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No. 69359-0-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

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JOHN F. KLINKERT,

Appellant

v.

WASHINGTON STATE LIQUOR CONTROL BOARD,

Respondent

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On Appeal from the Superior Court of Washington
for Snohomish County

The Honorable Ellen J. Fair, Judge

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# APPELLANT'S REPLY BRIEF

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## I. ARGUMENTS

### A. The Attorney General misstated my main argument

On Page 1, Paragraph 2 of Respondent's Brief the Attorney General says I argue that "the tobacco regulatory statutes' reference to elements enumerated in RCW 26.28.080 transforms the Board's enforcement of RCW 70.155.100 into a criminal prosecution."

The Attorney General has mischaracterized my objection to the Washington State Liquor Control Board's (LCB's) administrative action. First, I do not refer to "elements enumerated in RCW 26.28.080." [Emphasis added] I refer to RCW 26.28.080 itself in entirety. Second, I have never claimed or even implied that anything "transforms the Board's enforcement of RCW 70.155.100 into a criminal prosecution." I am claiming exactly the opposite, namely, that RCW 70.155.100 does not transform RCW 26.28.080, a criminal statute, into a mere administrative violation that can be adjudicated under the APA.

### B. The Notice of Board Action on Tobacco Violation did charge me with a crime

In the same paragraph 2, the Attorney General says "At no point was Mr. Klinkert charged with a crime...."

The Attorney General's statement is false. The pink Notice of Board Action on Tobacco Violation that I received from the LCB (Page 145 of Certified Appeal Board Record lists two violations, the first of which is a violation of RCW 26.28.080, a gross misdemeanor.

**C. A person charged as I was with a tobacco violation can not be sure whether he or she faces criminal liability**

Again in paragraph 2, the Attorney General says, "At no point was Mr. Klinkert … at risk of imprisonment or other criminal penalties…"

My reply is: How can anyone in my position – a person who has received a Notice of Administrative Violation which charges that person with a violation of a gross misdemeanor (one of the two violations I was charged with) -- be certain that they run no risk of imprisonment or other criminal penalty?

**D. The Attorney General has stated in conclusory form a topic that is actually at issue in this litigation**

In Respondent's Brief, Page 2, Paragraph 4, in the first sentence of paragraph 4, the Attorney General states "The Board has the authority to adjudicate and impose monetary penalties for violations of law regulating the sale of tobacco, and he cites RCW 70.155.100." However, this statement is actually a statement of what is at issue in this case, i.e., whether the Washington State Liquor Control Board does have the authority to adjudicate alleged violations of a criminal statute, RCW 26.28.080. And the Attorney General's simply claiming here that it is so, does not make it so.

**E. The Attorney General cites statutes whose wording actually undercuts the argument for which he cites them**

On Page 3 of his Respondent's Brief, Paragraph 3 (extending onto Page 4), the Attorney General cites some statutes whose wording undercuts the argument he cites them for and actually supports one of my

arguments, namely that the Washington State Liquor Control Board has no authority to adjudicate alleged violations of criminal statutes.

1. The Attorney General here says "the Board [can] issue criminal citations for violation of laws specifically related to the sale of alcohol and tobacco" and "[t]he Board can then refer these criminal citations to the local prosecuting attorneys, who have authority to prosecute criminal actions. *See generally* RCW 36.27.020." [Italics in original]

I agree with the Attorney General: the Board can refer the criminal citations to local prosecuting attorneys. What the Board cannot do, however, and what RCW 75.155.100 cannot grant anyone acting under the APA such as an administrative law judge the power to do, is to adjudicate alleged violations of criminal statutes like RCW 26.28.080 that require a public criminal jury trial. Note the following wording (in RCW 70.155.100) that is unconstitutional on its face:

> "RCW 70.155.100… (3) The liquor control board may impose a monetary penalty upon any person other than a licensed cigarette retailer **if the liquor control board finds** that the person has violated RCW 26.28.080…. " [Boldface added]

This means that it is the liquor control board which makes the finding of guilt or innocence of a person alleged to have violated RCW 26.28.080, not a criminal jury. Also note that the legislature could have worded the statute so as to allow a reasonable inference that the Board can impose a penalty if it finds that some judge or some jury, rather than the Board, has found a person guilty of violating a criminal statute.

