State of New Hampshire
Supreme Court

NO. 2004-0110

2005 TERM

JANUARY SESSION

STATE OF NEW HAMPSHIRE

v.

STEVE GUBITOSI

BRIEF OF STEVE GUBITOSI

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QUESTION PRESENTED

1. Was the evidence sufficient to convict Mr. Gubitosi of stalking when the witness's identification of a voice on a telephone in a bar as belonging to the defendant was equivocal, and the circumstances surrounding the ear-witness's identification made it hard to hear?

2. Did the court err in not expurgating from the indictment, and then allowing into evidence, instances of uncharged conduct such that the jury may have been unjustly swayed?

   Indictment issue preserved in written *Motion in Limine* (Oct. 17, 2003).
   Contemporaneous objection to uncharged conduct evidence, *10/27/03 Trn.* at 41.

3. Did the court err in admitting into evidence phone records that were obtained without a warrant and without any showing of probable cause?

   Preserved in written *Motion to Suppress* (Oct. 15, 2003).

4. Was the subpoena of Mr. Gubitosi's phone records over-broad when it included months of his phone calls and the charges alleged a single call on a single day?

   Preserved in written *Motion to Suppress* (Oct. 15, 2003).

5. Is an attempt to telephone a person a qualifying element of a charge of stalking?

   Preserved during oral motion for directed verdict, *10/28/03 Trn.* at 264.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Mr. Gubitosi was charged with one count of stalking. The State alleged that he drove by a restaurant in which his former girlfriend was having dinner, and then called her there on the telephone. Mr. Gubitosi was convicted by a jury in the Belknap County Superior Court (*George Manias*, J.), and this appeal followed.

SUMMARY OF ARGUMENT

Mr. Gubitosi first points to the evidence, which he argues is insufficient to support a finding of guilt because the ear-witness identification was hazy and unreliable, the call was too short for the number of people involved, there was no way for Mr. Gubitosi to have known Ms. Rubin was at the restaurant, he called for a legitimate purpose, and did not conduct an act of communication. Because the bulk of the evidence heard by the jury was provocative but involved uncharged conduct, the jury probably was improperly swayed.

Mr. Gubitosi then argues that the phone records used to prove one of the incidents of stalking were acquired by the State without a warrant. He suggests that this Court revisit this issue and find that people have a reasonable expectation of privacy in their phone billing records. He also argues that even if no warrant was necessary, the subpoena the State used to acquire the records was unconstitutionally broad and the records thus should have been suppressed.

Mr. Gubitosi then argues that because the State charged him with merely attempting to call, and the stalking statute does not recognize inchoate acts, the indictment charged him with conduct that is not illegal, and thus his conviction and sentence are unlawful.

ARGUMENT

I. Evidence Insufficient to Prove Guilt Beyond a Reasonable Doubt

A. Uncharged Conduct

The Belknap County jury heard a day-and-a-half of evidence. Much of if involved alleged bad acts for which Mr. Gubitosi was not charged.

Martha Rubin, Mr. Gubitosi's former girlfriend, testified that she and Mr. Gubitosi had had an intimate relationship, and that she had broken it off. *10/27/03 Trn*. at 33-34. The jury heard that during their romance Mr. Gubitosi resided in Ms. Rubin's home at her invitation, *10/27/03 Trn*. at 35, but that she asked him to leave after her cat (which apparently disliked him) mysteriously died, supposedly at the hand of Mr. Gubitosi. *10/27/03 Trn*. at 35-38. The jury also heard about the bumpiness of Mr. Gubitosi's exit, and lingering difficulties regarding household items left behind. *10/27/03 Trn*. at 38-39.

The jury was then told that Ms. Rubin began receiving dozens, even hundreds, of phone calls from Mr. Gubitosi, variously taunting her, pleading for her love, and threatening her. Ms. Rubin retrieved many of the calls from her voice-mail, and recorded them. The jury was subjected to an ***hour-and-a-half*** of these recordings, *Sent. Trn.* at 5-6, which contained ugly epithets, made terrible accusations, and were generally loathsome. *10/27/03 Trn*. at 43-45. Ms. Rubin also said that, although unspecified, she felt she was being followed. *10/28/03 Trn.* at 60. Ms. Rubin told the jury that at one point after their breakup, Mr. Gubitosi showed up at her home uninvited, and on the pretense of expressing his concern for her, demonstrated that he was wearing a weapon in his waistband. *10/28/03 Trn*. at 61-62.

As a result of all this, Ms. Rubin testified she feared for her safety, had her locks changed,

and sought help from the Concord police. The jury heard that while she was at the police station making her report, Mr. Gubitosi again called. The officer, who knew both Ms. Rubin and Mr. Gubitosi, got on the phone, and warned him to quit. *10/28/03 Trn*. at 155.

Despite a limiting instruction that all this was merely to lay a background and to show Ms. Rubin's feelings of fear were reasonable, *10/27/03 Trn*. at 45, these uncharged acts occupied a substantial chunk of the State's case, and featured prominently in its opening and closing arguments. OPENING, *10/27/03 Trn.* at 17 *et seq.;* CLOSING, *e.g., 10/30/03 Trn*. at 28-30 (defendant warned by police to not contact Ms. Rubin), 32-35 (calls and voice-mails in July), 35 (discovery of gun in waistline), 41-42 ("unexplained" and "creepy" "things going on in her world"; discovery of gun in defendant's waistline).

