

COPY

STATE V. KERRON ANDREWS
August 20, 2015 BEFORE JUDGE KENDRA AUSBY

STATE OF MARYLAND, * IN THE
V * CIRCUIT COURT
KERRON ANDREWS, * FOR
Defendant. * BALTIMORE CITY
* 114149007-09

* * * * *

TRANSCRIPT OF OFFICIAL PROCEEDINGS
(Motion Hearing)

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BEFORE: THE HONORABLE KENDRA AUSBY, Judge

--- --

HEARING DATE: August 20, 2015

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APPEARANCES:

For the State: Katie O'Hara, ASA

For the Defendant: Deborah Levi, APD

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1 P R O C E E D I N G S

2 (On the record - 10:07 a.m.)

3 MS. O'HARA: Your Honor, may I call the case?

4 THE COURT: Yes.

5 MS. O'HARA: Calling State of Maryland v. Kerron
6 Andrews, case number 114149007 through and including 009.
7 This is assistant State attorney Katie O'Hara for the
8 State.

9 MS. LEVI: Good morning, Your Honor. Deborah
10 Levi on behalf of Mr. Kerron Andrews. He's present to my
11 immediate left.

12 THE COURT: All right, thank you. Good morning.
13 You may be seated.

14 MS. O'HARA: Your Honor, Judge Phinn sent us
15 here for a motion to suppress --

16 THE COURT: Yes.

17 MS. O'HARA: -- and Counsel and I agree that
18 because of the lengthy history and the hearings that have
19 already taken place as a result of this case, we wanted to
20 fill the Court in on that and let the Court know that the
21 background leading up to the motion to suppress is we may
22 make a summary.

23 THE COURT: Well, so Defense Counsel's looking
24 at me as if she doesn't necessarily agree.

25 MS. LEVI: Well, I agree that we both need to

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1 address the Court, but seeing as it's our motion I would
2 hope to be able to present to the Court sort of where we
3 are first.

4 THE COURT: Oh, okay. That's fine.

5 MS. LEVI: Okay. So, Your Honor, this case is
6 over a year old. On the eve of the fourth trial date --

7 THE COURT: Let me ask you this before you all
8 give me whatever it is you want to give me.

9 MS. LEVI: Yeah.

10 THE COURT: Does any of this have anything to do
11 with whether or not the Defendant's rights were violated
12 in gathering some evidence that is sought to be
13 suppressed?

14 MS. LEVI: The State's position, what we'll get
15 to at the end but I'll start there, is that we already
16 litigated this in front of Judge Peters and so there's no
17 reason for us to reopen it. We absolutely disagree with
18 that. So ultimately what I have are the official
19 transcripts from the proceedings, but before we handed
20 them over to Your Honor we wanted to give a little bit of
21 a background. It'll only take about 45 seconds.

22 THE COURT: Did Judge Peters make a ruling as to
23 whether or not the evidence is suppressed?

24 MS. LEVI: Judge Peters specifically said -- and
25 I actually briefed this for Your Honor in case we, last

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1 night in case got sent to another judge. Throughout the
2 transcript on multiple occasions he said he was only
3 concerned in the three-day discovery proceeding that took
4 place over the course of a month. He was only concerned
5 with the discovery violations, at the conclusion of which
6 he -- we asked for multiple sanctions. Number one was the
7 case to be dismissed, number two was the primary detective
8 to be excluded from testifying. He granted that part of
9 our motion determining that the discovery violations were
10 so egregious and they were willful that the primary
11 detective was no longer credible and could not testify.

12 THE COURT: Okay.

13 MS. LEVI: In addition, I asked for other
14 sanctions such as the evidence to be suppressed as a
15 sanction for the discovery proceeding.

16 THE COURT: Okay.

17 MS. LEVI: For the discovery violations. He
18 denied our motion to suppress the evidence as a sanction
19 in the discovery proceeding, but he ordered in the middle
20 of this three-day proceeding for the State to give us all
21 the evidence that they had withheld.

22 Specifically, we filed a pleading in November
23 basically saying did you use Stingray in this case. Give
24 us all of the electronic surveillance that you used in
25 this case which you are entitled to give us under,

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1 required under 4-263. The State responded in writing, we
2 don't have it. In January they responded in writing, we
3 don't have it.

4 THE COURT: Okay, we're not going to relitigate
5 the discovery, so --

6 MS. LEVI: Right, but --

7 THE COURT: -- Judge Peters said the following.
8 He said I hereby order that the detective may not testify.

9 MS. LEVI: Yes.

10 MS. O'HARA: For the State. For the State.

11 THE COURT: Okay, for the State.

12 MS. LEVI: For the State. We can call him if we
13 want.

14 THE COURT: Okay. And?

15 MS. LEVI: And he said throughout the
16 transcript, look, Ms. Levi, as a remedy to you not getting
17 all of the Stingray evidence timely I'm going to let you
18 file the motion to suppress, which we did within 30 days
19 of the completion of that hearing.

20 THE COURT: Okay.

21 MS. LEVI: The State then responded 30 days
22 later, well beyond the 15-day time period that was just
23 recently reiterated in the Sinclair decision, and they
24 asserted one single defense that this has already been
25 litigated and we're foreclosed from proceeding on this

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1 issue already res judicata. That's the only defense that
2 they asserted.

3 THE COURT: Uh-huh.

4 MS. LEVI: It was late, their pleading, It was
5 untimely and it didn't comply --

6 THE COURT: Well, isn't this a regular motion to
7 suppress?

8 MS. LEVI: It is, but we would argue, Your
9 Honor, it's so egregious in this case that the --

10 THE COURT: But I haven't heard the evidence. I
11 don't understand. What do you mean?

12 MS. LEVI: What's so egregious, Your Honor, is
13 that we waited for over a year. Not only was the Stingray
14 evidence suppressed, but exculpatory photo arrays and
15 witness interviews.

16 THE COURT: It wasn't suppressed, you just said.

17 MS. LEVI: I'm sorry. That was withheld was
18 exculpatory negative photo arrays --

19 THE COURT: Okay, I'm not arguing the discovery
20 issue.

21 MS. LEVI: What I'm saying --

22 THE COURT: Today, I'm -- this is a motion to
23 suppress, I'm assuming.

24 MS. LEVI: It is, Your Honor, but the State is
25 misleading the Court in its pleading.

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1 THE COURT: What's the grounds for your motion?
2 I'm not reading the pleading. I'm just waiting to have a
3 motion.

4 MS. LEVI: Okay. Okay, great. We briefed it,
5 Your Honor. We filed about a 52-page brief with exhibits.

6 THE COURT: So you want -- is this just your
7 brief and argument? You're not going to call any
8 witnesses?

9 MS. LEVI: Well, it's their burden on the motion
10 to suppress.

11 THE COURT: I understand that.

12 MS. LEVI: Yes.

13 THE COURT: Okay. So this is just brief and
14 argument as far as you know?

15 MS. LEVI: Yes.

16 THE COURT: Okay.

17 MS. LEVI: I mean, brief and argument and
18 whatever witnesses the State's calling in support of
19 their --

20 THE COURT: What, and without me having seen the
21 brief, what is the grounds for the motion to suppress?

22 MS. LEVI: There's two. There's a motion to
23 suppress his statement, and the first one that we've
24 asserted is the motion to suppress the evidence that was
25 obtained as a result of the illegal search that was the

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1 Stingray that was not authorized.

2 THE COURT: Okay, so it's a Fourth Amendment.

3 MS. LEVI: Yes, exactly.

4 THE COURT: Okay, and the other? You said there
5 were two.

6 MS. LEVI: The motion to suppress Mr. Andrews's
7 statement. He gave a statement to the officers.

8 THE COURT: Okay.

9 MS. LEVI: That's the only one that the State --

10 THE COURT: And that's just that it wasn't
11 voluntary or that --

12 MS. LEVI: Exactly. Uh-huh.

13 THE COURT: Okay. Okay.

14 MS. O'HARA: Your Honor, my understanding based
15 on Ms. Levi's brief was that the first motion was falling
16 back on the discovery argument. Not on the Fourth
17 Amendment issue but on the discovery argument. In her
18 brief she states because of the egregious discovery
19 violations that is the ground that she suggested why the
20 Court should not permit the evidence obtained during an
21 arrest warrant and execution of the search and seizure
22 warrant.

