

1 Karen S. Townsend, District Judge
2 Department 4
3 Fourth Judicial District Court
4 Missoula County Courthouse
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9 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

10 STATE OF MONTANA,)	Department 4
)	Cause No. DC-12-352
11 Plaintiff,)	
)	
12 vs.)	ORDER ON DISCLOSURE OF
)	TEXT MESSAGES
13 JORDAN TODD JOHNSON,)	
)	
14 Defendant.)	
15)	
16)	

17
18 This matter comes before the Court upon briefing by the parties regarding
19 Text Message Redactions, the Defendant's Discovery Requests, and the
20 Defendant's Request to Appoint a Special Master.

21 As a preliminary matter, the Defendant has requested that the Court
22 appoint a Special Master to review the text messages in this case. As the
23 Court has completed its review of the redacted and unredacted text messages
24 provided for *in camera* review, the Defendant's request is DENIED AS MOOT.

25 **BACKGROUND**

26 This case arises out of the victim's report of an alleged rape that occurred
27 on or about February 5, 2012. The Defendant has admitted that an act of

1 sexual intercourse took place, but claims that it was consensual. Therefore,
2 the sole issue in this case is whether the victim consented to sexual
3 intercourse with the Defendant.

4 On or about May 25, 2012, and apparently at the request of law
5 enforcement, the victim turned over her cell phone to Great Falls Police and
6 the stored text messages, both sent and received, were downloaded. Some
7 29,000 messages were retrieved, even those messages the victim had
8 attempted to delete. The Defendant made a request for discovery of all text
9 messages. The State reviewed the messages and redacted many and asked
10 the Court for an *in camera* review of the redacted messages and a ruling by
11 this Court as to the propriety of the State's redactions. The Defendant has
12 received copies of all text messages not redacted by the State. The State has
13 a complete copy of all of the text messages sent from and received on the
14 victim's cell phone from April 7, 2011 to May 25, 2012. The State currently
15 has no copies of any text messages after May 25, 2012.

16 Text messages are defined as short electronically-transmitted written
17 communication between mobile devices. Text messaging stands to become
18 an increasingly prominent aspect of society. Ninety-five percent of young
19 adults, ages 18-29, use text messaging. This emerging group sends or
20 receives an average of 87.7 daily text messages. Texting has largely replaced
21 calling as the preferred form of communication by many young adults. Pew
22 Research Center 2011 Report as cited in *State v. Patino*, 2012 R.I. Super.
23 LEXIS 139, 76-78. It is interesting to note that over the course of essentially
24 13 ½ months, the victim and the individuals with whom she communicated
25 exchanged an average of 2,148 text messages per month.

26 For the *in camera* review process, the State provided the Court with four
27 notebooks. One notebook contained a complete copy of all text messages

1 between April 7, 2011 and May 25, 2012 sent from the victim's cell phone.
2 Another notebook contained a complete copy of all text messages received on
3 the victim's cell phone. The additional two notebooks contained copies of the
4 State's proposed redactions for the sent and received text messages.

5 ANALYSIS

6 Before this Court is a discovery dispute regarding the disclosure of text
7 messages sent from and received on the victim's cell phone. As stated
8 above, the Defendant seeks all of the text messages stored on the victim's cell
9 phone from April 7, 2011 to the present day. The State seeks to limit the
10 disclosure to the messages already provided. The State cites as reasons for
11 the redactions the privacy rights of both the victim and those with whom she
12 exchanged text messages, that the redacted messages have no exculpatory
13 value, and/or that the messages would be inadmissible at the trial because
14 they would be barred by the Rape Shield Statute and/or would be
15 inadmissible character evidence under Rule 608 M.R.E. The Defendant has
16 argued that he is entitled to discover the text messages in their entirety, as
17 discovery is broader than admissibility and admissibility may be argued later.
18 The Defendant has also argued that the Court cannot rule on whether a
19 particular text message is exculpatory since the Court cannot know the
20 theory of his case. Further the Defendant argued that the text messages
21 may be used to impeach the victim's credibility. Finally the Defendant
22 argued that there are no privacy rights available to the victim or those with
23 whom she communicated because once a person sends a text message it is
24 available to anyone who might view it.

