

63626-0

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No. 63626-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

DEBRA CANADY,

Appellant.

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COURT OF APPEALS DIVISION ONE
SNOHOMISH COUNTY

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

The Honorable Ronald Castleberry

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. In violation of the Fourth Amendment and article I, section 7 of the Washington Constitution, the trial court erred in admitting evidence of text messages.

2. 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.

3. 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.

4. 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.

5. 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.

6. 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.

B. ISSUES RELATING 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 holding 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 a search warrant?

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 first occurred when 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 Debra Canady had a privacy interest, but nonetheless signed a subpoena duces tecum for these same materials, without providing notice to Canady. Verizon, the entity in

possession of the materials, had no incentive or standing to object on Canady'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 Canady due process?

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

C. STATEMENT OF THE CASE

At approximately six a.m. on June 26, 2008, Debra Canady called 9-1-1 to report that she had come home and found her former boyfriend, David Grim, nonresponsive and possibly dead.

7RP 247-48.¹ Canady explained she had spent the night with her current boyfriend, Brent Starr, in his trailer.² 7RP 267. When she came home, the front door was unlocked and the house apparently undisturbed. 7RP 270. Police officers who responded to the scene found Grim face-down on the bed with his head wrapped in a comforter. 7RP 249; 9RP 431. He was obviously dead. 7RP 249-50. It was determined in an autopsy the next day that Grim had been beaten to death with a blunt object, most likely a hammer. 12RP 834-57, 870-73.

Both Canady and Starr cooperated with the police investigation. On the morning that Grim's body was discovered, Canady agreed to go to the Sultan police station to give a recorded statement. CP 116-17; 8RP 286-87. Detectives contacted Starr at

¹ The verbatim report of proceedings is cited herein as follows:

October 16, 2008	-	1RP
January 23, 2009	-	2RP
February 20, 2009	-	3RP
May 1, 2009	-	4RP
May 4, 2009	-	5RP
May 5, 2009	-	6RP
May 6, 2009	-	7RP
May 7, 2009	-	8RP
May 8, 2009	-	9RP
May 11, 2009	-	9RP
May 12, 2009	-	10RP
May 13, 2009	-	11RP
May 14, 2009	-	12RP
June 2, 2009	-	13RP

² Canady and Grim lived together at the time of his murder as he was reluctant to move out. 8RP 313, 318; 9RP 417.

his work that same day; he also agreed to give a recorded statement. CP 117-18. Lead detective Patrick VanderWeyst was suspicious, however, of a “discrepancy” between Canady’s and Starr’s accounts of what had happened. Canady stated she had not informed Starr of Grim’s death, but Starr told police that the morning that Grim’s body was discovered Canady sent him a text message telling him Grim was dead. CP 117-20. Both Canady and Starr were re-interviewed, and both maintained their original accounts of what had occurred. Id.

VanderWeyst decided to apply for a search warrant to clarify this disparity. In the affidavit for search warrant, he stated:

I request court authority to obtain cell phone records for Brent and Debra’s phones to include full subscriber information including name, address, date of birth, social security number, employer and any alternate phone numbers. The records should also include call detail to and from this phone number to include number called, duration, cell site (tower) information including address and direction of connection. Also to include the detail and content of any text messages to and from this phone, including the phone number and the email address of the sender/recipient. The time period for the phone records requested would be from Friday, February June 20th, through Sunday, June 29th, 2008. These records will corroborate either Debra’s version that she did not send text messages or Brent’s version that she did.

CP 120.

At the same time that VanderWeyst prepared the search warrant affidavit, the prosecutor drafted a subpoena duces tecum for a special inquiry proceeding, seeking review of records from the same period. CP 123-24; 7RP 191-92. Vanderweyst also directed another detective to send a preservation letter to Verizon to preserve records from Canady and Starr's mobile phones. 7RP 193. The preservation letter was sent to Verizon's law enforcement department on June 28, 2008. 7RP 165.

Both the search warrant and subpoena duces tecum were presented to Snohomish County Superior Court Judge Larry McKeeman on July 3, 2008, for signature. 7RP 191. Judge McKeeman, however, refused to find probable cause to issue a search warrant for the broad period VanderWeyst had requested. Instead, where VanderWeyst had typed, "The time period for the phone records requested would be from Friday, June 20th, 2008, 12:01 AM to Sunday, June 29th, 2008 11:59 PM", Judge McKeeman crossed out these dates and times and wrote, "Thursday June 26th 6:00 AM, through Thursday June 26th 12:00 P.M, 2008." CP 114; 7RP 191. Judge McKeeman did sign the subpoena duces tecum requiring records from the broader period

for purposes of the special inquiry proceeding. CP 123-24; 7RP 192.

VanderWeyst faxed the search warrant to Grant Fields, a member of Verizon's law enforcement team. 7RP 166, 173, 192. He also telephoned Fields and explained that the search warrant was more restrictive than the preservation letter. 7RP 193-94. After this telephone call, VanderWeyst went to the office of another detective to do some other work on the case. 7RP 194. While he was there, VanderWeyst received an alert on his Blackberry that he had received an email from Fields. Id. He signed onto his email account and found an email with a password-protected file containing text messages attached, and instructions on how to open the file. 7RP 194-95. VanderWeyst opened the file and immediately began to scroll through the text message content. 7RP 195. The messages were potentially incriminating, and caused VanderWeyst to believe that Canady and Starr had murdered Grim. 7RP 196-98.

After VanderWeyst had read through the messages, he realized that Fields' email contained messages in excess of what the warrant had authorized. 7RP 195-96. Specifically, VanderWeyst realized the email contained messages exchanged

by Canady and Starr commencing at 3:46 a.m. on June 26, 2008, and continuing through noon. 7RP 196. All of the potentially incriminating messages had been sent before 6 a.m. 7RP 196-97. When VanderWeyst returned to his own office, there was a voicemail message from Fields, stating Fields had inadvertently sent messages outside of the time frame specified in the warrant. 7RP 199.

Based on the information that VanderWeyst learned that day, both Canady and Starr were arrested. 7RP 199. VanderWeyst also relied on the mistakenly-sent text messages to obtain other search warrants for additional text messages and physical evidence. 7RP 198. VanderWeyst received CDs containing additional potentially incriminatory text messages that allegedly were sent to him in response to the subpoena duces tecum “and the search warrant.” 7RP 200. Canady and Starr were subsequently charged by amended information with first-degree murder with a deadly weapon enhancement. CP 147-48.

