

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

APRIL TERM 2024

STATE OF NEW HAMPSHIRE
V.
DANIELLE DAUPHINAIS

226-2021-CR-0944

STATE'S MOTION IN LIMINE #4 TO ADMIT CONTENTS
OF CELLULAR PHONE (STAPF PHONE 1)

NOW COMES the State of New Hampshire, by and through the Office of the Attorney General, and respectfully requests that this Honorable Court enter an order *in limine* allowing the State to admit as substantive evidence at trial in the above-captioned matter various contents of a cellular phone, referred to herein as Stapf Phone 1, recovered during the investigation to include, as detailed *infra*: (1) statements of a party opponent about or concerning E.L., and/or J.S., (3) statements of co-conspirators about or concerning E.L., and/or J.S. (4) statements related to other crimes.

Specifically, the State seeks to admit in its case-in-chief all statements, images and videos concerning E.L. made, received or sent by the defendant as a party opponent and between the defendant and Stapf as co-conspirators. The State also seeks to admit in its case-in-chief statements, images and videos concerning J.S. made or sent by the defendant as a party opponent and between the defendant and Stapf as co-conspirators. Further, the State is providing notice of its intent to use statements related to other crimes including drug use, drug purchases, and theft

and/or theft scheme in the event that defense opens the door to such information.¹ In support of this request, the State submits that:

I. RELEVANT FACTS²

1. The defendant is currently charged with first-degree murder and related charges for killing E.L. (Age 5) in or around September of 2021 in Merrimack, New Hampshire. The murder charge alleges that Dauphinais did on or between September 27, 2020, through September 24, 2021, commit the crime of first-degree murder by purposely causing the death of E.L. The defendant is also charged with three class B felony counts of tampering with witnesses, and two misdemeanor counts of endangering the welfare of a child for other conduct taken before and after the murder.

2. By way of background, on October 14, 2021, the Merrimack Police Department began an investigation into the whereabouts of E.L., a missing child. E.L. was last known to be in the custody of his mother, Danielle Dauphinais (the defendant), and her boyfriend, Joseph Stapf (Stapf). Based on the investigation, E.L. arrived in New Hampshire in May of 2020, and had resided with the defendant and Stapf in the basement of 7 Sunset Drive in Merrimack, New Hampshire since that time. Stapf's mother, Joanne Stapf, occupied the first floor of the home. The defendant and Stapf had a child together, J.S. (DOB: 07-08-2019) who also resided in the basement apartment.

3. From May 2020, through October 2021, Dauphinais and Stapf each had a cellular phone with active service. Dauphinais' phone number was 603-759-4953 (Dauphinais phone 1), while Stapf's phone number was 603-661-7094 (Stapf phone 1). They utilized their phones over the period of the charged conduct with usage also pre-dating E.L.'s arrival in New Hampshire. They utilized their phones over that time period in order to exchange messages on several topics, including behavior and treatment of E.L., photographs and images of E.L. sent by the defendant to Stapf, behavior and treatment of J.S., arrangements for the purchase of narcotics, ways to

¹ The State would seek to admit this evidence under the "open door" doctrine of "specific contradiction" should the defendant seek to put forth an argument implying or outright stating that Stapf single handedly committed the offense, was a sole aggressor, was abusive/controlling, or was the criminal mastermind. *See State v. Morrill*, 154 N.H. 547 (2006); *see also State v. White*, 155 N.H. 119, 124 (2007) (stating that "specific contradiction" is more broadly applied to situations in which one party has introduced admissible evidence that creates a misleading advantage and the opponent is then permitted to introduce previously suppressed or otherwise inadmissible evidence to counter the misleading advantage.")

² The facts are derived from the Probable Cause Affidavit and other discovery materials provided to defense counsel. The facts included are those relevant to the evidence that is the subject of the State's Motion.

obtain money from Joanne Stapf by deception or outright theft, and general conversation including shopping and money issues. The defendant and Stapf's use of these phones only ended on or about October 15, 2021, when they purchased and activated new phones as discussed *infra*.

4. Based, in part, on the communications between Dauphinais phone 1 and Stapf phone 1, investigators believe that E.L. died between September 21 and September 24, 2021.³ On the morning of September 24, 2021, the following text message conversation took place between the defendant and Stapf over those devices:

9:34:47 A.M. Stapf phone 1: Lol so much! Ugh I feel like a whole load of bricks just was removed off my chest..

