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SUPREME COURT NO. 937940  
COURT OF APPEALS NO. 72120-8-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

WILLIAM PHILLIP, JR.,

Respondent.

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**PETITION FOR REVIEW**

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 ORIGINAL

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A. **IDENTITY OF PETITIONER**

The State of Washington, Petitioner here and Respondent below, respectfully requests that this Court review one issue from the Court of Appeals' unpublished decision in State v. Phillip, No. 72120-8-I (Wash. Ct. App., Div. 1, Aug. 29, 2016).<sup>1</sup>

B. **ISSUE PRESENTED FOR REVIEW**

Did the Court of Appeals deviate from well-settled principles regarding interpretation of search warrant affidavits when it narrowly and illiberally analyzed a March 2012 warrant affidavit to obtain cellular service provider records for the cellular phone of a murder suspect who was a romantic rival of the victim and who refused to tell investigators whether he was in the area of the murder on the night in question, and concluded that there was not probable cause to search?

C. **STATEMENT OF THE CASE AS IT PERTAINS TO THE ISSUE FOR WHICH REVIEW IS SOUGHT**

On the morning of Saturday, May 22, 2010, Bonny Johnson was becoming increasingly worried by her inability to reach her

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<sup>1</sup> The slip opinion is attached as Appendix A. Phillip's motion for reconsideration was denied by the Court of Appeals on October 3, 2016.

boyfriend, Seth Frankel, by phone. 57RP 90-91.<sup>2</sup> Johnson was in the Portland, Oregon, area, where she lived part-time while at work at a local PBS station; when not at work, Johnson lived with Frankel at the couple's home in Auburn. 57RP 53, 88-89. Johnson had last spoken to Frankel at approximately 8:00 p.m. the previous night. 57RP 88-89. She had tried, without success, to reach him after her shift ended two hours later, and throughout the night. 57RP 90-91.

Concerned, Johnson phoned James Funston, who lived near Frankel's residence in Auburn. 57RP 110. Funston walked over to Frankel's home, and saw Frankel's car in the driveway. 49RP 20-21, 23. Funston knocked on the front door, but no one answered. 49RP 22-23. He looked through a window, and saw a body on the floor, amidst knocked-over furniture. 49RP 27-28. Funston immediately called 911. 49RP 31.

First responders quickly arrived. 49RP 143-44, 146. They saw no signs of forced entry. 49RP 23, 150. A medic kicked open the front door, and found Frankel's lifeless body on the floor of his blood-spattered living room. 50RP 23-25. Frankel's body was cold

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<sup>2</sup> The verbatim report of proceedings consists of 69 volumes, designated hereinafter in this brief as indicated in Appendix B.

to the touch, and rigor mortis had already set in. 50RP 26-27. Frankel had numerous puncture wounds, including a deep gash in his throat and a large cut in the webbing of his left hand. 49RP 194; 50RP 28. Around Frankel's right arm was a black zip-tie. 50RP 30. Although the living room was a horrific mess, the remainder of the home appeared entirely undisturbed, and investigators found Frankel's keys and wallet, containing cash and a number of credit cards, in the kitchen. 51RP 198.

In the course of investigating Frankel's murder, investigators with, or working in association with, the Auburn Police Department obtained the following search warrants relating to Phillip:

<b>Date of Warrant's Issuance</b>	<b>Items/Locations relating to Phillip to be Searched Pursuant to Warrant</b>
May 27, 2010	Usage records in possession of AT&T relating to Phillip's personal cell phone device
June 22, 2010	Phillip's apartment, vehicle, and person
November 5, 2010	Phillip's DNA, to be collected via buccal swab
January 25, 2012	Phillip's cell phone device
March 22, 2012	Usage records in possession of AT&T relating to Phillip's personal cell phone device

On May 22, 2010, and again on May 26<sup>th</sup>, Johnson told Auburn Police Department investigators that she had spoken to

William Phillip, Jr., several times throughout that week, and had told him on either May 20<sup>th</sup> or early on May 21<sup>st</sup> that she was going with a girlfriend to the Oregon coast that weekend. 57RP 25, 126-27; CP 132, 134. She described Phillip as a former co-worker whom she had briefly dated in late 2008 and early 2009. 57RP 25, 126. When Johnson had decided to end their romantic relationship, Phillip became very upset, to the point that she began to worry about his mental health and feared he might kill himself. 57RP 31. Johnson made an effort to remain on friendly, platonic terms with Phillip, but he continued to express a romantic interest in her. 57RP 33-34.

At the request of Auburn investigators, a detective with the Portland Police Bureau paid a visit to Phillip's apartment in Portland on May 25, 2010. CP 134. Phillip would not allow the detective into his home, but agreed to speak to him outside. CP 134. Phillip admitted to knowing Johnson, but said she was "just a friend." CP 134. He said he had not seen her in weeks, but acknowledged communicating with her by text message recently. CP 134. When the detective asked Phillip if he had visited Auburn, Washington,



recently, Phillip abruptly ended the conversation, and said that he was exercising his right to counsel. CP 134.

The following day, Johnson told detectives that the only person she could think of who would want to hurt Frankel was Phillip. CP 134. Johnson expressed her fear that she may have been "leading him on," and that Phillip had told her that he loved her the last time she had seen him. CP 134.

Text messages recovered from Johnson's phone included a number of persistently ardent communications sent by Phillip in the days leading up to the day of Frankel's homicide. CP 133. On the day of Frankel's death, Phillip implored Johnson, via text message, to break up with Frankel; Johnson chastised Phillip in response, directing him not to speak poorly of her boyfriend. 57RP 170-71; CP 133.

On May 27, 2010, Auburn detectives obtained a warrant from King County Superior Court Judge Brian Gain for, among other things, Phillip's cell phone records. CP 30-32. The affidavit in support of the warrant did not include much of the information described supra regarding Johnson's relationship with Phillip, and limited itself to details of the crime scene; the affidavit identified

Phillip only as one person with whom Johnson had been in electronic communication before Frankel's murder. CP 21-28.

APD detectives traveled to Portland on May 28, 2010, and visited Phillip at his apartment. 58RP 135, 139. Phillip told the detectives that he knew Johnson had moved to Auburn to live with Frankel. 58RP 143-44. The investigators noticed that Phillip's right hand was injured; two fingers were badly bruised, and he had a bandage over the webbing of his right hand, through which blood had soaked. 58RP 148-49. Phillip attributed the injury to a workplace event weeks earlier, when he had dropped something on his hand. 58RP 150-51. However, a co-worker of Phillip told the jury that he was present when Phillip had hurt his hand when it was caught between two decks of a stage he was assembling, and that Phillip had not been cut. 63RP 124-25. In addition, investigators discovered that zip-ties identical to the one found wrapped around Frankel's arm were readily available at Phillip's workplace. 63RP 130-32.

