NO. 87669-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JONATHAN NICHOLAS RODEN, Petitioner.

BRIEF OF AMICUS CURIAE WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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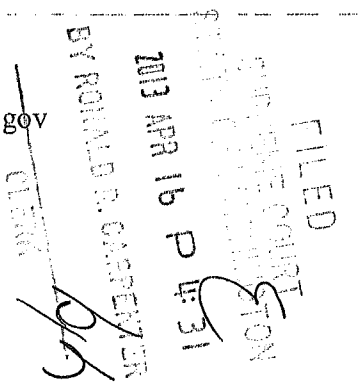

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I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. WAPA is interested in cases, such as this, that attempt to strike a balance between the effectiveness of police efforts to ensure public safety and the rights of citizens to be secure in their private affairs.

II. ISSUE PRESENTED

Whether the trial court and the Court of Appeals correctly found no constitutional or Privacy Act violation in the present case.

III. STATEMENT OF FACTS

WAPA supplements the facts as stated in the State's brief with the following: the phone seized by Detective Sawyer belonged to a third party, not Roden, and the phone was not password protected or locked. CP 15-16 FOF 1-2. Detective Sawyer saw a series of text messages on the phone indicating that Roden owed money to the third party and Roden had replied that he now had the money. RP 8-9. Detective Sawyer then used the seized phone and sent a text message to Roden, several messages were exchanged, and Roden ultimately sought and agreed to buy illegal narcotics then sent

back and forth. RP 9-11. Roden never indicated that his text messages were private. CP 16, FOF 4.

IV. ARGUMENT

A. DETECTIVE SAWYER'S READING AND EXCHANGE OF TEXT MESSAGES WITH RODEN DID NOT VIOLATE THE PRIVACY ACT.

In general, the Privacy Act provides that, "it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any private communication...." RCW 9.73.030(1). This rule cannot be violated when a) the text messages are not "private," or b) no communication was ever "intercepted," or c) none of the listed entities recorded any communication. WAPA agrees with Respondent that no Privacy Act violation occurred in this case.

1. Text Messages Are Not "Private" Communications.

For purposes of the Privacy Act, a communication is private (1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable. The court set forth several factors bearing on the reasonableness of a privacy expectation. *See State v. Christensen*, 153 Wn.2d 186, 193, 102 P.3d 789 (2005); *State v. Clark*, 129 Wn.2d 211, 225-27, 916 P.2d 384 (1996) (Those factors include the duration and subject matter of the communication, the location of the communication and the potential presence

of third parties, and the role of the nonconsenting party and his or her relationship to the consenting party). "A communication is not private where anyone may turn out to be the recipient of the information or the recipient may disclose the information." *Clark*, 129 Wn.2d at 227.

Common sense dictates, and our case law acknowledges, a hierarchy of risk that a third party could hear or access a communication, depending on the form of the communication used. For instance, the risk level is low when a person communicates with another person face to face in a location where there is no one else around to hear the conversation.

A telephone conversation naturally poses a greater risk, as the speaker is unable to visually identify the listener and is unable to see if anyone else is present on the other end of the call. Washington Courts have held that a caller bears that risk. *See, e.g., State v. Corliss*, 123 Wn.2d 656, 870 P.2d 317 (1994) (No Privacy Act violation when police listened to defendant's call via tilted phone receiver, with consent of an informant).[1]

A caller who leaves a message on an answering machine bears an even higher risk that the message will be heard by a third party, since the message may be retrieved by anyone who happens to be present with the

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[1] *See also, State v Gonzales*, 78 Wn. App. 976, 900 P.2d 564 (1995) (No privacy Act or constitutional violation where officer serving a warrant at defendant's home answered the phone and arranged drug transaction with the caller); *State v. Goucher*, 124 Wn.2d 778, 784, 881 P.2d 210 (1994) (No constitutional violation where officer serving a warrant answered phone and spoke with defendant who arranged to buy cocaine).

answering machine (or overheard by anyone within earshot when the message is played). Courts have held that a caller bears that risk. *See, e.g., In re Farr*, 87 Wn. App. 177, 184, 940 P.2d 679 (1997) (Caller waived any statutory privacy right and had no reasonable expectation of privacy when he left messages on an answering machine).