9:36:59 A.M. Dauphinais phone 1: Seriously, like i can breathe and be free. I was a prisoner for so long baby. It was hell, it wasn't how I wanted [J.S.] to be raised. She deserves the whole world. We deserve nothing but happiness and health. Time to kick ass and make moves. Time to create a life our beautiful children deserve.

9:41:02 A.M. Dauphinais phone 1: I can't wait to go places with you babe.

5. On October 14, 2021, when questioned about E.L.'s whereabouts, the defendant and Stapf fled New Hampshire, travelling through various cities in Massachusetts including, as relevant to the instant Motion, the cities of Burlington, Ayer, and Abington. At the time that they fled, the defendant and Stapf took their Dauphinais phone 1 and Stapf phone 1 with them.

6. On October 14, 2021, at approximately 3:20 P.M., the defendant and Stapf stopped at DCU bank, located at 379 Amherst Street in Nashua, New Hampshire. Video surveillance showed the defendant on the phone⁴ in the passenger seat of Stapf's red 2007 Toyota Tundra pickup truck (NH registration JOJOB78) while Stapf was in the driver seat. At that location, Stapf used Joanne Stapf's DCU bank debit card to withdraw a total of \$1,000 from Joanne Stapf's checking account.

³ On September 21, 2021, E.L. was mentioned for the last time during a text message conversation between the defendant and Stapf. At approximately 6:29 A.M. that day, the defendant told Stapf to be quiet when he returned to the basement apartment because J.S. was asleep and didn't feel well. She then sent Stapf a message stating "[d]oesn't help that [E.L.] kept waking her up".

⁴ Based on the investigation, the defendant was on the phone speaking with officers from the Merrimack Police Department. During that conversation which occurred at approximately 3:20 P.M., the defendant told Officer Amanda Groves that she and Stapf would be at the police department by 4:30 P.M. (*BS 116*).

7. The defendant and Stapf then stopped at the Target store, located at 34 Cambridge Street in Burlington, Massachusetts. Video surveillance confirmed their presence at that location beginning at approximately 4:29 P.M. At approximately 4:45 P.M. on October 14, 2021, a debit card belonging to Joanne Stapf was used at the Target store in an attempt to purchase two prepaid cellular phones. The debit card transaction was declined. The defendant and Stapf then paid for and activated two SimpleMobile prepaid cellular phones with cash and merchandise cards. Video surveillance showed the defendant and Stapf making the purchase. The investigation found that, upon being activated, the SimpleMobile prepaid phones were assigned phone numbers of 603-233-0827 and 603-233-0548.

8. On October 16, 2021, at approximately 12:32 P.M., an exigency location ping was reported to cellular phone 603-661-7094 (Stapf phone 1). The location ping indicated that the phone was near 5 Littleton Road in Ayer, Massachusetts. Officers from the Ayer Police Department responded to that area and conducted a search for the defendant, Stapf, and E.L., with no success.

9. While officers were conducting the search in the area of Littleton Road, the Ayer Police Department received a 911 call reporting that two juveniles had been fishing at Sandy Pond on Snake Hill Road⁵ in Ayer when they found a cellular phone in the water. One of the juveniles turned the phone on, saw the last name “Stapf” in the contents of the phone and contacted police when a Google search of Stapf’s name showed a news article about E.L. having been reported missing. The cellular phone was recovered by the Ayer Police Department and then turned over to investigators with the New Hampshire State Police, where it was assigned evidence number TLH-1. The phone was searched pursuant to a warrant and found to have active service with an assigned phone number of 603-661-7094, identifying it as Stapf’s cellular phone (Stapf phone 1). In the contact list of the phone, investigators located an entry for “My Wife Boober” with cellular phone number 603-759-4953 (Dauphinais phone 1).⁶

10. On the morning of Sunday, October 17, 2021, Dauphinais and Stapf were located in Bronx, New York; E.L. was not with them. At the time that they were located, officers found

⁵ Snake Hill Road intersects with Littleton Road.

⁶ The State notes that an extensive search was conducted of Sandy Pond and the surrounding area for Dauphinais phone 1, however, that phone was not recovered. In a recorded call on November 4, 2021, at 1:33 P.M., Dauphinais told a person believed to be her sister-in-law, Crystal Dauphinais, that she “doesn’t have her phone because she chucked it in the river because she didn’t want to be tracked.”

them to be in possession of two cellular phones. The phones were searched pursuant to warrants and identified as the two SimpleMobile prepaid cellular phones purchased at the Target store in Burlington, Massachusetts. The phone numbers assigned to those phones were identified as 603-233-0827 (Dauphinais phone 2) and 603-233-0548 (Stapf phone 2).⁷

11. In addition to warrants for the search of the recovered cellular phones, investigators obtained warrants for cell site location and google location data for the phones.

