

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 #5 TO ADMIT CONTENTS
OF CELLULAR PHONES (DAUPHINAIS PHONE 2/STAPF PHONE 2)**

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 content of two cellular phones, referred to herein as Dauphinais Phone 2 and Stapf Phone 2, recovered during the investigation to include, as detailed *infra*: (1) statements of a party opponent at the time of and concerning the burial of E.L., (2) statements of co-conspirators in furtherance of the crimes charged, and (3) statements and internet activity indicative of consciousness of guilt. In support of this request, the State submits that:

I. RELEVANT FACTS¹

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. Specifically, this 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

¹ 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.

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 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 (defendant), and her boyfriend, Joseph Stapf (Stapf). Based on the investigation, E.L. arrived in New Hampshire in May of 2020, and resided with the defendant and Stapf in a basement apartment at 7 Sunset Drive in Merrimack, New Hampshire from that time until the time of his death. Stapf's mother, Joanne Stapf owned the home and occupied the first floor. 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 also usage pre-dating E.L.'s arrival in New Hampshire and ending on or about October 15, 2021, when they purchased and activated new phones as discussed *supra*.

4. Based, in part, on cellular phone communications between Dauphinais phone 1 and Stapf phone 1, investigators believe that E.L. died between September 21 and September 24, 2021.² 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.

² 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".

9:41:02AM 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. When they fled, the defendant and Stapf took their cellular phones, Dauphinais phone 1 and Stapf phone 1 with them. They fled to Massachusetts, travelling through various cities including, as relevant to the instant Motion, the cities of Burlington, Ayer, and Abington before driving into Connecticut and then travelling on to New York.

6. On October 14, 2021, at approximately 3:20 P.M., the defendant and Stapf stopped at the DCU bank, located at 379 Amherst Street in Nashua, New Hampshire. Video surveillance showed the defendant on the phone³ in the passenger seat of Stapf's red 2007 Toyota Tundra pickup truck (NH registration JOJOD78) 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.

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 showing a possible location for 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.

³ 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*).

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 Road⁴ 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 the search for E.L. The cellular phone was recovered by the Ayer Police Department and turned over to investigators with the New Hampshire State Police where it was assigned evidence number TJH-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 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).⁵

10. On the morning of Sunday, October 17, 2021, the defendant and Stapf were found in Bronx, New York; E.L. was not with them. At the time that they were located, officers found them to be in possession of two cellular phones. The phones were turned over to the New Hampshire State Police and were searched pursuant to warrants. The search of the phones identified them as the two SimpleMobile prepaid cellular phones purchased at the Target store in Burlington, Massachusetts. Consistent with that determination, the phone numbers assigned to those phones were confirmed to be 603-233-0827 and 603-233-0548.

- i. The phone with number 603-233-0827 was assigned evidence number TJH-3. A review of the contents of that device showed that the phone was registered to the name Samantha Housen, with a Google e-mail account of samhousen7819@gmail.com. The phone had only one saved contact which was named “My world, My Love;” the phone number for that contact was 603-233-0548 (the other recovered phone).
- ii. The phone number 603-233-0548 was assigned evidence number TJH-2. A review of the contents of that device showed that the phone number 603-233-0827 (the other recovered phone) was saved as a contact under the name “Baby Girl.”

⁴ Snake Hill Road intersects with Littleton Road.

⁵ 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.”

A second contact “Lawtown Pizza” was saved to this phone with the phone number 617-797-4951.⁶ On October 14, 2021, at approximately 5:50 P.M., a text message was sent from the device to Lawtown Pizza which stated, “Yo it’s Joe new number”. Lawtown Pizza replied “Who” and the device responded with “the silver civic and red truck.”⁷

iii. Based on the above information as well as text message communications between the two phones, 603-233-0827 was identified as the cellular phone used by the defendant (Dauphinais phone 2) while 603-233-0548 was identified as the cellular phone used by Stapf (Stapf phone 2).

