

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

ROCKINGHAM, SS.

JUNE, 2025

STATE OF NEW HAMPSHIRE

v.

GENO MARCONI

218-2024-CR-1426

MOTION TO SUPPRESS WARRANTLESS SEARCH OF VOICEMAIL
ASSOCIATED WITH DEFENDANT'S PERSONAL PHONE NUMBER

NOW COMES the defendant, Geno Marconi, by and through counsel, Richard E. Samdperil and Joseph E. Welsh, and moves this Court suppress any evidence obtained by the Attorney General's Office without a warrant and without the defendant's authorization or consent. State investigators searched Mr. Marconi's work phone pursuant to a consent form executed by the Pease Development Authority (PDA) Executive Director. However, the consent form only authorized a search of the PDA phone number associated with the device, not a new personal phone number Mr. Marconi obtained *after* being placed on leave. The PDA consent form did not authorize a search of information associated with Mr. Marconi's private cell phone number. Even if it had, Mr. Marconi had a reasonable expectation of privacy in information associated with his personal phone number and the Executive Director lacked the authority to consent to a search of that information.

As further grounds for this Motion, the following is stated:

BACKGROUND

1. Since 2002, Geno Marconi has served as the Director of the Division of Ports and Harbors. *See* Rsa 12-G:43, II. The Division of Ports and Harbor is a division within the Pease Development Authority ("PDA") as set forth in RSA Chapter 12-G generally and as defined by RSA 12-G:43, I.
2. In connection with this position as Ports Director, Mr. Marconi was provided a cell phone. Indeed, over the years, the PDA provided Mr. Marconi with several phones.
3. On April 18, 2024, Mr. Marconi was placed on paid administrative leave. Mr. Marconi was not given any information about why he was being placed on administrative leave or the subject matter of the investigation beyond that it was criminal in nature.
4. At the time Mr. Marconi was placed on leave, the cell phone number associated with the PDA phone was [REDACTED]-[REDACTED]-0[REDACTED]3.
5. Upon information and belief, after placing Mr. Marconi on administrative leave, the PDA disconnected or suspended the phone line and Mr. Marconi was unable to continue using the number ending in 0[REDACTED]3.
6. Also on April 18, 2024, after being placed on administrative leave, Mr. Marconi set up a private account with Verizon and obtained a new personal phone number, [REDACTED]-[REDACTED]-8[REDACTED]4. The new phone number was initially set up on the PDA device.

7. On April 23, 2025, Mr. Marconi purchased a new phone and transferred the new [REDACTED]-[REDACTED]-8[REDACTED]4 number to the device. He subsequently returned the PDA phone to the PDA.

8. In the fall of 2024, Mr. Marconi was indicted on six offenses, including Falsifying Physical Evidence (Charge ID: 2257802C) contrary to RSA 641:6, I and Obstructing Government Administration (Charge ID: 2257803C) contrary to RSA 642:1, I. Both indictments allege that “on or about the 22nd day of April, 2024,” Mr. Marconi committed the offense “by deleting a voicemail and/or voicemails from a phone;...” The indictments themselves do not identify what “phone” or phone number the voicemail or voicemails were deleted from.

9. According to a digital evidence report provided by the State in discovery, State Police examined the phone after it was returned and determined that there were three voicemails from two different individuals that were deleted from the phone number ending in 8[REDACTED]4. The voicemails appear to be 5, 12 and 17 seconds in length. The callers who left the voicemails are identified, but are neither N.L. nor B.C, the only two individuals identified in Mr. Marconi's other charges.

10. For purposes of this motion, the defense presumes that the three voicemails received on the [REDACTED]-[REDACTED]-8[REDACTED]4 number and referenced in the digital evidence report are the “voicemail and/or voicemails” referenced in the indictments.