2. The Attorney General also says "It is within the Board's discretion whether to prosecute a violation administratively or refer it for criminal proceedings" and he immediately cites in support of that assertion RCW 10.93.020(2) without any explanation of how the cited statute support that claim. Also, the Attorney General's claim that "the Board does not adjudicate criminal violations itself" is the topic that is actually at issue in this litigation.

3. Again, as to the Attorney General's claim that his argument is supported by RCW 70.155.100, this is again a statement of what is at issue in this case, i.e., whether the Washington State Liquor Control Board by virtue of RCW 70.155.100 does have the authority to adjudicate alleged violations of a criminal statute, RCW 26.28.080. The Attorney General's claim that it is so, does not make it so.

**F. The Attorney General's discussion of the minor's vertically printed drivers license is irrelevant**

In the section of Respondent's Brief entitled "Facts"on Page 4, last paragraph (continuing onto Page 5), the last sentence that begins on Page 4 is a fragment ("The youth operative's compliance checks.") and I am unable to determine what argument the Attorney General is attempting to make. Perhaps it is related to the fact claimed by the Attorney General in the previous sentence that in Washington, drivers licenses issued to minors are printed vertically so as to distinguish them from those of drivers over the age of 21. If true, that fact is irrelevant, because, as the Attorney General recites in the next sentences following the fragment, I typed into

the cash register the youth operative's date of birth using her driver's license (Respondent's Brief, Page 5). If she was under 21, she still could have bought cigarettes if she was over 18. I didn't look at any other information on the driver's license; I simply typed in her birth date, making a keypunch error of one digit out of eight.

**G. The printed Notice of Board Action on Tobacco Violation did charge me with a crime**

In the section of Respondent's Brief entitled "Procedural History," Page 5, first full paragraph, in the first sentence, the Attorney General says that the Board staff in the printed Notice of Board Action on Tobacco Violation alleged that I "furnished tobacco to a minor." That is an understatement. The Board staff alleged in the Notice that I had violated RCW 26.28.080 (Page 145 of Certified Appeal Board Record), a criminal statute the violation of which is a gross misdemeanor.

**H. The administrative complaint charged me with a crime**

In the fourth sentence, the Attorney General says that the "administrative complaint based on the above-referenced AVN" charged that I had sold tobacco to a minor, "contrary to RCW 26.28.080." Again I point out that RCW 26.28.080 is a criminal statute the violation of which is a gross misdemeanor. Thus, the Board issued two documents, a Notice of Action on Tobacco Violation (Page 145 of Certified Appeal Board Record) and an administrative complaint (Page 96 of Certified Appeal Board Record), each claiming that I had violated a criminal statute. I was given (and I suspect that other people who have been in my

situation have also been given) no indication that I would not be subject to criminal sanctions in this particular action, in addition to whatever penalties are set out in RCW 70.155.100 (3) and (4).

**I. I was, and any person who receives a Notice of Board Action on Tobacco Violation that charges a violation of RCW 26.28.080 is, justified in fearing criminal liability**

In the section of Respondent's Brief entitled "A. RCW 70.155.100 Is Constitutional" on Page 7, first full paragraph, in the second sentence, the Attorney General says that "this penalty [meaning the monetary penalty stated in RCW 70.155.100(4)(a) for violating RCW 26.28.080] is limited to $50 or $100." Yet in the very next sentence the Attorney General once again undercuts his argument and supports mine, by saying "RCW 26.28.080 prohibits selling a tobacco product to a minor and provides that a person who does so 'is guilty of a gross misdemeanor.'" But note that the maximum monetary penalty for a gross misdemeanor is $5,000, as I mentioned in my opening brief. What is a person who receives a Notice of Board Action on Tobacco Violation, which has RCW 26.28.080 printed on it, supposed to make of that, and how can the person resolve the ambiguity? He or she is justified in fearing that he or she now faces criminal liability.

**J. The Attorney General's introductory paragraph to his numbered arguments contains three invalid claims**

On Page 7 of Respondent's Brief the second full paragraph serves as the introduction to the Attorney General's three numbered arguments (1, 2, and 3) under heading A. In the introductory paragraph the Attorney

General correctly states, citing my Appellant's Opening Brief at page 25, that "Mr. Klinkert asserts that RCW 70.155.100 is facially unconstitutional because it does not provide for a jury trial." I certainly agree. However, in his introductory paragraph for the numbered arguments that follow, the Attorney General also makes three brief claims, each of which is also numbered.