B. Charged Conduct

To be found guilty of stalking, the State must prove that a defendant knowingly engaged in a course of conduct which would provoke fear in a reasonable person. RSA 633:3-a. In this case, the charged "course of conduct," RSA 633:3-a, II(a), was that Mr. Gubitosi allegedly drove by a restaurant in which Ms. Rubin and her friends were eating, and a few minutes later attempted to call her there. INDICTMENT (Feb. 13, 2003), *Appx to Br.* at 31.

Not among the charged incidents were sobbing, threatening, or angry voice-mails; gun threats; or cat-killing.

The evidence the State offered to prove the restaurant call and the drive-by was much less compelling, and far short of reasonable doubt.

C. Equivocal Ear-Witness Identification in a Noisy Bar

The State's allegation was that Mr. Gubitosi called the restaurant when Ms. Rubin and her friends – Brian Kane and Kathy Companion – were eating there. Evidence that it was Mr. Gubitosi who called, however, came only from Ms. Companion, and she offered only tentative testimony.

Ms. Companion arrived at the restaurant after Ms. Rubin and Mr. Kane were already having their meal. She said a short hello to her friends, then went to the bar to get a drink. *10/28/03 Trn*. at 122, 162.

When Ms. Campanion got to the bar, she noticed that the bartender was "stuck on the phone, so she really wasn't paying attention to me or the rest of the customers." *10/28/03 Trn*. at 163. The bartender "then passed the phone to the waitress, who talked again on the phone." *10/28/03 Trn*. at 164. Ms. Companion testified that the waitress then "turned around and asked me if I was Martha." *Id.*

Ms. Companion took the phone and talked over the voice on the other end. *10/28/03 Trn*. at 182. She said she held the phone "for a very short amount of time," *id.*, but long enough, she claimed, to believe it was Mr. Gubitosi. Ms. Companion testified that the voice was disguised and delivered in a monotone, and that "it wasn't a normal speaking voice that I heard him in the past, but it sounded similar to this voice." *10/28/03 Trn*. at 165. She testified she believed it was Mr. Gubitosi's voice, but when asked whether she was sure it belonged to Mr. Gubitosi, she equivocated. *10/28/03 Trn*. at 181.

This occurred, of course, on a portable phone, *10/28/03 Trn*. at 165, at suppertime, in a bar within a restaurant, with two televisions on. *10/28/03 Trn*. at 99

Ms. Companion then handed the phone back to the bartender, returned to her table, *10/28/03 Trn*. at 165, and told Ms. Rubin that she "had just taken a call for her at the bar and that it had sounded like Steve." *10/28/03 Trn*. at 166.

Ms. Companion's belief that the phone call was from Mr. Gubitosi was not corroborated by any witness. Ms. Rubin did not hear the phone ring, *10/28/03 Trn*. at 69, and the only information Ms. Rubin and Mr. Kane had about the alleged call came as hearsay from Ms. Companion. *10/28/03 Trn*. at 166.

Ms. Companion learned of her friends' belief that they had seen Mr. Gubitosi's drive by the restaurant ***before*** she went to the bar to get a drink. *10/28/03 Trn*. at 144, 183. Thus, before the call, Ms. Companion was already aware of her friends' incredulity regarding how Mr. Gubitosi might have known they were there. When she took an anonymous call at the bar for a "Martha," Ms. Companion was susceptible to the suggestion that the disguised voice belonged to Mr. Gubitosi.

Because Ms. Companion's identification was made under conditions that would have been difficult for any ear-witness, and because the identification was so tentative, the only reliable evidence that the call came from Mr. Gubitosi was his phone record showing a call made from his cell phone to the restaurant that evening. *10/27/03 Trn*. at 13 ("phone records are critical" to prosecution).

D. Three People's Conversations Don't Fit into a One-minute Call

But the phone records do not corroborate significant details of Ms. Companion's story.

The State presented the defendant's phone bill through a witness from U.S. Cellular, Mr. Gubitosi's cell phone provider. The witness described the company's billing policies, and

described how the duration of calls is calculated: calls are billed in one-minute increments such that a call for even a few seconds is recorded as being for one minute, and a call for one minute plus one second is recorded as being for two minutes. *10/28/03 Trn*. at 198. The witness even conceded that because billing begins when the caller presses "send," the initial one minute often includes the time the caller listens to ringing waiting for the recipient to pick up, and that a caller may be billed even if the recipient never answers the phone. *10/28/03 Trn*. at 196-98.

The U.S. Cellular witness identified Mr. Gubitosi's bill that showed a call from his phone to the restaurant, and testified that the bill showed the call as lasting for one minute. *See* EXHIBIT 4, *Appx. to Br.* at 34 (Mr. Gubitosi's phone bill shows outgoing call to phone number 603-528-0800[1] at 8:03 p.m. on September 19, 2002). Thus, she testified, the maximum duration of the call could not possibly have been longer than one minute, and could have been shorter. *10/28/03 Trn*. at 205-06.

