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23-P-1462

Appeals Court

COMMONWEALTH vs. MICHAEL DIAZ.

No. 23-P-1462.

Suffolk. October 1, 2024. - August 29, 2025.

Present: Neyman, Singh, & Toone, JJ.

Child Abuse. Obscenity, Child pornography. Cellular Telephone.
Search and Seizure, Warrant, Arrest. Personal Property,
Property seized at time of arrest. Practice, Criminal,
Motion to suppress, Warrant, Property seized at time of
arrest.

Indictments found and returned in the Superior Court
Department on December 19, 2019.

A pretrial motion to suppress evidence was heard by Sarah
Weyland Ellis, J.

An application for leave to prosecute an interlocutory
appeal was allowed by David A. Lowy, J., in the Supreme Judicial
Court for the county of Suffolk and the case was reported by him
to the Appeals Court.

Cailin M. Campbell, Assistant District Attorney, for the
Commonwealth.

George F. Ohlson, Jr., for the defendant.

NEYMAN, J. The Commonwealth appeals from a Superior Court judge's order allowing the defendant's motion to suppress evidence obtained from a search of the defendant's cellular telephone (cell phone). This case requires us to consider whether the judge committed an error of law in concluding that a 123-day delay between the seizure of that cell phone pursuant to a lawful search incident to arrest, and the application for a warrant to search the contents of that cell phone, was not reasonable under the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights. Despite the critical governmental interests justifying the delayed search of the cell phone in the present case, Massachusetts precedent compels us to affirm the judge's order.

Background.¹ 1. Facts regarding sexual abuse. On June 29, 2019, twelve year old Amanda² disclosed to her biological mother that she had been sexually abused by the defendant, her foster father. Amanda also told her mother that she had seen the

¹ The uncontested facts stem from the motion judge's decision on the motion to suppress, which she derived from the four corners of Sergeant Detective Anthony D'Alba's affidavit submitted in support of the application for a search warrant, as well as from the testimony and exhibits at the suppression hearing.

² A pseudonym.

defendant sexually abuse Betty,³ her eleven year old foster sister. Sergeant Detective Anthony D'Alba (Sergeant D'Alba),⁴ the supervisor of the sexual assault and child abuse unit of the Chelsea police department, was assigned to investigate the case. On July 16, 2019, at a forensic interview attended by Sergeant D'Alba, Amanda disclosed as follows. Between the summer of 2018 and March of 2019, while she was living with her foster parents, the defendant raped her vaginally with his penis and fingers, and touched her breasts, vagina, and buttocks. These crimes occurred "daily" in the foster home and in the defendant's vehicle. The defendant also photographed Amanda with his cell phone and requested that she photograph herself and send the pictures to him via text message.⁵ Amanda also believed that the defendant had similarly abused Betty, as she had seen Betty "come out of a room with a closed door with the [d]efendant, and [Betty] had told [Amanda] that her vagina hurt." The defendant instructed both girls "to keep everything a secret."

³ A pseudonym.

⁴ We use the nomenclature employed by the judge in her written memorandum and order.

⁵ Amanda explained at her interview that the defendant had given her two cell phones, one when she was living with him and another after she was removed from the defendant's home. Amanda used these cell phones to communicate with the defendant. Through the second cell phone, the defendant set up meetings with Amanda before school, "during which time he would rape her." The defendant instructed Amanda to delete their text messages from her cell phone.

On July 18, 2019, Betty participated in a forensic interview likewise attended by Sergeant D'Alba. Betty disclosed that while she lived in the foster home, "which was between the Fall of 2017 and March 2019," the defendant raped her "by penetrating her vagina and mouth with his penis," touched her breasts and vagina, and "kissed her on the mouth with his tongue." In addition, the defendant used his cell phone to show Betty a photograph of himself and his wife engaging in oral sex. Betty also saw the defendant "repeatedly bringing [Amanda] into rooms alone, showering with [Amanda] in the dark, and kissing [Amanda] on the lips."

On July 18, 2019, Sergeant D'Alba applied for and received an arrest warrant for the defendant. That same day, Sergeant D'Alba contacted the defendant using a phone number that one of the girls had identified as belonging to him. The defendant answered the call and agreed to meet at a public location, where Sergeant D'Alba arrested the defendant pursuant to the warrant. At that time, the defendant was carrying "an iPhone 6S in a black and copper case, with an emblem for the U.S. Army." The police seized the defendant's cell phone at the time of arrest and placed it in "secure evidence storage" at the Chelsea Police Department.

On August 1, 2019, Sergeant D'Alba learned that Betty had disclosed that her foster mother, the defendant's wife, had also

sexually assaulted her. On August 15, 2019, during a second forensic interview, Betty again disclosed that the defendant had shown her a picture on his cell phone of him and his wife engaging in oral sex. Betty also reported an incident where "the [d]efendant had used the flashlight on his [cell] phone to take a picture of [Betty] with her shirt lifted."

2. Search warrant application and execution. Sergeant D'Alba drafted a search warrant application, supported by his comprehensive twenty-seven page affidavit, seeking permission to search the contents of the cell phone seized at the time of the defendant's arrest. As noted in the judge's decision and order on the motion to suppress:

"Sergeant D'Alba spent time during 4-5 shifts, each 8 hours in duration, working on the search warrant application. Sergeant D'Alba had difficulty finding time to work on the search warrant application because of his many duties, his serious caseload, and his responsibilities responding to emergency situations. Sergeant D'Alba maintains an average of 80 open sexual assault investigations, including child abuse cases. Sergeant D'Alba regularly participates in sexual assault forensic interviews and engages in witness preparation for trial. Working the night shift as a supervisor, Sergeant D'Alba also responds as needed to shootings and unattended deaths. Due to these obligations, Sergeant D'Alba placed the search warrant application in this case, 'on the back burner.'"