Sending a message to a pager, like leaving a message on an answering machine, affords the sender no opportunity to confirm the identity of the person who may ultimately receive the message. As a pager is portable, the sender bears an even greater risk that someone other than intended recipient might possess the pager. The Court of Appeals has held that a person who sends a message to a pager bears that risk. *See State v. Wojtyna*, 70 Wn. App. 689, 696, 855 P.2d 315 (1993) (No Privacy Act violation because by sending a message to a pager defendant had "run the risk" that the message would be received by whomever possessed it).

These cases and their reasoning demonstrate that the level of risk involved plays a critical role in assessing whether an expectation of privacy is reasonable. By sending a text message Roden assumed the risk that the message would not be private. First, as with a pager, Roden ran the risk that the message would be received by whoever possessed the phone. Second, unlike a phone conversation where a caller can hear a voice, Roden's use of text messaging carried no external indicia that the messages actually were or

would be received by the intended recipient. Third, as the record demonstrates, the "iPhone" used in the present case displays an incoming text message on its screen when the message is first received. Thus even if the intended recipient was in possession of the phone the message would still be visible to those in sight of the phone at the time the message was received. In sum, the trial court below correctly found that a text message is not "private" because the sender of a message ran the risk that the message would be heard or seen by someone other than the intended recipient. CP 25 (COL 3-4).

A contrary ruling would be inconsistent with the well-established principle that when a person uses a device that carries certain inherent risks, that user assumes those risks and cannot later complain that he misplaced his trust in a form of communication whose privacy was, by its very nature, uncertain. In essence, Roden here is asking this Court to: reject the cases discussed above; to protect his misplaced trust in an inherently untrustworthy form of communication; and to reframe the analysis of whether a communication is "private" into an entirely subjective test. This Court should decline that invitation.

2. Detective Sawyer did not "intercept" the text messages from the Defendant

In the present case Detective Sawyer did not "intercept" the text messages from Roden, as that term is used in the Privacy Act and as that term

has been interpreted in previous decisions. Washington courts have never found that a message can be "intercepted" after it has reached its intended destination. In *State v. Corliss*, *supra*, this Court held that the police did not "intercept" a conversation when the police had an informant tilt a telephone receiver away from his ear so that so that police could listen in on a conversation with defendant. *Id*, 123 Wn.2d at 662. Rather, the officers merely listened in person to what they could hear emanating from the telephone and the Privacy Act did not apply. *Id.* Similarly, in *State v Gonzales*, *supra*, the court found that the police had not "intercepted" a communication when the officers (who were serving a search warrant in the defendant's apartment) answered a phone call in which the caller stated that the defendant was late in delivering cocaine to him. *Id.*, 78 Wn. App. at 979.

Like Washington, many jurisdictions use the term "intercept" in their privacy laws. Under Federal law it has long been illegal for a person to intentionally "intercept . . . any wire, oral, or electronic communication." 18 U.S.C.A. § 2511(1).[2] Numerous states also use the term "intercept" or

[2] The Federal government enacted statutory protections for communications in 1934, and then further developed the statutory framework in the Wiretap Act of 1968 and again in the Electronic Communications Privacy Act of 1986 (codified as amended at 18 U.S.C.A. §§ 2510-22, 2701-12, 3121-27 (2006 & Supp. 2008)). The Wiretap Act, as amended by the ECPA, makes it illegal for anyone to "intentionally intercept . . . any wire, oral, or electronic communication." 18 U.S.C.A. § 2511(1). "Intercept" is defined in the Wiretap Act as the "acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4).

"interception" in their privacy statutes.[3] Cases examining the term "interception" in the various state and federal privacy laws demonstrate that there was no "interception" in the present case.

Prior to passage of RCW 9.73.030, this Court followed the United States Supreme Court's analysis of the term "interception," when considering whether a police woman had intercepted a phone conversation when she listened to it using an extension telephone. *State v. Jennen*, 58 Wn. 2d 171, 173, 361 P.2d 739, 740 (1961), citing *Rathbun v. United States*, 355 U.S. 107, 78 S.Ct. 161, 2 L.Ed.2d 134 (1957). Both *Rathbun* and *Jennen* held that no interception had occurred.

