Court of Appeals No. 47727-1-II
Consolidated With Court of Appeals No. 47367-4-II

COURT OF APPEALS, DIVISION II, OF THE STATE OF WASHINGTON

DALE E. ALSAGER, D.O., Ph.D.,

APPELLANT,

v.

BOARD OF OSTEOPATHIC MEDICINE AND SURGERY; *et al.*,

RESPONDENTS.

APPELLANT DALE ALSAGER'S REPLY BRIEF

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ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

United States Constitution

U.S. Supreme Court

Washington State Constitution

Washington Court Cases

Other Jurisdictions

State Statutes

Court Rules

Other Authorities

REPLY

Succinctly stated, the State rests its justification for the actions it took against Dr Alsager and his professional license by its assertions that professional license disciplinary actions are civil enforcement proceedings, and authority of law is vested in it by various statutes. The legal pillars upon which the State's assertions stand are (1) the total disregard of *stare decisis* and the well-established principles of legal precedent, and (2) the total disregard of both federal and State fundamental constitutional rights and privileges. This Court must not, nigh cannot, allow the State to prevail in its bold assertions and unstable foundation; as such would constitute a dramatic step backwards and the destruction of basic constitutional principles regarding and relating to the rights and privileges of the accused in quasi-criminal actions and the protection of all persons from government intrusion into their private affairs.[1] The State implies that the powers granted it by statute are essential in order to effectively regulate various professions, including Osteopathic Physicians. However, protecting constitutional rights and privileges is not the antithesis of effective regulation – the fact is, they are intended to, and must necessarily, compliment each other in order for any disciplinary action imposed to be accepted as just and fair under all the circumstances.

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[1] This case is a stark reminder why both the federal and State Constitutions provide for three independent branches of government; with the judicial branch the final and ultimate arbiter of constitutional and statutory interpretation and issues regarding their application under specific circumstances.

The three main themes comprising the State's position are that (1) quasi-criminal is but a mere label of talismanic aura devoid of any real substantive significance regarding constitutional rights; (2) professional license disciplinary actions are civil enforcement proceedings; and (3) it is vested with broad statutory authority of law to support each of its actions at issue in Dr Alsager's appeal.[2] The State's position is rife with errors that are not only non-harmless, but that severely undermine the very fabric from which our fundamental constitutional rights and privileges are woven.

A. Quasi-Criminal Is Not But A Mere Label Of Talismanic Aura As It Is Specially And Specifically Used To Describe An Action That Is Punitive And In Which The Accused Is Accorded Constitutional Rights And Safeguards That Must Be Respected

Over the duration of its action against Dr Alsager and his professional license, the State has employed as one of its basic memes that Dr Alsager's use of the term quasi-criminal is but talismanic (CAR, at 585-86, 1258) and

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[2] In an effort to divert this Court's focus from the dispositive constitutional issues in this appeal, the State attempts to respond to several issues of fact raised by Dr Alsager in Parts D and E of the Brief of Respondents, at pp. 41-49. Each of the State's points of attempted rebuttal are, however, presented and argued in great detail in Dr Alsager's Main Brief in his Assignments of Error, Statement of the Case, and Argument and Discussion. *See* Appellant Dale Alsager's Main Brief, Part III(A), at pp. 8-9; Part III(B), at pp. 9-10; Part III(C), at pp. 10-11; Part III(D), at pp. 11-12; Part III(E), at p. 12; Part IV, at pp. 12-18; Part VI(F), at pp. 42-49. Respectfully, although Dr Alsager disagrees with and objects to each of the State's attempts at rebuttal in Parts D and E of the Brief of Respondents, there is no further need to elaborate on these issues in Dr Alsager's Reply in order to retain the clear and undeniable demonstration regarding the abject abuse and disregard by both the DOH and Board of his fundamental constitutional rights and privileges; the unlawful search and seizure of alleged prescription records that in addition were not subject to any chain of custody and valid authentication based on documentation in the record; and the patent disregard by the Board Panel of mitigating factors and professional skills that show by clear, cogent and convincing proof that the Board erred as a matter of fact and law by revoking Dr Alsager's professional license to practice in any respect as an Osteopathic Physician and Surgeon with absolutely no opportunity ever for reinstatement – the ultimate death sentence imposed on a licensee, his livelihood, and his reputation. *In re Flynn*, 52 Wn.2d 589, 596, 328 P.2d 150 (1958).

thus has no significance in the determination of whether the accused in such an action has constitutional rights and privileges any different from a mere party or witness in a civil proceeding. The State's mischaracterization and diminishment of the importance of quasi-criminal underscores its disdain for recognizing and fully applying fundamental constitutional rights and privileges under both the federal and State Constitutions in professional license disciplinary proceedings. This misconception of constitutional magnitude must be promptly corrected by the Court with its issuance of a precedential decision binding on all lower tribunals involved in quasi-criminal actions. As very well explained almost 60 years ago, quasi-criminal is not used or intended as talismanic; it has important constitutional significance.