On November 18, 2019, Sergeant D'Alba applied for and received a warrant to search the contents of the cell phone, which had been stored at the Chelsea Police Department since the defendant's arrest on July 18, 2019. During the 123 days between the

seizure⁶ of the defendant's cell phone and the obtaining of the search warrant, the defendant did not contact Sergeant D'Alba or the Chelsea Police Department seeking return of the cell phone. Further, Sergeant D'Alba had conversations with the "prosecutor" wherein he "learned that the prosecutor intended to use the [cell phone] as a piece of physical evidence at trial, regardless of whether a search warrant was executed on the [cell phone]."

The search warrant was executed on or around November 19, 2019. Pursuant to the search, photographs were recovered from the cell phone showing Amanda partially undressed, photographs of the defendant and his wife engaged in oral sex, "and a photograph of a very young looking, unidentified child with a penis penetrating the child's mouth." The search also revealed a photograph of Betty "with her chest and vagina exposed" and another photograph showing "[Betty's] vagina exposed."⁷

⁶ The judge ruled that the police had probable cause to seize the cell phone, and that the seizure was justified as a valid seizure incident to arrest. The defendant does not challenge these rulings on appeal.

⁷ On appeal, the defendant does not challenge any of the judge's findings of fact. He does, however, assert that some uncontested facts were omitted from her findings, including that Sergeant D'Alba testified that (1) "it was not uncommon for an individual to own multiple phones," and (2) in the interviews and investigation, nobody told Sergeant D'Alba what the cell phone used by the defendant to perpetrate the crimes looked like or what model it was.

3. Procedural background. On December 19, 2019, the defendant was indicted on four counts of rape of a child aggravated by a ten-year age difference, six counts of indecent assault and battery on a child under fourteen, dissemination of visual material depicting a child in a state of nudity or engaged in sexual conduct, posing a child in a state of nudity or suggesting sexual conduct, and possession of child pornography. On October 12, 2022, the defendant filed a motion to suppress the evidence obtained from the search of the cell phone. The judge held an evidentiary hearing at which Sergeant D'Alba testified and recordings of the children's forensic interviews were introduced in evidence.

4. Judge's ruling. On October 17, 2023, the judge issued a detailed and thoughtful memorandum and order in which she allowed the motion to suppress. The judge balanced the "nature and quality of the intrusion on the [defendant's] Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion" (citation omitted). Commonwealth v. White, 475 Mass. 583, 593-594 (2016). Regarding the Commonwealth's interests, the judge ruled, in relevant part, that:

"there is no doubt the Commonwealth's interest in the [cell phone] was strong. The police had probable cause to believe that evidence pertaining to numerous rapes of two children and dissemination of matter harmful to children would be found on the device. The [d]efendant's status as

a foster parent, the number of children living in his home at the time of the allegations, and the egregious nature of the allegations were all factors creating a strong government interest in bringing the offender to justice" (footnote omitted).

The judge further ruled, however, that the defendant also "had a significant privacy and possessory interest in his [cell phone]," and that "[n]otably, the [d]efendant was using it at the time of his arrest, speaking with Sergeant D'Alba to coordinate their meeting." Citing White, supra at 594-595, the judge rejected the Commonwealth's argument that the defendant's failure to request the return of the cell phone during the four months between the seizure and search negated any possessory interest in that item. The judge also distinguished Commonwealth v. Arthur, 94 Mass. App. Ct. 161, 165-166 (2018), and rejected the Commonwealth's reliance on that authority. Finally, citing again to White, supra at 594, the judge ruled that although Sergeant D'Alba "was diligent about his responsibilities and his caseload" and there was evidence supporting some of the delay, the "evidence does not account for four months of delay," and "[t]here is no legal precedent for finding a delay of 123 days to be reasonable, even with a compelling governmental interest." The judge thus concluded that the Commonwealth failed to meet its "burden to show that the delay of 123 days from the time the device was seized to the date of search warrant application was reasonable," and allowed

the motion to suppress. The Commonwealth filed a timely notice of appeal and application for interlocutory review, which was allowed by a single justice of the Supreme Judicial Court.

Discussion. The present case centers on the application of White, 475 Mass. at 593-594. Although material distinctions between White and this case exist, under existing precedent, we cannot say that the judge erred in her analysis.

1. Standard of review. "In reviewing a decision on a motion to suppress, we accept the judge's subsidiary findings of fact absent clear error but conduct an independent review of [the] ultimate findings and conclusions of law" (citation omitted). Commonwealth v. Carrasquillo, 489 Mass. 107, 116-117 (2022). As to conclusions of law, we "make an independent determination of the correctness of the judge's application of constitutional principles to the facts as found" (citation omitted). Id. at 117.

