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COURT OF APPEALS
DIVISION II

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NO. 37576-1-II

STATE OF WASHINGTON

BY C. [Signature]

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

STATE OF WASHINGTON,

Respondent,

v.

DINO J. CONSTANCE,

Appellant.

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

The Honorable Robert A. Lewis, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE TRIAL COURT'S INTERCEPTION ORDER VIOLATED THE PRIVACY ACT BECAUSE THE APPLICATION FOR THE ORDER FAILED TO PROVIDE VALID REASONS WHY RECORDINGS WERE NECESSARY.

In the Brief of Appellant, appellant Dino J. Constance asserted the trial court violated the privacy act, RCW 9.73.130(3)(f), by authorizing the interception and recording of telephone conversations between Constance and police informant Ricci Castellanos. Constance argued police did not make the requisite showing that other normal investigative procedures reasonably appeared unlikely to succeed if tried or to be too dangerous to employ. Brief of Appellant (BOA) at 17-26.

The state responds by comparing the facts here with those set forth in State v. Johnson,¹ where this Court affirmed a trial court interception order challenged for the same reasons. Brief of Respondent (BOR) at 9-13. Johnson offers no refuge to the state.

Sophia S. Johnson appealed her first degree felony murder conviction for the death of her mother in-law, Marlyne Johnson. Johnson, 125 Wn. App. at 446. During the investigation, a detective spoke with both Johnson and a participant in the murder who agreed to serve as a government informant against Johnson. Johnson, 125 Wn. App. at 448-

¹ 125 Wn. App. 443, 105 P.3d 85 (2005).

49. The detective applied for authorization to electronically intercept and record conversations between Johnson and the informant. Johnson, 125 Wn. App. at 448-49. A detective represented, among other things, that normal investigative procedures were not attempted because (1) Johnson misrepresented her involvement in the murder; (2) Johnson would likely engage the informant in a conspiracy to cover up the crime; (3) recording conversations between Johnson and the informant regarding Johnson's recent activities would be "far superior to the circumstantial physical evidence and would tend strongly to corroborate existing information;" and (4) electronically recorded conversations "will present the clearest and most accurate record of what is discussed between" Johnson and the informant "as those discussions bear upon Johnson's own criminal liability" Johnson, 125 Wn. App. at 449.

The trial court entered an order authorizing police to record conversations. Johnson, 125 Wn. App. at 449. In affirming, this Court relied only on reasons (1) and (2). First, this Court held the detective showed that "attempting to elicit information from Johnson through police interviews would be futile" because Johnson informed police "she was expecting to meet Mrs. Johnson for lunch on January 10, 2002, but made no mention of the fact that she was present at Mrs. Johnson's home at the time of the murder." Johnson, 125 Wn. App. at 456.

Second, the detective established normal techniques to find and seize murder-related items would likely fail because Johnson and the informant concealed and destroyed all evidence linking Johnson to the crime. The officer's claim was supported by facts: the informant told him that Johnson entered and returned from the deceased's home with full garbage bags, which she asked the informant to throw away, that he threw "something" from the window of their getaway vehicle, and that he and Johnson concealed their bloody clothing. Johnson, 125 Wn. App. at 456.

It is worthy to note this Court did not rely on reasons (3) and (4) after observing, "Mere boilerplate language is antithetical" to the Privacy Act's requirement that police articulate particular reasons why normal investigative techniques would not likely bear fruit. Johnson, 125 Wn. App. at 456 (citing State v. Manning, 81 Wn. App. 714, 720, 915 P.2d 1162, review denied, 130 Wn.2d 1010 (1996)).

"Boilerplate" is "[r]eady-made or all-purpose language that will fit in a variety of documents." Black's Law Dictionary (7th Ed. 1999) 167. Reasons (3) and (4) are indisputably boilerplate. Evidence of recorded conversations regarding a prime suspect's recent activities is always "far superior" to circumstantial physical evidence. As well, recorded conversations will always "present the clearest and most accurate record" of discussions between the suspect and an informant.

Detective Acee's application in Constance's case includes the same types of objectionable boilerplate. First, Acee noted "[a] recording of statements between Castellanos and Constance will be the best way to verify Castellanos['s] statements," especially in light of Castellanos' impeachable character due to prior felony convictions. CP 67-68.