> The proceeding concerns a punitive offense, quasi-criminal in nature; and there is the same regard here as in strictly criminal cases for the essential civil rights and liberties designed to secure the individual against arbitrary actions. . . . A quasi-crime in its early technical sense is 'the act of doing damage or evil involuntarily'; in its enlarged usage it embraces all offenses not crimes or misdemeanors, but in the nature of crimes; the prefix to the noun signifies resemblance, in a certain sense or degree; a class of offenses against the public 'which have not been declared crimes, but wrongful against the general or local public which it is proper should be repressed or punished by forfeitures and penalties.' *Wiggins v. City of Chicago*, 68 Ill. 372 (Sup.Ct. 1873). . . . **'Quasi-criminal' is not an empty label. The classification is in no sense illusory; it has reference to the safeguards inherent in the very nature of the offense, the punitive quality that characterizes the proceeding,** and the requirements of fundamental fairness and essential justice to the accused.

State v. Laird, 135 A.2d 859, 861-62 (N.J. 1957, emphasis added) (prosecution for operating a motor vehicle while intoxicated). Thus it is long held

and well-established that in actions that are quasi-criminal, the accused "may testify or he may refrain from testifying and no unfavorable inference may be drawn against him because he has not testified." *People ex rel. Fischer v. Jones*, 101 N.Y.S.2d 317, 320 (N.Y. Fam. Ct. 1950) (filiation proceedings are quasi-criminal and the defendant's refusal to testify does not create any presumption against him). Finally, any proceeding that is quasi-criminal and in which the fundamental constitutional rights of the accused are not recognized and protected is but a sham and a travesty of justice.

> [Trial was had] on a charge which is quasi-criminal in its nature. . . . Trial on such a charge, even in a summary proceeding, must be so conducted as to respect and safeguard the rights of the accused. . . . [The accused's] purported trial was not timely, nor did it afford him any opportunity to defend himself with the aid of his counsel if he so chose [as] there is a strong inference that [the accused] was deliberately denied the benefit of his counsel's services. . . . [A] reading of the entire record impels the conclusion that he was railroaded rather than given a fair trial. The entire proceeding is a shameful and shocking travesty upon justice.

Kruttschnitt v. Hagaman, 25 A.2d 200, 202 (N.J. 1942) (action on charge of drunken driving).

It is very clear that our courts' firmly established holding that professional license disciplinary proceedings are quasi-criminal actions has great constitutional significance negating the bogus talismanic aura the State wishes to ascribe thereto. To diminish the respect and protection of all constitutional rights and privileges accorded the accused in a quasi-criminal action is to render such proceeding 'shameful and a travesty upon justice' with the very strong presumption that the accused was, as here, in fact 'railroaded'.

B. The State's Assertion That Its Regulation Of The Medical Profession Has Always Been By Civil Proceedings Is Misleading And False

The State asserts as fact and law that its "power to investigate and discipline licensees for unprofessional conduct . . . have ***always*** been civil proceedings." Brief of Respondents, at p. 1 (emphasis added). As a central support to its recurring theme in not only its license revocation action against Dr Alsager but in this appeal as well, the State's assertion is false. It is very clear that even before statehood physician disciplinary measures had a very distinct and intended punishment aspect for offenses against the law.

> A practitioner of medicine or surgery who shall present to an auditor a diploma or record which has been obtained or made fraudulently or which is in whole or in part a forgery, or shall make any false statement to be filed or registered, or shall practice medicine or surgery, without conforming to the requirements of this chapter **or shall otherwise violate or neglect to comply with any of the provisions of this chapter**, shall be deemed guilty of a misdemeanor and on conviction shall be punished for each and every offence by a fine of one hundred (100) dollars, . . . or be imprisoned in the county jail for the proper county for the term not exceeding one year, or both, or either, at the discretion of the court.

Code of Washington, Chapter CLXIX, § 2291 (1881, emphasis added).[3]

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[3] Note that under the Uniform Disciplinary Act, Chapter 18.130 RCW, the various acts and practices constituting criminal offenses in the foregoing Territorial Code are now defined as unprofessional conduct subject to disciplinary action including, *e.g.*, RCW 18.130.180(1) (commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession – providing a false affidavit or oath to any statement required for licensure constitutes perjury under the Code of Washington, § 2294); RCW 18.130.180(2) (misrepresentation or concealment of a material fact in obtaining a license); RCW 18.130.180(7) (violation of any State statute regulating the profession). Supplemental to actions against the professional license and fines imposed against the licensee, the Uniform Disciplinary Act also provides for criminal prosecution pursuant to RCW 18.130. 185. For example, "a person who attempts to obtain, obtains, or attempts to maintain a license by willful misrepresentation or fraudulent representation is guilty of a gross misdemean- (continued...)