2. Seizure of cell phone. There is no dispute that the defendant was taken into custody pursuant to a lawful arrest warrant and that a cell phone was taken from his person as a lawful seizure incident to arrest, predicated on probable cause to believe that a cell phone belonging to the defendant would contain evidence of crimes. As the judge found, Sergeant D'Alba had information that the defendant had used his cell phone to communicate with Amanda, request and receive photographs from

Amanda, arrange meetings to sexually assault Amanda, and show "self-made pornographic material" to Betty. This information established probable cause to believe that the cell phone would contain evidence connected to the crimes under investigation. See Commonwealth v. Barillas, 484 Mass. 250, 254 (2020) ("if a police officer has reason to believe that a cell phone found on an arrestee might contain evidence of the crime of arrest, the officer may seize that cell phone and secure it until a valid search warrant is obtained"); White, 475 Mass. at 588 (seizure justified where police have substantial basis for concluding that item seized contains evidence connected to crime under investigation).

3. Delay obtaining search warrant. "Police may retain an item seized without a warrant for 'the relatively short period of time needed . . . to obtain a search warrant,' but must release the item if a warrant is not obtained within that period." White, 475 Mass. at 593, quoting Commonwealth v. Gentile, 437 Mass. 569, 573 (2002). If the police fail to obtain a search warrant within a reasonable time, the seizure, even if "reasonable at its inception because based upon probable cause, may become unreasonable as a result of its duration." White, supra, quoting Segura v. United States, 468 U.S. 796, 812 (1984). See White, supra, quoting United States v. Burgard, 675 F.3d 1029, 1032 (7th Cir.), cert. denied, 568 U.S. 852 (2012)

("When officers fail to seek a search warrant, at some point the delay becomes unreasonable and is actionable under the Fourth Amendment").

There is no bright-line rule delineating when a delay in seeking a warrant becomes unreasonable. See White, 475 Mass. at 593, citing Burgard, 675 F.3d at 1033. Rather, "we analyze each case on its own facts, 'balanc[ing] the nature and quality of the intrusion on the individual's [interests under the Fourth Amendment to the United States Constitution] against the importance of the government interests alleged to justify the intrusion.'" Commonwealth v. Cruzado, 480 Mass. 275, 283 (2018), quoting White, supra at 593-594. In conducting this evaluation, the Supreme Judicial Court has stated that "whether police acted diligently in applying for [a] warrant is a factor that may be relevant. . . . However, [that court has] never said that it is a dispositive factor." Cruzado, supra at 283 n.9. The Commonwealth bears the burden of demonstrating that the delay was reasonable. White, supra at 594.

There is no dispute in the present case that the Commonwealth was required to obtain a search warrant to search the contents of the seized cell phone. See Riley v. California, 573 U.S. 373, 401 (2014) ("warrant is generally required before such a search, even when a cell phone is seized incident to arrest"). The Commonwealth argues, however, that the judge

erred "because the police had no obligation to diligently obtain a search warrant and the seizure of the defendant's cell [] phone was otherwise reasonable." The Commonwealth posits that in White, 475 Mass. at 593, the police had an obligation to diligently obtain a search warrant because the initial seizure of the defendant's cell phone did not fall into any exception to the warrant requirement. In the present case, by contrast, the defendant's cell phone was lawfully seized incident to arrest. In such circumstances, the Commonwealth contends, any delay in obtaining a warrant to search the cell phone is of lesser significance. Otherwise stated, the Commonwealth argues that the requirement to diligently or expeditiously obtain a warrant to search the contents of an object (here, a cell phone) does not apply, or at least does not apply with the same force, to objects lawfully seized pursuant to an exception to the warrant requirement (here, search incident to arrest based on probable cause).

We agree that the initial seizure in White was not based on probable cause or any recognized exception to the warrant requirement. We further agree that "the Fourth Amendment will tolerate greater delays after probable-cause seizures" as opposed to seizures predicated on reasonable suspicion, Burgard, 675 F.3d at 1033, or generalized suspicion, see White, 475 Mass. at 590-591. That distinction, however, does not negate the

requirement that law enforcement act without unreasonable delay to obtain a search warrant. See id. at 593. See also United States v. Smith, 967 F.3d 198, 209 (2d Cir. 2020) (existence of probable cause for initial seizure of tablet "far from dispositive to deciding the reasonableness of the ensuing delay in seeking a search warrant"). To the contrary, under the Fourth Amendment, even where there is probable cause to seize an item, courts still evaluate the reasonableness of a subsequent delay in obtaining a warrant to search that item. In Cruzado, 480 Mass. at 282, for example, the Supreme Judicial Court evaluated the seizure and subsequent search of a cell phone that contained evidence connected to a homicide. The court first concluded that the seizure of the cell phone was lawful "as police had probable cause to seize the cell phone and exigent circumstances existed to do so without a warrant." Id. The court then applied the White balancing test, "consider[ed] the reasonableness of the ten-day delay from the police's seizure of the cell phone to their application for a warrant to search it," and concluded that the brief delay was not unreasonable. Id. at 283. Thus, even where the initial seizure of evidence was lawful, the court in Cruzado, supra at 283-284, nonetheless applied the White balancing test; evaluated, among other factors, whether the police acted diligently; and weighed the nature and quality of the intrusion against the importance of

governmental interests as required by White. Similarly, in Burgard, supra at 1031, cited and relied on by the court in White, supra at 593-594, the defendant conceded that the initial warrantless seizure of his cell phone was lawful because of exigency and probable cause. Nonetheless, the Court of Appeals for the Seventh Circuit did not end its analysis there, but instead evaluated whether a six-day delay in obtaining a warrant to search the cell phone was unreasonable taking into account "whether the police diligently pursue[d] their investigation" (citation omitted). Burgard, supra at 1033.⁸ Thus, the Commonwealth's narrow interpretation of White is unpersuasive, and its first argument is unavailing.

