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NO. 63617-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BRENT STARR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Ronald L. Castleberry, Judge

BRIEF OF APPELLANT

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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of respondent, a copy of which contains a copy of the document to which this declaration is attached.

Snohomish Co. Susan Wilk  
I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

[Signature] 6/30/10  
Name Done in Seattle, WA Date

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting evidence of text messages unlawfully seized in violation of the state and federal constitutions.

2. The trial court erred in entering Finding of Fact (FOF 4), to the extent it finds no law enforcement officer “did anything to direct Verizon in any way to send records outside the scope of the warrant.” CP 39. A copy of the findings and conclusions is attached as appendix A.

3. The trial court erred in entering FOF 11, to the extent it finds the unauthorized records were sent to the police inadvertently.

4. Absent a finding of probable cause, the search authority of Chapters 10.27 and 10.29 RCW violates article I, section 7 of the Washington Constitution.

5. To the extent finding of fact 6 implies compliance with the provisions of Chapter 10.27 or 10.29 RCW, the trial court erred in finding:

Verizon does provide text messages, including content, in response to a subpoena duces tecum signed by a judge. Verizon would have, and did, provide the text message and phone records in response to the subpoena duces tecum issued by Judge McKeeman.

CP 43.

6. To the extent finding of fact 13 implies compliance with the provisions of Chapter 10.27 or 10.29 RCW, the trial court erred in finding, in pertinent part:

Subsequently, pursuant to the subpoena duces tecum and the second search warrant, Verizon provided two CD's with the requested records of text messages to Detective VanderWeyst.

CP 43.

7. The admission of unreliable evidence of text messages and telephone records violated the right to due process safeguarded by the Fourteenth Amendment and article I, section 3 of the Washington Constitution.

8. The trial court erred in entering a conviction and judgment where, absent the unlawfully seized evidence, the State could not prove the charged offense beyond a reasonable doubt.

Issues Related to Assignments of Error

1. The Washington Supreme Court has adopted a "bright line rule" holding the "private search" doctrine violates article I, section 7 of the Washington Constitution. Did the trial court err in concluding evidence of text messages was admissible on the basis that Verizon, the entity that supplied the text messages to law enforcement, was a "private actor" conducting a "private search"?

2. A private entity may be converted to a government agent or instrumentality if the government coerces, directs, or dominates the actions of the private entity. Even if there is a narrow exception to the bright line rule that the “private search” doctrine violates article I, section 7, did the trial court err in holding that Verizon was a “private actor” conducting a “private search” where Verizon acted in response to the state’s direction?

3. For the “private search” exception to apply, a private entity must first conduct a search of materials in which another individual has a privacy interest and then deliver them to law enforcement. Did the trial court err in holding that the “private search” exception applied where Verizon delivered a file containing unread text messages to law enforcement, and the search did not occur until the messages were read by a Snohomish County Sheriff’s detective?

4. The Washington Supreme Court has held the “inevitable discovery” doctrine violates article I, section 7’s exclusionary rule. Did the trial court err in holding the text messages were admissible because they inevitably would have been discovered?

5. The rules governing special inquiry proceedings are prescribed by statute. The statute permits special inquiry proceedings to be initiated to uncover evidence of crime and corruption and

provides for the appointment of a special inquiry judge and convening of a grand jury. The proceedings are strictly held in secret; not even attorneys, other than the “public attorney” and an attorney representing a witness then testifying, are permitted to attend or access evidence obtained in a special inquiry proceeding. A special inquiry judge authorized the issuance of a subpoena duces tecum for records and, in conformance with the statute, prohibited the production of the evidence except to the special inquiry judge or public attorney. Should this Court hold that the records given to the lead detective, in response to a search warrant, could and would not have been provided pursuant to the special inquiry proceeding?

6. A search warrant issued by a neutral and detached magistrate, and based on probable cause, provides the authority of law referenced in article I, section 7. Ordinarily, because of the protections attendant to the subpoena process, a subpoena would also provide the requisite authority of law. This is not true, however, where (1) the subpoena is for materials that otherwise could be produced only in response to a search warrant, (2) the person with the protected privacy interest in the materials is not given notice of or an opportunity to object to the subpoena, and (3) the party in possession of the materials would be unlikely to seek to enforce the privacy

interest. A special inquiry judge found the state had not established probable cause to issue a search warrant for materials in which appellant Brent Starr had a privacy interest, but nonetheless signed a subpoena duces tecum for these same materials, without providing notice to Starr. Verizon, the entity in possession of the materials, had no incentive or standing to object on Starr's behalf. Was the subpoena duces tecum issued without the authority of law required by article I, section 7?

7. Due process requires that the evidence used to convict an accused person be reliable. When the state seeks to admit computerized data under the "business records" exception to the hearsay rule, in addition to the usual foundational requirements for business records, the state must lay an authentication foundation regarding the computer and software utilized in order to assure the continuing accuracy of the records. Where the records custodian called by the state was unable to provide this requisite foundation, did the trial court err in finding computerized data admissible under the "business records" exception? Did the admission of this unreliable evidence deny Starr due process?

8. Without the wrongly admitted text message evidence, is the State's evidence insufficient to support the elements of the charged offense?