In the 1889-90 legislative session immediately after statehood, the new Legislature enacted an "Act to regulate the practice of medicine and surgery in the state of Washington, and to license physicians and surgeons, ***and to punish all persons violating the provisions of this act.***" Washington Session Laws, 1889-90, at p. 114 (Preamble, emphasis added).[4] The State cites this law as purportedly standing for its proposition that "the power to investigate and discipline licensees for unprofessional conduct . . . have ***always been civil proceedings.***"[5] However, the State's citation is in reference only to appeals in the superior court from the state medical examining board's decision to either refuse to issue a license or to revoke a license, wherein such appeal would proceed as in a civil action. 1889-90 Session Laws, at pp. 117-19, § 6 (under the 1889-90 Session Laws the examining board had two, and only two, actions it could take; namely, either refuse an application for a license, or revoke an existing license to practice).[6] Nothing

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[3](...continued)
or." RCW 18.130.200. It is thus very evident that in subsequent acts to regulate the medical practice and practitioners the Legislature intended to carry forth the underlying purpose of its early enactments to, as in criminal law, punish the accused licensee for offenses against the law. As clearly evinced in the following discussion, our jurisprudence defining license disciplinary actions as quasi-criminal is not a talismanic shroud, it is grounded in our long history that such actions are in fact intended to punish, and not be a mere civil wrist slap.

[4] The only section of the 1881 Territorial Code repealed by this 1890 Act was Section 2289 that required the registration of diplomas with the county auditor. 1889-90 Session Laws, at p. 120, § 10. All other provisions of the 1881 Territorial Code remained intact.

[5] Brief of Respondents, at p. 1 (emphasis added).

[6] In an appeal (Section 6) the appellant was referred to as the "applicant" where the board refused to issue a license, and as the "licentiate" in reference to a person who had a license (continued...)

in the Session Laws directly addresses, however, the conduct, type, and nature of hearing required to be held *by the examining board* in order to revoke a license.[7] Nevertheless, the 1889-90 Session Laws give a very strong indication as to the nature of the hearing required to be conducted in order for the examining board to revoke an existing license. First, and perhaps foremost, this entire Act regulating the practice of medicine is wholly contained and set forth in Chapter VI of the 1889-90 Session Laws that is entitled "CRIMINAL PRACTICE." 1889-90 Session Laws, at p. 99. And it thus follows that the "licentiate" against whom a complaint was filed alleging "unprofessional or dishonorable conduct" is called the "accused" who "may appear at [a] hearing, and defend against the accusations of such complaint." 1889-90 Session Laws, at pp. 116-17, § 5. Finally, Section 8 of the 1889-90 Session Laws provides that "any person practicing medicine or surgery within this state . . . contrary to the provisions of this act, shall be deemed guilty of a misdemeanor" and subject to a fine of not less than $50 and/or imprisonment in the county jail for not less than ten nor more than ninety days. 1889-90 Session Laws, at pp. 119-20, § 8. Included in Section 4 of the 1889-90 Session Laws, at p. 116, are those acts and practices defined as constituting "unprofessional or dishonorable conduct" and which are con-

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[6](...continued)
revoked.

[7] No hearing was required in order for the examining board to refuse to issue a license.

sistent with those acts and practices constituting unprofessional conduct under the current Uniform Disciplinary Act; respectively, RCW 18.130.180 (18), RCW 18.130.180(20), RCW 18.130.180(3), RCW 18.130.180(1), and RCW 18.130.180(23)(a).

Clearly, since even before and promptly upon gaining statehood, the State has deemed criminal and punished certain acts and practices of medical licensees now characterized as unprofessional conduct under today's Uniform Disciplinary Act. This is the table setting upon which punishment is meted by the State against professional licensees and their licenses for offenses against the law now characterized as unprofessional conduct.[8] This historical setting had, and continues to have, a distinctly criminal aspect to what the State fervently wishes to have this Court accept as merely civil proceedings, and thereby in such context deny to the accused the full application of all of his/her fundamental constitutional rights and privileges.

C. Under Established Washington Jurisprudence, Professional License Disciplinary Proceedings Are Quasi-Criminal Actions

It is upon the State's mischaracterization of professional license disciplinary actions as simply civil proceedings that rests its justification for denying the accused professional licensee fundamental federal and State constitutional rights and privileges that are the focus of Dr Alsager's appeal. But

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[8] Furthermore, in addition to punitive actions against the license itself such as permanent revocation, the State may assess against the licensee the "payment of a fine for each violation of this chapter, not to exceed five thousand dollars [$5,000] per violation." RCW 18.130.160 (8).

in order for this Court to accept the State's premise, over 57 years of precedent and persuasive authority must be ignored – or even worse, overruled and the doctrine of *stare decisis* abandoned. This Court will not, nigh cannot, undertake such course of action to deny citizens essential rights and privileges to which they are legally entitled.