Ms. Companion's story, however, is about a much longer call. She told the jury that when she first went to the bar, the bartender was "stuck on the phone" such that the bartender was ignoring customers. *10/28/03 Trn*. at 163. The bartender then passed the phone to the waitress, who also talked to the caller. *10/28/03 Trn*. at 164. Ms. Companion estimated that the waitress talked on the phone for 20 to 25 seconds. *10/28/03 Trn*. at 181. The waitress then called out for "Martha." It was only then that Ms. Companion got on the phone. She estimated that her interchange with the caller lasted perhaps another 25 seconds. *Id.*

Even granting U.S. Cellular the benefit of the billing doubt – supposing the bartender

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[1]It was established that the phone number, 603-528-0800, belonged to the restaurant at which the friends were having dinner. EXHIBIT 6 (excerpt of phone book, not included in appendix); *10/28/03 Trn.* at 204.

answered the call immediately and the company didn't bill for ringing in this instance – the longest the call could have lasted is one minute. And even accounting for inaccurate estimates by Ms. Companion, three people's conversations don't fit into a one-minute call.

Thus, whatever else is true, it is not possible that events occurred as Ms. Companion described them.

E. Mr. Gubitosi's Called the Restaurant Responding to a Pager Message

The defendant offered an explanation to account for his having made a short call to the restaurant on the day Ms. Rubin and her friends were eating there.[2]

While Ms. Rubin and her friends were in the restaurant, they testified that they called Mr. Gubitosi, *10/28/03 Trn*. at 87, and left messages for him on his pager to contact them. *10/28/03 Trn*. at 95. Ms. Rubin and her friends dispute whose phone was used to make the calls and to leave the pager messages. *10/28/03 Trn*. at 95, 111 (Ms. Rubin claiming it was her phone); *10/28/03 Trn*. at 166, 185 (Ms. Companion claiming it was her phone). But the friends acknowledge that Ms. Companion made several calls to and left several pages for Mr. Gubitosi. As to the calls, he did not answer one of them, *10/28/03 Trn*. at 69-70, a voice-mail was left for him, *id*; *10/28/03 Trn*. at 166, a lengthy *eleven minute* call was made from Ms. Rubin's phone, *10/28/03 Trn*. at 91-92, and Ms. Companion later had a phone conversation with Mr. Gubitosi in which he denied driving by the restaurant. *10/28/03 Trn*. at 103. Ms. Rubin acknowledged that Mr. Gubitosi's pager number appeared on her cell-phone bill as an outgoing call. *10/28/03 Trn*. at 94-95.

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[2]For the purposes of his sufficiency argument only, Mr. Gubitosi does not deny that he made a call to the restaurant. In so doing, he does not waive his other arguments regarding admissibility of the phone bill, *infra*.

Mr. Gubitosi established, to the surprise of the U.S. Cellular witness, that U.S. Cellular's 411 directory information service works in reverse. That is, when a customer calls 4-1-1 and provides the operator with a phone number, the company will give the customer whatever information its has about the owner of the number. During trial in front of the jury, the defendant conducted an experiment to prove this worked. The U.S. Cellular witness called 4-1-1, gave the operator the number for the restaurant, and was able to learn the name of the restaurant. *10/28/03 Trn*. at 204.

Mr. Gubitosi does not dispute that he called the restaurant that night; the charge is on his phone bill at 8:03 p.m. *10/28/03 Trn*. at 211; *see* EXHIBIT 4, *Appx. to Br.* at 34. The reason he called is that he received a page, which contained the phone number to the restaurant. He then conducted a reverse 411 inquiry, learned that the number appearing on his pager belonged to the restaurant, and dutifully returned the call. At the time, Mr. Gubitosi was a police officer in the nearby town of Bristol and it was a natural and normal part of his job to return pages in this manner. Mr. Gubitosi's 411 call seeking the owner of the number on his page is evidenced on his phone bill, EXHIBIT 4, *Appx. to Br.* at 34, which shows a 411 call at 8:01 p.m., two minutes before the 8:03 p.m. call to the restaurant.

Mr. Gubitosi's is the only reasonable explanation for the facts. According to the three friends sharing dinner, there is no other way Mr. Gubitosi could have known their whereabouts at that restaurant on that night. Each of the three friends told the jury that going there was spontaneous. Ms. Rubin testified she didn't tell anyone that Mr. Gubitosi might know, *10/28/03 Trn*. at 80-83; Brian Kane didn't tell anyone, *10/28/03 Trn. at 129*, and Ms. Companion told only her children. *10/28/03 Trn. at 170*. Having received the page is the only way Mr. Gubitosi could have known to call that restaurant that night.

F. State Relied on Emotional Testimony Unrelated to Charges in the Indictment to Secure Mr. Gubitosi's Conviction

The State was unable to prove beyond a reasonable doubt that a call from Mr. Gubitosi to Ms. Rubin was part of a course of conduct to sustain a conviction for stalking.

First, Ms. Rubin's story of three people talking on the bar phone does not comport with the fact that Mr. Gubitosi's call to the restaurant was under one minute.

Second, her identification was hazy, and took place in circumstances that make it unreliable.

Third, there is no way Mr. Gubitosi could have known to call Ms. Rubin at the restaurant unless he was returning her call.