Prior to trial, Canady and Starr moved to suppress the text messages as the product of an unconstitutional search.³ The trial

³ Canady and Starr also objected to the admissibility of the evidence on the basis that it was unreliable. Further facts and argument regarding this claim are contained in argument section 5, infra.

court denied the motion. 7RP 226-32. In its oral ruling, the court characterized the evidence as having come from an “independent source, to wit: the Verizon phone company, who turned the information over to the police department.” 7RP 230. The court explained, “[I]ndependent sources can be used to uphold the admission of evidence independently obtained. This applies to both the private citizen concept and the inevitable [discovery] concept.” Id. In written findings of fact and conclusions of law, the court clarified:

When Verizon provided records outside of the time frame on the search warrant, they acted as a private actor and not at police direction. The records were obtained not as a result of a search by a government agency, but rather an independent source, Verizon, turned information over to police. This situation is not similar to police searching a private home. Verizon, a private corporation, provided the information to police. There was no wrongdoing on the part of police. Verizon was a private actor and therefore the records they provided are not subject to suppression under the exclusionary rule. Verizon was an independent source and that concept has application both under the private search concept and the inevitable discovery concepts . . . Since Verizon was a private actor, there is no basis for the court to suppress the evidence under the exclusionary rule.

CP 44.

The court further concluded:

As a separate independent basis to deny suppression, the records provided by Verizon are not subject to suppression because they would have been inevitably discovered by law

enforcement. Inevitable discovery applies in this case because Judge McKeeman had signed a subpoena duces tecum for the text message records in question. The affidavit for search warrant clearly establishes sufficient grounds upon which a special inquiry procedure was properly instituted. The records would have been provided, and in fact were provided to police, in response to the subpoena duces tecum. This court specifically concludes that the State has proven by a preponderance of the evidence that the police did not act unreasonably, that proper and predictable actions of the police would have resulted in the records being obtained by police, and that the procedure used would result in the records in question being provided to law enforcement. Due to the inevitable discovery of the records by law enforcement there is no basis to suppress the records.

CP 44-45.⁴

As a consequence of the court's ruling, the text messages and other after-acquired evidence were admitted at Canady and Starr's trial. Canady and Starr were convicted as charged. CP 57-58. Canady appeals. CP 5-19.

D. ARGUMENT

1. THE ADMISSION OF TEXT MESSAGES OBTAINED IN VIOLATION OF ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION AND THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES REVERSAL OF CANADY'S CONVICTION.

"Although they protect similar interests, 'the protections guaranteed by article I, section 7 of the state constitution are

⁴ The court's findings of fact and conclusions of law pursuant to CrR 3.6 are attached as an Appendix.

qualitatively different from those provided by the Fourth Amendment to the United States Constitution.” State v. Eisfeldt, 163 Wn.2d 628, 634, 185 P.3d 580 (2008) (quoting State v. McKinney, 148 Wn.2d 20, 26, 60 P.3d 46 (2002)). Unlike the Fourth Amendment, article I, section 7 protects citizens against all warrantless searches, regardless of whether they are reasonable. Id. at 634-35. The few exceptions to article I, section 7’s blanket prohibition on warrantless searches are “narrowly drawn, and [t]he State bears a heavy burden in showing that the search falls within one of the exceptions.” Id. (quoting State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002)).

The trial court upheld the search of the text messages under two theories: the “private search” doctrine, and the “inevitable discovery” doctrine. Both of these exceptions to the warrant requirement of the Fourth Amendment violate article I, section 7 of the Washington Constitution. Eisfeldt, 163 Wn.2d at 638; State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226, 1231-33 (2009).⁵ Moreover, this case does not involve a true “private actor” conducting a “private search,” as Verizon was acting under

⁵ While the “private search” doctrine is indeed a recognized exception to the warrant requirement of the Fourth Amendment, the inevitable discovery doctrine is more properly categorized as an exception to the exclusionary rule. Winterstein, 220 P.3d at 1231.

government compulsion when it mistakenly delivered records that exceeded the lawful scope of the warrant, and Verizon was thus converted to an agent or instrumentality of the State. Last, the “private search” doctrine cannot apply because the unconstitutional search occurred when VanderWeyst opened and read the file containing the text messages in question, not when the unread messages were delivered by Verizon. The evidence obtained as a result of the search, and all fruit of the poisonous tree, should have been suppressed.

a. The “private search” doctrine violates article I, section 7 of the Washington Constitution. In Eisfeldt, the Supreme Court repudiated the “private search” doctrine as an exception to the warrant requirement of article I, section 7. 163 Wn.2d at 636-38. Under the Fourth Amendment, the doctrine permits the government to conduct a warrantless search where a private actor has previously conducted a search, provided the scope of the government’s search does not exceed the scope of the search by the private actor. United States v. Jacobsen, 466 U.S. 109, 113-14, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984) (the protections of the Fourth Amendment are “wholly inapplicable ‘to a search or seizure, even an unreasonable one, effected by a private individual not acting as

an agent of the Government or with the participation or knowledge of any government official.”) (quoting Walter v. United States, 447 U.S. 649, 662, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980) (Blackmun, J., dissenting)). “Underlying this doctrine is the rationale that an individual’s reasonable expectation of privacy is destroyed when the private actor conducts his search.” Eisfeldt, 163 Wn.2d at 636 (discussing Jacobsen, 466 U.S. at 119).