23 So I just want to make clear, we'll call
24 witnesses as it relates to the Fourth Amendment issue, but
25 I just want to make clear that the State's position is

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1 that as it relates to the discovery issue, Judge Peters
2 has heard the evidence --

3 THE COURT: Right.

4 MS. O'HARA: -- he has made a ruling, and Judge
5 Peter's ruling on the discovery issue stands and does not
6 need to be relitigated and should not be reexamined.

7 THE COURT: Understood. Uh-huh.

8 MS. LEVI: Okay.

9 THE COURT: Okay, that was easy.

10 MS. O'HARA: Thank you.

11 MS. LEVI: And then a brief response to that,
12 Your Honor, just for the benefit of the record. I do
13 think that if the State is going to respond that they need
14 to set forth and in compliance with 4-252, the arguments
15 that they're going to set forth at the hearing and the
16 points and authorities that they're going to rely on.

17 That's what 4-252 requires. That's what the
18 Court of Appeals requires from Sinclair, and they didn't
19 do that here. And I would say they're foreclosed from
20 raising any additional defenses. The reason for 4-252
21 that the Court of Appeals not only has made clear in
22 Sinclair, but Ray, State v. Ray, is so that the Court and
23 the State are not surprised by Counsel's argument, right,
24 so that everybody has a time to prepare in advance of the
25 motion hearing. The absolute same philosophy applies --

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1 THE COURT: Well, I don't -- before you can -- I
2 mean, I'm going to let you make your record, but I don't
3 get the sense that the State is going to raise any defense
4 other than his rights were not violated and his statement
5 was given freely and voluntarily.

6 MS. LEVI: I don't know what points and
7 authorities they're relying on. This is a complicated
8 issue, the pen register versus the --

9 THE COURT: All right, let me let you have a
10 seat for a moment, please.

11 MS. LEVI: Okay.

12 (Pause.)

13 THE COURT: Okay. Yes, anything else? You just
14 don't think they should be able to argue that the Fourth
15 Amendment was not violated?

16 MS. LEVI: Well, I don't know what they're
17 relying on to say that the pen register trap and trace
18 warrant -- I don't know what their argument is, really. I
19 have no idea. And I do think this is a really complicated
20 issue, and I think we're entitled to know what they're
21 going to argue because this is such, there's so much
22 secrecy surrounded by these Hailstorm machines that the
23 officers have already admitted to having used without any
24 notification.

25 If they're going to argue that Hailstorm doesn't

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1 actually go into the phone and listen -- I mean, I don't
2 know what their position is, but certainly I'm entitled to
3 defend against it and know about it, right? And so for
4 that reason I'd say we ought to be granted the motion
5 because they haven't complied with the rule and haven't
6 put forth any arguments and supported it with any points
7 and authorities whatsoever.

8 Arguing the alternative is not something new to
9 anybody. To say, first, we think it's been litigated;
10 second, in the event the Court doesn't find it's been
11 litigated here is the defense to the motion that we're
12 asserting so Counsel can be prepared. They didn't choose
13 to do that.

14 THE COURT: And you didn't do that. Okay.

15 MS. O'HARA: Your Honor, if the State could
16 address that point. The exact testimony that we're going
17 to hear about with regard to the Fourth Amendment issue
18 Counsel heard as it related to the discovery issue because
19 the discovery issue bled into the Fourth Amendment issue.

20 So there is nothing new. There is nothing --
21 Counsel's aware that the equipment is called Hailstorm not
22 Stingray because of the testimony that Counsel heard and
23 extracted from the detective as it relates to this very
24 case. So there simply is, there is nothing new. We're at
25 the exact same issue that we were two months ago.

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1 THE COURT: So do we even need, do you need to
2 call the witness or can I just rely on the transcript?

3 MS. O'HARA: It would seem to me to rely on the
4 transcript.

5 MS. LEVI: Your Honor, if I may speak to that
6 briefly.

7 THE COURT: Yes.

8 MS. LEVI: During the discovery proceeding, and
9 this is Page 76 of the June 4th transcript, I tried when
10 Officer Spinnato was on the stand to get to questions that
11 would relate to the 4-252 motion. Judge Peters
12 specifically said, I am not worried about that right now.
13 You will get to file your 4-252 motion; we are just on the
14 nature of the discovery violation.

15 So he specifically wouldn't -- and I said, Your
16 Honor, you asked if I had a likelihood of success at a
17 potential 4-252 motion, and so I'm just extracting
18 questions on that. He said, no, not right now, we're not
19 doing that; you file your motion in the ordinary course.
20 So we would absolutely disagree with that.

21 And I have briefed it and I have the transcripts
22 here to direct Your Honor's attention. I took those pages
23 out, but if Your Honor wants to look even just at the June
24 4th proceeding, there's three days. He addresses this
25 issue on May 12th and again on June 4th multiple times.

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1 THE COURT: So, and what the --

2 MS. LEVI: And if I just may, then, for the
3 completeness of the record, I asked questions during
4 Detective Spinnato's testimony on, I think it was
5 Detective Spinnato. It may have been the second
6 detective, but either way I was asking questions that
7 pertained to the 4-252.

8 The Court interrupted Counsel and said, okay, I
9 mean that's fine but that's not, that may be a motion to
10 suppress or something; We're on the discovery issue. That
11 was the June 4th transcript, Page 76 Lines 3 through 7. I
12 said, Your Honor had inquired as to whether there was
13 validity of the motion to suppress that we've been unable
14 to address so I just wanted to extract some information on
15 that. To which the Court responded, well, I'm not really
16 worried about that.

17 Again that was the same, 76, 16 through 17.
18 Further along the Court was inquiring as to prejudice. He
19 said as far as the Stingray, it's there. It seems to me
20 that if you're going to proceed with the motion to
21 suppress, you clearly have that information that you need.

22 Arguing prejudice for the Defense, I asserted
23 the evidence of the phone and the evidence of the gun
24 ought to be excluded because we were denied our
25 opportunity to timely file the motion to suppress. It's

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1 an egregious -- dot, dot, dot -- to which the Court
2 responded, well, I'll let you file the motion to suppress.
3 We were sent only on the discovery issue.

4 Then he -- so he felt like, your prejudice, Ms.
5 Levi, for getting all of this late is that go ahead, have
6 a crack at it, you get to file it. But he wasn't
7 concerned at the discovery hearing with the extent to
8 which Hailstorm was an intrusion, which the extent to
9 which it violated his Fourth Amendment rights. That was a
10 whole separate proceeding that he wasn't going to let us
11 get into during that three-day discovery proceeding.

12 THE COURT: Okay, that doesn't resolve. I don't
13 -- maybe I misunderstood what you're saying. So the State
14 is indicating that the testimony that the State would
15 present today is the same testimony that was presented --

16 MS. LEVI: Right.

17 THE COURT: -- there.

18 MS. LEVI: Right.

19 THE COURT: And that's in the transcript, and
20 the Court can just rely on the transcript to rule on your
21 motion.

22 MS. LEVI: Right.

23 THE COURT: You're fine with that?

24 MS. LEVI: Yep.

25 THE COURT: Oh, that's -- okay.

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1 MS. LEVI: Sorry.

2 THE COURT: Okay, so -- all right. Then why
3 don't you give that to me.

4 MS. LEVI: Okay, thank you. I'm going to
5 approach then, Your Honor, with what I would mark as
6 Defense Exhibits 1A, 1B and 1C, which are the transcripts
7 from the discovery proceeding.

8 (Transcripts marked for identification as Defendant's
9 Exhibit Nos. 1A-C.)

10 THE COURT: Okay, so those will be motion
11 exhibits, 1A, B, and C.

12 (Transcripts admitted into evidence as Defendant's
13 Exhibit Nos. 1A-C.)

14 MS. LEVI: These are the originals.

15 THE COURT: I'll take your brief as well.

16 MS. LEVI: In a stellar move of legal --

17 THE COURT: Now I should note that --

18 MS. LEVI: -- acumen I just don't have the copy
19 with all the exhibits which should be in the court file
20 because we filed it back in June.

21 MS. O'HARA: Well, that was the discovery brief.
22 And this is why we're --

23 MS. LEVI: No, it's the motion to suppress.

24 MS. O'HARA: Right.

25 THE COURT: No, I thought you said the motion is

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1 for me today.

2 MS. LEVI: We did. Oh, I have a reply to the
3 State's -- I just wrote out a reply to the State's
4 response, but I briefed the motion to suppress in June.