As to the Attorney General's first brief claim, namely, "1) the same conduct can give rise to both civil and criminal liability;", I agree. However, I have never disputed that proposition and have never claimed the opposite.

As to the Attorney General's second brief claim, namely, "2) a statute is not converted from civil to criminal merely by referencing conduct that can be punished criminally", I will also deal with this proposition later when the Attorney General makes it in more detail, so let me briefly repeat here what I have previously said: The Attorney General has it backwards. I have never claimed that a statute is converted from civil to criminal merely by referencing conduct that can be punished criminally. I am claiming exactly the opposite, namely, that RCW 70.155.100 can not transform RCW 26.28.080, a criminal statute, into a mere administrative (or civil) violation simply by stating that alleged violations of the criminal statute can be adjudicated by an administrative agency, or the Office of Administrative Hearings, under the APA.

As to the Attorney General's third brief claim, namely, "3) the Legislature intended for enforcement of RCW 70.155.100 to be a civil action", if the statute is, as I argue, unconstitutional on its face, the Legislature's intent is of little consequence To support his third brief claim, the Attorney General repeats his second brief claim, but now incorrectly states that I somewhere made an "assertion that RCW 70.155.100's reliance on RCW 26.28.080 converts enforcement under the former into a criminal action..." Again let me point out that I have never made such an assertion. Moreover, the Attorney General has it backwards. I have never claimed that a statute is converted from civil to criminal merely by referencing conduct that can be punished criminally. I am claiming exactly the opposite, namely, that RCW 70.155.100 can not transform RCW 26.28.080, a criminal statute, into a mere administrative (or civil) violation simply by stating that alleged violations of the criminal statute can be adjudicated by an administrative agency, or the Office of Administrative Hearings, under the APA.

**K. The Attorney General lists several traditional canons of statutory interpretation but never applies them**

On Page 8 of the Respondent's Brief the Attorney General cites several Washington cases in order to set out several canons of statutory interpretation that he thinks should govern this Court of Appeals' decision about the unconstitutionality on its face of RCW 70.155.100 (3) and (4). However, the Attorney General never suggests how the canons are to be applied to any particular language in RCW 70.155.100. I agree with all of

the canons, with some reservations (which I state below) based on common sense and also based on the first canon. Here is my list of all the Attorney General's canons, in the same sequence as the Attorney General listed them and using the Attorney General's wording. Some of the Attorney General's wordings are quotations from the cited cases, but I will omit the case citations and the quotation marks.

1. A party challenging the statute's constitutionality bears the heavy burden of establishing its unconstitutionality beyond a reasonable doubt.

I agree.

2. Reasonable doubt is resolved in favor of constitutionality.

My reservation here is to add that "doubt is resolved in favor of constitutionality" <u>if possible</u>. Otherwise, always construing a statute so as to uphold its constitutionality would prevent a court from declaring <u>any</u> statute to be unconstitutional on its face

3. It is the duty of this court to construe a statute so as to uphold its constitutionality.

My reservation here is that such a construction must be reasonable. Otherwise, always construing a statute so as to uphold its constitutionality would prevent a court from declaring <u>any</u> statute to be unconstitutional on its face.

4. A statute is facially unconstitutional if no set of circumstances exists in which the statute, as currently written, can be constitutionally applied.

I agree.

5. Any analysis of the statute must be done in the context of the entire statutory scheme and its purpose.

I agree.

6. Courts avoid statutory interpretation that leads to absurd results or renders a portion of a statute a nullity.

I have two reservations here. First, it is not "absurd" to declare a statute unconstitutional on its face if it is unconstitutional beyond a reasonable doubt. Second, a court should not avoid declaring "a portion of a statute a nullity" if the relevant portion really is unconstitutional on its face beyond a reasonable doubt.

**L. The Attorney General's title for his ARGUMENT A. 2 states my argument backwards**

On Page 9 of the Respondent's Brief the title of subsection 2 of ARGUMENTS is typed in boldface and is worded as follows: "**That RCW 70.155.10 References Conduct That Can Be Punished As a Gross Misdemeanor Does Not Transform RCW 70.155.100 Into A Criminal Statute.**" The Attorney General again has it backwards. I have never claimed that a statute is converted from civil to criminal merely by referencing conduct that can be punished criminally. What I am claiming is exactly the opposite, namely, that RCW 70.155.100 can not transform

RCW 26.28.080, a criminal statute, into a mere administrative (or civil) violation simply by stating that an alleged violation of a criminal statute (here, RCW 26.28.080, a gross misdemeanor) can be adjudicated by an administrative agency, or the Office of Administrative Hearings, under the APA.