But under article I, section 7, neither the reasonableness of the search nor the officer’s good faith are permissible considerations. State v. Morse, 156 Wn.2d 1, 9-10, 123 P.3d 832 (2005). For these reasons, the individual privacy interest is not extinguished by virtue of the fact that the initial search was conducted by a private actor. Eisfeldt, 163 Wn.2d at 638. Because the private search does not work to destroy the article I, section 7 interest, the Court in Eisfeldt rejected the doctrine, finding it inapplicable under the Washington Constitution. Id.

b. Even if an exception to the “private search” doctrine survives after *Eisfeldt*, the narrow exception is inapplicable to the circumstance of a private actor conducting a search under government compulsion. Although Eisfeldt had been decided when the trial court heard Canady’s motion to suppress, the court denied

the motion to suppress on the basis that “Verizon, a private corporation, provided the information to police.” CP 44. The court characterized this event as an “independent source,” in essence suggesting that a narrow iteration of the “private search” rule survived Eisfeldt. CP 44. As an initial premise, this reading of Eisfeldt is wholly incorrect. See Eisfeldt, 163 Wn.2d at 641 (Madsen, J., concurring in result) (criticizing the majority opinion for rejecting the doctrine in all cases). Justice Madsen would have held that citizens do not have a privacy interest if evidence was obtained by a private actor and delivered to police. Id. at 643.

In a footnote, the majority intimated that the premise articulated by Justice Madsen would be correct only insofar as the evidence was obtained by the private actor without government action. Eisfeldt, 163 Wn.2d at 638 n. 9. At most, this comment was dicta and consequently does not supply a foundation for the court’s ruling. “Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed.” DCR, Inc., v. Pierce County, 92 Wn. App. 660, 683, 964 P.2d 380 (1998). In its holding the majority broadly pronounced, “[w]e . . . reject the private search doctrine and

adopt a bright line rule holding it inapplicable under article I, section 7 of the Washington constitution.” Eisfeldt, 163 Wn.2d at 638.

Even if this footnote did identify a narrow exception to the court’s holding, the trial court was wrong to conclude that the exception applied to the search by Verizon in this case. As stated in Justice Madsen’s concurrence:

When a private party acting independently of the government conducts a search and delivers the material to the police, neither the Fourth Amendment, nor Article I, Section 7 require the police to obtain a search warrant before examining the material if the government search does not exceed the scope of that previously conducted by the private party.

Eisfeldt, 163 Wn.2d at 644 (Madsen, J., concurring) (quoting Charles W. Johnson, Survey of Washington Search and Seizure Law, 2005 Update, 28 Seattle U. L. Rev. 467, 711 (2005)).

Justice Madsen analogized the purported exception to the “silver platter” doctrine, in which Washington police may utilize evidence obtained in violation of Washington’s warrant requirement where the evidence was obtained by officers from a foreign jurisdiction. In both these instances, however, the crucial factor is that the evidence was delivered to Washington police without local law enforcement taking action to procure it. See Lustig v. United States, 338 U.S. 74, 78-79, 69 S.Ct. 1372, 93 L.Ed. 1819 (1949)

(“The crux of [the “silver platter”] doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a “silver platter”);⁶ State v. Dold, 44 Wn. App. 519, 522-23, 722 P.2d 1353 (1986) (explaining scope of “private search” doctrine).

But “[i]f the private person is acting in concert with the authorities or under the authority of the state . . . Fourth Amendment protections do apply.” Dold, 44 Wn. App. at 522; Coolidge v. New Hampshire, 403 U.S. 443, 487, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (a private search may be converted into state action if the private actor is “regarded as an ‘instrument’ or agent of the state”). The dispositive question in determining whether a “private” search is actually a governmental search is “if the government coerces, dominates or directs the actions of a private person” conducting the search or seizure. United States v. Smythe, 84 F.3d 1240, 1242 (10th Cir. 1996). See Com. v. Higgins, 499 A.2d 585, 592 (Pa. 1986) (“Brown’s search was state action within

⁶ But see State v. Fowler, 157 Wn.2d 387, 396 n. 5, 139 P.3d 342 (2006) (noting that this particular application of the doctrine disappeared with the holding in Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949), that the protections of the Fourth Amendment are applicable to the states under the Fourteenth Amendment).

the Fourth Amendment, for in conducting it, he did not act as a private individual but as a surrogate of the police.”).

A two-part inquiry is used to decide if a private individual has acted as a government agent or instrumentality in conducting a search: “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 efforts or to further his own ends.” United States v. Souza, 223 F.3d 1197, 1201 (10th Cir. 2000); United States v. Feffer, 831 F.3d 734, 737 (7th Cir. 1987) (same). “Other useful criteria are whether the private actor acted at the request of the government and whether the government offered the private actor a reward.” United States v. Shahid, 117 F.3d 322, 325 (7th Cir. 1997). The defendant bears the burden of proving that the private party was acting as an instrument or agent of the government. Id.

Both prongs of the two-part inquiry are established here. First, but for the issuance of the warrant, Verizon would never have sent the records. The fact of the warrant conclusively establishes government coercion, domination, or direction. Smythe, 84 F.3d at 1242; United States v. Koenig, 856 F.3d 843, 850 (7th Cir. 1988) (“legal compulsion by statute, regulation or executive order may

provide the control over private entities necessary to treat them as government agents”). It should be self-evident that a warrant issued by a neutral magistrate is also a device that provides the requisite control over the private entity. Moreover, Grant Fields, the Verizon employee who provided the records, also received VanderWeyst’s preservation letter before service of the search warrant. 7RP 193. Because of the preservation letter, the text messages at issue were not purged but instead were stored for government use. 7RP 166.

Second, Verizon plainly intended to assist law enforcement by complying with the warrant. Indeed, Verizon maintains an internal “law enforcement team” that is responsible for responding to legal service of process from law enforcement agencies. 7RP 166. Fields corresponded with Vanderweyst, spoke with him regarding the warrant, and telephoned him after he realized he erroneously had provided records that exceeded the warrant’s scope. 7RP 193-94, 200. In providing the records, Fields essentially colluded with the government in order to assist the police investigation.