As set forth in great detail in Dr Alsager's Main Brief, the Washington Supreme Court has long held that professional license disciplinary proceedings are quasi-criminal actions. *See* Appellant Dale Alsager's Main Brief, at pp. 18-19, 22. Contrary to any inference promoted by the State alluding to legislative intent to the contrary, this judicially-determined quasi-criminal nature of professional medical license disciplinary proceedings has continued unabated long after the Legislature first enacted the Uniform Disciplinary Act in 1984.[9] *See, e.g., Clausing v. Department of Health*, 90

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[9] The State implies that the legislative intent set forth in the 2007-2008 Session Laws, Chapter 134, § 1, amending the Uniform Disciplinary Act has somehow effectively eviscerated the quasi-criminal nature of professional license disciplinary proceedings and, according to it, supports its position that such actions are now merely civil proceedings in all respects with no more constitutional rights or privileges accorded the licensee as are due a party or witness in an ordinary civil action. Brief of Respondents, at p. 1 *et seq*. The State cannot be more mistaken, as the Legislature cannot change the basic character of an action in derogation of the Supremacy Clause and U.S. Supreme Court precedent, Wash. Const. art. I, § 2, and in so doing abrogate fundamental constitutional rights and privileges by mere fiat or declaration of intent or purpose. *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 372, 96 P.3d 979 (2004, Sanders, J., dissenting) ("the constitutional rights of our citizens cannot be altered by statute" and constitutional mandates cannot be abrogated by statute); *Booth Fisheries Corporation v. Case*, 182 Wash. 392, 399, 47 P.2d 834 (1935, Beals, J., dissenting) (declarations of legislative intent or purpose will not be given effect where such conflicts with constitutional provisions or is inconsistent with the organic law of the State). The Legislature corrects any such erroneous interpretation by acknowledging that "statutory and regulatory requirements provide sufficient due process protections to prevent the unwarranted revocation of health care provider's license." Chapter 134, § 1, at pp. 691-92. The breadth of due process protections includes such fundamental constitutional rights as those

(continued...)

Wn. App. 863, 955 P.2d 394 (1998) (Osteopathic Physician); *Nguyen v. State, Department of Health Medical Quality Assurance Commission*, 144 Wn.2d 516, 29 P.3d 689 (2001) (medical doctor).[10] The starting position, in fact the dispositive position, from which Dr Alsager's constitutional assertions and appeal stem is the fundamental truth that under Washington law professional license disciplinary proceedings are quasi-criminal actions.

D. Under Established U.S. Supreme Court Jurisprudence, The Accused In Quasi-Criminal Actions Is Entitled To The Full Protection Of Fourth And Fifth Amendment Rights And Privileges Without Risk Of Sanction Or Adverse Inference, Just As In Criminal Cases

Grounded solidly on U.S. Supreme Court binding precedent under the Supremacy Clause, the accused in quasi-criminal actions is constitutionally entitled to the full protection of the Fifth Amendment's right to remain silent

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[9](...continued)
guaranteed by the Fifth Amendment's privilege against self-incrimination. *State v. Escoto*, 108 Wn.2d 1, 8, 735 P.2d 1310 (1987, Durham, J., concurring) ("due process guaranties includ[e] the privilege against self-incrimination"). Moreover, the Administrative Procedure Act, Chapter 34.05, governs the proceedings of agencies under the Uniform Disciplinary Act, RCW 18.130.100, and clearly provides that "nothing in this chapter may be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law." RCW 34.05.020. Neither the Legislature nor the Respondents can or have effectively abrogated the fundamental federal and State constitutional rights and privileges to which Dr Alsager is entitled to assert and have fully applied and enforced in the State's quasi-criminal professional licence disciplinary action against him and his license.

[10] In fact, since January 2009, there have been at least one Washington Supreme Court, two Court of Appeals published opinions, and one Court of Appeals unpublished opinion (that cannot be cited pursuant to GR 14.1), that reference either the *In re Revocation of License of Kindschi*, 52 Wn.2d 8, 10-11, 319 P.2d 824 (1958) or the *Washington Medical Disciplinary Board v. Johnston*, 99 Wn.2d 466, 474, 663 P.2d 457 (1983), seminal holdings that medical license disciplinary proceedings are quasi-criminal actions. This basic holding has not changed one iota since 1958, notwithstanding the enactment and subsequent amendments of the Uniform Disciplinary Act, Chapter 18.130 RCW.

and privilege against self-incrimination without sanction or adverse inference, and the Fourth Amendment's right to protect private records from government intrusion without a search warrant, to the same absolute extent as the accused in a criminal case. *Boyd v. United States*, 116 U.S. 616, 633-34, 6 S. Ct. 524, 29 L. Ed. 746 (1886); *Spevack v. Klein*, 385 U.S. 511, 514-15, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967). Perhaps the foregoing is best and most succinctly summarized in the observation that:

> [In] quasi-criminal cases, the Fifth Amendment privilege is fully applicable; the [accused] may refuse to testify altogether and no adverse inference may be drawn from such refusal.