**M. The Attorney General cites cases that do not address the topic at issue in this litigation**

On Page 9 of the Respondent's Brief the Attorney General argues again that "The Legislature may constitutionally impose criminal and civil sanctions for the same conduct", citing Hudson v. U.S., 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997), and "[a]dditionally, 'the Legislature may provide for both civil sanctions and criminal penalties in the same statute without thereby converting the civil proceeding to a criminal or penal one'", citing Winchester v. Stein, 135 Wn.2d 835, 853, 959 P.2d 1077 (1998), a Washington Supreme Court case which cites Hudson, supra. First, these propositions are both beside the point, as I have showed above. Of course the legislature may impose criminal and civil sanctions for the same conduct, and I don't claim otherwise. I do claim that the legislature cannot constitutionally authorize an administrative agency to adjudicate alleged violations of a criminal statute, RCW 26.28.080. Second, both Hudson v. U.S., supra, and Winchester v. Stein, supra, dealt with claims of double jeopardy under the Fifth Amendment of the U. S. Constitution. However, my claim that RCW 70.155.100 (3) and (4) are unconstitutional on their face is based on violation of my rights under the

Sixth Amendment of the U. S. Constitution (and Article 1, Section 22 of the Washington Constitution), the right to a public jury trial.

**N. The Attorney General misstates my argument**

On Page 9 of the Respondent's Brief the Attorney General cites Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 491, 105 S.Ct. 3275, 87 L.Ed.2d 3436 (1985), for the proposition that "a legislative decision to reference another statute does not hinder prosecutions or enforcement proceedings involving the same illegal conduct." The Attorney General's statement is true, I concede, but it is also misleading. I do not argue that RCW 70.155.100 cannot "reference another statute" that involves "the same illegal conduct." I am arguing that RCW 70.155.100 (3) and (4) are unconstitutional on their face because they allow allegations of violation of a criminal statute, RCW 26.28.080, to be adjudicated under the APA. That is a completely different proposition.

**O. The Attorney General states my argument backwards**

On Page 10 of Respondent's Brief the Attorney General uses a slightly different variant of his favorite assertion (now, however, having cited Hudson v. U.S, supra, Winchester v. Stein, supra, and Sedima, S.P.R.L., supra, immediately before this in support of it), namely, his assertion that "the Board's imposition of an administrative, i.e., civil penalty for the sale of tobacco to a minor under RCW 70.155.100 is not converted into a criminal action merely because the behavior can also be punished as a gross misdemeanor." And, once again, I point out, using my

favorite rebuttal, which is that the Attorney General gets it backwards: I have never claimed that a statute is converted from civil to criminal merely by referencing conduct that can be punished criminally. What I am claiming is exactly the opposite, namely, that RCW 70.155.100 can not transform RCW 26.28.080, a criminal statute, into a mere administrative (or civil) violation simply by stating that an alleged violation of a criminal statute (here, RCW 26.28.080, a gross misdemeanor) can be adjudicated by an administrative agency, or the Office of Administrative Hearings, under the APA.

**P. The Attorney General's arguments, and the WAC he cites in support, are irrelevant because they deal with liquor, not tobacco**

1. I am puzzled by the second full paragraph on Page 10 of Respondent's Brief and I don't quite know how to reply, because the Attorney General in support of the following statement, that "[o]n the civil side, as evidenced here, the Board can issue an administrative complaint against the seller. *See generally* WAC 314-42-051", [Italics in original] cites WAC 314-42-051 which deals with liquor violations by liquor licensees and by liquor sales permit holders, not tobacco violations. Furthermore, the remainder of the second full paragraph contains selected quotations from certain provisions in RCW 70.155.100 to which the Attorney General attaches no arguments.

2. The Attorney General in the same paragraph on Page 10 says

"These proceedings are conducted in accordance with the APA" and then cites RCW 70.155.100(8) to support this claim. Yet, first, the phrase "These proceedings" can refer only to the proceedings mentioned in WAC 314-42-051, which as I just now pointed out refer to liquor operations. And second, and more important, it is RCW 70.155.100(8) itself that is a major cause of the unconstitutionality on its face of RCW 70.155.100 (3) and (4), because it purports explicitly to place adjudication of alleged violations of a criminal statute, RCW 26.28.080, in the hands of an administrative agency under the APA. Or, using slightly different language, it is RCW 70.155.100(8) that is in dispute, so that the Attorney General's citation of it to support its own constitutionality is circular and pointless.

