NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION, CRIMINAL PART
IND. 23-12-1316-I
PROS. FILE MER-23-3375

STATE OF NEW JERSEY,

Plaintiff,

v.

RAHEEM ELLIS,

Defendant.

Decided: November 20, 2024

JEFFREY C. MCELWEE, JR., ESQ., special deputy attorney general and acting assistant prosecutor, attorney for State of New Jersey (Mercer County Prosecutor's Office).

MARY CLARE PATTERSON, ESQ., assistant deputy public defender, attorney for Raheem Ellis (Office of the Public Defender)

OSTRER, J.A.D. (retired and temporarily assigned on recall):

Defendant seeks an order suppressing all evidence seized pursuant to a warrant to search his cellphone. He contends he is entitled to that relief because (1) the warrant was overbroad and (2) law enforcement unreasonably delayed seeking the warrant.

The court rejects the first contention but accepts the second. Even if the warrant were overbroad, law enforcement had probable cause to search for the text message they uncovered. Therefore, under the redaction or severability principle, any overbreadth would not require suppression. More problematic is the State's delay in seeking a warrant to search the cellphone seized incident to defendant's arrest. That unjustified delay violated defendant's right to be free from unreasonable seizures. On that ground, the court grants the motion to suppress.

I.

Defendant does not challenge the police's initial seizure of his cellphone. The seizure occurred incident to his arrest, pursuant to an arrest warrant, on September 26, 2023. Defendant was charged by a complaint-warrant with unlawfully possessing a weapon, doing so for an unlawful purpose, and being a certain person not permitted to possess a handgun. The affidavit of probable cause asserted that defendant appeared in a surveillance video possessing and discharging a handgun while in a liquor store in Trenton.

Prosecutor's office detectives waited until May 13, 2024 – 230 days -- to seek a warrant to search defendant's cellphone. The State has provided no explanation for the delay. The search warrant application was supported by a May 8, 2024, certification from Mercer County Prosecutor's Office Detective Nicholas Giori, and

a May 13, 2024, certification from Mercer County Prosecutor's Office Detective Sean Yard.

Det. Giori asserted that police were alerted to a shooting in the areas of 102 Chambers Street (a liquor store) and 116 Chambers Street. Police found spent shell casings in front of 102 Chambers and at the intersection of Chambers and Tioga Streets. Police also uncovered video surveillance footage – which is not part of the motion record -- that allegedly depicted defendant, while on his cellphone, enter the store at 102 Chambers Street about fifteen minutes before the shooting. A few minutes later, another man entered while talking on his cell phone. Both men then put away their phones; they spoke to each other; and defendant allegedly retrieved a handgun from the second man. Moments later, defendant allegedly discharged several rounds in the direction of Tioga Street and another person returned fire from Tioga and Chambers Streets.

In his certification, Det. Giori described a cellphone's capability to send and receive text messages, photographs, short videos and other electronic data and voice communications. Based on the facts he recited and his training and experience, Det. Giori stated that he had probable cause to believe that evidence of the three crimes for which defendant was charged could be found on the cellphone. He stated he had probable cause to believe such evidence could be found in multiple forms of data, applications, and places within the cellphone, which he identified as follows:

"outgoing, incoming and missed calls and all text, SMS, and data messages, call detail for all incoming, outgoing, and missed calls, all text, SMS, and data message detail, [and] all global positioning satellite (GPS) information and location information."

He also asserted he had probable cause to believe such evidence of the charged crimes could be uncovered by "a physical search and forensic examination" of defendant's cellphone, which would be designed "to obtain all contents of stored electronic data and communications." That all-encompassing search would include, but not be limited to an even longer list of forms of data, applications and places within the cellphone:

> text, data, instant, and SMS messages, whether opened or unopened deleted, read, or unread, incoming, outgoing, and missed call logs, emails with attachments, address books, contact lists and directories, calendar, photos, internet favorites, histories, profiles, and all global positioning satellite (GPS) information and location information and subscriber name, address, contact telephone numbers, and full account information associated with and from said item.

Therefore, Det. Giori sought a warrant "to obtain all contents of stored electronic data and communications, including but not limited to" the same longer list of forms of data, applications and places within the computer. Det. Giori limited the requested search to the period from September 12 to 26, 2023.