City of Philadelphia v. Kenny, 369 A.2d 1343, 1348-49 (Pa.Commw.Ct. 1977), *cert. denied*, 434 U.S. 923 (1978). And with this very clear, concise and correct statement of constitutional law, Division 1 of our Court of Appeals fully concurs:

> [The] Fifth Amendment privilege against compulsory self-incrimination applies in any criminal case, U.S. Const. amend. 5, as well as in quasi-criminal cases, *Boyd v. United States*, 116 U.S. 616, 633-34, 29 L. Ed. 746, 6 S. Ct. 524 (1886), but not in civil enforcement proceedings.

Washington v. Ankney, 53 Wn. App. 393, 397, 766 P.2d 1131 (1989).

These fundamental federal constitutional rights and privileges are further enhanced by application of Wash. Const. art. I, §§ 7 and 9 (as under the Washington Constitution there is no *required records* exception to the privilege against self-incrimination and any erosion to the protection of private affairs, including prescription records, from government intrusion and

acquisition without a properly supported and issued search warrant).

The State continues in its attempt to diminish the continued validity and vitality of *Boyd* – but to no avail. As for *Boyd's* clear holding that the accused in what is determined to be a quasi-criminal action is legally entitled to the full and absolute assertion and protection of the Fifth Amendment's right to remain silent and privilege against self-incrimination, this fundamental principle of constitutional law remains intact and applicable in all respects. *Boyd's* equally clear holding that private records/papers of the accused in what is determined to be a quasi-criminal action and which are testimonial in content to be used as evidence of guilt against him/her, likewise continues in its vitality as such records are legally entitled to the full and absolute protection of the Fourth Amendment, as properly enhanced by the increased protection and privacy accorded private affairs under and pursuant to Wash. Const. art. I, §§ 7 and 9. As for the important role the 1886 *Boyd* decision had in the formation of our 1889 State Constitution and the fundamental protections set forth therein, *see* Comment, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 Wash. L. Rev. 459, 522 (1986).

Where courts have strayed from the sound holdings of *Boyd* stem from either their characterization of certain (1) proceedings and/or remedies

as civil and non-punitive[11] rather than quasi-criminal in nature,[12] or (2) records, papers or other personal matter as having public or non-testimonial attributes, or otherwise not subject to a reasonable expectation of privacy,[13] thus giving rise to the so-called required records exception to Fourth and Fifth Amendment protections.[14] And courts acknowledge that where an action is held to be quasi-criminal and the Fifth Amendment would be fully applicable, the accused may nevertheless be deemed to waive his/her

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[11] Thus it was in the State's cited case of *United States v. Ward*, 448 U.S. 242, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980), that the monetary penalties imposed under the Federal Water Pollution Control Act were deemed to be civil rather than criminal in nature, consistent with the label affixed thereto by Congress.

[12] *But see* the excellent discussions of *Boyd* and its continued validity and vitality as applied to quasi-criminal actions in *One 1995 Corvette v. Mayor and City Council of Baltimore*, 724 A.2d 680 (Md. 1999), *cert. denied*, 528 U.S. 927, 120 S. Ct. 321, 145 L. Ed. 2d 250 (1999).

[13] Not surprisingly and speaking volumes by their absence, the State chose to omit from its Brief of Respondents any mention or reference whatsoever to several cases cited by Dr Alsager as clearly holding that prescription records have a heightened expectation of privacy by both the physician and patient and are protected by the Fourth Amendment from government intrusion and acquisition without a search warrant. *See Oregon Prescription Drug Monitoring Program v. U.S. Drug Enforcement Administration*, 998 F. Supp. 2d 957 (D. Oregon 2014) (holding that prescription records held by a third party in a database, very similar to our Prescription Monitoring Program database, retain a very reasonable and protected expectation of privacy, and cannot be disclosed to government agencies even under an administrative subpoena); *State v. Skinner*, 10 So.3d 1212, 1218 (La. 2009) (search warrant required because of reasonable expectation of privacy in prescription records). Apparently contrary to their position now taken, Respondents appeared to concede in the trial court proceeding that Dr Alsager had the right to assert an expectation of privacy in prescription records regardless of by whom and wherever kept – in the PMP database or pharmacy records.