B. STATEMENT OF THE CASE

On July 25, 2008, the state charged appellant Brent Starr with the first degree murder of David Grim. CP 141-42; RCW 9A.32.030(1)(a).<sup>1</sup> The state alleged Debra Canady was an accomplice. Canady's appeal is pending in cause number 63626-0-I.

Grim was killed in the early morning hours of June 26, 2008. CP 138-39; Ex. 133. While investigating the potential homicide the police interviewed Canady and Starr. Each cooperated in two interviews with the police. Ex. 133. The first interview with Starr occurred June 26, 2008 outside his workplace in the detective's car. Ex. 159. The second interview with Starr took place the night of June 27, 2008 at the Sultan Police Department. Ex. 208.

Detective Patrick VanderWeyst suspected Canady or Starr might have made a false statement in their interviews. Starr said he had sent Canady a text message about 7:00 the morning of June 26 asking how her morning was going. Starr said Canady had texted him

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<sup>1</sup> An amended information charging a deadly weapon allegation was filed February 20, 2009. CP 136-37.

back, informing him she was being questioned by police, and at 9:00 informed him via text she had found Grim dead. In contrast, Canady denied sending Starr any texts that morning. Ex. 131.

On June 28, 2008, VanderWeyst sent Verizon a letter requesting the preservation of text message content for Canady and Starr's phone numbers. The letter requested Verizon preserve messages "for the days Wednesday, June 25<sup>th</sup>, 2008 through Thursday June 26<sup>th</sup>, 2008. Ex. 137-38; 7RP 194-95.

On July 3, 2008, VanderWeyst presented an affidavit requesting a search warrant for Starr's and Canady's cell phone records and text messages for a longer period – from June 20<sup>th</sup> through June 29<sup>th</sup> – asserting there was probable cause to believe the crime of murder had been committed. Ex. 134. Judge McKeeman signed the warrant, but expressly limited the time to "Thursday June 26<sup>th</sup> 6:00 a.m. through Thursday June 26<sup>th</sup> 12:00 pm, 2008." The warrant also clarified the offense for which probable cause was found was "making a false statement." Ex. 131; 7RP 192.

At the same time the prosecutor prepared a Subpeona Duces Tecum (SDT) for phone records, demanding production of the entire period of June 20 through June 29, 2008. Ex. 132; 7RP 192. VanderWeyst said Judge McKeeman had set up a "special inquiry

proceeding” related to this investigation. 7RP 192. Judge McKeeman signed the SDT at the same time as the warrant. 7RP 193. The state offered no other evidence relating to the “special inquiry proceeding.”

VanderWeyst faxed the warrant to Grant Fields, an employee with Verizon’s “law enforcement resource team.” After faxing the warrant, VanderWeyst said he called Fields to tell him the warrant only allowed records from 6:00 am to noon. 7RP 167, 194. VanderWeyst then went to Detective Haley’s office. While at Haley’s office, VanderWeyst received notice on his Blackberry that Fields had sent an email. Being anxious to review the messages, he logged onto a county computer and opened the password-protected file Fields had emailed him. 7RP 174, 195-96; Ex. 131, 133 (page 251), 134.

The state did not call Fields to testify. The Verizon records were instead identified by Jody Citizen, who said he worked as the records custodian for these Verizon records. 7RP 140-86.

Citizen said Verizon would provide text message content in response to search warrants and court orders. 7RP 145-46. He identified the phone and text records for Canady and Starr. 7RP 146-48; Ex. 1-2. Citizen did not know what records Fields had sent to

VanderWeyst in response to the first warrant. 7RP 152.<sup>2</sup> Citizen believed all the records in exhibits 1 and 2 would have eventually been sent in response to the SDT. 7RP 153.

VanderWeyst admitted Fields had called to say he had accidentally sent messages outside the limited 6:00 a.m. to noon time period. 7RP 201. However, VanderWeyst said he did not receive Fields' warning until after he had read the messages. 7RP 201.

The files VanderWeyst opened contained "SMS" printouts of information relating to text messages sent on June 26<sup>th</sup>. 7RP 156-58. The top of each printout clearly set forth the date and time each message was sent. See e.g., CP 127; Ex. 1-2.<sup>3</sup> VanderWeyst said the first message he read was one Starr sent at 3:46 a.m., stating, "its done." 7RP 197. He continued reading several messages, at least through the message Canady sent at 4:34 a.m. stating, "make sure you lock the door when you leave." 7RP 198-99.<sup>4</sup>

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<sup>2</sup> VanderWeyst claimed the only information he received that morning were messages from 3:46 a.m. to noon. 7RP 200.

<sup>3</sup> A copy of CP 127, an example of the SMS PDF file, is attached as appendix B.

<sup>4</sup> The state quotes the messages on page 5 of its Canady response brief. The state also presented evidence of other text messages discovered after VanderWeyst exceeded the scope of the initial warrant. Canady BOR at 3-4.

When asked why he read messages that were clearly marked as outside the warrant's scope, VanderWeyst said he was familiar with these SMS printouts and had seen them before in other cases. He said he scrolled down past the date and time information to the actual text message at the bottom. 7RP 196. He claimed he "had not obtained any information to notify me" "what I was reading was out of the time frame of the search warrant." Ex. 133 (page 251).