Fourth, stalking cannot be based on "conduct . . . necessary to accomplish a legitimate purpose." RSA 633:3-a, II(a). Mr. Gubitosi legitimately returned a pager message – instigated by Ms. Rubin and her friends. *See, State v. Small*, 150 N.H. 457, 462 (2004)*; State v. Porelle*, 149 N.H. 420 (2003).

Fifth, an "act of communication" chargeable under the stalking statute is one that is intended to "impart a message." RSA 644:4, II (referenced in RSA 633:3-a, II(a)(7). Mr. Gubitosi merely returned a pager message to determine, in the course of his normal duties, who paged him and why. He was not seeking to impart a message, and apparently didn't impart one. *10/28/03 Trn.* at 164 (Ms. Companion testifying: "I really wasn't paying much attention to what the words were.").

Finally, it is apparent that the jury, rather than coldly evaluating this evidence with regard to the charges, convicted Mr. Gubitosi based on the numerous bad acts Ms. Rubin alleged –

killing her cat, showing her his gun, an hour-and-a-half tape of dastardly voice-mail messages – which were emotional, but unrelated to the charges specified in the indictment.

Blame for the jury's error, however, must be placed on the prosecutor. His closing argument to the jury repeatedly mentioned the uncharged conduct. He told the jury, for example:

> [W]e sat there on Monday afternoon for almost an hour and a half listening to call after call. And you heard [Ms. Rubin] talk about those calls, too, some suicidal, some confrontational, some threatening, very, very disturbing. Some of those calls were snide, mean.

10/30/03 Trn. at 32-33. The prosecutor reminded the jury that in one of those messages Mr. Gubitosi called Ms. Rubin "a dirty whore." *10/30/03 Trn*. at 33, 34. The prosecutor lamented that the jury was not allowed to take the tape into the jury room and listen again. *10/30/03 Trn*. at 32.

Because the State could not sustain its burden to prove beyond a reasonable doubt the crime alleged in the indictment, this court should reverse the conviction. *State v. Davies*, 121 N.H. 366 (1981).

II. People Have a Reasonable Expectation of Privacy in Their "Virtual Current Biography"

The United States Supreme Court in *Smith v. Maryland*, 442 U.S. 735 (1979), over vigorous dissents, found that people do not have an expectation of privacy in telephone billing records.[3] It based its ruling on earlier cases in which the Court had similarly found no expectation of privacy in one's bank financial records. In *Smith*, the Court wrote,

> [W]e doubt that people in general entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that they must "convey" phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed. All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills.

Smith, 442 U.S. at 742.

Thus, the court concluded that the defendant "in all probability entertained no actual expectation of privacy in the phone numbers he dialed, and that, even if he did, his expectation was not 'legitimate.' The installation and use of a pen register consequently, was not a 'search,' and no warrant was required." *Smith*, 442 U.S. at 745-46.

Since *Smith*, under the federal constitution, phone record cases have been decided in various contexts – the name of a suspect, identification of journalists' sources, confirmation of informants' tips, means of locating fugitives, showing a person's movements to prove or disprove an alibi or corroborate a witness's version of events, and like here, to show a call was made. In *State v. Valenzuela*, 130 N.H. 175 (1987), this Court adopted the *Smith* reasoning.

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[3]The device used to capture numbers being dialed is called a "pen register," *see* RSA 570-B:1, III; 18 U.S.C. § 3127(3), so named before digital technology obviated both the pen and the register.

Many state courts, however, have rejected *Smith*, and have used their state constitutions to protect the privacy of people's phone billing records. *See* SEARCH AND SEIZURE OF TELEPHONE COMPANY RECORDS PERTAINING TO SUBSCRIBER AS VIOLATION OF SUBSCRIBER'S CONSTITUTIONAL RIGHTS, 76 A.L.R.4th 536 § 3. Moreover, there is an enormous commentary on *Smith*, virtually all of it critical. In the interests of brevity the literature is not cited here; but *see generally* 1 W. LaFave, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.7(b), at 622 *et seq.* (1996).

Some states enacted phone record privacy statutes after *Smith*, but in New Hampshire, this is a constitutional matter because the wiretapping statute exempts phone records a company develops for billing purposes. RSA 570-B:1, III; RSA 7:6-b.

A. "Papers" in the New Hampshire Constitution Protect Privacy in Telephone Billing Records

The New Hampshire Constitution provides:

> Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions.

N.H. CONST., pt. I, art. 19. In *Valenzuela*, Judge Batchelder wrote in his dissent that the word "papers" in the New Hampshire Constitution directly addresses this issue.

> Article 19 protects a person's "papers" from all unreasonable searches and seizures. "Papers" as tangible objects, however, have little or no intrinsic value. The value of "papers" rests in the content of the information contained in them. The mere advance in technology from paper as the medium for the flow of information to, for example, telephonic communications should not alter the protective force of article 19. Similarly, article 19 should not be limited to protections against the intrusive capabilities of the government at the time of the adoption of article 19. Rather, the areas of protected privacy must be examined and determined on a case by case basis in light of the technology available to the government at any given time. The protected rights, of necessity, become more sharply defined as science and technology broaden the scope of governmental

> power. In the end, I see no functional difference between government officials searching for and seizing a person's papers, in the course of an investigation without the benefit of a warrant based on probable cause, and their monitoring the communicative activities of a citizen without the burden of similar requirements.