[14] As for the reinvigoration of *Boyd's* Fifth and Fourth Amendments protection of private records, *see United States v. Hubbell*, 530 U.S. 27, 55-56, 120 S. Ct. 2037, 147 L. Ed. 2d 24 (2000, Justice Thomas, with whom Justice Scalia joins, concurring -- soundly criticizing *Fisher v. United States*, 425 U.S. 391 (1976), and promoting its reconsideration and the ill-conceived *required records* exception). *See also* Clemens, *The Pending Reinvigoration of Boyd: Personal Papers Are Protected by the Privilege Against Self-Incrimination*, 25 N. Ill. U. L. Rev. 75 (2004) (*Boyd* still applies to protect personal papers from seizure without a warrant); *De La Cruz v. Quackenbush*, 96 Cal. Rptr. 2d 92, 98-104 (Cal.App. 2000) (the mere fact that the government may require a business to maintain certain records is not sufficient justification for the government to seize those records without a search warrant).

constitutional rights and privileges if such are not timely asserted in the proceeding.[15] Note that none of the foregoing grounds apply here.

E. Contrary To The State's Implication, Ruling In Favor Of Dr Alsager's Constitutional Rights And Privileges Will Not Be The Death Knell Of Effective Regulation And Discipline Of Professional Licensees, Only Those Regulatory Aspects Of The State's Current Enforcement Program Contrary To Established Legal Principles Will Be Forced To Comply With A Licensee's Fundamental Constitutional Rights And Privileges

Respondents state a "[h]olding that licensing proceedings are criminal in nature would be a dramatic departure from the existing case law and could create problematic unintended consequences." Brief of Respondents, at p. 31. Furthermore, the State has an apparent issue with Judges or some other independent judicial magistrate overseeing the seizure of prescription records for its investigative or prosecutorial purposes, a well-established and time-honored function that ensures seizures are in all respects constitutional.

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[15] Thus it was in the State's cited case of *State Bar Grievance Administrator v. Moes*, 205 N.W.2d 428 (Mich. 1973), that although the Court fully concurred with the holding in *Spevack*, *supra*, and that disbarment cannot be predicated on the assertion of the licensee's Fifth Amendment rights, such constitutional principle had no application where the licensee failed to appear and at no time asserted his Fifth Amendment rights; thus, the licensee was deemed to have waived his constitutional rights and privileges. *Moes*, 205 N.W.2d at 430. And in the State's cited case of *State Bar Grievance Administrator v. Baun*, 232 N.W.2d 621 (Mich. 1975), although the Court never referenced the disbarment proceeding as a quasi-criminal action, the concurring opinion acknowledged that the licensee had the right and privilege under the Fifth Amendment not to be called to the stand and have any questions of any kind put to him, and that "the hearing panel did not err in ruling that Baun was under no obligation to take the stand or answer any questions." *Baun*, 232 N.W.2d at 629 (Levin, J., concurring). In stark contrast, here the Presiding Officer, knowing as fact that Dr Alsager would stand on his Fifth Amendment rights and privileges and decline to testify, not only allowed the prosecutor to call Dr Alsager to the witness stand, but to then proceed and pose to an empty chair numerous incriminating queries in the presence of the Board Panel; and then topping that off with allowing the prosecutor to invite the Board Panel to draw an adverse inference from Dr Alsager's assertion of his constitutional rights and privileges. *See* CAR, at 2056-65; CAR, at 2065, 2123.

> Requiring a superior court to review every contested demand for patient records would not only become overly burdensome, but more importantly it would interrupt the regulatory scheme by interjecting a decision-maker without medical expertise between those charged by the legislature with their profession and the regulated person.

Brief of Respondents, at pp. 21-22. These assertions are but red herrings and have no sway in this Court's determination of the accused's fundamental constitutional rights and privileges in quasi-criminal professional license disciplinary proceedings.[16]

Affording a professional licensee fundamental Fourth and Fifth Amendment rights and privileges as enhanced by greater protections afforded under Wash. Const. art. I, §§ 7 and 9, including the security over private/ personal records and documents and the right to remain silent and privilege against self-incrimination, at all stages of a disciplinary proceeding, and removing the risk of sanctions, monetary penalties, and adverse inferences for the assertion thereof, will not effectively eviscerate the DOH/Board's ability to ever regulate and issue sanctions against a licensee for unprofessional conduct. Quasi-criminal cases, just as in all criminal cases, must be prosecuted on the efforts of the State other than by compelling testimonial confessions or evidence from the accused under threat of sanctions, as here.

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[16] One can only imagine that criminal prosecutors made this same argument ages ago in Fourth and Fifth Amendment cases as well as under Wash. Const. art. I, §§ 7 and 9 – as it's so much easier to obtain evidence and obtain a conviction without the judiciary becoming involved at critical steps to ensure that fundamental constitutional rights and privileges are fully respected at all stages and not trampled upon into oblivion. Recall also that here, neither Dr Alsager nor his patients were under any prior notice or warning that medical records, including purported prescriptions, would be totally exempt from constitutional protections.