After reading the messages, VanderWeyst returned to his office and faxed the SDT to Verizon. He then completed a second search warrant affidavit requesting all of the records he initially requested, not limited to 6:00 a.m. to noon on June 26. To support the broader warrant, he included the potentially incriminating information he had found in the text messages he was not authorized to read. 7RP 199; Ex. 133 (page 251); CP 40 (FOF 12).

Probable cause to arrest and charge Canady and Starr for murder arose from VanderWeyst's unauthorized review of text messages sent between 3:45 and 4:34 that morning. CP 139-40; Ex. 1-3; Supp. CP \_\_ (Sub no. 53, State's Trial Brief at 8-9).

The defense moved to suppress the text messages on several grounds. First, the search warrant authorizing Verizon to provide the text messages was expressly limited to messages occurring between

6:00 a.m. and noon. Verizon was not a “private actor” in delivering the messages. It was immediately apparent the messages were outside the warrant’s scope and there was no untainted source for the documents. CP 80-94; 7RP 219-24.

The trial court denied suppression citing two grounds. Appendix A. Its ruling is discussed in argument section 1, infra.

The defense also moved to suppress the text messages because the state had not shown Citizen was a true custodian of the records, the evidence was not reliable, and it was not the best evidence. CP 98-135; 4RP 41-56. The trial court denied that motion, finding Citizen was a custodian and the SMS printout evidence was sufficiently reliable and corroborated to be admissible. 4RP 67-78.

At trial the state presented evidence showing Grim and Canady’s strained relationship, as well as evidence tending to show what the state believed was Canady’s motive. The state also showed Starr and Canady had become intimate and having Grim still living at Canady’s house was inconvenient and awkward. BOA Canady<sup>5</sup> at 5-12; BOR Canady at 1-6; CP 76-78.

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<sup>5</sup> This brief refers to the Canady Briefs of Appellant and Respondent as “Canady BOA” and “Canady BOR.”

The trial record reveals the state's heavy reliance on the text messages to prove its case. The state cannot argue in this Court that admission of the text message evidence, as well as later evidence tainted by it, was harmless error.<sup>6</sup>

The court sentenced Starr to a term of 336 months in prison. CP 29; 13RP 1098. This appeal timely follows. CP 9.

C. ARGUMENT

1. STARR ADOPTS CANADY'S ARGUMENTS CHALLENGING THE UNCONSTITUTIONAL ADMISSION OF THE TEXT MESSAGES.

The Rules of Appellate procedure allow parties to adopt the arguments of another party in a consolidated case. RAP 10.1(g). Star adopts the arguments set forth in Canady's brief at 12-25. Starr supplements those arguments with the following additional points.

There can be no serious question our text message records are protected "private affairs" protected from governmental intrusion.

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<sup>6</sup> "Police solved the case when they obtained text message records for Starr's phone from Verizon." Supp. CP \_\_ (Sub no. 53, State's Trial Brief, at 6); 5RP 94 (deputy prosecutor admits if the court granted the suppression motion, "the practical effect of that would be to terminate the case." 5RP 94. In closing argument, the prosecutor emphasized the text messages. 12RP 999-1000, 1008-1015, 1018, 1020-22, 1024, 1062-65. The trial court recognized that several of the texts were "critical" and "crucial" to the state's case. 7RP 237-38; CP 40 (FOF 10). The texts also led police to request a search warrant for

Const. art. 1, § 7; State v. Miles, 160 Wn.2d 236, 244-45, 156 P.3d 864 (2007) (banking records); State v. Townsend, 147 Wn.2d 666, 673-74, 57 P.3d 255 (2002); State v. Christensen, 153 Wn.2d 186, 102 P.3d 789 (2004) (cordless telephone conversations); State v. Gunwall, 106 Wn.2d 54, 61, 65-66, 720 P.2d 808 (1986) (long distance phone records and pen registers); State v. Butterworth, 48 Wn. App. 152, 155-57, 737 P.2d 1297 (1987) (unlisted numbers). There also is a reasonable expectation of privacy in text messages under the Fourth Amendment. U.S. Const. amend. 4; City of Ontario, Cal. v. Quon, \_\_\_ U.S. \_\_\_, \_\_\_ S.Ct. \_\_\_, \_\_\_ L.Ed.2d \_\_\_, 2010 WL 2400087, \*10 (2010) (assuming the expectation of privacy is reasonable, but determining that an employer-owned pager was reasonably viewed in accordance with the employer's stated policies). Neither the state nor the trial court contested this.

The trial court instead denied the suppression motion based on what it described as two separate grounds. CP 41-42. The first found Verizon was a "private actor" and the phone records are not subject to the exclusionary rule. The court reasoned Verizon was an "independent source" of the records. CP 41 (citing State v. Richman,

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Starr's car, which recovered blood matching Grim's DNA. 9RP 664-65. The prosecutor emphasized this in closing. 12RP 1001, 1058.

85 Wn. App. 568, 575, 933 P.2d 1088 (1997)).<sup>7</sup> The court next reasoned the text messages would have been “inevitably discovered by law enforcement” via the SDT in the special inquiry proceeding. CP 41. Neither reason withstands constitutional scrutiny.

In its briefing in the trial court and in Canady’s appeal, the state admits Verizon provided information beyond the scope authorized by the search warrant. The state nonetheless contends Verizon was a “private actor” and its acts cannot violate the constitution. Canady BOR at 7-9.