Again, even if some narrow “private search” exception survives Eisfeldt, the State must show that the search was

conducted by “a private party acting independently of the government.” Eisfeldt, 163 Wn.2d at 644 (Madsen, J., concurring) (emphasis added). Under no reasonable construction of the facts can it be said that Verizon acted independently in delivering the text messages to law enforcement. Verizon acted at the government’s behest, in response to legal process, and through its specially designated team to ensure compliance with law enforcement requests. No search would have taken place but for the preservation letter and subsequent warrant. Verizon plainly was acting as a government agent or instrumentality in delivering the text messages to VanderWeyst. The “private actor” doctrine cannot salvage the unconstitutional search.

c. That VanderWeyst inadvertently reviewed the records is immaterial as there is no “good faith” exception to the warrant requirement of article I, section 7. The State may claim that even if Verizon was acting as a government agent when it provided the records, there was no constitutional violation because Verizon did so mistakenly and VanderWeyst reviewed the text messages inadvertently. Such a claim should be rejected as a thinly-disguised effort to revive a “good faith” exception to Washington’s exclusionary rule. But, under article I, section 7,

even a law enforcement officer's reasonable belief that he was acting in conformity with a recognized exception to the warrant requirement is not a basis to admit evidence obtained in an unconstitutional search. Morse, 156 Wn.2d at 9-10; see also id. at 10 ("the language of our state constitutional provision . . . shall not be diminished by . . . a selectively applied exclusionary remedy.") (quoting State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)).⁷ Thus, VanderWeyst's good faith is irrelevant. The unconstitutionally-obtained evidence still must be excluded.

d. The "private search" doctrine cannot apply because there is no evidence Verizon read the material before sending it. In the alternative, this Court should hold that the "private search" doctrine was improperly applied because there is no evidence that Verizon "searched" the records before sending them.

In the ordinary example of a "private search," a private entity actually conducts a preliminary search and as a consequence of discovering contraband notifies law enforcement. See e.g. Eisfeldt, 163 Wn.2d at 632 (private citizen discovers suspected marijuana

⁷ A two-judge majority of the Court of Appeals recently attempted to create a "good faith" exception to article I, section 7's exclusionary rule. State v. Riley, ___ Wn. App. ___, ___ P.3d ___, No. 62418 (February 8, 2010). As emphasized by dissenting Judge Dwyer, the Supreme Court neither has recognized such an exception nor is likely to do so. The opinion in Riley is an outlier and should not be followed by this Court.

grow operation); Dold, 44 Wn. App. at 524 (private citizen's search of misaddressed letter uncovers evidence of narcotics activity); State v. Ludvik, 40 Wn. App. 257, 259, 698 P.2d 1064 (1985) (private citizen alerts police to narcotics trafficking). Here, however, Verizon employees did not read the text messages in question, nor believe that they had discovered evidence of a crime and accordingly turn them over to law enforcement. To the contrary: the evidence strongly suggests text messages were not read by any member of the Verizon law enforcement team before they were delivered to law enforcement.

Verizon records custodian Jody Citizen testified that a central computer, or "switch", acts as a repository for mobile phone subscriber information. 7RP 158. In every instance where Verizon receives legal process, no human agency is involved in "searching" records. Instead, a SMS⁸ tool pulls the requested information from the network according to specified criteria and downloads it directly into a PDF⁹ file. Id.

In the instant case, Grant Fields followed this procedure and emailed VanderWeyst a password-protected file of text messages in PDF format. 7RP 195. It was not until after Fields sent all of the

⁸ "Short message service."

⁹ "Portable document format."

text messages exchanged by Canady and Starr on June 26, 2008, that Fields realized his error. 7RP 200. The situation is analogous to a private citizen delivering a locked container belonging to another to law enforcement; in such a case, the constitutional violation occurs when law enforcement officers search the container's contents without a warrant. See Walter v. United States, 447 U.S. 649, 654-55, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980) (plurality opinion) (search of film containers delivered to FBI agents occurred when agents viewed the films inside without a warrant; closed canisters were held to be analogous to locked containers).

Individuals have a protected privacy interest in the contents of their cell phones, including text messages. See e.g., Quon v. Arch Wireless Operating Co., Inc., 529 F.3d 892, 908 (9th Cir. 2008) (expectation of privacy in text messages objectively reasonable); United States v. Finley, 477 F.3d 250, 259 (7th Cir. 2007) (same); see also, In re Maxfield, 133 Wn.2d 333, 340-41, 945 P.2d 196 (1997) (privacy interest in electric consumption records); State v. Gunwall, 106 Wn.2d 54, 67, 720 P.2d 808 (1986) (protected privacy interest in long-distance phone records). Because no search occurred until VanderWeyst viewed the text

messages, this Court should alternatively conclude that the trial court erred in finding the search justified under the “private search” doctrine. The after-acquired evidence must be suppressed.

2. THE INEVITABLE DISCOVERY DOCTRINE VIOLATES ARTICLE I, SECTION 7’S EXCLUSIONARY RULE AND SO CANNOT SERVE AS AN ALTERNATIVE BASIS TO UPHOLD THE SEARCH.

The trial court ruled that because the records would have inevitably been discovered by law enforcement, this was a “separate independent basis to deny suppression.” CP 44. The court found,

the State [proved] by a preponderance of the evidence that the police did not act unreasonably, that proper and predictable actions of the police would have resulted in the records being obtained by police, and that the procedure used would result in the records in question being provided to law enforcement.

Id. But in Winterstein, the Supreme Court held the “inevitable discovery” doctrine is incompatible with article I, section 7’s “nearly categorical” exclusionary remedy. Winterstein, 220 P.3d at 1231. In so holding, the Court specifically criticized the doctrine’s “necessarily speculative” character and its consideration of illegally obtained evidence:

[A]dmitting evidence under the inevitable discovery doctrine would leave ‘no incentive for the State to comply with article I, section 7’s requirement that the arrest precede the search.’

Id. at 1231-32 (quoting State v. O'Neill, 148 Wn.2d 564, 592, 62 P.3d 489 (2003)). The “inevitable discovery” doctrine is not a valid basis to uphold admission of the evidence.

3. NO SPECIAL INQUIRY PROCEEDING WAS HELD, SO THE “INDEPENDENT SOURCE” DOCTRINE CANNOT APPLY.

The trial court characterized Verizon as an “independent source” of the records.¹⁰ 7RP 230; CP 44. The court additionally ruled,

The affidavit for search warrant clearly establishes sufficient grounds upon which a special inquiry procedure was properly instituted. The records would have been provided, and in fact were provided to police, in response to the subpoena duces tecum.

CP 44. It appears the court was using the term, “independent source”, in its colloquial sense, as the court neither considered nor applied the test for the “independent source” exception to the exclusionary rule.

