

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: CRC1400216CFAES

CURTIS JUDSON REEVES,

Defendant.

Spn 00683538 /

PROCEEDINGS: MOTION TO COMPEL

DATE: June 10, 2015

BEFORE: THE HONORABLE PAT SIRACUSA, JR.
Circuit Judge
Sixth Judicial Circuit
New Port Richey, Florida

PLACE: West Pasco Judicial Center
7530 Little Road
New Port Richey, FL 34654

REPORTER: Victoria L. Campbell, RPR
Notary Public
State of Florida at Large

Administrative Office of the Courts
Court Reporting Department
West Pasco Judicial Center
7530 Little Road
New Port Richey, FL 34654
Telephone: (727) 847-8156 Fax: (727) 847-8159

APPEARANCES

APPEARING ON BEHALF OF
THE STATE OF FLORIDA:

WILLIAM A. LOUGHERY, Assistant State Attorney
Office of Bernie McCabe, State Attorney
Sixth Judicial Circuit, Pinellas County

APPEARING ON BEHALF OF
THE DEFENDANT, CURTIS JUDSON REEVES:

RICHARD ESCOBAR, Esquire
DINO M. MICHAELS, Esquire
Escobar & Associates
2917 W. Kennedy Boulevard
Tampa, Fl 33609

APPEARING ON BEHALF OF
THE ESTATE OF CHAD OULSON:

TONY JOSEPH GRIMALDI, Esquire
STEPHEN ANDREW LEAL, Esquire
McIntyre Thanasides et al
501 E. Kennedy Boulevard
Suite 1900
Tampa, Fl 33602-5238

P R O C E E D I N G S

1
2 THE COURT: All right. Oh, where's -- there
3 he is. There's Mr. Loughery. You need a moment to
4 get set up or are you ready?

5 MR. LOUGHERY: I'm ready.

6 THE COURT: Mr. Escobar, are you ready?

7 MR. ESCOBAR: I am ready.

8 THE COURT: All right.

9 MR. LOUGHERY: Judge, I think Mr. Grimaldi is
10 a party to this motion as well.

11 THE COURT: Okay.

12 MR. LOUGHERY: He's here is what I am saying.

13 THE COURT: If he wants desk room, he can have
14 desk room.

15 MR. LOUGHERY: Yeah. I don't know what he
16 wants to do.

17 THE COURT: Probation, surrender some desk
18 room to him.

19 Do you want it?

20 MR. GRIMALDI: No. I don't need it.

21 THE COURT: He doesn't need it. He doesn't
22 need the desk room.

23 MR. LOUGHERY: All right.

24 THE COURT: He doesn't need it. You don't
25 have to -- you can stay there, continuing to

1 lament that Ms. Neisham abandoned you.

2 Let me see the file on Reeves. Just the first
3 one. I don't need all the volumes.

4 All right. We're here in State of Florida
5 versus Curtis Reeves. The case number is
6 2014-216CFAES. Allegation is murder in the second
7 degree, a first-degree felony PBL, and aggravated
8 battery, a second-degree felony.

9 Present for the Defense are Mr. Escobar and
10 Mr. Michaels.

11 Present for the State is Mr. Loughery.

12 And the defendant is not present. His
13 presence was waived since this is purely legal
14 argument.

15 Mr. Grimaldi is present representing the
16 estate of Mr. Oulson.

17 All right. I have a motion and a request for
18 some discovery access.

19 Mr. Escobar, give it to me in a nutshell.
20 I'll have the State respond and then I'll have
21 Mr. Grimaldi add something, if he wishes to add
22 something.

23 What do you want?

24 MR. ESCOBAR: Your Honor, we are looking for
25 two things in our motion to compel. If the Court

1 recalls, very early on in this case we had made
2 some motions -- and I believe we've got an actual
3 order by the Court -- for the Court to preserve the
4 contents of a cell phone --

5 THE COURT: Yes.

6 MR. ESCOBAR: -- that was owned by Mr. Oulson
7 that was the subject of some testimony before this
8 Court concerning Mr. Oulson making the remark that
9 he was texting his daughter and he was maybe
10 calling his daughter to determine how she was.

11 THE COURT: Okay.

12 MR. ESCOBAR: Obviously that was testimony not
13 only of the various witnesses, but I believe that
14 was the Government's position as well early on.

15 We have been asking for the download of that
16 particular phone and the ability to download that
17 phone for quite some time.

18 In April of this year, which is about a year
19 and four months or a year and three months after
20 this particular incident, --

21 THE COURT: Yeah.

22 MR. ESCOBAR: -- we received the first
23 download from that cell phone.

24 I'm going to hand this to the Court. The
25 Government's got that download. But I will hand

1 this to the Court so the Court can see what we
2 received in the form of a download from that
3 particular phone.

4 As you can see in reviewing that download, the
5 information contained in that download, Your Honor,
6 starts as early -- if you look at the third page of
7 that particular document that's titled, Message
8 Recovered 6848 on January the 13th of 2014, you'll
9 see that the download that was provided to us
10 contains information as early as 8:11 in the
11 morning, and it takes you all the way through --
12 through 23:07 that same day, so about 11:07 that
13 night.

14 THE COURT: Okay.

15 MR. ESCOBAR: So it comprises virtually the
16 entire day. There are various sections of that
17 download. The way these downloads are done, Your
18 Honor, is that they use a forensic software called
19 the Lantern Forensic Software.

20 There's going to be some indication by the
21 Defense and some facts that we want to put on the
22 record in camera concerning our findings of this
23 Lantern report and why we believe that a download
24 by our expert is absolutely necessary.

25 THE COURT: We're talking about an iPhone 5

1 here, right?

2 MR. ESCOBAR: We are.

3 THE COURT: Okay. And what is it that you
4 don't have that you need out of it?

5 MR. ESCOBAR: Well, I need -- we need to do
6 our own download of that particular phone because
7 we believe that the download that was provided
8 by -- that was done by the Sheriff's Office is
9 clearly -- was done in error and provided us
10 insufficient information concerning the activities
11 that took place that particular day. We're
12 prepared to show that to the Court. It's pretty
13 easy to spot within the report the problems and the
14 errors that were made, but we need the download
15 being one thing.

16 The second thing that we need from that phone
17 is the use of the phone so that we can conduct our
18 own experiments, not download related, but things
19 concerning lights and size and weight and how that
20 particular light -- how that particular phone
21 appears within the same area of the theater, if you
22 would.

23 And, so, I'd like to talk about -- first about
24 the download and then we can talk about the second
25 prong, which is the actual use of the phone.

1 THE COURT: Okay.

2 MR. ESCOBAR: As the Court well knows -- and
3 I've got a body of case law that I will provide to
4 all parties.

5 As the Court well knows -- and this is pretty
6 basic right of privacy law. In Florida we do have
7 a right of privacy that is given to us. It's
8 actually a bit stricter than the federal right of
9 privacy. And it's given to us by Article I,
10 Section 23 of the Florida Constitution.

11 However, before someone can assert a right of
12 privacy, that particular information first has to
13 be proven to be private. You just can't say,
14 "Well, I'm asserting my right of privacy" without
15 discussing and proving that, in fact, the contents
16 that you're seeking to be private is, in fact,
17 private. It's that type of conduct that we would
18 all expect to have a privacy interest in.

19 In looking at Mr. Grimaldi's motion -- and
20 that's the -- that's the first step, Your Honor,
21 that the Court has to take, keeping in mind that
22 they've already waived it. Their right of privacy
23 concerning this particular download is gone because
24 what happened from the very beginning is that the
25 State actually took custody of the phone. And then

1 after the State took custody of the phone,
2 Mr. Loughery approached Mrs. Oulson and said,
3 "Mrs. Oulson, you're the executor of Mr. Oulson's
4 estate and we would like permission to download
5 this particular phone." And she gave the State
6 permission to download that phone. And not
7 download just January the 13th, of 2014, because
8 you can't do that. When you download the phone,
9 you have to actually download the hard drive into a
10 mirrored image and then you can use the software in
11 an effort to select or filter the day that you want
12 to separate from the rest of the information.

13 So the minute that she's told Mr. Loughery --
14 because the only one that possibly -- "possibly" I
15 say -- could have an interest -- a privacy interest
16 would be Mrs. Oulson. Now, our position is that
17 once you die, you lose your privacy interest under
18 the Florida Constitution.

19 And there's a case, Your Honor, that I will
20 cite to the Court by the name of -- and you've got
21 it in your stack -- Antico versus Sindt Trucking
22 Inc. That was a case where the Court said, "Hey,
23 listen. We recognize that one of the parties there
24 indicated that once you die, you lose your privacy
25 interest. But we're deciding this case without

1 having to decide this issue" and so they did. They
2 never decided the issue of whether death ceases
3 your right of privacy under the Florida
4 Constitution.

5 And so that issue is still ripe to be decided
6 by any court that I'm aware of in Florida.

7 And so our position from the very beginning is
8 that once Mr. Oulson died, there was no longer a
9 right of privacy. Because when you read the
10 Florida Constitution, it clearly gives you the
11 indication that it's for a living person.

12 THE COURT: All right. Well, let's start with
13 this: Do you need anything other than
14 January 13th?

15 MR. ESCOBAR: No, Your Honor. And that's what
16 we tried to do. We tried to tell them. We tried
17 to tell them, "Hey, listen. Even though we believe
18 that we're entitled to the entire phone, all the
19 data of the phone, we're willing to be reasonable."
20 We're not in a fishing expedition. We want to be
21 able to have our expert download that particular
22 day, that entire day, just like they did with the
23 packet that they provided us, we want to
24 download -- our expert to download January the
25 13th.

1 The problem came --

2 And, Mr. Grimaldi, if I'm incorrect, please,
3 you know, let me know.

4 When I spoke to Mr. Grimaldi, you know, one of
5 the questions that we had -- and Mr. Loughery was,
6 you know, part of this conversation as well
7 independently -- was, "Well, you know, Rick, the
8 way that, you know, you download the phone is by
9 downloading the entire phone and then using the
10 software in order to filter that January 13th
11 date."

12 So I said, "Fine. There's no problems with
13 that. My expert will download all of the contents
14 of the phone, then use, you know, that filter in
15 order to download or to preserve only the
16 information on January the 13th. And I'll do it
17 pursuant to a court order. My expert will do it
18 pursuant to a court order. No problem."

19 They had a problem with that. They said, "Oh,
20 no. You know, we can't download, you know, the
21 information for the entire phone" when they've done
22 it themselves.

23 And, so, that's where the impasse really came
24 where we said, "Well, we're going to have to go to
25 court" because there's no way for me to retrieve

1 the information I need to retrieve without
2 downloading the entire phone.

3 We have no problems with using the filter.
4 And then after we use the filter and retrieve that
5 one day, giving them, you know, back the contents
6 of that full download because we don't need it
7 anymore. We're not -- this is not a fishing
8 expedition; this is some concrete information that
9 I think we're entitled to.

10 THE COURT: All right. Well, hold on for a
11 second.

12 Mr. Loughery, are you okay with that?

13 MR. LOUGHERY: No. And the reason why, Judge,
14 is --

15 THE COURT: Tell me why not.

16 MR. LOUGHERY: -- and I think if we take it a
17 step further, if they're expert is allowed to
18 download the whole thing, --

19 THE COURT: Right.

20 MR. LOUGHERY: -- then I would suggest from a
21 public records point of view, anybody from the
22 media could step up and say, "I want the whole
23 download since you've discovered the whole
24 download."