In making this claim the state overlooks two key facts. First, Verizon did not act independently of state direction. And second, even if Verizon did act privately, nothing justified VanderWeyst’s own failure to comply with the warrant’s expressed and clearly visible limits.

a. Verizon Acted in Response to Government Direction, Not as a Private Actor.<sup>8</sup>

The state first directed action by Fields and Verizon by sending its request to preserve the text messages, and then again by the

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<sup>7</sup> Richman was subsequently abrogated by State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009).

<sup>8</sup> As Canady’s brief shows, it is questionable whether the state’s “private actor” theory survives State v. Eisfeldt, 163 Wn.2d 628, 185 P.3d 580 (2008). Canady BOA at 14-17.

search warrant and SDT. The only reason Verizon provided the messages was because the state directed it. These facts are unlike any in the cases cited by the state. State v. Swenson, 104 Wn. App. 744, 9 P.3d 933 (2000) (victim's father was dissatisfied with police and conducted his own independent investigation; he provided numerous leads for the police and aggressively pursued phone records independently from police and not in response to police direction); State v. Krajieski, 104 Wn. App. 377, 16 P.3d 69 (landlord entered apartment to secure a dog; landlord later reported to police he saw a stolen bicycle in the apartment; court found this to be a private search because the police did not direct or encourage it), rev. denied, 144 Wn.2d 1025 (2001); State v. Walter, 66 Wn. App. 862, 865, 833 P.2d 440 (1992) (film lab alerted police to suspicious photographs then provided copies); State v. Clark, 48 Wn. App. 850, 743 P.2d 822 (police did not instigate the private search and had no knowledge the evidence existed before witness provided it; there was no evidence the police intended to encourage the witness to undertake action the police could not), rev. denied, 109 Wn.2d 1015 (1987); State v. Dold, 44 Wn. App. 519, 520-21, 722 P.2d 1353

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(1986) (police received opened and unsolicited letter from anonymous citizen).

The state quotes Swenson for a familiar two-part inquiry to help determine whether a search resulted from state action.<sup>9</sup> It then overstates Swenson's rule, claiming "[u]nless *both* questions are answered in the affirmative, the actions of the citizen are not attributed to the government." Canady BOR at 9 (state's emphasis). But the Swenson court was careful to also cite Dold for the proposition that "[n]o per se rule can be formulated to determine if a private citizen is acting as an agent of governmental authorities." Swenson, 104 Wn. App. at 744 (citing Dold, 44 Wash.App. at 522).

Even so, (1) any reasonably observant officer would know Verizon exceeded the warrant's scope. And (2) the party who conducted the actual search of the records – i.e. VanderWeyst – clearly did so to assist law enforcement.<sup>10</sup> Both parts of Swenson are satisfied here.

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<sup>9</sup> (1) Whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the party performing the search intended to assist law enforcement. Canady BOR at 9; Canady BOA at 19.

<sup>10</sup> The Swenson test for a "private search" is an awkward tool on these facts because nothing shows Fields "searched" the messages since the state did not call Fields to testify. This record shows only that he responded to the state's direction to collect the messages

Nor did Verizon act independently where the state directed Verizon's action on multiple occasions. A text message record would normally only exist for 3-5 days after the message is sent. As Citizen said, "[a]fter that it is purged." 7RP 144, 167. On June 28, the police first instructed Verizon to preserve all text messages from June 25 and 26. Ex. 137-38. The request went to Verizon's "law enforcement resource team."<sup>11</sup> 7RP 167, 176-77. VanderWeyst did not seek a warrant until July 3<sup>rd</sup>. Ex. 134. This shows that Verizon, acting solely at the government's request, preserved the records to assist law enforcement.<sup>12</sup> It did not do so privately or independently.

As part of the SDT, the government instructed Verizon to provide all calls and text messages "for the period from Friday June 20 through Sunday June 29, 2008." Ex. 135. The government made it

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using the SMS download tool. VanderWeyst conducted the actual search.

<sup>11</sup> Verizon's separate "law enforcement resource team" is not part of Verizon's regular business practices; it instead exists to provide information in response to law enforcement requests. 4RP 58; 7RP 166-67, 186. The PDF printouts of the SMS files (like Exhibits 1 and 2) are only generated in response to law enforcement requests. 7RP 172-74, 184, 186.

<sup>12</sup> This is analogous to a police officer instructing a cooperating witness to make sure his roommate does not flush contraband down the toilet, thereby giving the police time to seek a warrant. Like Verizon, that person does not act independently from the police.

more convenient for Verizon to provide those documents to the government<sup>13</sup> and to thereby avoid having to appear with the documents in court. Ex. 135. Given these facts, the state cannot seriously contend it “asked for nothing beyond the scope of the warrant.” Canady BOR at 12.

Another problem with the state’s “private actor” theory is that Verizon is a regulated telecommunications provider. With its license to use our public communications spectrum come duties to protect our privacy. It is statutorily prohibited from acting like a “private citizen” to provide information about our phone calls to the government absent a warrant or court order. See generally, 18 U.S.C. § 2511, et seq. (Electronic Communication Privacy Act); 18 U.S.C. § 2701 et seq. (Stored Communications Act).