Pursuant to the May 27, 2010, warrant, Auburn investigators received records from Phillip's cell phone service provider (AT&T), on June 20, 2010. CP 51. The records indicated that on the

morning of May 21, 2010, Phillip's phone utilized cell towers in the Portland area whenever he used his phone. 60RP 91-99. By the afternoon of May 21<sup>st</sup>, however, Phillip's phone began utilizing towers north of Portland situated near or alongside the I-5 freeway. 60RP 100. By 4:05 p.m., Phillip's phone connected with a tower in Kent, Washington, and, by 7:57 p.m., it utilized an Auburn tower. 60RP 109-10, 113-15. At 9:59 p.m., Phillip's phone began connecting with cell towers south of King County, and, by 12:25 a.m. on the morning of May 22, 2010, it was utilizing Portland towers once again. 60RP 122-29.

On June 2, 2010, APD detectives again called on Phillip at his Portland apartment. 58RP 157, 163. During that conversation, they discussed with him the possibility of taking a DNA sample from him via buccal swab. 58RP 164. Phillip's smartphone was seized pursuant to a warrant issued on June 22, 2010, and a search of that phone was authorized by a separate warrant issued on January 25, 2012. CP 79-81, 128-29. Examination of the phone revealed that on June 19, 2010, a search had been run on the phone's internet browser titled "how to ruin a buccal swab." 61RP 18-19, 71-72, 150.

The forensic examiner also found hundreds of text messages to and from Johnson in Phillip's phone sent between June 2009 and May 2010, many of which were of a romantic nature, in which Phillip told Johnson that she was the most beautiful creature he had even seen, that he dreamt of her constantly, and that he loved her. 61RP 117-18, 126-27, 132. In a text sent to Johnson a month and a half before Frankel's murder, after she had told Phillip that they would not be together but that she wanted him to be happy, Phillip complained to her that she had taken "my love, my best friend and completely shattered my ego." 61RP 135-37.

APD Detective Anna Weller read to the jury a number of excerpts from journals seized from Phillip's apartment pursuant to the search warrant issued on June 22, 2010. In those excerpts, Phillip wrote of his obsession with Johnson, and that she was his "main focus in life." 66RP 103-04. Phillip also noted that he and Johnson should be raising their own children, and that Frankel was a liar, cheat, and "douche bag" for ending an earlier marriage. 66RP 108-09.

A buccal swab of Phillip's DNA was performed on Phillip in November 2010 pursuant to a search warrant issued on the 5<sup>th</sup> of

that month. CP 122; 61RP 35-36. The swab was provided to Washington State Patrol Crime Lab forensic scientist Amy Smith, along with a number of other items, including a blood-stained towel found next to Frankel's body. 61RP 137; 65RP 37-38. Within one stain on the towel Smith found a mixture of two male profiles; the majority component matched Frankel's DNA, and the likelihood that anyone other than Phillip was the contributor of the minor component was approximately one in 2.2 million. 62RP 137.

In March 2012, APD Det. Weller presented an affidavit for a second warrant to obtain the cell phone records from Phillip's service provider, AT&T. CP 131-35. In this second affidavit,<sup>3</sup> presented to Judge Gain, who had signed the original warrant in May 2010, Weller explained that she had been directed to seek judicial authorization anew by the deputy prosecutor assigned to try Phillip, who had expressed his concern that the original affidavit left out several pieces of incriminating information already known by the investigators. CP 131-32. Det. Weller then described that information, discussed supra in this brief, in detail. CP 132-34. Judge Gain signed the second warrant. CP 137-38.

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<sup>3</sup> The March 2012 affidavit, with the relevant CP page number printed on the bottom of each page, is attached to this petition as Appendix C.

Prior to jury selection at his first trial for Frankel's murder in October 2013,<sup>4</sup> Phillip moved to suppress all of the evidence obtained by police in the course of their investigation, contending that the original May 2010 warrant for his cell phone records was not supported by probable cause, and that all of the subsequent warrants were irredeemably tainted by the investigators' unlawful discovery within those provider records of Phillip's movement on May 21 and 22, 2010. CP 7-19. The trial court agreed with Phillip that the original warrant lacked probable cause. CP 907. However, the court found that the affidavits supporting the warrants issued in June 2010, November 2010, and January 2012 established probable cause even after all reference to information gathered from Phillip's cell phone records was excised. CP 908. Finally, the trial court ruled that the March 2012 warrant for Phillip's cell phone records constituted an independent source of that information, unconnected to and untainted by the May 2010 warrant, and that the affidavit presented for the March 2012 warrant satisfied the probable cause requirement. CP 908.

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<sup>4</sup> Phillip's first trial ended in mistrial due to a hung jury. 36RP 17-19, 24-25. His retrial commenced in late February 2014.

Presented with all of this evidence, and the testimony of many witnesses, a jury convicted Phillip of first-degree murder on April 11, 2014. CP 845.

The Court of Appeals reversed Phillip's conviction on August 29, 2016. The appellate court agreed with the trial court that the affidavits in support of the June 2010, November 2010, and January 2012 warrants satisfied probable cause after redaction of all discussion of evidence gathered from the May 2010 warrant for Phillip's cell phone records. State v. Phillip, slip op. at 12-17. But the Court of Appeals concluded that the March 2012 affidavit submitted to obtain judicial authorization to seize those cell phone records a second time had failed to establish probable cause, and that the jury should not have been presented with any information gathered from those records. Phillip, slip op. at 9-12.

**D. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT**

RAP 13.4(b) permits review by this Court when a decision by the Court of Appeals is in conflict with published decisions by that court and with decisions by this Court. In addition, given that the Court of Appeals' decision in this case would erroneously deprive the trier of fact of the most compelling proof of Phillip's culpability

for the cold-blooded, unprovoked, and vicious slaying of an innocent father of two small children, its decision affects a matter of significant interest to the people of this state.

Probable cause is established when an affidavit supporting a search warrant provides sufficient facts for a reasonable magistrate to conclude there is a probability that the defendant was involved in criminal activity and that probative evidence will be found in the location to be searched. State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). Probable cause requires more than mere conjecture, but it does not require certainty. State v. Chenoweth, 160 Wn.2d 454, 476, 158 P.3d 595 (2007); see also State v. Seagull, 95 Wn.2d 898, 907, 632 P.2d 44 (1981) (noting that it is “only the probability of criminal activity and not a prima facie showing of it which governs the standard of probable cause.”). As the Court of Appeals observed in State v. Fore, 56 Wn. App. 339, 343, 783 P.2d 626 (1989) (internal citations omitted):

Probable cause does not emanate from an antiseptic courtroom, a sterile library or a sacrosanct adytum, nor it is a pristine philosophical concept existing in a vacuum, but rather it requires a pragmatic analysis of everyday life on which reasonable and prudent men, not legal technicians, act.



A magistrate may draw all reasonable inferences from the facts and circumstances set forth in a supporting affidavit. State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). In addition, facts that “standing alone, would not support probable cause can do so when viewed together with other facts.” State v. Cole, 128 Wn.2d 262, 286, 906 P.3d 925 (1995). And probable cause is not negated merely because it is possible to imagine an alternative, innocuous explanation for a defendant’s behavior or activities. See Fore, 56 Wn. App. at 344.

