

NO. 79712-9

IN THE SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

SCOTT ALAN CHAMBERLIN,

Appellant.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
07 APR 01 AM 7:59
BY RONALD R. CARPENTER
CLERK

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

The Honorable Alan R. Hancock, Judge
Superior Court Cause No. 05-1-00026-1

RESPONSE BRIEF TO AMICUS OF ACLU AND WACDL

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY
WSBA # 22926
Island County Courthouse
P.O. Box 5000
Coupeville, WA 98239
(360) 679-7363

By: Gregory Banks
Prosecuting Attorney
WSBA # 22926, OIN 91047
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. RESPONSE TO SELECTED ARGUMENTS IN AMICUS BRIEF...1	
A. The Process Due To A Criminal Defendant When Challenging The Legality Of A Search Warrant Is Distinct And Independent From The Issue Of Whether The Warrant Was Properly Issued.	1
B. A Judge Who Approves A Search Warrant Is Not Supervising The Investigation And Does Not Vouch For The Accuracy Of The Investigation.	5
C. The Text Of The Washington Constitution Is Silent Regarding Whether Evidence Must Be Excluded For Constitutional Violations.	12
II. CONCLUSION	18

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV	16
-----------------------------	----

FEDERAL CASES

<i>Adams v. New York</i> , 192 U.S. 585, 24 S. Ct. 372, 48 L. Ed. 575 (1905).....	16
<i>Amos v. United States</i> , 255 U.S. 313, 41 S. Ct. 266, 65 L. Ed. 654 (1921).....	16
<i>Boyd v. United States</i> , 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886).....	15, 16
<i>Illinois v. Gates</i> , 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527(1983).....	2, 8
<i>In re Murchison</i> , 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955).....	5, 6, 7, 8
<i>Johnson v. United States</i> , 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948).....	11
<i>Shadwick v. Tampa</i> , 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1972).....	11
<i>Silverthorne Lumber Co. v. United States</i> , 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1920).....	16
<i>Stone v. Powell</i> , 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) ..	10
<i>United States v. Calandra</i> , 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974).....	2, 14
<i>Weeks v. United States</i> , 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914).....	16
<i>Withrow v. Larkin</i> , 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1974).....	6
<i>Wong Sun v. United States</i> , 371 U.S. 471, 484-85, 83 S. Ct 407, 9 L. Ed. 2d 441 (1963).....	14

WASHINGTON CONSTITUTIONAL PROVISIONS

Const. art. I, § 3.....	3
Const. art. I, §7.....	passim

WASHINGTON CASES

<i>In re Rountree</i> , 35 Wn. App. 557, 668 P.2d 1292 (1983).....	13
<i>State v. Biloche</i> , 66 Wn.2d 325, 402 P.2d 491 (1965).....	19
<i>State v. Blake</i> , 71 Wn.2d 356, 359, 428 P.2d 555 (1967).....	13
<i>State v. Burns</i> , 19 Wash. 52, 52 P. 316 (1898).....	15
<i>State v. Gibbons</i> , 118 Wash. 171, 184-85, 203 P. 390 (1922).....	17
<i>State v. Manussier</i> , 129 Wn.2d 652, 921 P.2d 473 (1996).....	3
<i>State v. McFarland</i> , 84 Wn.2d 391, 393, 526 P.2d 361 (1974).....	10
<i>State v. Nordstrom</i> , 7 Wash. 506, 35 P. 382 (1893).....	15
<i>State v. O'Bremski</i> , 70 Wn.2d 425, 429, 423 P.2d 530 (1967).....	13, 18
<i>State v. Richman</i> , 85 Wn. App. 568, 933 P.2d 1088, <i>review denied</i> , 133 Wn.2d 1028 (1997).....	14
<i>State v. Royce</i> , 38 Wash. 11, 80 P. 268 (1905).....	16
<i>State v. Smith</i> , 16 Wn.App. 425, 558 P.2d 265 (1976), <i>review denied</i> 88 Wn.2d 1011 (1977).....	9, 10
<i>State v. Smith</i> , 50 Wn.2d 408, 411, 314 P.2d 1024 (1957).....	13, 15
<i>State v. White</i> , 97 Wn.2d 92, 640 P.2d 1061 (1982).....	18
<i>State v. Young</i> , 39 Wn.2d 910, 917, 239 P.2d 858 (1952).....	17
<i>Tabor v. Moore</i> , 6 Wn.App. 759, 496 P.2d 361 (1972).....	2

WASHINGTON STATUTES

RCW 10.27.180	6
RCW 10.29.130	6
RCW 7.21.040(2).....	7

COURT RULES

CrR 2.3.....	7
CrR 3.6.....	7, 14
CrRLJ 2.3.....	7
CrRLJ 3.6.....	7
RAP 16.12.....	7
RPC 8.3.....	12

OTHER CASES

<i>Commonwealth v. Dana</i> , 43 Mass. 329 (2 met. 1841).....	15
<i>Hirning v. Dooley</i> , 679 N.W.2d 771 (S.D. 2004).....	7, 8
<i>Irwin v. State</i> , 441 S.W.2d 203, 209 (Tex. Crim. App. 1968).....	9
<i>North Carolina v. Monserrate</i> , 125 N.C. App. 22, 479 S.E.2d 494, 501 (1997).....	8

