided him with a hard drive. This hard drive was subsequently obtained from Carney who received it from Mrs. Keown. The

Sony Viao and the subsequently obtained hard drive were secured in the state police locker. On June 8, 2006, Connolly obtained a search warrant with regard to this property. After obtaining the warrant Connolly took the Sony Viao notebook computer, the hard drive and the search warrant and gave them to Andrew Winrow (Winrow) the forensic computer expert. Connolly believes he gave Winrow the affidavit and search terms. These search terms were the same ones given to McSweeney which had been compiled from his (Connolly's) investigation and prior search warrants. The search warrant dated June 8, 2006 for the search of the Sony Viao and hard drive provided by Carney was marked Exhibit 24.

The items seized pursuant to the Consent to Search (Exhibit 17) on September 7, 2004, were two bottles of Sprite and another plastic bottle with markings like 2-3 on it containing liquid. Connolly obtained the Dell computers on September 8, 2004, and a forensic examination was performed by James Schwab (Schwab) a forensic investigator working with the District Attorney's office. These two computers as well as the computer from the Learning Exchange were turned over to McSweeney on or about January 18, 2005. Schwab examined the computer for evidence of whether Julie Keown had looked up chloroform on the Dell computers.

A copy of the e-mail sent to McSweeney contained the search terms, search warrant and affidavit. (Exhibits 24 and 25). The list of search terms Connolly provided to search the computer came from his affidavit pursuant to the investigation. Connolly's understanding is that the EnCase software program searches specific terms which if present on the computer are brought up so they can be examined to determine if they relate to the case or not. EnCase software is used to access material in the computer as a result of the user's use of the internet. The EnCase software can access information inside the files in the computer where the search terms provided are used. To a large

extent the words are out of Connolly's affidavit and his investigation. As of January 2005, there was a comprehensive list which subsequently had additional terms added by Winrow and Assistant District Attorney Nathaniel Yeager (Yeager) to the search terms in Exhibit 25. The search terms in Exhibit 25 were the only words Connolly provided. (EnCase Reports Exhibits 26 and 27 both impounded are the same document).

Connolly prepared five affidavits relative to this case. The first was his unsigned affidavit e-mailed to Buente in Kansas City in January 2005. (Exhibit 3). The second was an unsigned affidavit attached to the search warrant for 52 School Street, Waltham in March 2005. (Exhibit 21). The affidavit attached to Bailey's affidavit is substantially the same as the one he provided to Buente. The third was an unsigned affidavit sent to Kilgore for the search warrant in November, 2005. (Exhibit 3). The fourth was the affidavit signed by Connolly on December 7, 2005 previously referred to as Exhibit B attached to the Rooney's Motion (Exhibit 23) for Carney to turn over the Sony Viao computer and hard drive from the radio station and the hard drive from the desktop computer in Mrs. Keown's home. The final and fifth affidavit signed by Connolly on June 8, 2006 was used to search the Sony Viao laptop and hard drive. (Exhibit 24). In each of the five affidavits whether unsigned or signed paragraph f reads exactly the same.

Exhibit 3 is essentially the same as the affidavit attached to Exhibit 21 which is the 52 School Street search warrant application. The unsigned affidavit provided to Kilgore in November, 2005, and the affidavit signed on December 7, 2005 is the same with the addition of paragraphs 45, 45 and 46 which updates the information Connolly sent to Kilgore.

Connolly gave the Dell computers the defendant had voluntarily provided to him on September 3, 2004 from 52 School Street after signing a Consent to Search form (Exhibit 20) to

Schwab, then a civilian investigator for the Middlesex District Attorney's Office who had an expertise in computers. The result of Schwab's search were that research had been done on the victim's computer about chloroform. Schwab generated an EnCase document sometime in the fall or early winter of 2004. (Exhibit 28). The third page of Exhibit 28 contains a list of fifteen search terms some of which Connolly believes he suggested after conversations with Assistant District Attorney Steven Hoffman (Hoffman), a prior assistant district attorney on this case. Hoffman also contributed to the list of search terms. Once the list was created this EnCase software was used to search both Dell computers sometime in the fall of 2004. Schwab reported orally to Hoffman who told Connolly orally that the term chloroform had been searched on the computer. In January 2005 at or after the time of the Kansas City search, Connolly and Bailey provided McSweeney fifty key search words relating to the suspicious death of Julie Keown. (Exhibit 25). The words were created in part from Connolly's unsigned affidavit that he had provided to the Kansas City police. (Exhibit 3) and basically some other words concerning the investigation and any other words he thought would be useful. At some point later further keyword search words were provided in part by Yeager and Winrow sometime after Connolly created the initial list. (Exhibit 25).

The Buente Affidavit (Exhibit 1) says in "paragraph 41f:³

- f. Any electronic file or paper document specifically pertaining to the Internet activity of Keown (including, but not limited to file menus, Internet navigation directories and logs, "cookies" sent from Internet sites, "cache" directories and files, temporary Internet directories and files, and electronic mail logs) which may identify, trace or record the fact, date, time, modification, alteration, transmission and/or receipt via the Internet (or other computer-to-computer transmission mode) of any computer files of the type described in paragraph 2 of this affidavit."

³ See Appendix for a complete copy of this affidavit.

"41F refers to paragraph 2.

2. Lt. Connolly states that he has probable cause to believe that the crimes of murder (Mass. Gen. Laws c. 265, § 1) and use of a poisonous substance, to wit: ethylene glycol (Mass. Gen. Laws c. 266, § 102A½) have occurred and that evidence of those crimes will be found in the following items, which are currently located within the premises of a company called "The Learning Exchange," located in a single-story brick building in the northeast section of the Penn Valley Community College, at 3132 Pennsylvania Avenue, Kansas City, Missouri. The words "The Learning Exchange" are depicted in white letters to the left of the front double glass doors. On January 13th, 2005, Lt. Connolly spoke to Ms. JoLynn Bethke, Managing Director of the Learning Exchange. Ms. Bethke maintains control of the following:
 - a. electronic files and data within a Toshiba personal computer, Serial No. 81251803PU, and its peripherals, including CDs and diskettes;
 - b. electronic files and data within the hard drive of the personal computer workstation used by Keown at the Learning Exchange as designated by Ms. JoLynn Bethke;
 - c. electronic files and data within the server belonging to the Learning Exchange; and
 - d. various paper documents."

Connolly said the reference to paragraph 2 is clearly a typographical error and paragraph 2 should read paragraph 37 and paragraphs a through f. Connolly's unsigned affidavit (Exhibit 3) was e-mailed to Buente. Two months later when Bailey incorporated the same unsigned affidavit (Addendum A) in his application for the search warrant at 52 School Street in Waltham to seize computer and electronic files. (Exhibit 21). The warrant for the Learning Exchange (Exhibit 1) and the warrant for 52 School Street (Exhibit 21) authorized a search within the scope of Addendum A. This also defined the scope of the search of the Sony Viao and the hard drive in the possession of Carney. (Exhibit 23). Connolly then applied for a search warrant to actually search the contents of the two computers. (Exhibit 24).

I find in reading the complete affidavit in conjunction with the complete Addendum that Connolly clearly articulated and particularized what he was looking for.

From the Connolly affidavit and the investigation he created an original list of search items. (Exhibit 25). Over time the list was added to by others and by June 2006 the list was longer and included words to be used in the search of the computers that did not appear in the Connolly affidavit. (Exhibit 3). These additional search terms are included in the Keown EnCase Report (Exhibits 26 and 27). These few additional search terms not in Connolly's affidavit appear at the bottom of page 3 and on page 4.

There are no written policies of the State Police, District Attorney's Office or Department of Justice in regard to computer searches. All of the search terms in Exhibits 25 and 26 were not separately provided to a judge when Connolly applied for a search warrant. McSweeney went through the EnCase evaluation of seized computers and electronic files.

The affidavit attached to the Commonwealth's Motion (Exhibit 23) which Connolly signed on December 7, 2005 contains in paragraph 49b the additional search terms "propionic acid" and "methylmalonic acidemia" which are in the June 8, 2006 affidavit attached as Addendum A to the search warrant to search the Sony Viao notebook computer and the Western Digital Hard Drive. These items had been kept in the Massachusetts State Police Detective Unit Evidence Locker at 40 Thorndike Street, Cambridge, Massachusetts (Exhibit 24). Connolly was not sure when he learned these terms.

Greg Stocklan (Stocklan) of Las Vegas, Nevada had previously lived at 50 School Street in Waltham, Massachusetts which was a duplex owned by a family trust. The other address of the duplex was 52 School Street. Stocklan was responsible for rental and maintenance. In January of

2004, Stocklan rented 52 School Street to the defendant and his wife Julie. Coldwell Banker had found the tenants. The defendant signed the lease which was to run from January 2004 for 18 months. (Exhibit 12). The defendant gave a check for \$6,000 for first and last months' rent and a security deposit, and a further \$2,000. Two month's rent was paid up front. The lease was for two thousand dollars a month. In September 2004, the defendant came to Stocklan's apartment in the early evening and told him that there would be a lot of cars and people at the property over the next few days as his wife was going to be taken off life support the next day. He informed Stocklan of potential police presence. The next day or day after, the defendant told him he was going to be heading back to Missouri for the funeral. The defendant told him it was going to be a little while before he could pay next month's rent and Stocklan told him when he came back and had all his affairs in order after the funeral, he would work with him on an arrangement to make the rent current. A couple of weeks later he spoke to the defendant once. Further contact were a couple of voice mails saying he (Keown) would be back to get his things and pay his rent. After checks bounced, he paid rent for September and October in December of 2004 with a \$4,000 check which came from his mother's account. The rent was current through December. In January, 2005, Stocklan received a note from the defendant promising to send the January rent the following week by Federal Express, saying he was working on getting everything arranged to move his possessions out, and would be in touch after the holidays. (Exhibit 13). Stocklan never had contact with the defendant again. The defendant paid no rent in January or February 2005. No further payment was made after the December, 2004 check. Between the fall and winter of 2004⁴ Stocklan noticed mail overflowing in the box, a pile up of newspapers, as well as no car in the driveway. From outside it

⁴ Again the transcript is in error concerning the dates referring to the winter of 2005.

appeared no one was in the house. He noticed this mail piling up and no car in the driveway in December 2004, January and February 2005 as well as a few months into 2005. Before the defendant's wife died, Stocklan saw a car in their driveway every day. After his wife died, he never saw the vehicle.

In January, as a result of the pile up of mail and not seeing the defendant's car, Stocklan fearing the pipes would freeze entered 52 School Street to make sure the property was protected. The lease gave him that right for various reasons including if it appeared the apartment had been abandoned by the tenant. (Exhibit 12, paragraph 11). When he entered the apartment the heat had been shut off. With the exception of boxes in the kitchen apparently preparing for a move the rest of the apartment was in a regular living condition with furniture. The apartment had been rented unfurnished. Stocklan called N-Star and Keyspan and had the accounts transferred into his name so he could get the heat turned back on. Before entering the apartment he spoke to an attorney. Stocklan checked the apartment several times. On one occasion he thought he saw marijuana on the shelf of a third floor closet in a clear plastic kitchen bag. He was looking at the time for evidence of damage or any need to make repairs. When he saw the bag he called Bailey. In the winter of 2005 he had contact with Bailey. He told him about the condition of the apartment and how he had not seen or heard from the defendant and as a result was leaning towards eviction after the appropriate legal time passed. On March 21, 2005 after no further contact, Stocklan sent an eviction notice to 52 School Street Waltham, Massachusetts, as well as an address in Missouri of 2825 Covey Lane, Jefferson City where Stocklan learned the defendant was living. (Exhibit 14). The defendant never responded to the letter which notified him that his personal property was in storage and would remain there until all back rent is paid. At the end of ninety days if back rent was not paid, he was

informed his possessions would be considered abandoned and would be sold. The defendant abandoned the apartment and his property. By law after ninety days following the issuance of the eviction the property becomes the possession of the owner. Stocklan has since given most of the property to charity or friends.

On March 4, 2005, the search warrant was executed at 52 School Street Waltham. From mid-September through December 2004, Stocklan saw no one in or around the apartment nor did he see a car.

In the fall or winter of 2004, sometime after the death of the defendant's wife, Stocklan had conversations with Bailey and/or Connolly who asked him about his knowledge of arguments between the defendant and his wife, or whether he noticed anything unusual. They asked if Stocklan had seen the defendant and he told them he had not. Between September 2004 and March 2005 he had conversations a couple of times a month with investigating officers. They told him where the defendant was living in Missouri. After receiving the \$4,000 check Stocklan tried on numerous occasions leaving messages at his mother's home and never got a return call.

Before executing the search warrant, some police officer gave it to him. He believed the search was because the defendant's wife had been poisoned and they were searching the premises for evidence.

Attorney J.W. Carney, Jr. (Carney) a partner in the law office of Carney and Basil since 1989 was prior counsel for the defendant. He has been a member of the Massachusetts Bar since 1978. From 1978 to 1983 he was an attorney with the Massachusetts Defenders Committee (now known as the CPCS) and from 1983 to 1988 he was an assistant district attorney in Middlesex County. His specialty is criminal law. He has been involved in thousands of felony and/or murder cases either

as a defense attorney or prosecutor.

In early November 2005, Carney was appointed by CPCS to represent the defendant. He appeared in court for the defendant at his arraignment. Within a day or two of his appointment to the case, Carney had a conversation with the defendant's mother to introduce himself, talk a little about his background, the progress her son's case was likely to take, and answer any questions she might have.

At a later conversation with Mrs. Keown, again within a short time after his assignment to the case, she told Carney she had obtained some items from her son's workplace, which were at her home. She also said she had some other items also at her home. Mrs. Keown told Carney this information in response to his questions to her. Carney gave her list of the items he wanted her to send.

Carney received a package from Mrs. Keown which he understood contained the items she told him she was sending. When the package arrived Carney opened it and looked at it in a cursory fashion. The package contained a laptop and what he believed to be a hard drive as well as miscellaneous documents.

The next time he had a conversation with Mrs. Keown was close to November 22, 2005, when she called to tell him that police officers had come to her home and presented her with a search warrant for computers. Mrs. Keown told Kilgore she had previously sent those items to Carney in Boston. Either that same day or the next day Carney received a call from Middlesex Assistant District Attorney Lynn Rooney (Rooney) who said she understood he had the computers. Carney responded that he understood Rooney had a search warrant, which she acknowledged. Carney acted as a responsible competent attorney in confirming that Rooney had a search warrant for the items

in his possession.

Rooney told Carney that it was her intention to obtain them through a court order. Carney appropriately and responsibly told Rooney that he believed his role as an Officer of the Court was to preserve those items in exactly their present condition. Carney told Rooney basically that he viewed a search warrant to be the direct equivalent of a court order and as an Officer of the Court he assured Rooney he would not access the computer or allow anyone else to do so. Rooney agreed that was satisfactory to her. Carney alerted his staff not to touch the box, and he put it aside on a credenza in his office.

Carney had trained Rooney when he was the Director of Trial Attorney training in Middlesex County. He had known her very well for many decades sharing a very cordial professional relationship. He knew her to be an attorney with an excellent reputation. That day or the next day Carney received a fax from Rooney (Exhibit 29). Exhibit 29 memorialized the conversation Carney and Rooney had in the first two paragraphs.

Carney's understanding was that his role was to preserve what he had in the box which he believed to be a laptop removed from the KLIK radio station and a computer hard drive until Rooney obtained a court order to obtain access to the laptop and hard drive for forensic analysis. At the time Carney received the fax (Exhibit 29) he had not seen the search warrant or search warrant application and was not aware that only the laptop was included in the search warrant. The hard drive was not.

On December 7, 2005, Rooney filed a motion entitled the Commonwealth Motion for an Order to Turn Over Certain Items of the Defendant's Personal Property in the Custody of the Defendant's Attorney (Exhibit 23 with attachments - hereinafter "The Commonwealth's Motion") which set forth the chronology of events leading to Carney's obtaining the computer and a request

that an order be issued to Carney to “turn over forthwith the laptop computer (Sony Viao laptop) and its peripherals, including CDs and diskettes and the paper documents that were boxed and taken from the defendant’s office” at KLIK Radio, Jefferson City, Missouri pursuant to Kilgore’s search warrant executed November 22, 2005. (Exhibits 5 and 6). Further The Commonwealth’s Motion asked for an order for the hard drive the defendant’s mother had said she sent to Carney. The hard drive was not specified in the November 22, 2005 search warrant as the Commonwealth had not known of its existence. Physically the hard drive was in Mrs. Keown’s home in the computer located in the bedroom used as an office.

Carney said he read The Commonwealth’s Motion and viewed it as memorializing his understanding with Rooney and detailing the chain of custody about the transfer on the record. On January 4, 2006, at a status hearing, The Commonwealth’s Motion (Exhibit 23) was heard, assented to by Carney and allowed by the Court. (Exhibit 30). The defendant was not present at the hearing. Carney’s normal practice was to have his support staff send a client a copy of any pleadings. I find the defendant received a copy of Exhibit 23. Carney had not received any authority to assent to The Commonwealth’s Motion (Exhibit 23) directly from the defendant but had the authority to act pursuant to his representation of the defendant. The agreement was that Carney would turn over the documents, the laptop and the hard drive with the caveat that a third party, probably Kurt Schwartz (Schwartz) of the Attorney General’s office would look at some documents that the defendant had prepared for a prior attorney he retained during the investigation to see if attorney/client privilege applied. In assenting to The Commonwealth’s Motion I find Carney was not changing or compromising the defendant’s status or constitutional rights in any way nor was Carney waiving the defendant’s right to file and have a hearing on any motion to suppress any items turned over to the

Commonwealth.

Carney discussed with the defendant the fact that the government had an order issued by the Court entitling the Commonwealth to obtain the items Carney had received from his mother and that he had an obligation as an Officer of the Court to turn them over. He further explained to his client that the process was that the government initially obtains a search warrant to seize a computer, and then if one is seized the government must then seek another search warrant to search the hard drive of the computer. The third step is the hard drive would then be searched by the government and any evidence obtained would be turned over to the defense. If any incriminating evidence had been obtained by the government, the defendant would then have an opportunity to file a motion to suppress and contest both the initial seizure of the computer and the seizure of the data on the hard drive. At no time did Carney believe he was putting the Commonwealth in a better position than they were in before he turned over the items pursuant to the court order. I find he did not place the Commonwealth in any better position. His view was that his actions were comparable to the government obtaining those items as if they were in Mrs. Keown's home in Missouri and been seized pursuant to that search warrant.

Carney's agreement with Rooney was that any item protected by attorney/client privilege and identified by defense counsel would not be searched at any time during the hard drive search unless the government after notice to Carney sought specific authorization from the Court. Indeed that was done with Carney identifying to Schwartz specific folders in the computer written or prepared by the defendant for his prior attorney.

During the first week of January, 2006, Carney turned over the laptop and what he believed to be the hard drive from the desktop computer that he had received from Mrs. Keown to a state

trooper who came to his office. He did this pursuant to a court order. Soon thereafter he received a call from Rooney during which he learned for the first time that the item he provided to the Commonwealth which he thought was the hard drive was in fact another component of the desktop computer, the floppy-disk drive. Carney's experience was self-described as limited in dealing with computer searches. He had attended continuing legal education programs which explained the issues.

Carney understood that the component was not a hard drive after talking with Rooney. He understood that this mistake did not change his obligations to obtain the hard drive as he had agreed to in The Commonwealth's Motion.

When Rooney asked him to obtain the hard drive from Mrs. Keown in Missouri and provide it to the Commonwealth, Carney agreed understanding his obligations to be precisely the same as when he agreed to The Commonwealth's Motion (Exhibits 23 and 30). His view was he was under a court order to provide to the Commonwealth the items the Court had authorized the Commonwealth to seize once they were located, and the day to contest the order and pursue motions to suppress would come later. He did not in any way compromise any of his client's rights.