The state attempts to save this "all-purpose" language by noting Castellanos' "substantial criminal history." Brief of Respondent at 11. This Court should summarily reject this ploy. That Castellanos had a history of impeachable convictions does not transform boilerplate into a useful rationale for recording. Unfortunately for the state, "[T]he use of unsavory informants is quite often the nature of the beast in police investigations." United States v. King, 351 F.3d 859, 868 (8th Cir. 2003), cert. denied, 542 U.S. 905 (2004). "It is unrealistic to expect law enforcement officers to ferret out criminals without the help of unsavory characters." United States v. Simpson, 813 F.2d 1462, 1470 (9th Cir. 1987). A customary shortcoming of what results from normal police practice is not a particular justification for electronic interception.

Acee also used boilerplate when he asserted interception of the conversations "would be critical to a later evaluation of who made which statements and the knowledge and intentional participation of the

suspect[.]” CP 67-68. See Manning, 81 Wn. App. at 720 (that recording would provide best evidence of criminal intent is boilerplate).

The state would also have this Court affirm because Acee expressed concern that "time was of the essence" since Constance was out of jail and possibly soliciting others. CP 67; BOR at 11. This is nonsense. Acee stated in the application there was "probable cause to believe" Constance had already committed solicitation to murder. CP 59. Had the detective truly been so interested in ridding society of Constance, he could have arrested him based on the former roommates' "sworn testimony under oath" that Constance "had offered them \$10,000 dollars [sic] to kill [Constance's] ex-wife" CP 60.

Acee did not arrest Constance when he could have because it was not part of his true plan. He instead wanted to enhance the prosecutor's opportunity to convict Constance of a third count of solicitation: "[A]ny solicitation of Castellanos is a separate crime." CP 68. Given Castellanos's criminal history, "independent verification of his statements is necessary to help prove he was solicited." CP 68. Again, corroborating the testimony of any state's witness makes the state's case better, but it is not a valid reason for intercepting and recording a suspect's conversations.

The state relies as well on Acee's assertion that Constance would not likely "admit his intent to hire a hit-man" if he were arrested. CP 67,

BOR at 10. This is a reasonable belief. It is also boilerplate; by changing the name of the suspect and the incriminating conduct at issue, a police officer could plug this sentence into any application.

The state predictably relies on Acee's continued reliance on Castellanos's "background and potential issues with his criminal history" for his otherwise unsupported assertion that recording would serve to rebut anticipated allegations of entrapment. CP 68, BOR at 12. This is boilerplate. Manning, 81 Wn. App. at 720. The convenient existence of Castellanos's checkered past does not change this fact.

The state, echoing Acee, notes "[h]e only way to monitor the safety of the officer [hit-man] was through a transmitted conversation." CP 68; BOR at 12. This statement is true in any case, from solicitation to murder to delivery of cocaine. It is therefore the very definition of "boilerplate."

This examination of the application highlights the fundamental differences between Acee's reasons and those set forth in Johnson. This Court relied on two reasons to affirm the trial court's authorization to record Johnson's conversations with her co-participant. First, Johnson intentionally misrepresented her involvement in the murder. Second, Johnson destroyed evidence. These are facts derived from investigation. Neither reason is boilerplate.

None of the reasons upon which the state relies is comparable. Contrary to the state's claim, Acee's recitation is not similar to the recitation discussed in Johnson. BOR at 13. This Court should reverse the trial court's interception authorization.

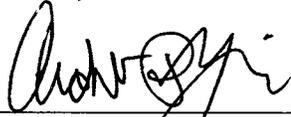
C. CONCLUSION

The statutory requirements of the Privacy Act have not been met. This court should reverse the trial court's conclusion to the contrary and remand for proceedings consistent with a reversal.

DATED this 4 day of June, 2009.

Respectfully submitted,

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DIVISION II

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STATE OF WASHINGTON)
)
 Respondent,)
)
 vs.) COA NO. 37576-1-II
)
 DINO CONSTANCE,)
)
 Appellant.)

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 4TH DAY OF JUNE 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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x Patrick Mayovsky

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