25 The Court has conducted an *in camera* review of all text messages stored
26 on the victim's cell phone between April 7, 2011 and May 25, 2012. In
27 deciding a discovery dispute, this Court must first decide whether or not the

1 Court can control discovery. As the Montana Supreme Court has stated, "[t]he
2 District Court has inherent discretionary power to control discovery and that
3 power is based upon the District Court's authority to control trial
4 administration." *State, ex rel. Guarantee Ins. Co. v. Dist. Ct. Eighth Jud.*
5 *Dist.*, 194 Mont. 64, 67-68, 634 P.2d 648, 650 (1981). Discovery in a civil
6 case is generally broad since discovery is permitted regarding any non-
7 privileged matter that is relevant to a claim or defense. Rule 26, M.R.Civ.P.

8 However, discovery in a criminal case is not as broad as in a civil case.
9 Discovery in a criminal case is governed by § 46-15-322, MCA, *Brady v.*
10 *Maryland*, 373 U.S. 83 (1963), and Montana cases interpreting *Brady*.
11 Pursuant to § 46-15-322, MCA:

12 (1) Upon request, the prosecutor shall make available to the defendant
13 for examination and reproduction the following material and
information within the prosecutor's possession or control:

14 (a) the names, addresses, and statements of all person whom the
prosecutor may call as witnesses in the case in chief;...

15 (e) all material or information that tends to mitigate or negate the
16 defendant's guilt as to the offense charged or that would tend to
17 reduce the defendant's potential sentence.

18 The Montana Supreme Court has specifically addressed *in camera*
19 review of material subject to a discovery dispute. In *State v. Burns*, the
20 Court considered whether the district court abused its discretion in its *in*
21 *camera* review of a personnel file and the court's resulting denial of a motion
22 for discovery. The Montana Supreme Court determined:

23 Prohibiting discovery of materials that are not probative is one of the
24 functions of trial judges which is within their discretionary powers. In the
25 case at bar, Judge Olson properly utilized his discretionary powers to
26 prohibit discovery of Burns' personnel records. The competing interests
of the parties were properly weighed by the district court.

27 *State v. Burns*, 253 Mont. 37, 45, 830 P.2d 1318, 1322 (1992).

1
2 This Court therefore concludes that it has the power to control discovery and
3 conduct this *in camera* review.

4 The specific issue of the discoverability of text messages and related
5 privacy rights has not yet been addressed in Montana. This Court therefore
6 looks to our underlying privacy right policies and our sister courts for guidance.

7 Montana adheres to one of the most stringent protection of its citizens'
8 right to privacy in the country. Mont. Const. Art. II, § 10. Montana has
9 adopted a two-prong test to determine whether issues of privacy are protected
10 under our Constitution:

- 11 1) Whether the person involved had a subjective or actual expectation
12 of privacy; and
- 13 2) Whether society is willing to recognize that expectation as
14 reasonable.

15 *State v. Burns*, 253 Mont. 37, 41, 830 P.2d 1318, 1320 (1992).

16 The Defendant cited *State of Washington v. Hinton*, 280 P.3d 476
17 (Wash. App. 2012) in support of his argument that all of the text messages
18 on the victim's phone are discoverable. The Washington Court of Appeals
19 affirmed the trial court's denial of a motion to suppress text messages. In
20 *Hinton*, a police officer had in his possession Lee's cell phone, a man
21 arrested on drug charges. While Lee's phone was in the possession of the
22 police, Hinton sent text messages to Lee seeking drugs. The officer
23 responded. The officer and Hinton agreed to meet for a drug transaction
24 and Hinton was arrested. Hinton moved to suppress the text messages he
25 sent to Lee. Like Montana, Washington applies a two-step privacy analysis.
26 The Washington Court of Appeals analogized text messages to letters and
27 determined that sent text messages, like sent letters, did not have privacy

1 protections as "the sender's expectation of privacy ordinarily terminates
2 upon delivery." ¶ 27. However, the Washington Court of Appeals also held
3 that "[o]n his own iPhone, on his own computer, or in the process of
4 electronic transit, Hinton's communications are shielded by our constitutions.
5 But after their arrival, Hinton's text messages on Lee's iPhone were no
6 longer private or deserving of constitutional protection." ¶ 30.