25 THE COURT: Well, you're not discovering the

1 whole download. His expert's going to show up at
2 the big fingerprint -- or whatever we're calling
3 that building -- he's going to walk in with a
4 computer; he's going to download the whole thing.
5 He's going to extract one day; and then he's going
6 to hit "delete", scrub his hard drive, show your
7 expert that he did that, and then we're going to go
8 from there. Right? I mean, can that work?

9 MR. LOUGHERY: Well, I suppose if it was as
10 simple as that, which I don't know if it is or not.

11 THE COURT: I don't know. That's why -- I'm
12 trying to cut through this Gordian knot, but it's a
13 big knot.

14 MR. LOUGHERY: No. I understand, Judge. I'm
15 just saying, if the Court orders that to happen, I
16 would believe that under a public record request,
17 from the standpoint that both sides -- the State
18 has now discovered the entire download. Now, maybe
19 they didn't officially discover it like we call it,
20 but they have been privy to this private
21 information, whatever it might be, you'd be saying
22 that Ms. Oulson's privacy rights don't apply or the
23 state of the victims don't apply, and then if that
24 argument was made, I would suggest we'd be putting
25 ourselves in a slippery slope to some future

1 argument that the media or whoever is entitled to
2 that same information. And I don't want to argue
3 that. And I don't think it's necessary to get to
4 that stage. Because this whole thing is predicated
5 supposedly on the belief, although there's no
6 evidence of that, that what we've given them is
7 either incomplete or is in error. Okay?

8 THE COURT: Okay.

9 MR. LOUGHERY: Now, so, I think it could
10 resolve in a different way than having their expert
11 be privy to the entire download and then deciding
12 what he wants to filter out, even if somebody's
13 present.

14 And, so, I just think it's a very dangerous
15 area to get into when it doesn't need to be.

16 THE COURT: All right. Well, give me your
17 position on how you resolve it and then I'll return
18 to Mr. Escobar already in progress. I'm trying to
19 see if we can cut through this though.

20 MR. LOUGHERY: Yeah. Well, I would say that
21 it's been -- until they can show, not in camera --
22 okay? Because if they want to call some expert to
23 say what we've given to them is in error and this
24 is the reason why, and if the Court is satisfied
25 that there's a true error that exists in the

1 download that we did that would make some
2 indication that we haven't given them everything
3 that arguably they have a right to, which they may
4 not even, but that's another relevance issue, then
5 maybe at that point, we figure out some other way
6 to do that.

7 But I would say we've taken our evidence -- as
8 an officer of the court I'm telling you we aren't
9 hiding anything. We've given them an entire day,
10 which arguably there may be no relevance to any of
11 this or there may be relevance for ten minutes of
12 it. But to try to calm down and, you know, because
13 if you think about how this ultimately is going to
14 be used in discovery -- okay?

15 THE COURT: I have no idea.

16 MR. LOUGHERY: Okay. Well, assuming it's to
17 impeach witnesses who said they heard Mr. Oulson
18 say something. You know, "I'm calling my child's
19 babysitter or school. I'm looking at the
20 babysitter's -- " whatever they think was
21 supposedly said and then the phone doesn't show
22 that. And I can tell the Court that it doesn't
23 show that.

24 So if they want impeachment purposes, then
25 that part's been perfected as far as they can say,

1 "Well, there's nothing on the website that says
2 that."

3 Now, there's going to be an argument about
4 what was actually said and what he was actually
5 doing. Was he waiting for a phone call from -- to
6 see if his sick daughter had to be picked up so
7 they had to leave the movie? Was he -- any of
8 those things. It's really kind of a grey area as
9 to the relevance of it.

10 But if they suggest the relevance is to either
11 show Mr. Oulson, if he made those statements,
12 wasn't telling the truth or the eyewitness, the ear
13 witnesses who said they heard that, that they must
14 not have heard that because that's not what's on
15 the phone and impeach them that way. They've
16 already got that opportunity to do that. That's
17 been perfected. That's there. So there's no real
18 reason to go beyond that, especially under this
19 speculation, as far as the Court's concerned, that
20 we've left something out or it's been done in
21 error.

22 So, you know, I would just say, at this point,
23 you shouldn't be getting yourself and ordering the
24 private property of a dead person to let the
25 Defense just go through it and see what -- I think

1 it is a fishing expedition.

2 THE COURT: Okay. So you object to them
3 having their expert look at the one day?

4 MR. LOUGHERY: Well, we've discovered that.

5 THE COURT: Okay. Well, I think he's saying
6 he wants to look at it himself, the phone. They
7 want to look at that one day on the phone
8 themselves in case you missed something.

9 MR. LOUGHERY: Yes. But the problem with that
10 is that you can't do that unless you look at
11 everything, unless the entire thing is downloaded.

12 THE COURT: But --

13 MR. LOUGHERY: So then the Defense has had
14 access to an entire download.

15 THE COURT: All right. But let's say that --
16 let's say -- on my computer, let's say I do a word
17 search for "Loughery".

18 MR. LOUGHERY: Okay.

19 THE COURT: And all the records that have
20 "Loughery" on it come up.

21 MR. LOUGHERY: Uh-huh.

22 THE COURT: And then I just put those on a
23 thumb drive, I've got everything with "Loughery" on
24 it. But I'm not discovering everything that's on
25 my computer that might say "Escobar" or "Michaels";

1 I'm just disclosing what says "Loughery" on it.

2 If you're just disclosing or giving them a
3 chance to look at what says, "January 13th of
4 2014", how's that a problem?

5 MR. LOUGHERY: Right.

6 Well, I'm going to say it again. Okay? And
7 this is the problem I see: I'm not saying it
8 necessarily is unless a month from now there's a
9 motion from some third party saying that what
10 you've done has allowed us to get this. And I'm
11 not so -- we're not here to argue that today.

12 THE COURT: Okay.

13 MR. LOUGHERY: And I'm concerned that a month
14 from now someone might say -- or an appellate --
15 the St. Pete -- Tampa Bay Times may file a motion
16 and you may deny it and they go appeal it and then
17 suddenly somebody says, "Oh, no. You have to
18 discover that whole thing." And then the media
19 decides they're going to put everything on
20 Mr. Oulson's phone they so chose to do out in the
21 public's eye, which has no relevance, would only
22 potentially affect a potential juror here, there's
23 just no necessity for it --

24 THE COURT: How about this --

25 MR. LOUGHERY: -- considering we've discovered

1 to them the relevant aspect.

2 THE COURT: How about this: The packet that
3 Mr. Escobar's handed me -- I'm presuming he wants
4 me to put this now in the court file; is that
5 correct?

6 MR. ESCOBAR: Well, Your Honor, I do. And,
7 you know, we can take some precautions. I can tell
8 you --

9 THE COURT: Well, I just wanted to confirm
10 that. So is what's in this prejudicial? Because
11 I've only had a moment to leaf through this, so I
12 can't say I know it.

13 MR. LOUGHERY: Well, I'm assuming it's
14 something we gave him in discovery. And if we gave
15 it to him in discovery, that's subject to public
16 records.

17 THE COURT: Okay. So there's no problem --

18 MR. LOUGHERY: It wouldn't normally be in a
19 court file. So the media will have easier access
20 to it than doing a public record request, but it's
21 still subject to public records.

22 THE COURT: Okay. If it's already been done,
23 though, what's -- what's the difference whether his
24 expert looks at it or your expert looks at it?

25 MR. LOUGHERY: Okay.

1 THE COURT: Maybe I didn't follow it, so
2 explain to it me again.

3 MR. LOUGHERY: The whole problem is that the
4 expert has to download the entire phone, every day,
5 not just the day that we've discovered.

6 THE COURT: Okay.

7 MR. LOUGHERY: Not just the day that is
8 arguably the relevant day.

9 THE COURT: Okay.

10 MR. LOUGHERY: Because they don't want to go
11 on a fishing expedition, supposedly. There's no
12 way to just say, "Give me this day." They've got
13 to download the whole thing first.

14 THE COURT: Onto the computer.

15 MR. LOUGHERY: Okay.

16 THE COURT: And then hit "search".

17 MR. LOUGHERY: I understand.

18 THE COURT: And then just take those --

19 MR. LOUGHERY: Okay. Here's my point,
20 again -- all right? -- is I'm not clear and I
21 don't think the Court can be clear, especially when
22 it's unnecessary, especially when you've got to
23 show me some prejudice first that we haven't abided
24 by the discovery rules, which we certainly have.

25 THE COURT: Well, I'll get to that in a

1 minute.

2 MR. LOUGHERY: Okay.

3 THE COURT: I just want to -- I just want to
4 find out if I let the camel's nose in the tent, how
5 far does the camel go. That's what I'm trying to
6 figure out.

7 MR. LOUGHERY: Well, the point is, I'm not the
8 camel.

9 THE COURT: Okay.

10 MR. LOUGHERY: Okay? And I'm concerned
11 there's a camel out there. Okay? There's plenty
12 of camels sitting out in the benches today that
13 maybe -- you know. So who knows what they may
14 decide or their lawyers may decide because this has
15 become -- speaking of "camels" are found in the
16 circus and this is getting to be more and more of
17 that as far as the media is concerned. No.

18 THE COURT: There isn't even a camera here
19 today. We're getting better.

20 MR. LOUGHERY: Yeah. I noticed. Or boring.
21 Yeah, more boring, I suppose.

22 So my point is, I'm not sure -- I haven't done
23 the research, nor do I think I need to at this
24 stage since I've abided by discovery, to get into
25 what could be the problems by you allowing a

1 defense expert to download the whole thing. Does
2 that, therefore, burden the public records arena
3 and have we compromised it in that regard?

4 THE COURT: No.

5 All right. Now I understand what you're
6 saying. How about this, though: If your expert
7 already downloaded the whole thing to extract this
8 one day --

9 MR. LOUGHERY: Yes .

10 THE COURT: -- didn't somebody already
11 download the whole thing?

12 MR. LOUGHERY: Yes. But we didn't discover
13 that. All we discovered was the only one day, the
14 only one relevant day.

15 THE COURT: But if his expert goes in, looks
16 at the computer or looks at the phone, downloads it
17 all onto one computer sitting right there --

18 MR. LOUGHERY: I know what you're saying.

19 THE COURT: -- only gets that one day, then he
20 doesn't get -- Mr. Escobar and Mr. Michaels never
21 get to look at anything other than that one day,
22 I'm still limiting the parameters to the same exact
23 parameters you've already given them.

24 MR. LOUGHERY: No. I understand. And I'm not
25 saying -- you're asking my opinion about what I

1 think you should do here. Okay?

2 THE COURT: Right. Yeah.

3 MR. LOUGHERY: I understand what you're
4 saying, but I'm concerned. I think being cautious
5 about a problem that could exist, we shouldn't go
6 that route when there's no real reason to do that.

7 THE COURT: All right.

8 MR. LOUGHERY: They have yet to show any
9 prejudice or any error that's occurred.

10 THE COURT: All right.

11 MR. LOUGHERY: So there's no -- nothing out
12 there to say that we have not discovered what we
13 were supposed to do.

14 THE COURT: All right. I'll ask him about
15 that next. I was going to go there next. I wanted
16 to see if I could shortcut it and get it fixed.

17 MR. LOUGHERY: I don't know.

18 THE COURT: Mr. Grimaldi, do you want to add
19 something at this point?

20 MR. GRIMALDI: Yes, Your Honor.

21 THE COURT: I'm going to come to you at the
22 end. Let me see if I can fix this first. I'll
23 come to you at the end. All right?