12. Location data for Dauphinais phone 2 and Stapf phone 2 placed those phones in that area of 585 Chestnut Street in Abington, Massachusetts on October 14, 2021, at 11:00 P.M. until October 15, 2021, at 12:52 A.M. Location data also placed Dauphinais phone 2 and Stapf phone 2 at a location near 212 Snake Hill Road in Ayer, Massachusetts on October 15, 2021, at approximately 11:02 A.M. This location is consistent with the location of recovery of Stapf phone 1, discussed *supra*.

13. On or about October 23, 2021, investigators located E.L.'s body buried in a roughly dug, shallow hole in a wooded area in Abington, Massachusetts. The location was in the woods near an apartment complex, located at 585 Chestnut Street, and was consistent with the area where location data placed Dauphinais phone 2 and Stapf phone 2 on October 14, 2021, at 11:00 P.M. until October 15, 2021, at 12:52 A.M.

14. An autopsy of E.L.'s body was performed by Dr. Richard M. Atkinson of the Massachusetts Office of the Chief Medical Examiner. E.L. was found to weigh 19 pounds and to be 3 feet tall. Following the autopsy, Dr. Atkinson determined that the manner of E.L.'s death was homicide, and the cause was violence and neglect, including facial and scalp injuries, acute fentanyl intoxication, malnourishment, and pressure ulcers.

15. On September 29, 2022, Stapf pled guilty to several charges related to his role in the death of E.L. Those charges included Manslaughter, Falsifying Physical Evidence, Tampering with Witnesses and Second-Degree Assault of E.L.

16. During the course of the investigation, a forensic download of Stapf phone 1 was obtained. Pursuant to a warrant, investigators reviewed content of that device from May 2020, when E.L. arrived in New Hampshire until October 2021, when E.L. was reported missing and found dead. A review of the contents of the device found hundreds of text messages sent during

⁷ By separate Motion, the State is also seeking to admit contents of Dauphinais phone 2 and Stapf phone 2 during the trial.

the time period of the charged offense between the defendant and Stapf in which they discussed E.L.

17. These text message conversations discussed, among other topics, E.L.'s behavior, E.L.'s treatment including nourishment, discussions of sending E.L. to the defendant's sister (Tracy Dauphinais), assaults committed against E.L. by the defendant, and E.L.'s physical condition. In several messages, the defendant described her hatred of E.L. and/or sent photographs or videos to Stapf showing E.L.; many of these images appear to be taken not face-to-face with E.L., but of E.L. through a camera monitor or baby monitor. Some videos and photographs show E.L. with J.S. or show J.S. interacting with the defendant and Stapf while E.L. cannot be seen. Other messages discuss behavior of J.S. or describe E.L. as having bothered or woken J.S.

18. There are too many messages to include in this filing however, examples of these messages include:

November 30, 2020:

1:32:47 A.M. Dauphinais phone 1: I fucking hate this child. I want to kill him. I want him dead.

April 8, 2021:

1:55:35 P.M. Dauphinais phone 1: [E.L.] kept fucking crying and wouldn't shut the fuck up. He said he feels like he's never gonna drink again. He's such a fucking asshole. That's all he fucking cares about

1:56:07 P.M. Stapf phone 1: Mhm I know. That is all he gives a shit about. What about us?

April 15, 2021:

6:46:36 P.M. Dauphinais phone 1: He's not my fucking kid. I will never accept him as my son. As far as I know I have 1 boy.

July 11, 2021:

2:40:48 P.M. Dauphinais phone 1: He doesn't listen to what I tell him to do. What else is new. Fucking using the pillow as a bed and curling up in a ball with his bandage all fucked up and his nasty ass touching the tub. Nasty fucking dirty rotten thing he is

July 23, 2021:

3:34:14 P.M. Dauphinais phone 1: I hit him in the head with the shower rod that's

all I did. Sprayed him down. You're gonna lose your shit joe, like you're not gonna stop it's that bad what he did.