Det. Yard described his expertise in digital forensic examination and explained how data can be hidden within a cellphone or a computer. A great deal of the certification addressed the capabilities of a computer, as distinct from smaller electronic devices like the cellphone involved in this case. Although Det. Giori requested a search limited to the period from September 12 to 26, 2023, Det Yard asserted that the search "needs to be conduct without a time limitation" because date and timestamps can be manipulated. He also contended it was essential to conduct a search that was unrestricted by the kind or form of data reviewed because incriminating information may be hidden in apparently innocent files.

The court issued the search warrant on May 13, 2024, authorizing Det. Giori and other participating agents and agencies to search the phone. The warrant continued:

> If you should find evidence from September 12, 2023 to September 26, 2023 of the specific offenses, including the contents of stored electronic data and communications, including, but not limited to text, data, instant, and SMS messages, whether opened or unopened deleted, read, or unread, incoming, outgoing, and missed call logs, emails with attachments, address books, contact lists and directories, calendars, photos, internet favorites, histories, profiles, and all global positioning satellite (GPS) information and location information and subscriber name, address, contact telephone numbers, and full account information associated with and from said item, then you shall take into your possession all such information and/or data, so that same may be dealt with according to law.

The warrant also authorized officers to defeat any password or locking code to conduct a forensic examination.

According to the State's brief, the State found only one item of evidential value – a brief text conversation consisting of an outgoing message stating, "I got my gun on my lap and I'm up," and a response stating, "Why Raheem," from a person identified as "Wife" on the cellphone. The State did not disclose how, or where, investigators located the text.

II.

The court rejects defendant's argument that suppression is required because the warrant, by authorizing detectives to examine "all stored electronic data," was overbroad and unparticularized. Even if the warrant were overbroad, the evidence law enforcement agents seized falls well within the warrant's "fair territory." And, under the redaction or severability principle, "only those items encompassed in an overly broad description or an overly broad seizure" must be suppressed. Kevin G. Byrnes, N.J. Arrest, Search & Seizure § 7:3 (2024).

Defendant's overbreadth argument relies on State v. Missak, 476 N.J. Super. 302 (App. Div. 2023), which reversed a trial court's interlocutory order declining to quash a search warrant. Id. at 307. The appellate court held that the search warrant applicant's speculative statements failed to establish probable cause for an "expansive search warrant for all data and information on [a] seized cellular phone."

Id. at 322. Specifically, the applicant's statement that individuals "may" hide evidence in disguised or altered files was not enough to establish probable for the unrestricted search requested. Id. at 320-21. The court also found fault with the warrant's unlimited timeframe, notwithstanding that the defendant allegedly committed the crimes of luring and attempted sexual assault on two specific days. Id. at 320, 321-22.

But the court agreed that the agent "established probable cause to believe the phone contained some evidence of the charged crimes." Id. at 320. And there was probable cause supporting a limited search "of the phone's contents and data" for the texts and any phone calls between the defendant and the agent who posed as a child on the two days mentioned. Ibid.

The State in this case attempts, with its certification from Det. Yard, to justify the kind of expansive search the Missak court found problematic. But the court need not reach the issue. The State has presented sufficient facts to establish probable cause to believe evidence of a crime could be found in a time-limited search for texts, emails, or oral communications. And such a search would have produced the text conversation that the detectives uncovered.

Supporting probable cause for that limited search, Det. Giori asserted that defendant was using his cellphone when he entered the liquor store and continued to do so as another person entered. The second person then gave defendant a handgun

which defendant discharged minutes later. There was a "fair probability," see Illinois v. Gates, 462 U.S. 213, 238 (1983), that defendant's almost contemporaneous use of the cellphone related to the charged crimes.

The redaction or severability principle "ensures that 'the suppression order will be commensurate with the deficiency of probable cause" and that the 'policy behind the exclusionary rule is served but not exalted.'" 2 Wayne R. LaFave, Search and Seizure § 3.7(d) (6th ed. 2024) (quoting People v. Hansen, 339 N.E.2d 873, 875 (N.Y. 1975)). Our courts have applied these principles to a case involving a valid warrant where officers seized items beyond the warrant's scope, State v. Dye, 60 N.J. 518 (1972), and to a case involving an overbroad warrant where officers seized items in places the warrant identified with probable cause, State v. Burnett, 232 N.J. Super. 211 (App. Div. 1989).

In Dye, the Court accepted "the common sense judicial approach . . . that only to the extent that the interception includes irrelevant communications should it be deemed an unreasonable search and seizure." Id. at 540-41. The Court explained, "[W]here articles of personal property are seized pursuant to a valid warrant, and the seizure of some of them is illegal as beyond the scope of the warrant, those illegally taken may be suppressed . . . but those within the warrant do not become so tainted . . . ." Id. at 537.