3. I am not certain what the Attorney General's purpose is in quoting language from RCW 70.155.100 (4), "The monetary penalty imposed 'may not exceed . . . fifty dollars for the first violation and one hundred dollars for each subsequent violation.'" As I point out in subsection I. above, it is reasonable for a person who receives a pink Notice of Board Action on Tobacco Violation to fear criminal liability. And again, the provision the Attorney General cites, RCW 70.155.100(4), is one of the very provisions in dispute in this litigation.

**Q. There is no "dual enforcement mechanism"**

In the last paragraph on Page 10 of the Respondent's Brief the

Attorney General begins an argument that extends to the bottom of Page 11, implying that RCW 10.93.020(2), RCW 26.28.080, and RCW 9.92.020 constitute one arm of a Washington "dual enforcement mechanism" for violations of the state's tobacco laws. According to the Attorney General, "On the criminal side, the law enforcement designation [meaning, I suppose, the designation of the liquor control board as a "limited authority law enforcement agency" under RCW 10.93.020(2), which the Attorney General cites here and also discussed earlier in subsection III. A. of his Respondent's Brief] allows Board staff to issue criminal citations and, just like any other law enforcement officer refer their investigation to the local prosecuting attorney. *See* RCW 10.93.020(2)." [Italics in original] There are several flaws in the Attorney General's argument here. Here are the two relevant subsections of RCW 10.93.020, i.e., subsections (2) and (4):

> "(2) Limited authority Washington law enforcement agency" means any agency, political subdivision, or unit of local government of this state, and any agency, department, or division of state government, having as one of its functions the apprehension or detection of persons committing infractions or violating the traffic or criminal laws relating to limited subject areas, including but not limited to, the state departments of natural resources and social and health services, the state gambling commission, the state lottery commission, the state parks and recreation commission, the state utilities and transportation commission, the state liquor control board, the office of the insurance commissioner, and the state department of corrections." [Emphasis added]
>
> "(4) Limited authority Washington peace officer" means any full-time, fully compensated officer of a limited authority Washington law enforcement agency empowered by that agency to detect or apprehend violators of the laws in some or all of the

> limited subject areas for which that agency is responsible. A limited authority Washington peace officer may be a specially commissioned Washington peace officer if otherwise qualified for such status under this chapter."

First, nowhere does RCW 10.93.020(2) or (4) say that "Board staff" may issue criminal citations.

Second, nowhere in Chapter RCW 10.93, or anywhere else in the Revised Code of Washington, as far as I can determine, is there a description of the proper procedure for the liquor control board to follow in obtaining prosecution of an alleged violator of the tobacco laws. Thus, the Attorney General's claim that the Board staff can issue citations and "just like any other law enforcement officer, refer their investigation to the local prosecuting attorney," has absolutely no support. Now, I actually do not doubt at all that something similar to the Attorney General's described procedure could occur, but he has certainly not provided any citations to statutes or case law here to justify his claim.

Third, these claims above are an attempt to establish the "criminal side" of a purported "dual enforcement mechanism", but the existence of a civil side is precisely what is at issue in this litigation. So once again the Attorney General is assuming what he must prove, namely that RCW 70.155.100 (3) and (4) constitute a valid administrative (civil) means of adjudicating alleged violations of RCW 26.28.080, a criminal statute.

The Attorney General's final argument on this topic (of a purported "dual enforcement mechanism") is that RCW 70.155.100, which he once again characterizes as a "civil enforcement statute", is

constitutionally valid because [as he argued earlier on Page 10 of his Respondent's Brief] it merely "references conduct that can also result in criminal enforcement" and does not thereby "render all proceedings thereunder criminal." I have shown above in subsection O. that the unconstitutionality on its face arises not from the statute's reference to "conduct that can also result in criminal enforcement" but from its purported grant of authority to an administrative agency to adjudicate violations of a criminal statute.