3:34:43 P.M. Dauphinais phone 1: He is to be removed from that fucking bathroom immediately

July 24, 2021:

3:37:08 P.M. Dauphinais phone 1: I'm gonna kill this kid joe, fucking screaming on the top of his lungs for fucking water and woke [J.S.] and I up

July 29, 2021:

10:33:18 A.M. Dauphinais phone 1: [J.S.] just fell asleep and here goes [E.L.] fucking crying and banging because his butt hurts. Woke her up and everything

September 7, 2021:

8:58:59 P.M. Dauphinais phone 1: Just whooped the maggots ass.

September 14, 2021:

7:47:09 A.M. Stapf phone 1: Just throw him something to eat. So u don't have to hear him complain.

7:50:48 A.M. Dauphinais phone 1: ... I slapped him and told him to never talk back again and he fucking screamed so loud [J.S.] woke up for a second. I had to go back and lay with her. Kid is fucked.

September 16, 2021:

11:26:48 A.M. Dauphinais phone 1: Every god damn fucking time you leave this fucking piece of shit kid gets so fucking disrespectful. I hate him, I HAAAAATE HIM.

12:04:33 P.M. Dauphinais phone 1: You on your way back yet??? This kid is standing took his mattress away because he's talking back and being a smart mouth. Wouldn't listen to a God damn thing I said. So he is to stand, I don't care what you say. He does not disrespect me at all. He's a fucking rotten kid, inside and out.

12:07:13 P.M. Stapf phone 1: What was he not listening too? And what was he saying? We can not torture him again.

12:08:20 P.M. Dauphinais phone 1: I told him to sit and he kept bending in half. I

told him to sit up and he said he can't and the he told me he doesn't want to. I asked him why can't he listen to me and he said because he doesn't feel like it.

12:08:44 P.M. Dauphinais phone 1: He can stand, that's not torture that's a punishment. Every child stands in timeout.

12:08:53 P.M. Dauphinais phone 1: Fuck him joe no don't care.

12:08:57 P.M. Stapf phone 1: He has a rotten hole in his back babe...

12:09:09 P.M. Dauphinais phone 1: And???

12:09:19 P.M. Dauphinais phone 1: That's his fault

12:09:26 P.M. Dauphinais phone 1: He can't bend in half

12:09:33 P.M. Stapf phone 1: It is obv painful. I know it is his fault.

12:09:38 P.M. Dauphinais phone 1: I just told him to sit that's it.

12:10:01 P.M. Dauphinais phone 1: If he fucking listened it wouldn't be bad. Stop this joe. He's standing and that's final

12:10:11 P.M. Stapf phone 1: IDC

12:10:40 P.M. Dauphinais phone 1: I'm the fucking boss now. He's disrespecting me because YOU let him get away with it. Baby the fucking piece of shit. He can rot in hell

19. A review of the download of Stapf phone 1 also found hundreds of messages related to drug use, drug purchases and thefts. In those messages, the defendant demonstrated that she had an active, participatory role in arranging drug purchases including directing Stapf through finances and telling him when to “go down” to purchase drugs. One such example includes:

December 26, 2020:

4:51:52 P.M. Dauphinais phone 1: We have to go see jose today. We're gonna be Miserable

5:58:14 P.M. Dauphinais phone 1: Ya heard

6:27:01 P.M. Dauphinais phone 1: What we gonna do? Return Elijah's shoes and clothes?

September 1, 2021:

9:26:00 A.M. Stapf phone 1: Can say I have someone coming to look at bathroom. And we have to put money down.

9:26:48 A.M. Dauphinais phone 1: No she wouldn't go for that. She will say she'll pay for them when they're here. It has to be for something she can just go pay.

9:54:26 A.M. Dauphinais phone 1: Tell her you have to go get a medical card to drive the truck. You have to get labs and pay for the card or whatever

9:55:12 A.M. Dauphinais phone 1: Something that she doesn't have to be involved in. Say you got pulled over in work truck and you have to provide medical clearance card or you'll lose your license and job driving truck.

1021:49 A.M. Dauphinais phone 1: We gotta come up with something quick. We need to go down asap.

20. Further, the defendant demonstrated that she had an active, participatory role in organizing thefts from Joanne Stapf in order to finance drug purchases. The defendant developed stories to use in order to fraudulently obtain money from Joanne Stapf, uses Joanne Stapf's bank and/or credit card(s) and arranges transfers of money from Joanne Stapf's accounts to Western Union and other money transfer applications in order for Stapf to pick up money for the purchase of narcotics. There are too many such messages to detail in this filing, but examples would include:

January 16, 2021:

4:42:08 P.M. Stapf phone 1: ... Do the money order??