In Burnett, the trial court issued a warrant to search various records of a dentist suspected of receiving kickbacks from union officials. The appellate court held that the warrant was overbroad as it permitted a search of records going back ten years. Id. at 216. The evidence establishing probable cause to believe the dentist was receiving kickbacks was of recent vintage and the affidavit supporting the warrant included no evidence of when the dentist started performing services for union members. Ibid. Following the redaction principle, the court rejected the "defendant's contention that the entire warrant should be suppressed because of its overly broad authorization to seize records encompassing the ten-year period." Ibid. Instead, the court held that the "[d]efendant's constitutional rights were amply protected by reducing the excessive period of ten years to a more reasonable period consistent with the facts set forth in the supporting affidavit," which was one year. Id. at 217.

Applying these principles to Mr. Ellis's case, even if the warrant authorizing an expansive search of all data were overbroad – a conclusion the court need not reach – the State established probable cause to search for texts and other communications within a day before or after the shooting. Notably, the single text conversation was likely found within that time (although that is not certain because of the sparse record before the court).

In urging the court to conclude that suppression is required, defendant mistakenly relies on State v. Shannon, 222 N.J. 576 (2015) (per curiam) (affirming by an equally divided Court), and two federal cases. Shannon involved a vacated warrant – a complete nullity -- and not an overbroad one. The issue at the heart of Shannon was whether a good faith exception to the exclusionary rule should apply when police rely in good faith on a stale warrant they believed was active. Defendant cites Justice LaVecchia's concurring opinion rejecting the good faith exception on the grounds that the exclusionary rule not only deters police misconduct but vindicates the right to be free from unreasonable searches. Shannon, 222 N.J. at 588 (LaVecchia, J., concurring). But, based on Det. Giori's certification, there is nothing unreasonable about searching and seizing defendant's texts around the time of the shooting.

And both federal cases defendant cites actually endorse the principle that partially invalid search warrants may be saved by severing the invalid parts.

In United States v. Christine, 687 F.2d 749, 758 (3d Cir. 1982), the court held "a partially invalid search warrant may be redacted so that evidence obtained pursuant to valid, severable portions of the warrant need not be suppressed." Id. at 750. The court explained, "By redaction, we mean striking from a warrant those severable phrases and clauses that are invalid for lack of probable cause or generality

and preserve those several phrases and clauses that satisfy the Fourth Amendment." Id. at 754.

In Cassady v. Goering, 567 F.3d 628, 637 (10th Cir. 2009), the court confirmed the "severability doctrine" whereby "the invalid parts of a warrant are severed from the valid parts and suppression is only required for those items seized pursuant to the invalid parts." The court added, "The rule in this circuit in criminal cases is that the severability doctrine is only applicable if 'the valid portions of the warrant [are] sufficiently particularized, distinguishable from the invalid portions, and make up the greater part of the warrant.'" Id. at 637 (quoting United States v. Naugle, 997 F.2d 819, 822 (10th Cir. 1993)). The court held that the warrant failed the last requirement because the warrant authorized seizure of all evidence of any criminal activity, in addition to seizing evidence of narcotics crimes, and there was probable cause only for the latter. Id. at 638-40.

Even if our courts adopted that test, the warrant here would survive, as it did not authorize a general search for evidence of any crime. Rather, it alleged specific crimes; it identified the kinds of items sought – including text messages; and it identified the various places to look within electronic devices.

In sum, any alleged overbreadth of the warrant does not require suppression of the text conversation found on defendant's cellphone.

III.

Although defendant's overbreadth argument falls short, the same cannot be said about his unreasonable-delay-to-seek-a-warrant argument. The State's 230-day delay in seeking the warrant to search defendant's cellphone, which it seized incident to his arrest, violated defendant's Constitutional right to be free from unreasonable seizures under the United States and New Jersey Constitutions. Suppression of the evidence is the appropriate remedy.

This case is governed by fundamental principles pertaining to the right to be free from unreasonable seizures. Persuasive authority of other courts that have addressed the unreasonable-delay argument also provide guidance.

A.

Turning first to basic principles, seizures and searches affect different interests. "A search threatens a citizen's personal privacy interest while a seizure threatens a citizen's interest in retaining possession of his or her property." State v. Johnson, 171 N.J. 192, 206 (2002). Put another way, "[a] 'search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." United States v. Jacobsen, 466 U.S. 109, 113 (1984); see also State v. Marshall, 123 N.J. 1, 67 (1991) (quoting Jacobsen).