The determination of probable cause by the issuing court should be given great deference by reviewing courts. Seagull, 95 Wn.2d at 907, citing Jones v. United States, 362 U.S. 257, 270-71, 80 S. Ct. 725, 735-36, 4 L. Ed. 2d 697 (1960). The U.S. Supreme Court has held that

[W]hen a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases... should be determined by the preference to be accorded to warrants.

United States v. Ventresca, 380 U.S. 102, 109, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1985), quoted in State v. Helmka, 86 Wn.2d 91, 93, 542 P.2d 115 (1975); see also Vickers, 148 Wn.2d at 108-09 (holding that doubts concerning the existence of probable cause should be resolved in favor of the validity of the search warrant).

The Court of Appeals disregarded these long-standing, common-sense legal principles in its review of the March 2012 affidavit for records maintained by Phillip's cell service provider. This Court and others have long recognized that evidence of romantic discord is compelling proof of motive. See State v. Powell, 126 Wn.2d 244, 259-60, 893 P.2d 615 (1995); State v. Messinger, 8 Wn. App. 829, 835, 509 P.2d 382 (1973). As the Supreme Court of Illinois recognized nearly a hundred years ago, "It is always relevant to put in evidence of jealousy and unrequited love, and the facts on which they rest, for the purpose of showing motive in homicide." People v. Laures, 289 Ill. 490, 499, 124 N.E. 585 (Ill. 1919); see also Senn v. State, 35 Ala. App. 62, 64-65, 43 So.2d 540 (Ala. Ct. App. 1949) (recognizing the probative value of evidence that the suspect and the victim were rivals for the same woman's affection).

As the March 2012 affidavit explained, Phillip was in love with Johnson, and had been extremely upset when she had ended their brief relationship. CP 134. She had again rejected him only weeks before the murder, when he had yet again declared his love for her. CP 134. Phillip had repeatedly disparaged Frankel both verbally and in writing to Johnson; Johnson responded by telling Phillip that she would no longer speak to him if he continued to insult Frankel. CP 132, 134.

The Court of Appeals refused to give appropriate weight to this evidence because “the only evidence supporting these assertions” was, according to the court, one text that Phillip sent to Johnson’s phone referring to Frankel as “unhot.” Phillip, slip op. at 10. The Court of Appeals provided no explanation as to why Johnson’s multiple *conversations* with detectives in which she recounted Phillip’s obsession with her were not themselves of evidentiary value or somehow unreliable. At the probable cause stage, Johnson’s assertions were sufficient on their own to establish Phillip’s fixation on Johnson and his jealousy of Frankel. The text message – one of several fervent messages, also included in the affidavit, that Phillip sent to Johnson near the time of

Frankel's murder, in which he harangued Johnson for attention – should not have been judged alone. Rather, it was additional proof.

The Court of Appeals further improperly discounted Phillip's jealousy by noting that even if it were true, it did not by itself establish probable cause to believe that he was involved in Frankel's death. Id. at 10-11. While no one would reasonably take issue with the proposition that motive *alone* is insufficient, the March 2012 affidavit, which had been deemed sufficient by two superior court judges, described much more. It included a crime scene whose characteristics were entirely consistent with the execution of Phillip's very personal motive and not with robbery or burglary; Phillip's identification as a rejected, fixated lover seen by Johnson as the only person with reason to harm the victim; Phillip's disingenuousness when asked to describe his relationship with Johnson; and his abrupt refusal to indicate whether he had recently been to the city where the crime took place. It was improper for the Court of Appeals to view evidence of motive in isolation, rather than as one item in a chain of facts and circumstances sufficient to establish probable cause.

The Court of Appeals was also dismissive of the fact that Phillip expressly declined to tell an investigator whether he had traveled to Auburn recently. The appellate court stated that while Phillip's refusal to discuss that subject was undoubtedly revealing (presumably, of his consciousness of guilt) and "that further investigation was warranted," it provided no basis upon which the issuing magistrate could conclude that Phillip's phone records would contain evidence of his involvement in Frankel's death in that city. Phillip, slip op. at 11. The Court of Appeals' conclusion is squarely at odds with the simple fact that those records, which automatically list the general geographic location of the cell phone each time it is in use, would certainly reveal Phillip's whereabouts on May 21 and 22, 2012, a period of time during which the investigators knew that he was actively using his phone, as he had sent multiple messages to Johnson.<sup>5</sup>

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<sup>5</sup> It should be noted that the warrant being sought was minimally intrusive and was limited to service records in the possession of AT&T; neither the May 2010 nor the March 2012 warrant permitted the police to search Phillip's phone itself or the content of any text messages. Insofar as Phillip's cell phone records revealed his location at particular points in time, the reasonableness of any expectation of privacy in that information is a debatable question, as Judge Applewick pointed out during oral argument in this matter at the Court of Appeals. See June 8, 2016, oral argument, State v. Phillip, COA No. 72120-8-1, at 23:52, available at [http://www.courts.wa.gov/appellate\\_trial\\_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a01&docketDate=20160608](http://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a01&docketDate=20160608).

Lastly, the Court of Appeals stated that it took issue with the fact that the State had “argued below” that “Johnson and Phillip may have been jointly involved in the crime and that if either of them was the killer, evidence of the crime would likely be found in Phillip’s phone records.” Phillip, slip op. at 11-12. The appellate court stated that these were “mere speculations” and that there was no basis in “the affidavit” to infer that Johnson and Phillip had conspired to kill Frankel. Id. at 12.

The Court of Appeals’ conclusion may be true, but it is entirely beside the point. The State made that passing reference during a pretrial suppression hearing and *only as to the May 2010 warrant*. 9RP 38-39. On appeal, the State has taken no issue with the fact that the trial court deemed the affidavit supporting the May 2010 warrant to be inadequate. Rather, the State has taken pains to distinguish between the earlier, deficient affidavit and the March 2012 document, which set forth a number of compelling items of

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last accessed on Oct. 31, 2016. After all, an individual’s cell phone is continually broadcasting its location, and this information is readily available to, and obtained and exploited by, a wide variety of commercial enterprises. See Natasha Singer, Their Apps Track You. Will Congress Track Them?, N.Y. Times, Jan. 5, 2013, available at <http://www.nytimes.com/2013/01/06/technology/legislation-would-regulate-tracking-of-cellphone-users.html? r=0>, last accessed on Oct. 31, 2016.

information implicating Phillip, and Phillip alone, which had been omitted in the original affidavit.

In sum, the Court of Appeals drew all inferences against the validity of the March 2012 warrant, scrutinized relevant facts in isolation rather than within a broader context, failed to understand what would be found within cell phone service provider registers, and misread the superior court record in such a way as to improperly discredit the affidavit in question. The appellate court's mistakes and its violations of established case law have resulted in a decision that would prevent the trier of fact from learning that on the night of Frankel's murder, William Phillip traveled from the comfort of his home in Portland, Oregon, up the I-5 corridor to the city of his romantic rival, Frankel, and then drove back to Portland again, within the space of less than half a day. The State respectfully asks this Court to grant its petition for review so that the flawed analysis in the Court of Appeals' opinion is not repeated in future cases.