> [T]he government seeking to punish an individual [must] produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.

Miranda v. Arizona, 384 U.S. 436, 460, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).[17] The Fourth and Fifth Amendments must be accorded liberal construction in favor of the rights they are intended to secure. *Counselman v. Hitchcock*, 142 U.S. 547, 562, 12 S. Ct. 195, 35 L. Ed. 1110 (1892).[18] Because the privilege against self-incrimination "reflects many of our fundamental values and most noble aspirations," *Murphy v. Waterfront Commission*, 378 U.S. 52, 55, 12 L. Ed. 2d 678, 84 S. Ct. 1594 (1964), it is "the essential mainstay of our adversary system." Accordingly, the Fifth Amendment privilege against self-incrimination is paramount, even where its invocation makes the prosecution of a case more problematic, as "the immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime." *Hoffman*, 341 U.S. at 490. Likewise, recognizing that prescription records and other private medical documents are entitled to a

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[17] "And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or forfeit his property, is contrary to the principles of free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." *Boyd*, 116 U.S. at 631-32.

[18] The Fifth Amendment's "guarantee against testimonial compulsion, like other provisions of the Bill of Rights, 'was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed.' *Feldman v. United States*, 322 U.S. 487, 489 (1944)." *Hoffman v. United States*, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951).

reasonable, if not in fact heightened, expectation of privacy under Wash. Const. art. I, § 7, does not preclude the government from ever obtaining such records for regulatory or enforcement purposes; this only means that the government must first make its case for such seizure to an independent body which may then, if probable cause is adequately shown, issue a search warrant.[19]

> A warrant assures the citizen that the intrusion is authorized by law, and that it is narrowly limited in its objectives and scope. . . . It also provides the detached scrutiny of a neutral magistrate, and thus ensures an objective determination whether an intrusion is justified in any given case.

Skinner v. Railway Labor Executives' Association, 489 U.S. 602, 622, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989).[20]

The State should have no fear that its professional license regulatory and enforcement powers will be eviscerated when this Court decides that yes, indeed, professional licensees and their private affairs, including patient medical and prescription records, are protected by fundamental constitutional rights and privileges under and pursuant to U.S. Const., Amends. IV and V,

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[19] "Except in the rarest of circumstances, the *authority of law* required to justify a search pursuant to article I, section 7 consists of a valid search warrant or subpoena issued by a neutral magistrate. This court has never found that a statute requiring a procedure less than a search warrant or subpoena constitutes *authority of law* justifying an intrusion into the *private affairs* of its citizens. This defies the very nature of our constitutional scheme." *State v. Ladson*, 138 Wn.2d 343, 353 n.3, 979 P.2d 833 (1999).

[20] *See also Hill v. Philpott*, 445 F.2d 144 (7th Cir. 1971) (Fifth Amendment rights violated in use against taxpayer of his personal books and records seized by search warrant); *Moyer v. Commonwealth of Virginia*, 520 S.E.2d 371 (Va.App. 1999) (analysis that *Boyd's* holding regarding the Fourth and Fifth Amendments' protection of private records and papers stands undisturbed, notwithstanding *Fisher*).

as enhanced by Wash. Const. art. I, §§ 7 and 9, that cannot be ignored or abridged by government officials and agencies in their investigation and quasi-criminal prosecution of alleged unprofessional conduct.[21] The only real and well-founded fear that exists and is ongoing is with the professional licensee who is being wrongly denied his/her fundamental constitutional rights and privileges and punished for the assertion thereof while waiting for this Court to render its decision, for it is during this waiting period that each professional licensee involved in a quasi-criminal disciplinary proceeding is unfairly and unjustly placed "between the *Scylla* of intentionally flouting state law and the *Charybdis* of foregoing what he believes to be constitutionally protected activity." *Steffel v. Thompson*, 415 U.S. 452, 462, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974).

In these quasi-criminal actions, the DOH and Board cannot take shortcuts and deny fundamental constitutional rights and privileges. Where, as here, fundamental and well-established constitutional rights and privileges accorded targeted licensees and private medical records, including prescriptions, are in play and at risk, this Court must not permit the State's interest in regulating professions and punishing unprofessional conduct to overwhelm such constitutional protections. *United States v. Wujkowski*, 929 F.2d 981,

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[21] Clearly, the business of prosecuting alleged unprofessional conduct in a quasi-criminal action that results in imposition of the administrative death penalty on a professional licensee should not be as easy as wished by the State. It is the clear intent of, for example, the Fifth Amendment to make such prosecution more difficult than without such protections, but nevertheless not impossible. *Hill*, 445 F.2d at 149-50.