7 This Court finds that the Defendant's reliance on *Hinton* is misplaced.
8 As the Washington court itself distinguished "[t]hat an individual may have a
9 reasonable expectation of privacy in certain contents of his or her own cell
10 phone, including the sent and received text messages that are stored on the
11 phone, is simply not the issue here." ¶ 24. That matter, however, is
12 precisely the matter before this Court.

13 More instructive to this Court is a recent decision from the Rhode Island
14 Superior Court on issues of first impression in *State of Rhode Island v.*
15 *Patino*, 2012 R.I. Super. LEXIS 139 (R.I. Super. 2012). Although a decision
16 from a state trial court, this Court, also a state trial court, finds it persuasive.
17 In *Patino*, the State indicted Patino for the alleged murder of his girlfriend's
18 six-year old boy. The case against Patino was built largely on cell phone
19 text messages that the State claims were sent by Patino to his girlfriend and
20 that Patino claims were illegally obtained by the police without a warrant, in
21 violation of his privacy rights protected by the Fourth Amendment.

22 Although much of the *Patino* Court's decision concerns the issue of
23 standing and the applicability of the Fourth Amendment to the warrantless
24 search of the cell phone, those issues are not applicable here. It is the
25 court's analysis of Patino's expectation of privacy in the text messages on
26 his girlfriend's cell phone that this Court finds instructive.
27

1 The Rhode Island court began its analysis by framing the context of the
2 device itself. The court stated “[i]n this Court’s view, therefore, a cell phone
3 is better thought of not as a container but as an ‘access point’ to potentially
4 boundless amounts of digital information.” *Id.* at 98. The court thereafter
5 framed the issue “the more pertinent question in this Court’s opinion...is not
6 whether Patino has standing in the [cell phone] itself but whether he has a
7 reasonable expectation of privacy in the at-issue text messages stored
8 within [another’s] phone.” *Id.* at 98, 99. Therefore “it is the content of the
9 communication, and not the device used to communicate, that is important
10 for the privacy analysis under the Fourth Amendment.” *Id.* at 102.

11 The court noted “the question of whether people have an expectation of
12 privacy in the content of their text messages has not yet been settled.” *Id.* at
13 111; see *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010). To therefore
14 answer this question as to Patino, the court determined that it would apply
15 the two-part test enunciated in *Katz v. U.S.*, 389 U.S. 347 (1967), —whether
16 Patino has a subjective expectation of privacy in the text messages on the
17 cell phone and whether such expectation of privacy is one society accepts
18 as objectively reasonable. *Id.* at 112. This analysis is similar to the privacy
19 analysis applied in *Montana*. The court first determined that Patino had a
20 subjective expectation of privacy in his text messages as it was his primary
21 means of communication and the tenor and contents of the text messages
22 indicated an expectation of privacy in them. *Id.* at 113. The court also
23 determined that that Patino’s expectation of privacy was objectively
24 reasonable as text messaging is an oft substitute for oral communication
25 and these messages, are often “raw, unvarnished and immediate, revealing
26 the most intimate of thoughts and emotions to those who are expected to
27 guard them from publication,” and most people keep their cell phones in

1 their immediate possession at all times. *Id.* at 115, 116. Moreover "[t]he
2 'risk' that a text message will be viewed by someone other than the intended
3 recipient is simply too remote to eliminate a person's objectively reasonable
4 belief that his or her text message will, in fact, be viewed only by the
5 intended recipient." *Id.* at 117; *citing State v. Hamilton*, 2003 MT 71, 314
6 Mont. 507, 67 P.3d 871 (finding that a remote possibility of harm did not
7 meet the standard for an objectively reasonable belief that such a threat
8 existed).