Police may, without a warrant, search a person incident to arrest to promote police safety and preserve evidence. See e.g State v. Eckel, 185 N.J. 523, 530 (2006). Although a warrant is generally required to seize personal property, United States v. Place, 462 U.S. 696, 701 (1983), if police find a cellphone in a search incident to arrest, they may, without a warrant, immediately seize it "to prevent destruction of evidence while seeking a warrant." Riley v. California, 573 U.S. 373, 388 (2014). But "a warrant is generally required" before police may search a cellphone seized incident to arrest. Id. at 401.

Police may also, without a warrant, seize property "on the basis of probable cause, for the time necessary to secure a warrant, where a warrantless search . . . likely would have been held impermissible." Segura v. United States, 468 U.S. 796, 806 (1984); see also Place, 462 U.S. at 701 (stating that when police "have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the [Fourth] Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents"); Marshall, 123 N.J. at 67-68 (following Place).

Once police have seized personal property without a warrant, timing becomes critical. The Fourth Amendment and Article I, Section 7 protect persons from "unreasonable searches and seizures." "[A] seizure reasonable at its inception because based upon probable cause may become unreasonable as a result of its

duration." Segura, 468 U.S. at 812; see also Illinois v. McArthur, 531 U.S. 326, 334 (2001) (stating that police may, with probable cause, temporarily seize property "to prevent the loss of evidence while the police diligently obtained a warrant in a reasonable period of time"); Jacobsen, 466 U.S. at 124 (stating "a seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on 'unreasonable seizures'").

In Marshall, our Supreme Court recognized that an unreasonable delay in securing a warrant may violate a person's rights. 123 N.J. at 69. But the Court held that a five-day delay in securing a warrant to search letters that police seized without a warrant was not "unreasonably intrusive," noting there was "an intervening weekend and the necessity for preparing an extensive affidavit." 123 N.J. at 69.

Furthermore, "special concerns . . . apply when law enforcement seize and search people's personal electronic data and communication devices." United States v. Smith, 967 F.3d 98, 207 (2d Cir. 2020). Cellphones contain a broad spectrum of personal information; they "differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person"; and they implicate far greater privacy concerns. Riley, 573 U.S. at 393. For that reason, "the search and seizure of personal electronic devices like a modern cell phone or tablet computer

implicates different privacy and possessory concerns than the search and seizure of a person's ordinary personal effects." Smith, 967 F.3d at 207.

B.

Consistent with these principles, numerous federal and state courts have held that the delay between when police warrantlessly seize personal electronic devices that have no independent evidentiary value,[1] and when they seek a warrant to search them, must be reasonable; and when the delay is unreasonable, suppression is required unless the good faith exception to the exclusionary rule applies.[2] See e.g. Smith, 967 F.3d at 205-06 (finding unreasonable a thirty-one-day delay in seeking a warrant to search a tablet seized during a DWI stop based on probable cause, but declining to suppress because a well-trained officer may not have known, given lack of clear precedent until that case, that the delay violated the defendant's rights); United States v. Pratt, 915 F.3d 266, 272-73 (4th Cir. 2019) (ordering suppression of evidence found on seized cellphone, finding a thirty-one-day delay in getting a warrant unreasonable); United States v. Mitchell, 565 F.3d 1347, 1350-51 (11th Cir. 2009) (finding unreasonable a twenty-one-day delay between probable cause seizure

[1] Unlike a murder weapon, which police arguably may retain indefinitely because it has independent evidentiary value, the electronic devices in these cases are themselves "evidence of nothing." United States v. Pratt, 915 F.3d 266, 273 (4th Cir. 2019). They were searched for the evidence that may have been found within.

[2] New Jersey rejects the good faith exception under its Constitution. See State v. Novembrino, 105 N.J. 95, 157-58 (1987).

of computer hard drive and request for warrant and ordering suppression of evidence); United States v. Eisenberg, 707 F.Supp.3d 406, 414-17 (S.D.N.Y. 2023) (finding that a twenty-three-day delay in seeking warrant was unreasonable, but denying suppression based on good faith); United States v. Fife, 356 F.Supp.3d 790, 795-807(N.D. Iowa 2019) (suppressing evidence after finding that six-month delay in obtaining warrant to search hard drive from the defendant's computer was unreasonable); State v. Rosenbaum, 826 S.E.2d 18, 25 (Ga. 2019) (suppressing evidence upon finding unreasonable a 539-day delay in seeking warrant to search tablets seized as part of inventory search and an iPhone seized incident to arrest); People v. Meakens, 185 N.E.3d 746 (Ill. App. 2021) (suppressing evidence from an iPhone seized incident to arrest after finding that a fifteen-month delay in seeking warrant was unreasonable); People v. McGregory, 131 N.E.3d 1147, 1153 (Ill. App. 2018) (finding unreasonable an eight-month delay in seeking a warrant to search computers and other equipment and suppressing evidence of identity theft that the search revealed).