**E. CONCLUSION**

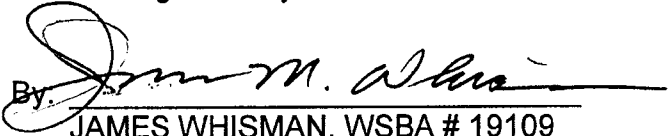
The March 2012 affidavit supporting the search warrant for records maintained by Phillip's cell phone service provider was

properly found to be supported by probable cause by the issuing superior court judge and by the trial court. The Court of Appeals' decision to the contrary conflicts with settled law, fails to give appropriate deference to the magistrates' inferences from all of the facts and circumstances presented, and presents an issue of substantial public interest. For these reasons, the State respectfully asks this Court to grant review.

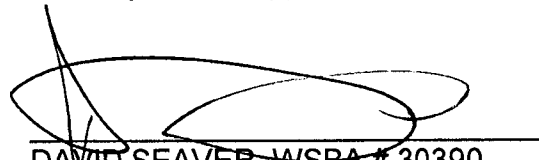
DATED this 2<sup>nd</sup> day of November, 2016.

RESPECTFULLY submitted,

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## **APPENDIX A**

Slip opinion, State of Washington v. William Phillip, Jr.  
COA No. 72120-8-1  
(Wash. Ct. App. Aug. 29, 2016)

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 72120-8-1
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
WILLIAM PHILLIP, JR.,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: <u>August 29, 2016</u>

SPEARMAN, J. — A search warrant may only issue if the underlying affidavit provides facts and circumstances sufficient to conclude that the defendant is probably involved in criminal activity and that evidence of the criminal activity is likely to be found in the place to be searched. While a magistrate may draw reasonable inferences from facts in the affidavit, mere speculation is not sufficient to give rise to probable cause. In this case, William Phillip challenges the trial court's denial of his motion to suppress, arguing that the warrant authorizing search of his cell phone records was invalid. Because we conclude that the warrant was not supported by probable cause, we reverse and remand. Phillip also challenges the trial court's denial of his motion to suppress evidence

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seized pursuant to other warrants and his motion to dismiss based on CrR 8.3(b).

These claims are without merit and we reject them.

### FACTS

William Phillip lived in Portland, Oregon. Seth Frankel lived in Auburn, Washington. Frankel's girlfriend, Bonny Johnson, lived part-time with him in Auburn and part-time in Portland where she worked.

Johnson became worried when she was unable to reach Frankel by phone on May 21, 2010. On May 22, Johnson called a neighbor and asked him to check on Frankel. When no one responded to a knock on Frankel's front door, the neighbor looked in a window and saw a body on the floor.

Police responded to the neighbor's 911 call and found Frankel dead of a knife wound to his throat. Frankel had also sustained blunt force injuries to his head and knife wounds to his hand and leg. There was an 18-inch black zip tie on one of Frankel's wrists and another zip tie near him. Other than the area immediately surrounding the body, Frankel's apartment was orderly and valuables appeared untouched. A medical examiner estimated Frankel's time of death as between 8:00 p.m. May 21 and 4:30 a.m. May 22.

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Police interviewed Johnson the day they discovered the body. They

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questioned Johnson about her relationship with Frankel and asked her about ex-boyfriends. Johnson identified Phillip, who went by the name "JR," as someone she had dated. Verbatim Report of Proceedings (VRP) (3/26/14) at 70-71. When asked if she could think of anyone who might want to hurt Frankel, Johnson said

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"I cannot. You know the close[...], I feel terrible saying this because I still consider him a friend and I, I don't think he's capable of it but JR is the only one that has ever said anything ill of Seth [Frankel] to me. . . ." Clerk's Papers (CP) at 227.

Johnson gave police permission to search her cell phone. Officers found that Johnson had been in frequent contact by phone with Phillip and another man, later identified as James Whipkey. Text messages between Johnson and Phillip appeared flirtatious.

At the request of the Auburn police department, a Portland officer visited Phillip on May 25, 2010. Without telling Phillip that Frankel was dead or stating that he was investigating a murder, the officer asked Phillip if he knew Johnson. Phillip stated that Johnson was a friend. When the detective asked Phillip if he had been to Auburn recently, Phillip responded that he wanted to exercise his right to counsel.

Auburn police interviewed Johnson again on May 26. An officer asked if there was anybody in her life who would want to get Frankel out of the way. Johnson replied "All I can think of is JR ... I can't think of anybody else that would hurt Seth [Frankel] like that." CP at 231. When the officer followed up by asking "You think JR would hurt him?" Johnson stated that Phillip was very upset when she broke up with him. CP at 231-32. Johnson said that it scared her to think Phillip might have something to do with Frankel's murder, but the more she thought about it, the more she could not believe that he would do it.

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On May 27, the Auburn police department requested a warrant to obtain records from Phillip's cell phone provider. The affidavit briefly describes the crime scene, states that Johnson was Frankel's girlfriend, and states that Johnson requested a welfare check on Frankel before his body was discovered. The affidavit states that Johnson had a significant relationship with Phillip and described him as someone she had dated. A judge approved the warrant.

On May 28, Auburn detectives visited Phillip in Portland. The officers noticed that Phillip's right hand was bruised and part of it was covered with a blood-stained Band-Aid. Phillip stated that he had injured his hand at work. When asked about Johnson, Phillip indicated that the last time he had seen or talked to Johnson was about a month earlier. He later told officers that he had received a text from Johnson the previous weekend. When an officer asked if he had ever been to Auburn, Phillip said he wanted to speak to an attorney.

Detectives interviewed Phillip again on June 2. Officers noticed that he tried to conceal a 1-2 inch cut on his right hand. The officers asked Phillip to voluntarily provide a DNA sample via buccal swab. Phillip denied consent to the buccal swab and refused to answer questions about the last time he was in Auburn.

On June 9, detectives visited the convention center where Phillip worked. Phillip's supervisor stated that Phillip and other employees commonly used zip ties as part of their job duties. The zip ties used at the convention center matched the ties found in Frankel's apartment. A coworker confirmed that Phillip had

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injured his hand at work, but stated that the injury did not break the skin or cause bleeding.

Auburn police received Phillip's cell phone records from AT&T on June 20, 2010. The records included the locations of the cell towers pinged by Phillip's phone. On May 21, the day of Frankel's murder, Phillip's phone accessed cell towers along the I-5 corridor heading north from Portland. Phillip's phone pinged cell towers in Auburn from about 7:00 until 9:00 p.m. The cell tower locations then track Phillip returning to Portland.

On June 22, Auburn police obtained a warrant to search Phillip's apartment and motorcycle. They seized Phillip's mobile phone and a journal. In the journal, Phillip wrote that he was "obsessed" with Johnson and that Frankel was not good enough for her. VRP (4/8/14) at 104, 108-09.

In August 2010, detectives learned that a bloodstain from the murder scene had yielded two different DNA samples. The first sample belonged to Frankel. The second sample was from an unknown male. In November 2010, a judge granted the detectives a warrant to obtain Phillip's DNA via buccal swab. Analysis of the sample determined that Phillip was a possible contributor of the second sample. Only about 1 in 2.2 million individuals could have contributed the sample and Phillip was within that set. Phillip was arrested and charged with first degree murder.