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

12. Location data for Dauphinais phone 2 and Stapf phone 2 placed those phones in that area of 585 Chestnut Street in Abington, Massachusetts beginning at approximately 11:00 P.M. on October 14, 2021, until October 15, 2021, at 12:52 A.M. During the time the phones were in that location, investigators found text message communications between the two devices. That communication, which the State is seeking to admit at trial, consisted of the following:

11:28:49 P.M.	Dauphinais Phone 2:	You ok?
11:29:24 P.M.	Stapf Phone 2:	Have to get thru a swamp. Fml
11:29:54 P.M.	Dauphinais Phone 2:	Are you serious
11:36:54 P.M.	Dauphinais Phone 2:	Keep me posted
11:37:22 P.M.	Stapf Phone 2:	This is tough. Big roots. Let me try.
11:37:45 P.M.	Stapf Phone 2:	I have to get it done.
11:37:47 P.M.	Stapf Phone 2:	Ugh
11:45:08 P.M.	Dauphinais Phone 2:	Ok
11:45:14 P.M.	Stapf Phone 2:	Getting there

⁶ The phone number 617-797-4951 was also saved as a contact “Lawtown Pizza” in Stapf phone 1. Based on communications between Stapf and Lawtown Pizza, the individual associated with this number is the defendant and Stapf’s drug dealer who they would meet in Lawrence, Massachusetts. Dauphinais Phone 2 did not have this phone number saved as a contact but the phone log showed 6 outgoing calls from Dauphinais Phone 2 to 617-797-4951 on October 14, 2021, between 11:08 A.M. and 5:16 P.M.

⁷ At the time that the defendant and Stapf fled New Hampshire, they were in Stapf’s red pickup truck. Stapf’s mother, Joanne Stapf owned and allowed Stapf to drive her silver 2020 Honda Civic (NH registration 4DREAMS). Additional messages between Lawtown Pizza and Stapf include a conversation on October 15, 2021, where at 9:03:35 A.M., Stapf writes “I’m in the truck” followed by a message at 9:12:57 A.M. where he writes “I have nh plates”. Location data for both Stapf phone 2 and Dauphinais phone 2 showed the two devices in Lawrence, Massachusetts between 9:15 A.M. and 9:18 A.M. on October 15, 2021.

11:46:39 P.M. Dauphinais Phone 2: We gotta figure out where we're gonna go next

11:48:58 P.M. Dauphinais Phone 2: Doesn't have to be big

11:54:11 P.M. Dauphinais Phone 2: Almost ready?

11:54:27 P.M. Stapf Phone 2: No

11:54:33 P.M. Stapf Phone 2: Thought I heard sumtin

11:57:14 P.M. Dauphinais Phone 2: You're good babe don't worry

11:57:51 P.M. Dauphinais Phone 2: I just don't want to sit here for much longer

12:03:32 A.M. Stapf Phone 2: Getting there baby

12:03:44 A.M. Stapf Phone 2: I'm getting there. Using hands a lot

12:03:55 A.M. Dauphinais Phone 2: How much longer you think?

12:04:12 A.M. Dauphinais Phone 2: It doesn't have to be far down you know

12:10:50 A.M. Dauphinais Phone 2: Miss you already babe. I love you more than anythi

12:15:47 A.M. Stapf Phone 2: I think in gonna go for it now. B patient bby

12:15:33 A.M. Stapf Phone 2: Ugh I love you so so much

12:16:18 A.M. Dauphinais Phone 2: I'm trying babe. I'm comfortable here just miss y

12:16:28 A.M. Dauphinais Phone 2: Do it up babe

12:35:40 A.M. Stapf Phone 2: I'll tell you when to come

12:35:51 A.M. Dauphinais Phone 2: Ok

12:40:47 A.M. Dauphinais Phone 2: You could leave the stuff there. I mean who's gonn

12:41:41 A.M. Stapf Phone 2: Come. No can't do that

12:42:05 A.M. Stapf Phone 2: Make sure we clear

12:43:56 A.M. Stapf Phone 2: Clear? Seeu

12:44:45 A.M. Dauphinais Phone 2: Good

12:44:54 A.M. Dauphinais Phone 2: Dude that went off on it's own

12:45:11 A.M. Stapf Phone 2: Wtf

13. Location data also placed Dauphinais Phone 2 and Stapf Phone 2 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*.