Determining when a delay is unreasonable is a fact-sensitive task. "There is unfortunately no bright line past which a delay becomes unreasonable." United States v. Burgard, 675 F.3d 1029, 1033 (7th Cir. 2012). "The reasonableness of the delay is determined 'in light of all the facts and circumstances,' and 'on a case-by-

case basis.'" Mitchell, 565 F.3d at 1351 (quoting United States v. Mayomi, 873 F.2d 1049, 1054 n.6 (7th Cir. 1989)).

Courts must balance the delay's effect on the defendant's possessory interests with the government's interests and justification for the delay. According to Burgard, a court must "weigh[ ] 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" Burgard, 675 F.3d at 1033 (quoting Place, 462 U.S. at 703); see also United States v. Stabile, 633 F.3d 219, 235 (3d Cir. 2011).

The court in Smith applied a four-factor test consisting of: "[1] the length of the delay, [2] the importance of the seized property to the defendant, [3] whether the defendant had a reduced property interest in the seized items, and the [4] strength of the state's justification for the delay." Smith, 967 F.3d at 206.

The Eighth Circuit considers an apparently non-exclusive list of factors to balance private and law-enforcement interests. United States v. Bragg, 44 F.4th 1067, 1073 (8th Cir. 2022).

> On the private-interests side, relevant considerations include the significance of the interference with the person's possessory interest, the duration of the delay, whether the person consented to the seizure, and the nature of the seized property. On the government-interests side, relevant considerations include the government's legitimate interest in holding the property as evidence, the nature and complexity of the investigation, the quality of

> the warrant application and the amount of time we expect the application would take to prepare, and any other evidence proving or disproving law enforcement's diligence in obtaining the warrant.
>
> [Ibid.]

Synthesizing these tests, courts consider three factors in assessing a defendant's interests: first, the nature of the seized property; second, the nature and extent of the interference; and third, the defendant's waiver or assertion of rights. Within the second factor -- the nature and extent of the interference -- courts consider three sub-factors: (1) the length of the delay; (2) whether law enforcement offered the defendant an opportunity to copy data while the original was retained; and (3) whether the defendant's ability to use the property was limited by incarceration or other incapacity. Balanced against a defendant's interests is the government's justification for the delay. In addition to the sub-factors identified in Bragg, courts will also consider whether the initial seizure was supported by probable cause. "[A]ll else being equal, the Fourth Amendment will tolerate greater delays after probable-cause seizures." Smith, 967 F.3d at 209.

C.

The court first considers law enforcement's interference with defendant's possessory interest.

Regarding the first factor -- the nature of the seized property -- as noted, digital devices deserve special treatment because they store a wealth of private information.

See e.g. Smith, 967 F.3d at 207. The monetary or non-monetary value of property would also seem to be relevant. Seizure of a highly fungible item would seem to affect a person's possessory interests less than the seizure of an item that is unique, or costly to replace, or that has sentimental or non-monetary value.

Here, law enforcement seized defendant's cellphone. Although there is no record evidence of the device's contents, other than the single text conversation, the court presumes that defendant's cellphone contained the array of personal information typical of a cellphone. See Riley, 573 U.S. at 393. Thus, defendant's possessory interest is heightened.

Turning to the second factor – the nature and extent of the interference – courts deem the length of the delay a critical sub-factor because "[t]he longer the police take to seek a warrant, the greater the infringement on the person's possessory interest will be." Burgard, 675 F.3d at 1033 (declining to find unreasonable six-day delay in seeking warrant to search cellphone seized based on probable cause to believe it contained evidence of child pornography). "[E]ach passing day 'infringes the possessory interests'" that the Fourth Amendment protects. Stabile, 633 F.3d at 235 (quoting Mitchell, 565 F.3d at 1350). "[U]nnecessary delays also undermine the criminal justice process in a more general way: they prevent the judiciary from promptly evaluating and correcting improper seizures. Burgard, 675 F.3d at 1033. After canvassing numerous cases involving delays no longer than three months, the

court in McGregory found that the eight-month delay in that case was "extraordinary" and unreasonable. 131 N.E.3d at 1154; see also Meakens, 185 N.E.3d at 749-50, 754 (holding that a sixteen-month delay was "extraordinary" and unreasonable). Likewise, the State's almost eight-month delay in defendant's case far exceeds delays found unreasonable in many other cases, as noted above.