Under the exception, “evidence tainted by unlawful governmental action is not subject to suppression under the exclusionary rule, provided that it ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful

¹⁰ The court’s comment may have been based on VanderWeyst’s assent to a leading question from the prosecutor that he received compact discs “in response to the subpoena duces tecum” as well as the search warrant. 7RP 200.

action.” State v. Gaines, 154 Wn.2d 711, 718, 116 P.3d 993 (2005). No special inquiry proceeding was held or even properly initiated; Judge McKeeman merely issued a subpoena.¹¹ Thus, there was no legitimate “independent source” of the evidence. Furthermore, the submission of evidence to VanderWeyst did not comply with the strict and mandatory provisions of the statutes governing special inquiry proceedings. Finally, the subpoena issued for the evidence violated article I, section 7.

a. The State did not comply with RCW Chapter 10.27 or 10.29 in obtaining the evidence. Special inquiry proceedings are governed by Chapters 10.27 and 10.29 RCW. The special inquiry judge proceeding was created by the Criminal Investigatory Act of 1971. State v. Neslund, 103 Wn.2d 79, 85, 69 P.2d 1153 (1984); Laws of 1971, 1st Ex. Sess., ch. 67. Under the statute, a “special inquiry judge” is designated by a majority of superior court judges to hear evidence of crime and corruption. RCW 10.27.050. As originally conceived, a special inquiry judge only sits as a judicial officer to hear and receive evidence, and performs a role supplementary to a grand jury, “which has the power to actively investigate evidence of crime and corruption.” Neslund, 103 Wn.2d

¹¹ Indeed, the subpoena duces tecum does not even bear a cause number. CP 123.

at 85 (quoting Washington State Judicial Coun., Twenty-Second Biennial Report 17-18 (1969-70)). A special inquiry judge does not have the power to issue indictments or actively participate in an investigation, but may turn over any evidence produced at special inquiry proceedings to any subsequent grand juries. Id.

A grand jury may not be convened except by order of the superior court. Const. art. I, § 26; RCW 10.27.030 (requiring majority of superior court judges to sign order summoning grand jury based on public interest where there is “sufficient evidence of criminal activity or corruption within the county” or when requested by public attorney¹² upon showing of “good cause”).

RCW Chapter 10.29, known as the “State-Wide Special Inquiry Judge Act,” was enacted in order to “strengthen and enhance the ability of the state to detect and eliminate organized criminal activity.” RCW 10.29.010; .020. A state-wide special inquiry judge proceeding under RCW Chapter 10.29 differs from a special inquiry proceeding convened under RCW Chapter 10.27 in

¹² The term “public attorney” means: the prosecuting attorney of the county in which a grand jury or special grand jury is impaneled; the attorney general of the state of Washington when acting pursuant to RCW 10.27.090(9) and, the special prosecutor appointed by the governor, pursuant to RCW 10.27.070(10), and their deputies or special deputies. RCW 10.27.020(2).

that the judge is brought in from another county. Former RCW 10.29.030(2);¹³ 13 Wash. Prac. §5110.

Both a “public attorney” in a special inquiry proceeding and a special inquiry judge or grand jury have the authority to cause evidence to be produced. RCW 10.27.140 (providing for attendance of witnesses and issuance of subpoenas); RCW 10.27.170 (authorizing public attorney to petition special inquiry judge for issuance of order commanding witnesses to appear). A person called to testify before a grand jury, whether as witness or principal, has the right to the assistance of counsel and the privilege against self-incrimination. RCW 10.27.120.

Proceedings under Chapter 10.27 and 10.29 RCW are strictly kept secret. RCW 10.27.080 prohibits the attendance of any person except “except the witness under examination and his attorney, public attorneys, the reporter, an interpreter, [and] a public servant guarding a witness who has been held in custody.”¹⁴ No person has the right to appear in such a proceeding unless called

¹³ Out of budgetary concerns, in 2009, the Legislature repealed RCW 10.29.030 and RCW 10.29.040, pertaining to the appointment of a statewide special inquiry judge by the Washington Supreme Court after preliminary review by the organized crime advisory board, RCW 10.29.080, pertaining to the appointment of a special prosecutor, and RCW 10.29.090, providing an operating budget for proceedings under the chapter. Laws 2009, ch. 560, § 24.

¹⁴ In narrow instances, the statute also authorizes the appearance of corporate counsel – i.e., counsel for a city or governmental entity.

to testify as a witness. RCW 10.27.140. Subject to very narrow exceptions, grand jurors, public attorneys, and other persons authorized by statute to attend the proceeding are forbidden to disclose testimony or evidence received in a special inquiry proceeding. RCW 10.27.090.

In this case, the State, through deputy prosecuting attorney Ed Stemler, sought to initiate a special inquiry proceeding on the strength of VanderWeyst's first search warrant. CP 44-45. Judge McKeeman, acting as special inquiry judge, authorized a subpoena duces tecum to issue to "Custodian or manager of records" of "Cellco Partnership DBA Verizon Wireless." CP 123. The subpoena duces tecum required personal appearance before "the Special Inquiry Judge of Snohomish County Superior Court, in Department 2 of the Snohomish County Courthouse in Everett, Washington, on the 18 day of July, 2008, at 2:00 pm." Id.

The subpoena also provided:

In lieu of personal appearance, you may satisfy this subpoena by delivering the indicated documents to applicant Deputy Prosecuting Attorney Ed Stemler, at the Snohomish County Prosecutor's Office (3000 Rockefeller Ave., MS 504, Everett, WA 98201), prior to the date shown above unless otherwise directed to appear[.]

CP 124. As required by RCW 10.27.090, the subpoena enjoined Verizon from “disclosing to anyone the existence of this Special Inquiry Judge subpoena, or your response to this subpoena.” Id.

As the unambiguous and mandatory statutory requirements and the text of the judicially-issued subpoena make clear, in no way was it proper to characterize the delivery of the text messages to VanderWeyst as “in response to the subpoena duces tecum.” CP 44. VanderWeyst was neither the special inquiry judge nor a public attorney with the authority to petition for evidence under RCW 10.29.170. VanderWeyst was not one of the few specifically-enumerated individuals entitled to access the otherwise secret evidence in a special inquiry proceeding. Whether VanderWeyst may eventually have been summoned to testify as a witness before a grand jury is immaterial; he was not entitled to hear or receive evidence pertaining to the proceeding.

