IN THE CIRCUIT COURT OF THE
7TH JUDICIAL CIRCUIT IN AND FOR
FLAGLER COUNTY, FLORIDA

CASE NO.: 2015 CF 000387

STATE OF FLORIDA,
Plaintiff,
vs.

JUDGE: HUDSON

KIMBERLEE WEEKS,
Defendant.
_____/

MOTION TO SUPPRESS EVIDENCE DUE TO OVERBREADTH OF SEARCH WARRANT

COMES NOW the Defendant, by and through the undersigned attorney, pursuant to Rule 3.190(h) Florida Rules of Criminal Procedure; the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution; and Article I, Sections l2 and 23, the Florida Constitution (1968), and moves this Honorable Court to suppress certain evidence, to wit: all recordings searched and seized from the Defendant's cell phone, and all evidence derived from the illegal search and seizure of the recordings from the Defendant's cell phone.

As grounds therefore, the Defendant would show that the evidence was obtained by law enforcement officers, persons acting under the direction of law enforcement officers, or persons acting under color of law as a result of an unreasonable search and seizure in violation of the Defendant's rights guaranteed by the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; Article I, Section 12, the Florida Constitution (1968); and/or Chapter 901, Florida Statutes.

The law is clear that a search and seizure, or seizure and search conducted by a law enforcement officer is presumptively unreasonable when conducted without a valid warrant, unless it can be shown that the officer's conduct comes within one of the specifically established and well delineated exceptions to the warrant requirement. Katz v. United States, 389 U.S. 347

(1967); Norman v. State, 379 So.2d 643 (Fla. l980); Pomerantz v. State, 372 So.2d 104 (Fla. 4 DCA l979). The prosecution has the burden of proving such an exception applies in the case sub judice. Taylor v. State, 355 So.2d 180 (Fla. 3 DCA 1978), cert. denied 361 So.2d 835 (Fla. 1978); Norman v. State, supra.

The search and seizure, or seizure and search, in the case sub judice does not come within the purview of any exceptions. Further, the connection between the unlawful conduct and the discovery of the evidence sought to be suppressed had not become sufficiently attenuated to dissipate the taint of unlawful conduct. Nardone v. United States, 308 U.S. 338 (1939); Wong Sun v. United States, 371 U.S. 471 (1963); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

The search and seizure was in violation of the Defendant's Right of Privacy as guaranteed by Article I, Section 23, of the Florida Constitution.

The Defendant reserves the right to raise other grounds ore-tenus which may arise during the evidentiary hearing or as a result of the evidentiary hearing.

STATEMENT OF FACTS

1. On October 2, 2014 Inspector Phillip Lindley of the FDLE swore an Affidavit for Search Warrant in the above captioned case.
2. Inspector Lindley alleged he had probable cause to believe the Defendant had committed a crime in violation of Florida Statutes 934.03 and 838.022, laws relating to interception and disclosure of oral communications and official misconduct.
3. In support of his allegation, Officer Lindley provided information that the Defendant had recorded a conversation involving officials associated with the canvassing board and that the conversation may have been illegally recorded.

4. Inspector Lindley's information first came from the Office of the State Attorney, which provided Inspector Lindley with an article in the Palm Coast Observer.

5. The article reported that the Defendant had provided a copy of the recorded conversation to a former Flagler County Commission candidate, Dennis McDonald, and to a local radio station.

6. After investigation, Inspector Lindley learned that the possibly illegally recorded conversation took place on August 25, 2014 and was between the Defendant and Attorney General Albert J. Hadid. Commissioner Erickson was also on the recording.

7. Inspector Lindley alleged that after the Defendant illegally recorded the conversation, she disseminated the recording to newspapers and a radio station.

8. Inspector Lindley alleged that these actions by the Defendant, recording the conversation, and sharing it with the newspapers, a radio station, and other individuals, constituted probable cause that the Defendant committed a crime in violation of Florida Statutes 934.03 and 838.022.

9. The only alleged illegal activity in the affidavit was the recording of Mr. Hadid and Mr. Erickson on August 25, 2014.

10. Inspector Lindley listened to recordings provided by the newspapers, the radio station, and individuals. Each recording was of the same conversation on August 25, 2014.

11. Inspector Lindley, in his search warrant affidavit, does not mention any other illegal recording or any other alleged criminal behavior by the Defendant except the recording of Mr. Hadid and Mr. Erickson on August 25, 2014.

12. In order to locate evidence of the alleged illegal recording and the recording itself,

Inspector Lindley requested permission to search and seize in relevant part: "Computer(s), hard drive(s), multiple cellphone(s) with different operating 'platforms,' email transaction records, stored electronic communications including electronic mail…" (See Search Warrant Affidavit pg. 2)

13. After reviewing the Affidavit for Search Warrant, The Honorable J. Michael Traynor issued a Search Warrant.

14. The Search Warrant specified the alleged violation of Florida Statutes 934.03 and 838.022 and described the premises.