A recent case that mirrors the facts of the present case addressed the issue of whether a police officer "intercepted" a communication in violation of Pennsylvania's privacy law when the officer sent and received text messages and planned a $19,000 marijuana sale with a defendant while pretending to be the defendant's accomplice and using his phone. *Commonwealth v. Cruttenden*, 58 A.3d 95 (Penn. 2012). On appeal the issue was whether the officer had illegally "intercepted" the text messages in violation of Pennsylvania law. *Id.* at 97. The Supreme Court first noted that it had previously addressed situations where officers who answered phone

[3] *See, e.g.*, Cal. Penal Code § 632.5; 632.6; Del. Code Ann. tit. 11, § 1335; Del. Code Ann. tit. 11, § 2402 ; Fla. Stat. Ann. § 934.03; 720 Ill. Comp. Stat. Ann. 5/14-2; Md. Code Ann., Cts. & Jud. Proc. § 10-402; Mass. Gen. Laws Ann. ch. 272, § 99; 18 Pa. Cons. Stat. Ann. § 5703.

calls while serving search warrants and engaged in conversations with those callers and the court had held that there was no interception because by receiving the communication "directly over the means of transmission employed, the officers were in fact themselves parties to the call." *Id.* at 98-99. With respect to the text messages, the Pennsylvania Supreme Court concluded that because the officer was a direct party to the communication, there simply was no "interception." *Cruttenden*, 58 A.3d at 100. The Court further stated that the fact a police officer may have misrepresented his or her identity does not change the fact that the officer is a direct party to the conversation and is deemed the intended recipient of the conversation under whatever identity the officer has set forth. *Id.* at 100. Thus "there was no eavesdropping or listening in, and no interception took place." *Id.*

The federal courts' understanding of the term "intercept" "is consistent with the ordinary meaning of 'intercept,' which is "to stop, seize, or interrupt in progress or course before arrival." *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 878 (9th Cir. 2002) (No interception occurs where a person views content that was previously posted to a website, even where that person obtained access via use of a ruse).[4] Thus it has long been

[4] The Washington Supreme Court also looked to the dictionary when considering the meaning of the word "intercept." In the context of RCW 9.73.030, the court said that "intercept" means "1. to take, seize, or stop by the way or before arrival at the destined place: stop or interrupt the progress or course of. 2. to stop or prevent from doing something: HINDER." *Bixler v. Hille*, 80 Wn. 2d 668, 670-71, 497 P.2d 594 (1972). Though *Bixler* was overruled by *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), the court did so in the context of focusing, not on the meaning of "interception," as did the *Bixler* court, but rather

the law in Federal Court that an "interception" only occurs if the communication is intercepted contemporaneous with and during its transmission to its destination. Once the message reaches its ultimate destination it can no longer be "intercepted." *See, e.g., U.S. v. Steiger*, 318 F.3d 1039, 1048-49 (11th Cir.2003) ("A contemporaneous interception- i.e., an acquisition during 'flight'-is required to implicate the Wiretap Act with respect to electronic communications").

This is why, in *U.S. v. Meriwether*, 917 F.2d 955 (6th Cir.1990), the court rejected defendant's argument that police had "intercepted" his page to his drug supplier. Rather, the court held, where police heard the pager emit a signal, the transmission had ceased and any subsequent retrieval of the message was not an "interception." *Meriwether*, 917 F.2d at 960. Washington followed this decision, on very similar facts, in *Wojtyna, supra* (This case is discussed at length in the party's briefs). *See also, U.S. v. Reyes*, 922 F. Supp. 818, 836 (S.D.N.Y. 1996) (agents retrieval of pages that had been received at their destination but had not yet been read by their intended

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on the nature of a pen register, which is to capture dialed telephone numbers contemporaneous with, and from the midst of their transmission over the telephone lines, i.e., while they were being communicated. *Gunwall* did not discuss what an interception is, or discuss the earlier court's reasoning, and overruled *Bixler* only to the extent it had "ruled that a pen register device does not intercept a telephonic communication." To hold that communications are obtained when a pen register is used, is not the same thing as overturning a prior court's definition of a different term altogether. In addition, Washington's differentiation between, on the one hand, use of a pen register to capture dialed numbers while they are traveling between their initiation and termination points, and, on the other hand, overhearing or seeing communications once they have reached their intended destination is consistent with the law of other jurisdictions.

recipients was not an interception).[5] Similarly, no interception occurs when a person listens to stored voice mail messages. *U.S. v. Moriarty*, 962 F. Supp. 217 (D. Mass. 1997).