For these reasons the trial court erred concluding Verizon was acting independently and in finding no law enforcement officer did anything to direct Verizon in any way to send records outside the scope of the warrant. CP 39 (FOF 4), 41 (COL 2, 3).

b. VanderWeyst Independently Exceeded the Warrant’s Scope.

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<sup>13</sup> If Verizon provided records in response to the SDT, they were not lawfully provided to VanderWeyst. See Canady BOA at 29-31.

According to the state, the police did not encourage Verizon to do anything that would be improper for the police themselves. Canady BOR at 10. This argument seems designed to divert this Court's gaze from VanderWeyst's role in receiving the information and searching records outside the warrant's scope. The state essentially contends whenever a private party exceeds a warrant's scope, every subsequent police officer is thereby excused from taking any action, not even reasonable and obvious action, to ensure the officers do not also exceed the warrant's scope. The state offers no authority for its theory that the government may ignore warrant violations in this fashion.

Existing authority does not favor the state. Washington courts have held that evidence beyond a warrant's scope must be suppressed. See e.g., State v. Kelley, 52 Wn. App. 581, 585-86, 762 P.2d 20, 23-24 (1988) (evidence suppressed after officers exceeded scope of warrant); accord State v. Gebaroff, 87 Wn. App. 11, 17, 939 P.2d 706 (1997).

While another case might have close facts, this one does not. It was immediately apparent the text messages were outside the warrant's scope. CP 39 (FOF 8) ("The date and time of each message is the very first line of data in each record."); Ex. 1-2. This is

not a situation where the officers had any difficulty determining whether the record was within the warrant's scope without viewing its entirety. Cf. State v. Stenson, 132 Wn.2d 668, 695, 940 P.2d 1239 (1997); United States v. Rude, 88 F.3d at 1538, 1552 (9<sup>th</sup> Cir. 1996) (error to admit documents where "immediate observation of the contested documents revealed that the documents fell outside the warrant").

In its Canady response, the state offers an analogy to a file cabinet containing business records within a warrant's scope. A private citizen delivers the key to the cabinet and informs the officers the records are inside. Officers open the cabinet and "find the records named in the warrant, but they also find additional records that have evidential value. They use these observations as the basis for another search warrant." Canady BOR at 11. The state sees no constitutional infirmity.

The state's inaccurate analogy fails because it omits two key facts: (1) this officer knew the warrant specifically excluded files generated "before 6:00 a.m."; and (2) all the files in the cabinet were individually and clearly marked – at the *top* of each file – with the time the file was generated. CP 127; Ex. 1, 2; 7RP 156-59, 160-61. The top of each of these files was marked with the equivalent of red (stop)

or green (go) lights. No officer was required nor allowed to view files outside the warrant's clear scope. Any officer who viewed files generated before 6:00 a.m. acted outside the warrant and disturbed Starr's private affairs without authority of law.<sup>14</sup>

This constitutional violation requires the remedy of suppression. Canady BOA at 38; Kelley, 52 Wn. App. at 588 (evidence viewed by police outside the warrant's scope must be suppressed).

The state's legally indefensible scope argument should also be rejected on policy grounds. The state asks this Court to adopt a new state constitutional rule that would encourage deliberate police indifference to a warrant's scope when searching documents. But "[g]reater care is required for documents than for physical objects because of the potential for intrusion into personal privacy." Charles W. Johnson, Survey of Washington Search and Seizure Law: 2005 Update, 28 Seattle U.L.Rev. 467, 560 (2005) (citing Stenson, 132

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<sup>14</sup> As authority for its file cabinet analogy, the state cites, without discussion, the "plain view" section of State v. Terrovona, 105 Wn.2d 632, 648, 716 P.2d 295 (1986). This is truly ironic, because glaring in the forefront of VanderWeyst's "plain view" was the fact that the text messages exceeded the warrant's limited scope. The Ninth Circuit also has recently criticized the "plain view" theory in the context of computer records. See U.S. v. Comprehensive Drug Testing, Inc., 579 F.3d 989, 1004-05 (9<sup>th</sup> Cir. 2009).

Wn.2d at 692). “[R]esponsible officials, including judicial officials, must take care to assure that [such searches] are conducted in a manner that minimizes unwarranted intrusions upon privacy.” Stenson, at 695 (quoting Andresen v. Maryland, 427 U.S. 463, 482 n.11, 96 S.Ct. 2737, 2748, 49 L.Ed.2d 627 (1976)). VanderWeyst faced no difficulty in separating records within the warrant’s scope from those beyond the warrant’s scope, he just did not bother.

Assuming arguendo VanderWeyst might have acted in good faith, Washington Courts have repeatedly refused to adopt state-friendly rules that would leave the scope of our privacy rights dependent on the whims of alleged government good faith. State v. Morse, 156 Wn.2d 1, 9-10, 123 P.3d 832 (2005) (officer’s “reasonable belief” that person had authority to consent is not the “authority of law” required by state constitution); State v. Canady, 116 Wn.2d 853, 857-58, 809 P.2d 203 (1991) (state’s good faith claim will not be considered where not briefed and argued in trial court); Kelley, 52 Wn. App. at 587 (“a search of buildings which are not described in the warrant is not a search made in good faith in reliance on the warrant”); see also State v. Hatchie, 161 Wn.2d 390, 400, 166 P.3d 698 (2007) (misdemeanor arrest warrant may provide “authority of law” to enter a home to effectuate an arrest, but “police action that

deviates from the narrow bounds of this authority has no authority of law”).