Allowing a defendant to copy seized material, may reduce the defendant's interest in the original's speedy return. In United States v. Laist, 702 F.3d 608 (11th Cir. 2012), the defendant admitted that his computer contained child pornography. The FBI seized the hard drives but permitted the defendant to download non-contraband files he needed for his university studies. The court held, "Since the possessory interest in a computer derives from its highly personal contents, the fact that Laist had a real opportunity to copy or remove personal documents reduces the significance of his interest." Id. at 616. But that factor was not alone dispositive. The court held that the defendant "retained a possessory interest, albeit a diminished one," which "still obligated the United States to 'diligently obtain[] a warrant.'" Id. at 616 (quoting McArthur, 531 U.S. at 334)). Notably, there is no evidence here that the State gave defendant an opportunity to download or copy material from his seized cellphone.

Some courts have also depreciated the possessory interests of a detained or incarcerated defendant who cannot use property, such as a cellphone or tablet,

because the institutional regulations prohibit such use. See e.g. United States v. Bragg, 44 F.4th 1067, 1073 (8th Cir. 2022) (finding twenty-four-day delay not unreasonable where the defendant "was in police custody for the entire twenty-four-day period"); United States v. Sullivan, 797 F.3d 623, 633 (9th Cir. 2015) (stating that "[w]here individuals are incarcerated and cannot make use of seized property, their possessory interest in that property is reduced."); Nelson v. State, 863 S.E. 61 (Ga. 2021) (affirming decision that over two-year delay in seeking warrant was not unreasonable because, among other reasons, the defendant "could not personally use or possess the devices given that he had been in custody without bond"). Nonetheless, the factor weighed only "slightly in the government's favor" in Eisenberg, where the court ruled on balance that a twenty-three delay was unreasonable. 707 F.Supp.3d at 415.

By contrast, the court in Meakens persuasively reasoned that incarceration may intensify rather than reduce the interference with a defendant's possessory interest in a cellphone because a detainee may wish to give someone working on his behalf access to his phone and the data contained on it.

> The discussed uses of a smartphone also require us to reject the trial court's conclusion that jailing diminishes an individual's possessory interest in a smartphone to near nothing. A smartphone carries with it a history of a person's communications. Therefore, if a detainee can give another access to his or her smartphone, that person can serve much more effectively as the detainee's agent than would be possible if the phone were seized, thus limiting

> the disruptive effect of the detention. By contrast, a person released on bond will likely be inconvenienced but generally not be rendered *incommunicado*. It is thus possible that the seizure of a smartphone is more disruptive to a pretrial detainee than to a person who has been released. We thus cannot dismiss defendant's possessory interest as inherently minimized by his jailing.
>
> [185 N.E.3d at 756].

Similarly, the district court in United States v. Javat, 549 F.Supp.3d 1344, 1359-59 (S.D. Fla. 2019), noted that although the Bureau of Prisons barred the defendant from accessing his cellphones, the defendant "could have asked [his family] to access information on his behalf" if the devices were not seized. The court held that the defendant, despite his incarceration, "maintained a possessory interest in the devices but a diminished one." Ibid.

The Meakens court also noted that a cellphone is "often one of a person's more expensive possessions," which a person may not easily replace. 185 N.E.3d at 755-56. That has other implications. Even if a defendant cannot use a cellphone while incarcerated, its prompt return would enable the defendant to sell it or give it to someone else, rather than let a valuable piece of property go to waste.

One must be mindful that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country." Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974). And "pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that . . . are enjoyed by convicted prisoners."

Bell v. Wolfish, 441 U.S. 520, 545 (1979). Detainees retain Fourth Amendment rights unless a jailhouse search or seizure is "reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89 (1987). Those interests include "internal order, discipline, security, and rehabilitation."[3] In re Rules Adoption Regarding Inmate Mail to Attorneys, 120 N.J. 137, 147 (1990). Jail officials may want to restrict cellphone use because they "are used to orchestrate violence and criminality both within and without jail-house walls," Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 332 (2012). But one's interest to use property, is not the same as the interest to possess it. Jails may justifiably limit the former, without divesting the detainees of the latter.