Furthermore, no special inquiry proceeding was held, and there is no evidence that Judge McKeeman ever reviewed Verizon’s response to the subpoena duces tecum to ascertain whether the evidence warranted the summoning of a grand jury. The prosecutor’s efforts to bootstrap the improper delivery of the evidence into the special inquiry proceeding, and the trial court’s

ratification of these efforts, should be rejected as contrary to the specific, unambiguous, and restrictive requirements of Chapters 10.27 and 10.29 RCW. The fact that a special inquiry proceeding was initiated cannot provide an independent justification for the evidence to be admitted.

b. The issuance of a subpoena for records in which Canady had a privacy interest without notice to her or probable cause violated article I, section 7's warrant requirement. The records also must be excluded because issuance of the subpoena duces tecum for records in which Canady had a constitutionally-protected privacy interest, without notice to Canady or probable cause, violated article I, section 7.

The warrant requirement of article I, section 7 is “especially important” because “it is the warrant which provides the ‘authority of law’ referenced therein.” State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 873 (1999). In Gunwall, the Washington Supreme Court held “the ‘authority of law’ required by article I, section 7 includes . . . legal process such as a search warrant or subpoena.” Gunwall, 106 Wn.2d at 68-69. But in State v. Miles, 160 Wn.2d 236, 156 P.3d 864 (2007), the Court refined this aspect of Gunwall's holding.

First, the authority of law requirement necessitates a subpoena be issued by a neutral magistrate. Miles, 160 Wn.2d at 247. In Miles, the Supreme Court invalidated a statute that provided for the issuance of subpoenas by an administrative agency. In an investigation of possible securities fraud, pursuant to former RCW 21.20.380, the Washington State Securities Division of the Department of Financial Institutions (“Division”) issued an administrative subpoena to Miles’ bank. 160 Wn.2d at 241. The Division did not notify Miles of the subpoena and instructed the bank not to disclose its existence to him. Id. In a prosecution stemming from the records obtained as a result of the administrative subpoena, the superior court denied Miles’ motion to suppress the evidence, and the Washington Supreme Court granted discretionary review of the order. Id. at 241-42.

The Supreme Court first found that Miles’ banking records were a “private affair” subject to the protections of article I, section 7. Id. at 244-45. The Court explained:

Private bank records may disclose what the citizen buys, how often, and from whom. They can disclose what political, recreational, and religious organizations a citizen supports. They potentially disclose where the citizen travels, their affiliations, reading materials, television viewing habits, financial condition, and more. Little doubt exists that

banking records, because of the type of information contained, are within a person's private affairs.

Id. at 246-47.

Having found a privacy interest, the Court next turned to the question whether there was authority of law for the search. While holding that generally authority of law is provided by a warrant or subpoena, the Court held that the statutorily-authorized administrative subpoenas failed to supply the protections normally inherent in the subpoena process: “the statute here has no safeguards and would allow the state to intrude into private affairs for little or no reason.” Id. at 248.

Important in the instant case, the Court rejected the contention that “the validity and reasonableness of a subpoena” are ensured when an agency must go to court to enforce it. Id. at 251. The Court found that this judicial oversight would not guarantee Miles’ privacy rights were adequately protected: “The bank does not share Miles’ interest and would not challenge the subpoena on the basis of Miles’ privacy rights even if the bank could assert those rights.” Id. The Court additionally criticized the non-disclosure requirement of the subpoena, finding it created a substantial risk that Miles’ privacy interests would be unjustly invaded. Id. at 251-

52. The Court accordingly reversed the order admitting the evidence. Id. at 252.

The same result is compelled with respect to the facts presented here. First, Canady had a privacy interest in the records sought. Quon, 529 F.3d at 908; Finley, 477 F.3d at 259; Gunwall, 106 Wn.2d at 67. Second, Judge McKeeman expressly found that probable cause did not support a search of the records: he specifically refused to authorize a search warrant to issue for the time period sought by VanderWeyst, and instead compelled these records to be produced only through the special inquiry subpoena duces tecum. CP 114, 123-24. Because of the court's finding on probable cause, there can be no claim that a warrant could have provided the requisite authority of law.

Third, Canady was not notified that her private records were being sought, nor was she given an opportunity to interpose an objection to their production. Compare Miles, 160 Wn.2d at 241. Fourth, the party producing the records, Verizon, had no incentive to protect Canady's privacy interest, even assuming it would have had standing to do so. Id. at 251.

The protections attendant to a judicially-issued subpoena are thus of little value here. CrR 4.8 provides that in criminal matters,

“[s]ubpoenas shall be issued in the same manner as in civil actions.” CrR 4.8. According to CR 45, “A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.” CR 45(c)(1). The rule also provides:

On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

- (i) fails to allow reasonable time for compliance;
- (ii) fails to comply with RCW 5.56.010 or subsection (e)(2) of this rule;
- (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or
- (iv) subjects a person to undue burden, provided that the court may condition denial of the motion upon a requirement that the subpoenaing party advance the reasonable cost of producing the books, papers, documents, or tangible things.

CR 45(c)(3)(A).

Likewise, information requested in a subpoena may be withheld subject to a claim of privilege, provided the claim is made expressly and supported by a sufficient description of the things not produced to enable the party seeking production to contest the claim. CR 45(d)(2)(A). Last, a party who has produced privileged information in response to a subpoena is entitled to have the information returned, sequestered or destroyed, or may seek a

protective order and in camera review until the claim is resolved.
CR 45(d)(2)(B).

The privilege here belonged to Canady, who was given no opportunity to object to disclosure or obtain a protective order. Judge McKeeman also apparently gave little thought to the fact that he was authorizing a search without probable cause. And again, Verizon did not share Canady's interest and would not have challenged the subpoena on the basis of her privacy rights. See 7RP 144-45 (Citizen testifies that Verizon provides subscriber information, including the content of text messages, in response to a search warrant or court order, and that the records here would have been turned over in response to the subpoena duces tecum).

