

STATE OF MAINE
Washington, ss.

WASHINGTON COURT
Criminal Action
Docket No. PENCDCR-22-20121

STATE OF MAINE)
)
v.) DEFENDANT'S MOTION FOR RETURN OF PROPERTY:
) DEFENDANT'S CELL PHONE
KAILIE BRACKETT)
)
Defendant)

NOW COMES Defendant, Kailie Brackett, by and through counsel, David W. Bate, and moves the Court to order the State to return her cell phone pursuant to Me. R. Crim. P. 44(j).

Background

The cell phone is crucial to Ms. Brackett's defense because, according to Ms. Brackett's Information Technology ("IT") expert, the phone is the most likely source of IP address data that will prove Ms. Brackett's alibi that she was at home and, therefore, not at the murder scene at the time of this murder. The State has known of Ms. Brackett's IP address-related alibi since April, 2022.

The phone was seized pursuant to search warrant on April 29, 2022, over a year ago. Since that time, the State's experts have had ample time to investigate the phone but have been unable to access the phone due to its being password protected. Therefore, the phone is of no use to the State because their experts are unable to generate any evidence from the phone, meaning the State's grounds for seizing the phone (the State's belief that the phone may contain probative evidence of a crime) have dissipated.

The State declined counsel's compromise request that Ms. Brackett's IT expert be provided access to the phone to make a

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image. Instead, the State offers to provide a mirror image of the phone if Ms. Brackett produces her password, essentially holding the phone for ransom in order to extract evidence from Ms. Brackett.

To preserve the integrity of the cell phone, Ms. Brackett proposes that the State produce the phone to Ms. Brackett's phone expert in a sealed envelope or container. Ms. Brackett's phone expert will video the opening of the container, the opening of the phone (without divulging the password), the production of a mirror image of the phone to be used in the defense investigation, and the sealing of the phone back in the container. The contents of the phone will not be altered in any manner. Any reasonable alternative for preserving the integrity of the phone would be acceptable to the defense.

If the Court declines to order the return of the cell phone pursuant to Rule 44(j), Ms. Brackett proposes, as an alternative to Ms. Brackett's IT expert having sole possession of the phone, that her IT expert be permitted access to the phone, pursuant to Rule 16(a), at the State's facility in a manner that allows her expert to enter the password confidentially and produce a mirror image of the phone for defense investigative purposes.

Motion for Return of Property

Rule 44(j) governing motions for return of property reads:

A person aggrieved by an unlawful seizure of property may file a motion in the Unified Criminal Docket for the return of the property on the ground that it was illegally seized. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the court shall order that the property be restored unless otherwise subject to lawful detention. The motion may be joined with a motion to suppress evidence.

The initial seizure of the phone pursuant to the search warrant

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is not at issue here. This Motion concerns only the State's continued possession - the continued seizure - of the phone when the State is only able to speculate that the phone, which the State cannot access, is even relevant to their case.

The Rule 44(j) standard was addressed in State v. Sweat, 427 A.2d 940 (1981), a return of property case involving suppressed evidence.¹ The Law Court wrote,

[T]he burden is always on the government to show some nexus between the supposed evidence that has been suppressed and criminal activity before the supposed evidence may be detained. ... [W]here the suppressed evidence is neither contraband by force of law nor stolen property nor evidence of a crime, it must be returned to the movant absent an adverse claim of ownership.

Id. at 950-51.

Rule 44(j) mentions suppression as just one context in which a motion for return of property can be considered by the courts. Rule 44(j) applies to all defendants "aggrieved by an unlawful seizure of property."

No duty to disclose password

The State has declined counsel's request for private access to the phone at a State facility but offered to provide a mirror image of the phone once Ms. Brackett surrenders her password. The State's offer forces Ms. Brackett to sacrifice her Fifth Amendment right against self-incrimination in order to access to her own property that likely contains exonerating, alibi evidence and that the State cannot

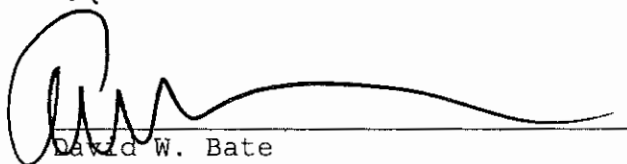
¹ Rule 44(j) states "The motion may be joined with a motion to suppress evidence" (emphasis added) and, therefore, does not limit its application to suppressed evidence.

use in its case.

Ms. Brackett has no duty to produce her phone's password. See U.S. v. Hubble, 530 U.S. 27, 37-38 (2000) (5th Amm. "protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence"); In re: Grand Jury Subpoena Duces Tecum Dated March 25, 2011, 670 F.3d 1335, 1341 (11th Cir. 2012) ("decryption and production of the hard drives' contents would trigger Fifth Amendment protection because it would be testimonial, and that such protection would extend to the Government's use of the drives' contents.").

WHEREFORE, the phone must be returned to Ms. Brackett through her IT expert or the phone must be made available to her IT expert because the State cannot determine whether the phone contains evidence relevant to their case; the phone is neither contraband, stolen property, nor evidence of a crime; the phone likely contains alibi evidence crucial to the defense; and the defense expert will not disturb the original data on the phone.

Dated in Bangor, Maine this 17th day of July, 2023.



David W. Bate
Attorney for Defendant
State Bar No. 7340
15 Columbia Street, Suite 301
Bangor, Maine 04401
(207) 945-3233
davidbatelaw@gmail.com

pc: A.G.
Client