5 MS. O'HARA: But that was as it related to the
6 discovery --

7 THE COURT: Understood.

8 MS. O'HARA: -- issue. So --

9 MS. LEVI: Certainly --

10 MS. O'HARA: -- the arguments in that are not
11 what is before the Court.

12 THE COURT: Right.

13 MS. O'HARA: So the State's, keeps kind of --

14 MS. LEVI: It says that this should be --

15 THE COURT: Go on.

16 MS. LEVI: -- that it was implicated in the --
17 that it was related to the seizure that implicated the
18 Fourth Amendment. Okay. The discovery was obtained in
19 violation of the Fourth Amendment to the United States
20 Constitution.

21 But the problem is, Your Honor, I don't have a
22 copy with all of the exhibits, and they're lengthy. If I
23 could run back to my office and bring it over, although
24 the State may have a copy with all my exhibits.

25 MS. O'HARA: I've written all over them.

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1 MS. LEVI: That was my problematic move as a bad
2 lawyer is I forgot to bring that copy with all the
3 exhibits. Apologies.

4 THE COURT: Are the exhibits in here?

5 MS. LEVI: I mean rarely do I find something
6 that's been filed actually make it into the court file.

7 THE COURT: Welcome to my world. All right,
8 hold on one second.

9 (Pause.)

10 THE COURT: So I'm just --

11 MS. LEVI: We also asked for a Franks hearing.

12 MS. O'HARA: You're asking now for a Franks
13 hearing?

14 MS. LEVI: No, in the motion we asked for a
15 Franks hearing.

16 THE COURT: I noticed that. Okay, so from what
17 I could tell most of this motion, I think, deals with the
18 Fourth Amendment. I'm just looking at the headers.

19 MS. O'HARA: I'm not sure what Counsel gave you.
20 Is that what she filed after the June discovery hearing or
21 before the June discovery hearing?

22 THE COURT: Before, I think.

23 MS. O'HARA: Before?

24 THE COURT: Let me tell you. It says -- well,
25 there's no date on this, but I assume it's the same thing

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1 that's in the court file.

2 MS. LEVI: The motion to suppress right there.
3 That one.

4 MS. O'HARA: This is the one held --

5 MS. LEVI: Yes.

6 MS. O'HARA: -- June 30th.

7 MS. LEVI: June 30th, right.

8 THE COURT: Yes.

9 MS. O'HARA: The Court just said before that
10 discovery hearing, so this is the one filed after.

11 THE COURT: Oh, I'm sorry.

12 MS. O'HARA: That's okay. There's a lot of
13 background.

14 THE COURT: Okay, so this is the -- not. Okay.

15 MS. O'HARA: So what came first was the
16 transcripts.

17 THE COURT: Did you file a response to this June
18 30th?

19 MS. O'HARA: I did. Here's my copy. It's my
20 only copy, but it may be in the court file.

21 THE COURT: Thank you.

22 MS. O'HARA: So in order, Your Honor, that the
23 transcripts were the hearing that occurred over the period
24 of May and June, and then Counsel filed the motion that
25 the Court just had in its hand, the June 30th, and then

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1 the State responded to that motion with the one-page
2 response.

3 THE COURT: Okay. All right, so you want to get
4 me -- this is your copy. I didn't see this in here.
5 Maybe I'll see if there's one in here before I keep your
6 copy.

7 MS. O'HARA: I can print myself another copy.
8 That's fine.

9 THE COURT: Oh, it's in here.

10 MS. LEVI: And I haven't date stamped it, Your
11 Honor, because I just finished the reply. But just to,
12 for the, I was just to point the Court out to all the
13 pages where this was --

14 MS. O'HARA: I can --

15 MS. LEVI: I was just going to argue for a
16 minute but I'd feel better if I just supplement the record
17 with a copy of the reply, although I haven't, it's not
18 docketed yet.

19 THE COURT: That's fine. Did you give it to the
20 State though?

21 MS. O'HARA: I'm just receiving it for the first
22 time.

23 THE COURT: Oh, okay.

24 MS. LEVI: So in any event, it didn't get sent
25 to Judge Peters.

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1 THE COURT: Other than the exhibit is there
2 anything else you want me to review?

3 MS. LEVI: No. The exhibits are the trap and
4 trace and the -- that's it.

5 THE COURT: Okay, and then in terms of the other
6 motion, the statement, I guess we should just deal with
7 this one first.

8 MS. LEVI: Okay.

9 MS. O'HARA: And Your Honor, we can make
10 argument after the Court has had a chance to review
11 everything?

12 THE COURT: Yes.

13 MS. O'HARA: Okay.

14 THE COURT: So -- right. Let me make sure I
15 have your phone numbers.

16 MS. O'HARA: Okay.

17 THE COURT: And then you can, actually you can
18 give them to the Clerk when I stand down. And in terms of
19 your client's statement should you call witnesses have you
20 made them available? Have you all talked about making
21 them --

22 MS. O'HARA: The two witnesses who would be
23 required, one has been excluded to be called by the State
24 and I have made Detective Johnson available. He's on his
25 way here. So he would be the second. He would be the

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1 witness then for the statement.

2 THE COURT: Okay. He would be your witness.

3 MS. O'HARA: Correct.

4 THE COURT: I'm talking about the Defense.

5 MS. LEVI: Right, because it's their burden on
6 the voluntariness, we think.

7 THE COURT: Right.

8 MS. O'HARA: Sure.

9 THE COURT: Okay.

10 (Counsels confer with each other.)

11 THE COURT: You're going to bring the exhibits?

12 MS. LEVI: I am going to run over and grab them,
13 yes.

14 THE COURT: Okay, great. Thank you.

15 (Pause.)

16 MS. LEVI: Shall we have a -- or you'll just
17 call us when Your Honor's finished?

18 THE COURT: Yes. I will, if you all will just
19 leave your phone numbers --

20 MS. O'HARA: Sure.

21 THE COURT: -- I'll give you a call maybe in
22 about an hour or two, maybe closer to lunchtime to give
23 you a sense of --

24 MS. LEVI: That's fine. May I please be
25 briefly --

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1 THE COURT: -- the best.

2 MS. LEVI: I have a Part 45 matter at 11:00, so
3 if I could then just go there?

4 THE COURT: Sure, you have plenty of time to do
5 that.

6 MS. LEVI: Okay.

7 MS. O'HARA: Thank you.

8 THE COURT: I'll give you a call around like the
9 midday recess to give you a sense of when it would be good
10 to come back.

11 MS. O'HARA: Sure.

12 MS. LEVI: Okay, thank you, Your Honor.

13 MS. O'HARA: Thank you, Your Honor.

14 (Off the record - 10:28 a.m.)

15 (On the record - 3:15 p.m.)

16 THE COURT: Please be seated. Could you please
17 recall the case?

18 MS. O'HARA: Yes, Your Honor, and thank you.

19 Calling the State of Maryland v. Kerron Andrews. This is
20 case number 114149007 through and including 009. This is
21 assistant State attorney Katie O'Hara for the State.

22 THE COURT: Yes.

23 MS. LEVI: Good afternoon, Your Honor, Debi Levi
24 on behalf of Mr. Kerron Andrews who's present to my left.

25 THE COURT: Thank you. You may be seated, okay.

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1 MS. O'HARA: Your Honor, as it relates to the
2 motion to suppress I thank the Court for taking the time,
3 and it was lengthy, to read the transcript that Ms. Levi
4 provided.

5 THE COURT: I didn't read the whole thing. I
6 hope you don't think I did.

7 MS. O'HARA: No, the pertinent parts that the
8 State provided.

9 THE COURT: Pretty amazing but not that amazing.

10 MS. O'HARA: I was just reviewing it because I
11 haven't had a chance to review it. And I'm not sure what
12 exhibits were provided because those were attached
13 separately, so I wanted to take this opportunity to
14 provide exhibits that would be beneficial, I believe, to
15 the Court. And those would be the arrest warrant for
16 Kerron Andrews is Exhibit Number 1, and the actual DNR
17 application that's referenced through the testimony of
18 Detective --

19 (Arrest warrant and marked for identification as
20 Plaintiff's Exhibit No. 1.)

21 THE COURT: That is here.

22 MS. O'HARA: That is here?

23 THE COURT: Uh-huh.

24 MS. O'HARA: And it is -- let me see. It's the
25 signed one or the true-test copy.

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1 THE COURT: This is the application and the
2 warrant.