24 MR. GRIMALDI: It's just on this specific
25 issue. That's why I --

1 THE COURT: All right. What is it on this
2 specific issue? What do you want to tell me?

3 MR. GRIMALDI: Well, this specific issue being
4 that while, as the State argued as far as what is
5 relevant and what is not, and the Defense indicated
6 that had Nicole may have already waived those --
7 her privacy --

8 THE COURT: Right.

9 MR. GRIMALDI: -- because it's Chad's phone,
10 because he is now deceased or whether she allowed
11 the State to download the phone. First of all, we
12 haven't established whether the phone is actually
13 Chad's or if the phone is actually Nicole's; if the
14 bill was in Nicole's name or the bill was in Chad's
15 name. So I believe their Antico case is not
16 relevant yet.

17 THE COURT: Well, I'm not worried about any of
18 that yet. I'm trying to see if I even need to
19 disarm this device. I might have already figured
20 this out.

21 MR. GRIMALDI: But my other issue is that with
22 her -- she obviously does not understand how a
23 phone, like an expert does, needs to be downloaded.
24 And when she provided a limited waiver of her
25 privacy to look at the phone, she understood it to

1 be the time frame that is relevant, not even the
2 entire day, the time frame that is relevant,
3 meaning, maybe the time that they actually showed
4 up at the theater to the time maybe even ten
5 minutes after he got shot. Because what if Chad
6 was doing things that are private that affect other
7 people on that phone earlier that morning? That
8 stuff is completely irrelevant. It has nothing to
9 do with even the questions the Defense could
10 possibly raise in the future.

11 THE COURT: I understand. But we're already
12 past one day. We already have one day. I've got
13 one day right here. So that's already out. I
14 can't undo this. This is already out.

15 MR. GRIMALDI: Right.

16 THE COURT: So let me see why he believes
17 there's a mistake made. Maybe there isn't even a
18 mistake made yet.

19 Mr. Escobar, tell me what mistake do you think
20 the State has made in providing you all these
21 records?

22 MR. ESCOBAR: Judge, I'll be glad in camera to
23 show that to you line by line of the mistake. It's
24 an issue that we've discovered. It's our work
25 product. And I'll be more than glad to put that on

1 the record. We could seal it and let the appellate
2 courts at some point in time review it. But it's
3 pretty clear by looking at the actual records that
4 there's a big mistake that was made. Huge mistake.

5 THE COURT: Why's it got to be -- why's it got
6 to be a secret? If your expert's going to examine
7 this stuff, you're going to tell the State anyway,
8 right?

9 MR. ESCOBAR: Because, Judge, I don't believe
10 that it's our obligation at this point in time to
11 divulge that to the Government.

12 I think at this point in time, we've got our
13 experts, we've done our work product, it should be
14 preserved until the time that we decide at this
15 point in time to turn over that information.

16 THE COURT: Well, that time is fast
17 approaching. That time is fast approaching.

18 MR. ESCOBAR: I realize.

19 THE COURT: Believe me, you're going to get an
20 order on Friday that's going to explain that the
21 Court is now been waiting for a long time. We're
22 approaching 18 months now that I've been waiting
23 for discovery to be completed. And discovery, both
24 of you have an obligation. You haven't discovered
25 anything to him yet. Right?

1 MR. ESCOBAR: You know when we got this?

2 THE COURT: I don't know.

3 MR. ESCOBAR: April the 9th of 2015.

4 THE COURT: Then welcome to my road of
5 frustration. I've been frustrated at discovery for
6 a while now. I get it.

7 MR. ESCOBAR: You can't -- I know you're
8 looking at us and saying, "Well, you know, you
9 haven't provided, you haven't provided." When I
10 get the most important part that we asked about at
11 the beginning -- at the bond hearing about the
12 phone and we get it on April the 18th, and this
13 case happened in January the 13th of 2014, Your
14 Honor, it's not the Defense. I know what they want
15 us to do. They want us to try to do the discovery
16 or the depositions without getting all the proper
17 discovery that we need in order to zealously and
18 competently question these witnesses and we can't
19 do that in representing our client competently.

20 So we get this April the 9th. The minute that
21 we get it April the 9th, it goes to our experts.
22 We start examining it.

23 And at this point in time, Your Honor, I will
24 tell you the first thing: First of all,
25 Mr. Loughery -- and there's case law in the packet

1 that I gave to you --

2 THE COURT: Yeah.

3 MR. ESCOBAR: -- Mr. Loughery has no standing
4 whatsoever to argue about third-party privacy
5 interests. The only one that may have an interest
6 at this point, because she the executor of
7 Mr. Oulson's estate, would be Mrs. Oulson, and we
8 refute that as well.

9 We believe that the minute that two things
10 happen: Number one, with the death of Mr. Oulson,
11 the privacy rights have vanished. Number two, even
12 beyond that, the time that Mr. Loughery had a
13 conversation with Mrs. Oulson where she said,
14 "Yeah. Here you go. You can go ahead and download
15 that phone", she has relinquished, not only for
16 herself but also for Mr. Oulson as his personal
17 representative, all of the privacy rights in that
18 phone.

19 We're not trying to be unreasonable. We're
20 not trying to do a search of the entire phone. We
21 want one day. And, so, in my conversation with
22 Mr. Grimaldi, I said, "Look. Our expert would
23 download it" just like the State expert. I can
24 tell you the State expert is no more credible, no
25 more honest, no more truthful than my expert.

1 Their expert did that. They were able to extract
2 that one day. They were able to isolate that one
3 day and then they provided me that one day.

4 Mr. Loughery is standing up talking about
5 speculation of whether the St. Pete Times or the
6 Tampa Times and the Tampa Tribune are going to get
7 involved. That's pure speculation. At this point
8 in time there's an obligation and a burden on one
9 person, that's Mr. Grimaldi and his client to bring
10 before this Court, first of all, the issue of
11 number one, are the contents of this phone of the
12 type that one can expect should be private.
13 Because that's what they have to prove. It's their
14 burden. That's what they have to prove.

15 And then if, in fact, it's of the type that,
16 in fact, garners under Article I, Section 23, the
17 right of privacy, then the Court starts applying
18 this issue of balancing test and waiver.

19 I'm going to give the Court another piece of
20 information. Florida Statutes 90.507. I believe
21 it's the first statute in the packet that I've
22 provided you.

23 Let me read to you what 90.507 says.

24 "A person who has a privilege against
25 disclosure -- against the disclosure of

1 confidential matters or communication waives the
2 privilege if the person or the person's predecessor
3 while the holder of the privilege voluntarily --
4 voluntarily -- discloses or makes the communication
5 when he or she does not have a reasonable
6 expectation of privacy, or -- "

7 This is the important part.

8 " -- consents to the disclosure of any
9 significant part of the matter or communication."

10 So we've got a statute. Not only a common law
11 waiver, but we've got a statute that speaks
12 directly to what happened between Mr. Loughery and
13 Mrs. Oulson, and that is, she said, "Go ahead.
14 Download it. Use it for your case. Do whatever
15 you need to do with it." And that's what they did.

16 THE COURT: How do we know that Mr. Loughery
17 and Ms. Oulson had this conversation?

18 MR. ESCOBAR: Mr. Loughery told me.

19 THE COURT: Okay. But Ms. Oulson's not here
20 to tell me that she --

21 Well, is she here?

22 MR. ESCOBAR: Judge, I don't believe that
23 Mr. Loughery will tell you anything different
24 because that's what he told me.

25 THE COURT: No.

1 I'm not saying that he didn't. I'm telling
2 you -- you say it as though I know it. I'm not
3 omniscient. That would make this job much easier.
4 I'm not.

5 MR. ESCOBAR: I believe I had that same
6 conversation with Mr. Grimaldi where he
7 acknowledged that.

8 THE COURT: Again, I don't know. But you're
9 telling me things as though it's as true as the sun
10 will rise tomorrow. I believe you, but I don't
11 have any facts or testimony to it yet and, so, I
12 don't know what she's consented to or what she
13 hasn't consented to.

14 MR. ESCOBAR: It's their burden. They first
15 have to show that it's a private communication.
16 They have to show that the type of communication,
17 the words, the whatever, is intended to be private.
18 That's how it all starts. That's under -- now I'll
19 give you the case.

20 THE COURT: Well, these are texts between
21 people and their Facebook postings that he's
22 looking at, private communications between himself
23 and others. And there's --

24 MR. ESCOBAR: They're not.

25 THE COURT: I have to sign warrants now all

1 the time to get people's cell phones when they raid
2 drug dealers' houses so that they can look in those
3 phones. I'm sure that if your client was charged
4 with possession of drugs and Mr. Loughery was going
5 through his phone without a warrant, you'd have a
6 problem with that, right?

7 MR. ESCOBAR: Facebook, texts, those matters
8 are not private. I'll cite to you --

9 THE COURT: Texts aren't private?

10 MR. ESCOBAR: No. -- Nucci versus Target
11 Corporation, which is a January 2015 case. And I'm
12 going to read to you what it is says. You've got
13 it in your packet there, Your Honor.

14 THE COURT: Which packet are we talking about
15 here?

16 MR. ESCOBAR: The one that has the large
17 paperclip.

18 THE COURT: Okay. Again, I lack omniscience,
19 so I'm not sure where it is in this giant stack
20 of --

21 MR. ESCOBAR: I've got another one.

22 May I approach?

23 THE COURT: No. Wait a minute now. Just so
24 that people don't think I'm not paying attention
25 here, it's not in here.

1 MR. ESCOBAR: Here's another packet
2 (indicating).

3 THE COURT: Another packet. Okay.

4 All right. This packet's different. This one
5 has case law. Let's see.

6 All right. Which one am I looking at?

7 MR. ESCOBAR: The case is Nucci versus Target
8 Corp.

9 THE COURT: How many cases down is it; do you
10 know approximately?

11 MR. GRIMALDI: Six, Your Honor.

12 THE COURT: Six. All right. Thank you.

13 MR. ESCOBAR: And I'll read you just some of
14 the -- some of the language of this case.

15 "We agree with those cases concluding that,
16 generally, photographs posted on social networking
17 sites are neither privileged nor protected by any
18 right of privacy, regardless of any privacy
19 settings that the user may have established."

20 And they go on to cite a case also of
21 Patterson vs. Turner. And it says:

22 Holding that: "The postings on the
23 plaintiff's online Facebook account, if relevant,
24 are not shielded from discovery merely because the
25 plaintiff used the service's privacy settings to

1 restrict access. Such posted photographs are
2 unlike medical records or communications with one's
3 attorney where disclosure is confined to narrow,
4 confidential relationships. Facebook itself does
5 not guarantee privacy. By creating a Facebook
6 account, a user acknowledges that her personal
7 information would be shared with others. Indeed,
8 that is the very nature and purpose of these social
9 network sites else they would cease to exist.

10 Because the information that an individual
11 shares through a social network web-sites like
12 Facebook may be copied and disseminated by another,
13 the expectation of such information is privacy in
14 traditional sense of the word, is not a reasonable
15 one.

16 Legitimate expectations of privacy may be even
17 lower in e-mails or other Internet transmissions."

18 And they cite United States vs. Lifshitz at
19 369 F.2d 173 (sic).

20 And that's contrasting the privacy expectation
21 of e-mail within greater expectation of materials
22 located on a personal computer.