5:00:17 P.M. Dauphinais phone 1: I can let me know when and how much

5:05:45 P.M. Stapf phone 1: Do like 500. When ever. Just so it ready to go when I get out of here.

5:19:02 P.M. Dauphinais phone 1: Ok

5:47:20 P.M. Dauhpinais phone 1: It asks for an I'd for 500. I found her id should I do it

5:47:42 P.M. Stapf phone 1: Hmmm...idk

5:48:10 P.M. Dauphinais phone 1: We can do \$300

6:10:55 P.M. Dauphinais phone 1: I sent a \$200 one too. So you have two to pick up

6:10:58 P.M. Dauphinais phone 1: It's reviewing transaction. Because I tried to send the \$500 its asking for I'd anyways. I sent it and it's reviewing.

6:14:29 P.M. Dauphinais phone 1: Ref#70011606 \$350, Ref#55842324 \$200, ???ref #46733240 \$350.

6:23:06 P.M. Stapf phone 1: Picked up two.

6:24:28 P.M. Dauphinais phone 1: Did you get the money

6:24:43 P.M. Stapf phone 1: Yes. Two of the ones u sent. Didn't try the third.

6:24:58 P.M. Dauphinais phone 1: Why

6:26:50 P.M. Stapf phone 1: Umm how does mom know....

6:28:53 P.M. Dauphinais phone 1: What you mean??

6:29:13 P.M. Dauphinais phone 1: How could she know???

6:30:31 P.M. Dauphinais phone 1: I don't get how she would know anything.

21. On September 29, 2022, Stapf pled guilty to several charges related to his role in the death of E.L. Those charges included manslaughter, falsifying physical evidence, tampering with witnesses and second-degree assault of E.L.

II. LEGAL ANALYSIS

22. As indicated *supra*, the State intends to introduce various statements of the defendant (as party opponent) related to E.L. and/or J.S. and of Stapf, the defendant's co-conspirator, made during and in furtherance of the conspiracy. The statements that the State seeks to admit consist of hundreds of text messages, as well as several photographs and videos contained in Stapf phone 1 which are discussed in the fact section above and referenced *infra* include statements made by the defendant in conversation with co-conspirator, Stapf. The statements at issue in the current Motion specifically relate to the content of communications between the defendant and Stapf utilizing cellular phones identified as Dauphinais phone 1 and Stapf phone 1 between September 27, 2020, and October 15, 2021. The content of these communications were recovered from Stapf phone 1 in light of the fact that Dauphinais phone 1 was discarded by the defendant and not recovered.

23. Further, the State is also seeking to admit certain statements of the defendant and Stapf related to other crimes evidence of drug use and theft or theft scheme should the door be opened to that evidence.

A. Defendant's statements are admissible statements of a party opponent.

24. All statements of the defendant contained in /recorded by Stapf phone 1 are admissible as admissions of a party-opponent. N.H. R. Evid. 801(d)(2) provides that a prior, out-of-court statement is not hearsay where it was made by the opposing party. The defendant's statements include messages, videos and photographs.

25. In this evidentiary context, the defendant's statements during E.L.'s life where she communicated with Stapf about E.L.'s behavior, nutrition, condition and treatment constitute statements of a party opponent. These statements will be "offered against the party," and thus do not constitute hearsay under the pertinent rules of evidence. N.H. R. Evid. 801(d)(2); *State v. Belonga*, 163 N.H. 343, 359 (2012).

26. To the extent that statements related to treatment, nutrition, condition, or behavior of E.L. constitute separate criminal acts from the murder of E.L., these acts are intrinsic to the charged offense of murder. E.L. weighed only 19 pounds when he was located. The medical examiner opined that E.L.'s body showed a marked loss of skeletal muscle and of subcutaneous fat. E.L. was observed to have injuries to his face and scalp at the time of his death in addition to blunt force injuries, pressure ulcers on his back and heels, and evidence that he had hypothermia. The medical examiner would testify that some of the face and scalp injuries observed during autopsy were present in a photograph sent by the defendant to Stapf on September 11, 2021. In the instant case, E.L. died as a result of physical abuse and malnourishment which took place over a lengthy period of time; this lengthy period of time is evidenced by the time period of the charged conduct. Further, many of the defendant's statements refer to her feelings towards E.L. and her treatment of him which are relevant and probative to the charged conduct.