The court concludes that defendant's pre-trial detention should bear relatively little weight in the analysis of his possessory interests. Even assuming defendant was barred from using his cellphone while in custody – although, notably, there is no competent evidence on the cellphone regulations governing defendant – the seizure still "meaningful[ly] interfered" with his possessory interests by preventing him from securing any benefit from the device. For example, he could have transferred the cellphone to another person, to extract information that could assist

[3] However, rehabilitation may not be an appropriate goal when it comes to pre-trial detainees.

defendant. Or he could have transferred the cellphone simply to allow another person to use a valuable device, rather than have it sit idle.

Regarding the third factor -- defendant's waiver or assertion of rights – courts have held that a person's consent to the seizure undermines a defendant's unreasonable-delay claim. For example, in Stabile, the Third Circuit held that a three-month delay in seeking a warrant was not unreasonable in part because police received consent to seize the defendant's computer from a person with a shared possessory interest. 633 F.3d at 235. The court reasoned that "where a person consents to search and seizure, no possessory interest has been infringed because valid consent, by definition, requires voluntary tender of property." Ibid. See also Sullivan, 797 F.3d at 634 (citing Stabile and holding that defendant's "express consent to the search of his laptop . . . vitiate[d] his claim that any possessory interest was infringed"); United States v. Christie, 717 F.3d 1156, 1162-64 (10th Cir. 2013) (finding delay reasonable where property seized with consent).

Whether a defendant demanded an item's return may also be relevant. If the demand is made, then one may reasonably conclude the defendant has a strong possessory interest in the seized property. As the Seventh Circuit observed, " "checking on the status of the seizure or looking for assurance that the item would be returned . . . would be some evidence (helpful, though not essential) that the seizure in fact affect her possessory interests." Burgard, 675 F.3d at 1033; see also

Rosenbaum, 826 S.E.2d at 26-27 (noting that evidence of defendants' demands for the return of their devices was "sufficient to avoid diminishing their possessory interest").

Some courts have adopted the inverse proposition: that if demand is not made, then the defendant has a reduced possessory interest. See e.g. Bragg, 44 F.4th at 1072 (noting absence of evidence of a request for cellphone's return); Stabile, 633 F.3d at 235 (noting that the defendant did not request the return of his hard drives for eighteen months after police seized them).[4] Even so, there is no "a bright-line rule that a defendant must request the return of property to complain of an unreasonable delay." Fife, 356 F.Supp.3d at 803 (rejecting argument that under United States v. Johns, 469 U.S. 478 (1985) "only a defendant that requests the return of his property may complain of an unreasonable delay"); see also United States v. Uu, 293 F.Supp.3d 1209 (D.Haw. 2017) (stating that despite his failure to seek return of his backpack, the defendant "retained some possessory interest"; and requiring suppression given the government's twenty-day delay "with almost no explanation"); United States v. Bumphus, 227 A.3d 559 (D.C. Ct. App. 2020)

[4] This view seems to fall prey to the logical fallacy of denying the antecedent. For example, it is true that if it is snowing outside, then it must be cold. But it does not follow that if it is not snowing outside, then it must not be cold. It may simply be a clear but cold day. See N.L.R.B. v. Canning, 573 U.S. 513, 589 (2014) (Scalia, J., concurring) (discussing the "fallacy of the inverse (otherwise known as denying the antecedent): the incorrect assumption that if P implies Q, then not-P implies not-Q").

(suppressing evidence due to unreasonable delay, and stating that if the defendant failed to demand the return of a seized car and the possessions within it, including a cellphone, "such a failure would have only potentially lessened his possessory interests . . . [and] we cannot say it would have compelled a different balancing of interests").

In McGregory, 131 N.E.3d at 1153, 1156, the court rejected the State's argument that the defendant's failure to request his property's return meant the delay did not harm him and he lacked a legitimate interest in the property. "[A]lthough a defendant's assertion of his possessory interest in the seized property is helpful evidence that the seizure affected his possessory interest, it is not essential." Id. at 1156. The appellate court agreed with the trial court that "if the police or government seizes someone's property, [it is not] up to that individual to constantly beg the government for the property back." Ibid.

Without making any demands, a person can demonstrate possessory interest simply by how or where a person keeps property. As the court in Meakens noted, "[A]lthough there is no clear evidence of defendant verbally asserting his interest, the iPhone was taken from his person, which strongly suggests his possessory interest." 185 N.E.3d at 758.