I find that Carney's view that pursuant to the outstanding court order he had no choice but to provide both the hard drive and the laptop was correct and that in all his actions he acted appropriately to represent his client's interests and as an Officer of the Court.

After speaking to Rooney he spoke to the defendant's sister and asked her to locate someone who could remove the hard drive from the computer in Mrs. Keown's home and send it to him as soon as possible. He asked that it be mailed by Federal Express and gave her his account number. Within a day or two he received in the mail what he understood to be the hard drive. He contacted

Rooney, told her he had the hard drive, and gave it to a Massachusetts State Trooper.

In August, Carney met with Schwartz at the office of the District Attorney and with the assistance of a technical person. Winrow isolated the attorney/client files in the Sony Viao laptop that were in the computer. Carney then, on behalf of his client, acted to enter into an Agreement to protect the attorney/client materials in the computer hard drive. (Exhibit 31). He sent a letter along with the Agreement requesting it be signed on October 4, 2006 (Exhibit 32). Other than the attorney/client privilege folder, Carney indicated the remainder of the computer folders could be viewed as ordered by the Court in the search warrant. I find Carney was correct that the Agreement (Exhibit 31) did not in any way compromise the defendant's rights with regard to challenging seizure and search of the hard drive or the Sony Viao laptop computer.

At the August meeting, Schwartz, Connolly, Winrow and Yeager were there with Carney. The detailed agreement was that Winrow and Carney would look at a copy of the hard drive (a read-only copy on the original hard drive) alone and that Winrow was told not to speak to anyone about what he saw on that copy of the hard drive without a court order.

As a result of Exhibit 29, Carney believed the hard drive was directly connected to the search warrant. I find that Carney's understanding that the Agreement regarding a computer hard drive (Exhibit 31) was limited to the attorney/client privilege only and did not in any way constitute a waiver of any grounds in any future motion to suppress challenging the Commonwealth's right to custody or inspection of the hard drive. (Exhibit 31, paragraph 4.3) Exhibit 31 was signed by Carney, Yeager and the defendant.

I find that at all times Carney acted appropriately consistent with the highest standards of the profession to protect his client and comply with lawful orders of the Court. No rights of his client

were waived or compromised.

Carney's understanding of the procedure being followed was that the Commonwealth had obtained a search warrant to search for and seize the two computers (laptop and hard drive) in Missouri. Carney believed these to be the items Mrs. Keown had sent him. The next step he understood was the Commonwealth would seek a second search warrant to perform a forensic analysis.

Andrew Winrow (Winrow) a computer forensic investigator for the Attorney General's office for three weeks, had previously worked in the same capacity for the Middlesex County District Attorney's Office. He had worked as a computer forensic specialist for a total of three years. Winrow as a computer forensic specialist acquires, authenticates, searches and analyzes computer evidence, electronic information stored on a computer, and electronic stored media as well as compact discs. By his education, training and work experience, Winrow is qualified to testify as an expert. Specifically he has assisted law enforcement and prosecutors in investigating computer crime cases and also analyzing the hard drives in computer crime cases. A hard drive is the data repository of a computer. All the data, the operating system and all the system files and user created data from that computer are stored. Once information is written, it is stored on the hard drive on a magnetized platter.

There are a number of steps followed as part of the forensic process in examining and searching a seized computer. The first is acquisition which involves making an exact bit by bit read only copy of the original hard drive. A copy is made so a forensic specialist never works off the original hard drive because there could be a hardware failure. The original hard drive is write-protected which means the original cannot be altered at any stage of the investigation. The actual

copy is also read-only which ensures that the copy of the hard drive cannot be changed. Thus an exact copy is made of whatever is being searched and then that copy is what is ultimately searched.

After acquisition is complete, the second step Winrow followed as part of the forensic processes in examining and searching a seized computer is authentication. To accomplish this, EnCase, a software program runs a mathematical checksum. Checksum is error checking. It is called an MD5 checksum which is a mathematical value. MD5 works as follows. When the bit by bit copy is made EnCase makes a checksum first of the original hard drive and then a checksum of the copy. It is a mathematical value (2 to 128th power) which is compared to see if the original and the copy are equal. The authentication means comparing to make sure the number that comes up on the original and the copy of the hard drive match up exactly. If the number matches up, you know you have an identical copy. If the number doesn't match, the copy is not identical.

EnCase software is the leading software for forensic investigators used in the corporate world as well as by state, local and government agencies. EnCase made by Guidance Software is used throughout the field of forensic analysis and has been tested, peer reviewed, and allowed as evidence by the courts in many criminal and civil cases.

The third step in the forensic process for examining and searching a seized computer is analysis. Analysis involves, depending upon the kind and breadth of the investigation, an investigation of the hard drive for whatever is the subject of the search. This three step process is used with all types of computer equipment being examined and includes hard drives, digital media and thumb drives. The EnCase program involves something called a bookmark which is used by the person doing the forensic analysis to flag something determined to be relevant to the investigation.

A search term is a word, a name or anything the user or investigator wants to input which is

relevant to the investigation. The search term is entered in EnCase and then a search is run for that term on the hard drive. Once the search is completed, the software displays all the search hits that were found and all the files that came from that search.

In this case Winrow examined a Western Digital hard drive (no computer was involved) and a Sony Viao laptop notebook computer which contained a hard drive inside the laptop.⁵ Normally a hard drive is attached to a computer. When Winrow received the Sony Viao laptop he removed the hard drive (Hitachi Travel Star) from the laptop because all of the data is stored on the hard drive. He obtained these items from Connolly who gave him certain instructions. Connolly gave Winrow a copy of the search warrant and the addendum, the key words (Exhibits 24 and 25) and instructions that when he did his search that he wasn't allowed to speak to Yeager, Connolly or anyone in the office regarding the case because there might be files protected by attorney/client privilege. Addendum A (attached to Exhibit 24) is two pages and lists paragraphs a through k. Winrow could not recall if he had Connolly's affidavit attached to Exhibit 24. Winrow also had a memorandum provided by Connolly for some fifty search terms relative to the investigation he was to search for in the case. (Exhibit 25). He had Exhibit 24 and Exhibit 25 to guide him in his investigation of the Sony Viao laptop hard drive and the Western Digital hard drive. Connolly provided him with an understanding of the background of the case. Connolly told him to conduct his search and let him know when it was completed and not speak of any details of the case. The search took place over a couple of months and began right after Connolly dropped off the hard drives and the search warrant (Exhibit 24) and search terms (Exhibit 25). The search produced an EnCase report. (Exhibit 26 and

⁵ These were the items obtained by Carney from Mrs. Keown and given to the Commonwealth.

Exhibit 27 are both the same report. Reference to Exhibit 26 also includes Exhibit 27).

Pages 1 and 2 (Exhibit 26) concern the acquisition data and detail the technical background of the two hard drives Winrow searched. Page 1 concerns the Western Digital hard drive from the desktop computer. Enumerated are the details of the computer -- some of the technical aspects including how large the computer is, its operating system and other background. Winrow conducted the acquisition on June 9, 2006. (Exhibit 26).

Page 2 (Exhibit 26) concerns the same technical information for the Sony Viao laptop hard drive. The acquisition was performed also on June 9, 2006 at a different time.

Winrow input the search terms (Exhibit 25) into EnCase and then ran a search in this case on these two hard drives. He ran a complete search which involved searching every file on a particular hard drive for the specific terms. For example one of the search terms he ran was "Sprite." (Exhibit 25). He ran it because it was believed that the soft drink Sprite had been seized from the defendant's home and might be involved in the case. The number of 20,980 in the left hand column of the EnCase report represents the number of search hits that came up from the word "Sprite."

A hit could be a file name, as well as a code within a file. If the word is within a file it could also be a code of a file. Anytime a word comes up on the computer, it is going to be displayed. The number 20,980 indicated the number of hits; in other words the number of times the word comes up. The word "Sprite" is typed in, the search is done and the number of times it exists in the hard drive comes up. The number does not represent the total number of electronic files that were searched.

The next step is to go through in a limited way all the hits to see if they are relevant. This is done by a preview pane in EnCase which does not involve a search of the whole file. When the file is checked there is a pane below, which gives a brief sentence about the highlighted search term

in that file to determine if it is relevant to the case. If it is not relevant, no further search is made of the file beyond this very limited search. For example in this particular case none of the 20,980 hits of the word Sprite were relevant to the case. Before the search, Winrow did not know that Sprite was a computer coding term in a macromedia flash program so the hits were false positive. Even though the word Sprite was a relevant, legitimate search term in this case, the hits did not refer to the soft drink Sprite and thus were not relevant to this case. By using the preview pane in EnCase, Winrow was able to avoid completely searching any of the files including where the Sprite hits came up. The intrusion was therefore limited. Once Winrow looks at the preview screen and determines that a search hit word is not relevant to the case, he does not open up that computer file any further. The word could appear once or multiple times in a particular file. After checking each file where a word appears and determining it is not relevant to the case, Winrow then moves on to the next search hit. This procedure is followed with all search hits. While EnCase tells every time a particular word comes up, it does not cover the entire computer. By way of example if there is only a picture of a Sprite bottle but not the actual word, Winrow would have to look through all the images on the computer to see if there was a picture. There are also files that are compressed that cannot be accessed by EnCase. For example, zip files which can't be accessed have to be gone through manually to see if they were user created or system files. System files are part of the computer such as WordPerfect or Word documents such as java files.

Concerning Winrow's search, examining one example to illustrate the way it was carried out, Exhibit 25 has the search word "ethylene glycol." Paragraph b of Addendum A of Exhibit 24 which Winrow had with him during the search and read before searching contains among others the word "ethylene glycol." Addendum A to Connolly's search warrant and affidavit (Exhibit 24) seeks to

search for the following electronic files stored on the Sony Viao notebook computer (hard drive) and the Western digital hard drive which are then more particularly enumerated in paragraphs a through k. I find Paragraph f which makes reference to Paragraph 2 of the Connolly affidavit is in fact a ministerial, typographical error which did not result in transforming this warrant into a general warrant. This fact is clearly evidenced by the limited manner in which Winrow conducted his search.

Concerning photographs on page five in the EnCase report (Exhibit 26) the report shows a picture of a bottle of potassium ferricyanide. This photograph was a deleted image on the computer so Winrow looked through all the deleted images to see if there were any that were relevant to this case. EnCase and search terms would not work on these deleted images. Winrow found that the label on the bottle was significant with regard to the search he was conducting because he researched what potassium ferricyanide was and learned it could be used for poisons. As a result Winrow added onto the key word search list the words "potassium ferricyanide." This is a good example of when Winrow would view a file to see whether or not there is a word that can't be detected by EnCase. He would not actually open up the file but would view that with a preview. There could be multiple hits within one file. Winrow would run the search term hits, use the preview screen in the files to see if the hit is relevant to the case, and in deleted images if found to be relevant he would bookmark it. "Bookmark" was his tagged files that Winrow included in his report. He can print up that document and provide it to investigators at some point. Items in the computer that cannot adequately searched with EnCase alone include photographs and zip drives. EnCase does display the images which Winrow then bookmarks if relevant. Exhibit 26 on page 24 is an example of a bookmark which can be a snippet of a file or an entire file. The bookmarks made up the bulk of Exhibit 26.

The list of key search terms which Winrow had to guide him from Connolly included that the forensic analyst was free to add any further search terms he thought might be useful. (Exhibit 25). The Addendum A (Exhibit 24) which Winrow also had guided him, because if he found something useful and it related to the addendum he would add it.

In Exhibit 26, pages 3 and 4, Winrow added some search terms. On page 3 the last four terms from the bottom were a string ending in EMF which is an enhanced meta file where a file printed on a computer is printed as an image. EnCase can't search for this. Winrow was looking here for any documents recently printed. There were hits but nothing relevant. Winrow added it because something could have been printed out that wouldn't have resulted from the search hits. This has to be manually entered. On page 3 of Exhibit 26, three items from the bottom Winrow added "base 64" as a search term. The reasons he made the addition is if a file gets e-mailed or an image gets e-mailed, it is stored in base 64 format which is not displayed in EnCase. As a result, Winrow has to do some manual labor to look for any images that might have been e-mail attachments already deleted. The 10,000 hits resulted in nothing relevant to this case. The remaining additions on page 3 were as previously discussed "potassium" and "ferricyanide."

Winrow also added as a last item in the list of search term hits on page 4 a Google search. He did that to narrow the number of files he had to open because he found that for the key words previously coming up, the primary search being used was Google.

When a file is on a hard drive, it is in an allocated area of the hard drive. The file is saved on the computer, so the hard drive knows where the file is located. If the file is deleted, the actual data of the file is still there, but the location on the hard drive is in "unallocated space." Unallocated space only remains as long as it doesn't get overwritten by new files that come in and take up that

space as needed on the hard drive. For instance if you wrote a ninety page memorandum and the unallocated space had a hundred page memorandum there would be unallocated space of the ten pages which would be data fragments not in order. The unallocated space depends on how much has been overwritten.

As he searched using the EnCase program search terms. Winrow found items or remnants of electronic files in unallocated spaces that he bookmarked because he deemed them to be relevant. Beginning at page 174 (Exhibit 26), a number of bookmarks are highlighted in yellow that are relevant to the investigation. For example at the bottom of page 177 was a Google search for the Anarchist's Cookbook. These and the two above them were in unallocated clusters to indicate when the searches occurred -- for example the bottom one on page 177 reads 2004, August 17 (2004 817) and the next day on 2004, August 18 (2004 818). This indicates a Google search on August 17 and 18, 2004 for The Anarchist's Cookbook which is a huge file that includes everything from making bombs, how to make poisons, how to kill someone with your hands, as well as numerous illegal activities. This search was prior to Julie Keown's death at Newton-Wellesley Hospital in early September 2004.

The entry above indicated that a Google search for homemade poisons was searched on August 17 or 18, 2004. There are many searches relevant to this investigation. On page 175 (Exhibit 26) the last entry indicates a Google search from October 24 to October 31, 2005 (2005 1024 2005 1021) after Julie Keown had passed away. Not all of the Google searches he found have dates or times concerning the information he found depending on how the files were stored. If the file was part of an "html" found it would not have a date or time. Where times are assigned by computer they can be in daily, weekly, or monthly format.

There are approximately ten to twenty dated searches involving some form of poison or questions about poison that occurred prior to Julie Keown's death. These searches were the only additions Winrow made.

Yeager told Winrow to add more key word searches on page 4 (Exhibit 26), on the third line down beginning at "anistolocheic" and ending with "Health Report." Yeager did not at any time before providing these terms talk to Winrow about what Winrow had found during his forensic analysis of the computer. Yeager referred Winrow to Addendum A, paragraph a "any electronic file relating to the health and/or death of Julie Keown" (Exhibit 24) and explained all the terms he had added. Winrow added no other terms. All the search terms Winrow used are on page 3 and 4 in the EnCase report. (Exhibit 26). He used them to search both hard drives together.

Exhibit 26 has yellow flags indicating the Sony Viao laptop. Exhibit 27 has the red flags which are from the Western digital hard drive and the blue flags which are from the Sony Viao laptop. There is a way to determine which bookmark designates which hard drive. He designated as HDD02 the Hitachi Travel Star hard drive from the Sony Viao laptop and flagged it in blue. These don't indicate dates so Winrow could not tell when the search was conducted. One of these examples was the word "chloroform" which resulted as a keyword when "poison" was the search hit. These searches could have been before or after the death of Julie Keown. The bookmark tells when and whether that information was available. The red flag in Exhibit 27 indicates a Google search from the Western Digital hard drive where no computer was included. This hard drive was from the desktop computer in Mrs. Keown's home and mailed to Carney in a second mailing. On page 174 the third one from the bottom is a Google search from October 24, 2005 to October 31, 2005 (2005 1024 2005 1031) which is highlighted with a red flag and a pink marker. (Exhibit 27).

This bookmark represents a Google search that was performed on March 5 to March 6, 2004 and was a search for the initials "JP" and then "Keown". The items that are highlighted in yellow on Exhibit 26 are Hard Drive 2 from the Sony Viao laptop. On Exhibit 27 page 174 with the red tab highlighted in pink is the Western Digital hard drive that was not accompanied by a computer. The blue highlighted on Exhibit 27 is the Sony Viao laptop. To know which bookmark refers to which hard drive Winrow refers to HDD01 when he references the Western Digital and HDD02 when he references the hard drive removed from the Sony Viao laptop.

The serial number mentioned in the warrant is the serial number for the actual Sony Viao laptop. The serial number for the actual hard drive enclosed inside the Sony laptop is different. As a result the serial number in the addendum and the EnCase report are different. When Winrow removed the hard drive HDD02 referred to in the EnCase report, it was the hard drive from the computer with the serial number authorized by the search warrant. Every computer has a serial number and a model number and when the hard drive is removed it also has a serial number and a model number which are different than what is on the computer.

Winrow ran no specific search related to Paragraph f in Addendum A (Exhibit 24) because running the search terms on pages 3 and 4 (Exhibit 26) indicated in the EnCase report would have triggered that search anyway. Paragraph f is basically authorizing a search relating to the user's internet activity. Paragraphs a through f (Exhibit 24) are duplicative of the key word searches from pages 3 and 4 (Exhibit 26).

If Paragraph f (Exhibit 24) had not existed at the time Winrow conducted the search, it would not have had any effect whatsoever on his searches. There would have been no searches he bookmarked that he would not have been able to do. If he had conducted a search using Paragraph

f there are multiple ways he could have done it. He could have exported the index.dat file out to a third party piece of software and analyze it, or he could have issued EnCase to produce a report of the internet history. I find that the error in Paragraph f referring to Paragraph 2 of the affidavit (Exhibit 24) at no time transformed this warrant into a general warrant nor was there ever a general search.

For each hard drive search, Winrow followed the steps of acquisition and authentication. Both searchable copies of each hard drive are together in the same program so the search is run once rather than twice. What is found on each hard drive is delineated as HDD1 or HDD2. Over 397,000 files on the two hard drives were searched and previewed, as described before using the EnCase program. The search is automated. Of these files only 325 or .08 percent were bookmarked as relevant to the investigation and preserved in the EnCase report. The only report Winrow generated in this case was the EnCase report. (Exhibits 26 and 27).

Internet searches are stored in the computer in two ways -- everything that's done within the course of a week and everything that's done within the course of a day. This storage is a function of the operating systems which is Windows XP. The entry "actual date" on Exhibits 26 and 27 indicate the date and time of acquisition. Winrow put the two hard drives -- the Western Digital hard drive from the Keown desktop and the Hitachi Travelstar hard drive from the Sony laptop -- in one large evidence hard drive on which he ran the search. Unallocated space is either free space or deleted files, and special software such as EnCase is needed to access it. Allocated space is the actual number of files the user would be able to access. There is special software that can delete files to make them unavailable to special software such as EnCase. Winrow did not recall looking for that. Pages 3 and 4 (Exhibit 26) contain search text which indicate the search terms used by

inputting them into EnCase, a column entitled last searched list of the date and time searched, and a column indicating the number of hits all of which may or may not be relevant. There could be multiple hits within a single file. He ran six separate searches. No searches were duplicated. (Exhibit 26 pages 3 and 4).

Winrow did not physically open up every image file in the computer. EnCase does not have the capability of making a record of opening up a particular image, graphics or zip file. The only image he bookmarked was on page 5 (Exhibit 26).