Valenzuela, 130 N.H. at 201 (Batchelder, J., dissenting). *See also State v. Gunwall*, 720 P.2d 808, 813 (Wash. 1986) (constitutional protection of "private affairs" found to protect privacy in telephone billing records).

B. Expectation of Privacy in Telephone Billing Records

Recently this Court adopted the "expectation of privacy" test to determine the scope of citizens' rights against the government's power to search and seize. *Compare, State v. Pellicci*, 133 N.H. 523 (1990) (noting New Hampshire had not adopted expectation of privacy doctrine) *with, State v. Goss*, 150 N.H. 46 (2003) (explicitly adopting doctrine). Because of this change in doctrine, and because this Court has consistently maintained that New Hampshire's constitution is more protective than its federal counterpart of personal rights against governmental searches and seizures, *see e.g., Goss*, 150 N.H. at 49; *State v. Finn*, 146 N.H. 59 (2001); *State v. Brodeur*, 126 N.H. 411 (1985); *State v. Koppel*, 127 N.H. 286 (1985); *State v. Ball*, 124 N.H. 226 (1983) (and cases cited therein), the issue decided in *Valenzuela* is open for reinterpretation.

1. Telephones a Necessary Part of Everyday Personal and Business Life

> Technological developments have enlarged our conception of what constitutes the home. The telephone has become an essential instrument in carrying on our personal affairs. It has become part and parcel of the home. When a telephone call is made, it is as if two people are having a private conversation in the sanctity of their living room.

State v. Hunt, 450 A.2d 952, 955-56 (N.J. 1982). For privacy purposes, a phone call is just like having a face-to-face conversation, and for many a phone relationship is the *only* way two people

might know each other.

> A telephone is a necessary component of modern life. It is a personal and business necessity indispensable to one's ability to effectively communicate in today's complex society. When a telephone call is made, it is as if two people are having a conversation in the privacy of the home or office, locations entitled to protection.

State v. Gunwall, 720 P.2d 808, 813 (Wash. 1986), *quoting People v. Sporleder*, 666 P.2d 135, 141 (Colo. 1983).

Conversations begin at their initiation. For phone conversations, especially if the recipient has caller-ID (equipment that displays the caller's name and number), initiation occurs when the caller dials the number.

> Telephone activities are largely of one piece, and efforts to create distinctions between numbers and conversational content are constitutionally untenable in our view.

Commonwealth v. Melilli, 555 A.2d 1254, 1259 (Pa. 1989).

If phone usage were not considered private, a person would have to go to absurd lengths to find an alternative.

> [Some suggest that] anyone wishing to maintain anonymity and avoid transmission of his or her telephone number may do so by making pay telephone calls . . . credit card calls . . . or operator assisted calls . . . . Such suggestion rises to absurdity when considering the inconveniences and added costs imposed upon consumers to protect their privacy.

Barasch v. Pennsylvania Public Utility Comm'n, 576 A.2d 79 (Commw.Ct. 1990), *aff'd*, 605 A.2d 1198 (Pa. 1992); *see also, Smith v. Maryland*, 442 U.S. at 750 (Marshall, J., dissenting) ("unless a person is prepared to forgo use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance"). If phone records are not private, to maintain privacy a person would have to assume the burden of personal travel to

communicate with a person. *See Commonweath v. Beauford*, 475 A.2d 783 (Pa.Super 1984) ("For all practical purposes an individual in America today has very little choice about whether the telephone company will have access to the numbers he dials and the frequency of times he dials them. The company has a virtual monopoly over vital communications media, and the individual must accept that this information will be collected by the company for billing purposes.").

2. Disclosure to Phone Company is for Accounting Purposes Only

This Court in *Valenzuela* held that because phone dialing information is collected and retained by the telephone company, the information has already been disclosed and thus there is no privacy interest in the information. But when people make phone calls, they understand that the phone company retains information about the call only for *billing* purposes.

> [A] telephone subscriber has a reasonable expectation that the calls he makes will be utilized only for the accounting functions of the telephone company and that he cannot anticipate that his personal life, as disclosed by the calls he makes and receives, will be disclosed to outsiders.

People v. Blair, 602 P.2d 738, 746-47 (Cal. 1979); *State v. Gunwall*, 720 P.2d at 813; *State v. Hunt*, 450 A.2d 952 (N.J. 1982) ("a telephone subscriber has a reasonable expectation that the calls he makes will be utilized only for the accounting functions of the telephone company"). This is because

> Telephone calls cannot be made except through the telephone company's property and without payment to it for the service. This disclosure has been necessitated because of the nature of the instrumentality, but more significantly the disclosure has been made for a limited business purpose and not for release to other persons for other reasons.

Hunt, 450 A.2d at 952.

Thus, "even assuming . . . that individuals typically know that a phone company monitors calls for internal reasons, it does not follow that they expect this information to be made available to the public in general or the government in particular." *Smith v. Maryland*, 442 U.S. at 749 (Marshall, J., dissenting) (quotations and citations omitted).