3 MS. O'HARA: Application and the order?

4 THE COURT: And the order, I'm sorry.

5 MS. O'HARA: Thank you.

6 THE COURT: Yes.

7 MS. O'HARA: As long as that's in there, Your
8 Honor, then I'd like --

9 THE COURT: May 5th, 2014 from Judge Williams?

10 MS. O'HARA: Yes. Let me just make sure. Yes.

11 THE COURT: And inside of here are two ATT work
12 order forms?

13 MS. O'HARA: Those -- that's fine.

14 THE COURT: Okay.

15 MS. O'HARA: I just wanted to make sure the
16 order and the application were included.

17 THE COURT: They're somehow included in this
18 exhibit. I think these papers may be out of order, but
19 okay.

20 MS. O'HARA: That's probably so. Okay. And
21 then that's as to the motion to suppress the cell phone.
22 As to the motion to suppress the gun, the State does have
23 an exhibit which is the actual search and seizure warrant
24 that was signed by Judge Etheridge, so I want to make that
25 part of the record which is State's Exhibit Number 3.

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1 (Search warrant marked for identification as
2 Plaintiff's Exhibit No. 3.)

3 MS. O'HARA: But it would be the State's request
4 to deal with these separately because I think that the
5 issues are separate, just the phone and then the gun.
6 Obviously the statement is its own separate issue.

7 THE COURT: Right. And we're not -- right.
8 Okay.

9 MS. LEVI: Your Honor, we would object to this
10 point to the record. I think the State had the burden
11 this morning. They chose not to present evidence, to
12 rely --

13 THE COURT: Stand.

14 MS. LEVI: -- I'm sorry, Your Honor. I really
15 do apologize. I am sorry. They, relying on the
16 transcripts that's all they offered. We've had all this
17 time for me not to look over and prepare argument in
18 response to that. So I would object to the introduction
19 of even as exhibits at this point.

20 THE COURT: Okay. Well, the objection is
21 overruled. And I'll hear from you, I guess, at the point
22 in which I have questions for you, but I don't -- my
23 understanding is that the gun was seized pursuant to a
24 valid search and seizure warrant. And so I'm not sure how
25 you want me to -- you may have an argument that I don't

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1 need to go there, but if you want me to suppress it I
2 probably do need to go there. So I think that it is
3 relevant and perhaps necessary for the Court. You can
4 argue, I guess, at some point that I could just ignore it.

5 All right. All right, is there anything else?

6 MS. O'HARA: Your Honor, just by way of how
7 we're proceeding, do we want to proceed first with the
8 phone or first with the gun, so that the State can make
9 the requisite notations?

10 THE COURT: You can argue both.

11 MS. O'HARA: Okay. As it relates first -- well,
12 I think we'll do the easy part first. As it relates to
13 the gun, the State would first ask the Court to note that
14 the Defendant has not made a showing of standing as to
15 5032 Clifton Avenue. Search and seizure was authorized by
16 Detective -- excuse me, Judge Etheridge for that location.
17 That location was searched pursuant to the search and
18 seizure warrant, and at this point I believe the Defendant
19 would have to establish standing to challenge that search.

20 THE COURT: Okay. And as to the phone?

21 MS. O'HARA: I'm sorry, okay. Then assuming
22 that that is established as then continuing as to the gun,
23 then it would be the State's position that the search and
24 seizure warrant was valid, it was executed in a timely
25 fashion, the gun was found on the premises, it was

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1 recovered and it has been identified as part of the
2 evidence in this case.

3 As to the phone, there was a valid arrest
4 warrant and the State just admitted it as State's Exhibit
5 1 for Kerron Andrews. That arrest warrant was active on
6 the date and time in question. There was a valid court
7 order for a DNR aka a pen register. That order was signed
8 by Judge Williams on May 5th, 2014.

9 The State would direct the Court to the
10 application language which is "cell tracking device and
11 cell site information without geographical limits." That
12 language is contained in the application, but more
13 importantly that language is contained on the very last
14 page of the order where Judge Williams ordered that the
15 phone company, which in this case was Sprint, provide
16 identical services to those received by the subscriber
17 including all communications transmitted over the
18 telephone that the subscriber receives, regardless of
19 which other communication carrier's facilities are
20 involved, and is further ordered that the phone company
21 provide the agency with all call data content,
22 transactional/call data/call detail and cell site data
23 simultaneous with all communications over 443-208-2776.

24 That order was active at the time that the
25 equipment was used. The equipment as described by the

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1 June 4th, 2015 was not as Counsel describes in her motion.
2 I believe that she wrongly interprets the equipment and
3 the technology.

4 Frankly, the officers describe exactly what the
5 technology is and that it is an extension basically of a
6 cell site tower and that is perfectly fits within the
7 order which is enhanced cell site, which is cell site
8 information without geographical limits.

9 The equipment does not, did not in this case,
10 does not take information as described by Counsel and give
11 the government all kinds of information that it didn't
12 have. The equipment was used to locate the phone as
13 described as it would be in the application to locate the
14 phone as ordered by Judge Williams, and it acted, the
15 equipment acted as a cell site to determine where the
16 phone was with greater accuracy than other cell sites in
17 the areas.

18 Paragraph E, let's see. The application
19 outlines that -- the State would point to the Court in
20 Paragraph E, and at this point the State does not see any
21 change in technology, change in the way that it was used
22 between when Judge Williams issued the order and when the
23 technology was used to locate the phone on May 5th, 2014,
24 and the State submits that the phone was located in
25 compliance with the order.

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1 THE COURT: Okay.

2 MS. O'HARA: Thank you.

3 THE COURT: So before I hear from the Defense,
4 and so the Defense did provide the Court a brief which
5 I've had an opportunity to review, and the law. Let me
6 make a few preliminary findings and then I will invite
7 each of you to respond to sort of what's left, okay.

8 So preliminarily, based on my review of the
9 record, the -- I don't -- let me just say this. I don't
10 find that Judge Williams' order is invalid as a pen
11 register or trap and trace, but I do find that the order
12 does not authorize the use of Hailstorm and I would have,
13 it would have been my intent to invite the State to tell
14 me otherwise. And what I've heard the State say is that
15 the use of the Hailstorm is not different from the use,
16 the tracking of information that's authorized by this
17 order.

18 I am not persuaded of that for a few reasons.
19 It's very clear, I think, to me from this order, and even
20 the paragraphs that the State just read to me is that the
21 gathering of that information is based on the use of the
22 phone, the user's use of the phone or calls coming into
23 the phone with the user's use of the phone.

24 It does not authorize what I understood based
25 upon -- now I can't remember which person's testimony it

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1 was, but there's testimony in the transcript about -- I
2 can't remember which detective it was. But he essentially
3 testifies about how this works and he's having, he's been
4 questioned by Ms. Levi about does it go into the wall,
5 does it go through the wall of the house and does it go
6 into the phone, and he's basically saying generally that's
7 his understanding. It used to be called Stingray, it's
8 Hailstorm, and based on what Ms. Levi's asking him he
9 basically says that that's pretty much how he understands
10 it to work.

11 And then of course that is how Ms. Levi
12 describes it in her bench memorandum which the Court
13 understood. And so my understanding of that is that
14 essentially this particular piece of equipment goes into
15 the phone. The testimony made it very clear that the
16 person does not have to be using the phone. Quite frankly
17 I think the detective testified that it would be difficult
18 to use or you may not even be able to use it if the person
19 is actually using their phone.

20 So this is very different from an order
21 authorizing, for example, GPS or cell site information,
22 because that is information that's generated by the phone.
23 And my understanding of this equipment is essentially that
24 it's forcing the phone to emit information, or it's taking
25 information from the phone that the phone is not sort of

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1 on its own generating at that time which is very
2 different.

3 And so I think that the law is pretty clear that
4 you can't take the information out of the phone, or I
5 don't know if you could in this particular instance, I
6 guess, force the phone to emit information. So it's a
7 little high-tech, slightly over my head, but from what I
8 can, my limited understanding is that it's very different.
9 Clearly, it's very different from what the order, the pen
10 register or GPS allows them to do.

11 Now I will give you an opportunity to, well,
12 I'll give you an opportunity to tell me otherwise. Is
13 there something else in this record or in this order that
14 makes you think that --

15 MS. O'HARA: Yes, Your Honor. Detective Haley
16 who testified in front of Judge Peters indicated that the
17 Hailstorm simply acts, and it acted in this fashion, as a
18 independent hand-held cell site. And the order indicates
19 very clearly that cell site data can be recovered
20 simultaneously with all communications over the phone.

21 Detective Haley had testified --

22 THE COURT: Simultaneously with the
23 communications over the phone.

24 MS. O'HARA: The phone is always communicating
25 with cell phone towers so that you're up and ready to make

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1 a phone call at whatever time. So the order doesn't say
2 simultaneous with calls or simultaneous with text, it's
3 any communication with all communications over the phone.