Other courts have reached the same conclusion with respect to emails and have found no interception where police access stored messages that have already been transmitted and saved to a computer, even where those messages had not yet been received or read by their intended recipients. *Steve Jackson Games, Inc. v. U.S. Secret Serv.*, 36 F.3d 457, 462 (5th Cir.1994); *Wesley Coll. v. Pitts*, 974 F. Supp. 375 (D. Del. 1997), *aff'd*, 172 F.3d 861 (3d Cir. 1998) (Email messages are not "intercepted" if they are accessed after they have been transmitted to their destination.).[6] Similarly, in *State v Brooks*, 265 P.3d 1175, 1190-92 (Kan.App. 2012), the court held that accessing an archived file or emails from the sender's "sent box" after it had already been sent and received did not amount to "intercepting" that communication. The

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[5] Washington followed this decision, on very similar facts, in *Wojtyna*, *supra* (This case is discussed at length in the party's briefs). *See also, U.S. v. Reyes*, 922 F. Supp. 818, 836 (S.D.N.Y. 1996) (agents retrieval of pages that had been received at their destination but had not yet been read by their intended recipients was not an interception).

[6] *See also, Theofel v. Farey-Jones*, 359 F.3d 1066, 1077-78 (9th Cir. 2004) (No interception occurred when defendant allegedly gained unauthorized access to plaintiff's e–mails which were already delivered to recipients and stored electronically by plaintiff's internet service provider (ISP))*Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107 (3d Cir. 2003)(Insurance company did not "intercept" its agent's electronic communications when it accessed his e–mail on its central file server without his express permission, inasmuch as company did not access e–mail at initial time of transmission); *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F. Supp. 2d 548 (S.D. N.Y. 2008) (Unauthorized access to e-mails that had previously been sent or received did not constitute an "interception" of an electronic communication under the (ECPA)); *Bohach v. City of Reno*, 932 F. Supp. 1232, 1235–36 (D. Nev. 1996)(access to e-mails that had previously been sent or received did not constitute an "interception" of an electronic communication).

court analogized to a traditional letter, stating that viewing received emails was like "taking an unauthorized look at a file copy of a letter sent out 6 months earlier. To consider that 'intercepting' strains any definition." *Id.*

In the present case Detective Sawyer did not intercept the text messages from Roden. As with any person who listens to an answering machine message or voicemail, or who reads a fax, page, or text message, Detective Sawyer did no more than observe the message once it had been received by the intended device. As in *Cruttenden*, the Detective simply received the communication directly over the means of transmission employed, and Roden bore the risk that anyone in possession of the iPhone could receive the message. Despite that risk (and without any attempts to identify the party on the other end) Roden chose to communicate with Detective Sawyer. There simply was no interception, and Washington law provides no protection to people who recklessly discuss their criminal behavior while not knowing with whom they are communicating. *See*, *Farr*, 87 Wn.App. at 184; *Gonzales*, 78 Wn. App. at 981-82; *Wojtyna*, 70 Wn. App at 694.

In sum, the use of the term "intercept" requires that the message must be acquired while it is in transit and before it reaches its destination.[7] Once

[7] The origin of the word "intercept" further supports this conclusion. *See* Oxford English Dictionary, 1971 ed. ("intercept" comes from the French [*inter* between + *capere* to take, seize] and means: "1. To seize, catch, or carry off (a person, ship, letter, etc) on the way from one place to another; to cut off from the destination aimed at."

an answering machine message, voicemail, fax, page, text message, or email reaches its destination it is no longer in transmission but rather is stored on the receiving device. Thus, once the communication has arrived, plain meaning, common sense, and numerous state and Federal decisions demonstrate that the message can no longer be "intercepted."[8]