14. On October 15, 2021, at 7:02 P.M., Stapf phone 2 accessed an internet blog post article on a website called VegasTripping.com entitled “Note to Self: Don’t Sleep in Foxwoods Parking Garage When Being Hunted by FBI.”⁸

15. On October 15, 2021, at approximately 7:44 P.M., video surveillance at the Mohegan Sun Casino in Uncasville, Connecticut showed the defendant and Stapf arrive in Stapf’s red pickup truck and enter one of the Casino’s parking garages. At 10:20 P.M., they parked the truck in a parking spot where it would later be found and recovered by police. Video surveillance showed that the occupants of the truck (the defendant and Stapf) remained inside of it until October 16, 2021, at approximately 11:25 A.M. At that time, the defendant and Stapf exited the truck, entered the casino, walked to the bus terminal before leaving on an 11:40 A.M. bus travelling towards New York City. Their movements were captured by video surveillance inside of the Casino and later the bus in which they were travelling.

16. The content of Dauphinais Phone 2 shows that there was internet activity on that device while inside of the Casino parking garage. That activity consisted of web searches as follows:

8:47:12 A.M.	“us marshals most wanted”
8:47:39 A.M.	“us marshals most wanted”
8:47:39 A.M.	“U.S. Marshals warrant list”
8:47:43 A.M.	“U.S. Marshals warrant list”
8:48:57 A.M.	“How do you find out if someone is wanted by the US Marshals”
8:49:02 A.M.	“How do you find out if someone is wanted by the US Marshals”

Further, Dauphinais Phone 2 was used to view the U.S. Marshals Service, Fugitive Investigations Index (<https://www.usmarshals.gov/investigations/index/html>) on October 16, 2021, at 8:49:23 A.M.

17. During this same period, Stapf Phone 2 showed activity which included multiple searches for “merrimack nh”⁹ and the device was used to accessed multiple news outlet articles

⁸ The State notes that Foxwoods Casino is located in Ledyard, Connecticut approximately 20 minutes away from the Mohegan Sun Casino in Uncasville, Connecticut.

⁹ Specifically, “merrimack nh” was searched fifty-two times between 8:39:51 A.M. and 8:40:48 A.M.

about the investigation. Beginning at 1:01 P.M., Stapf Phone 2 showed web searches for Ferries and Trains to New Jersey and New York, as follows:

1:01:53 P.M.	“ferry schedule new jersey”
1:01:53 P.M.	“feery”
101:54 P.M.	“ferry schedule new jersey”
101:54 P.M.	“feery”
1:02:35 P.M.	“train to new york”
1:02:37 P.M.	“train to new york”

Further, the phone showed that Stapf accessed websites related to travel including www.nywaterway.com, www.amtrak.com, www.greyhound.com.

18. 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.

19. An autopsy of E.L.’s body was performed by Dr. Richard 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.

20. 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

21. As indicated *supra*, the State intends to introduce various statements of the defendant (as party opponent) and of Stapf, the defendant’s co-conspirator, made during and in furtherance of the conspiracy. The statements outlined 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 text message

communications between the defendant and Stapf utilizing cellular phones identified as Dauphinais phone 2 and Stapf phone 2, following the murder of E.L. and during the time when these co-conspirators were burying E.L.'s body and fleeing from law enforcement.

22. Further, the State intends to introduce the statements of the defendant as well as the internet search history recovered in Dauphinais phone 2 as evidence of consciousness of guilt.

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

23. All statements of the defendant contained in Dauphinais phone 2 or contained in/recorded by Stapf phone 2 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.

24. In this evidentiary context, the defendant's statements during the time of E.L.'s burial where she communicated with Stapf about his progress digging, how long he would take, advised him as to the depth at which to bury E.L., and told him he should leave "the stuff"¹⁰ there constitute statements of a party opponent. These statements will be "offered against the party," and thus would 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).