When Connolly gave Winrow the hard drive and the Sony with a hard drive, he also gave him a list of terms to search (Exhibit 25) as well as the search warrant (Exhibit 24). He could not recall if he had the actual affidavit and the addendum in support of the search warrant. He understood when he received the search warrant (Exhibit 24) together with addendum that it set the limits of the scope of his search. He read the search terms (Exhibit 25) and Addendum A (Exhibit 24). The language in Addendum A was the same language he had previously seen in every other search warrant he had executed for computers. On Exhibits 26 and 27, page 3, Winrow added five search hits that were not in Exhibit 25. Exhibit 25 had indicated that Winrow, in his forensic analysis, was free to add terms he thought might be useful. The fourth addition from the bottom, a string of x's and o's was a search for everything ever printed from this computer regardless of the content of what was printed. Often this is captured as an image. There were no relevant hits for this particular search. Winrow indicated theoretically it was a long shot to get such images because it was only a temporary file to begin with and therefore would not go into allocated space.

The warrant (Exhibit 24) authorizes the search of the entire computer. EnCase is a way of narrowing the level and number of files in the search.

Base 64 is a search for when e-mail with or without attachments are sent and then deleted. This search is only performed in unallocated space. If an e-mail with or without an attachment has been sent but not deleted, it would be in allocated space.

In Addendum A the phrase "any electronic file" would include specific authority to search for an image. Addendum A (Exhibit 24 paragraphs a - f.)

Exhibit 26, page 5, indicates a graphics file that was located in unallocated clusters and resulted from search term hits he added of potassium and ferricyanide. He retrieved all images still residing in unallocated clusters and viewed them deeming only the image on page 5 (Exhibit 26) to be relevant. He did this using a file-finder script which carves unallocated clusters looking for signatures of image files that still reside in unallocated clusters and displays them. He looked for GIF files, JPEG files and bitmap files all having to do with graphics format for pictures on a computer although the file attributes of GIF, JPEG and bitmaps no longer show. He did not open them all up, but previewed them.

The search terms on page 4 (Exhibit 26) - "gatorade" and "retirement benefits" were part of the original search term list (Exhibit 25) given him by Connolly but Winrow had left them off in error. Nine remaining search hits terms on page 4 (Exhibit 26) beginning with "Aristolochic" and ending with "Health Report" were terms he added after talking to Yeager and having Yeager explain their possible relevance to the investigation.

Winrow added a Google search on July 19, 2006 on his own authority based on Exhibit 25 indicating a forensic analyst should add terms he thought might be useful. Google is a website one can go to, type in search terms and search for information on the Internet. He decided to add a Google search because his prior search indicated a fair number of hits for particular search terms

using EnCase. The prior search indicated those terms appeared showing the defendant used Google to create the files where those terms were found. Every time a Google search is done using a computer with Encase software, hitting the return button generates files that exist in the computer and are contained in the index.dat file until they are overwritten. Of the 1,071 hits, he bookmarked the relevant ones. EnCase can access files without having a password because the software can bypass the password.

Winrow did not conduct a search of either computer by opening up the hard drive and viewing it the way a user would view their own computer. His approach was much more limited. It is not possible to determine the age of undated files. Files in unallocated space no longer have a designated log in user name.

An EnCase search starts with the entire computer using the search terms which result in hits. The hits are then previewed with the little preview screen to see which ones are relevant. If it is relevant, Winrow goes further or if not he moves on and conducts no further search. Lastly, if he deems it relevant, he bookmarks it. Allocated space is any space where a file is currently saved on the computer. If the file is deleted and no longer saved, or if the space has never been used, it is in unallocated space. Once a file goes into unallocated space, it is impossible to tell when the file was created. Concerning some of the bookmarks, Winrow could indicate time periods when the search occurred. If a file in unallocated space is part of an index.dat file, that file stamps a date on it. If he ran only a Google search on a particular day and got a hit regarding "poison," running another search using only the word "poison" would result in the same but duplicative hits.

It is possible using information on the hard drive, for example e-mail, to determine whether or not the dates and times of a particular hard drive are accurate. A work e-mail is usually time

stamped from a corporate server.

Winrow used nothing in the attorney-client file when he was conducting the rest of his search.

When Winrow ran the Google search in July, it told him all Google searches on the hard drive whether they were in allocated or unallocated space. Before that in June, he ran the standard list of search terms from Exhibit 25 with EnCase. When he searched the Google files in July, they were duplicative of searches he ran in June.

David McSweeney (McSweeney), a trooper with the Massachusetts State Police since 1993 is currently assigned to the Norfolk County District Attorney's Office White Collar Crimes Division. His specific functions cover computer related investigations, computer search and seizure, and the process of computer forensics. Computer forensics is the acquisition and analysis from media storage, media disks, and hard drives, as well as the process of analyzing that data and extracting data of evidentiary value.

McSweeney has a Bachelor's in business from Providence College, and a Master's in Criminal Justice Administration from Western New England College. He is a certified EnCase examiner and is certified by national organizations such as the International Information System Forensic Association, as well as numerous professional organizations. He attends many conferences, and has had training and classes in computer search and seizure, computer forensics and computer and internet related investigations.

In the field of computer forensics his work experience includes search warrants and cases where the crime itself is committed using the computer. The hard drive or the storage media that is seized is used to store data of evidentiary value such as letters or e-mails.

His forensic analysis includes acquisition where an exact physical copy is made of a hard drive as well as every piece of data on that drive. A test is performed to be sure the copy is an exact duplicate using a mathematical algorithm. This is called authentication. The third part would be analysis which is typically guided by a search warrant or a consent search.

In terms of acquisition, McSweeney uses EnCase which is a software tool which has a write block device used to prevent any change occurring to the data. The software allows the investigation to examine the copy without making any changes to the digital medium. It is a non-intrusive way of searching the data. He used EnCase which can search the entire computer.

There are certain files or parts of the computer EnCase cannot search without further work. There are some types of files called compressed files, zipped files or images. Searching for text would not cause an image to come up if there was no text part. There are certain files where you can only be sure what you obtained from the file if you actually browse the file yourself. In this case he was required to go beyond running only EnCase in his search. These files or images require extracting the files from those files and opening them up in as close to their native environment as possible to browse the contents.

McSweeney has conducted two types of searches -- the first, pursuant to a search warrant which is an authorization from the court to search a computer, and second, a consent search where the owner of the computer or piece of storage media gives consent to search the computer.

On January 28, 2005, McSweeney received a Toshiba laptop personal computer belonging to defendant and seized from the Learning Exchange in Kansas City, Missouri and two Dell laptops both owned by Cerner Corporation, the employer of Julie Keown that had been issued to her. He was provided a search warrant issued by the courts in Missouri for the Toshiba personal computer

(Exhibit 1), and read Exhibit 1, which included paragraph 41 a-k before searching the Toshiba laptop. There were consent searches for the two Cerner laptops.

McSweeney followed the process concerning the three laptops and the eleven compact disks of utilizing EnCase (1) to acquire, (2) authenticate that the data was an exact copy and (3) analyze the data. The process is the same for a laptop computer and a compact disk. McSweeney produced an EnCase report regarding these three computers and compact discs. (Exhibit 33).

On May 17, 2005, McSweeney received additional evidence from Connolly along with a search warrant. (Exhibit 21 - 52 School Street Waltham, Massachusetts). The additional five evidentiary items were two hard drives not installed in computers - (1) a Seagate 60 gigabyte hard drive (Seagate) and (2) a Quantum Fireball hard drive (Fireball). (3) an IBM Thinkpad laptop (IBM), (4) an Apple monitor (Apple) and (5) an Apple MacIntosh desktop computer (MacIntosh). He imaged the two external hard drives, and previewed the IBM and MacIntosh using Exhibit 21. A preview is first attaching the item to be acquired to the system to view -- in other words get a preview of -- the contents of the computer to determine relevancy to the investigation. An exact copy has to be made where the material in evidence files is acquired and searched. The Apple monitor could not be previewed, but the other items could. All items were ruled out as the limited search revealed older dates and/or files that were irrelevant to the investigation.

The items received on January 28, 2005 pursuant to the Exhibit 1 search warrant -- the Toshiba satellite laptop, seized from the Learning Exchange in Kansas City, Missouri and the two Dell laptops which were work computers of Julie Keown from Cerner and eleven compact disks -- were previewed, acquired, the copies authenticated and then an EnCase search was run on them. McSweeney searched beyond EnCase by opening compressed items and looking for images. Exhibit

33 details both the search he conducted and the references to the files that were bookmarked or extracted.

EnCase has built in automated search tools. When the data is presented to the examiner each file is listed that exists on the computer and next to that file is a short preview of eight to ten words on each side of the hit to get a preview of what the file might be. Sometimes it is necessary to take an extra step and run search terms if you can't be sure the preview is all that exists in that file. In this case, McSweeney ran search terms obtained from Connolly (Exhibit 25) against acquired data. Some files were not relevant to the investigation and some produced relevant hits which McSweeney bookmarked. Some of the hits were in unallocated space. The physical space of the hard drive that is inaccessible using Windows or an operating system can be accessible by the use of forensic software. Often a search of the search terms produce hits of remnant data that lies in unallocated space.

A search hit is simply the EnCase software searching the entire computer hard drive to find the search terms. If there is a hit on a specific word, the word could be in a file able to be viewed using an operating system or it could be in unallocated space and be remnant data from a file that previously existed. EnCase software searches the computer physically. Physically includes logical which is the file you see when you open up windows and view the file folders plus everything else that exists on the hard drive -- all the unallocated, unused area. One file can contain more than one hit.

Every time McSweeney saw a hit, the process is to go to the file, whether it is an active file, unallocated space, or a remnant file and preview the resulting search hits. McSweeney then pulls out what is relevant that falls within the search warrant, perhaps runs additional searches and then

makes the final bookmarks and references. He then writes a final report for the District Attorney's Office.

He does not open files that he can immediately determine are irrelevant by using the preview screen. Sometimes he has to take the extra step to determine relevancy. Search terms are a method used because the search is less intrusive, and actually narrow the scope of the search as well as removing the human element of the investigator out of the picture. The computer runs the search terms to narrow the search but make it more feasible to conduct a good search. Typically there are more false positives than there are relevant hits.

The total number of files on the three computers was approximately 218,000. Of those he bookmarked less than one percent. Concerning the Dell computers, Cerner for security reasons has another password. Since it was a consent search, McSweeney asked Connolly to obtain the password from Cerner rather than using technology to obtain it. He ran the search terms or variations of them in Exhibit 25. Sometimes if the way the word is written, such as say "Windows" is going to produce a lot of false positives he might change slightly or eliminate it. He has no memory of changing or eliminating any terms.

McSweeney also was given and read a copy of the search warrant and affidavit (Exhibit 1) and was guided in his search by this and the search terms in Exhibit 25. Most of what he produced in his search of the three laptops and CDs was from webpage activity. He included everything in his report that he thought was relevant. Exhibit 33 is an abbreviated report containing representations of the actual files he found. He looked in every file on the hard drive as he described above and if he found relevant web activity he bookmarked it. Bookmarks are generated by search term hits or opening up a file to see if it is relevant and if so including it in a report.

In particular, McSweeney searched on or about the date of death of Julie Keown to see what kind of web or other activity was taking place. Exhibit 34 was formerly Grand Jury Exhibit 1. Exhibit 35 a file with a list of medical questions was formerly Grand Jury Exhibit 2, Exhibit 36 referring to real estate and some buying and selling houses was formerly Grand Jury Exhibit 3. Exhibit 37 was a sample of files created by user access formerly Grand Jury Exhibit 4. These exhibits concerned time frames on or about September 3, 2004 in the early evening hours and related to activity at or around the time of Julie Keown's death. All Grand Jury exhibits where files were organized by time and date were times and dates from the BIOS clock inside the computer.

Nothing of relevance was found on an IBM laptop, Apple MacIntosh and some other individual hard drives.

A stipulation was entered concerning the search warrant for 52 School Street obtained by Bailey (Exhibit 21) which resulted in the seizure of a green leafy substance believed to be marijuana. As a result of testing, it was found not to be marijuana. As a result the Commonwealth inquired of its nephrologists, and then contacted Winrow and asked him to add nine search terms to his search of the Sony Vaio laptop computer and the hard drive seized from Carney (Exhibits 26 and 27). The terms provided by Yeager to Winrow are on page four of Exhibits 26 and 27 and are "aristolochic. aristolochia. Chinese herbs, Chinese herbal nephropathy, nephropathy, stephania, tetrandra. tetrandrin. and ABC radio health report." He did not provide Google.

James Schwab (Schwab) had originally done some searches of two Dell laptops and produced some documents. Schwab, presently a Belmont police officer and no longer employed by the Middlesex District Attorney's office, returned to testify and reviewed his search. Formerly he worked there as a civilian computer forensic investigator in the computer crime unit for about a year

and a half. He had been employed the same amount of time as a Belmont police officer. He is an expert computer forensic investigator with a Bachelor of Science in criminal justice who also attended EnCase computer forensic software training put on by EnCase in Virginia as well as numerous other training sessions by professional organizations. In mid-September, 2004 he was given the two Dell laptops by Assistant District Attorney Steve Hoffman (Hoffman) listed on page 4 of Exhibit 28 and asked to conduct a cursory search of each computer looking for specific keyword terms provided by Hoffman and report his findings. He did so and generated an EnCase report. (Exhibit 28). Counsel stipulated that the item in his report referred to as HD2 is the same Dell 600 Latitude computer McSweeney refers to in his report as LT2. He ran the provided search terms using the EnCase software. The other hard drive HD01 was not acquired into EnCase and was what McSweeney referred to as LT3. (Exhibit 33 - p. 00339). Only a cursory search was performed on HD01 (LT3), and none of the hits were relevant so EnCase was not used.

He only made one forensic copy of one hard drive -- the Dell 600 (HD2 - Schwab report is the same as LT2 in McSweeney's report). In the other hard drive (LT3 McSweeney's report and HD01 in Schwab's report), he ran EnCase on the actual hard drive but did not make a copy using a blocked process. This involves attaching a device to the hard drive between the evidence hard drive and the forensic machine which prevents any changes being made to the evidence hard drive thus preserving the original state. Information can be read from the evidence hard drive but nothing can be written on it nor can any changes be made.

At the direction of Hoffman he did a cursory search of the two computers, discussed his findings and as a result went back, made a copy of the Dell 600 and ran the search terms. A search EnCase report regarding his investigation which dealt solely with hard drive two (Exhibit 41).

provided more information and had no references to hard drive one. Other than that the majority of Exhibit 41 (referring to hard drive two) was the same as his first report. (Exhibit 28). Hard drive two is the Dell 600 (Exhibit 28) referred to as LT2 I McSweeney's report.

Schwab took an HTML file which is essentially a printout of a web page of the Dell 600 computer and deemed it the only relevant file as a result of his search. (Exhibit 42). Page five of Exhibit 41 lists a series of search terms along with a series of dates. The dates relate to when he did the EnCase search for those search terms. Exhibit 42, the web page exhibit, references the word chloroform on page 3 under HTML files in Exhibit 41.

Schwab knew his search of the two Dell laptop computers was pursuant to a consent search and not as a result of the execution of a search warrant. For the first laptop he did a read-only format which meant he couldn't change the hard drive. He did not see anything he felt was relevant and therefore did not make any forensic copy.

He followed the same procedure with the second hard drive, found something he felt was relevant and then acquired it and went through authentication. He did not produce a report at that time. A couple of years later when Yeager contacted him and asked about his role in the case, he went to the forensic unit, printed up the EnCase report (Exhibit 28) and talked to defense counsel. At that time he provided a copy of his report. He was contacted a second time, and asked to double check that he had turned over everything with regard to a report on the documentation of what was done in the government's server. He came at 7:30 a.m. the morning he testified, checked and printed up additional information and provided the documents that day to the Commonwealth and defense counsel. (Exhibits 41 and 42). The report he printed that day was based upon a more modern version of EnCase than the one he actually used. Any time zone information was not available at

the time he conducted the searches. The searches involving his case files were part of someone else's searches. Everything dated 7/27/06 on page five halfway down the column in Exhibit 41 are not his searches (p. 115). All the first searches appearing on 7/27 were done by him.

RULINGS OF LAW

CONSTITUTIONAL, STATUTORY, AND COMMON LAW FRAMEWORK

1. Choice of Law Issue

The initial question in deciding the validity of the two search warrants issued and executed in the State of Missouri is whether Missouri law or Massachusetts law should be applied. The defendant argues that this court should apply a functional approach focusing on whether Massachusetts or Missouri has the most significant relationship to the issues. The defendant further argues that the facts in this case indicate that Massachusetts is more significantly related to the issues, and that Massachusetts law should apply.

The Commonwealth argues that Missouri law concerning search warrants is identical to the Fourth Amendment and therefore the issues should be decided under both the United States Constitution and the Massachusetts Declaration of Rights as applicable.

The Missouri Supreme Court has stated, “[t]he Fourth Amendment provides the same guarantees against unreasonable searches and seizures as article I, section 15 of the Missouri Constitution.” State v. Damask, 936 S.W.2d 565, 570 (Mo. 1996) (en banc) (rehearing denied Jan. 21, 1997). “Thus, any analysis of search and seizure questions under the Fourth Amendment is identical to search and seizure questions arising under Missouri law.” Id.

No reported Massachusetts case addressing the issue of choice of law in the criminal context

has been found.⁶ “In the absence of an applicable U.S. constitutional provision, courts generally follow the rule that ‘the law of the forum governs as to procedure and rules of evidence.’” Commonwealth v. Miller, Cr. No. 1169-001 (Essex Super. Ct. July 9, 2002) (Lowy, J.) (quoting Burge v. State, 443 S.W.2d 720, 723 (Tex. Cr. App. 1969)). “The decision to apply the forum state’s law is based on the forum state’s superior ‘interest in proceeding effectively to prosecute major crimes committed within its boundaries.’” Id. (quoting People v. Rogers, 141 Cal. Rptr. 412, 417 (Cal. 1977)). “[E]ven if ‘the conflict concerning the choice of law encompass[es] the preliminary issue of whether evidence was wrongfully obtained, a substantive matter. . . . from the viewpoint of significant relationship or center of gravity rules, the significant contacts’ are with the state in which the crime occurred and is being prosecuted.” Id. (quoting People v. Saiken, 275 N.E.2d 381, 385 (Ill. 1971)).

Here, Massachusetts law should apply in determining the validity of the two Missouri search warrants since Massachusetts is the forum state and has the more significant relationship to the case. The victim and the defendant were both residents of Massachusetts, and the crime was committed

⁶ Similarly, Justice Kottmyer reached the same result in Commonwealth v. Sepulveda, Cr. No. 01-0187 (Essex Super. Ct. Feb. 6, 2003).

“No reported Massachusetts case addressing the issue of choice of law in the criminal context has been found. Of the courts which have considered the issue, some jurisdictions adhere to the choice-of-law analysis traditionally used to resolves conflict issues in civil cases and others apply a so-called exclusionary rule analysis. See generally State of Hawaii v. Bridges, 925 P.2d 357 (1996). In civil cases, Massachusetts courts apply a functional choice-of-law approach, and apply the law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties. Bushkin Assoc., Inc. v. Raytheon Co., 393 Mass. 622, 631-34 (1985). The exclusionary rule analysis looks at the principles which gave rise to the exclusionary rule, judicial integrity and deterrence of police misconduct, and evaluates whether these principles would be served by exclusion.” Id.

in and is being prosecuted in Massachusetts. See Commonwealth v. Miller, Cr. No. 1169-001 (Essex Super. Ct. July 9, 2002) (Lowy, J.).

2. Constitutional Protections

A. Necessary Triggering Conditions

“Although the burden of establishing that a warrantless search is reasonable, and therefore lawful, is on the Commonwealth, Commonwealth v. Antobenedetto, 366 Mass. 51, 57 (1974), the burden with respect to the threshold question whether a search in the Fourth Amendment sense occurred at all is on a defendant.” Commonwealth v. D’Onofrio, 396 Mass. 711, 714-715 (1986). “To establish a violation of rights secured by the Fourth Amendment, the defendant must prove that [government conduct invaded the defendant’s] reasonable expectation of privacy.” Id. at 715 (citing Rawlings v. Kentucky, 448 U.S. 98, 104-105 (1980)).