"[A] subpoena . . . does not supply authority of law where that authority is lacking." Miles, 160 Wn.2d at 250 n. 7. The subpoena duces tecum here, issued without probable cause or notice to the person whose privacy rights were implicated was, essentially, an end run around article I, section 7's warrant requirement. "[U]ltimately our state constitutional provision is designed to guard against 'unreasonable search and seizure, made without probable cause.'" Ladson, 138 Wn.2d at 343. This Court

should conclude the subpoena duces tecum was issued without authority of law.

4. THE REMEDY FOR THE CONSTITUTIONAL VIOLATION IS SUPPRESSION OF THE AFTER-ACQUIRED EVIDENCE.

When the rights safeguarded by article I, section 7 are violated, the remedy is exclusion of the after-acquired evidence. Winterstein, 220 P.3d at 1231. Because the State constitutional provision protects personal rights rather than curbing government actions, “whenever the right is unreasonably violated, the remedy must follow.” Id. (quoting White, 97 Wn.2d at 110). The same result is required under the Fourth Amendment: the taint of the primary illegality requires suppression of after-acquired evidence as “fruit of the poisonous tree.” Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Canady is entitled to exclusion of the text messages and all evidence collected as a consequence of this initial constitutional violation.

5. THE ELECTRONIC DATA PROVIDED BY VERIZON WAS UNRELIABLE AND ITS ADMISSION VIOLATED DUE PROCESS.

a. Canady and Starr objected to the admission of electronic evidence because the evidence was unreliable. Canady and Starr also moved to exclude the text messages and other data

obtained from Verizon because the evidence was unreliable.¹⁵ 4RP 40-55; CP (Starr) 98-135.¹⁶ They contended the evidentiary foundation presented by the State was fatally defective, because the State could not show (1) that the records were stored or maintained in a consistent and dependable fashion; (2) that Verizon had safeguards to identify and prevent errors in the capturing and transmittal of data from the “switch;” or (3) that the software used to retrieve the data held in the “switch” was reliable. Id. In fact, Citizen admitted that a “glitch” in the SMS tool used to download the data and convert it to a PDF file caused chunks of text to inexplicably be dropped from the documents submitted to law enforcement. 7RP 160-61, 178-79.

Eric Blank, an expert on electronic document creation, retention, destruction, and record-keeping, submitted a declaration in support of the motion. CP (Starr) 121-27. He noted that in producing the PDFs, Verizon omitted almost all of the raw electronic data that could establish the reliability, authenticity, or completeness of the documents. CP (Starr) 122. Blank opined that

¹⁵ Starr’s attorney took the laboring oar in litigating this motion, but Canady joined in all of Starr’s pretrial motions. 4RP 4.

¹⁶ Starr has appealed his conviction in cause number 63617-1-I. For purposes of clarity, citations to the clerk’s papers in his case are as follows: “CP (Starr)” followed by page number.

in the absence of this critical information, the text message and related call history records were presumptively unreliable. CP (Starr) 126-27.

b. The admission of the unreliable electronic data violated due process. An accused person has the due process right to a fair trial, and this right includes the guarantee that the evidence used to convict him will meet elementary requirements of fairness and reliability in the ascertainment of guilt or innocence. U.S. Const. amend. XIV; Const. art. I, § 3; Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); see also, State v. Ahlfinger, 50 Wn. App. 466, 472-73, 749 P.2d 190 (1988) (upholding exclusion of polygraph evidence, although relevant and helpful to accused's defense, given "the State's legitimate interest in excluding inherently unreliable testimony.")

Records of regularly conducted activity are not inadmissible as hearsay. ER 803(a)(6); RCW 5.45.020. RCW 5.45.020 provides:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information,

method and time of preparation were such as to justify its admission.

RCW 5.45.020.

Before a purported business record may be admissible, however, it must:

(1) be in record form; (2) be of an act, condition, or event; (3) be made in the regular course of business; (4) be made at or near the time of the fact, condition or event; and (5) the court must be satisfied that the sources of information, method, and time of preparation justify admitting the evidence.

State v. Hopkins, 134 Wn. App. 780, 788, 142 P.3d 1104 (2006)

(reversing order admitting medical records where State failed to establish prerequisites of business record exception).

Computerized records are treated the same as other business records, but the proponent of the evidence must be able to show that “the sources of information, method and time of preparation were such as to justify [the records’] admission.” State v. Benneth, 34 Wn. App. 600, 603, 663 P.2d 156 (1983).

Authenticity of the records is a key component of the analysis of the admissibility of evidence proffered under the business record exception. In re Vee Vinhnee, 336 B.R. 437, 444 (9th Cir. BAP 2005). This predicate is closely tied to the

authenticity requirement of ER 901(a). As explained by the Ninth

Circuit:

The primary authenticity issue in the context of business records is on what has, or may have, happened to the record in the interval between when it was placed in the files and the time of trial. In other words, the record being proffered must be shown to continue to be an accurate representation of the record that originally was created.

Vinhnee, 336 B.R. at 444.

In Vinhnee, a bankruptcy judge refused to admit electronic records of billing statements because of a defective evidentiary foundation. Id. at 440-42. Although Vinhnee did not appear at his trial and the court proceeded in his absence, the court informed creditor American Express that it would insist upon proof of entitlement to the relief requested. Id. at 441. American Express accordingly called as a witness an employee who testified he was the records custodian, that entries on the monthly statements were made at or near the time of the transactions, that the records were made in the regular course of business, and that the regular practice was to retain the records. Id.

The court then explained that because the records were maintained electronically, it would require, in addition to the basic foundation for business records, an authentication foundation

regarding the computer and software utilized in order to assure the continuing accuracy of the records. Id. at 442. The witness was unable to provide this additional information, and, despite an opportunity to cure the defect post-trial, American Express did not supplement the record to the court's satisfaction. Id.

On review, the Ninth Circuit held the foundation was inadequate. In so holding, the Court observed that early versions of foundations for the admission of computerized data were "too cursory." Id. at 445. The Court noted:

Computerized data . . . raise unique issues concerning accuracy and authenticity. Accuracy may be impaired by incomplete data entry, mistakes in output instructions, programming errors, damage and contamination of storage media, power outages, and equipment malfunctions. The integrity of data may also be compromised in the course of discovery by improper search and retrieval techniques, data conversion, or mishandling.

Id. (quoting Manual for Complex Litigation (Fourth) §11.446 (2004)).