OTHER AUTHORITIES

4 J. Wigmore, Evidence § 2183 (2nd ed. 1923)..... 15
Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev.
757, 811-816 (1994)..... 13
Barry Latzer, *Toward the Decentralization of Criminal Procedure: State
Constitutional Law and Selective Disincorporation*, 87 J.Crim.L. &
Criminology 63, 111-123 (1996)..... 13
Stanford E. Pitler, Comment, *The Origin and Development of
Washington’s Independent Exclusionary Rule: Constitutional Right
and Constitutionally Compelled Remedy*, 61 Wash.L.Rev. 459 (1986)
..... 15, 17, 18

I. RESPONSE TO SELECTED ARGUMENTS IN AMICUS BRIEF

The following is a brief response to selected points in the amicus brief filed by the American Civil Liberties Union and the Washington Association of Criminal Defense Lawyers (hereinafter ACLU). Points not addressed in this response are not conceded; rather they are not addressed because the State believes them to be covered in the State's brief, in the brief filed by the Washington Association of Prosecuting Attorneys (WAPA), or in the materials cited therein.

A. The Process Due To A Criminal Defendant When Challenging The Legality Of A Search Warrant Is Distinct And Independent From The Issue Of Whether The Warrant Was Properly Issued.

This case presents two distinct issues to the Court. The first is whether it is permissible for the same judge who issued a search warrant to hear a challenge to that warrant in a subsequent criminal prosecution. That question implicates what process is due a defendant in a criminal prosecution. Distinct and completely independent from that issue is whether the particular search warrant in this case violated Const. art. I, §7. The remedy for a violation of the former is for a reviewing court to consider the challenge to the warrant, *de novo*. The remedy for a violation

of the latter is to invoke the exclusionary rule, suppressing the illegally obtained evidence.

Amicus ACLU has intermingled and confused these two issues. ACLU has tried to construct a new due process right out of the exclusionary rule remedy. This turns constitutional jurisprudence on its head. Remedies are fashioned to protect rights, not the other way round.

“The exclusionary rule is ‘a judicially created remedy designed to safeguard Fourth Amendment rights generally’ and not ‘a personal constitutional right of the party aggrieved.’” *Illinois v. Gates*, 462 U.S. 213, 223, 103 S.Ct. 2317, 76 L.Ed.2d 527(1983) (quoting *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613, 620, 38 L.Ed.2d 561 (1974)).

A significant portion of ACLU’s argument flows from the heading: “Washington’s exclusionary rule mandates suppression of evidence obtained in violation of Article 1, Section 7.” Amici Br. at 4. This statement is a simple redundancy, since the very meaning of an exclusionary rule is that it mandates suppression of illegally gained evidence. *See, e.g. Tabor v. Moore*, 6 Wn.App. 759, 762, 496 P.2d 361 (1972) (equating the “suppression doctrine” to the “exclusionary rule”). The text of ACLU’s brief that follows this redundancy is less an argument than an essay on Washington’s constitutional privacy rights. However, there is neither legal authority nor logic to support ACLU’s leap from the

essay on privacy rights and remedies to its conclusion that a judge who issued a warrant is per se barred from ruling on a suppression motion. ACLU's conclusion is a complete non-sequitur. Amici Br. at 7.

The issue regarding whether the judge who issued the search warrant is per se barred from further proceedings does not implicate a defendant's privacy rights. The issue instead deals with the process that a charged criminal defendant is entitled to. ACLU acknowledges this fact *sotto voce* by its reliance upon the due process clause of the federal constitution, and upon cases interpreting that clause.¹ See Amici Br. at 10-11.

Once ACLU's exposition on the exclusionary rule is recognized for the distraction that it is, the Court can focus on the actual issue. Although this is an issue of first impression in Washington, many other jurisdictions have faced it, and resolved it in the State's favor.

The rule followed by the vast majority of states² -- that the judge who authorized a search warrant is not per se barred from participating in subsequent proceedings that stem from evidence obtained pursuant to the

¹Neither the ACLU nor Chamberlin has asserted a claim that the Washington Constitution's due process provision, Wash. Const. art. I, § 3, is more protective than its federal counterpart. Their decision to not present such an argument is well-supported by Washington case law. See, e.g., *State v. Manussier*, 129 Wn.2d 652, 679, 921 P.2d 473 (1996) (stating, "[t]he *Gunwall* factors do not favor an independent inquiry under article I, section 3 of the state constitution").