McGregory and Meakens are persuasive in their critique of the view that silence implies a reduced possessory interest. Analogously, a theft is no less a theft

because the victim remains silent immediately after the crime. The victim may believe protesting would be futile, or it would provoke the thief, or confirm the value of what's been taken. Likewise, arrestees may silently lament their property's seizure because they have no idea they have a right to its return. They also may believe it would be futile to complain, or that doing so would convince the taker they have something valuable. In short, defendant's evident failure to demand that police return his cellphone is weak evidence of a reduced possessory interest.

D.

Balanced against the nature and extent of the interference with defendant's possessory interests, the court must consider the State's justification for delay.

The court in Bragg considered in the government's favor its "strong legitimate interest in seizing the iPhone incident to [the defendant's] lawful arrest." 44 F.4th at 1073. As in this case, the government had probable cause to believe that the defendant was guilty of a firearms offense and the iPhone might have evidence of the offense. Ibid. But the existence of probable cause is "but one factor of many to be weighed in the analysis of whether the delay in obtaining a search warrant was unreasonable; it does not automatically justify any delay in obtaining a search warrant." McGregory, 131 N.E.3d at 1154.

Courts have also weighed in the government's favor delays attributable to the complexity of the investigation. For example, in Laist, the investigation "took

roughly a year and involved the efforts of numerous FBI agents . . . rendering it unlike a simpler case such as some narcotics possession cases." 702 F.3d at 617. The court concluded that "[a]n investigation of this scope and complexity requires more time to prepare a warrant." Ibid. Also supporting the delay in Laist was the obvious effort put into preparing the warrant application. "Rather than being replete with boilerplate," the warrant contained considerable case-specific information and information obtained from other agents. Ibid. The court also considered that the agents were "extremely busy." All these factors supported the reasonableness of a twenty-five delay. See also Stabile, 633 F.3d at 236 (noting, as a factor, that the Secret Service agent who sought the warrant was "the lead investigator on a multiple-county investigation requiring coordination" and was handling other assignments including presidential protection duty).

By contrast, the court in Smith considered the "desultory nature of the police investigation" in concluding that the thirty-one-day delay was unreasonable. 967 F.3d at 210. The court noted the dearth of evidence that the agent in charge engaged in any investigation of the defendant's case for nearly four weeks. Ibid. The court also rejected the district court's finding that the agent's caseload and the size of his territory justified the delay. "The fact that a police officer has a generally heavy caseload or is responsible for a large geographical district does not without more

entitle the officer to wait without limit before applying for a warrant to search an item that the officer has seized." Ibid.

The McGregory court also rejected the argument that the court should consider only the delays directly attributable to the investigating officer and not delays attributable to other law enforcement agencies. 131 N.E.3d at 1155. The court reviewed the activity and inactivity of the investigation over an eight-month period, including periods that were "completely unexplained" and concluded that the agent did not pursue the search warrant with diligence. Ibid.

In this case, the State offers absolutely no evidence to justify its 230-day delay in seeking the warrant. Although there was probable cause to believe defendant's cellphone contained evidence of the charged offenses, there is no explanation for the State's delay.

Detectives Giori and Yard evidently sought to justify a thorough search of defendant's cellphone in light of Missak. But that did not justify a 230-day delay. Notably, Det. Yard's certification contains irrelevant material supporting an application to search a computer, although only a cellphone is involved here. That boilerplate indicates that Det. Yard did not prepare his lengthy certification specifically for this case. The certification evidently was already "on the shelf."

And Det. Giori's certification is far from complex. The detective recounted the facts of this simple case. He described what can be seen on the video surveillance

collected the day of the shooting. He noted that police collected shell casings in the area after the shooting. And he mentioned defendant's arrest the following day. He did not describe any further investigation of the case. He included general paragraphs about a cellphone's capability to store information and then concluded he had probable cause to believe the cellphone contained evidence of the charged crimes. In other words, there was nothing particularly complex about the case or the warrant certifications that justified the 230-day delay.

E.

In sum, defendant retained a significant possessory interest in his cellphone, a repository of personal information, notwithstanding his pretrial detention and his apparent failure to demand its return; and the State's delay in seeking a warrant was extraordinarily long and unexplained. Therefore, the delay was unreasonable and violated defendant's right to be free from unreasonable searches and seizures under both the Fourth Amendment and the New Jersey Constitution. As there is no good faith exception under the State Constitution, suppression is required.

IV.

For the reasons stated, the motion to suppress is granted.