4 THE COURT: Uh-huh.

5 MS. O'HARA: So the phone is communicating with
6 the various cell sites, the large permanent cell sites,
7 and the Hailstorm as Detective Haley testified simply
8 acted as a hand-held cell site. It has greater accuracy
9 than the cell site data that we get from Sprint to say
10 that the cell site at President Street and Pratt is the
11 cell site, and you can look at corner number one which is
12 the east-facing corner.

13 This is with greater accuracy, but in fact the
14 order addresses that specifically and says without
15 geographical limitations. And that is the language that
16 permits this very use. They were not -- it doesn't matter
17 what the technology can do, the testimony's what the
18 technology did in this case.

19 They did not extract information from the phone.
20 They did not call the phone and extract a third call from
21 the phone like a wiretap. They did not take the phone's
22 data. They did not extract text from the phone. They
23 didn't extract data from the phone. The phone was putting
24 out data to the nearby cell site, and the Hailstorm's
25 acting as the nearest one.

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1 THE COURT: Okay, hold on. Let's go back to his
2 testimony because I don't think that's what he said.

3 MS. O'HARA: Page 48 I just was reading. I
4 don't have the benefit of the transcript.

5 THE COURT: Which day was it? I can't remember
6 which day it was.

7 MS. LEVI: June 4th is when he testified, Your
8 Honor. Page 53, I think is what Your Honor's --

9 MS. O'HARA: I would encourage the Court to look
10 at Page 48. That's --

11 THE COURT: All right, so Stingray was the --
12 yeah, this is what I just read. I mean -- okay, talk
13 about the Stingray. Now it's called Hailstorm, it used to
14 be Stingray. Hailstorm used to be, probably is pretty
15 sophisticated, yes. So it doesn't just look at the --

16 MS. LEVI: I'm sorry, Your Honor, can Mr.
17 Andrews be uncuffed? I forgot to ask.

18 THE COURT: I'm sorry?

19 MS. LEVI: Can he be unshackled in the hands?

20 THE COURT: You can put them in the front. You
21 can put his hands in the front. Thank you.

22 MS. O'HARA: Your Honor, if the Court would look
23 at Page 48, that is the very first time that I see that
24 Detective Haley recites the equipment and how it was used
25 in this case. Line 18, he goes on to say, "And the

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1 Hailstorm equipment acts as a cell tower. So we go into a
2 certain area, and basically the equipment is looking for a
3 particular identifier and that's the serial number." It's
4 a cell tower.

5 It is Ms. Levi who is indicating that it's
6 peering into walls and peering into neighborhoods and
7 peering into other phones, but there is no indication,
8 absolutely no testimony, no testimony from the Defense
9 that in fact this Hailstorm was used that day, which is
10 what is at issue. Not what it is capable of is not what
11 is at issue. How it was used that day was simply as a
12 cell site.

13 Could it have been used to pull out texts, third
14 party calls, voice mails? I don't actually know the
15 answer to that, but even if it was that doesn't matter.
16 That's not what was done in this case. And the testimony
17 relates to what was actually done in this case, and the
18 Fourth Amendment is based on that day and the actions of
19 the officers on that very day.

20 (Brief pause.)

21 THE COURT: Okay.

22 MS. O'HARA: And then, Your Honor --

23 THE COURT: All right.

24 MS. O'HARA: I'm sorry. If I could just, one
25 final word is that the very last sentence of the order

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1 that Judge Williams authorized on May 5th is that the cell
2 site data simultaneous with all communications over the
3 phone was ordered to be captured. I don't see how this is
4 different than any other communication. The communication
5 with the Hailstorm as a hand-held cell site is exactly
6 fitting in with Judge Williams ordered. This Hailstorm in
7 no way has been accused of being used or in any way
8 there's evidence of it being used in any other fashion
9 than what Judge Williams ordered, which is what the
10 application, applicant applied for in this case.

11 (Brief pause.)

12 THE COURT: All right, thank you. After
13 consideration of the evidence and the State's arguments as
14 well the Court is still, one, not convinced that Judge
15 Williams' order is invalid. It's not. But I am convinced
16 that the order does not authorize the use of the Hailstorm
17 in the Court's understanding.

18 Based on my reading of the officer's testimony
19 is that it is used to get the -- go into the phone and get
20 information and which is very different from what the
21 court orders, which is that information that the phone is
22 generating on its own be gathered and/or collected to be
23 able to further the investigation. I think it's very
24 different, and my understanding is that it is going into
25 the phone. It's the best understanding that I have based

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1 on the testimony that's in here and the arguments of the
2 counsel. In order to go into the phone to get information
3 out of the phone you need a search warrant, and there was
4 no search warrant in this particular case.

5 So now in this particular case we have -- and
6 I'll allow the Defense, I guess, at this point to argue,
7 we have what the phone -- so there was no search warrant
8 to sort of go into the phone, but the Hailstorm went into
9 the phone and found, essentially found the Defendant.
10 There was a valid arrest warrant for the Defendant to
11 begin with, so they find him and he has a phone in his
12 pocket and they arrest him pursuant to the arrest warrant.

13 So I'll hear from you first as to why this is
14 all not negated by the fact that there's a valid arrest
15 warrant and the phone is in his pocket at the time of his
16 arrest. Yes, ma'am.

17 MS. LEVI: Well, we think but for the illegal
18 intrusion into the home they wouldn't have located him
19 there. So that makes the intrusion into the home and his
20 arrest -- I mean, the question really is what's the fruit
21 of the poisonous tree, right? So poisonous tree is the
22 entry into the home, but for Hailstorm they never would
23 have known he was there. So there's no inevitable
24 discovery because they would have had to wait for him to
25 have walked out onto the street and we don't know when

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1 that would have happened and whether or not they would
2 have arrested him there with the alleged phone in his
3 pocket. So they wouldn't have gotten him but for the
4 illegal intrusion into that home. There's no other
5 explanation for that.

6 They tried another address for him. They were
7 surveilling another address for him. That's provided in
8 the discovery. They had absolutely no intelligence that
9 connected him to this neighborhood or this house or behind
10 those walls, so but for that they wouldn't have come to
11 that house to arrest him.

12 I mean, there's a direct connection immediately
13 upon locating him is when they came to the house to serve
14 the arrest warrant. So I don't think the fact that they
15 had the valid arrest warrant gave them the authority to
16 locate him in the home and go into the home to serve the
17 arrest warrant. That's --

18 THE COURT: And what -- and then we have what is
19 presumably a valid search and seizure warrant upon the
20 execution of which there was located this gun.

21 MS. LEVI: Again, Your Honor --

22 THE COURT: I'll hear you.

23 MS. LEVI: -- that's the same as the Jardines
24 case where they do pre-warrant an illegal search and
25 that's a search that's illegal, and they use the illegal

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1 search as the basis for the valid issued search warrant.

2 And for example in those cases what we argue
3 here is if they do an illegal trash pull inside the
4 curtilage of somebody's home and they go and pull the
5 trash from the property without a warrant and then they
6 use that mail or personal effects that they find in the
7 trash to then go back and get the warrant, then that
8 warrant's illegal. Because they have no other, let's say
9 they have no other independent cooperation of the fact
10 that the defendant is at that home.

11 That's the exact same --

12 THE COURT: All right, let me --

13 MS. LEVI: -- scenario that we have here.

14 But --

15 THE COURT: All right, let me look at the
16 affidavit and see, which makes this sort of a quasi or
17 impromptu Franks thing and unless there's any objection
18 we'll just go with that.

19 MS. O'HARA: Well --

20 THE COURT: Yes.

21 MS. O'HARA: I'm sorry. My concern is that I
22 understand that Ms. Levi filed for the Franks motion but
23 did not provide with particularity an affidavit, evidence,
24 witness statement as to what the material omission would
25 have caused.

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1 THE COURT: Okay.

2 MS. O'HARA: So in this particular case I think
3 that she would have --

4 THE COURT: So it's really just the fruit of the
5 poisonous tree essentially. I mean, I think her, I mean
6 her arguments, I think it's pretty clear her argument is
7 that it's the bad arrest. The only reason they got the
8 search warrant in the first place -- and mind you, we
9 haven't gotten to standing and we haven't gotten to
10 whether or not it's a bad arrest. I haven't ruled on that
11 yet.

12 But my understanding is the argument is that if
13 it's a bad arrest, the only reason they got the search
14 warrant in the first place is because he was there. And
15 she's saying that if they weren't allowed to know that he
16 was there essentially the way that they found out that he
17 was there, then that is the problem with the warrant.