25. To the extent that statements related to the burial of E.L. and the burial itself constitute a separate criminal act from the murder of E.L., the act of the burial is intrinsic to the charged offense of the murder.

26. 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

¹⁰ In the context of the discovery in this case, "the stuff" referenced by the defendant would comprise a shovel, the plastic tote and garbage bags in which E.L.'s body was stored prior to burial, and any clothing or bedsheets that were in the garbage bags with E.L.'s body.

omitted). *See also State v. Wells*, 166 N.H. 73 (2014), and *United States v. Hardy*, 228 F. 3d 745 (6th Cir. 2000).

27. In this instance, the burial of E.L.'s body and the defendant's statements concerning the burial constitute intrinsic evidence and show the jury the complete story of the charged offense. The evidence of the defendant's statements concerning the burial of E.L. and of the burial itself 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).

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

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

29. At trial, the State will introduce the text message conversation between the defendant and Stapf through Dauphinais phone 2 and Stapf phone 2 that took place on October 14, 2021, while both devices were at the location where E.L.'s body was buried.

30. All of the statements contained in this conversation 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.

31. The conversations between the defendant and Stapf, with corroboration of the content of Stapf phone 1, cellular location, google location data, and internet search history establish the fact that they were co-conspirators. This fact will further be 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 New Hampshire.¹¹

32. 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

¹¹ In addition, the State has filed a separate Motion seeking to utilize a proffered statement of the defendant from October 21, 2021.

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.*

33. “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.*

34. 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.

35. 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).

36. 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.

37. 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 is ongoing and comprised of their joint efforts to hide the murder of E.L. as demonstrated by their flight from authorities and disposal of E.L.’s body.
38. The State intends to introduce evidence of the murder 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, the State intends to introduce evidence as discussed *infra* of video surveillance showing the defendant and Stapf’s joint flight from the State of New Hampshire including their withdrawal of money, purchase of new phones, and their efforts to avoid detection by law enforcement. The State will show that the defendant intended to avoid authorities by her own statement to her sister-in-law in a recorded call where she stated that she discarded her phone to avoid being tracked.
39. 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.
40. 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.

41. 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 Dauphinis 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.”
42. 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.

43. 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.* “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).

44. 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 did not end and there is no evidence to suggest that the conspiracy was terminated in the month between E.L.’s death and the burial of his body. *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 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.

45. 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 choose to conditionally admit Stapf’s statements contained in Stapf phone 2.
46. 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.

47. 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).

C. Consciousness of guilt.

48. Evidence of the defendant’s consciousness of guilt is a classic form of inculpatory evidence that is presented in criminal trials. Consciousness of guilt is “[t]he awareness of an accused that he or she has engaged in blameworthy conduct, usually as demonstrated by evidence that the accused has tried to avoid the consequences of a crime.” Black’s Law Dictionary (10th Ed.). Such evidence plainly is relevant, probative, and admissible. “The commission of a crime leaves usually upon the consciousness a moral impression that is characteristic. The innocent man is without it; the guilty man usually has it. Its evidential value has never been doubted. The inference from consciousness of guilt to ‘guilty’ is always available in evidence.” 2 Wigmore on Evidence § 173 (Chadbourn rev. 1979).
49. As the New Hampshire Supreme Court has noted generally, “the jury may infer culpability from attempts to cover up involvement or mislead the police.” *State v. Evans*, 134 N.H. 378,387 (2003); *see also State v. Laudarowicz*, 142 N.H. 1, 5 (1997); *State v. Duguay*, 142 N.H. 221,226 (1997). The New Hampshire Supreme Court has further held that “it is beyond dispute that evidence of post-offense flight is probative... of the defendant’s consciousness of guilt.” *State v. Fernandez*, 152 N.H. 233, 242 (2005) (citations omitted).
50. Consciousness of guilt can manifest itself in a wide assortment of actions and statements. “The kinds of behavior which may properly suggest such a cause [consciousness of guilt]