In her thoughtful opinion, our dissenting colleague contends that where the police seized the cell phone incident to a lawful arrest, and where there was probable cause to believe the cell phone was used as an instrumentality of the crimes, the Commonwealth was "authorized to seize it and keep it as long as necessary for it to be used in the prosecution of the defendant." Post at . We acknowledge that there is commonsense appeal to this argument. Nonetheless, we are

⁸ In the Superior Court and on appeal, neither party argued that art. 14 of the Massachusetts Declaration of Rights provides different or greater protections than the Fourth Amendment to the United States Constitution. We thus apply no material distinction between the two herein.

unaware of any precedent for the proposition that the White reasonableness test and the "expeditiousness" requirement do not apply when an item has been seized pursuant to a search incident to arrest as opposed to being seized on a different lawful basis. Furthermore, courts have applied the expeditiousness requirement and balancing test even where items have been seized incident to lawful arrest. See, e.g., United States v. Sykes, 65 F.4th 867, 878-879 (6th Cir. 2023), cert. denied, 144 S. Ct. 576 (2024) (applying balancing test to determine whether delay in obtaining warrant to search cell phone seized incident to arrest was reasonable); United States v. Bragg, 44 F.4th 1067, 1071-1072 (8th Cir. 2022), cert. denied, 143 S. Ct. 1062 (2023) (same). Accordingly, we apply the White balancing test.

The Commonwealth argues, in essence, that even if the balancing test applies, the judge erred because the Commonwealth's interest in maintaining the cell phone as evidence of serious crimes far outweighed the defendant's minimal possessory interest. The Commonwealth cites to several factors that weigh in its favor. First, the government had a "particularly strong" interest in investigating and resolving the crimes in this case, including multiple counts of aggravated statutory rape and sexual assault against multiple child victims, posing a child in a state of nudity or engaged in sexual conduct, and dissemination of visual material of a child

in a state of nudity or suggesting sexual conduct. Cruzado, 480 Mass. at 284. See id. ("There can be no doubt that there is a strong government interest in solving crimes and bringing offenders to justice. . . . This interest is particularly strong in the context of felonies or crimes involving a threat to public safety, such as murder" [quotations and citations omitted]). Second, the Commonwealth lawfully seized the cell phone and had probable cause to believe that it contained critical evidence of the crimes charged. See Arthur, 94 Mass. App. Ct. at 165 (distinguishing White and emphasizing "particularized evidence [in this case] that the cell phones were used in the commission of the crime"). Third, the defendant never sought the return of the cell phone. See Burgard, 675 F.3d at 1033 ("it can be revealing to see whether the person from whom the item was taken ever asserted a possessory claim to it"); United States v. Stabile, 633 F.3d 219, 235-236 (3d Cir.), cert. denied, 565 U.S. 942 (2011) (defendant's failure to seek return of property for eighteen months considered as factor suggesting lesser possessory interest in item); United States v. Blanchard, 544 F. Supp. 3d 166, 172 (D. Mass. 2021) (defendant had diminished possessory interest in seized cell phone where she never asked for its return "nor could she have because she ha[d] been incarcerated

ever since the date [of the seizure]").⁹ Finally, as discussed supra, Massachusetts courts have not imposed any outer limit or "bright-line rule that demarcates when a delay [in obtaining a search warrant] is unreasonable." Cruzado, supra at 283, citing White, 475 Mass. at 593. Thus, the Commonwealth argues, the length of the delay in the present case is neither dispositive nor unreasonable.

In view of all these circumstances, there is more than a measure of persuasiveness to the Commonwealth's claim that the delay in obtaining the search warrant was not unreasonable because the balancing of interests weighed in the Commonwealth's favor. Indeed, there is some support for the Commonwealth's position in Federal case law. See, e.g., Sykes, 65 F.4th at 878-879, quoting Segura, 468 U.S. at 813 (forty-two day delay between initial seizure of defendant's cell phone and obtaining of search warrant not unreasonable because defendant's possessory interest was "virtually nonexistent" where there was probable cause to believe cell phone contained child pornography and evidence of sex crimes against minor, defendant did not seek return of cell phone, and defendant was in custody); Stabile, 633 F.3d at 236 (three-month delay in obtaining search warrant

⁹ The judge did not make any findings as to whether or how long the defendant was in custody following his arrest on July 18, 2019. The docket reflects, however, that bail was "posted" on January 10, 2020.

reasonable, even though "not unavoidable," in view of lead officer's assignment to Secret Service detail protecting President and other high officials, among other factors); Blanchard, 544 F. Supp. 3d at 172 (four-month delay between seizure of cell phone and application for search warrant not unreasonable, even where law enforcement held cell phone "longer than was necessary to secure a warrant," in view of diminished possessory interest and transfer of case from State to Federal authorities). But see White, 475 Mass. at 594-595 (sixty-eight day delay between seizure and date of search warrant application unreasonable even though cell phone was "pay-as-you-go" device and defendant did not request its return).