15. The Search Warrant described the property to be seized exactly as written in the affidavit:

"Computer(s), hard drive(s), multiple cellphone(s) with different operating 'platforms,' email transaction records, stored electronic communications including electronic mail…. which are being kept in violation of the laws of the State of Florida, to wit: the laws prohibiting F.S. 934.03 Interception of Oral Communications and F.S. 838.022 Official Misconduct" (See Search Warrant pg. 2-3)

16. The Search Warrant incorporated the Affidavit for Search Warrant by stating: "The facts tending to establish the grounds and probable cause for this search warrant are set forth in the Affidavit for Search Warrant made by Inspector Phillip W. Lindley, Florida Department of Law Enforcement which was sworn and made before me, the undersigned this 2nd day of October 2014" (See Search Warrant pg. 3)

17. Officers subsequently executed the search warrant and seized the property listed in the Search Warrant.

18. After seizing the property, which included the Defendant's cell phone, law enforcement proceeded to search the entirety of the data on the cell phone.

19. Specifically, law enforcement searched and seized every recording on the Defendant's cell phone.

20. Law enforcement listened to all recordings on the Defendant's cell phone.

21. Based on what they heard in the recordings, law enforcement contacted several individuals who they believed may have been on the recordings.

22. Law enforcement conducted interviews of those individuals and conducted investigations based on those recordings.

23. Those recordings and subsequent investigations became the basis of all remaining charges in the above captioned case.

ARGUMENT

In the Defendant's case, the search warrant was overbroad. The search warrant contained only a general description of the property the officers were authorized to seize. The search warrant gave law enforcement discretion to seize data that was not immediately recognizable as illegal or contraband on its face. The particularity requirement for a search warrant stands to prevent exploratory searches by officers armed with a general warrant. *Carlton v. State*, 449 So.2d 250, 252 (1984) Citing *Andersen v. Maryland*, 427 U.S. 463, 480 (1976)

In *Carlton*, the Florida Supreme Court held that the particularity requirement must be judged by looking only at the information contained in the four corners of the warrant. *Carlton*, at 251 The particularity requirement "must be given reasonable interpretation consistent with the type or character of the property sought." *Id.* at 252 Quoting *North v. State*, 32 So.2d 915, 917 (1947)

In *Carlton*, the property sought was a controlled substance. The affidavit for search warrant alleged the defendant had sold marijuana out of his vehicle on two separate occasions. *Carlton,* at 250 The search warrant authorized law enforcement to seize "all controlled

substances" from the defendant's vehicle. *Id.* The Court held the warrant was not overbroad. *Id.* at 252

In upholding the validity of the search warrant, the Court considered the "circumstances involved in the present case and the type of property to be seized." *Id.* Specifically, since the sale of marijuana, one controlled substance, was alleged, there was a "high probability that the offense involve(ed) more than one particular controlled substance." *Id.*

In the Defendant's case, the search warrant incorporates the affidavit. The affidavit provides evidence of one allegedly illegally recorded conversation believed to be in the Defendant's property and on the premises. The nature of the alleged illegal recording is not of a similar nature to a controlled substance, where one would assume multiple controlled substances would be present. Additionally, unlike a file, icon, application, or other data on a cell phone, the illicit nature of a controlled substance is immediately apparent when the substance is seen.

Further, *Carlton* predates the ubiquitous phenomenon of personal cell phones, which is a relatively new and evolving issue addressed by the judiciary. Judges are becoming aware that a computer, and a modern cell phone is a computer, is not just another purse or address book. *Smallwood v. State*, 113 So.3d 724, 732 (2013) "Because computers hold so much personal and sensitive information touching on many aspects of private life…there is a far greater potential for the 'inter-mingling' of documents and a consequent invasion of privacy when police execute a search on a computer." *Id.* Quoting *United States v. Lucas*, 640 F.3d 168 178 (6th Circuit 2011) and Citing *United States v. Walser*, 275 F.3d 981, 986 (10th Circuit 2001); *United States v. Carey*, 172 F.3d 1268, 1275 (10th Circuit 1999); *United States v. Comprehensive Drug Testing Inc*, 621 F.3d 1162 1175-77 (9th Circuit 2010); *United States v. Otero*, 563 F.3d 1127, 1132 (10th Circuit 2009)

In *Green v. State*, 688 So.2d 301, 306 (1996) the Court held a search warrant was

overbroad that authorized the seizure of the clothing the defendant was wearing the evening of the murder.

The Court noted that the description of the property to be seized in the search warrant did not make it possible for an officer to look at the warrant and decide with reasonable certainty which articles of clothing he was allowed to seize. *Id.* Because the search warrant "failed to rein-in the officer's discretion when executing a search" the Court held the items the officers seized must be suppressed. *Id.* In the instant case, the search warrant does not make clear which files, icons, folders, applications, emails, texts, or recordings an officer is empowered to search and seize in the Defendant's cell phone.