ARGUMENT

11. The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. const. amend. IV; *see Carpenter v. United States*, 585 U.S. 296, 304 (2018). The Founders designed the Fourth Amendment as a “response to the reviled ‘general warrants’ and ‘writs of assistance’ of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity.” *Carpenter* at 304. “The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government, without regard to whether the government actor is investigating crime or performing another function,” such as “act[ing] in its capacity as an employer.” *City of Ontario v. Quon*, 560 U.S. 746, 755-56 (2010) (quotations omitted).

12. Part I, Article 19 of the New Hampshire Constitution also provides that every person has a right “to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions.” N.H. Const. Pt I, art. 19; *see State v. Goss*, 150 N.H. 46, 48 (2003). Article 19 safeguards privacy and protection from government intrusion and offers greater protection than its federal counterpart. While the Fourth Amendment exclusionary rule is limited to deterring police misconduct, *See Mapp v. Ohio*, 367 U.S. 643, 656 (1961), under Article 19 this is not the rule’s sole purpose. *See State v. Canelo*, 139 N.H. 376, 386 (1995). Rather, in New Hampshire, the exclusionary rule serves “to redress the injury to the privacy of the search victim and guard compliance with the probable cause requirement of part I, article 19.” *Id.*

“Enforcement of the rule places the parties in the position they would have been in had there been ... no violation of the defendant's constitutional right to be free of searches and seizures made pursuant to warrants issued without probable cause.” *Id.* (citations and brackets omitted).

13. Although cell phones did not exist when these constitutional provisions were written, they and their contents are precisely the type of personal effects and private possessions that these provisions protect: “Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans ‘the privacies of life.’” *Riley v. California*, 573 U.S. 373, 403 (2014). The normal safeguard for protecting a person’s private effects and possessions is a warrant, obtained from a neutral and detached magistrate, based upon probable cause, and identifying with specificity the evidence sought, or information believed to be present. *See generally, Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *State v. Cannulli*, 143 N.H. 149, 452 (1998). None of that was done here.

14. For the reasons below, this Court should find that the PDA Executive Director did not authorize a search of Mr. Marconi’s private phone line, and if he did, such a warrantless search violated Mr. Marconi’s right to privacy since this was private phone line obtained by Mr. Marconi after he was placed on administrative leave. While the Court should find that this warrantless search lacked probable cause and was an unauthorized governmental intrusion under both the federal and State constitutions, it should specifically exclude such evidence from trial in order to vindicate Mr. Marconi’s

right to privacy as protected by Article 19.

- A. The Attorney General's Office exceeded the scope of any lawful authority to search that was granted by the PDA.

15. On May 15, 2024, Stephen Johnson, an investigator with Attorney General's Public Integrity Unit, obtained the signature of Paul Brean, Executive Director of the PDA, on a form entitled "Consent to Seize and Search Cell Phone(s)" (the "Consent Form"). The process and manner by which Johnson requested and obtained Brean's consent is unknown, since he did not write a report about this, or about most of his investigative work in this case (with some minor exceptions)¹.

16. The Consent Form specifically authorizes the search of an Apple iPhone with "Cell Phone #: [REDACTED]-[REDACTED]-0[REDACTED]3". The Consent Form does not reference the [REDACTED]-[REDACTED]-8[REDACTED]4 number.

17. "A voluntary consent free of duress and coercion is a recognized exception to the need for both a warrant and probable cause." *State v. Livingston*, 153 N.H. 399, 405 (2006). The State bears the burden of proving, by a preponderance of the evidence, that the consent was free, knowing and voluntary. *State v. O'Brien*, 175 N.H. 697, 700 (2023). The voluntariness of the consent is a question of fact determined by examining the totality of the circumstances. *State v. Johnston*, 150 N.H. 448, 453, 839 A.2d 830 (2004).

¹ According to the Department of Justice Law Enforcement Manual (2020 ed.), "Report writing is a critical part of every law enforcement officer's job. A report is the way an officer communicates information about his or her activities to others, and preserves information for future use. Police reports are routinely provided to the defendant's lawyer in discovery."