On the defendant's side of the ledger, however, we first note that the defendant had a material possessory interest in his cell phone. See White, 475 Mass. at 591, 593, quoting Riley, 573 U.S. at 395 (many "who own a cell phone [in effect] keep on their person a digital record of nearly every aspect of their lives"). Indeed, the judge found that the defendant "had a significant privacy and possessory interest in his [cell phone]," and that "[n]otably, the [d]efendant was using it at the time of his arrest, speaking with Sergeant D'Alba to coordinate their meeting." Second, although the Commonwealth lawfully seized the cell phone through a search incident to arrest, the "existence of probable cause is relevant to [the

defendant's] possessory interest but far from dispositive to deciding the reasonableness of the ensuing delay in seeking a search warrant." Smith, 967 F.3d at 209. Third, although the defendant did not seek the return of the cell phone, "[p]ossessory interest is only one factor to be considered in the over-all reasonableness calculus." White, supra at 595. "Even in circumstances where a defendant's possessory interest is weak, a delay may be unreasonable if police do not act diligently in applying for a warrant." Id. "This is so in part because unreasonable delay 'affects [not] only the person's possessory interest[],' but also the ability of the judiciary 'promptly [to] evaluat[e] and correct[] improper seizures.'" Id., citing Burgard, 675 F.3d at 1033. Finally, the judge found that although Sergeant D'Alba maintained a demanding caseload of complex matters, and "was diligent about his responsibilities and his caseload," the "evidence does not account for four months of delay" because Sergeant D'Alba admittedly put the effort to obtain the search warrant on the "back burner."¹⁰

¹⁰ We acknowledge the judge's finding that Sergeant D'Alba "was diligent about his responsibilities and his caseload," and nothing herein should be read to infer otherwise. However, the ultimate issue is not whether the officer was diligent in his work, but whether he promptly applied for a search warrant in this case and whether any delay was reasonable under the language and parameters delineated in White, supra at 593-595.

The judge ultimately concluded based on these findings that "[t]here is no legal precedent for finding a delay of 123 days to be reasonable, even with a compelling governmental interest." That conclusion is, to date, correct under Massachusetts law. See White, 475 Mass. at 593, quoting Burgard, 675 F.3d at 1035 ("once a warrantless seizure has been executed, the police 'must make it a priority to secure a search warrant'"). To be clear, we recognize the persuasive value of Federal case law holding that lengthy delays between seizing evidence and obtaining a search warrant may be reasonable, see Sykes, 65 F.4th at 878-879; Stabile, 633 F.3d at 236; Blanchard, 544 F. Supp. 3d at 172, and we recognize that police diligence in obtaining a search warrant is not dispositive under the White balancing test. See Cruzado, 480 Mass. at 283 n.9. Further, we agree with the judge's determination that the Commonwealth's interest in the content of the cell phone was strong. We also note that, unlike in White and Cruzado where there was suspicion or probable cause to believe that the cell phones contained evidence relevant to the crimes under investigation, here the defendant was alleged to have used the cell phone itself in myriad ways to entice the victims and to perpetrate the crimes against them. Finally, our courts have recognized that some delay in obtaining a search warrant may be reasonable where, as here, the governmental interest in the seized item is critical,

and where a defendant does nothing to assert a possessory interest in the seized item. See, e.g., Cruzado, supra at 282-284 (ten-day delay in obtaining warrant to search cell phone reasonable where government's interest in solving homicide was strong and defendant's interest in cell phone was minimal as defendant claimed he only had phone for one day and had received cell phone from "crack head"). That notwithstanding, there is no Massachusetts precedent upholding as reasonable anything remotely approaching the 123-day delay in the present case.

Finally, the Commonwealth argues that the delay in seeking the search warrant was not unreasonable for the reasons delineated in Arthur, 94 Mass. App. Ct. at 165-166. There, we held that an eighty-five day delay between the seizure of cell phones used in the commission of a crime and the obtaining of a warrant to search the cell phones was not unreasonable. Id. We grounded our holding on two critical distinctions from White. First, in Arthur, supra at 165, the police did diligently obtain a warrant to seize the cell phones -- within three days of the offense -- and then subsequently sought a second warrant to search the cell phones. Second, the cell phones used by the defendants in that case were "evidence of the crime independent of their content," and could be used at trial to prove how the defendants operated in a joint venture. Id. See id. ("in proving the joint venture, and the involvement of all three

alleged perpetrators, the Commonwealth might well decide to introduce the cell phones. . . . This evidentiary value existed regardless of whether, on further investigation, the cell phones might contain additional relevant evidence in their digital data"). See generally J.A. Grasso, Jr., *Suppression Matters Under Massachusetts Law* § 7-6[a][2][iv] (2024 ed.). In the present case, by contrast, the judge found that "unlike Arthur, the Commonwealth has failed to demonstrate the evidentiary value of the [cell phone] as a physical object, independent of its electronic content." We agree that the evidentiary value of the cell phone hinged on the contents therein, and "the police could not search its contents unless and until they applied for a search warrant." Smith, 967 F.3d at 209. See id. ("this is not like a case where the police seize in plain view a murder weapon or obvious contraband like narcotics that retains investigative or prosecutorial value regardless of any further search of its contents"); United States v. Pratt, 915 F.3d 266, 273 (4th Cir. 2019) (holding thirty-one day delay in obtaining search warrant unreasonable, and rejecting government argument that cell phone had independent evidentiary value, because "[o]nly the phone's files had evidentiary value . . . the phone itself is evidence

of nothing").¹¹ Accordingly, Arthur is materially distinguishable and does not control.

In short, despite the soundness of the reasoning in the Commonwealth's argument, the Federal cases discussed supra, and the dissent, infra, we cannot say that the judge erred in suppressing the evidence because the Commonwealth failed to meet its "burden to show that the delay of 123 days from the time the device was seized to the date of search warrant application was reasonable."¹² We are constrained under White and the facts of this case to affirm the order allowing the motion to suppress. See Commonwealth v. Vasquez, 456 Mass. 350, 356 (2010) ("this court is the highest appellate authority in the Commonwealth, and our decisions on all questions of law are conclusive on all Massachusetts trial courts and the Appeals Court").