In January 2012, officers obtained a warrant to search the contents of Phillip's mobile phone. Detective Blake reviewed the data from the phone. Blake

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discovered that Phillip submitted a request for information through a Portland law firm's website several hours before Frankel's body was discovered. Phillip asked if the firm had attorneys that practiced in Washington and stated that he was seeking representation for an alleged violent crime that occurred in Washington State. An attorney responded to Phillip by email later that morning and told him they did not practice in Washington but they may be able to provide a referral. Phillip specified that the alleged crime took place in King County.

Detective Blake summarized this information in an email to the prosecutor, Wyman Yip. The following week, Yip asked Blake to forward the actual emails. The State did not offer the emails into evidence.

In March 2012, Yip asked Blake to prepare a more thorough warrant affidavit for Phillip's cell phone records. Yip stated that the May 2010 warrant was defensible, but the affidavit could have included many other facts that were known at the time. Police prepared an affidavit that incorporated the May 2010 affidavit and provided further details about the crime scene and Johnson's relationship with Phillip. A judge approved the warrant.

Prior to trial, Phillip moved for dismissal under CrR 8.3. He argued that the ~~government committed misconduct by reading Phillip's email exchange with the~~ Portland law firm and that the misconduct was presumed prejudicial. The trial court found that the State had rebutted the presumption of prejudice and denied Phillip's motion.

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Phillip also moved to suppress all evidence obtained during the execution of search warrants. The trial court denied the motion. The court found that the May 2010 warrant for Phillip's phone records was invalid because it was not supported by probable cause. But the court found that the March 2012 warrant for the phone records was supported by probable cause and met the requirements of the independent source doctrine. The trial court determined that the other warrants, evaluated without consideration of any information obtained from the faulty May 2010 warrant, were valid.

The jury found Phillip guilty of first degree murder and he appeals.<sup>1</sup>

#### DISCUSSION

We first address Phillip's challenge to the trial court's denial of his CrR 8.3 motion to dismiss. He asserts that the State violated his right to confidential communication with an attorney when it read his email exchange with the Portland law firm.

Eavesdropping on an attorney-client conversation is presumptively prejudicial. State v. Pena Fuentes, 179 Wn.2d 808, 819, 318 P.3d 257 (2014). It is the State's burden to rebut the presumption by showing the absence of prejudice beyond a reasonable doubt. Id. This court reviews the trial court's decision on a CrR 8.3 motion for abuse of discretion. Id. at 820. The trial court abuses its discretion if its decision was manifestly unreasonable or based on untenable grounds. State v. Wilson, 149 Wn.2d 1, 9, 65 P.3d 657 (2003).

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<sup>1</sup> Phillip's first trial resulted in a hung jury. He was convicted at his second trial.



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At the hearing on Phillip's motion to dismiss, the court heard testimony from the lead investigator and the forensic examiner who extracted the information from Phillip's cell phone. The court also considered the detective's follow-up report and the prosecutor's affidavit. The trial court found the State's witnesses credible. It found that the police took no meaningful action and discovered no new evidence as a result of the privileged communication. The court further found that the privileged communication did not affect the prosecution's trial preparation or strategy. The trial court accordingly ruled that the State had rebutted the presumption of prejudice and that it could not find any injury to Phillip's rights to due process, counsel, and a fair trial.

The trial court's decision is based on the correct legal standard and is not manifestly unreasonable. There was no abuse of discretion.

Phillip next argues that the trial court erred in denying his motion to suppress his cell phone records. He asserts that the March 2012 warrant was invalid and the cell phone records were thus unlawfully seized.

A search warrant may only issue if the underlying affidavit shows probable cause. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (citing State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995)). Probable cause exists where the affidavit includes facts sufficient for a reasonable person to conclude the defendant is probably involved in criminal activity and that evidence of the criminal activity is likely to be found in the place to be searched. Id. In the context of a search warrant, the probable cause inquiry focuses on the connection

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between the crime, the items sought, and the likely location of the items. Zurcher v. Stanford Daily, 436 U.S. 547, 555-56, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978).

An affidavit is evaluated "in the light of common sense." Cole, 128 Wn.2d at 286 (citing State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994)). A magistrate may draw reasonable inferences from the facts and circumstances included in the affidavit. State v. Nusbaum, 126 Wn. App. 160, 166-67, 107 P.3d 768 (2005) (citing State v. Anderson, 105 Wn. App. 223, 229, 19 P.3d 1094 (2001)). But mere speculations are not sufficient to give rise to probable cause. Id. (citing Thein, 138 Wn.2d at 145-46). Whether the facts in the affidavit support probable cause is a question of law that this court reviews de novo. Id. (citing In re Det. of Petersen v. State, 145 Wn.2d 789, 799-800, 42 P.3d 952 (2002)). Our review is limited to the four corners of the affidavit. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

Phillip argues that the trial court erred in concluding that the affidavit underlying the March 2012 warrant established probable cause. He argues that the facts in the affidavit do not sufficiently state a factual basis connecting Phillip's phone records with Frankel's murder. We agree.

The March 2012 affidavit incorporates the May 2010 affidavit and thus includes the earlier affidavit's brief description of the crime scene, identification of Johnson as Frankel's girlfriend, information that Johnson asked the neighbor to check on Frankel, and description of Phillip as a man with whom Johnson had a close relationship. The March 2012 affidavit provides further details about the

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crime scene, including the fact that doors were locked and that, except for the area immediately surrounding the body, the apartment appeared untouched. It also includes Johnson's statements that Phillip had served in the military, he was the only person she knew who had ever spoken ill of Frankel, he was the only person she could think of who would want to hurt Frankel, and he was extremely upset when she broke up with him. The affidavit reports Phillip's statement to the Portland police that Johnson was "just a friend" and his invocation of the right to counsel when asked if he had ever been in Auburn. CP at 134.

The affidavit includes copies of text messages between Johnson and Phillip in the week of Frankel's death. The text messages appear flirtatious. In one message, Phillip refers to Frankel as an "unhot old man." CP at 133. In Johnson's reply, she tells Phillip not to speak about Frankel like that. The text messages do not express any intent to harm Frankel.

The facts in the affidavit indicate that Phillip had a close relationship with Johnson and frequently communicated with her by telephone. Johnson said that Phillip was the only person she could think of who had spoken ill of Frankel and who might want to harm Frankel. But the only evidence supporting these assertions was Phillip's text referring to Frankel as an "unhot old man" and Johnson's claim that Phillip was very upset when she broke up with him. These facts at most suggest that Phillip may have been jealous of Frankel's relationship with Johnson. But they do not create a reasonable inference that Phillip was

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involved in Frankel's death or that evidence relating to Frankel's death would likely be found in Phillip's cell phone records.