9 The Rhode Island court also considered the different analogies the
10 courts have applied to text messages. Most commonly, text messages have
11 been analogized to other forms of written communications such as letters
12 and emails. The Rhode Island court found text messages to not be like
13 letters or emails because "while a letter or email can be understood on its
14 own, a text message's meaning is best comprehended in the context of its
15 surrounding messages from sender and recipient." *Id.* at 131, 132. Text
16 messaging is more akin to dialogue as both sides of the conversation can be
17 seen. "The separation of text messages sent versus received, conversely, is
18 increasingly blurred, if not altogether demolished, because of the manner in
19 which text messages are displayed on phones." *Id.* at 132. The court
20 therefore determined that the analogy of oral communications more closely
21 reflected the realities of text messaging. *Id.* at 136. The court noted that
22 text messages conveyed information formerly subject to oral communication,
23 that advancement of technology made interpersonal communication
24 functionally possible and commonplace, especially among younger users,
25 and that because most cell phone owners are in immediate possession of
26 their cell phones, private topics are now confidently exchanged. *Id.* at 136,
27 137.

1
2 In light of its analysis, the court found that the *Katz* test for determining
3 whether a person has a reasonable expectation of privacy was the
4 appropriate test to apply, and in applying the *Katz* test, the court further
5 found that Patino had a reasonable expectation of privacy in the content of
6 this alleged text messages. *Id.* at 143. In so holding, the court emphasized
7 that in viewing the contents of people's text messages it is possible to obtain
8 "a wealth of detail about [a person's] familial, political, professional, religious,
9 and sexual associations." *Id.* The court concluded:

10 In light of the reviewed analogies and discussed considerations, this
11 Court offers a series of interconnected holdings...It also finds that text
12 messages should not be considered solely as the contents of a single
13 individual's cell phone for purposes of analyzing an expectation of
14 privacy in those messages under the Fourth Amendment. For this
15 analysis, this Court finds that text messages sent and received should
16 be viewed as a single entity due to their interdependent nature and
17 form. Finally, in applying the *Katz* test for standing, this Court finds that
18 a person has a reasonable expectation of privacy in the contents of his
19 or her text messages....

20 *Id.* at 145, 146.

21 The Court recognizes that both *Hinton* and *Patino* deal with Fourth
22 Amendment issues of defendants, however, the courts' analyses of the
23 privacy rights attached to text message communications and the analogy in
24 *Patino* that text messages are more like oral communications, are
25 persuasive to this Court in its analysis.

26 The Court finds that the victim and the individuals with whom she
27 communicated had a reasonable expectation of privacy in their text
message communications. As stated in both *Hinton* and *Patino* the victim
had an expectation of privacy in the communications on her own phone and

1 in the contents of her text messages. As indicated by the sheer volume of
2 communication through text messaging, it is apparent to this Court that the
3 victim used text messaging as an important form of communication and as a
4 way of carrying on a dialogue with other individuals. Moreover, the Court
5 considers the victim's cell phone as a portable filing cabinet storing private
6 information. This same reasoning applies to those who communicated with
7 the victim. These individuals also had an expectation of privacy in their text
8 message communications. This Court agrees with the *Patino* court that
9 "[t]he 'risk' that a text message will be viewed by someone other than the
10 intended recipient is simply too remote to eliminate a person's objectively
11 reasonable belief that his or her text message will, in fact, be viewed only by
12 the intended recipient." The individuals communicating with the victim had a
13 reasonable expectation of privacy in their communications with her. Further,
14 as the Court has observed from its own review of the text messages at issue
15 it is quite clear that "a wealth of detail about [a person's] familial, political,
16 professional, religious, and sexual associations" is plain to read that would
17 otherwise likely remain private.

18 Although it might be argued that the victim waived her privacy rights
19 when she voluntarily, and at the request of law enforcement, turned over her
20 cell phone to Great Falls police, the Court does not find that this constituted
21 a waiver of any privacy rights. Additionally, it does not constitute a waiver of
22 the privacy rights of those individuals with whom she communicated.

23 The Court further recognizes that it must balance the victim's right to
24 privacy with the Defendant's right to exculpatory information. The Defendant
25 has argued that the Court cannot rule on whether a particular text message
26 is exculpatory since the Court cannot know the theory of his case. Although
27 true, the Montana Supreme Court has addressed this concern previously.