Taking a larger view of the present case, this is not the sort of "eavesdropping" case that the Legislature had in mind when it passed the Privacy Act. Rather, at its core, the issue in the present case really involves access to "stored" communications, which are simply not covered by the Privacy Act. While a number of states have begun to enact laws that deal with "stored" communications,[9] Washington has not yet done so. Further, even though these statutes provide protections for various forms of "stored" communications, WAPA is unaware of any state or federal law that would provide a defendant a privacy right in his or her text messages once they have been sent and stored in a recipient's cell phone. Rather than expand the plain language of the Privacy Act to encompass new areas and provide new protections, this Court should leave it to the Legislature to expand the scope

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[8] To conclude otherwise would lead to bizarre results. If an interception occurs only when a person listens to or reads a previously recorded communication, a violation of the Act could occur on every subsequent occasion when that recording is replayed or reread. That would mean that innumerable 'interceptions,' and thus violations of the Act, could follow from a single recorded message. This cannot be what the legislature intended.

[9] *See, e.g.*, 18 Pa. Cons. Stat. Ann. § 5741; Del. Code Ann. tit. 11, §§ 2421 to 2427; Florida Statutes § 934.21; D.C. Code § 23-542; Va. Code Ann. § 19.2-70.3; and Wis. Stat. Ann. §§ 968.27 to 968.37.

of the Privacy Act, should it choose to do so.

3. A Text Message That Was Recorded Onto A Device Via Automatic Computer Programming, Was, By Definition, Not Recorded By Any Individual, Partnership, Corporation, Association, The State, Government Agency, Or Political Subdivision.

In the present case, the text messages were automatically recorded by a computer – the receiving telephone. RCW 9.73.030 prohibits recording of private communications only by an "individual, partnership, corporation, association, the State, government agency, or political subdivision." A computer is not among the entities that are prohibited from "recording" communications. Moreover, Detective Sawyer did not "record" the text messages from Roden. Detective Sawyer did not use a tape recorder or other device to record a message while the communication was in transit, nor did he use a device to record and thereby preserve a communication that would have otherwise been fleeting and ephemeral. Rather, Roden's written text messages, by design, were preserved on the cell phone that received those communications without any action by Detective Sawyer.

A common sense understanding of the term "record" means that a person "records" a communication when he or she uses an independent device to record the communication while it is occurring or is in transit. A person does not "record" a message simply by receiving it. This definition would make it unlawful for a person to use a tape recorder to record an oral conversation, to use a bug or other listening device to record an oral

conversation, or to tap into other forms of electronic communication and thereby record those communications. Common sense dictates that these are the types of recordings that were intended to be covered by the Privacy Act; not the simple act of *receiving* a voicemail, fax, text, page, or email.

Case law from around the country supports this common sense understanding. Under the Federal laws and numerous state statutes it is unlawful to "intercept" an electronic communication, and the term "intercept" is typically defined to include "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." *See, e.g.*, 18 U.S.C. § 2510(4); Del. Code Ann. tit. 11, § 2401, 2402; Fla. Stat. Ann. § 934.02, 934.03; Md. Code Ann., Cts. & Jud. Proc. § 10-401, 402; 18 Pa. Cons. Stat. Ann. § 5702, 5703. A "recording" of the communication would qualify as an "interception" since by recording the communication a person would "acquire" its contents by use of a device.[10] Cases from other jurisdictions have clearly explained that the mere act of receiving a message in the designed fashion, however, does not violate the privacy laws.

For example, in *Crowley v. Cybersource Corp.*, 166 F.Supp.2d 1263, 1268 (N.D.Ca.2001), the plaintiffs purchased items from Amazon.com and

[10] Although the Washington Act is structured slightly differently, the same activities are ultimately covered because the other jurisdictions consider a "recording" to be a subset of an "interception."

in doing so emailed Amazon information about their identity and credit. *Crowley*, 166 F.Supp.2d at 1266. Amazon received the emails and sent this information to a third party to verify the plaintiffs' credit. The plaintiffs alleged that Amazon intercepted their communications in violation of the Wiretap Act. *Id*, at 1267. The Court noted receiving an email necessarily entailed storage (recording) of the email, and that:

> Amazon acted as no more than the second party to a communication. This is not an interception as defined by the Wiretap Act.
>
> [Plaintiff]s' argument, moreover, would result in an untenable result. Holding that Amazon, by receiving an e-mail, intercepted a communication within the meaning of the Wiretap Act would be akin to holding that one who picks up a telephone to receive a call has intercepted a communication and must seek safety in an exemption to the Wiretap Act.