18. Consent to search is valid against a defendant when conferred by a third party with “common authority over or other sufficient relationship to the premises or effects sought to be inspected.” *United States v. Matlock*, 415 U.S. 164, 171 (1974); *see also, State v. Collins*, 133 N.H. 609 (1990). However, even when a defendant's private employer has such authority and supplies third-party consent to search business instrumentalities, the scope of the authorized search is limited by what is authorized. *See United States v. Ross*, 456 U.S. 798. (1982) (“The scope of a search is generally defined by its expressed object”); *State v. Saunders*, 164 N.H. 342 (When the police are relying upon consent as a basis for their warrantless search, they have no more authority than they have been given by the consent).

19. In this case, the scope of the Consent Form authorization was clear: “Cell Phone #: [REDACTED]-[REDACTED]-0[REDACTED]3”. Director Brean may have submitted to a search of the PDA phone device, but he never explicitly authorized a search of Mr. Marconi’s private phone number. To the contrary, the express object of the phone number in the Consent Form was the PDA phone number. The Attorney General’s Office, choosing not to seek a warrant and lacking probable cause to search, should have therefore limited its warrantless search of the device to what the PDA director specifically authorized, “Cell Phone #: [REDACTED]-[REDACTED]-0[REDACTED]3”. Because it did not, any alleged evidence obtained as a result of this unauthorized and unlawful search should be suppressed.

B. The PDA lacked the authority to consent to a search of Mr. Marconi's private phone number.

20. Even if the PDA Director had consented to the Attorney General's Office conduct a search of Mr. Marconi's personal phone number, he had no authority to do so. Mr. Marconi had a reasonable expectation of privacy in his personal phone number, which he obtained after being placed on administrative leave.

21. In *Katz v. United States*, 389 U.S. 347, 351 (1967) the Supreme Court articulated the Fourth Amendment right to privacy by stating, "[t]he Fourth Amendment protects people, not places." "As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes," the Supreme Court has sought to preserve individual privacy and apply Fourth Amendment protections against expanded government intrusion. *See e.g., 's Riley*, 573 U.S. at 384 (holding that police must generally obtain a warrant before searching the contents of a phone even when search incident to arrest may allow the search of other objects or containers on the arrestee's person).

22. Under the Fourth Amendment, a person has a reasonable expectation of privacy when that individual "seeks to preserve something as private," and the expectation of privacy is "one that society is prepared to recognize as reasonable." *Smith v. Maryland*, 442 U.S. 735, 740 (1979). Official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause. *Carpenter* at 304.

23. In *State v. Goss, supra*, the New Hampshire Supreme Court recognized a reasonable expectation of privacy test under Part I, Article 19 of the New Hampshire Constitution and adopted the same two-part test. *Id.*, 150 N.H. at 49. Again, this is an area where Article 19 offers greater protection than its federal counterpart. In *Goss*, the Court concluded that the defendant exhibited an actual expectation of privacy in his trash because he placed it in black plastic bags with the expectation it would be picked up by authorized persons for eventual disposal. *Id.* The *Goss* Court also held that “society is prepared to recognize that expectation as reasonable” despite the United States Supreme Court’s refusal to do so. *See id.* (holding that “We are free ... to construe our State Constitution to provide greater protection than the Federal Constitution” and declining to accept the United States Supreme Court holding in *California v. Greenwood*, 486 U.S. 35, 41 (1988)).

24. Deleted voicemails sent to a private phone number are trash, no different than garbage put out on a public curb, and the Attorney General’s Office should have obtained a warrant before searching Mr. Marconi’s personal phone information.

25. This Court should reach this conclusion regardless of whether the PDA had the legal authority to review other content on the phone because even government employees have a reasonable expectation of privacy under the Fourth Amendment.