23 So, no, these -- and if you look at the
24 exhibit, which is the download, there is a great
25 deal of Facebook images all throughout. In fact,

1 the vast majority of what's not a dictionary in the
2 packet that was provided to me on the download are
3 Facebook postings. I mean, there's Facebook
4 posting after Facebook posting after Facebook
5 posting. And so the vast majority of what's here,
6 in my opinion, is not private and, therefore,
7 they've got the burden, first of all, to be able to
8 show this Court that, wait a minute; what's being
9 disseminated to the Defense here is the type of
10 communication that our Constitution expects to be
11 private; therefore, I've an got an interest, a
12 standing in order to object. They've never done
13 that. It's their burden; it's not mine.

14 And Mr. Loughery has absolutely no standing.
15 And I can cite, you know, many cases in the packet
16 that I gave you that stands for that proposition.
17 He doesn't have the standing to object. I think
18 that --

19 And I'm going to give you this case now
20 because you mentioned something, Your Honor, that
21 there's a case that actually outlined that
22 procedure. The case of Antico vs. Sindt Trucking
23 Incorporated, which is at 148 So.2d 163 (sic).
24 It's in your packet. It's a 2014 case.

25 THE COURT: Okay. How many down so I don't

1 have to --

2 MR. GRIMALDI: It's the third one in, Judge.

3 THE COURT: The third one in? Thank you.

4 MR. GRIMALDI: Third or fourth.

5 MR. ESCOBAR: If you look at that case, Your
6 Honor -- and I will tell you that this case is
7 distinguishable in my favor. But the court here --
8 and I believe it was a First District Court of
9 Appeal case. What they did was exactly what the
10 Court was proposing to do. They said, "Wait a
11 minute. We're going to fashion certain
12 restrictions on how the party is going to be able
13 to download and extract the information that they
14 want."

15 And if you look on page -- I think it's the
16 third page of that opinion. It goes through a list
17 of seven things that the Court determined were
18 appropriate in order to balance the interest of the
19 parties in getting the needed material. In one of
20 them they said to:

21 "Install write-protected software to ensure no
22 alteration of the phone's hard drive would be made
23 during the inspection.

24 Number two: Download a copy of the cell
25 phone's hard drive, making a master copy, a review

1 copy, and a copy for Petitioner's counsel.

2 Number three: Return the cell phone to the
3 Petitioner's counsel immediately after copying the
4 hard drive.

5 Four: Review only the data on the hard drive
6 for the nine-hour period permitted by the Court,
7 including call records, text messages, web
8 searches, emails ... and received, uploads,
9 downloads, data changes and GPS data.

10 Number five: Prepare a summary of the data
11 reviewed, including the type of data, use of data
12 date and time of the data, and any other
13 information he or she deems relevant.

14 Number six: Provide the summary to the
15 Petitioner's counsel prior to the dissemination of
16 any more specifics findings. Petitioner's counsel
17 should have ten days from service to file a Motion
18 for Protective Order or other form of objection to
19 the release of all or a portion of the data, citing
20 grounds for each objection.

21 Number seven: If no objection is interposed
22 by the Petitioner, then Respondent's expert may
23 release his or her findings to the Respondents'
24 counsel."

25 So ... I mean, I'm not suggesting that this is

1 what you have to do here because I don't believe
2 they've met their burden. But I think this Court
3 in the First District was opining, as you were,
4 that there are ways in order to protect the
5 interests of everybody by doing it in a very
6 protective rule mandated manner.

7 But, again, Judge, I think we're really, you
8 know, jumping far ahead afield at this point in
9 time because it is their obligation, their burden
10 under 3.220 -- the protective order, (l) and (m) --
11 it is their burden to show that, number one, it's a
12 communication that deserves the right of privacy
13 protected by Article I, Section 23. And then, you
14 know, obviously, you know, the balancing test that
15 we have to apply, you know, once that's done. And
16 that's not even considering the fact that it's been
17 waived. That ship has sailed. They had the right
18 to say to Mr. Loughery, "I do not want you to
19 download any of the information on that phone."
20 They chose not to do that. They chose to allow
21 Mr. Loughery to do that and so that's over.

22 And, Judge, just so that we can have a record
23 here of the cases, the statute that I cited on
24 waiver is 90.507. We will also cite Alterra
25 Healthcare versus the Estate of Shelley, which is

1 located at 827 So.2d 936; Post-Newsweek Stations
2 versus Doe, located at 612 So.2d 549; Holland vs.
3 Barfield, which is located at 35 So.2d 953 (sic);
4 Post-News Stations vs. Florida vs. Doe, located at
5 612 So.2d 549; Antico, which I just cited to the
6 Court; Winfield, which is one of the first cases to
7 really deal with this issue in Florida, which is
8 located at 477 So.2d 544; the Nucci case, which
9 I've already cited to the Court; Menke vs. Broward
10 County School Board, and that one is located at 916
11 So.2d 8; Times Publishing vs. the State, 903 So.2d
12 322; Dwyer versus State, 743 So.2d 46; Banks versus
13 State, 351 So.2d 1071; and Savage versus State, 99
14 So.3d 1001.

15 These are all cases standing for that same
16 proposition of how we need to proceed orderly with
17 a motion like this and it's their burden initially,
18 which they have not met.

19 THE COURT: All right. Give me a moment. I
20 want to read something.

21 All right. Mr. Escobar, if I were writing the
22 order -- I'm sorry. If you were writing the order,
23 tell me what you would put in the order and why you
24 would put it that way, simply.

25 MR. ESCOBAR: Your Honor, what I would put in

1 the order would be that we be allowed to have our
2 expert to come down to the, I would presume, the
3 Sheriff's Office --

4 THE COURT: Yeah.

5 MR. ESCOBAR: -- to allow the download of that
6 particular phone; for that expert then to use
7 software in order to filter or extract all of the
8 information that took place on January the 13th of
9 2014. Once that information was preserved by the
10 expert, that the expert would then turn over the
11 downloaded hard drive of the phone back to the
12 Government or some representative of the
13 Government, and we would go on our way with our
14 download to do our further analysis.

15 THE COURT: Do you have any objection to the
16 Government's expert watching your expert during the
17 download?

18 MR. ESCOBAR: No objection.

19 THE COURT: What's missing from the download
20 that you say the State has not given you? Because
21 if you're telling me that they didn't give you
22 something, tell me what it is they didn't give you.

23 MR. ESCOBAR: Your Honor, I'd prefer to do
24 that in camera. I think that it's of a sensitive
25 nature enough. And I think when you see what the

1 verbiage is, I think this Court would prefer me to
2 do it in camera. And we would certainly prefer it
3 because it's part of our work product. It's part
4 of the packet that they provided me. It's not
5 something that I put into to this packet. But it's
6 clearly visible once you examine it and you know
7 what you're doing in reference to the Lantern
8 Forensic Software Report.

9 THE COURT: All right. Mr. Loughery, do you
10 object to me doing this in camera?

11 MR. LOUGHERY: Yeah. On this last point, I
12 do, Judge. I'll tell you why: I object to it
13 under reciprocal discovery.

14 They've already had an expert that looked at
15 this, who's a person that apparently exists, who
16 has looked at the discovery and has said the State
17 has made a mistake. Therefore, that person has
18 information that I imagine is going to have to be
19 released to the State at some point. And if
20 they've had that more than 15 days, then they
21 should have given it to us already.

22 THE COURT: All right.

23 MR. LOUGHERY: Okay? Because -- and, so, I've
24 got a problem with that.

25 Let me go back just a second just so we're on

1 the same page here.

2 This motion wanted the cell phone for a week
3 unsupervised. That's how we started in here this
4 morning.

5 THE COURT: Okay.

6 MR. LOUGHERY: That's what his motion asks
7 for.

8 THE COURT: All right. He's refined what he's
9 requesting.

10 MR. LOUGHERY: Well, no, you've refined it
11 and, apparently, he's agreed to it now.

12 THE COURT: Well, --

13 MR. ESCOBAR: No, Your Honor. That's part
14 two. Part two is us getting the phone. There's a
15 way of us getting the phone without us getting the
16 phone and the hard drive. There's a way of doing
17 that.

18 THE COURT: All right. Well, let's just
19 finish this part.

20 MR. LOUGHERY: Okay.

21 THE COURT: Mr. Escobar, whatever you need to
22 tell me, you're going to have to tell me in here.
23 I'm not going to do this one in camera. So what do
24 you want to tell me?

25 MR. ESCOBAR: Judge, if you look at the

1 report. And I am going to show you there's a place
2 called "dictionary".

3 THE COURT: Okay.

4 MR. ESCOBAR: And I want to you take a look at
5 the dictionary. And I'll tell you how many pages
6 of the dictionary are completely in error.

7 THE COURT: Okay. Are there numbers on this?
8 I don't see any numbers on this. Let me take this
9 off.

10 MR. ESCOBAR: Up until the middle of -- let me
11 double check to make sure for the record that we
12 have it correct.

13 It's all the way up to entry number, Your
14 Honor, 641. You see the entry number is that
15 second column?

16 THE COURT: Yep. Now I've got it. All right.
17 641, let's see what I've got.

18 MR. ESCOBAR: Now, if you look at first page
19 of that document, it's called "dictionary". What
20 the Apple Software does is that it actually
21 categorizes the words that are used by the user of
22 this phone --

23 THE COURT: Okay.

24 MR. ESCOBAR: -- and it categorizes them. And
25 it categorizes them in alphabetical order.

1 THE COURT: Okay.

2 MR. ESCOBAR: You will see that there was
3 either two things that could have happened here.
4 Number one, the individual that downloaded and
5 filtered this particular information downloaded it
6 and filtered it incorrectly. Or, number two, there
7 was an Apple Software issue that was not corrected
8 before the download was actually done. And this is
9 the reason why:

10 When you start looking from 642 on, you will
11 see that it's a dictionary and it's alphabetized
12 all the way through without any problems
13 whatsoever.

14 THE COURT: Okay.

15 MR. ESCOBAR: But when you see the first
16 number of pages, 14 pages, whatever it is, you will
17 see it's actually text messages, text messages that
18 have no date and text messages that have no time.

19 THE COURT: Okay.

20 MR. ESCOBAR: And I'd probably prefer not to
21 read some of these text messages, Your Honor,
22 because of the sensitivity of them.

23 THE COURT: Okay.

24 MR. ESCOBAR: But ...

25 THE COURT: You'd prefer not to read them, but

1 you're putting them in evidence in the court file.

2 MR. ESCOBAR: Well, I have to. I have no
3 choice --

4 THE COURT: Okay.

5 MR. ESCOBAR: -- because I've got to make a
6 record. It's as simple as that. I would have
7 loved to have done this in camera, but I've got to
8 make a record.

9 And, so, I can tell you that the -- we believe
10 that the last e-mail -- because it should go
11 through the last e-mail being on the top -- we
12 believe that the last text message, not an
13 e-mail -- the last text messages was something to
14 the effect of, "Cleaned for a good pounding."

15 And, so, the time, the dates of these
16 particular text messages, which were not reflected
17 in the areas that -- they're supposed to be
18 reflected in the report. If you look at the
19 report, there are segments of the report that are
20 specifically delineated for the capture and the
21 recording and the downloading of text messages.
22 And in here what happened was is that those
23 particular text messages, we believe, were actually
24 downloaded into the dictionary.

25 And if you read all the way down through all

1 these pages, you will see that there are a series
2 of texts, one after another, one after another, one
3 after another. Obviously some of these texts are
4 very important in our defense, especially the very
5 last one, obviously. We want to know what time
6 that statement was made, "Cleaned for a good
7 pounding." That is something that is going to be
8 extremely important.

9 In addition to that, we want to know whether
10 if, in fact, they made an error concerning the
11 texting and the download there, we believe that we
12 have the same error in the Facebook chronology.