3. Phone Bills Reveal Intimate Personal Details

> The numbers dialed from a private telephone – although certainly more prosaic than the conversation itself – are not without "content." Most private telephone subscribers may have their own numbers listed in a publicly distributed directory, but I doubt there are any who would be happy to have broadcast to the world a list of the local or long distance numbers they have called. This is not because such a list might in some sense be incriminating, but because it easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life.

Smith v. Maryland, 442 U.S. at 748 (Stewart and Brennan, JJ., dissenting).

"[A] record of telephone calls . . . provides 'a virtual current biography'" of a person's life. *Blair*, 602 P.2d at 746. From a bill the government can know that a person called their lawyer, lover, doctor, banker or business associate. This Court recognized the inherent privacy of bills in *Goss*. In holding that there is a privacy right in one's garbage, this court wrote:

> Personal letters, ***bills***, receipts, prescription bottles and similar items that are regularly disposed of in household trash disclose information about the resident that few people would want to be made public.

Goss, 150 N.H. at 49 (emphasis added). As with garbage, even though outsiders have access for a particular purpose to the information contained in a person's bill, it remains private to the world at large, and to the government without a warrant.

4. Everybody is Protected by Phone Record Privacy

> Privacy in placing calls is of value not only to those engaged in criminal activity. The prospect of unregulated governmental monitoring will undoubtedly prove disturbing even to those with nothing illicit to hide. Many individuals, including members of unpopular political organizations or journalists with confidential sources, may legitimately wish to avoid disclosure of their personal contacts.

Smith v. Maryland, 442 U.S. at 751 (Marshall and Brennen, JJ., dissenting).

Even though many courts have found that there are privacy rights in phone billing records, that privacy is waivable.

> Not all telephone conversations enjoy the same privacy. If one party makes the conversation available to others, such as through the use of a speaker phone or by permitting someone else to hear, . . . the privacy interest does not remain the same.

Hunt, 450 A.2d at 956. The Court went on, finding that "when neither party permits any interference with the call and only the telephone company in the course of its operations is privy to any information," the company's participation does not destroy "the sanctity of the call, which comprises data as to both who was contacted and what message was conveyed, so as to permit unauthorized governmental intrusion."

Based on these considerations, it is apparent that people have an expectation of privacy in the numbers they dial.

> I am convinced that a person using the telephone fully expects that the numbers he dials will remain as private as the content of the communication. The numbers provide a strong, sometimes conclusive, inference as to who is being called and with what frequency, unquestionably a private matter. A collection of such information can provide a virtual mosaic of a person's private life.

Valenzuela, 130 N.H. at 200 (Batchelder, J., dissenting).

> [W]e are convinced that a person picking up a telephone in his home or office fully expects that the number he is about to dial will remain as private as the

> contents of the communication he is about to have. That number provides a strong, sometimes conclusive inference as to whom is being called, unquestionably a private matter. The caller certainly evidences no intention to shed his veil of privacy merely because he chooses to use the telephone to make private contacts. In modern-day America the telephone call is a nearly indispensable tool used to conduct the widest range of business, government, political, social, and personal affairs.

Barasch v. Pennsylvania PUC, 576 A.2d at 79. Accordingly, most non-federal jurisdictions reaching the issue have rejected the United States Supreme Court's opinion in *Smith v. Maryland*. *See* SEARCH AND SEIZURE OF TELEPHONE COMPANY RECORDS PERTAINING TO SUBSCRIBER AS VIOLATION OF SUBSCRIBER'S CONSTITUTIONAL RIGHTS, 76 A.L.R.4th 536 § 3; *People v. Blair*, 602 P.2d 738 (Cal. 1979); *People v. Corr*, 682 P.2d 20 (Colo. 1984), *cert. denied*, 469 U.S. 855; *People v. Sporleder*, 666 P.2d 135 (Colo. 1983); *Shaktman v. State*, 553 So. 2d 148 (Fla. 1989); *State v. Rothman*, 779 P.2d 1 (Haw. 1989); *State v. Thompson*, 760 P.2d 1162 (Idaho 1988); *People v. DeLaire*, 610 N.E. 1277 (Ill. App. 1993), *app. denied*, 616 N.E.2d 340 (Ill. 1993); *State v. Hunt*, 450 A.2d 952 (N.J. 1982); *Barasch v. Pennsylvania Public Utility Comm'n*, 576 A.2d 79 (Commw.Ct. 1990), *aff'd*, 605 A.2d 1198 (Pa. 1992); *Commonwealth v. Melilli*, 555 A.2d 1254, 1258 (Pa. 1989); *Commonweath v. Beauford*, 475 A.2d 783 (Pa.Super. 1984); *State v. Gunwall*, 720 P.2d 808, 813 (Wash. 1986).

C. Additional Expectation of Privacy in Unlisted Number

People have an augmented expectation of privacy in unlisted, or unpublished, phone numbers.

For instance, telephone companies may be liable for disclosing unlisted numbers. *See Annotation*, TELEPHONE COMPANY'S LIABILITY FOR DISCLOSURE OF NUMBER OR ADDRESS OF SUBSCRIBER HOLDING UNLISTED NUMBER, 1 A.L.R.4th 218; *Montinieri v. Southern New*

England Tel. Co., 398 A.2d 1180 (Conn. 1978) (plaintiff sued phone company for negligently providing unlisted number to a stalker; court found no liability, though ruling based on unrelated tort law doctrine under Connecticut law).