Criticizing the evidentiary shortcuts engaged in by many trial courts considering the admissibility of computerized data, the Court commented, "judicial notice is commonly taken of the validity of the theory underlying computers and of their general reliability. . . Theory and general reliability, however, represent only part of the foundation." Id. at 446 (citation omitted). The Court listed nine

factors that should be considered by a court evaluating electronic data under the “business records” exception. Id. Of particular importance is the requirement that the proponent of the evidence establish the procedure “has built-in safeguards to ensure accuracy and identify errors.” Id. (citation omitted). This, in turn, requires the proponent of the evidence to supply “details regarding computer policy and system control procedures, including control of access to the database, control of access to the program, recording and logging of changes, backup practices, and audit procedures to assure the continuing integrity of the records.” Id. at 446-47.

The evidence adduced in this case failed to meet these fundamental foundational requirements. Citizen was not a software engineer and had no personal knowledge of how the data was stored, maintained, or retrieved. 7RP 164-65. Citizen was unable to explain many of the codes on the records that pertained to their authenticity, and the explanations he did provide were relayed to him, via email, by software engineers who did not testify. 7RP 183. Citizen acknowledged that a malfunction in the SMS tool had occurred, but had no understanding of the nature of the malfunction. 7RP 179. Citizen admitted that due to this

malfunction, text message data was dropped in whole or in part from the records that were submitted. 7RP 178.

If Verizon's records system had "built-in safeguards" to "ensure accuracy and identify errors," the safeguards failed disastrously. In fact, all of the properties that traditionally ensure business records are authentic and reliable were lacking. The court perceived these defects as affecting the "weight" of the evidence, 4RP 67, but in so ruling, the court excused the State from its duty to lay an evidentiary foundation. At bottom, the evidence failed to meet basic standards of reliability, and its admission violated Canady's due process right to a fair trial. Canady is entitled to a new trial at which the unreliable evidence will be excluded.

6. THE ERRORS HERE ARE PREJUDICIAL.

The State conceded to the trial court that the suppression motion was dispositive. Deputy prosecuting attorney Ed Stemler told the court, "the practical effect of [any suppression order] would be to terminate the case[.]" 4RP 93. By the State's own admission, without the wrongly-admitted evidence and its fruits, the State would have been unable to prove the charged offense. The error in admitting the evidence was prejudicial.

E. CONCLUSION

This Court should conclude that the search of text messages in which Canady had a privacy interest violated her rights under article I, section 7 and the Fourth Amendment. The constitutional error requires suppression of all after-acquired evidence. In the alternative, this Court should find the electronic evidence collected from Verizon failed to meet fundamental standards of reliability, and should have been excluded.

DATED this 10th day of February, 2010.

Respectfully submitted:

 WSBA 28806
for

SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A



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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.

CANADY, Debra A.

Defendant.

08-1-01864-9

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
FOLLOWING CrR 3.6 HEARING
DENYING DEFENSE MOTION TO
SUPPRESS TEXT MESSAGES

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 her attorney, Karen Halverson. The defendant chose not to testify.

80

I. FINDINGS OF FACT

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

7 2. On the search warrant, Judge McKeeman interlined the time period for
8 records sought by the warrant would be between 6:00am and noon on 6/26/08.
9

10 3. Simultaneously with signing the search warrant, Judge McKeeman also signed
11 a subpoena duces tecum pursuant to a Special Inquiry Court that had been previously
12 initiated. The subpoena duces tecum required Verizon to provide, among other things,
13 records of text messages of (425)299-2110 for Defendant Starr and (425)239-2999 for
14 Defendant Canady from 6/21/08 to 6/29/08. The subpoena duces tecum set a hearing for
15 July 18, 2008 for Verizon to bring the records to court. As is standard protocol, a letter
16 was sent along with the subpoena indicating that if Verizon provided the records prior to
17 the hearing then they need not appear on July 18.
18
19

20 4. Armed with both the search warrant and subpoena duces tecum signed by
21 Judge McKeeman, detective VanderWeyst called Verizon to let them know that he would
22 be faxing the search warrant and that the search warrant time period was only between
23 6am and noon on 6/26/08. Detective VanderWeyst also typed on the fax cover sheet that
24 he faxed along with the warrant that the search warrant was only for the period from 6am
25 to noon on 6/26/08. Neither Detective VanderWeyst nor any other law enforcement
26

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

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

13 8. Detective VanderWeyst logged onto another detective's county computer to
14 check his email from Verizon. Detective VanderWeyst was familiar with the format of
15 this type of text message record because he had dealt with this type of record before. The
16 format of these records is to set forth columns of data with the substance of the text
17 message at the bottom of each record. The date and time of each text message is the very
18 first line of data in each record. Detective VanderWeyst did not look at the date and time
19 of the message because he was naturally curious about the substance of the messages.
20
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.
25
26
27

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

10
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.
22

23
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
26
27

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.

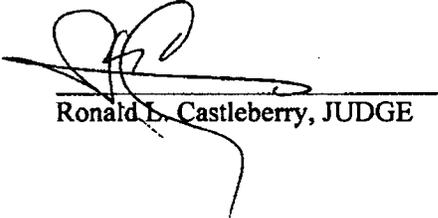
5 *either of which by itself is a basis for denial. PC*

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
18
19

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
26

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.
8

9
10 DATED this 2 day of June, 2009

11
12 
13 Ronald L. Castleberry, JUDGE

14 Presented by:

15
16 
17 Edward Stemler #19175
18 Deputy Prosecuting Attorney

19 Approved for entry:

20 
21 Karen Halverson
22 Attorney for Defendant Canady
23
24
25
26
27

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

STATE OF WASHINGTON,)
)
 Respondent/Cross-Appellant,)
)
 v.)
)
 DEBRA CANADY,)
)
 Appellant/Cross-Respondent.)

NO. 63626-0-I

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF FEBRUARY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SNOHOMISH COUNTY PROSECUTING ATTORNEY
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() _____ |
| [X] DEBRA CANADY
331364
WASHINGTON CC FOR WOMEN
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GIG HARBOR, WA 98332-8300 | (X) U.S. MAIL
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() _____ |

SIGNED IN SEATTLE, WASHINGTON, THIS 10TH DAY OF FEBRUARY, 2010.

x _____ *grnd*

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