Additionally, the United States Supreme Court has effectively done away with standing as a requirement for Fourth Amendment purposes. Rakas v. Illinois, 439 U.S. 128, 140 (1978). In Rakas v. Illinois, the Supreme Court “abandoned a separate inquiry into a defendant’s standing to contest an allegedly illegal search in favor of an inquiry that focused directly on the substance of the defendant’s claim that he or she possessed a legitimate expectation of privacy in the area searched.” Rawlings, 448 U.S. at 104.

However, in Massachusetts the Supreme Judicial Court still addresses standing as a distinct concept for Art. 14 purposes. See infra at 4.

B. Government Action or Conduct

“The Fourth Amendment, and the accompanying rule of exclusion, apply only to government action.” Commonwealth v. Leone, 386 Mass. 329, 333 (1982). “Evidence discovered and seized

by private parties is admissible without regard to the methods used, unless State officials have instigated or participated in the search.” Id. (citing Commonwealth v. Richmond, 379 Mass. 557, 561-562 (1980)). “Private persons are not regularly involved in law enforcement, and those who undertake searches generally do so for reasons other than to secure criminal conviction.” Id. “Neither the Fourth Amendment nor art. 14 is implicated when the State is not involved in the private search, even when the evidence is subsequently given to the police.” Dist. Attorney for the Plymouth Dist. v. Coffey, 386 Mass. 218, 221 (1982).

C. Reasonable Expectation of Privacy

“[T]he [Supreme] Court in Katz held that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.” Rakas, 439 U.S. at 143 (citing Katz v. United States, 389 U.S. 347, 353 (1967)).

A defendant’s expectation of privacy is measured by examining “(1) whether the defendant has manifested a subjective expectation of privacy in the object of the search, and (2) whether society is willing to recognize that expectation as reasonable.” Commonwealth v. Montanez, 410 Mass. 290, 301 (1991). The defendant must establish both elements. Id.

D. Standing

A defendant moving to suppress evidence must establish that he has standing to contest the constitutionality of a search and seizure. Commonwealth v. King, 389 Mass. 233, 240 (1983). “In order to have standing to contend that a search violates a constitutionally protected interest, the defendant must show a violation of his constitutional rights and not those of another.” Id. A violation of constitutional rights requires a showing that the government conduct invaded the

defendant's reasonable expectation of privacy. D'Onofrio, 396 Mass. at 715.

“When a defendant is charged with a crime in which possession of the seized evidence at the time of the contested search is an essential element of guilt, the defendant shall be deemed to have standing to contest the legality of the search and the seizure of that evidence.” Commonwealth v. Bostock, 450 Mass. 616, 623 n.5 (2008) (quoting Commonwealth v. Amendola, 406 Mass. 592, 601 (1990)). For a crime in which possession of the seized evidence is not an element, the defendant must show he was “a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.” Commonwealth v. Diring, 354 Mass. 523, 532 (1968) (quoting Jones v. United States, 362 U.S. 257, 261 (1960) (announcing now defunct automatic standing rule under Fourth Amendment to United States Constitution)).

3. Search Warrants

A. Issuance of Search Warrants

Article Fourteen of the Massachusetts Declaration of Rights states,

““Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation: and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.”

Warrants may issue only when probable cause “supported by oath or affirmation” has been established and all “formalities prescribed by the laws” are satisfied. Id.

Missouri and Massachusetts have the same statutorily prescribed formalities for the issuance

of a search warrant. Both require: (1) that the place to be searched and the item to be seized is described with sufficient particularity, (2) that there is a substantial basis to credit the affiant's assertions of probable cause that the item to be seized is related to criminal activity, and (3) that there is probable cause to establish a nexus between the item to be seized and the place to be searched. Mo. Rev. Stat. § 542.276.⁷ G.L. c. 276, §§ 1, 2, 2A, 2B.⁸

B. Determining Probable Cause: *Aguilar-Spinelli* Two Prong Standard

“The Massachusetts Declaration of Rights can . . . provide greater safeguards than the Bill of Rights of the United States Constitution.” Commonwealth v. Hodge, 386 Mass. 165, 169 (1982).

In Commonwealth v. Upton, the Supreme Judicial Court, on remand from the Supreme Court, determined that the test for determining probable cause is stricter under art. 14 of the Declaration of Rights of the Massachusetts Constitution than under the Fourth Amendment. 394 Mass. 363, 373 (1985). The Supreme Judicial Court rejected the *totality of circumstances* test favored by a majority of the Supreme Court as “unacceptably shapeless and permissive.” Id. (quoting Commonwealth v. Upton, 390 Mass. 562, 574 (1983), rev’d, 466 U.S. 727 (1984)). The Supreme Judicial Court concluded “that the principles developed under Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969), if not applied hypertechnically, provide a more appropriate structure for probable cause inquiries under art. 14.” Id. at 374.

The most recent Supreme Judicial Court case to restate the *Aguilar-Spinelli* standard is Commonwealth v. Mullane, 445 Mass. 702, 705 n.1 (2006).

“Under the *Aguilar-Spinelli* standard . . . the magistrate must be informed of (1)

⁷ See appendix for Mo. Rev. Stat. § 542.276.

⁸ See appendix for G.L. c. 276, §§ 1, 2, 2A, 2B.

some of the underlying circumstances from which the informant concluded that the contraband was where he claimed it was (the *basis of knowledge* test), and (2) some of the underlying circumstances from which the affiant concluded that the informant was credible or his information reliable (the *veracity* test). Aguilar v. Texas, 378 U.S. 108, 114 (1964). If the informant's tip does not satisfy each aspect of the Aguilar test, other allegations in the affidavit that corroborate the information could support a finding of probable cause. Spinelli v. United States, 393 U.S. 410, 415 (1969).”

Id. (citing Upton, 394 Mass. at 374-375, quoting Upton, 390 Mass. at 566).

“In each case, the basic question for the magistrate is whether he has a substantial basis for concluding that any of the articles described in the warrant are probably in the place to be searched.”

Upton, 394 Mass. at 370. “[T]he affidavit must ‘contain enough information for an issuing magistrate to determine that the items sought are related to the criminal activity under investigation, and that they reasonably may be expected to be located in the place to be searched.’” Id. at 370-371 (quoting Commonwealth v. Cinelli, 389 Mass. 197, 213 (1983), cert. denied, 464 U.S. 860 (1983)).

Therefore, under Massachusetts law a search warrant requires probable cause that a particular item will be in a particular place to be searched, that the item is evidence of criminal activity, and there is a nexus between the criminal activity, the item to be seized, and the place to be searched. Probable cause is determined under the *Aguilar-Spinelli* standard, the basis of knowledge test, and the veracity test. See Commonwealth v. Upton, 394 Mass. 363, 370-371, 374-375 (1985).

C. Illegal Searches and the Exclusionary Rule

In Weeks v. United States, the Supreme Court stated that evidence seized by federal officials “in direct violation of the constitutional rights of the defendant” should be excluded from trial use. 232 U.S. 383, 398 (1914). The Supreme Court extended the exclusionary rule to the states in Mapp v. Ohio, stating “all evidence obtained by searches and seizures in violation of the Constitution is,

by that same authority, inadmissible in a state court.” 367 U.S. 643, 655 (1961).

“The [Supreme] Court ultimately concluded that the exclusionary rule should be applied as a remedy for unreasonable searches and seizures, on a case-by-case basis, only when the rule’s application would further the purpose of deterring police misconduct.” Commonwealth v. Valerio, 449 Mass. 562, 569 (2007) (citing United States v. Leon, 468 U.S. 897, 920-921 (1984)). “Massachusetts has never adopted the ‘good faith’ exception, and we do not adopt it now, [w]e refer to the Leon decision, . . . for the general principles.” Id.

“[I]t bears mentioning why an exclusionary rule has been judicially engrafted onto art. 14 [of the Massachusetts Declaration of Rights] . . . such a rule is necessary to give art. 14 practical meaning and purpose . . . [and] to provide a prophylactic remedy against, and to deter, unlawful police conduct.” Commonwealth v. Goewey, 69 Mass. App. Ct. 429, 436 (2007). The “rule is designed ‘to deter future police conduct in violation of constitutional or statutory rights.’” Commonwealth v. Ennis, 439 Mass. 64, 70 (2003) (quoting Commonwealth v. Santoro, 406 Mass. 421, 423 (1990)).

The Supreme Judicial Court stated it has “applied a rule of exclusion to prejudicial, and thus substantial, violations” of the G.L. c. 276, § 2B, that “thwarted the Legislature’s evident intent to protect the citizens of the Commonwealth from searches and seizures not supported by probable cause.” Commonwealth v. Sheppard, 394 Mass. 381, 389 (1985). “[V]iolations of the statutory probable cause requirements are substantial.” Id. Technical violations of G.L. c. 276 or art. 14 where the search was conducted reasonably and where the police did not exploit, “or attempted to exploit, the illegality of the warrant” does not require suppression under the exclusionary rule. Id. at 389-391. See Commonwealth v. Gomes, 408 Mass. 43, 46 (1990) (violation of knock and announce rule

does not require automatic suppression): Commonwealth v. Freiberg, 405 Mass. 282, 300 (1989) (“The error in the [warrant] return does not constitute ground for voiding the otherwise lawful search.”). Additionally, the Supreme Judicial Court stated, “an improper application of the exclusionary rule exacts an unwarranted and costly toll on the truth-finding function in criminal trials.” Goewey, 69 Mass. App. Ct. at 437 (citing Commonwealth v. Sheppard, 387 Mass. 488, 503 (1982), rev’d on other grounds, 468 U.S. 981 (1984)).

Therefore, the exclusionary rule is applied to suppress evidence obtained through government misconduct when suppression will deter such future misconduct. See Commonwealth v. Valerio, 449 Mass. 562, 569 (2007).

D. Fruit of the Poisonous Tree Doctrine

“The exclusionary prohibition extends as well to the indirect as the direct products of” police misconduct. Commonwealth v. Balicki, 436 Mass. 1, 16 (2002) (quoting Wong Sun v. United States, 371 U.S. 471, 484 (1963). citing Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)). “[K]nowledge gained by the Government’s own wrong cannot be used by it’ simply because it is used derivatively.” Nardone v. United States, 308 U.S. 338, 341 (1939) (quoting Silverthorne Lumber Co., 251 U.S. at 392). However, the connection between the misconduct and the evidence eventually gained “may have become so attenuated as to dissipate the taint” to allow use of the evidence. Id.

E. Exception to Exclusions Under the Fruit of the Poisonous Tree Doctrine

“Evidence is not excluded under the [attenuation] doctrine if . . . the ‘connection [between the improper conduct and the derivative evidence has] become so attenuated as to dissipate the taint.’” Commonwealth v. Benoit, 382 Mass. 210, 216 (1981) (quoting Nardone, 308 U.S. at 341).

The doctrine allows “removal of the taint if the government can demonstrate that the improper official conduct was not a sine qua non or but for cause of the discovery of the evidence.” Id.

In Brown v. Illinois, the Supreme Court stated a balancing test for attenuation, weighing the interests of deterrence against societal interests in producing all relevant evidence to prove guilt. 422 U.S. 590, 603-604 (1975). There are three factors: (1) “[t]he temporal proximity of the” police misconduct and discovery of the evidence, (2) “the presence of intervening circumstances,” and (3) “the purpose and flagrancy of the official misconduct.” Id.

“In determining whether the connection between the evidence and the improper conduct has become so attenuated as to dissipate the taint, the facts of each case must be examined in light of [the] three [Brown] factors.” Commonwealth v. Fredette, 396 Mass. 455, 460 (1985). The Supreme Judicial Court also analyzed the challenged evidence under the but for test,⁹ “[i]f a simple *but for* test is applied to the . . . evidence at issue here, the same result is reached.” Id. at 461.

F. Exception to Search Warrant Requirement - Consent Searches Without Warrants

Where the “Commonwealth relies on consent to justify the lawfulness of a search without a warrant, it bears the burden of proving that the consent was ‘freely and voluntarily’ given.” Commonwealth v. Burgess, 434 Mass. 307, 310 (2001) (quoting Commonwealth v. Krisco Corp., 421 Mass. 37, 46 (1995)). “The Commonwealth must show ‘consent unfettered by coercion, express or implied, and also something more than mere acquiescence to a claim of lawful authority.’” Id. (quoting Commonwealth v. Sanna, 424 Mass. 92, 97 (1997)). “[W]hile consent must be free and voluntary, there is no requirement that it be knowing and intelligent.” Commonwealth v. Costa, 65

⁹ The Supreme Judicial Court cautioned that “[g]enerally, a ‘but for’ test is too simplistic a tool for analyzing suppression issues.” Id. at 461 n.4.

Mass. App. Ct. 227, 232 (2005); see Schneckloth v. Bustamonte, 412 U.S. 218, 248-249 (1973); Commonwealth v. Rogers, 444 Mass. 234, 237 n.4 (2005).

The test for whether consent is voluntary is subjective, focusing on the particular individual. Compare Commonwealth v. Egan, 12 Mass. App. Ct. 658, 663 (1981) (police officer with twenty-one years experience, who was strong-minded and intelligent, was aware that consent could be withheld, and his cooperative conduct indicated he voluntarily and freely consented), with Commonwealth v. Heath, 12 Mass. App. Ct. 677, 684-685 (1981) (young woman under influence of drugs who had no prior arrest record, was under arrest and in handcuffs fastened behind her back, and may have been questioned after she had asked for an attorney did not voluntarily and freely consent).

Voluntariness of consent “is a question of fact to be determined in the circumstances of each case.” Commonwealth v. Aguiar, 370 Mass. 490, 496 (1976). Common factors include the lack of knowledge of the right to refuse consent, intoxication or influence of drugs, physical injury, lack of prior arrest, mental or emotional state, age, education, intelligence, maturity, and whether the individual was under arrest. Commonwealth v. Harmond, 376 Mass. 557, 561-562 (1978). “If an item is surrendered voluntarily, arguably a search or seizure within the purview of the Fourth Amendment to the United States constitution is not involved.” Aguiar, 370 Mass. at 496 (citing Coolidge v. New Hampshire, 403 U.S. 443, 484-490 (1971)).

G. Electronic File Searches of Computers or Electronic Media

“In conducting the actual search of the computers and disks, considerable discretion must be afforded to the executing officers regarding how best to proceed with the search.” Commonwealth v. McDermott, 448 Mass. 750, 776 (2007). “Advance approval for the particular methods to be used

in the forensic examination of the computers and disks is not necessary.” *Id.*; see United States v. Upham, 168 F.3d 532, 537 (1st Cir. 1999) (“The warrant process is primarily concerned with identifying *what* may be searched or seized — not how . . .”) “[C]are must be taken to minimize the intrusion of the search and the search conducted must be reasonable.” McDermott, 448 Mass. at 777.

4. Consent Searches Without Warrants

A. September 7, 2004

The defendant argues that his consent was involuntarily given because he was distraught over his wife’s condition, and that he felt threatened and intimidated by the police.

The Commonwealth must prove that the defendant’s consent was freely and voluntarily given by showing “consent unfettered by coercion, express or implied, and also something more than mere acquiescence to a claim of lawful authority.” Burgess, 434 Mass. at 310.

On September 7, 2004, Julie Keown was in the Intensive Care Unit at the Newton-Wellesley Hospital, and she was suffering from the effects of ethylene glycol poisoning. Forster (at that time a sergeant) and Connolly, both with the Massachusetts State Police, arrived at the hospital to join several Waltham Police officers in the investigation of an accusation that Julie Keown had been poisoned. Members of Julie’s family and the defendant, her husband, were present at the hospital. Various police officers conducted interviews of hospital personnel and family members.

Forster along with Lambert of the Waltham Police Department interviewed the defendant in a hospital conference room from approximately 6:30 p.m. until 8:30 p.m. The interview was general in nature, gathering background information to determine the circumstances. The defendant was not a suspect at the time, was not read Miranda warnings, was not under arrest, and was free to leave or

end the interview at anytime. At the end of the interview, the police officers asked if they could look in his home for the source of the ethylene glycol. The defendant was informed of his right to refuse to allow the search without a search warrant. The defendant gave his consent to the search and signed the Waltham Police Department Consent to Search form at 8:10 p.m. The defendant's demeanor was cooperative but upset.

That night the officers searched the Keown residence at 52 School Avenue, Waltham, Massachusetts. The defendant was present and at no time did he limit the search in any way. The officers asked if the family car could be searched, and the defendant consented and initialed a sentence added at the end of the consent form adding the search of the family car. Police officers searched for products that might contain ethylene glycol or antifreeze, and seized several drink bottles in the process. During the search the defendant's demeanor was cooperative and he assisted the police in their efforts.

There is no evidence of any coercion by the police in acquiring the defendant's consent: the defendant is an educated and intelligent person, he was told he could withhold consent, there is no evidence he was intoxicated or under the influence of drugs, he was not under arrest, he was not in custody, and he gave the police the keys to his residence. However, the defendant did have his wife's condition on his mind. These factors considered as a whole indicate that when the defendant signed the Waltham Police Department Consent to Search form, he freely and voluntarily gave his consent for the September 7, 2004 search. See Commonwealth v. Burgess, 434 Mass. 307, 310 (2001); Commonwealth v. Harmond, 376 Mass. 557, 561-562 (1978).

B. September 8, 2004

The defendant argues that his consent was involuntarily given because he was distraught over

his wife's condition, and because he felt threatened and intimidated by the police.

The Commonwealth must prove that the defendant's consent was freely and voluntarily given by showing that the "consent unfettered by coercion, express or implied, and also something more than mere acquiescence to a claim of lawful authority." Burgess, 434 Mass. at 310.

At approximately 8:00 a.m. on September 8, 2004 the defendant voluntarily initiated telephone contact with Forster. The defendant told the sergeant that he had forgotten that Julie had been talking about whether it hurts when you die, and that she had purchased chloroform in May on her computer over the internet, but he did not know if she ever received the chloroform. The defendant had put forth the theory that his wife self poisoned in a suicide attempt.

Later that day, Connolly went to the Keown residence to recover Julie's computers. At 12:08 p.m. the defendant, at his residence, signed the second consent form indicating that he was giving Julie's two employer-assigned Dell laptop computers to the police. The defendant was very cooperative and quiet at the time.

Many of the factors discussed above apply here. Additionally the defendant initiated the contact with Forster and made the allegation about his wife purchasing chloroform. The defendant then signed a second consent form on September 8, 2004, and turned over his wife's two computers to Connolly. Together these factors indicate that the defendant's consent was freely and voluntarily given without any coercion by the police. See Commonwealth v. Burgess, 434 Mass. 307, 310 (2001); Commonwealth v. Hammond, 376 Mass. 557, 561-562 (1978).

Additionally, the defendant voluntarily initiated the contact with Forster and volunteered the information of Julie's alleged purchase over the internet from her computer. The subsequent surrender of Julie's computers initiated by the defendant was not a seizure within the purview of the

Fourth Amendment. See Coolidge v. New Hampshire, 403 U.S. 443, 484-490 (1971); Commonwealth v. Aguiar, 370 Mass. 490, 496 (1976).

5. Seizure of Property from The Learning Exchange, Kansas City, Missouri, January 18, 2005

A. Abandonment and Expectation of Privacy

The Commonwealth argues that the defendant abandoned his property at The Learning Exchange, and therefore, he could not have had a reasonable expectation of privacy in the abandoned items subsequently seized.

The Fourth Amendment proscribes unreasonable searches and seizures. The Supreme Court has construed the Fourth Amendment to make any government seizure and search of personal property, located in an area where the owner has a legitimate expectation of privacy, per se unreasonable unless accomplished pursuant to a properly issued warrant. See United States v. Place, 462 U.S. 696, 701 (1983); United States v. Chadwick, 433 U.S. 1, 9, 13 (1977); Katz v. United States, 389 U.S. 347, 357 (1967).