are beyond enumeration; they are as various and as changeable as men's dispositions and emotions." 2 Wigmore § 273. The breadth of evidence that properly may fall under the admissible mantle of "consciousness of guilt" evidence is reflected in New Hampshire jurisprudence. Over the years, our Supreme Court has recognized a variety of words and behaviors as constituting relevant and admissible consciousness of guilt evidence. See *State v. Papillon*, 173 N.H. 13, 29-30 (2020) (flight); *State v. Etienne*, 163 N.H. 57, 85 (2011) (witness tampering); *State v. Brown*, 128 N.H. 606, 615-16 (1986); (suicide attempt); *State v. Evans*, 150 N.H. 416, 420-21 (2003) false exculpatory statements). See generally 2 Wigmore § 276 ("It is universally conceded today that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself."); *State v. Barry*, 93 N.H. 10, 13 (1943) (quoting same).

51. Here, the evidence of the defendant's statements at E.L.'s burial location and her internet searches concerning the U.S. Marshall's Most Wanted List as set forth *supra* constitute relevant and admissible consciousness of guilt evidence.¹² In that regard, the evidence reflects a noticeable and abrupt shift in behavior by the defendant after the victim's murder, and when confronted by investigators in connection with an active and ongoing missing person investigation, the subject of whom was that same victim. Whether viewed separately or together, this evidence fairly can reflect conduct by the defendant motivated by her burdened and guilty conscious. Specifically, the delineated conduct demonstrates the defendant's active attempts to avoid culpability for crimes known to have been committed, by escaping consequences through fleeing from what she knew to be the ongoing investigation into what happened to the victim.
52. Under the New Hampshire Rules of Evidence, "relevant evidence" is generally admissible at trial. See N.H. R. Evid. 402. Evidence is "relevant" if it "has any tendency to make a fact more or less probable than it would be without the evidence [and] the fact is of consequence in determining the action." N.H. R. Evid. 401. Once this low relevancy

¹² Although the State has endeavored to provide a complete list of evidence contained within Stapf phone 2 and Dauphinais phone 2 that fairly may be considered evidence of consciousness of guilt, and thus considered within the legal framework set forth *supra*, as noted the types of evidence that may be considered consciousness of guilt fall within a broad spectrum. To the extent the State has overlooked other content and/or statements that constitute consciousness of guilt, the State relies upon the filed motions for admission.

threshold has been crossed, a Court should exclude relevant evidence only "if its probative value is substantially outweighed by a danger of ... unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." N.H. R. Evid. 403.

For these reasons, the proffered evidence is relevant and admissible at the defendant's trial as demonstrating her consciousness of guilt. Further, to the extent that the defendant may posit any alternative explanations for any of this delineated consciousness of guilt evidence, such claims would not support preclusion at trial. After all, the fact that other explanations - whether contrived or valid - may exist only goes to the weight of the evidence, rather than its admissibility. *See State v. Cocomo*, 31 A.3d 1012, 1017 (Conn. 2012) ("Generally speaking, all that is required is that ... evidence [of consciousness of guilt] have relevance, and the fact that ambiguities or explanations may exist which tend to rebut an inference of guilt does not render [such] evidence ... the evidence might support an innocent explanation as well as an inference of a consciousness of guilt does not make [the admission of evidence of consciousness of guilt] erroneous.") (internal quotation marks omitted); *Commonwealth v. Sheriff*, 680 N.E.2d 75, 83 (Mass. 1997) ("[C]onsciousness of guilt evidence may be admitted even though the defendant presents plausible alternative explanations for the conduct that are consistent with innocence of the crime charged."); *see also Torrence*, 134 N.H. at 27 ("Although flight motivated by fear of future criminal prosecution may support a variety of inferences, it undeniably supports a reasonable inference that the defendant was aware of his guilt.").

WHEREFORE, the State respectfully requests that this Honorable Court:

- A. Grant the State's Motion in Limine #5 to Admit the Content of Cellular Phones (Dauphinais phone 2 and Stapf phone 2);
- 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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