18 MS. O'HARA: But I think the State's issue with
19 that is the situation described by Ms. Levi was that the,
20 quote unquote, bad search -- because the State does not
21 think that that's a bad search -- the bad search on the
22 curtilage then is used to issue the arrest warrant. That
23 is not the case here. The arrest warrant was outstanding
24 before the Hailstorm was used.

25 MS. LEVI: The search warrant.

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1 THE COURT: No, but she said, but she's saying
2 that the --

3 MS. O'HARA: I understand. The arrest warrant
4 was outstanding before the Hailstorm was used.

5 THE COURT: Right.

6 MS. O'HARA: As a result of the Hailstorm the
7 Defendant was arrested. Even if the Hailstorm was not
8 used and the Defendant was arrested at 5032 Clifton Avenue
9 that search and seizure warrant would have been obtained
10 for 5032 Clifton Avenue because he was arrested there.

11 THE COURT: Right. And her argument is, is that
12 his being there or the warrant that they got as a result
13 of him being there is fruit of the poisonous tree because
14 there was a violation of his Fourth Amendment rights by
15 him using the Hailstorm on his phone to locate him at that
16 residence in the first place.

17 MS. O'HARA: I understand that's her argument.

18 THE COURT: Okay. Okay. So unless there's any
19 objection I'm still going to read this.

20 MS. LEVI: No objection, Your Honor.

21 THE COURT: Okay. I mean, you've admitted it,
22 so --

23 MS. O'HARA: Yes, of course.

24 (Brief pause.)

25 THE COURT: Okay, so all it says he was located

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1 at this address and so we want to search this address. I
2 mean that's really all it says. And so -- yes.

3 MS. LEVI: I'm just nodding my head in agreement
4 that there is no other independent cooperation but for the
5 illegal intrusion in 5032. They have no other independent
6 cooperation that he had any connection to that address.
7 So we think it's a direct fruit of the poisonous tree in
8 that regard.

9 THE COURT: And what about the standing issue?
10 You're just --

11 MS. LEVI: Well, the State alleges that he, I
12 mean, in their own discovery they assert he has a property
13 interest there; that there was property recovered from him
14 there; that he was staying there. They interview
15 witnesses that say he was an overnight guest there.

16 So I think the State can't have their cake and
17 eat it too. Either the property that was found there
18 they're attributing to him, that's the standing that
19 they're giving him by going forward saying what we found
20 there was yours and they have interviewed some witnesses
21 saying that he was an occasional guest. This came after
22 the warrant, the interviews from the witnesses who they
23 had there.

24 So in their own discovery they're asserting he
25 had a property interest in 5032 Clifton Avenue based on

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1 the statements by the witnesses. And the location of the
2 property that they found there, I mean, he, we need him to
3 take the stand to say that he had a property interest
4 there. He did, but they're asserting his own property
5 interest in the property itself, saying that he -- and I
6 think there are statements in the discovery that he was
7 sleeping there occasionally. So they're asserting that by
8 the evidence that they're putting forward.

9 I'm always perplexed by the State's assertion
10 that somebody's staying there and the property was theirs,
11 and then saying that they can't argue that it's theirs or
12 that they had a property interest in it. It just seems
13 illogical.

14 THE COURT: Anything else?

15 MS. O'HARA: Yes, Your Honor. This isn't how it
16 works. It's not so because Ms. Levi says it's so. It
17 works that the Defendant, once standing is raised the
18 Defendant must prove by preponderance of the evidence that
19 he's standing to challenge the search of the house.
20 That's -- I'm not making it up. I'm not creating anything
21 new. This is well founded.

22 And so the State's theory of the fact that he
23 has some interest there and that is why the gun from this
24 crime, the murder weapon, was there with him that's for
25 trial. This is a motion. And so for -- the Defense at

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1 this point has the burden to prove by preponderance of the
2 evidence through some testimony or some evidence other
3 than testimony that in fact the Defendant had standing to
4 challenge the search of the house.

5 MS. LEVI: So Your Honor, if I may respond
6 briefly. This is what we were talking about before on the
7 -- I mean we gave the evidence that we thought we needed
8 this morning. If this Court wants to hear briefly, we
9 submitted our brief under *Simmons v. United States*; any
10 testimony taken from Mr. Andrews in the Fourth Amendment
11 proceeding can't be used against him at trial unless he
12 takes the stand.

13 So if the Court wants to reopen -- the State
14 didn't respond with a substance of pleading. The State's
15 now asserting standing for the first time. If the Court
16 wants to take testimony of him of whether he was ever an
17 overnight guest at there for the purpose of this motion
18 then we'll go forward on that. I would proffer to you
19 that the State asserts that he was an overnight guest at
20 that property. If the Court needs more based on the last
21 notice of the argument then we'll comply.

22 THE COURT: Okay, I just want to look at one
23 more thing, so I'm going to ask you to give me a few
24 minutes and then I'll come right back out, okay?

25 MS. LEVI: Thank you, Your Honor.

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1 THE BAILIFF: All rise.

2 (Off the record - 3:47:13 p.m.)

3 (On the record - 4:25:59 p.m.)

4 THE COURT: Thank you, you may be seated. All
5 right, thank you for your patience. Let me, I'll just
6 reiterate something with respect to the Hailstorm. I'm
7 going to again, and I think I made the record very clear
8 that the Court was not satisfied that use of the Hailstorm
9 was authorized by the order for the pen register and trap
10 and trace, and the State made an argument about it sort of
11 being a miniature cell site.

12 And there's another reason for which the Court,
13 even if, and I'm not persuaded that that's the case. I'm
14 more persuaded as I stated before that it goes into the
15 phone and gets information out of the phone as opposed to
16 the phone already transmitting information to cell sites,
17 which is what phones do.

18 And the reason that it's so easy, I think, to
19 get -- easy. It's easier to get pen registers and trap
20 and trace is because to some extent people when they buy
21 and use cell phones they kind of are somewhat on notice
22 that signals are being sent around. That's what a phone
23 does and that's what it's for.

24 Even if, again I'm not a hundred percent
25 convinced, but just so the record's clear, even if what

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1 the Hailstorm is is sort of this mini cell tower or cell
2 locator site tower, hand-held, whatever it is, it's the
3 police department's device.

4 And so no one with a phone, even if we were to
5 argue that people when they get phones they have a sense -
6 - some people more sophisticated than others -- have a
7 sense that information's being sent around because that's
8 how phones work, no one expects that their phone
9 information is being sent directly to the police
10 department on their apparatus; that the police department
11 has its own cell, cell site or cell tower or mini hand-
12 held tower or whatever it is, and that the information on
13 my phone is being sent to the police department which is a
14 violation of our reasonable expectation of privacy. My
15 Fourth Amendment rights.

16 And so just so the Court is clear, like I said
17 I'm not convinced that that's how it works based upon the
18 testimony I read in the transcript. But if for any reason
19 I'm wrong about that I'm still not convinced that the use
20 was authorized and that you wouldn't need a search and
21 seizure warrant to be able to use that because it's the
22 police department, it's the government taking that
23 information from the phone without the person having any
24 knowledge of it whatsoever.

25 So there's that issue. And so that leaves us

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1 what, with what's left with the warrants and with the
2 arrest.

3 MS. O'HARA: Yes, Your Honor. I think though in
4 the recess that we had, based on the Court's ruling at
5 this point the State would ask the Court if the Court
6 would be willing to recess until tomorrow so that I can
7 speak with my supervisors. I have been advised that the
8 State would like to at least explore an interlocutory
9 appeal on the Court's ruling as to the DNR.

10 THE COURT: Okay, well, let me give you a whole
11 ruling --

12 MS. O'HARA: Yes.

13 THE COURT: -- and then you can --

14 MS. O'HARA: But just as it relates to this very
15 portion which is why I wanted to give the Court --

16 THE COURT: Well, but I've got to make a ruling
17 on it.

18 MS. O'HARA: Oh, I thought you had.

19 THE COURT: I mean, I'm just giving you sort of
20 my opinion about what it is, but I have to rule on what
21 happens because of that. Do you understand?

22 MS. O'HARA: Well, it would be -- I do, but I
23 guess I'm looking at it in the sense that if the Court has
24 ruled that there's a Fourth Amendment violation with
25 respect to the Hailstorm and the DNR then that then could

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1 affect moving forward.

2 THE COURT: But if I rule that there's a Fourth
3 Amendment violation but for some reason there's no
4 consequence or no particular remedy, you can go to trial.