These facts provide no reason to depart from this settled law. The time each text was generated was clearly marked at the top of each SMS summary. Fields also called VanderWeyst to alert him Verizon’s initial response exceeded the warrant’s scope. Although VanderWeyst claimed he did not notice the times at the top of each text file, nor did he timely receive Fields’ warning (7RP 201, 209), he did admit he anxiously looked forward to reviewing the text messages. 7RP 196; Ex. 133 (page 251). He had originally requested the unauthorized messages, but Judge McKeeman rejected the broader request. Ex. 134; 7RP 192-93, 212, 228. He was unable to answer counsel’s questions as to when he received Fields’ email and voice mail. 7RP 209-10. This is hardly a confidence-inspiring foundation for the state’s belated request for this Court to blindly accept VanderWeyst’s unproved good faith.<sup>15</sup>

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<sup>15</sup> The state did not ask the trial court to find VanderWeyst acted in good faith. Nor would his “anxious” review of the messages justify suspending the Constitution. Courts instead routinely recognize the warrant requirement is necessary to protect us from “the officer engaged in the often competitive enterprise of ferreting out crime.” State v. Hatchie, 161 Wn.2d at 399-400 (quoting Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 92 L.Ed. 436 (1948)).

The state appears to argue officers who claim to make a mistake in searching the wrong file – or the wrong house or the wrong apartment or the wrong car, or arrest the wrong person – enter a constitution-free zone whenever the officer can say the mistake stems from information provided by a private citizen. Washington courts have rejected similar claims, however. Washington requires police to have actual “authority of law,” not “apparent” authority or “mistaken” authority. Morse, 156 Wn.2d at 12 (“Because our constitution focuses on the rights of the individual, rather than on the reasonableness of the government action, the apparent authority doctrine . . . applied in the Fourth Amendment context is not appropriate to any analysis under article I, section 7”); Hatchie, 161 Wn.2d at 400 (police who act beyond the scope of a warrant lack “authority of law”); State v. Smith, 102 Wn.2d 449, 453-54, 688 P.2d 146 (1984) (an arrest warrant does not give police authority to arrest a person not within the warrant’s scope; police must first take reasonable efforts to determine the suspect is the person named in the warrant). As these cases show, the state’s argument has been rejected. This Court should reject it again.

For these reasons, and those argued in Canady’s brief, the search of the text messages was unconstitutional. Because the state

cannot argue the error is harmless, reversal of Starr's conviction is required.

2. STARR ADOPTS CANADY'S ARGUMENT OPPOSING THE STATE'S INEVITABLE DISCOVERY THEORY.

The trial court's second reason for denying the suppression motion was based on the theory the text messages would have been inevitably discovered. The Supreme Court has since rejected this theory. State v. Winterstein, 167 Wn.2d 620, 634-36, 220 P.3d 1226 (2009). Starr adopts Canady's arguments. Canady BOA at 25-26; RAP 10.1(g).

3. THE SUBPOENA DUCES TECUM DOES NOT PROVIDE AUTHORITY OF LAW OR AN INDEPENDENT SOURCE FOR THE TEXT MESSAGE EVIDENCE.

Canady's brief establishes that no lawful special inquiry proceeding was held, nor was probable cause established to justify the broader scope of records demanded by the SDT. The SDT therefore cannot be an independent source – or “authority of law” – untainted by the unconstitutional search of the text messages. Canady BOA at 26-38. Starr adopts and incorporates the argument. RAP 10.1(g). The state has declined to defend the trial court's ruling on these grounds. Canady BOR at 12.

4. STARR ADOPTS CANADY'S DUE PROCESS ARGUMENT.

Canady's brief shows why admission of the unreliable text messages violates due process. Canady BOA at 38-45. Starr adopts and incorporates the argument. RAP 10.1(g).

5. STARR ADOPTS CANADY'S REMEDY ARGUMENTS.

Canady's brief shows why suppression and reversal are required. Canady BOA at 38, 45. Starr adopts and incorporates these arguments. RAP 10.1(g). Evidence that exceeds the scope of a warrant must be excluded. Kelley, 52 Wn. App. at 588; State v. Gebaroff, 87 Wn. App. at 17.

D. CONCLUSION

The text message evidence was admitted in violation of Starr's state and federal constitutional rights. His conviction should be reversed.

DATED this 30<sup>th</sup> day of June, 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

  
ERIC BROMAN, WSBA 18487  
OID No. 91051  
Attorneys for Appellant

APPENDIX A

No. 63617-1-I

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

THE STATE OF WASHINGTON

Plaintiff,

vs.

STARR, Brent T.

Defendant.

08-1-01865-7

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW RE: MOTION  
TO SUPPRESS TEXT MESSAGES  
PURSUANT TO CrR 3.6

A hearing pursuant to CrR 3.6 was conducted before the honorable Ronald L. Castleberry on May 6, 2009. The State was represented by Deputy Prosecutor, Ed Stemler, who presented the testimony of Jody Citizen from Verizon and Detective VanderWeyst. The defendant was represented by his attorney, Anna Goykhman. The defendant chose not to testify.