The affidavit also establishes that Phillip did not want to discuss with police whether he had traveled to Auburn.<sup>2</sup> This fact may have indicated to police that further investigation was warranted, but it does not establish a connection sufficient to infer that evidence of the crime would likely be found in Phillip's cell phone records. "Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law." Thein, 138 Wn.2d at 147. See e.g., (State v. Smith, 93 Wn.2d 329, 352, 610 P.2d 869 (1980); State v. Helmka, 86 Wn.2d 91, 92-93, 542 P.2d 115 (1975); State v. Patterson, 83 Wn.2d 49, 52, 61, 515 P.2d 496 (1973)).

The State argues that the facts in the affidavit give rise to a chain of inferences supporting probable cause. The State argued below that Phillip's relationship with Johnson gave him a motive to harm Frankel, Phillip could have obtained a key to the apartment from Johnson, and Phillip thus may have had access to Frankel. The State further argued that Johnson and Phillip may have

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<sup>2</sup> Phillip argues that the trial court erred in considering his invocation of the right to counsel when asked if he had been to Auburn. Relying on cases holding that a person's exercise of the right to remain silent may not be used as substantive evidence of guilt, Phillip asserts that it is fundamentally unfair to consider his exercise of the right to counsel in evaluating probable cause. App. Br. at 36-37. We reject this argument. An affidavit of probable cause is not limited to facts that are admissible in evidence. State v. Grenning, 142 Wn. App. 518, 534, 174 P.3d 706 (2008) (citing State v. Withers, 8 Wn. App. 123, 125, 504 P.2d 1151 (1972)). A suspect's conduct in speaking with police, including the suspect's invocation of a constitutional right, is relevant to the common sense determination of probable cause.

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been jointly involved in the crime and that if either of them was the killer, evidence of the crime would likely be found in Phillip's phone records.

These are mere speculations. The facts in the affidavit provide no basis for inferring that Johnson and Phillip conspired to harm Frankel and that evidence of this conspiracy would be found in Phillip's phone records. To the contrary, in the text messages, Johnson defends Frankel and instructs Phillip not to speak badly of him. Conclusory statements, speculations, and suspicions do not provide a factual basis that supports probable cause. Thein, 138 Wn.2d at 147.

We conclude that the March 2012 warrant for Phillip's cell phone records was invalid and the trial court erred in denying Phillip's motion to suppress the records. The underlying affidavit did not provide a sufficient factual basis from which to infer that evidence of the crime would likely be found in Phillip's phone records. Because we conclude that the warrant was not supported by probable cause, we do not consider Phillip's further challenges to its validity. We also do not consider Phillip's challenge to the testimony of AT&T's custodian concerning the phone records.

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~~Phillip also argues that the trial court erred in denying his motion to~~  
suppress evidence obtained from the June 2010 and November 2010 warrants to search his apartment, vehicle, person, and DNA. He argues that these warrants were invalid because they relied on information unlawfully obtained from Phillip's

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cell phone records. Phillip also asserts that the unlawfully obtained information motivated police to seek the June and November 2010 warrants. We disagree.

Evidence seized during an illegal search is generally subject to suppression under the exclusionary rule. State v. Gaines, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005). Evidence derived from an illegal search may also be subject to suppression under the fruit of the poisonous tree doctrine. Id. at 717. One exception to the exclusionary rule, however, is the independent source doctrine. Id.

Under the independent source doctrine, "evidence obtained pursuant to a warrant is admissible, even though the warrant recites information tainted by an unconstitutional search, provided the warrant contains enough untainted information to establish probable cause." State v. Eserjose, 171 Wn.2d 907, 928, 259 P.3d 172 (2011) (citing Gaines, 154 Wn.2d at 719)). To pronounce such a warrant lawful, a court must also find that police would have sought the warrant even without knowing the tainted information. Id. (citing Gaines, 154 Wn.2d at 721). See Murray v. United States, 487 U.S. 533, 542, 108 S. Ct. 2529, 2533, 101 L.Ed.2d 472 (1988).

Both a Washington court and an Oregon court issued warrants on June 22, 2010. The Oregon warrant authorized search of Phillip's apartment and motorcycle. It also authorized seizure of Phillip's cell phone and a limited seizure of Phillip in order to photograph his right hand and any other blunt or sharp force injuries on his person. The Washington warrant authorized search of Phillip's

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email account and search of Verizon records for information concerning the cell phone number that Phillip dialed at 8:56 p.m. on the night of the murder. The affidavits supporting the two warrants were identical in all relevant particulars. Applying the independent source doctrine, we first analyze the affidavits with all references to the illegally obtained cell phone records excised to determine if the warrants were supported by probable cause.

Viewed in that light, the affidavits contain the following facts: Frankel suffered multiple violent injuries and died of a knife wound to the neck. There were no signs of forced entry or burglary at Frankel's home. Frankel had a cut on one hand. An 18-inch zip tie was around one of Frankel's wrists and another zip tie was nearby. On May 25, investigators searched Johnson's cell phone with her consent. They learned that Johnson was in frequent contact with Phillip. In addition, they were aware that Phillip appeared jealous of Johnson's relationship with Frankel.

The affidavits further state: On May 28, Auburn detectives visited Phillip and observed that he tried to conceal his right hand, which was covered in part by a bloodstained Band-Aid. Phillip stated that he injured his hand at work. Phillip refused to answer any questions about when he was last in Auburn. On June 2, detectives again visited Phillip. The detectives observed that Phillip had a 1-2 inch cut on his right hand when he opened the door. Phillip covered the cut before talking with the detectives. Phillip again refused to answer any questions about Auburn. On June 9, detectives learned that zip ties consistent with the type

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found at the crime scene were available at Phillip's work and commonly used in his job duties. A coworker stated that Phillip had injured his hand at work in May but the accident did not break the skin or cause any bleeding.

We conclude that, when viewed with the tainted information excised, the affidavit taken as a whole established probable cause to believe that Phillip was probably involved with Frankel's murder and that evidence of the crime would be found in Phillip's apartment or motorcycle. The affidavit also established probable cause to seize Phillip's cell phone and to seize his person for evidence that the injury to his right hand was related to the crime.

However, the provision in the Washington warrant issued in June 2010 and authorizing search of Verizon records concerning the phone number that Phillip dialed on the night of the crime was not valid. The phone number was known to police from Phillip's unlawfully obtained phone records. Absent that information, there was no probable cause to search phone records for that number.<sup>3</sup>

We next examine whether the police would have sought the warrant even without knowing the information contained in the unlawfully obtained cell phone records. Eserjose, 171 Wn.2d at 928. Phillip asserts that absent those records the police would not have sought the subsequent warrants. We disagree.

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<sup>3</sup> We conclude that the remaining provisions of the warrant are valid under the doctrine of severability. State v. Maddox, 116 Wn. App. 796, 807-09, 67 P.3d 1135 (2003)).



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Police obtained the cell phone records from AT&T on June 20. The facts in the affidavit amply demonstrate that Phillip was a person of interest under active investigation prior to that date.<sup>4</sup> We conclude that based on the information gathered in their investigation prior to June 20, the police had probable cause to believe Phillip was involved in the crime and would have sought the additional warrants even without knowledge of cell phone records. The trial court did not err in admitting the evidence obtained from executing the warrant on Phillip's apartment and vehicle.