985-86 (4th Cir. 1991) (even the substantial government interest in pursuit of white collar crime cannot be permitted to overwhelm constitutional protections, including the Fifth Amendment).

In sum, Respondents have no well-founded fear of any "problematic unintended consequences" stemming from this Court's final and binding decision that the accused in professional license disciplinary quasi-criminal actions have full and absolute Fourth and Fifth Amendment rights and privileges, as enhanced by Wash. Const. art. I, §§ 7 and 9.[22]

CONCLUSIONS

No matter how hard it tries, no matter how fervently it wishes, no matter what tactics it employs, the State cannot change the basic nature of the discipline of medical professional licensees. Such discipline was punishment back before statehood. Such discipline continues to be punishment under today's Uniform Disciplinary Act. Disciplinary proceedings were quasi-criminal actions back before statehood. Disciplinary proceedings continue to be quasi-criminal actions under today's Uniform Disciplinary Act. As a direct and inescapable result, professional medical licensees are legally entitled to the full and absolute federal and State constitutional protections under and pursuant to U.S. Const., Amends. IV and V, as enhanced by Wash.

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[22] Including protection afforded private patient medical records and prescriptions, wherever and by whomever kept. It should be noted once more that it is herein unchallenged and undisputed that, as set forth from the very beginning, Dr Alsager's patient medical records and prescriptions are his own personal, private records.

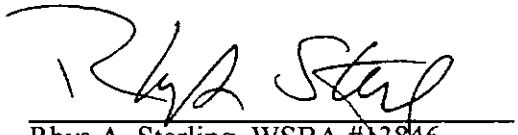
Const. art. I, §§ 7 and 9, without penalty or sanction and with no adverse inference stemming from their assertion; and private medical records wherever and by whomever kept, including prescriptions, may be obtained by the government only by search warrant properly issued and supported by probable cause. Dr Alsager was denied the full application and protection of these fundamental constitutional rights and privileges in quasi-criminal professional license disciplinary proceedings, and in so doing, the State imposed on him, his reputation, and his livelihood, the ultimate administrative death penalty – permanent revocation of his professional medical license to practice as an Osteopathic Physician and Surgeon with absolutely no opportunity ever for reinstatement.

Based on the foregoing, Dr Alsager respectfully asks this Court to vacate the Board's Final Order and order that he be reinstated as an Osteopathic Physician and Surgeon with all rights and privileges thereby entitled.

Dated this 7th day of October, 2015.

Respectfully submitted,

RHYS A. STERLING, P.E., J.D.



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Attorney for Appellant Dale E. Alsager

47727-1-II
CONSOLIDATED WITH 47367-4-II

DECLARATION OF SERVICE

DALE E. ALSAGER, D.O., Ph.D.,

Appellant,

v.

BOARD OF OSTEOPATHIC MEDICINE AND SURGERY;
et al.,

Respondents.

STATE OF WASHINGTON)
) ss: DECLARATION OF RHYS A. STERLING
COUNTY OF KING)

RHYS A. STERLING hereby says and states under penalty of perjury:

1. I am over the age of 21 and I am competent to testify regarding the matters herein described. I make this declaration on my own personal knowledge.

2. I am the attorney of record representing Appellant Dale E. Alsager in his two appeals to the Washington State Court of Appeals, Division 2, captioned *Alsager v. Board of Osteopathic Medicine and Surgery, et al.*, No. 47727-1-II, consolidated with No. 47367-4-II.

3. By postage prepaid priority first class mail on October 8, 2015, I filed in the Court of Appeals, Division II, the original and one (1) copy of the APPELLANT DALE ALSAGER'S REPLY BRIEF in No. 47727-1-II and the original DECLARATION OF SERVICE in this matter, by placing in the United States mail the same addressed to:

Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, Washington 98402
Attn: David C. Ponzoha,
Clerk/Administrator

4. By postage prepaid priority first class mail on October 8, 2015, I served one (1) copy of APPELLANT DALE ALSAGER'S REPLY BRIEF in No. 47727-1-II and a copy of the

ORIGINAL

DECLARATION OF SERVICE filed in this matter, by placing in the United States mail the same addressed to:

Kristin G. Brewer, AAG
Office of the Attorney General
P.O. Box 40100
Olympia, Washington 98504-0100
Attorney for Respondents.

5. Pursuant to the provisions of RAP 10.2(d), 10.2(h), and 10.4(a)(1), Appellant's Brief has been properly filed and all parties required to be served with a copy of both the APPELLANT DALE ALSAGER'S REPLY BRIEF in No. 47727-1-II and this DECLARATION OF SERVICE have been served as set forth above.

I certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

October 8, 2015
DATE

RHYS A. STERLING (WRITTEN)
WSBA # 13846

Hobart, WA
PLACE OF SIGNATURE

Rhys A. Sterling
RHYS A. STERLING (PRINTED)