In *Riley v. California*, 134 S.Ct. 2473, 2485 (2014), the United States Supreme Court held that a police officer may not search a cell phone found on a Defendant's person incident to arrest without a search warrant. *Riley* was the one of the first instances in which the Supreme Court considered a personal cell phone in the 4th Amendment context. The Florida Supreme Court made the same ruling one year earlier in *Smallwood*. Although *Riley* and *Smallwood* addressed the issue of a warrantless search incident to arrest, the same rationale and privacy issues apply to cases where the search warrant for a cell phone or computer is overbroad. A search pursuant to an invalid warrant raises the same concerns as a search executed without a warrant. In *Riley*, the Court noted that the data contained on a cell phone is different both qualitatively and quantitatively from physical evidence. *Id.* at 2490.

In *Russ v. State*, 185 So.3d 622, 626 (2016) the 5th District Court of Appeals held a search warrant was overbroad that allowed officers to seize "any and all burglary tools, stolen items, or any similar items pertaining to this or any other recent burglary." "When a search warrant fails to adequately specify material to be seized, and leaves the scope of the seizure to the discretion of the officer, it is constitutionally overbroad." *Id.* Citing *State v. Nelson*, 542 So.2d 1043, 1045 (5th

DCA 1989)

In *Polakoff v. State*, 586 So.2d 385, 392 (5th DCA1991) the 5th District Court of Appeals held that the search warrant authorizing search for and seizure of "documents recording the extension of credit to Haya Bigloo" did not particularly describe the thing or things to be seized. In *Polakoff*, the defendant was accused of making usurious loans to an individual, Haya Bigloo, and of receiving usurious money to from that individual, Haya Bigloo, in violation of Florida Statute 687.071. *Id.* at 387

The 5th District explained that the "documents" that might constitute evidence of loans made to or money received from Haya Bigloo "should have been so 'particularly' and specifically described as to have permitted any document, found and examined by an officer executing the search, to have been readily recognized as being, or not being, a document described in the warrant." *Id.* at 392 The Court reiterated, "Nothing should be left to the discretion of the officers executing the warrant as to what should be seized and taken." *Id.* Citing *Marron v. U.S.*, 275 192, 195 (1927) and *Gildrie v. State*, 94 Fla. 134, 113 So. 604 (1927)

The warrant in *Polakoff* did not describe the documents with enough particularity and the officers improperly seized many files and documents not relating to Haya Bigloo. *Id.* at 393 Because the warrant was not specific, the officers improperly seized many files and documents which involved loans to other individuals that were not contraband on their face. *Id.*

The officers conducted interviews and did investigation on the documents involving the other individuals. Those documents then became the basis of other criminal charges against the defendant. *Id.* The Court held all such documents were illegally seized and should be suppressed, and all evidence the documents led to were fruit of the poisoness tree. *Id.*

This is exactly what happened in the instant case. The search warrant authorized the officers to search and seize certain property, to wit:

"Computer(s), hard drive(s), multiple cellphone(s) with different operating 'platforms,' email transaction records, stored electronic communications including electronic mail…**which are being kept in violation of the laws of the State of Florida**, to wit: the laws prohibiting F.S. 934.03 Interception of Oral Communications and F.S. 838.022 Official Misconduct" (See Search Warrant pg. 2-3) (Emphasis supplied)

The only description of the computers, cell phones, and electronic data is that it is property "being kept in violation of the laws of the State of Florida," specifically 934.03 and 838.022.This general description of the property the officers are authorized to seize is overbroad. It also allows officers to search and seize data that is not immediately recognizable as illegal or contraband on its face.

In the instant case, officers searched and seized numerous other recordings on the Defendant's phone. Because officers could not immediately tell if the recordings were done illegally, they began an investigation and conducted interviews of the participants on the recordings. The Defendant was then charged with the offenses in the above captioned case based on the officers' search and seizure of those recordings and the follow-up investigation.

As in *Polakoff*, the evidence and corresponding charges constitute fruit of the poisoness tree and must be suppressed. The overbroad search warrant and the illegal seizure in the Defendant's case is compounded by the fact that officers were searching through the Defendant's personal cell phone and other electronic devices and data. The storage capacity of cell phones has several interrelated consequences for privacy, such as the types of information a cell phone collects and the meticulous detail of each type of information. *Riley*, at 2489. There is an element of pervasiveness that characterizes cell phones, but not physical records." *Id*, at 2490

Other grounds to be argued Ore Tenus.

WHEREFORE the Defendant would pray that the Court grant the relief requested herein and suppress the evidence searched and seized as a result of an overbroad search warrant which allowed an illegal search and seizure by officers.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by efiling delivery this 31st day of July, 2017, to: Office of the State Attorney, 1769 East Moody Blvd., Bldg. 1, 3rd Floor, Bunnell, FL 32110; and Clerk of the Circuit Court, 1769 East Moody Blvd., Bldg. 1, Bunnell, FL 32110.

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