1 The Court has accepted as appropriate the *in camera* review process in
2 cases where privacy rights are implicated. "While we concede that *in*
3 *camera* review by the court is not the equivalent of scrutiny by the
4 defendant's attorney, we conclude that it is a reasonable compromise which
5 considers the interests of both the defendant and the victim...." *State v.*
6 *Duffy*, 2000 MT 186, ¶ 22, 300 Mont. 381, 6 P.3d 453. The Court has
7 carefully reviewed all of the text messages for exculpatory evidence. The
8 Court has found none.

9 The Court determines that it agrees with the State's redactions in both the
10 text messages sent from and received on the victim's cell phone. The Court
11 finds that none of the messages redacted contain exculpatory material.
12 Therefore the privacy rights in the content of the communications of both the
13 victim and the individuals with whom she communicated are paramount and
14 the Defendant is not entitled to view the redacted text messages.

15 Further, the State does not have within its possession a copy of the
16 victim's text messages sent or received from May 26, 2012 to the present as
17 has been requested by the Defendant. The Court finds that the State is not
18 required to obtain copies of these text messages. "As we have long held, the
19 State is not required to take the initiative or even assist the defendant in
20 obtaining evidence on his behalf." *State v. Seiffert*, 2010 MT 169, ¶ 15, 357
21 Mont. 188, 237 P.3d 669, *citing State v. Belgrade*, 1998 MT 152, ¶ 16, 289
22 Mont. 287, 962 P.2d 571; *see State v. Heth*, 230 Mont. 268, 272, 750 P.2d
23 103, 105 (1998). The Defendant has argued that he needs access to those
24 additional text messages to determine if the victim has been tampering with
25 potential witnesses. The Defendant offers no examples of claimed tampering
26 and in the Court's review of the messages the Court found no evidence to
27 even hint at the claim that the victim was trying to manipulate witness

1 testimony. Therefore this Court finds that the State is not required to obtain
2 the contents of the victim's cell phone from May 26, 2012 to the present. If the
3 victim voluntarily turns over her phone to the police for another download, that
4 is her choice. The Court will not order her or the State to do so.

5 Although the Court recognizes that it is troublesome and more difficult to
6 review the text messages not in chronological order, the Court has managed
7 to do it and therefore will not require the State to provide the Defendant with a
8 copy of the text messages in chronological order. The Defendant's request
9 that text messages be provided in chronological order is DENIED. The Court
10 will decide the remaining discovery matters at issue in a separate Order.

11 This Order is not filed under seal. However, the copies of text messages
12 in both the State's possession and in the Defendant's possession are to
13 remain confidential. Further, neither party shall disclose the identity of any
14 individual with whom the victim has communicated by text message.
15 However, the State shall provide to the Defendant identifying information
16 about the individuals with whom the victim has communicated by text
17 message.

18 Based on the reasoning discussed above, the Court issues the following:

19 **ORDER**

20 **IT IS HEREBY ORDERED THAT:**

21 [1] The Defendant's Request to Appoint a Special Master: Text
22 Messages is DENIED AS MOOT;

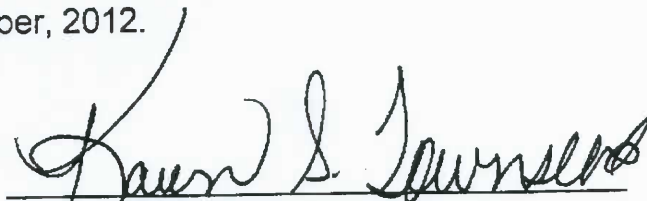
23 [2] The State's redactions STAND;

24 [3] The Defendant's Discovery Requests for text messages from May
25 26, 2012 to the present is DENIED; and

26 [4] The Defendant's Request that text messages to be provided in
27 chronological order is DENIED;

1
2 [5] The State is REQUIRED to provide the Defendant with a list of
3 names, telephone numbers and any other identifying information with whom
4 the victim in this case exchanged text messages between April 7, 2011 and
5 May 25, 2012. The State is to provide this information to the Defendant within
6 two weeks of the date of this Order.

7 DATED this 21st day of November, 2012.

8
9 
10 Karen S. Townsend
11 District Judge

12 c: Suzy Boylan
13 Missoula County Deputy Attorney

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