13 And when you look at the Facebook chronology,
14 Your Honor, it appears that there's a Facebook
15 chronology, but there is actually no text, no
16 information. It's just the Facebook download image
17 that's coming down.

18 And so we need our expert to download it
19 appropriately. My expert's a former FBI expert
20 that dealt for, I believe -- I think it was like 14
21 years he dealt in Miami with this particular area.
22 And you could put him on whatever orders the Court
23 wants to put him on to restrict him as to what he's
24 able to do. And if you want, you can have the
25 State's expert looking over his shoulder. We have

1 no problems, but we certainly need the information
2 in order to confront the evidence that the
3 Government has placed in front of us to tell us,
4 "Hey, you know, yeah, he didn't text his daughter
5 and, you know, yeah, he didn't call his daughter
6 and that's about all you should do, Rick. Don't
7 worry about it. You know, that's enough for you."
8 No. It's not enough for us. We want to know
9 exactly what was taking place during that time; we
10 want to know what communication he was having with
11 whom. And that's critical to our case in chief.

12 THE COURT: What time did the shooting
13 allegedly happen?

14 MR. ESCOBAR: Somewhere between 1:10 to 1:30,
15 1:40, depending upon, you know, which witness
16 you --

17 THE COURT: Okay. Somewhere around after 1:00
18 but before 1:40.

19 MR. ESCOBAR: Again, Your Honor, we still
20 maintain that Mr. Grimaldi, nor the State -- and
21 they don't even have standing to assert this. They
22 haven't brought Ms. Oulson up here to say, "Hey,
23 listen. You know, what's on that phone is really
24 private -- is really private information. Let me
25 tell you, you know, generally what it is so that

1 you can assess the privacy interest that's afforded
2 to me under Article I, Section 23." They haven't
3 done any of that and that's their burden. It's not
4 our burden.

5 THE COURT: I understand. I'm just trying to
6 figure out what we have here.

7 MR. LOUGHERY: I don't mean to interrupt,
8 Judge, but I have something before you --

9 THE COURT: What have you got?

10 MR. LOUGHERY: Well, a couple things we need
11 to not lose track of here. Okay?

12 I believe we do have standing because this is
13 ultimately under the Rules of Discovery. Okay?
14 And under the Rules of Discovery, that has to at
15 least lead to relevant information. And, so, you
16 know, if we can't -- if we're just talking about --
17 I mean, I don't know, you know, when Mr. Escobar
18 says, this dictionary thing is wrong and that, we
19 haven't heard any evidence of that. I don't know
20 that. And, of course, you know, if they were to
21 take the deposition of the person who supposedly
22 erroneously did it from the State and he had an
23 opportunity to answer their questions, which might
24 clarify the issue that we have no evidence in front
25 of the Court right now there's an error, then,

1 perhaps, they can come in front of the State and
2 say, "Look. The State's witness admittedly didn't
3 do this correct." But they haven't done that.
4 It's just this magical work product thing that's
5 been hanging out here for 18 months.

6 Okay. Then after they show that expert -- I
7 don't care who the expert is. I mean, it's not
8 like we want a head start in looking up the CV. I
9 don't care about that. But there has to be some
10 evidence in front of the Court to back up what
11 they're suggesting. And they're doing this in a
12 vacuum by saying, "We don't want to ask anybody who
13 might have the answers; we want to do all of this
14 stuff before we have to do that."

15 THE COURT: All right.

16 MR. LOUGHERY: And I don't see what the
17 prejudice is. So ...

18 THE COURT: If you were writing the order,
19 what would you write in the order?

20 MR. LOUGHERY: If I was writing the order, I
21 would write the order that it would be denied. It
22 would be very simple. Just say that. Okay?

23 THE COURT: Okay. Let's say that I was
24 entertaining the idea of giving Mr. Escobar's
25 expert some access to the phone, which obviously I

1 am, what would the reasonable limitations you would
2 write in the order be?

3 MR. LOUGHERY: Well, I mean, I'm sure just --
4 I don't know if there's any limitations beyond the
5 ones they've already said, which is they just want
6 that same amount we've already provided to them.

7 THE COURT: Okay.

8 MR. LOUGHERY: But just because we provided --

9 THE COURT: What's the problem with them
10 looking it up again then?

11 MR. LOUGHERY: No. I understand. I've
12 already said what my problem with that is.

13 THE COURT: Okay.

14 MR. LOUGHERY: Okay? But I think it
15 potentially creates a public records issue that I
16 don't see the necessity of having to do that right
17 now until we've determined there really is
18 something that's amiss, either by them deposing the
19 person or having this witness come in and testify
20 to the Court specifically why it is this is an
21 error. And, perhaps, I could cross-examine him to
22 determine that it's not necessarily an error. I
23 don't know. We're just talking about a mystery
24 here.

25 THE COURT: Well, let's look at it this way,

1 though: Say it was a gun, not some new piece of
2 information or new piece of technology that always
3 gives us trouble, but, rather, something we've had
4 around for a long time.

5 MR. LOUGHERY: Yes.

6 THE COURT: Let's say that it was a gun and --

7 MR. LOUGHERY: Yes.

8 THE COURT: -- your expert fires three of the
9 bullets and there are six bullets left and his
10 expert wants to fire three of the bullets --

11 MR. LOUGHERY: Of course.

12 THE COURT: -- you'd let him.

13 MR. LOUGHERY: Of course.

14 THE COURT: Your expert got to turn on the
15 phone and look at that day; why can't his expert
16 turn on the phone and look at that day?

17 MR. LOUGHERY: Well, because, first off, I
18 don't think there's a privacy issue with a gun,
19 number one. And, number two, there has to be some
20 relevance to what they're looking for. This is
21 governed by discovery, not some civil case. It's
22 criminal discovery.

23 And, so, in theory, look, if, in fact, the
24 person who created the discovery, you know, our guy
25 who went through the phone, if he made a mistake,

1 my gosh, I'd love to find out what it is and I'd
2 like to correct that. I certainly don't want to
3 give them bad information or information that
4 that's bad. So, in that regard, the aspect of
5 going -- but I don't know that we've established
6 that yet.

7 THE COURT: All right.

8 MR. LOUGHERY: And going through the way you
9 suggested before with the expert standing there
10 watching him doing it, that the only thing -- the
11 software apparently, if true, you can filter it and
12 just show me that one day, and we don't have any
13 evidence of that, you can download everything in
14 the dark and then just turn a light on that last
15 day. Okay? If that can truly be done -- I don't
16 know. We haven't heard any testimony about it.
17 I'd hate to find out that we're wrong about that.
18 And then if, in fact, that person can do that, and
19 whatever he then downloads, we get a copy of that
20 as well, we don't have to wait until they filter it
21 and decide on what they want to rediscover to us --
22 okay? -- then I suppose I would write the order in
23 that fashion. And then -- and, perhaps, you'd have
24 to do a protective order afterwards saying that the
25 rest of this is clearly not part of discovery,

1 maybe that would nip in the bud future arguments
2 from third parties.

3 But, you know, if you look at the Rules of
4 Discovery, not to throw a racket in here, but you
5 know, we have to give them information we intend to
6 use at a hearing or trial. I don't know if we
7 intend to use -- those aren't relevant, those text
8 messages or the stuff we gave them. I mean, if
9 they're in error and there is some relevance of it,
10 then they would intend to use it in trial and they
11 would have it, but I don't see where we're
12 obligated to go through this whole phone.

13 We have no intention to use any of this
14 stuff -- anything in the phone. That was just
15 given to them under discovery because I'm sure if
16 they had done a motion, the Court would have said
17 there's some relevance to see what's on his cell
18 phone right before this happened. And, so, we gave
19 that to them without having the Court order to do
20 that. And, so, you know, I -- you know.

21 THE COURT: Okay.

22 MR. LOUGHERY: I just think we haven't
23 established -- especially when you're messing with
24 the privacy of a victim here. Okay? And his
25 entire cell phone and that we're going to

1 potentially push that out there to have people pry
2 into, I think we should be very, very cautious.
3 And I don't know if we have any kind of record to
4 establish half the stuff you even said. We haven't
5 heard any expert testimony to say why this is wrong
6 and the State needs to give us more information
7 about that.

8 THE COURT: Okay.

9 MR. ESCOBAR: Judge, if I may? I'm not sure
10 if Mr. Loughery really meant what he just said.
11 I'm going to read to you --

12 THE COURT: I presume that Mr. Loughery means
13 everything he says.

14 MR. LOUGHERY: Well, unless I said it wrong.

15 MR. ESCOBAR: 3.220(b)(1)(F).

16 THE COURT: Okay.

17 MR. ESCOBAR: "The prosecution shall serve a
18 written discovery exhibit which shall disclose to
19 the defendant, permit the defendant to inspect,
20 copy, test, photograph the following information
21 and material within the State's possession or
22 control ... "

23 THE COURT: Right.

24 MR. ESCOBAR: " ... any tangible papers or
25 objects that were obtained or belonged to from the

1 defendant as well as from other people." There's
2 two sections of this.

3 MR. LOUGHERY: No. I'm talking about the one,
4 objects not obtained from him. Objects not
5 obtained. The ones that we intend to use in trial.
6 That's what that rule says.

7 THE COURT: Okay.

8 MR. ESCOBAR: Judge, this is the problem
9 procedurally: In my opinion, procedurally they
10 have not met their burden. And we're already
11 getting to the nuts and bolts of the argument when
12 procedurally no one's come up here. They haven't
13 brought -- Ms. Oulson's not even here. They
14 haven't brought Oulson in here to even say, "Hey.
15 You know what? Those things are private. Hey.
16 You know what? I'm the personal representative."
17 I'm taking that word from Mr. Loughery and --

18 MR. LOUGHERY: There was a written response
19 from Mr. Grimaldi in the case.

20 MR. ESCOBAR: -- and Mr. Grimaldi.

21 THE COURT: I read it.

22 MR. ESCOBAR: And, so, you know, they've got
23 to be able to show that burden. They've got to
24 show that, number one, the communication that
25 they're seeking to protect, it's one that there's

1 an expectation -- a general expectation of privacy
2 from the public. They haven't done that.

3 I'm trying to be as reasonable as I can and
4 not go on a fishing expedition. I have no interest
5 in doing that. But I have an interest in taking a
6 look at those particular areas, that one day, that
7 I think is going to be very beneficial to the
8 Defense once we clear up the errors that were done
9 in the download by the State. They've done it.

10 Think about the issue of fairness. Think
11 just -- just fairness. How can it be fair for the
12 State of Florida who accuses someone of
13 second-degree murder and to say, "You know what,
14 I've got the phone because she allowed me to have
15 the phone. You know what, I downloaded the entire
16 phone and, you know, after I downloaded the phone,
17 I only gave you what I wanted to give you, which
18 was January the 13th. And you know what, you're
19 stuck with it because you have not right to
20 confront it."

21 MR. LOUGHERY: Because that's -- wait a
22 minute. That's the only relevant aspect.

23 THE COURT: Wait. Hold on. I'm going to ask
24 him that question.

25 Why would you need anything other than that

1 day?

2 MR. ESCOBAR: I'm not asking for anything.

3 But what I'm saying is -- and I think that under
4 the law, I think we're entitled to everything, but
5 I don't want that; I just want that day.

6 THE COURT: Well, let me clear it up. You're
7 not entitled to everything. You would not get his
8 whole phone. I would never have that happen.