Order allowing motion to

¹¹ Although Sergeant D'Alba testified that he "learned that the prosecutor intended to use the [cell phone] as a piece of physical evidence at trial, regardless of whether a search warrant was executed on the [cell phone]," the prosecutor's intent does not control our analysis. Rather, the analysis under Arthur turns on whether the cell phone had evidentiary value regardless of the contents therein. Where, as here, the evidentiary significance of the cell phone was not apparent unless and until it was searched, our holding in Arthur does not apply.

¹² We note that the judge also found, regarding the "future admissibility" of the cell phone at trial, that "the Commonwealth did not introduce evidence at the motion hearing to indicate that [Betty] described or identified the seized [cell phone] as the device the [d]efendant used to show her the photograph."

suppress affirmed.

SINGH, J. (dissenting). Where the cellular telephone (cell phone) was properly seized as evidence during a search incident to the defendant's arrest and the contents of the phone properly searched under the authority of a search warrant issued on probable cause, the mere length of time that elapsed between the seizure and the application for the search warrant cannot give rise to suppression of evidence in the absence of "substantial and prejudicial" violation of the defendant's constitutional rights or statutes closely associated with constitutional rights. Commonwealth v. Hernandez, 456 Mass. 528, 533 (2010). See id. at 532-533 (discussing exclusionary rule under Massachusetts law). No such violation has been established as would warrant suppression of evidence in this case.

The validity of the arrest warrant, the search incident to arrest, and the search warrant are not in dispute. Nevertheless, on the authority of Commonwealth v. White, 475 Mass. 583 (2016), the court concludes that evidence obtained from the search of the cell phone must be suppressed due to unreasonable delay in seeking a search warrant. But White does not compel this result. First, the analysis employed by White to examine the impact of delay on the reasonableness of the initial seizure (delay analysis) is inapplicable to this case where the cell phone was permissibly seized incident to arrest

as an instrumentality of the crimes. Second, even if the White delay analysis applied, a proper application of the balancing test would weigh in favor of reasonableness. Finally, a determination of unreasonableness would not require suppression of evidence in any event.

1. Applicability of delay analysis. White, 475 Mass. at 593-595, and all the cases relied on in its delay analysis, dealt with the temporary warrantless seizure of an item pending the issuance of a search warrant.¹ The court explained that, in this context, it is important for police to act diligently in securing a search warrant. Id. at 593. Although a defendant's privacy interest in the item will be protected by the eventual issuance (or denial) of a search warrant, the defendant's possessory interest in the item is infringed on in the interim. See Segura v. United States, 468 U.S. 796, 806 (1984) (seizure

¹ See Segura v. United States, 468 U.S. 796, 812 (1984) (impoundment of house pending securing of search warrant); United States v. Place, 462 U.S. 696, 715-716 (1983) (Brennan, J., concurring in result) (discussing temporary detention of luggage pending canine search, which led to search warrant); United States v. Burgard, 675 F.3d 1029, 1032 (7th Cir.), cert. denied, 568 U.S. 852 (2012) (impoundment of cell phone pending search warrant); United States v. Laist, 702 F.3d 608, 610-611 (11th Cir. 2012) (after consent revoked, retention of computer pending search warrant); Commonwealth v. Kaupp, 453 Mass. 102, 105 (2009) (impoundment of computer pending search warrant); Commonwealth v. Gentile, 437 Mass. 569, 573 (2002) (impoundment of truck pending search warrant); Commonwealth v. Taylor, 426 Mass. 189, 195 (1997) (temporary detention of defendant pending search warrant to seize his clothes).

affects only possessory interests; search affects privacy interests). A delay in seeking a warrant aggravates that infringement and for this reason, a "seizure, even if 'reasonable at its inception because based upon probable cause,' 'may become unreasonable as a result of its duration.'" White, supra, quoting Segura, supra at 812. In this context, delay also affects the ability of the judiciary promptly to evaluate and correct improper seizures. See White, supra at 595.

Although the cell phone seizure in White was unreasonable at the outset because it was not based on probable cause, White, 475 Mass. at 592, the court nevertheless examined the length of time between the seizure of the cell phone and the filing of an application for a search warrant, emphasizing that police may retain an item seized without a warrant for the short period of time needed to obtain a search warrant "but must release the item if a warrant is not obtained within that period." Id. at 593. That the item must be released in the absence of a search warrant presupposes that there is no other legitimate basis on which the item may be retained.

Unlike in White, police in this case had the lawful authority to retain the cell phone independent of the issuance of any search warrant. The cell phone was seized pursuant to statutory authority, see G. L. c. 276, § 1 (during search

incident to arrest, police may seize without a warrant fruits, instrumentalities, contraband and other evidence of crimes for which arrest has been made), as well as the search incident to arrest exception to the warrant requirement, see Commonwealth v. Barillas, 484 Mass. 250, 254 (2020) (purposes of search incident to arrest exception are preventing loss of evidence of crime for which police have probable cause to arrest and stripping arrestee of weapons that could be used to resist or facilitate escape).

The defendant was arrested on a warrant for crimes involving child sexual assault and dissemination of matter harmful to children. At the time of the arrest, police had firsthand information from the child victims that the defendant used his cell phone in the commission of the crimes, specifically, to photograph the children, to receive photographs of the children which he directed that they send him, to show them images of a woman performing oral sex on him, and to contact them in order to arrange secret meetings with them. A cell phone belonging to the defendant would therefore be not only mere evidence of the crimes, but an instrumentality of the crimes.