Under the same analysis, the November 2010 warrant authorizing search of Phillip's DNA was also valid. The warrant affidavit incorporates the previous warrants and additionally states that the bloodstained towel recovered from the murder scene had yielded a partial DNA sample from an unknown male.<sup>5</sup> Police did not have a known sample of Phillip's DNA to compare with the sample obtained from the crime scene.

We conclude that the trial court did not err in denying Phillip's motion to suppress the evidence seized in executing the warrants for Phillip's apartment, motorcycle, email, cell phone, person, and DNA. But because the trial court erred in denying Phillip's motion to suppress his phone records and the cell phone

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<sup>4</sup> Phillip places great weight on a detective's statement that, at the time police requested the warrant for Phillip's phone records on May 27, they "didn't really have any suspects." App. Br. at 23-24; Reply Br. at 4. But Phillip does not account for the additional information revealed through investigation after police requested the warrant but before they obtained the phone records.

<sup>5</sup> In considering the November 2010 warrant authorizing search of Phillip's DNA, we excise information obtained from the search of Verizon records for the number that Phillip dialed on the night of the crime.

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records related to the number Phillip dialed on the night of the crime, we reverse and remand for further proceedings. We do not reach Phillip's arguments that the trial court erred in denying his motion to dismiss for juror misconduct or in requiring Phillip to appear in restraints at sentencing.<sup>6</sup>

*Reversed and remanded.*

WE CONCUR:

*Capporich, J.*

*Spears, J.*

*Becker, J.*

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<sup>6</sup> We note, however, that the latter issue arose below before our decision in State v. Walker, 185 Wn. App. 790, 344 P.3d 227 (2015) rev. denied, 183 Wn.2d 1025, 355 P.3d 1154 (2015).

## **APPENDIX B**

The Verbatim Report of Proceedings consists of 69 volumes, identified in this brief as follows:

<b>RP NUMBER</b>	<b>HEARING DATE</b>
1RP	5/4/2012
2RP	5/18/2012
3RP	4/5/2013
4RP	7/12/2013
5RP	7/25/2013
6RP	8/9/2013
7RP	9/9/2013
8RP	9/30/2013
9RP	10/15/2013
10RP	10/16/2013
11RP	10/17/2013
12RP	10/21/2013
13RP	10/22/2013
14RP	10/23/2013
15RP	10/25/2013
16RP	10/28/2013
17RP	10/29/2013
18RP	10/30/2013
19RP	10/31/2013
20RP	11/4/2013
21RP	11/19/2013
22RP	11/20/2013
23RP	11/21/2013
24RP	11/25/2013
25RP	11/26/2013
26RP	11/27/2013
27RP	12/3/2013
28RP	12/4/2013
29RP	12/5/2013
30RP	12/9/2013
31RP	12/10/2013
32RP	12/11/2013
33RP	12/12/2013
34RP	12/16/2013

35RP	12/17/2013
36RP	12/18/2013
37RP	12/20/2013
38RP	2/7/2014
39RP	2/21/2014
40RP	2/24/2014
41RP	2/25/2014
42RP	2/26/2014
43RP	2/27/2014
44RP	3/3/2014
45RP	3/4/2014
46RP	3/5/2014
47RP	3/6/2014
48RP	3/10/2014
49RP	3/11/2014
50RP	3/12/2014
51RP	3/13/2014
52RP	3/17/2014
53RP	3/18/2014
54RP	3/19/2014
55RP	3/20/2014
56RP	3/24/2014
57RP	3/25/2014
58RP	3/26/2014
59RP	3/27/2014
60RP	3/31/2014
61RP	4/1/2014
62RP	4/2/2014
63RP	4/3/2014
64RP	4/7/2014 (reporter Chatelain)
65RP	4/7/2014 (reporter Townsend)
66RP	4/8/2014
67RP	4/9/2014
68RP	4/11/2014
69RP	6/27/2014

**APPENDIX C**

March 22, 2012, affidavit for search warrant  
CP 131-35

## SUPERIOR COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON )  
                           ) SS.  
 COUNTY OF KING      )

NO. 12-1104

## AFFIDAVIT FOR SEARCH WARRANT

The undersigned by oath states: I believe that:

- Evidence of the crime of Murder 1<sup>st</sup> Degree
- Contraband, the fruits of the crime, or things otherwise criminally possessed, and
- Weapons or other things by means of which a crime has been committed or reasonably appears to be committed, and
- A person for whose detention there is probable cause, or who is unlawfully restrained

is/are located in, on, or about the following described premises, vehicles or person:

My belief is based upon the following facts and circumstances:

Your affiant, Detective Anna Weller, has been a commissioned law enforcement officer for the past thirteen years. I am employed by the City of Auburn Police Department and I am currently assigned to the Detective division in the Major Crimes Unit.

This Affidavit for Search Warrant pertains to Auburn Police Department case number 10-06048, a currently charged case in King County Superior Court (State of Washington v. William Phillip, Jr., #10-1-09730-5), assigned to the Honorable Beth Andrus for trial on June 20, 2012.

On May 27, 2010, a search warrant was sought to obtain a variety of records, including "subscriber information, billing records, all cell tower site records, text messages sent and received, as well as call logs for the period of time beginning April 1, 2010 and ending May 26, 2010 related to [the defendant, William Phillip, Jr.'s] AT&T cellular phone number 503-381-8057." The search warrant was approved on May 27, 2010 by King County Superior Court Judge, the Honorable Brian Gain. The Affidavit for Search Warrant and the signed Search Warrant are attached and incorporated by reference.

I faxed a copy of the warrant to AT&T's legal department on May 29, 2010. AT&T responded to the search warrant on June 20, 2010 by emailing me the requested information/records.

Affidavit for Search Warrant

1 of 5

WLP001800

Recently, I was contacted by Wyman Yip, the Senior Deputy Prosecuting Attorney currently assigned to this case. He suggested that I draft this supplemental affidavit because I failed to include some information known to me at the time I drafted the May 27, 2010 affidavit. This additional information, which I had on May 27, 2010, is still true today and none of it is derived, in any way, directly or indirectly, by the A&T records sought by the May 27, 2010 search warrant.

The information known to me on 5/27/2010 that I failed to include in the original search warrant affidavit I submitted to Judge Gain on that day is as follows:

1. When Auburn police officers first arrived at Seth Frankel's residence (102 D St. NW, Auburn, WA) on May 22, 2010, the front and back doors were both locked. Firefighters forced entry via the front door to tend to Frankel, whom they discovered was deceased. Police conducted a visual inspection of the three doors which allow entrance into Frankel's residence and none of them appeared to have any evidence of forced entry, except for the damage done by the firefighters to the front door.

2. Frankel's body was found in the living room, lying near the front door. The only sign of disturbance was in the living room - a small, overturned table, blood stains on the carpet, and playing cards scattered on the floor. The rest of the residence appeared to be clean and orderly. None of the rooms in the residence appeared to have been ransacked through. In the living room, an Apple iMac computer, a television, and a Wii video game console remained undisturbed. On the kitchen counter were Frankel's car keys and wallet, containing credit cards and cash. There was no evidence to suggest that taking Frankel's property was a motive for the murder.