Having an unlisted number is evidence that one intends to maintain the privacy of the number. *See In re Lisa H.*, 134 N.H. 188 (1991) (termination of parental rights; proof that parent abandoned child based on facts including unlisted phone number).

Agency regulations in New Hampshire demonstrate the same understanding. *See, e.g.*, N.H. ADMIN. RULES, Ins 3001.04(w)(6)b. ("A licensee has a reasonable basis to believe that an individual's telephone number is lawfully made available to the general public if the licensee has located the telephone number in the telephone book or the consumer has informed [the agency] that the telephone number is not unlisted.").

Mr. Gubitosi's cell phone number was unlisted. *10/27/03 Trn.* at 7. This evidences Mr. Gubitosi's subjective expectation of privacy in his phone information, including his bills.

D. Privacy of Telephone Billing Records Extends to Cell Phones

Today cellular telephones are ubiquitous, and many people have abandoned landlines altogether. USA Today, *For Many, Their Cell Phone Has Become Their Only Phone* (March 24, 2003) <http://www.usatoday.com/tech/news/2003-03-24-cell-phones_x.htm>. At the time most state courts decided cases concerning the privacy of telephone billing records, however, cell phones largely did not exist.

Consequently, many of the cases speak of people using telephones in their homes and offices. *See e.g., State v. Gunwall*, 720 P.2d at 813. In *People v. Blair*, 602 P.2d 738 (Cal. 1979), the California Supreme Court extended that state's rejection of *Smith v. Maryland* to the

use of a hotel phone because "a hotel guest may reasonably expect that the calls which he makes from his room are recorded by the hotel for billing purposes only, and that the record of his calls will not be transmitted to others without legal process." *Id.*, 602 P.2d at 746.

It is thus the nature of peoples' understanding of the purposes for which a phone company collects information about the call, and not the location of the caller, which creates the expectation of privacy in phone billing records. Although cell phones have untethered personal and business conversations from people's homes and offices, they have not changed people's understanding that the purpose for which the company collects information is billing.

E. Warrant Was Necessary for State to Acquire Mr. Gubitosi's Phone Billing Records

Where courts have recognized a privacy interest in telephone billing records, they have required a showing of probable cause for the government to gain access to them. *See Commonwealth v. Melilli*, 555 A.2d at 1258; *Shaktman v. State*, 553 So. 2d at 151 (compelling state interest in phone billing records shown when state demonstrates clear connection between illegal activity and person whose privacy invaded, and reasonable founded suspicion that targeted phone being used for criminal purpose).

Getting a warrant would not have been an undue burden in this case; the State was able to prepare and issue a subpoena. *See State v. Rothman*, 779 P.2d at 8 (getting warrant for phone billing records "does not seem, to us, to impose any undue burden on the law enforcement authorities"). This Court should reverse the lower court's ruling, and find that the phone billing records should have been suppressed because they were acquired without a warrant and without a showing of probable cause. *See State v. Flynn*, 123 N.H. 457, 465 (1983).

III. Phone Billing Records Should Have Been Suppressed Because They Were Acquired by an Unconstitutionally Overbroad Subpoena

The records should also have been suppressed because the subpoena by which they were acquired was overbroad. The State subpoenaed Mr. Gubitosi's phone billing records for the period between April 12, 2002 and October 18, 2002. SUBPOENA DUCES TECUM (Oct. 18, 2002), *Appx. to Br.* at 32-33. He was charged, however, with incidents that occurred on just one day.

Overbreadth in a subpoena is a constitutional violation. U.S. CONST., amd. 4 &14; N.H. CONST., pt. I, art. 19.

> The requirement of "probable cause, supported by oath or affirmation," literally applicable in the case of a warrant, is satisfied in that of an order for production by the court's determination that the investigation is authorized by [the legislature], is for a purpose [the legislature] can order, and the documents sought are relevant to the inquiry. Beyond this the requirement of reasonableness, including particularity in "describing the place to be searched, and the persons or things to be seized," also literally applicable to warrants, comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily, as has been said, this cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry.

Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209 (1946). "[T]he Constitution undoubtedly protects against overly broad subpoenas duces tecum." *In re Horowitz*, 482 F.2d 72, 79 (2nd Cir. 1973), *cert. denied*, 414 U.S. 867.

The measure of overbreadth is relevancy. *Walling*, 327 U.S. at 209; *Heidelberg Americas v. Tokyo Kikai Seisakusho*, 333 F.3d 38 (1st Cir. 2003) (subpoena requesting many years of documents overbroad); *Horowitz*, 482 F.2d at 80 (reformation of subpoena limiting dates of requested materials).

Mr. Gubitosi's case cannot be guided by *State v. Settle*, 124 N.H. 832, 837 (1984). There

the defendant was charged with unauthorized practice of law, and the State requested all documents he had filed in court. Although he claimed it was overbroad, this Court easily found that because the practice of law is *at least* as broad as filing documents in court, the subpoena was, if anything, narrower than justified.