9 MR. ESCOBAR: Okay.

10 THE COURT: If I'm mistaken about that, I'm in
11 the wrong job because I am not going to start
12 handing out people's cell phones for people to
13 peruse through every piece of data that's in their
14 phone. That's never going to happen and I would
15 resign before I would let that happen. If I'm not
16 wrong about that and the Second DCA says I've got
17 to start handing out cell phones from every
18 deceased person that is in my court, I'm in the
19 wrong line of work. I'm not doing that.

20 So we'll clear that up; you're not going to
21 get all of it. I'll give you that day. I've
22 already said I'll give you that day, though. I'm
23 trying to figure out how to give you that day while
24 protecting everybody's rights.

25 And we've already had this conversation. But

1 Mr. Loughery's already given you that day. You
2 just want that day a different way. You want to
3 look at it yourself. And I already asked him the
4 question about the gun, which I think is
5 actually -- you know, I don't have that many great
6 observations in the world, but I think that was a
7 pretty good observation that that's an accurate
8 comparison.

9 So I'm just trying to figure out how to do
10 this efficiently and protect everybody's rights.
11 That's all I'm doing.

12 MR. ESCOBAR: Judge, it goes with our
13 constitutional right -- my client's constitutional
14 right to due process. We have the right to
15 confront and to be able to present a zealous and
16 competent defense and that's where the issue is.
17 And I shouldn't have to, under any stretch of the
18 imagination, accept the Government's expert as the
19 expert that has done it perfectly, that the expert
20 that has done it honestly. That's not what defense
21 attorneys do and thank God we don't do that.

22 THE COURT: You're trying to convince me of
23 something to believe.

24 MR. LOUGHERY: Wait a minute. I've already
25 said that I'm -- if it's wrong, I want to make sure

1 it's right.

2 THE COURT: Yeah. Right. You're trying to
3 convince me of something I already believe.

4 MR. LOUGHERY: Right.

5 THE COURT: Consider it -- take yes.

6 Mr. Grimaldi, add what you need to add before
7 I rule.

8 MR. GRIMALDI: Your Honor, very briefly. You
9 know, I agree that this case that Counsel for the
10 Defense keeps saying is a civil case, but the civil
11 case specifically says that what -- on Page 4,
12 first paragraph. If you read that whole paragraph,
13 it specifically indicates --

14 THE COURT: Which page? I mean, which case?

15 MR. GRIMALDI: Page 4 of Antico case.

16 THE COURT: Antico. All right. It happens to
17 be the one I'm holding. That's perfect.

18 MR. GRIMALDI: It starts with: "The context
19 of the Respondent's discovery request is quite
20 important."

21 THE COURT: Yes.

22 MR. GRIMALDI: Page 4.

23 Again, this is a civil case with civil
24 procedure, not criminal procedure. But it
25 specifically outlines that in this case it's not a

1 fishing expedition because --

2 THE COURT: I know. I read the case. It's a
3 texting while driving and GPS.

4 MR. GRIMALDI: It's a cell phone, whether he
5 was texting or not --

6 So the defense indicated in this case, one
7 side indicated that he was texting, the other side
8 indicated that it was different. So that's the
9 issue. Here, all we have is Mr. Escobar indicating
10 that he says something's wrong. He says
11 something's wrong. Well, I can say it all day,
12 just like I can say maybe he was on his bank
13 account that morning at 8:30 in the morning. Why
14 is that relevant? Maybe he looked at his
15 daughter's medical information at 10:00 that
16 morning. How is that relevant? HIPAA, I think,
17 protects that pretty strongly.

18 So I wouldn't even suggest that the whole day
19 is relevant.

20 THE COURT: It's already been given to him.

21 MR. GRIMALDI: I understand. That's why I
22 can't argue against it. But what I can say is that
23 he is not entitled to more -- looking at the phone
24 any more because he has not -- while he says I
25 haven't met my burden, he hasn't suggested what the

1 exact problem is. Without knowing what the problem
2 is, I can't meet my burden because I'm arguing in
3 the dark, arguing in a vacuum. I have no clue what
4 to suggest if he is right or wrong or what I may
5 have a privacy right to.

6 THE COURT: All right. So what's the flaw if
7 I write the order as Mr. Escobar proposed, that the
8 expert may examine under the close observation of
9 the State's expert -- and I'll even throw it in,
10 your expert or your person as the executor of the
11 estate and/or the personal representative of
12 Mr. Oulson. What's the problem with him doing
13 that, which the State has already done, limiting it
14 to that one day, which the State's already done, to
15 make sure that what they did was correctly done?
16 What's the problem with that?

17 MR. LEAL: Your Honor, if I may? Steven Leal
18 on behalf of the Estate and Mrs. Oulson.

19 THE COURT: Sure.

20 MR. LEAL: We think what's in this particular
21 case that we're citing to, again, is actually a
22 very good roadmap for you to follow for that. And
23 the thing that I would point out here is that in
24 this case, once their expert had a chance to look
25 at the area in question, he did not disclose that

1 information directly to the respondents in that
2 case. They had to provide what they found to the
3 petitioner first. And the petitioner was afforded
4 an opportunity to review that for a period of time
5 and then make objections based on what was
6 disclosed as to whether or not that was relevant or
7 they had any issues with it. That would allow the
8 State in his capacity and us in our capacity to
9 both have a chance to see what was actually there
10 and if it's something that we would have an
11 objection to.

12 THE COURT: Yeah. But your two sides -- your
13 side and the State have had this phone for now 18
14 months knowing that there could be useful
15 information on it. You could have turned it on
16 yesterday; you could have turned it on this
17 morning; you could have turned it on last month;
18 you could have turned it on three months ago and
19 looked at everything that's on the phone and/or
20 you've had your experts available to look at what's
21 on the phone. Well, if you haven't found anything
22 other than what you gave, then that's what you
23 expect is on there. And I don't have any reason to
24 doubt that you found what was on there. I am
25 curious, as I read through this, if there isn't

1 more like just a simple printout of: First text
2 message at 1:13, "Hi. How do you think the
3 Chargers are going to do in the playoff game?" You
4 know, I mean something -- reading this, it's
5 convoluted. It is kind of tough to read and for me
6 to understand. I've only had it for an hour under
7 the intense scrutiny of everything that's going on,
8 so I haven't had a chance to look at it closely.
9 But it's not as simple as, first text message -- I
10 mean, I turn my phone on, I can see my history of
11 text messages that I did. It's pretty easy to
12 read. This isn't that easy to read.

13 And I looked at what Mr. Escobar pointed me
14 to, and that's pretty difficult to read in the way
15 it's printed out as well. I don't understand why
16 they shouldn't have the chance to read that which
17 you've had for 16 or 18 months.

18 So explain to it me again because I want to
19 try to make sure I understand both sides. And I've
20 heard a lot from Mr. Escobar today.

21 Do you have anything else to explain to me as
22 far as what -- what I need to do to protect your
23 client's rights for that day that's already been
24 handed over. I mean, do you believe that the State
25 missed something? Is that your concern?

1 MR. LEAL: No, Judge. Our concern is that our
2 client, to the extent that we acquiesced to this
3 information being used in the case --

4 THE COURT: Right.

5 MR. LEAL: -- had an understanding that it
6 would not extend beyond the scope of the day.

7 THE COURT: Right.

8 MR. LEAL: If we're were to the point we're
9 past that point by all parties and we're agreeing
10 with that, then we're in the realm of getting this
11 resolved.

12 THE COURT: I'm not going past the day. I am
13 not going past the day.

14 MR. LEAL: Okay. Based on what you said
15 earlier, that's fine.

16 THE COURT: Okay.

17 MR. LEAL: And what's already been provided
18 has been provided. What could have been done can't
19 be undone.

20 THE COURT: The horse is out of the barn, to
21 use my old Dade City expression.

22 MR. LEAL: Exactly.

23 But to the extent that the process of trying
24 to take a second stab at this from their end is
25 going to allow access to other information.

1 THE COURT: It's not. I'm going to direct
2 that Mr. Escobar's expert is going to look only at
3 this day. Everything else is destroyed and not
4 public record, not to leave the room, give it right
5 back to the State. The State can fry it; they can
6 shred it; they can do whatever they want. But I
7 think Mr. Escobar thinks that maybe there are more
8 horses in the barn, to stay with my metaphor, so he
9 wants to go and look and see if there are any other
10 horses.

11 Mr. Loughery says he's already looked; there's
12 nothing else -- or his expert has, there's nothing
13 else, so, you know, it should be pretty simple.
14 There either is stuff or there isn't stuff. If
15 there is stuff, I don't even know if it's relevant
16 stuff. I don't know. That's the idea, though;
17 they get to look at it. Not everything that comes
18 out in a deposition or discovery is relevant; it's
19 for them to sort through because an allegation is
20 made that could send their client to prison for
21 theoretically the rest of his life or 25 years.

22 So I've got to let them look at something. So
23 I'm trying to figure out what I can let them look
24 at that still protects your interest, keeps the
25 State able to prosecute their case, and protects

1 Mr. Reeves's rights.

2 MR. LEAL: Which, again, presupposes that
3 there's something that's been missed, there's
4 something that's inaccurate. And if an expert can
5 look at it and come to that conclusion, again, we
6 think the way this case was structured where the
7 other side has a chance to look at it first --
8 because we may be able to look and say, it's the
9 same stuff that was disclosed. There's maybe a
10 date stamp that we didn't have beforehand that
11 shows that it's from that particular date. Maybe
12 there's a date stamp that says it had nothing to do
13 with that date; it's from another date, but for
14 whatever reason because it's listed that particular
15 way in the data collection, it doesn't have a date
16 applied to it, then it isn't relevant.

17 THE COURT: Well, that's not much of horse to
18 still be in the barn then. It shouldn't be a
19 problem if that's all there is. Right?

20 MR. LEAL: Right. But if they've got access
21 to it first at that point, without us having the
22 ability to come in and make an objection to you
23 subsequent to it being downloaded, then, again,
24 we're getting into the area where Mr. Loughery
25 suggested where it's discoverable; therefore, it's

1 information that might get out. And if it is
2 medical information at this point isn't that
3 detailed or if it's personal information -- you
4 know, honestly, without knowing what's there, it's
5 a lot of speculation on our part.

6 THE COURT: Do you want me to give you
7 another --

8 MR. LEAL: So we're having to protect our
9 client's potential interest based on something
10 we're speculating.

11 THE COURT: Do you want me to give you another
12 two weeks to look at the phone or another week to
13 look at the phone to make sure that nothing else is
14 in there?

15 MR. GRIMALDI: We never had the phone, Your
16 Honor.

17 THE COURT: Well, your client had the phone
18 before he passed away at the theater. Your client
19 had it or Ms. Oulson had it.

20 MR. GRIMALDI: No. It was taken --

21 MR. LEAL: No. It was taken in custody at the
22 scene.

23 THE COURT: No. Before they passed away.
24 When they walked into the theater, either
25 Mr. Oulson or Ms. Oulson had the phone. And --

1 MR. LEAL: Sure.

2 THE COURT: I mean, would you want me to write
3 an order that says that you get to look at phone
4 also? I could do that.

5 State, do you have any objection to them
6 looking at the phone?

7 MR. LOUGHERY: No. We would have no problem,
8 we never would, if they wanted to look at it.

9 THE COURT: Okay.

10 MR. LOUGHERY: I don't know if it needs to be
11 powered up or whatever. But --

12 THE COURT: It's in an evidence locker. It's
13 been there for 18 months.

14 MR. LOUGHERY: But, see -- okay. And that's
15 fine, except for, I would imagine, Mr. Escobar
16 would suggest that he might have a problem with
17 that because what if somebody deletes something. I
18 mean, I don't know. We've been trying to not do
19 that for obvious reasons.