“‘Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts’” Commonwealth v. Paszko, 391 Mass. 164, 184 (1984) (quoting United States v. Colbert, 474 F.2d 174, 176 (5th Cir. 1973)).

The defendant moved from Kansas City, Missouri to Waltham, Massachusetts to work remotely for his employer, The Learning Exchange, in February of 2004. The defendant left property at his employer's place of business at that time. In early July of 2004, the defendant was terminated by his employer for creating false invoices, fake contracts, and forged documents. At the time of the defendant's termination he was told to collect his personal property located at the employer's place

of business in Kansas City. By November of 2004, the defendant was back living in Kansas City and had applied for a lease on an apartment. The defendant made no attempts to collect his personal property which he had left at The Learning Exchange since February of 2004, at any time after his termination in July of 2004, or after his return to Kansas City in November of 2004.

On January 18, 2005, the defendant's personal property was still at The Learning Exchange, and management informed the police they were going to throw the defendant's property into the trash. Buente took possession of all of the defendant's property at The Learning Exchange on that date for safekeeping.

The defendant abandoned his personal property at his former employer's place of business. The defendant had an opportunity to personally retrieve his property after returning to live in Kansas City. The defendant had other options available to him such as arranging to have the items shipped or having someone else retrieve them for him.

The defendant had no reasonable expectation of privacy in the personal property he had abandoned at The Learning Exchange after his termination in July of 2004, and the seizure of the items on January 18, 2005, was not a violation of the Fourth Amendment prohibition of unreasonable government seizures of personal property. See Commonwealth v. Paszko, 391 Mass. 164, 184 (1984); United States v. Colbert, 474 F.2d 174, 176 (5th Cir. 1973).

B. Search Warrant Obtained by Kansas City Police Detective Buente

On January 18, 2005, Buente took possession of all of the defendant's property while executing a search warrant at The Learning Exchange. Some of the items taken into possession were not listed on the warrant, but were taken by Buente for safekeeping.

The defendant argues that the search warrant obtained by Buente failed to establish probable

cause, and failed to describe with sufficient particularity the items to be seized. Probable cause and sufficiency of particularity will be discussed infra beginning at 74. However, the court will address several other arguments made by the defendant first.

i. Sufficiency of Evidence

The defendant argues Buente's affidavit offers no evidence of any criminal activity by the defendant, makes a general assertion that computers are used by perpetrators to trouble shoot and gather information, and is speculative in establishing a nexus between the crime and the items sought for seizure. This argument addresses the sufficiency of evidence necessary to establish probable cause.

In United States v. Ventresca, the Supreme Court stated, "[w]hile a warrant may issue only upon a finding of probable cause, [the Supreme] Court has long held that 'the term probable cause . . . means less than evidence which would justify condemnation.'" 380 U.S. 102, 107 (1965) (quoting Locke v. United States, 7 Cranch 339, 348, 1813 WL 1402 (1813)). Adding "that a finding of probable cause may rest upon evidence which is not legally competent in a criminal trial." Id. (citing Draper v. United States, 358 U.S. 307, 311(1959)).

The standard for probable cause "'requires more than mere suspicion but something less than evidence sufficient to warrant a conviction.'" Commonwealth v. Roman, 414 Mass. 642, 643 (1993), (quoting Commonwealth v. Hason, 387 Mass. 169, 174 (1982): see Commonwealth v. O'Dell, 392 Mass. 445, 451 (1984) (probable cause is "considerably less exacting than a requirement of sufficient evidence to warrant a guilty finding"))).

ii. Failure to Establish Credentials in Affidavit

The defendant argues that Buente's affidavit did not establish his credentials nor mention his

employment or experience.

Buente's affidavit established Connolly's credentials, employment, and experience, based on the detailed information Connolly provided to Buente. Connolly provided this information because it is the standard procedure followed in Massachusetts.¹⁰ However, in Missouri a police officer making a warrant application does not include this information: it is not part of the procedure in Missouri for state-issued warrants.

This argument is at most an argument that a technical violation in the search warrant application took place. Technical violations do not require suppress under the exclusionary rule. See Commonwealth v. Sheppard, 394 Mass. 381, 389 (1985).

C. Probable Cause to Support Issuance of Search Warrant Obtained by Buente to Search The Learning Exchange, Kansas City, Missouri

i. Basis of Knowledge Prong

Buente's basis of knowledge came directly from Connolly via several telephone conversations and a detailed and extensive fourteen page e-mailed statement (see Exhibit 1) supplied with the intention that it be used in Buente's application affidavit to establish probable cause. Reliable hearsay may satisfy the basis of knowledge prong. Commonwealth v. Allen, 406 Mass. 575, 578 (1990). The information provided and the description of criminal activity must be described with detail that raises it "above the level of a causal rumor or a mere reflection of the reputation of the supposed actor." Commonwealth v. Kaufman, 381 Mass. 301, 302-303 (1980). Here, the information Connolly provided to Buente came directly from his investigation of Julie Keown's death and was clearly more than casual rumor or reputation. See Commonwealth v.

¹⁰ See Appendix for full text of G.L. c. 276, § 2B, Affidavit in support of application for warrant; contents and form.

Kaufman, 381 Mass. 301, 302-303 (1980). Julie Keown was taken off of life support on September 8, 2004, and died approximately one and a half hours later. An autopsy performed on September 9, 2004 resulted in a finding that she died as a result of ethylene glycol poisoning, and that oxalate crystals were found in her kidneys and brain. In November of 2004, Connolly interviewed fifteen to twenty people while in Missouri, including persons at The Learning Exchange.

The information provided by Connolly and used by Buente included a list of witnesses interviewed during the investigation whose statements were corroborated by Connolly or other witnesses, and details gathered during the investigation. Buente incorporated Connolly's exact words into his affidavit to which he signed and swore.

There was a substantial basis in the warrant application to determine that the basis of knowledge prong of the *Aguilar-Spinelli* standard was satisfied. See Commonwealth v. Upton, 394 Mass. 363, 374-375 (1985).

ii. **Veracity or Reliability Prong**

Buente's affidavit in his application for the search warrant included the names of persons interviewed by Connolly. "Reliability is shown when an informant provides his identity to police and is willing to be named in the affidavit in support of the warrant." Commonwealth v. Beliard, 443 Mass. 79, 85 (2004); see Commonwealth v. Bakoian, 412 Mass. 295, 301 (1992); Commonwealth v. Atchue, 393 Mass. 343, 347 (1984). "'A serious charge . . . when volunteered by an identified party . . . carries with it indicia of reliability of the informant.'" Atchue, 393 Mass. at 347 (quoting United States v. Wilson, 479 F.2d 936, 940 (7th Cir. 1973)). Connolly corroborated the statements through investigation or by cross statements of other persons interviewed. Police corroboration of facts is a strong indicator of the reliability of the informant. Commonwealth v. Alfonso, 438 Mass.

372, 377 (2003).

Buente's affidavit in the application for the search warrant included Connolly's name. Observations made by Connolly and included in Buente's affidavit would be presumed reliable as they come from a police officer. Ventresca, 380 U.S. at 111.

The veracity of the named persons who gave statements during Connolly's investigation and who were named in Buente's affidavit in support of the search warrant established a substantial basis to determine that the veracity prong of the *Aguilar-Spinelli* standard was satisfied. See Commonwealth v. Upton, 394 Mass. 363, 374-375 (1985).

iii. Item Sought Must Be Related to Criminal Activity

The defendant argues that Buente's affidavit did not offer any evidence of any criminal activity by the defendant.

The item sought must be connected to criminal activity and must be the proper item of a search warrant as set forth in G.L. c. 276, § 1. The allegation of criminal activity in Buente's affidavit, as supplied by Connolly was murder in the first degree.

Murder is defined under G.L. c. 265, § 1, as,

"Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury."

Id.

Murder with deliberate premeditation requires the Commonwealth to prove deliberation and premeditation, a decision to kill, and a killing in furtherance of the decision. Commonwealth v.

Duran, 435 Mass. 97, 111-112 (2001)). “Deliberate premeditation consists of ‘a plan to murder ... formed after the matter had been made a subject of deliberation and reflection,’ but ‘in view of the quickness with which the mind may act,’ such deliberation may take ‘a matter of days, hours, or even seconds.’” Commonwealth v. Burgess, 450 Mass. 422, 432 (2008) (quoting Commonwealth v. Tucker, 189 Mass. 457, 494-495 (1905)).

“‘Malice aforethought includes any unexcused intent to kill, to do grievous bodily harm, or to do an act creating a plain and strong likelihood that death or grievous harm will follow.’” Commonwealth v. Puleio, 394 Mass. 101, 108 (1985) (quoting Commonwealth v. Huot, 380 Mass. 403, 408 (1980)).

“To establish probable cause, ‘[a]n affidavit must contain enough information for an issuing magistrate to determine that the items sought are related to the criminal activity under investigation, and that they reasonably may be expected to be located in the place to be searched at the time the search warrant issues.’” Commonwealth v. Matias, 440 Mass. 787, 792 (2004) (quoting Commonwealth v. Cruz, 430 Mass. 838, 840 (2000)).

Under the search warrant the Commonwealth sought to seize: (1) electronic files and data within a Toshiba personal computer with the serial no. 81251803PU, and its peripherals including CDs and diskettes, (2) electronic files and data within the hard drive of a personal workstation computer at The Learning Exchange and used by the defendant, (3) electronic files and data within the server belonging to The Learning Exchange, and (4) various paper documents that the defendant had abandoned at The Learning Exchange.

Any evidence regarding poisoning by ethylene glycol, discord in the relationship between Julie and the defendant, or motive to kill would be evidence connecting the item seized and the

criminal activity. Here, the information before the issuing judge included information that the defendant had forged documents and created false invoices and that he had used computers in those endeavors. Additionally, there was information that the defendant was living beyond his income level and keeping his wife unaware of the situation as indicated by her statement to her father that the couple was putting aside \$1,500 into savings each month.

There was sufficient information for an issuing judge to determine that the items sought were related to the criminal activity under investigation. See Commonwealth v. Matias, 440 Mass. 787, 792 (2004).

iv. Nexus Between Criminal Activity, Item to Be Seized, and Place to Be Searched

The defendant argues that Buente's affidavit was speculative in establishing a nexus between the crime and the items sought for seizure.

There must be information "sufficient [to establish a] nexus between the defendant and the [place to be searched], and to permit the issuing magistrate to determine whether . . . [the item sought] could reasonably be expected to be located in the" place to be searched. Commonwealth v. Ortiz-Peguero, 51 Mass. App. Ct. 90, 97 (2001).

Here, the information before the issuing judge included information that the defendant had been employed by The Learning Exchange, the place to be searched; had used a computer to forge documents and create false invoices; and may have also used it to investigate and plan the murder of his wife. There was information before the issuing judge that the defendant had abandoned computer equipment and personal papers at his former employer's place of business.

The information before the issuing judge was sufficient to establish the nexus between the criminal activity of murder, the defendant, and the place to be searched, The Learning Exchange. See

Commonwealth v. Ortiz-Peguero, 51 Mass. App. Ct. 90, 97 (2001).

D. Search Warrant Must Describe with Sufficient Particularity

i. Typographical Error in Warrant Application¹¹

The defendant argues that the search warrant failed to describe the items to be seized with sufficient particularity. That reference in paragraph forty-one (f) to paragraph two, did not create any limitation as paragraph two did not discuss computer files at all.

The Commonwealth argues that the search warrant satisfied the sufficient particularity requirement notwithstanding the defendant's reliance on a typographical error referencing the incorrect paragraph in the affidavit.

Paragraph forty-one, subpart (f), referenced "computer files of the type described in Paragraph 2 of this affidavit." Exhibit 1, p. 41(f). The correct reference would have been, computer files of the type described in paragraphs thirty-seven and forty-one (a) through (f).

The typographical error was not a deliberate misrepresentation requiring invalidation of the search warrant. See Commonwealth v. Perez, 357 Mass. 290, 301 (1970) (a deliberate misrepresentation used to establish probable cause in an affidavit may render a search warrant invalid). The search warrant authorized the seizure of documents, computers, and their peripherals, including CDs and diskettes. The typographical error in paragraph forty-one (f) is not fatal to the particularity of the authorization to seize the items listed in (a) through (d) of the Missouri search warrant issued January 18, 2005. See Commonwealth v. Forish, 61 Mass. App. Ct. 554, 560 (2004) (the fatal error was a "lack of particularity in the warrant and the absence, both at issuance and on

¹¹ This typographical error was carried over to the application for the search warrant at 52 School Avenue, Waltham, Massachusetts, issued March 4, 2005. Discussed infra at 82.

execution, of an attached affidavit that specified the objects of the search”).

ii. Sufficient Particularity of Things to Be Seized

The defendant argues that the search warrant without limitation authorized the seizure of all electronic files on the Toshiba personal computer, on a computer workstation, on The Learning Exchange computer server, and various paper documents, without itemization, and thereby created a general warrant.

The item to be seized should be described as particularly as possible. Commonwealth v. Dunigan, 384 Mass. 1, 6-7 (1981). Failure to particularize may result in suppression. Commonwealth v. Taylor, 383 Mass. 272, 276 (1981).

The purpose of the particularity requirement is to safeguard against general exploratory searches by the police. Coolidge, 403 U.S. at 467. A search warrant that neither specifies the items to be seized nor is accompanied by an incorporated supporting affidavit that specifies the items fails to satisfy the particularity requirement. Forish, 61 Mass. App. Ct. at 560. “[T]he degree of specificity required when describing the goods to be seized may necessarily vary according to the circumstances and type of items involved.” Freiberg, 405 Mass. at 298 (quoting United States v. Johnson, 541 F.2d 1311, 1314 (8th Cir. 1976)). The court will not impose unreasonable particularization of description when the police do not know the exact characteristics of the item sought, “[t]o hold otherwise would unreasonably thwart the ability of the police to investigate a crime immediately after its occurrence.” Id. at 299.

Here, the items to be seized under the warrant were described as: (1) electronic files and data within a Toshiba personal computer with the serial no. 81251803PU, and its peripherals including CDs and diskettes, (2) electronic files and data within the hard drive of a personal workstation

computer at The Learning Exchange and used by the defendant, (3) electronic files and data within the server belonging to The Learning Exchange, and (4) various paper documents that the defendant had abandoned at The Learning Exchange. This was sufficient particularization to seize the items listed. See Commonwealth v. Dunigan, 384 Mass. 1, 6-7 (1981).

The affidavit described with sufficient particularity the forensic analysis of the Toshiba laptop which was authorized by the issuing of the search warrant. The affidavit was not present when the computer was seized, but was present and did guide McSweeney when he conducted the actual forensic analysis of the Toshiba laptop. The forensic search of the Toshiba was limited to specific categories of electronic files relating to: (1) Julie Keown's health, (2) ethylene glycol poisoning, its effects, and similar poisoning cases, (3) financial records, (4) life insurance on Julie Keown, (5) the preparation of a will, (6) files concerning internet activity, (7) software applications used to erase, encrypt, or decrypt files, and (8) any installed application software used to organize, store, or track financial activities or electronic calendar or appointment activities.

McSweeney limited his forensic search of the Toshiba laptop computer to a list of search terms. The search terms limited the number of files viewed to files that first contained a search term and second was relevant to the investigation after a portion of the file was viewed with the word in context. This search method of searching for specific keywords, viewing the located keywords in a limited previewed in context, disregarding non-relevant files based on the context preview, and not opening every file within the computer provided a safeguard against a general exploratory search.

The warrant together with the affidavit and list of search terms, sufficiently described the items to be seized, electronic file storage devices, and the search of those storage devices' electronic files. See Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971); Commonwealth v. Freiberg, 405

Mass. 282, 298 (1989) Commonwealth v. Forish, 61 Mass. App. Ct. 554, 560 (2004). The defendant's constitutional rights were not violated by the search warrant authorizing seizure of electronic files and data from a computer work station or the computer server belonging to The Learning Exchange. The defendant has not demonstrated he had a reasonable expectation of privacy in his former employer's computer files. See Commonwealth v. D'Onofrio, 396 Mass. 711, 715 (1986); Commonwealth v. King, 389 Mass. 233, 240 (1983).

iii. **Sufficient Particularity of Place to Be Searched**

The place to be searched must also be described with sufficient particularity. "No one requires elegant precision of these documents, but particularity is demanded of warrants by the Fourth Amendment itself." Commonwealth v. Hall, 366 Mass. 790, 799 (1975). Likewise, "[a] conveyancer's precision of language is not to be expected in the affidavit." Commonwealth v. Pellier, 362 Mass. 621, 625 (1972).

Here, the place to be searched, The Learning Exchange, was described in the search warrant as, "The Learning Exchange, located in a single-story brick building in the northeast section of the Penn Valley Community College, at 3132 Pennsylvania Avenue, Kansas City, Jackson County, Missouri. The words The Learning Exchange are depicted in white letters to the left of the front double glass doors."

The search warrant description of the place to be searched met the sufficiently particularized description requirement. See Commonwealth v. Hall, 366 Mass. 790, 799 (1975).

6. **Warrant Search of the Keown Residence at 52 School Avenue, Waltham, Massachusetts**

Bailey obtained a search warrant for 52 School Avenue, Waltham, the Keown residence. On

March 4, 2005, the search warrant was executed. The defendant argues: (1) that the affidavit contained information from a prior illegal search, (2) that the affidavit failed to establish probable cause to issue a warrant, and (3) that the warrant failed to describe with sufficient particularity the items to be seized.

The Commonwealth argues that the defendant abandoned the property located in the residence sometime in November of 2004, and that by December mail began to pile up. Additionally, the defendant had signed a lease for an apartment in November in Kansas City, Missouri, and he had not paid any rent for 52 School Avenue for the first three months of 2005.

Alternatively, the Commonwealth argues that the search warrant for the residence at 52 School Avenue was valid. The affidavit satisfied the *Aguilar-Spinelli* two-prong test for basis of knowledge and veracity. The warrant satisfied the sufficient particularity requirement not regarding the defendant's reliance on a typographical error referencing a paragraph in the addendum, instead of the correct paragraph in the affidavit. The application established evidence of criminal activity and a nexus between the evidence sought and the place to be searched.

A. Affidavit Contained Information from Previous Illegal Search

The defendant argues that Bailey's affidavit contained information that was the product of prior illegal searches. The defendant argues that the landlord, Stocklan, entered the residence as an agent of the police, on February 28, 2005, in violation of the Fourth Amendment and art. 14. The defendant argues that Bailey entered the curtilage of the residence on February 15, 2005, and this entering of the curtilage constituted a search in violation of the Fourth Amendment and art. 14. Therefore, all evidence seized under the warrant is fruit of the poisonous tree.

i. Abandonment and Expectation of Privacy

The Fourth Amendment proscribes unreasonable searches and seizures. The Supreme Court has construed the Fourth Amendment to make any government seizure and search of personal property, located in an area where the owner has a legitimate expectation of privacy, per se unreasonable unless accomplished pursuant to a properly issued warrant. See United States v. Place, 462 U.S. 696, 701 (1983); United States v. Chadwick, 433 U.S. 1, 9, 13 (1977); Katz v. United States, 389 U.S. 347, 357 (1967).

“Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts.” Paszko, 391 Mass. at 184 (quoting Colbert, 474 F.2d at 176).

Here, the defendant stopped paying rent after December 2004, and the landlord's last contact with the defendant was in late December of 2004 or early January of 2005, by a note from the defendant promising to pay the rent and to send a check the next week via Federal Express. The defendant's note also stated he was in the process of moving the last of his belongings out of the apartment. The check was never received and the defendant's property was not moved out.

From December of 2004 through February of 2005, the landlord who lived next door at 50 School Avenue, never saw the defendant's or any other automobile in the driveway, and he noticed mail was piling up. Before Julie Keown's death, the landlord saw an automobile in the driveway every day. The landlord made several unsuccessful attempts to contact the defendant in Missouri, and never received a return call in response to messages that he had left for the defendant.