**R. I rebutted the Attorney General's prima facie evidence in my Appellant's Opening Brief; also, the Attorney General has miscited a case**

On Page 12 of the Respondent's Brief, the title of subsection 3 is typed in boldface: "**The Legislature Intended Its Prohibition To Sell Tobacco To A Minor To Include A Civil Enforcement Component.**" Now, this statement requires examination. What "prohibition" does the Attorney General have in mind? Maybe the Attorney General here is referring to RCW 70.155.100 as the "civil enforcement component" rather than to RCW 26.28.080, because RCW 26.28.080 is explicitly a criminal statute. Yet in his Respondent's Brief the Attorney General has never argued that RCW 70.155.100 includes a civil enforcement component; all along he has been arguing that it is in itself the civil enforcement statute. Thus, the legislature cannot have intended it to include a civil enforcement component.

The Attorney General develops his argument by citing Hudson v. U.S., supra, at 522 U.S. 103: "Even if a statute does not expressly provide that it is civil in nature, the fact that authority to impose the sanction is conferred upon an agency is 'prima facie evidence that Congress intended to provide for a civil sanction." I agree. Such a conferring of authority is ordinarily prima facie evidence. But the term "prima facie evidence" means, according to Black's Law Dictionary, Ninth Edition, pp. 638-9:

> "Evidence that will establish a fact or sustain a judgment unless contradictory evidence is produced." [Emphasis added]

That is, it means rebuttable evidence. In my Appellant's Opening Brief I produced arguments that rebutted the prima facie evidence and I proved beyond a reasonable doubt that RCW 70.155.100 (3) and (4), when read in conjunction with RCW 70.155.100 (8), are unconstitutional on their face. Thus the Attorney General's reliance on Hudson is unavailing because I rebutted the prima facie evidence.

Next the Attorney General relies on U. S. v. One Assortment of 89 Firearms, 465 U.S. 354, 363, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984) for the proposition that a state legislature can express its intent that a statute be civil in nature by creating "distinctly civil procedures." Again, I agree. However, first (and once again) that proposition itself is really irrelevant because what is at issue in this case is whether RCW 70.155.100 (3) and (4) can grant authority to an administrative agency to adjudicate alleged violations of a criminal statute, RCW 26.28.080, and still be, as the Attorney General claims, a civil statute that is constitutional on its face. I

have already shown beyond a reasonable doubt in my Appellant's Opening Brief that RCW 70.155.100 (3) and (4) are unconstitutional on their face.

However, I am unable to find the proposition in question and its related quotation (that a state legislature can express its intent that a statute be civil in nature by creating 'distinctly civil procedures') anywhere in U. S. v. One Assortment of 89 Firearms, supra. First, the 89 Firearms decision did not involve a statute enacted by a state legislature; it involved a federal forfeiture statute. Second, the 89 Firearms decision focused on the issue of double jeopardy where there had been two separate lawsuits, a federal criminal prosecution and a federal civil forfeiture lawsuit. The double jeopardy issue involved the U. S. Constitution Fifth Amendment's prohibition against double jeopardy, but my claim invokes the Sixth Amendment (and Wash. Const. art. I, Sec. 22) guarantee of a right to a public jury trial in criminal prosecutions. Third, in the 89 Firearms decision I have not been able to find any reference to a state legislature or the phrase "distinctly civil procedures". Now, I don't doubt that the topic of a state legislature enacting a statute appears in some appellate decision that also contains the phrase "distinctly civil procedures." I conjecture that the Attorney General has quoted from that case but has simply erroneously cited 89 Firearms instead.

The final paragraph of the Attorney General's argument in subsection 3 is again simply a statement in conclusory form of the topics that are actually at issue in this case.

**S. My request for costs on appeal should be granted because the Washington State Liquor Control Board's (LCB's) actions were not substantially justified**

The Attorney General and I agree that the proper guidelines for awarding costs under RCW 4.84.350 are contained in Silverstreak Inc. v. Washington Dep't of Labor & Industries, 159 Wm/2d 868. 892. 154 P.3d 891 (2007). And we both agree that in order for the LCB's actions to be deemed "substantially justified," thereby preventing my recovery of costs, the Attorney General bears the burden of showing that the LCB's actions "had a reasonable basis in law and fact." Respondent's Brief, Page 13, citing Silverstsreak Inc., supra, at 892. But this means that the LCB's actions must have been justified in both "law and fact". Or, stated differently, I am entitled to my costs on appeal if I am the prevailing party and either (1) the LCB's actions were not justified in law or (2) the LCB's actions were not justified in fact. I will prove more than I am required to do; I will show that the LCB's actions were justified neither in law nor fact.