3. On May 22, 2010, Frankel's girlfriend, Bonny Johnson, was interviewed by Auburn Police Detectives Blake and Jones. During that interview, Johnson told the detectives that she and the defendant (who she knows as "JR") were co-workers and had previously dated. She said she last saw the defendant a month and a half ago. During that meeting, Johnson said, the defendant was mooping and expressed his love for Johnson. Johnson told him that she had moved on. Johnson also told the detectives that the defendant is the only person she knows who has ever spoken ill of Frankel, calling him "old and ugly." Johnson said she told the defendant that she would stop talking to him if he kept disparaging Frankel. Johnson also told police that the defendant previously served in the military, possibly the Marines, doing a tour in Iraq. She also mentioned that the defendant owned a motorcycle, but not a car.

4. Via Johnson's consent and a search warrant, Auburn Police obtained Johnson's cellular phone records on 5/25/10. During the review of those records, police discovered that Johnson's text message conversations were primarily with Frankel, "JR", and an individual identified as "Jeanes." It appeared that Johnson had some sort of romantic relationship with each of these three individuals. Some of the text messages between Johnson and "JR" are provided below.

Text messages sent by "JR" to Johnson on the days leading up to day of Frankel's homicide:

73	+15033818057	JR	05/17/10 22:32:28 (GMT-7)	Read	Inbox	Incoming	I miss you, B. I'm really hoping you have time for me next weekend.
74	+15033818057	JR	05/17/10 23:54:26	Read	Inbox	Incoming	Hi, remember me?
86	+15033818057	JR	05/18/10 17:09:20 (GMT-7)	Read	Inbox	Incoming	Don't forget about me now.
87	+15033818057	JR	05/18/10 21:03:22 (GMT-7)	Read	Inbox	Incoming	Damn, she forgot about me.
88	+15033818057	JR	05/18/10 08:05:48 (GMT-7)	Read	Inbox	Incoming	Dreamt I was fooling around with Demi Moore. That's definitely not in my dream dictionary. What do you think it means?
89	+15033818057	JR	05/19/10 08:09:02 (GMT-7)	Read	Inbox	Incoming	I've been a very naughty boy, you'd think I'd deserve a spanking. How do you do, Ms. Johnson? You ever going to get back to me bout this weekend?
91	+15033818057	JR	05/18/10 08:13:45 (GMT-7)	Read	Inbox	Incoming	Take your time, sweetheart. It's gonna be a slow day. And not so much a whisper as she rolled me off the bed and the floor wake me up.
94	+15033818057	JR	05/19/10 15:09:21 (GMT-7)	Read	Inbox	Incoming	I'm still hoping to hear from you about this weekend, you know. Call me, yeah?

Text messages sent by "JR" to Johnson on the actual day of Frankel's homicide:

109	+15033818057	JR	05/21/10 11:01:00 (GMT-7)	Read	Inbox	Incoming	I imagine he's young and hot, in which case, if you wanna be like Bo you'll have to ditch that un-hot, big man you're attached to.
110	+15033818057	JR	05/21/10 11:18:00 (GMT-7)	Read	Inbox	Incoming	Chill. I didn't mean it derogatorily, just comparatively. You've gotta up your game if you wanna play with the big girls.
111	+15033818057	JR	05/21/10 11:50:00 (GMT-7)	Read	Inbox	Incoming	Yes, but you'd probably be completely wrong. kinda like the whole you being remarkably special.



115	+15033818057	JR	05/22/10 00:25:00 (GMT-7)	Read	inbox		Incoming	I could tell you were trying something a lil' different on air tonight.
117	+15033818057	JR	05/22/10 02:47:00 (GMT-7)	Read	inbox		Incoming	In honor of Ms. Green's birthday I've playing a new drinking game. I just invented, my left hand versus my right... eh)oy yourself, B.

Text messages sent by Johnson to "JR" on the day of Frankel's homicide (note that the records below are "GMT" time, while the records above are "GMT-7.")

383	+15033818057	JR	05/21/10 17:52:12 (GMT)	Sent	Sent		Outgoing	I recently found out who Bo Derek is dating and its kind of amazing. I want to be just like her when I grow older...
388	+15033818057	JR	05/21/10 18:12:33 (GMT)	Sent	Sent		Outgoing	Don't talk about him like that to that I mean it
390	+15033818057	JR	05/21/10 18:42:38 (GMT)	Sent	Sent		Outgoing	Shut up, pussy... I could talk more about what older men have versus the younger hothead, but I thought it would be rude...


5. On May 25, 2010, Portland Police Detective Ken Wattum went to the defendant's residence to speak with him. The defendant would not allow Det. Wattum into his residence, but they spoke outside for approximately 3 to 4 minutes. During this brief conversation, the defendant admitted to knowing Bonny Johnson, but claimed that she was "just a friend." He told Det. Wattum that he had not seen Johnson in weeks; however, he was in recent contact with her via text messaging. Det. Wattum asked the defendant if he had been to Auburn, Washington recently, to which the defendant replied, "I would like to exercise my right to counsel."

6. On May 26, 2010, Auburn Police interviewed Bonny Johnson again. During this interview, Johnson admitted to having a lot of text message communication with the defendant, occasionally multiple times a day. She was again asked if she could think of anyone who would want to hurt Frankel, and she said "all I can think of is JR." Johnson further explained that when she broke up with the defendant, he was extremely upset with her. Johnson admitted that she may have been leading the defendant on by continuing to tell him that she cares about him, even while she dated Frankel. Johnson again reiterated that the last time she saw the defendant, he told her that he loves her.

Based on the information contained in the original affidavit for search warrant dated May 27, 2010 (attached hereto and incorporated by reference herein) and the additional information provided above, that was known to me on May 27, 2010, your affiant requests judicial authority

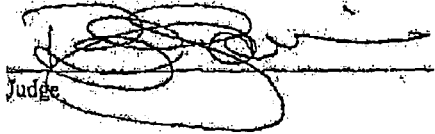
to seize subscriber information, billing records, all cell tower site records, text messages sent and received, as well as call logs for the period of time beginning April 1, 2010 and ending May 26, 2010 related the defendant, William Phillip, Jr.'s AT&T cellular phone number 503-381-8057.

I certify (or declare) under the penalty of perjury, under the Laws of the State of Washington, that the foregoing is true and correct.

 Affiant

Det. Anna Weller, #9144  
Auburn Police Department

SUBSCRIBED AND SWORN TO BEFORE ME THIS 22<sup>nd</sup> DAY OF March, 2012.

  
Judge

Issuance of Warrant Approved:

By: DPA Wyman Yip  
Deputy Prosecuting Attorney  
King County Prosecutor's Office

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Nancy Collins, the attorney for the respondent, at Nancy@washapp.org, containing a copy of the Petition for Review, in State v. William L Phillip, Jr., Cause No. 72120-8, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 2nd day of November, 2016.

UBrame

Name:

Done in Seattle, Washington