Had the lower court complied with the law in Mr. Gubitosi's case, it could have narrowed the overbroad subpoena to relevant materials such that the remainder might have been constitutionally admissible; just as it could have narrowed an overbroad warrant. *See In re Grand Jury Subpoena*, 150 N.H. 436 (2004) (requiring notice to defendant and *in camera* review of subpoenaed materials). The court here, however, did not restrict the subpoena to the relevant date. Rather, it unlawfully approved the State's "fishing expedition." *F.T.C. v. American Tobacco Co.*, 264 U.S. 298, 306 (1924) (government may not "direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime").

In Mr. Gubitosi's case, the State sought billing records that covered a half a year of his phone calls. Relevant to the indictment in this case, however, is a single one-minute call. The State went on a "fishing expedition," even though it knew the date of the call at the time the subpoena was issued. *10/28/03 Trn.* at 70, 219 (Ms. Rubin called police immediately upon learning that Mr. Gubitosi called the restaurant; she also met with detective few weeks later). The State cannot credibly allege any relevancy beyond a single moment, yet it deliberately violated Mr. Gubitosi's right to privacy for the over 4,500 incoming and outgoing calls[4] he made

[4]Due to their volume and limited utility, the entire seven months of phone records, provided to the defendant in discovery, are omitted from the appendix. Exhibit 4, which is a portion of the bill dated 10/2/02, includes the date of the charged incident, September 19, 2002, and is included in the appendix. On the bills each line is numbered, making it a simple matter to calculate how (continued...)

in the conduct of his active business and personal affairs during seven months of his life.

This deliberate violation of rights is one of the purposes for which protections against unreasonable searches and seizures are incorporated into both our Federal and State Constitutions. *State v. Canelo*, 139 N.H. 376, 385-88 (1995). The remedy for their violation is suppression. *Id.*

[4](...continued)
many calls are on the subpoenaed bills: April = 548, May = 702, June = 536, July = 961, August = 573, September = 568, October = 619; Total April through October = 4,507 calls.

IV. An Attempt to Telephone is Not Within the Course of Conduct Constituting the Crime of Stalking

Stalking is defined in several ways. The portion of the statute with which Mr. Gubitosi was charged provides, in part, that the State prove beyond a reasonable doubt that he "knowingly . . . engage[d]" in "2 or more acts over a period of time." RSA 633:3-a, II.

The indictment, however, did not charge two acts; it charged one act and one attempt. The indictment first alleges Mr. Gubitosi "drove to a restaurant where Martha Rubin was." INDICTMENT (Feb. 13, 2003), *Appx. to Br.* at 31. This is a charged act. The indictment then alleges he "attempted to telephone her there." *Id.* This is an allegation of an attempted act, not an act.

There is a difference between an attempted act and a completed act. *See* RSA 629:1 (attempt requires merely substantial step toward a crime, not completed actus reus). "[A]n attempt is an intent to do a particular criminal thing, with an act toward it, failing short of the thing intended." *State v. Davis*, 108 N.H. 158, 160 (1967) (quotation omitted).

A completed act cannot be presumed from proof of an attempt. "[A]n attempted crime is by definition a crime not completed." *State v. Johnson*, 144 N.H. 175, 178 (1999). In *State v Davis*, 108 N.H. at 160, the State successfully proved attempted statutory rape, but because attempt is lesser included to the crime-in-chief, proof of completed rape would have required an extra element beyond a substantial step. To prove attempt, the State need not prove the greater crime. *State v. Martin*, 116 N.H. 47 (1976) (car idling with defendant asleep sufficient to prove attempted drunk driving).

Mr. Gubitosi was found guilty of "attempting to telephone" Ms. Rubin at the restaurant.

Because extra elements are necessary for proof of the completed act, one cannot infer that the jury would have also found Mr. Gubitosi guilty of actually telephoning her there, had that been the charge. *State v. Hardy*, 120 N.H. 552 (1980) (State may charge lesser offence even if facts support greater offense).

The stalking statute requires proof of two "acts." None of the examples of qualifying conduct contained in the statute are inchoate; all require completion. RSA 633:3-a, II(1) through II(7) (*e.g.*, "[t]hreatening the safety . . .," "[f]ollowing, approaching, or confronting," "[a]ppearing in close proximity," "[c]ausing damage," "[p]lacing an object," "[c]ausing injury."). The statute does not provide for attempted acts as constituents for a course of conduct.

Because the State charged and proved only an attempted act, it fell short of the two acts required. Accordingly, the allegations contained in the indictment do not state a crime, *see State v. Johnson*, 144 N.H. at 179, and Mr. Gubitosi was unlawfully convicted and sentenced.

CONCLUSION

Based on the foregoing, Mr. Gubitosi requests that his conviction be reversed.

Respectfully submitted,

Steve Gubitosi,
By his Attorney,

Law Office of Joshua L. Gordon

Dated: January 28, 2004

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Steve Gubitosi requests that his counsel, Joshua L. Gordon, be allowed 15 minutes for oral argument.

I hereby certify that on January 24, 2004 copies of the foregoing will be forwarded to Stephen D. Fuller, Senior Assistant Attorney General.

Dated: January 28, 2004

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APPENDIX