27. The New Hampshire Supreme Court discussed intrinsic evidence in *State v. Papillon*, 173 N.H. 13 (2020). In that case, the Court held that other act evidence is intrinsic when the evidence of the other act and the evidence of the crime charged are inextricably intertwined." *Id.* at 25 (internal quotations omitted). The Court stated that "[t]ypically, such evidence is a prelude to the charged offense, is directly probative of the charge offense, arises from the same events as the charged offense, forms an integral part of a witness's testimony, or

completes the story of the charged offense.” *Id.* at 25-26 (internal quotations and citations omitted). *See also State v. Wells*, 166 N.H. 73 (2014), and *United States v. Hardy*, 228 F. 3d 745 (6th Cir. 2000).

28. In this instance, the defendant’s statements as well as the videos and photographs that she sent to Stapf concerning her feelings towards E.L., and about E.L.’s condition, nutrition, and treatment constitute intrinsic evidence and show the jury the complete story of the charged offense. The evidence of these statements as contained in Stapf phone 1 is thereby intrinsic and “admissible under the rationale that events do not occur in a vacuum, and the jury has a right to hear what occurred immediately prior to and subsequent to the commission of the charged act so that it may realistically evaluate the evidence.” *Id.* (internal quotations and citations omitted). *See also Wells*, 166 N.H. 73, 77-78 (2014).

29. The State has filed a separate Motion related to the admission of other crimes evidence pursuant to Rule 404(b) in which the evidence of other crimes is discussed.

B. Stapf’s statements are admissible co-conspirator statements.

30. At trial the State will introduce conversations between the defendant and Stapf through Stapf phone 1 that took place during the period of time relevant to the charged conduct, or between September 29, 2020, and October 15, 2021.

31. All of the statements contained in these conversations between the defendant and Stapf are admissible pursuant to Rule 801(d)(2)(E) of the New Hampshire Rules of Evidence. That Rule provides that a statement is not hearsay if it is offered against a party and is a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

32. The text message conversations between the defendant and Stapf through the content of their cellular phones including Stapf phone 1, Dauphinais phone 2, and Stapf phone 2, with corroboration by cellular location, google location data, and internet search history establish that the defendant and Stapf were co-conspirators. This fact is further established by witness testimony, social media account records and through video surveillance showing the defendant and Stapf’s activities as described herein and otherwise showing their joint flight from the State of New Hampshire.⁸

⁸ In addition, the State has filed a separate Motion seeking to utilize a proffered statement of the defendant from October 21, 2021.

33. A person is guilty of conspiracy if, with a purpose that a crime defined by statute be committed, he agrees with one or more persons to commit or cause the commission of such crime, and an overt act is committed by one of the conspirators in furtherance of the conspiracy.” RSA 629:3, *State v. Gonzalez*, 136 N.H. 354, 356 (1992). The heart of the conspiracy is the agreement among the co-conspirators to commit a crime. Proving that agreement is rarely done with direct evidence of an explicit, spoken agreement or written contract. *See State v. Theodore*, 118 N.H. 548, 551 (1978). The crime of conspiracy at “its very essence is secrecy and concealment and the state [is] entitled to rely on inferences drawn from the course of conduct of the alleged conspirators” to prove its existence. *State v. Gilbert*, 115 N.H. 665, 667 (1975). “To establish a prima facie case of conspiracy, the State is not required to demonstrate an explicit agreement among the conspirators.” *Id.* “A tacit understanding between the parties to cooperate in an illegal course of conduct will warrant a conviction for conspiracy.” *Id.*

34. “The State must also show that one of the conspirators has performed an overt act in furtherance of the conspiracy.” *State v. Kilgus*, 128 N.H. 577, 586-587 (1986) (internal citations and quotations omitted). “The overt act in furtherance of the conspiracy need not be criminal in character, so long as it shows that the conspiracy is at work.” *Id.*

35. The essence of a conspiracy is an agreement, express or tacit, between two or more people to do or cause to be done something the law forbids. *United States v. Rivera-Santiago*, 872 F.2d 1073, 1079 (1st Cir. 1989). “[A] common purpose and plan may be inferred from a development and collection of circumstances.” *Glasser v. United States*, 315 U.S. 60, 80 (1942). The actions, as well as the words of the defendants, are evidence of the existence and scope of a conspiracy. *See Rivera-Santiago*, 872 F.2d at 1079 (citing *United States v. Glenn*, 828 F.2d 855, 857 (1st Cir. 1987)).

i. There is Sufficient Independent Evidence of a Conspiracy.