5 MS. O'HARA: Absolutely.

6 THE COURT: So the issue of whether or not you
7 go to trial now or after appeal doesn't come into effect
8 until I've finished giving my ruling as to what the effect
9 of my opinion that I just gave is.

10 MS. O'HARA: Okay, understood.

11 THE COURT: And then if you wish to have an
12 interlocutory appeal we'll check with Judge Peters and --

13 MS. O'HARA: Thank you.

14 THE COURT: -- we can do all that.

15 MS. O'HARA: Okay, thank you.

16 MS. LEVI: So that sounds good for us.

17 THE COURT: I don't think he was necessarily
18 sent here for trial. I don't know if you were sent here
19 for trial.

20 MS. LEVI: We were not. We were only sent for
21 the motion.

22 THE COURT: All right, thank you. You may be
23 seated. So the Court then essentially having found that
24 the use of the Hailstorm violates the Defendant's Fourth
25 Amendment rights, the Court is going to find that any

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1 information generated from the use of the Hailstorm be
2 suppressed.

3 And so just so that I'm clear, it means that the
4 jury cannot hear any testimony or evidence about
5 information obtained from the Hailstorm, obtained through
6 the Hailstorm device. And just so that I'm clear, it's my
7 understanding that the Hailstorm device is what told the
8 police that the Defendant was at that location.

9 And so that includes any testimony or evidence
10 then that the Defendant was at that location, if that's
11 what -- because that's what the Hailstorm told the police,
12 And so the jury would be prohibited from hearing evidence
13 or testimony of that. It does not invalidate the arrest
14 or the search into the arrest with the phone that's in his
15 pocket.

16 Now anything that came off the phone, again if
17 it came through the Hailstorm device it is suppressed.
18 There can be no evidence or testimony about it. And then
19 again, any police knowledge that the Defendant was at that
20 location again also suppressed, so the jury would not be
21 able to hear any evidence or testimony of that.

22 So then that leaves us with the fruit of the
23 poisonous tree argument for the search and seizure
24 warrant. I reviewed the warrant and it literally says the
25 Defendant was in there so now we need a warrant. And

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1 that's all that it is. And so I analyze this different, a
2 little bit different from a normal sort of motion to
3 suppress a search and seizure warrant or even Franks in
4 terms of standing.

5 I don't -- I understand the State's argument in
6 terms of standing and this not being his residence, and
7 the Defense's argument that he was at a minimum an
8 overnight guest and has some reasonable expectation of
9 privacy. I don't think I need to reach those issues
10 because the warrant is really just fruit of the poisonous
11 tree of the illegally obtained information about the
12 Defendant's location. That's what it is.

13 And so I am granting the suppression of that for
14 that very reason. And so that the record is clear -- and
15 I know that the State is asking to take an appeal, the
16 record is clear. The ruling of the Court is that the
17 government violated the Defendant's Fourth Amendment
18 rights by essentially using the Hailstorm to locate him at
19 that residence.

20 And so information obtained about his location
21 at that residence is suppressed, and if that information
22 is suppressed then there would be no warrant, because it
23 is fruit of the poisonous tree which is that illegal
24 location information. And that is why I'm granting the
25 motion to suppress the information recovered from the

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1 search warrant. Let me note though that the exhibit that
2 you gave me had two warrants. It had one for the house;
3 it had one for the car.

4 MS. O'HARA: I'm sorry.

5 THE COURT: I am not ruling at all about any
6 search of any vehicle. I've not been asked to, and nor
7 did I even, once I saw at the top of it it's got both and
8 they're signed by two different judges on two different
9 days.

10 MS. O'HARA: That was inadvertently included.

11 THE COURT: Okay, so I'm making no ruling about
12 the affidavit application or search and seizure warrant
13 with respect to some vehicle that was listed in here
14 whatsoever. So it's just that warrant that says he was
15 there so we need a warrant there. And again it's, for the
16 Court it's fruit of the poisonous tree of the violation of
17 the Fourth Amendment rights.

18 MS. O'HARA: Your Honor, my understanding though
19 then, is then the burden shifts back to the State that the
20 State can now put on evidence of good faith; that any
21 officer acting in good faith pursuant to United States v.
22 Leon, they had the warrant not knowing what the Court's
23 ruling was going to be 17 months later, they were acting
24 in good faith and executed the search and seizure warrant.

25 I think that -- I don't think that the analysis

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1 ends at this point. If the warrant is successfully
2 attacked by the Defense then the good faith exception is
3 still available for the State.

4 THE COURT: Right. And because -- and so that
5 I'm, because this for me is strictly a fruit of the
6 poisonous tree issue as opposed to, I guess, the way we
7 normally handle search warrant challenges, I think that, I
8 mean, I guess you can argue good, I mean, I guess you're
9 just sort of arguing good faith in general because they
10 had the warrant.

11 MS. O'HARA: Yes, Your Honor. Yes, I think it's
12 entirely appropriate at this juncture then if the Court is
13 indicating that the Defense is successful on the search
14 and seizure warrant being invalidated because of the fruit
15 of the poisonous tree or for any other reason, the good
16 faith exception still stands.

17 THE COURT: Right.

18 MS. O'HARA: I don't see why that doesn't stand.

19 THE COURT: And the Court finds that that is
20 not, the Court's not persuaded nor do I think that it's
21 applicable in this particular case because it is a
22 violation of the Fourth Amendment right that led them
23 there. So in terms of saying that it was good faith, the
24 good faith is the bad faith in illegally essentially
25 locating him or locating him through using the Hailstorm

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1 in violation of his Fourth Amendment rights. And so it's,
2 to me I think the good faith exception doesn't really
3 apply here. So, based upon these facts.

4 MS. O'HARA: I guess I would just ask the Court
5 to read McDonald and, v. State and United States v. Leon,
6 because it appears two different sets of officers as
7 testified in front of Judge Peters -- one set of officers
8 who located the Defendant using Hailstorm; another set of
9 officers who entered executing search and seizure warrant;
10 and a third officer actually recovered the weapon.

11 So those officers who entered the house based on
12 the good faith exception in the search and seizure warrant
13 and the officer who recovered the weapon, they were
14 acting, it's the State's position that the good faith
15 exception applies to those officers, applies to the
16 actions of those officers and would apply to the Court's
17 analysis at this point.

18 THE COURT: So are you indicating that there was
19 some other team?

20 MS. O'HARA: Yes.

21 THE COURT: Because when I read the transcript
22 that they were in teams.

23 MS. O'HARA: So Detective Haley testified that
24 he's part of the advanced technical team.

25 THE COURT: Uh-huh.

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1 MS. O'HARA: He is the detective in his team who
2 located the Defendant. Stop. Then WATF joins in and
3 searches then for the Defendant. Stop. Then Patrol holds
4 the house in the Southwest District, searched the house
5 and found the murder weapon in the couch.

6 So yes, there's several different teams and
7 that's, that is, I think, the reason for the good faith
8 exception as articulated in McDonald and Leon because the
9 officers who were standing there, the WATF officers, the
10 Southwest District officers who then secured the house and
11 searched the house were standing there knowing only they
12 have the signed search and seizure warrant that Judge
13 Etheridge signed that day based on, I understand based on
14 what the Court believes now a year and many months later
15 should have been excluded, but that is the very basis for
16 the good faith exception.

17 THE COURT: Right. And again in this case I
18 disagree. My understanding of what the portion of the
19 transcript that I read that the teams, this was all sort
20 of done in concert and contemporaneously. And so I don't,
21 again based on the facts in this particular case, I don't
22 believe that that applies. I think this was more of a,
23 we're getting closer, we're getting closer, we got him.
24 We had one team here, we had one team here. Let's call
25 the patrol who tell them, you know, we got him here. And

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1 so it was all really contemporaneously based upon this
2 illegally locating him through the Hailstorm.

3 So I do understand your arguments. I understand
4 exactly what you're saying. I just think the facts of
5 this case do not apply, or that that good faith exception
6 is not appropriate in this case because of the way that
7 this entire sort of from the Hailstorm through the warrant
8 was executed by the government.

9 MS. O'HARA: Okay.

10 THE COURT: Okay. All right, and so in terms of
11 -- let me just --

12 MS. O'HARA: Oh, I'm sorry.

13 THE COURT: Yes. Please.

14 MS. O'HARA: Can I just make one more point so
15 that I have the record clear?

16 THE COURT: Yes.

17 MS. O'HARA: The good faith exception is
18 actually not available under very specific circumstances,
19 so I want to make sure that I understand the Court. The
20 Court's not finding a Franks violation; the Court is not
21 finding that the issuing magistrate was not neutrally
22 detached; and the Court's not finding that the affidavit
23 was so lacking in probable cause that a reasonably well
24 trained officer would not rely upon it or that the warrant
25 was facially deficient in allowing the dwelling to be

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1 searched, or it did not particularize the dwelling or
2 place to be searched or the things to be seized that a
3 reasonable officer would not presume it to be valid.