It can be inferred from the defendant's relocation to Kansas City in November of 2004, his not paying the monthly rent after December of 2004 as he indicated he would, and his not returning

to the apartment as indicated by his failure to retrieve his mail, that the defendant had abandoned 52 School Avenue. Thus he had no reasonable expectation of privacy in March of 2005. See Commonwealth v. Paszko, 391 Mass. 164, 184 (1984).

ii. **Landlord's Entry Into 52 School Avenue on February 28, 2005**

The defendant argues that police interviews of the landlord and police urging the landlord to report anything suspicious made the landlord an agent of the police.

The landlord testified that from the outside it appeared no one was in the home, there was no longer an automobile in the driveway, mail had been piling up, and he had not seen anyone at the apartment since the middle of September 2004. In January of 2005, the landlord had entered 52 School Avenue to check on its condition, a right he had under the lease terms. The landlord had feared the pipes would freeze and when he entered, he found the heat was turned off. As a result the landlord had the utilities' accounts transferred to his name and the heat was turned back on.

The landlord then checked the apartment several times between the first entry and the February 28, 2005 entry. On the February 28 entry, while in the process of checking for damage and necessary repairs the landlord saw what he thought was a clear plastic bag of marijuana in a closet. The landlord left it and informed Bailey. This information became a part of the affidavit for the search warrant.

"The Fourth Amendment, and the accompanying rule of exclusion, apply only to government action, [and] [e]vidence discovered and seized by private parties is admissible without regard to the methods used, unless State officials have instigated or participated in the search." Leone, 386 Mass. at 333 (citing Richmond, 379 Mass. at 561-562). "Private persons are not regularly involved in law enforcement, and those who undertake searches generally do so for reasons other than to secure

criminal conviction.” Id. “Neither the Fourth Amendment nor art. 14 is implicated when the State is not involved in the private search, even when the evidence is subsequently given to the police.” Coffey, 386 Mass. at 221.

Here, the landlord was acting in his own best interests, to prevent damage to 52 School Avenue, a property owned by his family trust. The police did not instruct the landlord to enter into the apartment and conduct a search for incriminating evidence on February 28, 2005.

The information the landlord provided to Bailey, which was included in the affidavit for the search warrant, did not result from any police instigation or participation in the landlord’s entry. Therefore the exclusionary rule is not applicable. See Commonwealth v. Leone, 386 Mass. 329, 333 (1982).

iii. Bailey’s Entry Into the Curtilage of 52 School Avenue on February 15, 2005

The defendant argues that Bailey entered the curtilage of the residence on February 15, 2005, which constituted a search in violation of the Fourth Amendment and art. 14.

“For purposes of art. 14, as for the Fourth Amendment, whether a particular instance of government scrutiny, unauthorized by a warrant, constitutes an unreasonable search under constitutional standards, depends on whether the person had a reasonable expectation of privacy, that was violated by the government.” Commonwealth v. One 1985 Ford Thunderbird Automobile, 416 Mass. 603, 607 (1993) (citing Commonwealth v. Panetti, 406 Mass. 230, 231 (1989)).

The defendant had abandoned his property at 52 School Avenue and therefore did not have an expectation of privacy. See supra at 27-28. Absent a reasonable expectation of privacy, government scrutiny unauthorized by a warrant is not a violation of art. 14 or the Fourth Amendment. See Commonwealth v. One 1985 Ford Thunderbird Automobile, 416 Mass. 603, 607

(1993). However, if the defendant still had an expectation of privacy the issue would be, was the area that Bailey entered within a constitutionally protected zone.

“When used in the Fourth Amendment context, curtilage helps to define those areas that the police generally cannot search without a warrant.” Commonwealth v. McCarthy, 428 Mass. 871, 874 (1999). “The Supreme Court has held that an area is within the curtilage of a residence only when it is ‘so intimately tied to the home itself’ that ‘an individual reasonably may expect that the area in question [will] be treated as the home itself.’” Id. (quoting United States v. Dunn, 480 U.S. 294, 300-301 (1987)). “[C]urtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.” Dunn, 480 U.S. at 301. “These factors are not intended as a finely tuned formula; rather, they provide a framework to aid in analyzing the relevant facts and deciding the core issue — whether the area in question harbors those intimate activities associated with domestic life and the privacies of the home.” McCarthy, 428 Mass. at 874 (citing Dunn, 480 U.S. at 301 n.4).

The area Bailey entered was at the rear of 52 School Avenue, and he looked through the rear sliding glass door entry to the apartment. There is no indication that the area was fenced off from the rest of the apartment complex. The area is an alternative entry-way to the apartment. The defendant had not covered the glass of the sliding entry door with a blind or curtain to block the view in. Any member of the public could approach the sliding glass door and knock for the resident to answer, or peer inside.

Bailey went to 52 School Avenue and peered in after he was informed by the landlord that

the landlord had not seen anyone at the residence since September of 2004, and that the defendant, who was now living in Missouri, had not responded to calls made by the landlord, nor paid rent for January or February of 2005.

Therefore, since the defendant had demonstrated an intent to abandon 52 School Avenue there was no reasonable expectation of privacy. Additionally, Bailey did not enter any area that any member of the public or resident at the apartment complex could have entered. Under the circumstances Bailey did not invade or enter the curtilage under the Fourth Amendment or art. 14 of the Declaration of Rights. See Commonwealth v. McCarthy, 428 Mass. 871, 874 (1999).

B. Probable Cause to Support Issuance of Search Warrant for 52 School Avenue

i. Basis of Knowledge Prong

Bailey's basis of knowledge came directly from his own investigations, his participation with Connolly in the investigation, and through conversations with Connolly concerning Connolly's investigation results. Additionally, the information of the landlord's observations concerning possible marijuana were all stated in the affidavit.

Bailey also stated the observation he had made on February 15, 2005. He had looked through the rear sliding glass door to the apartment and observed several boxes in the kitchen area, one marked "James Computer." Bailey further stated facts surrounding the consent search in September of 2004, at which time, Keown family friend, Dr. Willmore, wanted to show the police something on the defendant's computer. However, while the monitor and keyboard were there, the hard drive was not, nor was it found during that search.

Reliable hearsay may satisfy the basis of knowledge prong. Allen, 406 Mass. at 278. Information provided and the description of criminal activity must be described with detail that raises

it “above the level of a causal rumor or a mere reflection of the reputation of the supposed actor.” Kaufman, 381 Mass. at 303.

There was a substantial basis for the issuing judge to determine the basis of knowledge prong of the *Aguilar-Spinelli* standard was satisfied in determining there was probable cause. See Commonwealth v. Upton, 394 Mass. 363, 374-375 (1985).

ii. Veracity or Reliability Prong

Bailey’s affidavit stated his own observations and investigation results. The affidavit named Connolly as a source of information. The affidavit detailed the observations and statement of the landlord concerning his entry into the apartment. “Reliability is shown when an informant provides his identity to police and is willing to be named in the affidavit in support of the warrant.” Beliard, 443 Mass. at 85; see Bakoian, 412 Mass. at 301; Atchue, 393 Mass. at 347. ““A serious charge ... when volunteered by an identified party ... carries with it indicia of reliability of the informant.”” Atchue, 393 Mass. at 347 (quoting Wilson, 479 F.2d at 940). Information from a fellow police officer presumed is reliable. Ventresca, 380 U.S. at 111.

There was a substantial basis for the issuing judge to find the veracity of information provided in the affidavit satisfied the *Aguilar-Spinelli* standard in determining there was probable cause for the search warrant. See Commonwealth v. Upton, 394 Mass. 363, 374-375 (1985).

iii. Item Sought Is Related to Criminal Activity

The item sought must be connected to criminal activity and must be the proper item of a search warrant as set forth in G.L. c. 276, § 1. The allegation of criminal activity in Bailey’s affidavit was murder in the first degree and marijuana possession.

Murder is defined under G.L. c. 265, § 1, as,

“Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.”

Id.

“Murder with deliberate premeditation requires the Commonwealth to prove deliberation and premeditation, a decision to kill, and a killing in furtherance of the decision.” Duran, 435 Mass. at 111-112. “Deliberate premeditation consists of ‘a plan to murder . . . formed after the matter had been made a subject of deliberation and reflection,’ but ‘in view of the quickness with which the mind may act,’ such deliberation may take ‘a matter of days, hours, or even seconds.’” Burgess, 450 Mass. at 432 (quoting Tucker, 189 Mass. at 494-495).

“‘Malice aforethought includes any unexcused intent to kill, to do grievous bodily harm, or to do an act creating a plain and strong likelihood that death or grievous harm will follow.’” Puleio, 394 Mass. at 108 (quoting Huot, 380 Mass. at 408).

Possession of marijuana is a violation of G.L. c. 94C, § 34. “No person knowingly or intentionally shall possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the provisions of this chapter.” Id.

“To establish probable cause, ‘[a]n affidavit must contain enough information for an issuing magistrate to determine that the items sought are related to the criminal activity under investigation, and that they reasonably may be expected to be located in the place to be searched at the time the search warrant issues.’” Matias, 440 Mass. at 792 (quoting Cruz, 430 Mass. at 840).

Under the search warrant, (Exhibit 21) the Commonwealth sought to seize a bag of marijuana, and all documents, computers, and their peripherals including CDs and diskettes pertaining to items a-k as outlined in the attached Addendum A.

Here, the information before the issuing judge included information that the landlord observed a clear plastic bag with marijuana. Through their murder investigation Bailey and Connolly learned that evidence of the defendant's motive and plans may have been on his computer, and the defendant's computer was not in the home at the time of the consent search in September of 2004. Bailey observed a carton marked "James Computer" through the sliding glass door amongst several cartons in the apartment.

There was sufficient information for the issuing judge to determine that the items sought were related to the criminal activity under investigation. See Commonwealth v. Matias, 440 Mass. 787, 792 (2004).

iv. A Nexus Between Criminal Activity, Item to Be Seized, and Place to Be Searched

Here, the information before the issuing judge included the place to be searched, 52 School Avenue, Waltham, Massachusetts, the apartment or abandoned apartment of the defendant. The items sought to be seized were a bag of marijuana, and all documents, computers, and their peripherals including CDs and diskettes pertaining to items a-k as outlined in the attached Addendum A. The alleged criminal activity included murder in the first degree and possession of marijuana.

The information before the issuing judge was sufficient to establish the nexus between the criminal activity of murder, the defendant, and the place to be searched, 52 School Avenue,

Waltham, Massachusetts. See Commonwealth v. Ortiz-Peguero, 51 Mass. App. Ct. 90, 97 (2001).

C. Search Warrant Must Describe with Sufficient Particularity

i. Typographical Error in Warrant Application

The defendant argues that the search warrant failed to describe the items to be seized with sufficient particularity. Defendant asserts that Addendum A to the search warrant setting out a list of categories of items to be seized authorized seizure of any electronic file or paper document, and was therefore a general warrant. Furthermore, he argues that reference in the application to limiting the search to files of the type described in paragraph two of the affidavit did not create any limitation as paragraph two did not discuss computer files at all.

The Commonwealth argues that the search warrant for the residence at 52 School Avenue was valid under the *Aguilar-Spinelli* standard. It contends that the warrant satisfied the sufficient particularity requirement notwithstanding the defendant's reliance on a typographical error referencing a paragraph in the addendum, instead of the correct paragraph in the affidavit.

Addendum A, paragraph (f), referenced "computer files of the type described in Paragraph 2 of this affidavit." Exhibit 21, at SW-003. The correct reference would have been, computer files of the type described in paragraphs five and seven (a) through (f) of the Bailey affidavit which are restated Addendum A.¹²

The typographical error was not a deliberate misrepresentation requiring invalidation of the

¹² The original typographical error in the Connolly affidavit in paragraph 41(f) incorrectly referenced paragraph 2. The correct reference would have been to paragraphs 37 and 41 (a) through (f) of Connolly's affidavit. The confusion results from different officers cutting and pasting Connolly's affidavit parts in warrant applications. Proof reading mistakes do not rise to the level of official misconduct that the exclusionary rule aims to deter. See Perez, 357 Mass. at 301.

search warrant. See Commonwealth v. Perez, 357 Mass. 290, 301 (1970) (a deliberate misrepresentation used to establish probable cause in an affidavit may render a search warrant invalid). The search warrant authorized the seizure of documents, computers, and their peripherals, including CDs and diskettes by incorporation of Addendum A. The typographical error in paragraph (f) of Addendum A is not fatal to the particularity of the authorization to seize the items listed in the introductory paragraph of Addendum A. See Commonwealth v. Forish, 61 Mass. App. Ct. 554, 560 (2004) (fatal error was a “lack of particularity in the warrant and the absence, both at issuance and on execution, of an attached affidavit that specified the objects of the search”).

ii. Sufficient Particularity of Things to Be Seized

Here, the items to be seized under the warrant were described as a bag of marijuana, and all documents, computers, and their peripherals including CDs and diskettes pertaining to items a-k as outlined in the attached Addendum A. The items seized included an IBM Thinkpad computer serial no. AA-FT 5HW 00/05, an Apple Macintosh G3 computer serial no. XB823202CY3, a hard drive serial no. 3KC2F809, a second hard drive serial no. 336809963130, 234 CD's, fifty Zip Discs, six Jaz back up discs, and six floppy discs.

Addendum A set forth the particularity of the documents and electronic files subject to the search. Electronic files located on an electronic storage device are not searched at the place of the warrant execution. The electronic devices which store the electronic files are seized and later searched by qualified forensic computer technicians.

The search warrant described with sufficient particularization the items to be seized. See Commonwealth v. Dunigan, 384 Mass. 1, 6-7 (1981).

Here, the search of the electronic files or paper documents were described in Addendum A

as relating to: (1) Julie Keown's health, (2) ethylene glycol, anti-freeze, poisoning, kidney dysfunction, gastritis, the Heller case, the Turner case, or Harvard University, (3) personal financial records, (4) life insurance, (5) a will by or for Julie Keown, (6) internet activity, (7) installed computer application software used to process, organize, or store financial or banking information, (8) installed computer application software used to track daily activities or appointments, (9) installed computer application software used to encrypt, decrypt, or erase computer files, (10) installed computer application software used to detect, access, or read any files or application described above, and (11) files relating to the creation of, editing of, access to, or control of any files or application described above.

The warrant together with the affidavit and addendums sufficiently described the items subject to the search warrant. See Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971); Commonwealth v. Freiberg, 405 Mass. 282, 298 (1989); Commonwealth v. Forish, 61 Mass. App. Ct. 554, 560 (2004).

iii. Sufficient Particularity of Place to Be Searched

Here, the place to be searched, 52 School Avenue, Waltham, Massachusetts, was described in the search warrant in Addendum B as, “a duplex apartment, grayish blue in color, with white trim, blue shutters, and a blue front door. The number ‘52’ appears above the mailbox to the left of the front door.”

The place to be searched was described with a sufficiently particularized description. See Commonwealth v. Hall, 366 Mass. 790, 799 (1975).

7. Warrant Search of 2825 Covey Lane, Jefferson City, Missouri, Pursuant to a Search Warrant Obtained by Kilgore

The defendant argues: (1) the police unreasonably entered the residence when executing the search warrant, (2) the affidavit failed to establish probable cause to issue a search warrant, and (3) the search warrant failed to describe with sufficient particularity the items to be seized.

A. Reasonableness of the Police Entry into 2825 Covey Lane

The criteria for when police “officers [can] legitimately enter after knocking” are the same as those “requiring or dispensing with a knock and announcement.” United States v. Banks, 540 U.S. 31, 35 (2003). “The Fourth Amendment says nothing specific about formalities in exercising a warrant’s authorization, speaking to the manner of searching as well as to the legitimacy of searching at all simply in terms of the right to be ‘secure . . . against unreasonable searches and seizures.’” Id. (quoting U.S. Constitution amend. IV). The Supreme Court has “treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case.” Id. at 36.

“[T]he common law knock-and-announce principle is one focus of the reasonableness enquiry.” Id. “[T]he obligation gives way when officers ‘have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or . . . would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.’” Id. (quoting Richards v. Wisconsin, 520 U.S. 385, 394 (1997)).

“The Commonwealth’s knock and announce rule is a common law rule,” and “is not constitutionally required.” Commonwealth v. Sepulveda, 406 Mass. 180, 181 (1989) (citing Commonwealth v. Scalise, 387 Mass. 413, 420 (1982)). “The reason for the knock and announce

rule is the desirability of “decreasing the potential for violence, protection of privacy, and the prevention of unnecessary damage to homes.” Id. at 182 (quoting Commonwealth v. Cundriff, 382 Mass. 137, 146 (1980)).

Failure to comply in all respects with the knock and announce rule does not necessarily mandate suppression of the evidence. Gomes, 408 Mass. at 46. “Rather, the decision whether to exclude such evidence should properly turn on: (1) the degree to which the violation undermined the principles underlying the governing rule of law, and (2) the extent to which exclusion will tend to deter such violations from being repeated in the future.” Id.

Here, the significant circumstances include the arrival of the police in the daytime hours, knocking and announcing their presence and purpose, their not receiving a response in return, the finding of the unlocked sliding glass door, and their subsequent entry and simultaneous announcements. There is no evidence that the police used force or damaged the property in order to gain entry.

On November 22, 2005, pursuant to a search warrant, the police knocked and announced their presence, and subsequently made entry through an unlocked sliding glass door. Under the circumstances this entry was not unreasonable. See United States v. Banks, 540 U.S. 31, 35 (2003); Commonwealth v. Sepulveda, 406 Mass. 180, 181 (1989).

B. Search Warrant Obtained by Kilgore

i. Search Warrant Lacked Probable Cause

The Commonwealth concedes that the affidavit Kilgore used for the search warrant application, signed by Kilgore and Valentine did not establish probable cause, notwithstanding the fact that a neutral and detached judge had authorized the warrant. The Commonwealth attributes this

to Kilgore's failure to use the two affidavits supplied by Connolly and not to any intentional wrong doing by Kilgore.

"An absence of probable cause is a particularly significant defect in the warrant process because, if there was no probable cause, a search warrant should not have been issued and [barring any other justification for the search] the search should not have been conducted." Upton, 394 Mass. at 368.

An examination within the four corners of this warrant and affidavit finds there was no probable cause upon which to issue the warrant. "[V]iolations of the statutory probable cause requirements are substantial." Sheppard, 394 Mass. at 389.

ii. Search Warrant Must Describe with Sufficient Particularity

The defendant argues that the search warrant did not contain descriptions of the files and documents and thus was a general warrant.

Here, the original warrant application described the items to be seized as a Sony Viao computer and its peripherals located at 2825 Covey Lane, Jefferson City, Missouri. Execution of the search warrant did not result in the seizure of the particularly described items at 2825 Covey Lane.

The Sony Viao was recovered at a later time under a Massachusetts Superior Court Order. Infra at 104. A subsequent search of the electronic files on the Sony Viao computer was made under a separate search warrant issued in Massachusetts. Infra at 107.

iii. Execution of the Search Warrant

After Kilgore entered the residence of the defendant's mother at 2825 Covey Lane, Jefferson City, she began searching for the items described in the warrant. Kilgore was looking for boxes of the defendant's property that the defendant's mother retrieved from his employer's place of business.

after the defendant had been arrested on November 7, 2005 at his place of work.

Kilgore located a telephone number inside the residence and eventually made contact with the defendant's mother who was shopping at the time. Kilgore located two of the boxes, but not the box with the Sony Viao computer. The defendant's mother arrived home shortly afterwards. During a conversation with Kilgore, the defendant's mother stated she had mailed the items that the police were searching for, a Sony Viao computer and a hard drive to the defendant's attorney, Carney, in Massachusetts. The hard drive was not part of the original warrant application.