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**I. FINDINGS OF FACT**

1. On Thursday July 3, 2008 Detective VanderWeyst approached Snohomish County Superior Court Judge Larry McKeeman with a search warrant for, among other things, records of text messages for phone number (425)299-2110 for Defendant Starr and (425)239-2999 for Defendant Canady from 6/21/08 to 6/29/08.

2. On the search warrant, Judge McKeeman interlineated the time period for records sought by the warrant would be between 6:00am and noon on 6/26/08.

3. Simultaneously with signing the search warrant, Judge McKeeman also signed a subpoena duces tecum pursuant to a Special Inquiry Court that had been previously initiated. The subpoena duces tecum required Verizon to provide, among other things, records of text messages of (425)299-2110 for Defendant Starr and (425)239-2999 for Defendant Canady from 6/21/08 to 6/29/08. The subpoena duces tecum set a hearing for July 18, 2008 for Verizon to bring the records to court. As is standard protocol, a letter was sent along with the subpoena indicating that if Verizon provided the records prior to the hearing then they need not appear on July 18.

4. Armed with both the search warrant and subpoena duces tecum signed by Judge McKeeman, detective VanderWeyst called Verizon to let them know that he would be faxing the search warrant and that the search warrant time period was only between 6am and noon on 6/26/08. Detective VanderWeyst also typed on the fax cover sheet that he faxed along with the warrant that the search warrant was only for the period from 6am to noon on 6/26/08. Neither Detective VanderWeyst nor any other law enforcement

1 officer did anything to direct Verizon in any way to send records outside the scope of the  
2 warrant.

3 5. Detective VanderWeyst faxed a copy of the subpoena duces tecum to Verizon  
4 later the same day.

5  
6 6. Verizon does provide text message records, including content, in response to a  
7 subpoena duces tecum signed by a judge. Verizon would have, and did, provide the text  
8 message and phone records in response to the subpoena duces tecum issued by Judge  
9 McKeeman.  
10

11 7. Detective VanderWeyst went on to other business until he was alerted by his  
12 blackberry that he had received an email from Verizon.  
13

14 8. Detective VanderWeyst logged onto another detective's county computer to  
15 check his email from Verizon. Detective VanderWeyst was familiar with the format of  
16 this type of text message record because he had dealt with this type of record before. The  
17 format of these records is to set forth columns of data with the substance of the text  
18 message at the bottom of each record. The date and time of each text message is the very  
19 first line of data in each record. Detective VanderWeyst did not look at the date and time  
20 of the message because he was naturally curious about the substance of the messages.  
21

22 9. Detective VanderWeyst saw the records starting with "its done" followed by  
23 what he immediately recognized as extremely critical evidence of defendants  
24 involvement in the murder of David Grim.  
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1           10. After reviewing a series of text message content that contained information  
2 obviously crucial to the prosecution's case, Detective VanderWeyst looked at the date and  
3 time of the messages and learned that the time on the incriminating messages was before  
4 6:00am on June 26 and outside the time authorized by the search warrant. Messages  
5 starting at 6:00am on June 26 were not indicative of the defendants being involved in the  
6 homicide except that they showed that defendant Canady made a false statement to the  
7 police when she told the police she did not communicate with anyone regarding finding  
8 the body of the deceased.  
9

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11           11. At that point, Detective VanderWeyst quit reading further and returned to his  
12 office. Once at his office he listened to a voice mail message from a custodian of the  
13 record for Verizon stating that Verizon had apparently inadvertently sent information  
14 exceeding the scope of the search warrant.  
15

16           12. Detective VanderWeyst then prepared another search warrant for among other  
17 things, text messages from both phones for the broader period of time, 6/20/08 through  
18 7/3/08. Detective VanderWeyst included the factual circumstances described above in  
19 the second search warrant application. Detective VanderWeyst then presented that  
20 second search warrant and affidavit to Judge McKeeman. Judge McKeeman authorized  
21 the second search warrant on the same day as the original search warrant, July 3, 2008.  
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24           13. Subsequently, pursuant to the subpoena duces tecum and the second search  
25 warrant, Verizon provided two CD's with the requested records of text messages to  
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1 detective VanderWeyst. It is a printout of those records on CD that are Exhibits 1 and 2  
2 in this hearing (same as trial Exhibits 1 & 2).