Id. at 1269.[11] *See also, Cruttenden, supra.*

The holdings from *Cruttenden* and *Crowley*, in essence, simply stand for the proposition that there is no "acquisition" or "recording" when the receiving party merely receives the communication via the means of transmission used for the type of communication at issue. This holding, of course, eliminates that otherwise absurd result that every person who receives a fax, text, page, answering machine message, or email would technically be violating the law merely be receiving the message.

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[11] *See also, Conte v. Newsday, Inc.*, 703 F. Supp. 2d 126, 140 (E.D.N.Y. 2010) (stating in that no intercept occurred because no device, other than the computer used by the recipients of the e-mails, was used).

It must be noted, however, that this Court in *State v. Townsend*, 147 Wn.2d 666, 57 P.3d 255 (2002), reached a contrary conclusion. In *Townsend* an undercover officer had exchanged email and "ICQ" messages with the defendant and this Court held that those messages were "recorded" on the officer's computer for purposes of the act. *Townsend*, 147 Wn.2d at 674-75. This Court, however, went on to hold that because the defendant, as a user of email, had to understand that his email would be recorded, he was "properly deemed to have consented to the recording of those messages." *Id.* at 676. Thus, even if there was a recording in the present case, there would still be no violation since, as in *Townsend*, Roden consented to the recording.

Townsend's finding of a "recording," however, is inconsistent with the cases outlined above, and Justice Bridge (joined by Justice Ireland) wrote a concurring opinion in that case pointing out that the majority's holding "would produce the absurd result of making all electronic communication via computers criminal by virtue of how the communication is inherently transmitted and stored on the recipient's computer." *Townsend*, 147 Wn.2d at 683 (concurrence of Justice Bridge). The absurd result, however, is not limited to the email and ICQ messages mentioned by Justice Bridge. The majority opinion arguably makes it criminal to receive any communication via an answering machine message, voicemail, fax, page, text message, or

email.[12] This court has long held that statutes should be construed to affect their purpose and unlikely, absurd, or strained consequences should be avoided. *State v. Stannard*, 109 Wn.2d 29, 742 P.2d 1244 (1987). As the Townsend holding has created an absurd result, this Court should overturn the portion of the *Townsend* opinion outlined above since it is both incorrect and harmful.[13]

B. NO SEARCH OCCURRED WHEN DETECTIVE SAWYER READ RODEN'S TEXT MESSAGES.

WAPA agrees with the Court of Appeals and the State that no search of the seized phone occurred as to Roden. No search occurred because Roden did not have a reasonable expectation of privacy in a text message sent to a telephone belonging to a third person.

Courts have long recognized that a person's reasonable expectation of privacy turns in large part on his ability to exclude others from the place searched. *See, e.g., State v. Jones*, 68 Wn. App. 843, 845 P.2d 1358, *review denied*, 122 Wn.2d 1018 (1993). The Court expanded on this in *Katz v. U.S.*,

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[12] Or perhaps even a simple phone call (depending on how broadly one interprets the term "intercept").

[13] *State v. Barber*, 170 Wn.2d 854, 864, 248 P.3d 494 (2011) (a prior decision may be overturned if it is incorrect and harmful). While the net result from *Townsend* is that a person does not violate the Act by simply receiving an email or text, the *Townsend* approach still finds a technical violation of the Act but finds that the Defendant has "waived" the violation. Rather than construing the statute in a manner that results in an absurd result with a judicially crafted remedy, WAPA strongly urges this Court to reconsider *Townsend* and to hold, following the reasoning of numerous other cases from Washington and around the Country, that a person does not violate the Privacy Act merely by receiving the message in its intended form

389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), holding there is no reasonable expectation of privacy in that which one exposes to another, regardless whether that be in conversation with a government informant, an undercover agent, or other witness.