Although Kilgore did not seize any of the items described in the defective search warrant she did learn the current whereabouts of the items and that an additional item existed, a computer hard drive, all of which the defendant's mother stated she had shipped to Carney.

As a result of the execution of the search warrant by Kilgore, the Commonwealth learned the whereabouts of the items described in the warrant. Specifically, the Commonwealth learned that the Sony Viao computer and its peripherals were sent by the defendant's mother to the defense counsel, Carney, in Massachusetts. Additionally, the defendant's mother stated she had sent a hard drive,¹³ not listed or described in the search warrant, to defense counsel.

C. Exclusionary Rule

i. Applicability of the Exclusionary Rule

The items described in the search warrant obtained by Kilgore, which are the subject of the defendant's motion to suppress, were not seized under the authority of the search warrant when it was executed. These items, the Sony Viao computer and Western digital hard drive, were turned over to the Commonwealth under the authority of a Superior Court order.

¹³ This hard drive was later identified as the Western digital hard drive.

The Supreme Court has determined that the “exclusionary rule should be applied as a remedy for unreasonable searches and seizures, on a case by case basis. only when the rule’s application would further the purpose of deterring police misconduct.” Valerio, 449 Mass. at 569. “The Fourth Amendment insists that an unreasonable search or seizure is, constitutionally speaking, an illegal search or seizure.” Hudson v. Michigan, 547 U.S. 586, 608 (2006).

In this case, since the items were not seized under the defective search warrant, the exclusionary rule is not the appropriate rule to apply. However, this court will apply the exclusionary rule to determine whether application of the rule would deter future potential misconduct by Massachusetts and Missouri law enforcement officers.

ii. Application of The Exclusionary Rule to Connolly

This court finds no misconduct by Connolly. He expected Kilgore to follow his instructions in obtaining the search warrant. Connolly provided two affidavits for Kilgore to use and expected her to do as Buente had done when he obtained the search warrant for The Learning Exchange. Application of the exclusionary rule is not applicable to Connolly because he committed no police misconduct. See Commonwealth v. Valerio, 449 Mass. 562, 569 (2007).

iii. Application of The Exclusionary Rule to Missouri Police

The defendant and the Commonwealth both argued that Massachusetts law should apply to the defendant's motion to suppress. Massachusetts applies the more stringent *Aguilar-Spinelli* standard in determining probable cause under Art. 14, compared to the totality of circumstances standard applied to Fourth Amendment analysis. Here, Kilgore could not have had a reasonable expectation that the search warrant satisfied the probable cause requirement, and is likely unaware of the requirements in Massachusetts under art. 14.

There is no evidence that Kilgore acted intentionally in bad faith to accelerate discovery because Connolly had already corroborated that the items had been boxed by the defendant's employer at the time of his arrest, and then retrieved by the defendant's mother. See Commonwealth v. O'Connor, 406 Mass. 112, 118 (1989) ("Bad faith of the police, shown by such activities as conducting an unlawful search in order to accelerate discovery of the evidence, will be relevant in assessing the severity of any constitutional violation.")

In Commonwealth v. Wallace, the Supreme Judicial Court refused to apply the exclusionary rule for Fourth Amendment violations to a Canadian police officer's conduct because the amendment is not "directed at foreign police, and no purpose would be served by applying the exclusionary rule, since what we do will not alter the search and seizure policies of the foreign nation." 356 Mass. 92, 95 (1969).

In Commonwealth v. Gagnon, the Appeals Court following the general rule applied in Wallace, 356 Mass. 92, restated that the exclusionary rule is not applicable to foreign police conduct, but that two exceptions to the general rule had developed. 16 Mass. App. Ct. 110, 122 (1983).

"The first calls for invocation of the exclusionary rule if the circumstances attending the search and seizure are such that they shock the judicial conscience. The second and more pertinent exception is that the exclusionary rule may be invoked if American police participate in the search in the foreign country, or if the authorities in the foreign country who conduct the search, in fact, are acting under the direction of their American counterparts, and as their agents. More than cooperation by American police must appear; there must be direct participation or, as it is sometimes said, a joint venture by the American and foreign police."

Id. at 122-123.

In Commonwealth v. Cryer, the Supreme Judicial Court refused to apply the exclusionary rule to deter misconduct of police officers in New Hampshire who are likely unaware of the

Massachusetts Declaration of Rights, and who were not in a combined enterprise with the Massachusetts police officers. 426 Mass. 562, 568-569 (1998). This combined enterprise analysis is an application of the second exception the Appeals Court outlined in Gagnon, 16 Mass. App. Ct. 110, 122-123. (1983). In Cryer, the Supreme Judicial Court stated,

“Article 12 would not apply to the New Hampshire police unless they had been engaged in a combined enterprise with the Massachusetts officers with respect to the murder investigation. See Commonwealth v. Gonzalez, 426 Mass. 313, 317 (1997). The involvement of the New Hampshire police was simply too minimal for a combined enterprise to have existed here.¹⁴ The New Hampshire police therefore did not violate the defendant's art. 12 rights, because art. 12 does not apply to the New Hampshire police.”

Id. at 568.

After determining there was no combined enterprise, the Supreme Judicial Court stated that the New Hampshire police officers were “unlikely to be instructed or deterred by the suppression of evidence in accordance with rules by which they are not accustomed to playing.” Id. at 569.

Missouri police were twice supplied with all of the necessary information by Connolly to establish probable cause for a search warrant. In the first instance, Buente used all of the information

¹⁴ In n.4, the Supreme Judicial Court stated,
“In Commonwealth v. Gonzalez, [426 Mass.] 313, 314, 316-317 (1997). [The Supreme Judicial Court] concluded that no combined enterprise existed between Federal agents and Massachusetts police where the Massachusetts police acted under the direction and discretion of Federal agents and the Massachusetts police merely provided surveillance and intelligence information, provided facilities for field tests of drug purchases made by Federal agents, and occasionally joined Federal agents in monitoring conversations transmitted from a “body wire” worn by a Federal agent. Here [Cryer], the involvement of the New Hampshire police was substantially less. It consisted of supplying the evidence to the Massachusetts officers in the first place and then providing facilities where the Massachusetts officers could view the evidence and interrogate the defendant and Kendall.”

Cryer, 426 Mass. at 568 n.4.

supplied and established probable cause for the search warrant for The Learning Exchange. In the second instance, Kilgore neglected to use the supplied and necessary information to establish probable cause for the search warrant for 2825 Covey Lane. The defective search warrant application was co-signed by an assistant district attorney, and then authorized by a judge.

Under the circumstances of this case, Missouri law enforcement officers would not be deterred from future misconduct by application of the exclusionary rule here. See Commonwealth v. Valerio, 449 Mass. 562, 569 (2007); Commonwealth v. Cryer, 426 Mass. 562, 568-569 (1998).

D. Fruit of the Poisonous Tree

i. Poisonous Act and Its Fruit

The defendant argues that the Commonwealth's knowledge that prior defense counsel had custody of the Sony Viao laptop computer and Western digital hard drive was the fruit of a prior illegal search on November 22, 2005, at 2825 Covey Lane, Jefferson City, Missouri.

“‘The exclusionary prohibition extends as well to the indirect as the direct products of police’ misconduct. Balicki, 436 Mass. at 16 (quoting Wong Sun, 371 U.S. at 484, citing Silverthorne Lumber Co., 251 U.S. 385). “‘[K]nowledge gained by the Government’s own wrong cannot be used by it simply because it is used derivatively.” Nardone, 308 U.S. at 341 (quoting Silverthorne Lumber Co., 251 U.S. at 392). However, the connection between the misconduct and the evidence eventually gained “may have become so attenuated as to dissipate the taint” to allow use of the evidence. Id.

In Wong Sun, the Supreme Court stated,

“We need not hold that all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is ‘whether, granting establishment of the primary

illegality, the evidence to which 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.”

371 U.S. at 487-488 (quoting *Maguire*, *Evidence of Guilt*, 221 (1959)).

a. The Sony Viao Computer, Peripherals, and Financial Documents

In this case, the Commonwealth did not learn that the Sony Viao computer, its peripherals, and certain financial documents existed as a result of the defective search warrant. It was through Connolly’s investigation that the Commonwealth learned that several days after the defendant’s arrest at his place of employment, radio station KLIK, Jefferson City, and through the program director, Wilson, that these particular items belonging to the defendant had been boxed and retrieved by the defendant’s mother. The evidence did not come by exploitation of the defective search warrant; that is to say, that the items listed in the search warrant were already known to Connolly. As such, the items listed in the defective search warrant should not be treated as fruit of the poisonous tree, because knowledge of the items was not an exploitation of the defective warrant. See Wong Sun v. United States, 371 U.S. 471, 487-488 (1963).

b. Hard Drive in Possession of Carney

Connolly through his investigation had learned from an informant that the defendant had yet another hard drive, but was unable to corroborate that information. Connolly had specifically followed up with Wilson at the radio station to find out if they had boxed a separate hard drive. Unable to corroborate the existence of the separate hard drive, the item was not included in the search warrant for 2825 Covey Lane, Jefferson City, Missouri.

The fact that a hard drive had been sent to Carney was only learned as a result of Kilgore’s execution of the defective search warrant. However, Kilgore was not purposely exploiting the

defective warrant: the defendant's mother told Kilgore about the hard drive. The hard drive presents different problems than the items listed in the warrant. But for the execution of the warrant, the existence of the hard drive in Carney's possession would not have been known, and for this reason it should be treated as fruit of the poisonous tree because it is knowledge gained by the defective warrant. See Wong Sun v. United States, 371 U.S. 471, 484, 487-488 (1963); Nardone v. United States, 308 U.S. 338, 341 (1939); Commonwealth v. Balicki, 436 Mass. 1, 16 (2002).

ii. Superior Court Order to Turn Over Certain Evidence

After being informed by Connolly that Kilgore learned the items sought were in the possession of Carney, Rooney contacted Carney. Rooney informed Carney that a search warrant had issued in Missouri for the items the defendant's mother had shipped to him, and that the Commonwealth would seek an order compelling him to turn over the items.

The Commonwealth's Motion sought the items specified in the search warrant and the hard drive which the motion specifically stated was not included in the search warrant authorization. After a hearing on January 4, 2006, the Commonwealth's Motion was allowed as agreed upon. Carney agreed to the motion because it was his belief that the Commonwealth's possession of the items did not change his client's rights to challenge whether the Commonwealth had properly acquired the items under the authority of a valid search warrant in Missouri. Carney turned the items over to a Massachusetts State Police Trooper later that day, who then delivered them to Rooney.

On January 5, 2006, Rooney informed Carney that he did not turn over a hard drive, but had in fact turned over a floppy disc instead. Carney, believing he had misrepresented what items he had, believed it was his duty as an Officer of the Court to fulfill his obligation under the court order. Carney then arranged to get the hard drive which was still in a desktop computer at 2825 Covey

Lane, Jefferson City, Missouri, from the defendant's mother. After obtaining the hard drive, he turned it over to Rooney.

iii. Attenuation Doctrine

The defendant argues that the Sony Viao computer and Western digital hard drive are fruit of the poisonous tree because the warrant for 2825 Covey Lane, Jefferson City, Missouri, was defective, and therefore should be excluded.

Having determined that knowledge of the items listed in the defective search warrant were not the product of exploitation of the defective warrant, the court will not examine them under the attenuation doctrine. See supra at 47. The Western digital hard drive will be tested under the attenuation doctrine because of the determination it is fruit of the poisonous tree. See supra at 47-48.

The attenuation doctrine examines the connection between the improper conduct and the derivative evidence to determine if the connection has become so attenuated as to dissipate the taint.

In Brown, the Supreme Court stated a balancing test for attenuation, weighing the interests of deterrence against societal interests in producing all relevant evidence to prove guilt. 422 U.S. at 603-604. There are three factors: (1) "[t]he temporal proximity of the" police misconduct and discovery of the evidence, (2) "the presence of intervening circumstances," and (3) "the purpose and flagrancy of the official misconduct." Id.

In his concurring in part opinion in Brown, Justice Powell stated, "[D]issipation of the taint attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." Id. at 609.

"All Fourth Amendment violations are, by constitutional definition, unreasonable. There are, however, significant practical differences that distinguish among violations, differences that measurably assist in identifying the kinds of cases in

which disqualifying the evidence is likely to serve the deterrent purposes of the exclusionary rule. [citations omitted] In my view, the point at which the taint can be said to have dissipated should be related, in the absence of other controlling circumstances, to the nature of that taint. The impermissibility of the [misconduct], and the extent to which such [misconduct] can be deterred by the use of the exclusionary rule, are of primary relevance in determining whether exclusion is an appropriate remedy.”

Id.

“In determining whether the connection between the evidence and the improper conduct has become so attenuated as to dissipate the taint, the facts of each case must be examined in light of [the] three [Brown] factors.” Fredette, 396 Mass. at 460.

The temporal proximity between the illegal conduct and the discovery of the evidence was close. The defendant's mother had told Kilgore about the hard drive during the execution of the search warrant. As it turned out, Carney did not have possession of the Western digital hard drive as the defendant's mother had indicated to Kilgore because the defendant's mother had sent a floppy disc instead.

The intervening circumstances were a Superior Court order that directed Carney to turn over the hard drive he received from the defendant's mother. The Commonwealth's Motion expressly stated the hard drive was not part of the original search warrant. Carney following the court order turned over the items in his possession. Carney was informed that he had not turned over a hard drive. Believing he had misrepresented the items he had, and believing it was his duty as an officer of the Court to fulfill his obligation under the court order, Carney arranged to get the hard drive. After the defendant's mother had the hard drive removed and sent to Carney it was turned over to the Commonwealth.

The purpose and flagrancy of the official misconduct in executing the defective search

warrant is the third factor. Here, Kilgore did not act in deliberate bad faith to accelerate discovery of the evidence. See Commonwealth v. O'Connor, 406 Mass. 112, 118 (1989) (“Bad faith of the police, shown by such activities as conducting an unlawful search in order to accelerate discovery of the evidence, will be relevant in assessing the severity of any constitutional violation.”) Additionally, Kilgore followed Missouri procedure in obtaining the search warrant; she went to an assistant district attorney who assisted in making the application and both signed it. The application was presented to a neutral and detached Missouri judge, who reviewed the application, authorized the search warrant and signed it. This is not a case where the Missouri police acted without a warrant at all. See Commonwealth v. Midi, 46 Mass. App. Ct. 591, 594-596 (1999) (police entered home without a warrant and subsequently asked for consent to a search, the Appeals Court found the consent was tainted by the unlawful conduct).

In this case, the lack of purposeful misconduct by Missouri officials and the presence of intervening circumstances between Kilgore executing a defective search warrant and the evidence eventually obtained through a court order has attenuated to dissipate any taint. Exclusion of the Western digital hard drive will not deter any future misconduct in Missouri. Based upon the facts of this case and applying the balancing test for attenuation, weighing the interests of deterrence against societal interests in producing all relevant evidence to produce guilt, the Court rules against suppression of the Western digital hard drive. See Brown v. Illinois, 422 U.S. 590, 603-604 (1975); Commonwealth v. Valerio, 449 Mass. 562, 569 (2007); Commonwealth v. Cryer, 426 Mass. 562, 568-569 (1998); Commonwealth v. Fredette, 396 Mass. 455, 460 (1985).

8. **Search Warrant Issued June 8, 2006 for the Search of Electronic Files Contained Within a Sony Viao Computer and Western Digital Hard Drive**

A. **Probable Cause to Support Issuance of Search Warrant Obtained by Connolly**

The defendant argues that the affidavit of Connolly failed to establish probable cause. He states that the affidavit failed to indicate any criminal activity whatsoever by the defendant, the affidavit made a general assertion that perpetrators use computers to access the Internet to troubleshoot criminal plans and find information, and there was no evidence that the defendant had accessed information through the Internet, only mere suspicion which does not rise to the level of probable cause.

The Commonwealth argues the search warrant is valid because the basis of knowledge and veracity prongs of the *Aguilar-Spinelli* standard were satisfied. Further, evidence of criminal activity was satisfied by the stated facts in the affidavit, and the warrant established a nexus between the electronic files sought and the computers to be searched.

i. **Basis of Knowledge Prong**

Connolly submitted a detailed and extensive affidavit with Addendum A attached (Exhibit 24) in his application for the search warrant. The affidavit described the investigation of Julie Keown's death, named sources of information, and provided corroboration of statements.

Reliable hearsay may satisfy the basis of knowledge prong. Allen, 406 Mass. at 578. Information provided and the description of criminal activity must be described with detail that raises it "above the level of a causal rumor or a mere reflection of the reputation of the supposed actor." Kaufman, 381 Mass. at 303. Here, the extensive information Connolly provided came directly from his investigation into Julie Keown's death.

There was a substantial basis in the warrant application for an issuing judge to determine that the basis of knowledge prong of the *Aguilar-Spinelli* standard was satisfied. See Commonwealth v. Upton, 394 Mass. 363, 374-375 (1985).

ii. Veracity or Reliability Prong

Connolly's affidavit included the names of persons interviewed during the investigation. "Reliability is shown when an informant provides his identity to police and is willing to be named in the affidavit in support of the warrant." Beliard, 443 Mass. at 85. "'A serious charge . . . when volunteered by an identified party . . . carries with it indicia of reliability of the informant.'" Atchue, 393 Mass. at 347 (quoting Wilson, 479 F.2d at 940). Connolly corroborated the statements through investigation or by cross statements of other persons interviewed. Police corroboration of facts is a strong indicator of the reliability of the informant. Alfonso, 438 Mass. at 377.

The veracity of the named persons who gave statements during Connolly's investigation and who were named established a substantial basis to determine that the veracity prong of the *Aguilar-Spinelli* standard was satisfied. See Commonwealth v. Upton, 394 Mass. 363, 374-375 (1985).

iii. Item Sought Must Be Related to Criminal Activity

The defendant argues that the affidavit of Connolly failed to establish any criminal activity whatsoever by the defendant.

The item sought must be connected to criminal activity and must be the proper item of a search warrant as set forth in G.L. c. 276, § 1. The allegation of criminal activity in Connolly's affidavit was murder in the first degree.

"Murder with deliberate premeditation requires the Commonwealth to prove deliberation and

premeditation, a decision to kill, and a killing in furtherance of the decision.” Duran, 435 Mass. at 111-112. “Deliberate premeditation consists of ‘a plan to murder . . . formed after the matter had been made a subject of deliberation and reflection,’ but ‘in view of the quickness with which the mind may act,’ such deliberation may take ‘a matter of days, hours, or even seconds.’” Burgess, 450 Mass. at 432. “‘Malice aforethought includes any unexcused intent to kill, to do grievous bodily harm, or to do an act creating a plain and strong likelihood that death or grievous harm will follow.’” Puleio, 394 Mass. at 108.

“To establish probable cause, ‘[a]n affidavit must contain enough information for an issuing magistrate to determine that the items sought are related to the criminal activity under investigation, and that they reasonably may be expected to be located in the place to be searched at the time the search warrant issues.’” Matias, 440 Mass. at 792.

Under the search warrant the Commonwealth sought to search the Sony Viao computer and Western digital hard drive for files containing keywords. The keywords were developed during the investigation.

Any evidence on the computer or hard drive regarding poisoning by ethylene glycol, discord in relationship between Julie and the defendant, or motive to kill would be evidence connecting the item seized and the criminal activity. Here, the information before the issuing judge included information that the defendant had forged documents and created false invoices and that he had used computers in those endeavors.

This was sufficient information for an issuing judge to determine that the items sought were related to the criminal activity under investigation. See Commonwealth v. Matias, 440 Mass. 787, 792 (2004).

iv. A Nexus Between Criminal Activity, Item to Be Seized, and Place to Be Searched

The defendant argues that Connolly's affidavit was speculative in establishing a nexus between the crime and the items sought for seizure.