4 THE COURT: Well, I mean I can make a Franks --
5 I mean, that's essentially what it amounts to.

6 MS. O'HARA: But if the Court's making a Franks
7 determination --

8 THE COURT: I know where you're going with this.

9 MS. O'HARA: -- the State, the Defense never
10 proffered any testimony or a witness.

11 THE COURT: Well, that's fine. That's
12 absolutely fine. And I figured that's where you wanted to
13 go. What I'm telling you is what I'm saying essentially
14 what amounts to a Franks. We didn't have a Franks hearing
15 and I don't think one is necessary because it is fruit of
16 the poisonous tree. I think I'm trying my best to be able
17 to articulate what my ruling is and why it sort of doesn't
18 particularly fall within Franks.

19 I mean, I think, is it analogous? Yes. But did
20 we need a Franks hearing for me to be able to make this
21 ruling? No. Because the ruling is really based upon the
22 violation of the Fourth Amendment right by using the
23 Hailstorm. And this again is just fruit of the poisonous
24 tree. The fruit just happens to be the search and seizure
25 warrant. It could have been something else that they

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1 recovered or discovered or something else that was fruit
2 of the poisonous tree. In this particular instance it
3 happens to be the search and seizure warrant.

4 So I don't know any other way to articulate it.
5 I understand what you're saying with the case laws and
6 what the four --

7 MS. O'HARA: I'm just asking the Court --

8 THE COURT: -- exceptions are, so --

9 MS. O'HARA: Right, those four exceptions are
10 the articulated exceptions to the good faith. It doesn't
11 appear to me that we have an articulated exception, so I'm
12 taking note. I'm just --

13 THE COURT: So I'm articulating it, and maybe --

14 MS. O'HARA: Okay, understood.

15 THE COURT: -- when you take your appeal now
16 there will be a fifth one.

17 MS. O'HARA: Thank you.

18 THE COURT: I'm not sure.

19 MS. O'HARA: No, right. Understood.

20 THE COURT: Right, but I'm intentionally ruling
21 the way that I'm ruling so that the record can be what the
22 record is, and so that when you take your appeal that I
23 don't want this to be confused about what I'm trying to
24 rule here. I'm trying to -- what I'm saying is that
25 there's no good faith exception in this particular case

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1 because the facts don't lead to a good faith exception,
2 because to me this was contemporaneous with the violation
3 of the Fourth Amendment right and that this just happened
4 to be a fruit, the fruit of the poisonous tree happened to
5 be the warrant in this case.

6 And I respect that you're saying that at this
7 point there's no case law to support sort of the way that
8 I'm doing this. And I understand that, but I believe that
9 this is the appropriate ruling based upon the violation of
10 the Defendant's Fourth Amendment rights. So what I would
11 like to do, I would allow you to make additional record if
12 you'd like.

13 MS. O'HARA: I think I've made everything I can,
14 so --

15 THE COURT: I think you did. Okay. And then
16 what I'd like to do is just give a call to Judge Peters to
17 find out exactly what we should do in terms of an
18 interlocutory appeal.

19 MS. O'HARA: Thank you.

20 THE COURT: Okay.

21 (Brief pause.)

22 THE COURT: Now before I step down for a second
23 just in terms of where to, it's just a matter of where we
24 put this on the calendar or what do we with it. We did
25 not, we haven't resolved the issue of the motion to

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1 suppress the statement.

2 MS. LEVI: Right.

3 THE COURT: Okay.

4 MS. LEVI: And we both talked about it. Clearly
5 it's the end of the day and it's been a long week and
6 we're happy to delay that until the next, until we convene
7 again whether -- but let's see where we're going.

8 I was thinking, Your Honor, that we would
9 probably come back and see Judge Phinn in the morning.
10 They still need to file the paperwork first for the
11 interloc to see what's going to happen, and then we would
12 ask for his release. So Mr. Andrews' release on --

13 THE COURT: Well, the case is not over.

14 MS. LEVI: Right, but if they're going to
15 interloc it, my understanding from our appellate and
16 forensics division --

17 THE COURT: Okay, well, you figure that out.

18 MS. LEVI: All right. But I was thinking we
19 would just float them over until the morning and go see
20 Judge Phinn again and let them decide if they're going to
21 interloc and then we can decide the appropriate scheduling
22 with Judge Phinn in the morning. Is that --

23 THE COURT: On terms of the other motion?

24 MS. LEVI: The other --

25 THE COURT: I'm sorry, the other motion in the

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1 trial, if necessary.

2 MS. LEVI: Yeah.

3 MS. O'HARA: Right.

4 MS. LEVI: I had the impression we were only
5 sent here to see Your Honor just for today, and so we
6 didn't get to the other one and so then we'll let her
7 decide what she wants to do with the second one and send
8 us back, or is that up to you?

9 THE COURT: What is your -- do you have a
10 preference?

11 MS. O'HARA: Your Honor, I think that the
12 Court's ruling today actually puts a twist in the case
13 that is much more sufficient. It's much more delaying to
14 the case than going back to Part 46 tomorrow, potentially
15 getting another motions date for the statement. I think
16 that potentially the statement motion could be heard in
17 conjunction with the trial.

18 THE COURT: Okay.

19 MS. O'HARA: So I mean, I would think that we
20 probably should wait to hear what Judge Peters' suggestion
21 is as to how to proceed, but we should -- obviously we
22 have to go back through reception court at some point.

23 THE COURT: I'm thinking he's going to say go
24 back to Part 46.

25 MS. O'HARA: Right.

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1 THE COURT: But I just want to double check.

2 MS. O'HARA: Sure. If we go back to Part 46, or
3 even he can give us an answer to Part 46 tomorrow as to
4 how to proceed if it's not something that we can get this
5 afternoon.

6 THE COURT: Okay. So okay, then that's what
7 we'll do. But still with whatever the appropriate
8 procedure is for this Court in terms of the fact that we
9 are now under the impression that your office may file an
10 interlocutory appeal --

11 MS. O'HARA: Yes.

12 THE COURT: -- and then you can deal with the
13 other motion where it makes the most sense.

14 MS. O'HARA: Wherever it goes next, okay.

15 MS. LEVI: And then, Your Honor, would I have
16 permission, does the Court want the original transcripts
17 in the file? I got electronic copies today so if the
18 Court wants to keep the originals, I don't know how that
19 works. But --

20 MS. O'HARA: I mean they're part -- they're
21 admitted, so --

22 THE COURT: They're admitted, and I think if
23 there's going to be an interlocutory appeal they've got to
24 go. So --

25 MS. O'HARA: They should be, yeah.

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1 MS. LEVI: Right. So I was just wondering if we
2 can keep them with the court file for now, and then if I
3 have permission on the record to replace with copies of
4 them.

5 MS. O'HARA: Well, you have an electronic copy,
6 don't you?

7 MS. LEVI: Uh-huh.

8 MS. O'HARA: So can you just use your electronic
9 copy?

10 THE COURT: Yeah, I mean, I think that now that
11 this is admitted and this is what I relied on it goes.

12 MS. O'HARA: Right, and that has to go.

13 MS. LEVI: Okay, that's fine.

14 THE COURT: Okay.

15 MS. LEVI: Thank you, Your Honor.

16 MS. O'HARA: Thank you.

17 THE COURT: I'll give you an answer in just a
18 few minutes (inaudible).

19 (Off the record - 4:46:58 p.m.)
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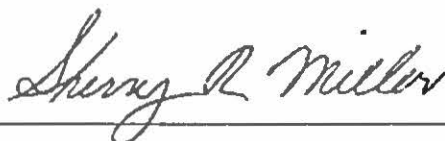
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This is to certify that the proceedings in the matter of State of Maryland v. Kerron Andrews, case number 114149007, 114149008, and 114149009 heard in Circuit Court for Baltimore City on August 20, 2015, was recorded on digital media with video.

I hereby certify that the proceedings herein contained were transcribed by me or under my direction. That said transcript is a true and accurate record to the best of my ability and constitutes the official transcript thereof.

In witness thereof, I have hereunto subscribed my name on September 28th, 2015.



Sherry R. Miller, President