The motion judge recognized that the cell phone was an instrumentality of the crimes, yet found that it had no

"evidentiary value" independent of its electronic content.

This was clear error. As an instrumentality of the crimes, the phone itself was relevant to corroborate the victims' accounts - the fact that the defendant had a cell phone when he was arrested capable of doing what the victims alleged. Moreover, once the police seized the phone, they could use it to secure witness identification of it and later introduce it in evidence at trial as the phone used to commit the crimes. Even if it turned out that the phone had no relevant content on it (perhaps because it had been wiped clean), the physical phone would still have the evidentiary value of corroborating the victims' accounts. Contrast White, 475 Mass. at 590 (no evidence that cell phone was used in commission of crimes). In any event, the salient point is not how valuable the phone was as an evidentiary matter, but rather that the police had the lawful authority to hold on to it as evidence of the crimes, regardless of its electronic content.

As the police had probable cause to believe the phone was an instrumentality of the crimes for which the defendant was arrested, the police were authorized to seize it and keep it as long as necessary for it to be used in the prosecution of the defendant. Cf. G. L. c. 276, § 3 ("If an officer in the execution of a search warrant finds property or articles therein

described, he shall seize and safely keep them, under the direction of the court or justice, so long as necessary to permit them to be produced or used as evidence in any trial").

See Commonwealth v. Sacco, 401 Mass. 204, 207 n.3 (1987)

("Property seized pursuant to a search warrant must be restored to its owners when it is no longer needed. . . . The same requirement logically applies to property seized without a warrant").

Because the defendant had no right to the return of the cell phone prior to the conclusion of the case, there was no violation of his rights flowing from its continued detention. See Commonwealth v. Arthur, 94 Mass. App. Ct. 161, 165-166 (2018) (defendant had no basis to expect return of cell phone prior to conclusion of trial where it was properly in police custody as evidence in case against him). Any delay in seeking a warrant to search the contents of the cell phone is irrelevant since there was no unlawful intrusion on the defendant's possessory right pending the search warrant. To the contrary, the "intrusion" occasioned by the seizure of the cell phone in this case was specifically authorized by statute, see G. L. c. 276, § 1, as well as by the search incident to arrest exception to the warrant requirement, see Barillas, 484 Mass. at 254.

The diligence requirement is aimed at minimizing the unlawful intrusion on the defendant's possessory interest. But here, even if the search warrant had been obtained immediately after seizure, the cell phone would have lawfully remained in police custody as an instrumentality of the crimes to be used in the prosecution of the defendant. The timing of the search warrant would thus have no separate impact on the defendant's possessory interest. Cf. Commonwealth v. Gelfgatt, 468 Mass. 512, 524 (2014) (requiring defendant to enter encryption key to unlock computers seized by police not violation of Fifth Amendment, because defendant already said computers were his). The delay analysis is therefore inapplicable in the circumstances of this case.²

2. Balancing test. To the extent that the delay analysis applies, a proper balance between "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion" would result in the conclusion that the seizure of the cell phone was reasonable in this case. White, 475 Mass.

² Where there is no actual impact on a defendant's possessory or privacy interest, the court's examination of the internal workings of a police investigation and its insistence on elevating certain priorities over others risks intrusion on an area committed to another branch of government. See Commonwealth v. Bernardo B., 453 Mass. 158, 161 (2009).

at 594, quoting United States v. Place, 462 U.S. 696, 703 (1983).³ The importance of the governmental interest justifying seizure of the cell phone cannot be overstated -- the phone was seized to preserve evidence important to prosecuting the defendant for sexual crimes against children. See Commonwealth v. Feliz, 486 Mass. 510, 517 (2020) ("sexual exploitation and abuse of children constitutes a government objective of surpassing importance").⁴

With respect to the nature and quality of the intrusion, the seizure of the cell phone was made on statutory authority and probable cause. See Place, 462 U.S. at 702-703 (probable cause justifies greater intrusion than reasonable suspicion). Compare White, 475 Mass. at 592 (police lacked probable cause to seize cell phone). Additionally, the intrusion was only on the

³ Although White, supra at 583, characterized the balancing test as determining the "reasonableness of the delay" in conducting a search, Place, supra at 703, stated that the test was for the purpose of determining the reasonableness of the seizure in light of delay. Arguably, focus on reasonableness of the delay itself skews the balance.

⁴ And in this case, the facts suggested that the cell phone may have contained images that were not merely evidence of crimes, but contraband that was unlawful to possess -- child sexual exploitation material. See Commonwealth v. James, 493 Mass. 828, 834-838 (2024). See also Feliz, supra at 517, quoting Paroline v. United States, 572 U.S. 434, 440 (2014) ("Child pornography is a 'permanent record of the depicted child's abuse, and the harm to the child is exacerbated by its circulation'").

defendant's possessory interest, not privacy interest. See Segura, 468 U.S. at 810 (heightened protection accorded to privacy interests not implicated where seizure at issue).

Although the defendant was deprived of possession and use of the phone for an extended period of time pending the search warrant, he was not entitled to have the phone, because it was properly held by the police as evidence in the case. The "actual interference with [his] possessory interests in the [cell phone] was, thus, virtually nonexistent." Segura, 468 U.S. at 813. Cf. id. (where defendants were in custody during time they claimed violation of possessory interest in their home).