There must be information "'sufficient [to establish a] nexus' between the defendant and the [place to be searched], and 'to permit the issuing magistrate to determine whether . . . [the item sought] could reasonably be expected to be located in the'" place to be searched. Ortiz-Peguero, 51 Mass. App. Ct. at 97 (quoting Blake, 413 Mass. at 829).

Here, the information before the issuing judge included information that the Sony Viao and Western digital hard drive belonged to the defendant. The defendant had previously used computers to create false documents and invoices. Additionally, through police investigations it is known that criminals use computers to further their activities.

The information before the issuing judge was sufficient to establish the nexus between the criminal activity of murder, the defendant, and the computer equipment to be searched. See Commonwealth v. Ortiz-Peguero, 51 Mass. App. Ct. 90, 97 (2001).

B. Search Warrant Must Describe with Sufficient Particularity

i. Sufficient Particularity of Things to Be Seized

The defendant argues that the search warrant failed to describe the items to be seized with sufficient particularity. He further argues that the Addendum is the same as the one attached to the January 18, 2005 search warrant with respect to the Toshiba laptop computer at The Learning Exchange, and the authorized search warrant was a prohibited general warrant allowing a search of every file on the computer and hard drive.

The Commonwealth argues that sufficient particularity is satisfied by the attached and incorporated Addendum when the warrant is reviewed as a whole.

The item to be seized should be described as particularly as possible. Dunigan, 384 Mass. at 6-7. Failure to particularize may result in suppression. Taylor, 383 Mass. at 276.

The purpose of the particularity requirement is to safeguard against general exploratory searches by the police. Coolidge, 403 U.S. at 467. A search warrant that neither specifies the items to be seized nor is accompanied by an incorporated supporting affidavit that specifies the items fails to satisfy the particularity requirement. Forish, 61 Mass. App. Ct. at 560. “[T]he degree of specificity required when describing the goods to be seized may necessarily vary according to the circumstances and type of items involved.” Freiberg, 405 Mass. at 298 (quoting Johnson, 541 F.2d at 1314). The court will not impose unreasonable particularization of description when the police do not know the exact characteristics of the item sought. “[t]o hold otherwise would unreasonably thwart the ability of the police to investigate a crime immediately after its occurrence.” Freiberg, 405 Mass. at 299.

Here, the files to be searched under the warrant and affidavit were described with sufficient particularity. See Commonwealth v. Dunigan, 384 Mass. 1, 6-7 (1981). The forensic search process, described in extensive detail in the Findings of Fact section, limits the search to files containing a relevant keyword developed from the investigation, and was not a general exploratory search. See Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971); Commonwealth v. Freiberg, 405 Mass. 282, 298-299 (1989).

ii. Sufficient Particularity of Place to Be Searched

The place to be searched, here the Sony Viao computer and Western digital hard drive, must

be described with sufficient particularity. “No one requires elegant precision of these documents. but particularity is demanded of warrants by the Fourth Amendment itself.” Hall, 366 Mass. at 799. Likewise, “[a] conveyancer's precision of language is not to be expected in the affidavit.” Pellier, 362 Mass. at 625.

The search warrant sufficiently described the Sony Viao computer and Western digital hard drive and where they could be located. See Commonwealth v. Hall, 366 Mass. 790, 799 (1975)

C. Reasonableness of Search

The defendant argues that the method of the search as conducted was unreasonable and overly broad. The defendant argues that the keyword search using sixty-nine words and scrutinizing all of the laptop and hard drive files exceeds the bounds of reasonableness. Additionally, nowhere in the affidavit, application, or search warrant itself are these sixty-nine keywords listed or justified.

The Commonwealth argues that the electronic file search was not unreasonable or overly broad. The search warrant authorized examination of every electronic file. However, the files were scanned for keywords to determine if they were relevant to the investigation, and every file was not opened and examined in detail.

“In conducting the actual search of the computers and disks, considerable discretion must be afforded to the executing officers regarding how best to proceed with the search.” Commonwealth v. McDermott, 448 Mass. 750, 776 (2007). “[C]are must be taken to minimize the intrusion of the search and the search conducted must be reasonable.” Id. at 777.

In McDermott, the Supreme Judicial Court found the search of the defendant’s computer hard drive and storage media reasonable, where a forensic duplicate was first made to preserve the original information, and a keyword search method was used to locate relevant files which resulted

in less than one percent of the defendant's files being examined. Id.

In this case the forensic search was conducted in a similar manner. The search was conducted by Winrow of the Attorney General's Office. Winrow had a copy of the warrant, addendum, and keyword list. Steps were taken to preserve the original hard drives. The keyword search was conducted. Files containing a keyword would result in a hit. The keyword would be viewed in a limited context preview. If the limited preview was relevant, the file was bookmarked for later examination. If the limited preview was not relevant, then the file was closed and not examined any further. One search method, the automated Encase program keyword search, only located 328 files out of over 397,000 files, on the Sony Viao computer and Western digital hard drive, that were then bookmarked as relevant to the investigation.

The search of the computer hard drives or storage media was reasonable. See Commonwealth v. McDermott, 448 Mass. 750, 776-778 (2007).

9. Ineffective Assistance Counsel

The defendant argues it was ineffective assistance of prior counsel for not resisting the Commonwealth's Motion for a court order to turn over evidence, and prior counsel's agreement may constitute waiver of the defendant's right to challenge the Commonwealth's custody or search of the Western digital hard drive.

The defendant has in fact been given an opportunity to exercise his rights to challenge all of the Commonwealth's evidence obtained by consent, valid search warrant, defective search warrant, and court order. The agreement of September 19, 2006, did not waive any rights nor prohibit the defendant from bringing the present motion to suppress evidence.

The defendant is arguing that the present motion to suppress concerning the search warrant

obtained by Kilgore should have been argued at the time the Commonwealth filed a motion for a court order to turn over certain evidence.¹⁵ Clearly however, I find and rule the defendant did not lose any right to challenge the evidence, nor suffer any loss of his constitutional rights as a result of prior counsel's conduct.

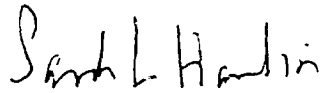
Assuming arguendo that counsel had presented such an objection to the Motion, any court undoubtedly would have ordered the hard drive turned over.

ORDER

It is therefore ORDERED that the defendant's motion to suppress all physical evidence seized from his home on September 7, 2004, be DENIED. It is further ORDERED that the defendant's motion to suppress all physical evidence seized from his home on September 8, 2004, be DENIED. It is further ORDERED that the defendant's motion to suppress all physical evidence seized at The Learning Exchange, Kansas City, Missouri, on January 15, 2005, be DENIED. It is further ORDERED that the defendant's motion to suppress all physical evidence seized at 52 School Avenue, Waltham, Massachusetts on March 4, 2005, be DENIED. It is further ORDERED that the defendant's motion to suppress all physical evidence seized at 2825 Covey Lane, Jefferson City, Missouri, on November 22, 2005, be DENIED. It is further ORDERED that the defendant's motion to suppress all physical evidence obtained by a Superior Court Order, on January 4, 2006, be DENIED. It is further ORDERED that the defendant's motion to suppress all electronic evidence seized from a Sony Viao computer and Western Digital Hard Drive under a Search Warrant issued

¹⁵ Whether that was ineffective assistance of counsel at the time is not relevant to the present motion to suppress.

on June 8, 2006, be DENIED.

A handwritten signature in dark ink, appearing to read "Sandra L. Hamlin". The signature is written in a cursive, flowing style.

Sandra L. Hamlin
Justice of the Superior Court

DATED: March 25, 2008

APPENDIX

Mo. Rev. Stat. § 542.276 Who may apply for search warrant — contents of application, affidavit — where filed, hearing — contents of warrant — who may execute, return, when and how made — warrant deemed invalid, when. —

"1. Any peace officer or prosecuting attorney may make application under section 542.271 for the issuance of a search warrant.

2. The application shall:

- (1) Be in writing;
- (2) State the time and date of the making of the application;
- (3) Identify the property, article, material, substance or person which is to be searched for and seized, in sufficient detail and particularity that the officer executing the warrant can readily ascertain it;
- (4) Identify the person, place, or thing which is to be searched, in sufficient detail and particularity that the officer executing the warrant can readily ascertain whom or what he or she is to search;
- (5) State facts sufficient to show probable cause for the issuance of a search warrant;
- (6) Be verified by the oath or affirmation of the applicant;
- (7) Be filed in the proper court;
- (8) Be signed by the prosecuting attorney of the county where the search is to take place, or his or her designated assistant.

3. The application may be supplemented by a written affidavit verified by oath or affirmation. Such affidavit shall be considered in determining whether there is probable cause for the issuance of a search warrant and in filling out any deficiencies in the description of the person, place, or thing to be searched or of the property, article, material, substance, or person to be seized. Oral testimony shall not be considered. The application may be submitted by facsimile or other electronic means.

4. The judge shall determine whether sufficient facts have been stated to justify the issuance of a search warrant. If it appears from the application and any supporting affidavit that there is probable cause to believe that property, article, material, substance, or person subject to seizure is on the person or at the place or in the thing described, a search warrant shall immediately be issued. The warrant shall be issued in the form of an original and two copies.

5. The application and any supporting affidavit and a copy of the warrant shall be retained in the records of the court from which the warrant was issued.

6. The search warrant shall:

- (1) Be in writing and in the name of the state of Missouri;
- (2) Be directed to any peace officer in the state;
- (3) State the time and date the warrant is issued;
- (4) Identify the property, article, material, substance or person which is to be searched for and seized, in sufficient detail and particularity that the officer executing the warrant can readily ascertain it;
- (5) Identify the person, place, or thing which is to be searched, in sufficient detail and particularity that the officer executing the warrant can readily ascertain whom or what he or she is to search;
- (6) Command that the described person, place, or thing be searched and that any of the described property, article, material, substance, or person found thereon or therein be seized or photographed or copied and within ten days after filing of the application,

any photographs or copies of the items may be filed with the issuing court;
(7) Be signed by the judge, with his or her title of office indicated.

7. A search warrant issued under this section may be executed only by a peace officer. The warrant shall be executed by conducting the search and seizure commanded. The search warrant issued under this section may be issued by facsimile or other electronic means.

8. A search warrant shall be executed as soon as practicable and shall expire if it is not executed and the return made within ten days after the date of the making of the application.

9. After execution of the search warrant, the warrant with a return thereon, signed by the officer making the search, shall be delivered to the judge who issued the warrant. The return shall show the date and manner of execution, what was seized, and the name of the possessor and of the owner, when he or she is not the same person, if known. The return shall be accompanied by a copy of the itemized receipt required by subsection 6 of section 542.291. The judge or clerk shall, upon request, deliver a copy of such receipt to the person from whose possession the property was taken and to the applicant for the warrant.

10. A search warrant shall be deemed invalid:

- (1) If it was not issued by a judge; or
- (2) If it was issued without a written application having been filed and verified; or
- (3) If it was issued without probable cause; or
- (4) If it was not issued in the proper county; or
- (5) If it does not describe the person, place, or thing to be searched or the property, article, material, substance, or person to be seized with sufficient certainty; or
- (6) If it is not signed by the judge who issued it; or
- (7) If it was not executed within the time prescribed by subsection 8 of this section."

G.L. c. 276. § 1 Complaint; warrant for designated property or articles; search incident to arrest; documentary evidence subject to privilege.

"Section 1. A court or justice authorized to issue warrants in criminal cases may, upon complaint on oath that the complainant believes that any of the property or articles hereinafter named are concealed in a house, place, vessel or vehicle or in the possession of a person anywhere within the commonwealth and territorial waters thereof, if satisfied that there is probable cause for such belief issue a warrant identifying the property and naming or describing the person or place to be searched and commanding the person seeking such warrant to search for the following property or articles:

First, property or articles stolen, embezzled or obtained by false pretenses, or otherwise obtained in the commission of a crime;

Second, property or articles which are intended for use, or which are or have been used, as a means or instrumentality of committing a crime, including, but not in limitation of the foregoing, any property or article worn, carried or otherwise used, changed or marked in the preparation for or perpetration of or concealment of a crime;

Third, property or articles the possession or control of which is unlawful, or which are possessed or controlled for an unlawful purpose; except property subject to search and seizure under sections forty-two through fifty-six, inclusive, of chapter one hundred and thirty-eight:

Fourth, the dead body of a human being.

Fifth, the body of a living person for whom a current arrest warrant is outstanding.

A search conducted incident to an arrest may be made only for the purposes of seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made, in order to prevent its destruction or concealment; and removing any weapons that the arrestee might use to resist arrest or effect his escape. Property seized as a result of a search in violation of the provisions of this paragraph shall not be admissible in evidence in criminal proceedings.

The word "property", as used in this section shall include books, papers, documents, records and any other tangible objects.

Nothing in this section shall be construed to abrogate, impair or limit powers of search and seizure granted under other provisions of the General Laws or under the common law.

Notwithstanding the foregoing provisions of this section, no search and seizure without a warrant shall be conducted, and no search warrant shall issue for any documentary evidence in the possession of a lawyer, psychotherapist, or a clergyman, including an accredited Christian Science practitioner, who is known or may reasonably be assumed to have a relationship with any other person which relationship is the subject of a testimonial privilege, unless, in addition to the other requirements of this section, a justice is satisfied that there is probable cause to believe that the documentary evidence will be destroyed, secreted, or lost in the event a search warrant does not issue. Nothing in this paragraph shall impair or affect the ability, pursuant to otherwise applicable law, to search or seize without a warrant or to issue a warrant for the search or seizure of any documentary evidence where there is probable cause to believe that the lawyer, psychotherapist, or clergyman in possession of such documentary evidence has committed, is committing, or is about to commit a crime. For purposes of this paragraph, "documentary evidence" includes, but is not limited to, writings, documents, blueprints, drawings, photographs, computer printouts, microfilms, X-rays, files, diagrams, ledgers, books, tapes, audio and video recordings, films or papers of any type or description."

G.L. c. 276. § 2 Requisites of warrant.

"Section 2. Search warrants shall designate and describe the building, house, place, vessel or vehicle to be searched and shall particularly describe the property or articles to be searched for. They shall be substantially in the form prescribed in section two A of this chapter and shall be directed to the sheriff or his deputy or to a constable or police officer, commanding him to search in the daytime, or if the warrant so directs, in the nighttime, the building, house, place, vessel or vehicle where the property or articles for which he is required to search are believed to be concealed, and to bring such property or articles when found, and the persons in whose possession they are found, before a court having jurisdiction."

G.L.c. 276, § 2A Form of warrant.

"Section 2A. The warrant shall be in substantially the following form:

THE COMMONWEALTH OF MASSACHUSETTS.

(COUNTY), ss.

(NAME) COURT.

To the Sheriffs of our several counties, or their deputies, any State Police Officer, or any Constable or Police Officer of any city or town, within our said Commonwealth.

Proof by affidavit having been made this day before (name of person authorized to issue warrant) by (names of person or persons whose affidavits have been taken) that there is probable cause for believing that (certain property has been stolen, embezzled, or obtained by false pretenses; certain property is intended for use or has been used as the means of committing a crime; certain property has been concealed to prevent a crime from being discovered; certain property is unlawfully possessed or kept or concealed for an unlawful purpose).

We therefore command you in the daytime (or at any time of the day or night to make an immediate search of (identify premises) (occupied by A. B.) and (of the person of A. B.) and of any person present who may be found to have such property in his possession or under his control or to whom such property may have been delivered, for the following property: (description of property) and if you find any such property or any part thereof to bring it and the persons in whose possession A is found before (court having jurisdiction) at (name of court and location).

Dated at (city or town) this day of, 19 .

Clerk."

G.L. c. 276, § 2B Affidavit in support of application for warrant; contents and form.

"Section 2B. A person seeking a search warrant shall appear personally before a court or justice authorized to issue search warrants in criminal cases and shall give an affidavit in substantially the form hereinafter prescribed. Such affidavit shall contain the facts, information, and circumstances upon which such person relies to establish sufficient grounds for the issuance of the warrant. The person issuing the warrant shall retain the affidavit and shall deliver it within three days after the issuance of the warrant to the court to which the warrant is returnable. Upon the return of said warrant the affidavit shall be attached to A and shall be filed therewith, and it shall not be a public document until the warrant is returned.

The affidavit in support of the application for a search warrant shall be in substantially the following form:

THE COMMONWEALTH OF MASSACHUSETTS.

(COUNTY), ss.

(NAME) COURT.

.... 19 .

I, (name of applicant) being duly sworn, depose and say:

1. I am (describe position, assignment, office, etc.).

2. I have information, based upon (describe source, facts indicating reliability of source and nature of information; if based on personal knowledge and belief, so state).

3. Based upon the foregoing reliable information (and upon my personal knowledge) there is probable cause to believe that the property hereinafter described (has been stolen, or is being concealed, etc.)

and may be found (in the possession of A. B. or any other person) at premises (identify).

4. The property for which I seek the issuance of a search warrant is the following: (here describe the property as particularly as possible).

Wherefore, I respectfully request that the court issue a warrant and order of seizure, authorizing the search of (identify premises and the persons to be searched) and directing that if such property or evidence or any part thereof be found that it be seized and brought before the court; together with such other and further relief that the court may deem proper.

.....
Name.

Then personally appeared the above named and made oath that the foregoing affidavit by him subscribed is true.

Before me this day of 19 ."

The Buente Affidavit

41. For all of the above reasons, I seek permission to seize the previously referenced Toshiba personal laptop computer and its peripherals, including CDs and diskettes; the previously referenced personal computer workstation; the previously-referenced documents Keown left behind at the Learning Exchange; and the Learning Exchange's company server and search for the following:
- a. Any electronic file or paper document relating to the health of Julie Keown:
 - b. Any electronic file or paper document relating to ethylene glycol, anti-freeze, poisoning, kidney dysfunction, gastritis, the Heller case, the Turner case, Harvard University, and/or the Harvard University Extension Program:
 - c. Any electronic file or paper document relating to personal financial records, statements, ledgers, tax returns or any other records reflecting Keown's financial transactions and financial condition:
 - d. Any electronic file or paper document relating to life insurance policies or any other preparations made by or on behalf of Julie Keown and/or James Keown:
 - e. Any electronic file, paper document, and/or computer application software relating to the preparation of a will by or on behalf of Julie Keown and/or James Keown:
 - f. Any electronic file or paper document specifically pertaining to the Internet activity of Keown (including, but not limited to file menus, Internet navigation directories and logs, "cookies" sent from Internet sites, "cache" directories and files, temporary Internet directories and files, and electronic mail logs) which may identify, trace or record the fact, date, time, modification, alteration, transmission and/or receipt via the Internet (or other computer-to-computer transmission mode) of any computer files of the type described in paragraph 2 of this affidavit.
 - g. Any installed computer application software, and any related data files, which are used to perform functions concerning the processing, organization or storage of financial and/or banking records relating to Keown, particularly those data files containing personal financial records, statements, ledgers, tax returns and notations reflecting Keown's financial transactions and financial condition. These types of documents or related

computer data files also include, but are not limited to bills, receipts and records pertaining to the purchase and sale of goods and services (including the purchase or lease of real property and automobiles), credit card statements, monthly bank statements and records of bank deposits and withdrawals, loan documents and other documents evidencing debt, investment account statements and records of purchases and sales of stocks, certificates of deposit, bonds and other financial investments, tax returns, statements of income and gains including income from employment, statements of dividends and interest, and safe deposit box lease records.

- h. Any installed computer application software, and any related data files, which are used to track daily activities and appointments, such as software used for creating or maintaining electronic calendars, date books, and to-do lists.
- i. Any installed computer application software and related data files and password files used to encrypt, decrypt and/or erase computer files.
- j. Any installed computer application software, and any related data files that will be necessary to detect and or access and read any of the computer files or applications described above.
- k. Any computer file or data demonstrating the creation of, editing of, access to, and/or control of any of the above files or applications and the date and time of any such creation, editing, access or exercise of control.