36. Rule 801(d)(2)(E) allows the admission of out-of-court statements of co-conspirators as non-hearsay statements if “[t]he statement is offered against a party and is . . . a statement made by a co-conspirator of a party during the course and in furtherance of the conspiracy.” This was also the law prior to the adoption of the New Hampshire Rules of Evidence in 1985. *See State v. Colby*, 116 N.H. 791, 793-794 (1976).

37. Under the Rule, co-conspirator statements may be admitted if the court determines that the evidence meets three conditions: (1) there must be independent evidence establishing the existence of the conspiracy; (2) the statement must have been made in furtherance of the conspiracy; and (3) the statement must have been made during the course of the conspiracy. *See Gonzalez*, 136 N.H. at 356 (citing *State v. Gilbert*, 21 N.H. 305, 311 (1981)). In making this determination, the court may consider “any evidence which is otherwise admissible.” *State v. Gibney*, 133 N.H. 890, 897 (1991). Co-conspirator statements can be considered, but do not alone establish the existence of a conspiracy. N.H.R. Evid. 801(d)(2). The proof of the existence of the conspiracy that is required is that of a *prima facie* case. *Gonzalez*, 136 N.H. at 356.

38. In this case, there is independent evidence establishing the existence of a conspiracy and the defendant’s connection to it. As relevant to the current Motion, the conspiracy between the defendant and Stapf’s was ongoing and comprised of their joint efforts.

39. Evidence of the murder is contained in the defendant’s statements related to E.L. located in Stapf phone 1, and in her statements contained in Stapf phone 2 and Dauphinais phone 2. Further, as described *infra*, video surveillance showing the defendant and Stapf’s joint flight from the New Hampshire including their withdrawal of money, purchase of new phones, and their efforts to avoid detection by law enforcement provides additional evidence of her involvement with the murder of E.L. The defendants’ statement to her sister-in-law in a recorded call shows that the defendant intended to avoid authorities, where she stated that she discarded her phone to avoid being tracked.

40. Evidence of the conspiracy would also be established by evidence concerning the defendant and Stapf’s efforts to tamper with witnesses related to the investigation into the whereabouts of E.L. Stapf pled guilty to tampering with a witness, namely Joanne Stapf. Meanwhile, the defendant told authorities conflicting stories about the whereabouts of E.L. and made efforts to provide authorities with witnesses who would confirm those stories.

41. The defendant first told authorities that E.L. was with her sister, Tracy Dauphinais (Tracy), in California. That same day, Tracy told investigators that the defendant contacted her and requested that she tell authorities that E.L. was living with her in California when he was not and had never been in her care. Phone records for Dauphinais phone 1 show that between 8:25

A.M. and 2:18 P.M. on October 14, 2021, there were 105 text messages and 21 outgoing calls of varying lengths between the defendant and Tracy.

42. The defendant then told authorities that E.L. was with her “friend,” Bruce Rolland, in Texas. Authorities were able to identify Bruce Rolland as Bruce Scherzer (Scherzer). Phone records for Dauphinais phone 1 show that between 1:12 P.M. and 3:53 P.M. on October 14, 2021, there were 6 text messages and 8 phone calls between the defendant and Scherzer. At 1:16:18 P.M., the defendant sent Scherzer a text message that said “September 10th Friday you came and got him You drove up and got him.” At 2:30 P.M., Scherzer spoke with investigators and told them that E.L. was living with him. At 7:23 P.M., Scherzer sent a text message to the defendant stating, in part, “I can’t lie to people and say I have your child”. At 8:57 P.M., Scherzer contacted investigators and told them that he did not have E.L. and had said that he did because the defendant asked him to do so.”

43. This evidence, considered together with the defendant’s statements discussed herein and the co-conspirators’ statements is more than sufficient to establish the existence of the conspiracy and the defendant’s connection to it.

ii. The Co-conspirator Statements were Made During and in Furtherance of the Conspiracy.