20 THE COURT: Okay. Right.

21 MR. LOUGHERY: It's in evidence. And if
22 Ms. Oulson just said, "Hey. Can I borrow the phone
23 for a few minutes", we would have said no.

24 THE COURT: Well, no. Yeah. Obviously chain
25 of custody's got to be protected by you, the same

1 way against Ms. Oulson tampering with it that in
2 case, for some reason one of Mr. Escobar's experts
3 wanted to tamper with it.

4 Nobody gets to see the phone without there
5 being an evidence custodian there. But I don't see
6 how I say no to them. If it was a gun, I'd let
7 them look at it.

8 MR. LOUGHERY: Sure.

9 THE COURT: And since it's already out and I
10 can't put these horses back in, it doesn't -- it
11 doesn't change anything.

12 So I'm going to write an order letting your
13 expert look at it. I'm going to give you the
14 ability to download what you need to download, look
15 at one day, destroy everything else.

16 Basically I'm going to write the order
17 essentially the way you just proposed it, with the
18 understanding that I'll delay it seven days if you
19 want. Do you want seven days so that you, in the
20 company, of course, of an evidence custodian can go
21 look at it first?

22 MR. GRIMALDI: Your Honor, we, coincidentally,
23 have Nicole Oulson's deposition on Monday the 15th
24 as it stands right now. So that would be a perfect
25 time for us to be able to do that within the time

1 period --

2 THE COURT: All right.

3 MR. GRIMALDI: -- if that's what you're going
4 to write in the order. That would give us the
5 opportunity to all be in one spot anyway to look at
6 it, take care of it, and be done with it.

7 THE COURT: Okay.

8 MR. GRIMALDI: If you're going to write that
9 in the order.

10 THE COURT: All right. So you want me to let
11 their expert look at it on June 15?

12 MR. GRIMALDI: No. Let us look at it, as you
13 were suggesting just now.

14 THE COURT: On June 15?

15 MR. GRIMALDI: Yes. Which is Monday.

16 THE COURT: But do you need Ms. Oulson to be
17 present for this, to surf through this phone?

18 MR. GRIMALDI: You were going to -- my point
19 is is that we were going to -- never mind.

20 THE COURT: Well, I'm just trying to figure
21 out --

22 MR. GRIMALDI: You said you were going to give
23 us seven days to look at it.

24 THE COURT: Yeah.

25 MR. GRIMALDI: What I was suggesting is we can

1 take care of that even faster coming in Monday is
2 my point.

3 THE COURT: Oh, okay. You want to do it on
4 Monday. Okay.

5 Mr. Escobar, do you have any problem with me
6 letting Ms. Oulson look at phone before you all
7 look at it?

8 MR. ESCOBAR: Your Honor, as long as their
9 expert is present during that process, just to make
10 sure that nothing happens. I'm talking about their
11 expert, not my expert.

12 THE COURT: Right.

13 MR. ESCOBAR: Their expert. As long as
14 there's someone responsible that knows how to
15 handle that phone in order to take a look at it and
16 not delete information, I have no problems with
17 that.

18 You know, one of the things that I'm going to
19 suggest and that maybe Mr. Loughery can confirm,
20 this problem of deleting or destroying or what have
21 you, can be easily fixed if the Government properly
22 downloads, maybe, again, the entire phone, holds
23 that hard drive separate and apart. Because that's
24 what we're going to propose anyway for part two of
25 my motion.

1 Part two of my motion is, obviously, that I
2 want to have physical use of the phone. And I'm
3 proposing that you download all of the information
4 from the phone, preserve it, make sure that it's
5 preserved, and then clean that phone as far as
6 information that's been downloaded onto that phone
7 with the exception of the main screen on the phone.

8 THE COURT: All right. Before we get to
9 that -- before we get to that, stop for just one
10 second.

11 MR. ESCOBAR: Okay.

12 THE COURT: I want to put the first issue to
13 bed.

14 MR. ESCOBAR: Okay.

15 THE COURT: And so here's what I'm going to
16 do: I'm going to direct, Mr. Escobar, you provide
17 me with an order by -- can you get it done by, say,
18 next Wednesday or -- no, next Friday -- when's your
19 expert coming to town? Is he coming to town to do
20 this or is he here?

21 MR. ESCOBAR: Judge, he is. But I'll have to
22 schedule that with him. I didn't want to get the
23 cart before the horse.

24 THE COURT: All right. So what we'll do is --
25 could you run it by -- the order that you propose,

1 could you run it with your language by
2 Mr. Loughery, let's say, by -- you're going to see
3 him Monday anyway for the deposition, right? So
4 run it by him on Monday. And then, Mr. Loughery,
5 you'll get a chance to provide me with a competing
6 order, if you don't like the language or you can't
7 come to an agreement on the tweaking, but you know
8 basically what I'm approving here, that I'm going
9 to let his expert look at it over your objection,
10 preserved for the record, not going to tamper with
11 it, only going to download the one day. We'll
12 download the whole thing, destroy everything else.
13 Keep the one day, print it and you're good. And
14 it's what you already gave him anyway, so he's not
15 getting anything extra, unless there's, like I
16 said, the mysterious horses that didn't emerge from
17 the barn and aren't already gone. And --

18 MR. LOUGHERY: Well, let me ask this -- I
19 understand. Do I get those horses or do I have to
20 wait?

21 THE COURT: You absolutely would get those
22 horses.

23 MR. LOUGHERY: That day.

24 THE COURT: Well, I don't think you're going
25 to get them that day because I don't think you'll

1 have found them. They don't know if there's horses
2 that day. Right? Will he?

3 MR. LOUGHERY: I don't know. I'm not --

4 THE COURT: I don't know.

5 MR. LOUGHERY: I don't know how this --

6 MR. ESCOBAR: Well, my expert --

7 THE COURT: I'm going to be writing an order
8 this week that's going to set out a discovery
9 timeline for the Defense. So you better get
10 discovery ready because it's time. It's time.
11 It's 18 months. It's time.

12 So you're going to be getting a lot of things
13 very soon. Because before the June 30th date
14 arrives, I'm going to write a long order setting
15 out the things that I expect to see happen between
16 now and the end of July.

17 MR. LOUGHERY: Okay. But here's my specific
18 problem about whatever he takes away --

19 THE COURT: Right.

20 MR. LOUGHERY: -- from there --

21 THE COURT: Yes.

22 MR. LOUGHERY: -- in his software --

23 THE COURT: Yes.

24 MR. LOUGHERY: Okay? -- if I don't have or we
25 don't have that on that day --

1 THE COURT: Right.

2 MR. LOUGHERY: Okay? -- then they have an
3 opportunity, if they follow the Rules of Discovery,
4 they don't have to give me everything. They can
5 pick and choose what they want to give back, if
6 it's different than what I have.

7 THE COURT: I understand your concern.

8 MR. LOUGHERY: Okay.

9 THE COURT: And your concern is met by my
10 order. Because your expert will be standing there
11 watching what happens. And if they run the --

12 MR. LOUGHERY: I got you.

13 THE COURT: -- TSX 15 37 software, then your
14 expert could then wait until Mr. Escobar's expert
15 leaves, and then he could run the TSX 37 software
16 and get the exact same results and see the exact
17 same horses that may still be in the barn. All
18 right?

19 MR. LOUGHERY: I got you. Yes, sir.

20 THE COURT: All right. So we have a plan on
21 that.

22 You tell me there's a second issue. Tell me
23 your second issue.

24 MR. ESCOBAR: Your Honor, as the Court knows,
25 this was a continuation of our motion to compel

1 that we did a couple of weeks ago --

2 THE COURT: Yes.

3 MR. ESCOBAR: -- and this involves a very
4 similar issues.

5 What I am proposing on the phone is that once
6 we go ahead and get this download done and I get
7 January the 13th, --

8 THE COURT: Yes.

9 MR. ESCOBAR: -- what I am proposing is that,
10 again, we need to have the actual phone that was
11 Mr. Oulson's phone on this particular day for us to
12 use in our analysis of events that occurred there
13 at the theater. And the way to do that so they're
14 not concerned that somehow I'm going to get this
15 phone now and get, you know, some area of
16 downloading that I wasn't entitled to is that, you
17 know, they can download it, preserve it, and then
18 clean the phone of any of those downloads that we
19 had previously obtained and just give me the
20 phone -- okay? -- with, you know -- that has not
21 been altered as far as the lighting --

22 THE COURT: Right.

23 MR. ESCOBAR: -- on the screen; that has not
24 been altered in any of the settings. And I can use
25 that phone for a period of three or four days with

1 my experts and myself in our analysis of trying to
2 determine what actually happened in the theater.

3 THE COURT: Is it an iPhone 5?

4 MR. ESCOBAR: It's a 5.

5 THE COURT: Does it have any little letters
6 behind it or is it just the iPhone 5?

7 MR. ESCOBAR: Your Honor, I've got the serial
8 number back at the office. I didn't bring that.
9 It may be in my motion.

10 THE COURT: I mean, I don't need the serial,
11 it's just -- I just looked up iPhone 5 on Amazon.
12 I Bing'd it on Amazon. It says that there's plenty
13 of these available. I bet you that they're fairly
14 standard.

15 MR. ESCOBAR: Yeah. But that's the problem,
16 Your Honor. I don't want to get into issues --
17 expert issues as to whether the light that's
18 emanating from the screen of this particular phone
19 on a phone that was maybe manufactured in January
20 may be a little different than a phone that was
21 manufactured in April or so and on and so on.
22 We've got the light setting that presumably hasn't
23 been altered. And I have total confidence the
24 Government didn't do anything or their experts to
25 alter the light setting on the phone or any of the

1 settings on the phone. This will give us -- I'm
2 sure they've documented those settings as well
3 before they've done anything to this phone. So now
4 it's an opportunity for me to get just that phone
5 and get that particular phone that was used, power
6 it up, and use it for our experiments and our
7 testing and then provide that within a five-day
8 period back to the Government. It's as simple as
9 that. And then we're not getting into the issue of
10 whether, you know, that particular phone had, you
11 know a lower ambient light or a higher ambient
12 light or whatever the issues may be. It creates, I
13 think, a very solid basis for expert opinion later
14 down the road. If not, you know, we're going to
15 have these particular problems. They're going to
16 be objecting, well, it wasn't the phone. They got,
17 you know, a phone that was manufactured on a
18 different month. And there's no need for it.
19 There's no prejudice on their part. I'm waiving --
20 just like I told you the last time in the motion,
21 I'm waiving chain of custody for all the items that
22 we requested. There's no chain of custody issue
23 here. And that's been his response, oh, chain of
24 custody. I'm responsible for chain of custody. As
25 I told you at the last hearing, we're waiving chain

1 of custody. We don't care about chain of custody.
2 None of the items that we are asking for really has
3 a chain of custody issue. They're very
4 identifiable items and I think we discussed that
5 with the Court. Items that have really
6 identifiable serial numbers and what have you are
7 items that really chain of custody means very
8 little and, so, we're willing to waive that. So
9 give us that item. Let us take it; let us use it.
10 We'll give it right back to you. And then both the
11 State and the Defense has equal access to do their
12 test. Equal access. It's due process. It's my
13 right to confront his theory of prosecution.