### 3 II. CONCLUSIONS OF LAW

4 1. The defense motion to suppress is denied on two separate independent grounds.  
5 *either of which by itself is a basis for denial. PC*  
6 2. When Verizon provided records outside of the time frame on the search  
7 warrant, they acted as a private actor and not at police direction. The records were  
8 obtained not as a result of a search by a government agency, but rather an independent  
9 source, Verizon, turned information over to police. This situation is not similar to police  
10 searching a private home. Verizon, a private corporation, provided the information to  
11 police. There was no wrongdoing on the part of police. Verizon was a private actor and  
12 therefore the records they provided are not subject to suppression under the exclusionary  
13 rule. Verizon was an independent source and that concept has application both under the  
14 private search concept and the inevitable discovery concepts. *State v. Richman*, 85  
15 Wn.App. 568, 575 (1997). Since Verizon was a private actor, there is no basis for the  
16 court to suppress the evidence under the exclusionary rule.  
17  
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20 3. As a separate independent basis to deny suppression, the records provided by  
21 Verizon are not subject to suppression because they would have inevitably been  
22 discovered by law enforcement. Inevitable discovery applies in this case because Judge  
23 McKeeman had signed a subpoena duces tecum for the text message records in question.  
24 The affidavit for search warrant clearly establishes sufficient grounds upon which a  
25 special inquiry procedure was properly instituted. The records would have been  
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1 provided, and in fact were provided to police, in response to the subpoena duces tecum.  
2 This court specifically concludes that the State has proven by a preponderance of the  
3 evidence that the police did not act unreasonably, that proper and predictable actions of  
4 the police would have resulted in the records being obtained by police, and that the  
5 procedure used would result in the records in question being provided to law  
6 enforcement. Due to the inevitable discovery of the records by law enforcement there is  
7 no basis to suppress the records.  
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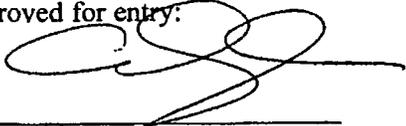
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13 Ronald L. Castleberry, JUDGE

14 Presented by:

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17 Edward Stemler #19175  
18 Deputy Prosecuting Attorney

19 Approved for entry:

20   
21 Anna Goykhman  
22 Attorney for Defendant Starr  
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# APPENDIX B

No. 63617-1-I

```

Log Written          07/03/2008 06:20:46 Number of attempts UK 0
Message arrival     07/03/2008 06:20:41 Message TeleService UK 4098
Final Disposition   07/03/2008 06:20:46 Last Cause Code UK 256
Source Protocol UK  MO Delivery Init. Method UK Default
Input Port UK      0 Operation Type UK new_msg_arrival
Output Protocol UK SS7 Message Final Status Delivered
Output Port UK     0 Call Back number 4252392999
Message Source UK  MO_AlphaPg Originator COS UK 1
Message ID UK      5165308948 Terminating COS UK 1
Input Label UK     AUX2 Message Dest. Address UK 204.13.2
Billing ID UK      0 HLR Address UK full_digits
Billable           true Originator DN 4252392999
Broadcast message UK false Originator MSID 4253488521
User Data Header Indicator UK false Terminating DN 4252992110
Priority UK        0 Message MSID UK 4252992110
Data Coding UK    0 Terminating MSID UK 4252572433
Number Of VM messages (N/A) Length of text message 13
Message Text
[ :morning baby ]
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Log Written          07/03/2008 06:20:55 Number of attempts 0
Message arrival     07/03/2008 06:20:46 Message TeleService 4098
Final Disposition   07/03/2008 06:20:55 Last Cause Code 256
Source Protocol     MO Delivery Init. Method Default
Input Port          0 Operation Type new_msg_arrival
Output Protocol     SS7 Message Final Status Delivered
Output Port         0 Call Back number (N/A)
Message Source      AlphaPg Originator COS 1
Message ID          61493087254 Terminating COS 1
Input Label         UNDEF Message Dest. Address 204.13.2
Billing ID          0 HLR Address full_digits
Billable           false Originator DN 4252992110
Broadcast message   false Originator MSID (N/A)
User Data Header Indicator false Terminating DN 4252392999
Priority            0 Message MSID 4252392999
Data Coding         0 Terminating MSID 4253488521
Number Of VM messages (N/A) Length of text message 31
Message Text
[ Message to 4252992110 Delivered ]
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Log Written          07/03/2008 06:39:12 Number of attempts 0
Message arrival     07/03/2008 06:39:04 Message TeleService 4098
Final Disposition   07/03/2008 06:39:12 Last Cause Code 256
Source Protocol     MO Delivery Init. Method Default
Input Port          0 Operation Type new_msg_arrival
Output Protocol     SS7 Message Final Status Delivered
Output Port         0 Call Back number 4252392999
Message Source      MO_AlphaPg Originator COS 1
Message ID          5283245427 Terminating COS 1
Input Label         AUX2 Message Dest. Address 204.13.2
Billing ID          0 HLR Address full_digits
Billable           true Originator DN 4252392999
Broadcast message   false Originator MSID 4253488521
User Data Header Indicator false Terminating DN 4252992110
Priority            0 Message MSID 4252992110
Data Coding         0 Terminating MSID 4252572433
Number Of VM messages (N/A) Length of text message 55
Message Text
[ guess i shower when i get home. gotta work n the rain. ]
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Log Written          07/03/2008 06:40:08 Number of attempts 1
Message arrival     07/03/2008 06:39:12 Message TeleService 4098
Final Disposition   07/03/2008 06:40:08 Last Cause Code 256
Source Protocol     MO Delivery Init. Method IS41Dpp
Input Port          0 Operation Type tbr_arrival
Output Protocol     SS7 Message Final Status Delivered
Output Port         0 Call Back number (N/A)
Message Source      AlphaPg Originator COS 1
Message ID          62152267615 Terminating COS 1
Input Label         UNDEF Message Dest. Address 204.13.2
Billing ID          0 HLR Address full_digits
Billable           false Originator DN 4252992110
Broadcast message   false Originator MSID (N/A)
User Data Header Indicator false Terminating DN 4252392999
Priority            0 Message MSID 4252392999
Data Coding         0 Terminating MSID 4253488521

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