**1. The LCB's actions were not justified in law**

I believe I have shown beyond a reasonable doubt in my Appellant's Opening Brief that the statute under which I was charged, RCW 70.155.100 (3) and (4), when read in conjunction with RCW 70.155.100

(8), is unconstitutional on its face. That is, the unconstitutionality is visible.

**2. The LCB's actions were not justified in fact -- in four ways**

I repeat here, but list in itemized form and with slightly different wording, my arguments from Pages 28-33 in my Appellant's Opening Brief.

a. Unjustifiable Fact 1. My actions as a cashier satisfied the defense provided in RCW 70.155.090(2). See my argument in my Appellant's Opening Brief, Page 28, last paragraph, to the end of the first paragraph on Page 29.

b. Unjustifiable Fact 2. The LCB knew I had inadvertently mispunched only one digit out of eight, yet they cited me. See my argument in my Appellant's Opening Brief, Page 29, second paragraph, to the end of the first paragraph at the top of Page 30.

c. Unjustifiable Fact 3. The LCB's own annual certification required by the Synar Amendment was slipshod, causing the LCB's ignorance of the facial unconstitutionality of Washington's tobacco law. See my argument in my Appellant's Opening Brief, Page 30, first full paragraph, to the end of the paragraph at the top of Page 32.

d. Unjustifiable Fact 4. The LCB's own review in preparing for its 2012 Synar Report was slipshod, causing its ignorance of the facial unconstitutionality of Washington's tobacco law. See my Appellant's Opening Brief, Page 32, first full paragraph.

**T. I am entitled to remission of my fine**

In footnote 4 on Page 14 of Respondent's Brief the Attorney General points out that the $100 penalty which I paid is not actually considered a "cost" in this litigation. The Attorney General is correct; I made a mistake. After doing some additional legal research, I have learned that the correct linguistic terminology for the action I request is "remission of fines" or "remission of penalties." However, I have found no Washington case law at all on this topic.

The predominant rule in other state appellate decisions seems to be expressed in a recent Colorado Court of Appeals decision, Rector v.City and County of Denver, 122 P.3d 1010, 1015 (2005), which holds that if a defendant fails to avail himself of an opportunity to contest his violation but instead pays a fine without protest, he is not entitled to a later remission of the fine. This rule of law does not apply to me, because I paid the $100 fine explicitly under protest (See Exhibit 7 in Declaration of Costs, CP 60-79) and after I had contested the alleged violation by filing my Notice of Appeal.

As to federal appellate decisions on remission of fines, the only Ninth Circuit Court of Appeals case I could find held that where a prisoner's payment of a fine was merely "improvident", the fine should be remitted to the prisoner or credited to the payment of a different fine, whichever course he wanted to follow. Smith v. United States, 287 F.2d 270, 274 (9th Cir. 1961). Actually, more on point to my case is United

States v. Lewis, 478 F.2d 835, 836 (5th Cir. 1973), which cites Smith v. United States, supra, and states explicitly, "We can see no reason why a person who has paid a fine pursuant to an unconstitutional statute should be required to resort to a multiplicity of actions in order to obtain reimbursement of money to which he is entitled." [Emphasis added]

**III. CONCLUSION**

To my request for relief contained in "E. CONCLUSION" on Page 33 of my Appellant's Opening Brief, please delete from (d) the words "(which include the $100 penalty I paid to the Washington State Liquor Control Board)" and add the following two new subsections after (d):

"(e) requires either the Washington State Liquor Control Board or the appropriate state department to delete any record of my conviction for the alleged violation; and

"(f) directs the Washington State Liquor Control Board, or the Treasurer of the State of Washington, or whichever Washington state department is appropriate, to remit to me within 60 days the fine of $100 that I paid under protest in this case."

Dated this 13th day of March, 2013

Respectfully submitted,

John F. Klinkert
Appellant pro se

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

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|---|---|
| JOHN F. KLINKERT,<br><br>Appellant<br>vs.<br><br>WASHINGTON STATE LIQUOR CONTROL BOARD,<br><br>Respondent | NO. 69359-0-I<br><br>DECLARATION OF MAILING |

I certify that I am over 18 years of age, that I am not a party to this action, and that I served a copy of the APPELLANT'S REPLY BRIEF on the parties named below on the date below by depositing it in the US mail, postage prepaid, in Lynnwood, Washington.

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DATED this 13th day of March, 2013 at Lynnwood, Washington.

Caron C Curry-Klinkert

Caron C. Curry-Klinkert



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