44. The principal issue in determining if the statement was made in furtherance of the conspiracy is whether the statement promoted, or was intended to promote, the goals of the conspiracy. *United States v. Fields*, 871 F.2d 188, 194 (1st Cir. 1989) (“[t]he declaration[] must have advanced the objectives of the scheme, (citation omitted), but there is ‘no talismanic formula for ascertaining when a conspirator’s statements are ‘in furtherance’ of the conspiracy’”), quoting *United States v. Reyes*, 798 F.2d 380, 384 (10th Cir. 1986); *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1199 (2nd Cir. 1989). As one court concluded, “[i]t is enough that [the statements] be intended to promote the conspiratorial objectives,” not that the statements actually assisted the conspirators in achieving their objectives. *Reyes*, 798 F.2d at 384 (emphasis added). “Rule 801(d)(2)(E) explicitly says statements need to be ‘in furtherance of the conspiracy,’ not that they ‘further the conspiracy.’” *Id.*

45. “To be deemed ‘in furtherance,’ a statement need not be necessary or even important to the conspiracy, or even made to a coconspirator, as long as it can be said to advance the goals of the conspiracy in some way.” *United States v. Ciresi*, 697 F.3d 19, 28 (1st Cir. 2012)

(internal quotation omitted). With respect to whether the statements are made during the course of the conspiracy, the time at which a conspiracy ends depends upon the particular facts of the case. *United States v. Silverstein*, 737 F.2d 864, 867 (10th Cir. 1984); *Woodring v. United States*, 367 F.2d 968, 969 (10th Cir. 1966). “Generally, . . . a conspiracy terminates when its central criminal purposes have been attained.” *Krulewitch v. United States*, 336 U.S. 440, 442–43 (1949); *Silverstein*, 737 F.2d at 867; *Ammar*, 714 F.2d at 253 (a conspiracy is presumed to continue until its objective is achieved).

46. Here, the conspiracy between the defendant and Stapf was not only the death of E.L. but their efforts made to hide his death and their involvement in it. The conspiracy began during E.L.’s life as demonstrated by the defendant and Stapf’s conversations about his treatment, nutrition and condition. The conspiracy continued through his death to their efforts to hide the death and there is no evidence to suggest that the conspiracy was terminated at any point prior to the arrest of the defendant and Stapf. See *United States v. Fields*, 871 D.2d 188 (1989), *United States v. Etheridge*, 424 F.2d 951 6th Cir. 1970). The co-conspirator statements that the State intends to introduce in this case are admissible as they were all made during the course of the charged conspiracy and in furtherance of the charged conspiracy.

iii. The Co-Conspirator Statements can be Conditionally Admitted by the Court.

47. While the State would argue that there is ample evidence presented herein to allow this Court to grant the instant Motion and allow the admission of the requested evidence at trial, the Court could also conditionally admit Stapf’s statements contained in Stapf phone 1.

48. During trial, this Court can conditionally admit co-conspirator statements subject to a “*Petrozziello* determination” at the close of the evidence. *United States v. Ciampaglia*, 628 F.2d 632, 638 (1980). See *United States v. Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977) (courts should only admit co-conspirator statements if it is more likely than not the declarant and the defendant were members of a conspiracy when the hearsay statement was made, and that the statement was in furtherance of the conspiracy). As explained by the *Ciampaglia* court, (a decision which the New Hampshire Supreme Court found “well-reasoned,” (*State v. Favreau*, 134 N.H. 336, 342 (1991))), the procedure for admitting co-conspirator statements is that:

the trial court, upon proper objection, may conditionally admit the declaration. If the declaration is conditionally admitted, the court should inform the parties on the record out of the hearing of the jury that (a) the prosecution will be required to prove by a

preponderance of the evidence that a conspiracy existed, that the declarant and the defendant were members of it at the time that the declaration was made, and that the declaration was in furtherance of the conspiracy, (b) that at the close of all the evidence the court will make a final *Petrozziello* determination for the record, out of the hearing of the jury; and , (c) that if the determination is against admitting the declaration, the court will give a cautionary instruction to the jury, or upon an appropriate motion, declare a mistrial if the instruction will not suffice to cure any prejudice.

Ciampaglia, 628 F.2d at 638.

49. Put another way, *Petrozziello* and progeny explain that a court may admit, upon a proper objection, a co-conspirator statement subject to the statement being “connected up” or being “subject to tie up” at the end of the case. *U.S. v. Machor*, 879 F.2d 945, 950, 951 (1989).

WHEREFORE, the State respectfully requests that this Honorable Court:

- A. Grant the State’s Motion in Limine #4 to Admit the Content of Cellular Phone (Stapf phone 1);
- B. Hold a hearing on this issue; and/or:
- C. Grant such further relief as may be just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorney

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April 15, 2024

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CERTIFICATE OF SERVICE

I certify that on this day I sent a copy of the foregoing to counsel for the defendant through the Court's e-filing system.

April 15, 2024

/s/ Bethany J. Durand

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Assistant Attorney General