Likewise, there was no impact on the judiciary's ability to promptly evaluate and correct improper seizures since the continued seizure of the cell phone as evidence in the case required no further judicial permission. In any event, the parties agree that the seizure was proper in this case, so this factor should have no weight in the balance.

With respect to the delay itself, it was eminently reasonable for the police to put the search warrant on the "back burner," and instead focus on other pressing aspects of this investigation (as well as other serious and demanding public safety obligations), since the cell phone was going to remain in police custody as evidence in the case. See Segura U.S. at 812

(not unreasonable for officers to focus on processing people arrested before turning to search warrant for house where occupants of house were in custody so their possessory rights were not impacted by delay). This is not a case where the defendant sought the return of the cell phone or articulated any hardship or prejudice from being dispossessed.⁵ See United States v. Johns, 469 U.S. 478, 487 (1985) (where defendants never requested return of seized property, they failed to establish that delay in search of property affected their legitimate interests). In the balance, any delay in seeking the warrant in this case did not render the initial seizure of the cell phone unreasonable.

To the extent that every warrantless seizure may be reviewed for reasonableness, it cannot be maintained that the seizure of the cell phone pursuant to statutory authority and search incident to lawful arrest was unreasonable in any sense. See Commonwealth v. Entwistle, 463 Mass. 205, 213 (2012)

⁵ The defendant's failure to request return of his phone at any point is strong indication that the extended seizure did not occasion the sort of infringement on his possessory rights as is presumed. It could well be that the defendant had multiple phones and was not at all put out by the seizure of one of them; indeed, there was evidence that the defendant provided multiple phones to the victims as part of his scheme to sexually exploit them. Cf. United States v. Smith, 967 F.3d 198, 208 (2d Cir. 2020) (fact that defendant had alternative devices and never requested seized tablet back weighed in favor of government).

(touchstone for both Fourth Amendment and art. 14 is reasonableness). Even if a search warrant had been obtained the day after its seizure, the cell phone was not being returned to the defendant. Indeed, the cell phone itself was not suppressed in this case. If the cell phone was lawfully seized and held, then the defendant had no possessory interest in it for the police to infringe on, and he could not have suffered the level of constitutional deprivation that might justify application of the exclusionary rule.

3. Exclusionary rule. In White, 475 Mass. at 595, evidence obtained from the cell phone search was suppressed, but not because of unreasonable delay in obtaining a warrant. Rather, the court held that, "[e]ven if the delay were reasonable, any evidence recovered from the telephone would nonetheless require suppression on the ground that it was the fruit of an unlawful seizure." This is so, because the warrantless seizure in White was without probable cause and so "the seizure was by definition improper." Id. at 592. Delay had nothing to do with it.

Here, by contrast, the warrantless seizure was supported by probable cause, specifically authorized by statute, see G. L. c. 276, § 1, and permitted by the search incident to arrest exception to warrant requirement, see Barillas, 484 Mass. 250,

254 (2020). If delay in obtaining a search warrant could nonetheless convert this seizure into an unreasonable and therefore unconstitutional one, then there still would remain the question whether evidence obtained as a result of that seizure should be excluded. See Commonwealth v. Gomes, 408 Mass. 43, 46 (1990) ("mere fact that an unlawful search and seizure has occurred should not automatically result in the exclusion of any illegally seized evidence").

Although the judicially created remedy of the exclusionary rule bars the use of evidence derived from an unconstitutional search or seizure, a "practical application [of the rule] must strike a balance between the goal[] of deterring official misconduct and the competing societal interest in convicting the guilty" (quotations and citations omitted). Commonwealth v. Diaz, 496 Mass. 210, 214 (2025). Suppression may not be appropriate if the evidence is "sufficiently attenuated from the underlying illegality." Id., quoting Commonwealth v. Damiano, 444 Mass. 444, 454 (2005).⁶ In making the attenuation determination, the question is not whether the illegal actions

⁶ Although often referred to as the "attenuation exception," Diaz, supra, the attenuation doctrine is not an exception to the exclusionary rule, but rather "a test of its limits." Commonwealth v. Fredericq, 482 Mass. 70, 78 (2019), quoting R.G. Stearns, *Massachusetts Criminal Law: A District Court Prosecutor's Guide* 172 (38th ed. 2018).

of the police were a "but for" cause of the evidence being found, but rather "whether the evidence for which suppression is sought 'has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Diaz, supra, quoting Wong Sun v. United States, 371 U.S. 471, 488 (1963).

Here, the evidence was obtained by virtue of a search warrant supported by probable cause. Neither the seizure of the cell phone nor the delay in seeking a warrant was exploited in order to obtain the evidence from the cell phone. Indeed, the information in the affidavit supporting probable cause to search the cell phone existed prior to seizure of the phone. Contrast White, 475 Mass. at 586-587 (probable cause to search phone developed after seizure). The alleged illegality of delay was occasioned by the burdensome workload of the police, as well as the reasonable belief that the phone was properly in police custody for the duration. It did not have the purpose or effect of giving the prosecution an advantage or harming the defendant's legitimate interests. See Commonwealth v. Borges, 395 Mass. 788, 795-796 (1985) (attenuation looks at purpose and flagrancy of police misconduct). Although our courts have not adopted the "good faith" exception to the exclusionary rule, we have instead focused on whether the alleged violations are

"substantial and prejudicial." Hernandez, 456 Mass. at 532-

533. On this record, such a violation has not been established.

There should be no suppression of evidence in this case.