26. Although the Fourth Amendment constrains the government when it acts in its capacity as an employer, “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable for legitimate work-related, noninvestigatory intrusions as well as investigations of work-

related misconduct.” *O'Connor v. Ortega*, 480 U.S. 709, 725 (1987). In lieu of the Fourth Amendment's default warrant and probable cause requirement, intrusions by public employers on their employees' constitutionally protected privacy interests are “judged by the standard of reasonableness under all the circumstances.” *Id.* at 725-726. The search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the misconduct. *Id.* at 726 (quotations and citations omitted). For this reason, “the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis.” *Id.* at 718; *see also, State v. Gates*, 173 N.H. 765, 771 (2020) (also applying a case-by-case analysis “considering the unique facts of each particular case”). In *O'Connor*, the Supreme Court determined that the plaintiff – a physician at a public hospital – had a reasonable expectation of privacy in his desk and file cabinets because (1) he did not share them with other employees; (2) he occupied the office for a long period of time and kept certain items in the office that were unconnected to his employment, including personal correspondence and financial records; and (3) the hospital had no established regulation or policy discouraging employees from storing personal items in their desks or file cabinets. *Id.* at 718-719.

27. In *City of Ontario v. Quon, supra*, the question was whether the city had violated the Fourth Amendment rights of a police officer by reviewing text messages that he had sent and received on a pager provided by the city. *Id.*, 560 U.S. at 750. The Supreme Court considered several factors that could inform a determination regarding whether the employee had a reasonable expectation of privacy in his text messages,

including whether the city had given the employee notice that his text messages could be searched and the nature of the city's reasons for reviewing the messages. *Id.* at 758.

Although the Court declined to say whether the employee had a reasonable expectation of privacy in the text messages, it concluded that it was necessary to “proceed with care” because of the “difficulty predicting how employees’ privacy expectations will be shaped by ... changes [in technology] or the degree to which society will be prepared to recognize those expectations as reasonable.” *Id.* Ultimately, the Supreme Court assumed that there *was* a reasonable expectation of privacy and resolved the case on other grounds. *Id.* at 760.

28. Even under the lower Fourth Amendment standard, Mr. Marconi had a reasonable expectation of privacy in his new, personal phone number: The phone number was not a number issued to Mr. Marconi by the PDA; the phone number was obtained by Mr. Marconi after he was placed on administrative leave. The number was not something Mr. Marconi used while active in his capacity as Port Director or shared by the PDA with other employees. The number was not surrendered to the PDA when Mr. Marconi returned the phone; it was transferred to his personal device. All of these facts demonstrate that the voicemails were received on a phone number Mr. Marconi sought to preserve as private and that his expectation of privacy was “one that society is prepared to recognize as reasonable.” *See Smith*, 442 U.S. at 740; *Goss*, 150 N.H. at 49.

29. Accordingly, under both the federal and State constitutional standards, the PDA lacked authority to consent to a search of Mr. Marconi’s private phone number and

the State's subsequent warrantless search of information related to that number should be suppressed.

CONCLUSION

30. The State made no pretense of having probable cause and made no effort to secure a judicial warrant. Instead, the State relied upon the fact that the device was the property of the PDA, and presumably under the specter of a criminal investigation, obtained the PDA Executive Director's consent to search the device. In doing so, the State both exceeded the scope of the authority it was given by the PDA Director, who only authorized a search of "Cell Phone #: [REDACTED]-[REDACTED]-0[REDACTED]3," and violated Mr. Marconi's legitimate expectation of privacy in his person phone number, obtained only after he was placed on administrative leave.

WHEREFORE, the defendant, Geno Marconi, respectfully requests this Court to grant this Motion; and

- a) Suppress any alleged evidence obtained as a result of the search of Mr. Marconi's private phone number, [REDACTED]-[REDACTED]-8[REDACTED]4; and/or
- b) Schedule a hearing on this matter.

Respectfully submitted,

/s/ Richard E. Samdperil

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CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing Motion for Discovery has been filed this 6th day of June, 2025, via the New Hampshire Judicial Branch electronic case filing system (e-file) with service to registered parties, attorneys Dan Alan Jimenez and Joe Michael Finchman of the New Hampshire Attorney General's office.

/s/ Richard E. Samdperil
Richard E. Samdperil