Where a defendant consents to the recording of a conversation, the conversations are not private, and recordings to not violate article 1, section 7. *State v. Archie*, 148 Wn. App. 198, 199 P.3d 1005 (2009). It has long been the law that no person has any legitimate expectation of privacy in a telephone to which he places a phone call. *Gonzales*, 78 Wn. App. At 983. Similarly, no person has any legitimate expectation of privacy in records pertaining to a third party's phone.

With written letters, courts have explained that a defendant who sent a letter lost all control over a letter once he sent it through the mail, and thus lost any expectation of privacy in it. *See, e.g., State v. Kenny*, 224 Neb. 638, 641, 399 N.W.2d 821, 824 (1987). The rule does not operate any differently with electronic communications. Rather, an individual sending an e-mail loses "a legitimate expectation of privacy in an e-mail that had already reached its recipient." *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir.2001); *U.S. v. Lifshitz*, 369 F.3d 173, 190 (2d Cir.2004).[14]

[14] In analogous cases, courts have refused to grant the sender of messages any expectation of privacy in the contents of the recipients' mailboxes. *See State v. Champion*, 594 N.W.2d 526 (Minn. Ct. App. 1999), and cases cited therein. The court in *Champion* went further, observing that "[e]ven if it is reasonable to expect a mailbox to be accessed only by its owners, this expectation cannot flow vicariously to third parties." *Id.* at 529. In another case,

Furthermore, even if a search occurred, Roden lacks automatic standing to contest a search of a phone belonging to a third party. The purpose of the automatic standing rule is "to guard against the risk of self-incrimination by the defendant who, in order to establish standing at the suppression hearing, would have to admit possession of the seized evidence which could later be used as admission of guilt at trial" *State v. Carter*, 127 Wn.2d 836, 850, 904 P.2d 290, 296 (1995).

Automatic standing only applies when three conditions are met: (1) defendant was legitimately on the premises searched; (2) the crime defendant is charged with involved possession as an essential element; and (3) the defendant was, at the time of the contested search and seizure, in possession of the contraband he wishes suppressed. There must be a direct relationship between the challenged police action and the evidence used against the defendant. *State v. Jones*, 146 Wn.2d 328, 334, 45 P.3d 1062, 1065 (2002). To have automatic standing, the defendant must be charged with possession of the very item that was seized.

In the case involving the text messages Roden is charged with violating RCW 69.50.407, attempted possession of illegal narcotics. He wishes to suppress his text messages to a third person's telephone. He did

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the court observed that "a defendant has no legitimate expectation of privacy in messages and images transmitted over internet." *See U.S. v. Sawyer*, 786 F.Supp.2d 1352, 1356 (N.D. Ohio 2011).

not possess that phone. Nor did he possess messages after he had sent them to that phone. He is not charged with possessing the phone or the messages. The messages are not contraband. In short, automatic standing does not apply.

V. CONCLUSION

This Court should hold that there was Privacy Act violation and that the sender of a text message, page, e-mail, or similar electronic message has no expectation of privacy in the message once the message reaches the intended recipient's account or electronic device.

Respectfully submitted this 2nd day of April, 2013.

Jeremy Morris, WSBA No. 28722
Deputy Prosecuting Attorney
Kitsap County Prosecutor's Office

Susan Storey, WSBA No. 16447
Deputy Prosecuting Attorney
King County Prosecutor's Office

OFFICE RECEPTIONIST, CLERK

To: Pam Loginsky; ddvburns@aol.com; Sean Brittain; Jeremy Morris; Susan Storey
Subject: RE: State of Washington v. Jonathan Nicholas Roden, No. 87669-0

Rec'd 4-2-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Pam Loginsky [mailto:Pamloginsky@waprosecutors.org]
Sent: Tuesday, April 02, 2013 3:03 PM
To: ddvburns@aol.com; Sean Brittain; Jeremy Morris; OFFICE RECEPTIONIST, CLERK; Susan Storey
Subject: State of Washington v. Jonathan Nicholas Roden, No. 87669-0

Dear Clerk and Counsel:

Attached for filing is a motion for leave to file an amicus curiae brief, the proposed amicus curiae brief, and a proof of service.

Please contact me if you should encounter any difficulty in opening any of the documents.

Sincerely,

Pam Loginsky
Staff Attorney
Washington Association of Prosecuting Attorneys
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