14 THE COURT: All right. How many days do you
15 want the phone for?

16 MR. ESCOBAR: I'll take it for five days.

17 THE COURT: Okay. Is this your shoe time
18 right now? Do you have the left shoe right now?

19 MR. ESCOBAR: I haven't gotten the left shoe
20 yet because I'm going to bring my experts down and
21 try to do it altogether.

22 THE COURT: Okay. Okay. State, I'm going to
23 go out on a limb here and guess that you object to
24 them having five days alone with the phone.

25 MR. LOUGHERY: I do. And I think there's a

1 valid reason. One is they can get another phone as
2 you suggested. We're thinking that way. But the
3 real issue that he doesn't seem to understand about
4 waiving the chain of custody, first off, we can't
5 make them stipulate to that. But, secondarily, if
6 their expert makes a finding where it's not -- our
7 evidence is not being supervised -- okay? -- I
8 found that the light was X, Y, Z. And our expert
9 says, well, I find the light the was A, B, C.
10 Okay. Now you have an absolute credibility issue
11 in front of a jury that doesn't need to exist if
12 the expert is supervised where they both see it
13 happen at the same time.

14 There's absolutely no purpose -- again, I
15 don't know what they -- they want to take her phone
16 and throw it on the ground to see if it lights up.
17 Is that going to alter or damage it? It might.
18 Okay? If Ms. Oulson decides, hey, when this trial
19 is over, I want a memento of my husband; I want to
20 put his cell phone on my mantelpiece, I mean, I
21 don't know. It's not theirs to have for five days,
22 to throw it on the ground -- okay? -- or do
23 whatever they need to do. If it's just trying to
24 figure out if the light comes on when it strikes
25 something or if somebody steps on it and the light

1 comes on, even though it's in a protective sleeve,
2 well, their expert can do it in front of ours.
3 There's no need to have it in some top secret lab
4 on the moon for five days so they can run all these
5 tests. I mean, enough's enough. It's an item in
6 evidence. It can easily be duplicated by buying
7 another one. If they come up with some huge issue,
8 then we can deal with it at that point. But just
9 to give them the phone to go out the door -- and
10 then also as part have that, we've had to download
11 it and clean it and done all those type of things
12 which is time-consuming and unnecessary.

13 THE COURT: All right. Well, I'm not worried
14 about the time-consuming part, but I am concerned
15 about some of the other aspects.

16 Mr. Escobar, I'm still trying to figure out
17 why it's got to be this phone. If you said you can
18 find out what the settings are, and those will be
19 preserved. If you said that it's readily
20 identifiable and it's actually not that unique.
21 Henry Ford did us a great favor by standardizing
22 production of all of this stuff. And I think
23 Apple's taken it the next step. I mean, you can
24 take a SIM card out of most of these phones and pop
25 it in the next and they're going to work just fine.

1 Why is it that your expert can't, for whatever
2 simulation you plan to do, why can't they just buy
3 the exact same phone? I mean, you can -- literally
4 there are tens of thousands of phones, Apple 5s,
5 that are available. It's not the most modern. I
6 think we're at 6 or something now. But there are
7 tens of thousands of these phones. You can get it
8 the same month the same plant. You can get -- you
9 know, you can get it made on Monday and it can all
10 be determined.

11 MR. ESCOBAR: Because I can't guarantee that
12 the same ambient light, the same amount of light is
13 emanating from the LCD screen that is on the front
14 of the phone, which is of crucial importance. And
15 when you're looking at those particular issues,
16 that is a crucial issue for us. Because, remember,
17 part of their theory is that somehow a stripe on a
18 shoe, okay, is what caused the ambient light. And
19 we have the right to confront that. We have the
20 right to confront that with the actual phone, not
21 some other phone that they're going to say, well,
22 you know, they bought that, you know, two years
23 later or, you know, that phone's a used phone from,
24 you know, from someone else, whatever the issue may
25 be. As we know, when these phones are

1 manufactured, Apple may in January be manufacturing
2 a particular phone and then by March, that bug or
3 that issue has been corrected and improved. It's
4 virtually impossible, Your Honor, for us to
5 guarantee that same ambient lighting. And when you
6 consider and weigh the issues here of fairness,
7 it's rather clear that we've provided everything
8 that we can to them to make it as fair as possible
9 so that, you know, whatever privacy issues are not
10 infringed and all we want is for five days so that
11 we can do our own testing in order to be able to
12 confront our particular issues that the Government
13 has placed before us. They don't get the right --
14 did they call us and say, hey, listen. Come on
15 over and, you know, my expert's going to be, you
16 know, opening the phone and testing the light and
17 doing the shoes and all. They didn't call us over
18 for that. And for some reason they think that just
19 because it's a Defense expert that they're
20 untrustworthy or they're not reliable, --

21 THE COURT: I don't think he said that.

22 MR. ESCOBAR: -- which is, I think, a bit
23 farfetched.

24 THE COURT: I don't think he's saying that. I
25 don't think he's saying that. You both -- you

1 obviously both have very different jobs. You're
2 both very good at your jobs. You know that your
3 jobs are different. You know that he's on offense.
4 He's got to prove his case. The burden of proof
5 rests exclusively at the People of the State of
6 Florida. It's a different -- it's a different
7 scenario that he's running. That's why he's the
8 keeper of the evidence. I gave you a shoe. That's
9 one thing. There were two of them. But now we're
10 talking about the phone and I don't know what tests
11 you're going to run on it. And --

12 MR. ESCOBAR: Your Honor, I can tell you,
13 we're going to determine what the settings were and
14 hopefully --

15 THE COURT: Okay. Why can't you do that with
16 them there?

17 MR. ESCOBAR: We can do the settings,
18 obviously. We can tell what the settings are. But
19 we want to be able to use that particular phone and
20 the ambient light that comes from that particular
21 phone in a scene in the theater that's going to
22 help us understand what happened that day. And,
23 no, it's not as easy as just going and buying a
24 iPhone 5 and saying, well, you know, let's
25 assume -- let's assume that that's the same ambient

1 light or let's -- you know, let's just assume that
2 Apple didn't change the ambient light or that this
3 phone, you know, didn't have a greater ambient
4 light just because of the way it was produced.
5 That is way too dangerous in our line of work,
6 especially when we're dealing with someone's life.
7 What they're putting on the other side is total
8 speculation that somehow we're either going to
9 crush the phone on the phone floor or we're going
10 to lose the phone. That's speculative. What we're
11 asking this Court and what we're telling this Court
12 that we're doing has no speculation whatsoever.

13 We've got -- and if you want to put us under
14 court orders -- as I told this Court before, if you
15 want to put us under court orders that I am to, you
16 know, be present with that phone at all times,
17 that's exactly what I'll do in order to give this
18 Court and the prosecution some assurance that
19 nothing is going to happen to that phone.

20 I think we're entitled. We're entitled to
21 test it. But we're not necessarily just entitled
22 to test it, you know, at the wishes of the
23 Government and how the Government wants when they
24 have nothing concrete to back that up. It's just
25 total speculation.

1 THE COURT: All right. Here's what we're
2 going to do: Your motion is denied without
3 prejudice.

4 Have your expert go look at the phone. Have
5 him check the settings. Have him check the serial
6 number. He doesn't have to use Bing; search engine
7 of his choice. If he can't find the phone on the
8 Internet and get the exact lot number so that he's
9 confident that he can render an expert opinion
10 based on his examination of the one phone and then
11 the almost identical -- and when I say, "almost
12 identical", I mean, these things weigh out to the
13 microgram the same. I mean, they go to great
14 lengths, probably someplace in China, to make these
15 phones exactly the same. So if he comes in and he
16 tells me after the examination of the State's phone
17 and his cursory search of the Internet to try and
18 find another phone exactly like it. We'll set it
19 at the same setting and conduct his -- I don't want
20 to call it an experiment because I don't want to --
21 I'm not attempting to denigrate what you're doing.
22 I get what you're trying to do. I understand it
23 and I admire the enthusiasm that you put into it.
24 But at the same time, it would be an exceptional --
25 an exceptional change in the current status of the

1 law for me to give you the phone. You can't give
2 me a case where somebody said, here, key pieces of
3 evidence, the only key piece of evidence, take it.
4 You know, when there's bullets, if there's ten
5 them, I don't have a problem giving you two or five
6 even. When there's shoes and there are two, I gave
7 you one, which I thought was pretty exceptional.
8 I'm bending over backwards to accommodate you. But
9 now we're talking about the only phone where a
10 replica that Apple takes such great care to make
11 the same, with the same settings, the same numbers
12 is out there.

13 So have your expert look at it.

14 MR. ESCOBAR: I will, Your Honor.

15 THE COURT: Have him do whatever he's going to
16 do with it. And if that doesn't work and then he
17 can come in under oath and tell me, Judge, I'm an
18 expert. Here's my bona fides; here's my CV. Give
19 Mr. Loughery a chance, if he's still here to
20 cross-examine on it and see where we are. Okay?
21 So ...

22 MR. ESCOBAR: Judge, I will definitely do
23 that.

24 The only thing I would ask the Court, not that
25 I would think the State would do anything to change

1 the settings, but I would ask the Court to issue an
2 order that when they're reviewing the phone,
3 including the State and Mr. Grimaldi, that none of
4 the settings on the phone be disturbed and be
5 preserved for my expert to view.

6 THE COURT: And I will -- you know, State, you
7 understand what he's saying?

8 MR. LOUGHERY: Of course, Judge.

9 THE COURT: Okay. All right. I mean, it's a
10 given. He knows it's not supposed to happen. He's
11 going to let it happen. At some point, we'll have
12 to trust each other a little bit. So let's do
13 that.

14 Were there any other issues I can attempt to
15 resolve today to advance the case to trial?

16 MR. ESCOBAR: Judge, we're trying. I think
17 Mr. Loughery will tell you, we're trying as much as
18 possible to get as many depositions done. You know, we
19 had a bump in the road with an expert in that --

20 THE COURT: Uh-oh.

21 MR. ESCOBAR: You know, it is a doctor. And
22 it's one of the -- they're just difficult. So,
23 they hired a lawyer and, so, we had some changes
24 that we had to make, but we're moving forward.
25 We're trying to take as many depositions as possible.

1 Dino and I are in depos this month. I can't tell
2 you how many depos.

3 THE COURT: I understand. All right.

4 Mr. Loughery, is there anything I can do to
5 advance the case from the position of the
6 prosecution?

7 MR. LOUGHERY: I don't think so, Judge. I
8 think we know what our --

9 THE COURT: All right. Mr. Grimaldi, anything
10 you want to add?

11 MR. GRIMALDI: No, Your Honor. Because I
12 think you're denial without prejudice is sufficient
13 because we can readdress my potential issue if it
14 comes up.

15 THE COURT: You had an issue on the physical
16 phone issue?

17 MR. GRIMALDI: Yes.

18 THE COURT: All right. We'll save it and see
19 if we need to cross it. We'll see if we even need
20 to cross that bridge.

21 MR. GRIMALDI: I think given your order we can
22 save it.

23 THE COURT: All right. And the deposition of
24 the victim is going to occur on Monday; is that
25 what I heard?

1 MR. GRIMALDI: Yes, sir.

2 THE COURT: Okay. My ears perked up. That's
3 good to hear. It means we're moving closer. Good.
4 Good luck, everybody.

5 We're in recess on that.

6 (Proceedings concluded.)

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STATE OF FLORIDA)
)
COUNTY OF PASCO)

I, Victoria L. Campbell, Registered
Professional Reporter, certify that I was authorized
to and did stenographically report the foregoing
proceedings and that the transcript is a true
record.

DATED this 19th day of September, 2016