²The majority rule rejecting the disqualification rule advanced by the ACLU is set forth in detail in the brief of Amicus Curiae Washington Association of Prosecuting Attorneys.

search warrant -- is entirely consistent with Washington practice. The majority rule allows the defendant to disqualify the judge upon a showing of actual bias or prejudice. In Washington, such a showing can be made simply by filing an affidavit of prejudice. RCW 4.12.050. This burden is no greater than the burden already placed upon the defendant to make an initial showing that evidence should be excluded.

Adopting the majority rule allowing the issuing judge to participate in a subsequent challenge to a search warrant balances the rights of the defendant and the general public. It ensures that a community is not deprived of the services of the judge that they elected unless such a step is actually needed to ensure that the defendant's motion is heard by an unbiased and unprejudiced judge.

The above discussion establishes that this case does not involve any issue concerning Washington's exclusionary rule. The ACLU's historical analysis of that rule is, therefore, unnecessary to resolving the issues presented in this case. If, however, the Court wishes to engage in such an analysis, it should recognize that the history put forward by the ACLU is fundamentally flawed. This brief clarifies the history of the exclusionary rule below, in Section C.

B. A Judge Who Approves A Search Warrant Is Not Supervising The Investigation And Does Not Vouch For The Accuracy Of The Investigation.

The ACLU contends that the due process case of *In re Murchison*, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955), mandates the adoption of a per se recusal rule. *Amicus Brief*, at 11. They are wrong.

The Michigan trial judge in *Murchison* sat as a “one-man judge-grand jury” and acted as both investigator and charging authority. After the secret grand jury proceedings were completed, the judge initiated criminal contempt proceedings against two of the witnesses he called.

Under those circumstances, the Supreme Court noted that:

It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations. Perhaps no State has ever forced a defendant to accept grand jurors as proper trial jurors to pass on charges growing out of their hearings. A single 'judge-grand jury' is even more a part of the accusatory process than an ordinary lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused.

Murchison, 349 U.S. at 137.

Nineteen years later the Supreme Court indicated that the per se disqualification rule laid down in *Murchison* is limited to its facts. In *Withrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1974),

the Court acknowledged that a judge may preside over a matter even if the judge presided over preliminary proceedings:

Judges repeatedly issue arrest warrants on the basis that there is probable cause to believe that a crime has been committed and that the person named in the warrant has committed it. Judges also preside at preliminary hearings where they must decide whether the evidence is sufficient to hold a defendant for trial. Neither of these pretrial involvements has been thought to raise any constitutional barrier against the judge's presiding over the criminal trial and, if the trial is without a jury, against making the necessary determination of guilt or innocence. Nor has it been thought that a judge is disqualified from presiding over injunction proceedings because he has initially assessed the facts in issuing or denying a temporary restraining order or a preliminary injunction. . . . We should also remember that it is not contrary to due process to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same questions a second time around.

Withrow, 421 U.S. at 56-57.

Washington's legislature has already enacted statutes to deal with the concerns identified in *Murchison*. A judge who presides over a special inquiry is barred from presiding over subsequent proceedings. See RCW 10.27.180; RCW 10.29.130. A judge who is the object of disrespect or criticism is similarly barred from presiding over the punitive contempt trial arising from that conduct. RCW 7.21.040(2). No similar statute has ever been enacted with respect to judges who issue search warrants.

This Court has codified a per se disqualification rule in RAP 16.12, that bars the superior court judge, who was involved in the challenged

proceeding, from presiding over any reference hearing. No similar per se disqualification rule is contained in the rules governing the issuance of search warrants or in the rules setting out the procedure for suppression motions. See CrR 2.3; CrR 3.6; CrRLJ 2.3; CrRLJ 3.6. No local rule has been adopted by any Washington superior court that prohibits the judge who approved the issuance of a search warrant from presiding over subsequent proceedings. See West, *Washington Court Rules, Local, 2007* (2006).

The Supreme Court of South Dakota discussed *Murchison* at length in *Hirning v. Dooley*, 679 N.W.2d 771 (S.D. 2004), in the course of rejecting the per se disqualification rule urged by the ACLU. The South Dakota Supreme Court identified a number of differences between the situation in *Murchison* and that presented here:

In this case, Judge Von Wald initially reviewed an affidavit that was prepared outside his presence. No witnesses were required to testify in front of Judge Von Wald, and the affidavit only contained written information from outside sources. Therefore, Judge Von Wald was only required to determine if legally, that affidavit established probable cause for the issuance of the warrant. In performing that task “a judge does not vouch for the veracity of the affidavit given in support thereof; [the judge] simply determines that the information in the affidavit is sufficient to provide probable cause to believe that the informant was giving truthful information.” *North Carolina v. Monserrate*, 125 N.C. App. 22, 479 S.E.2d 494, 501 (1997) (citing *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)). Consequently, in the subsequent

suppression hearing, Judge Von Wald was only required to reconsider his earlier legal determination, and none of the due process dangers described in *Murchison* were present. *Hirning*, 679 N.W.2d at 780, ¶ 25.

All of the factors identified in *Hirning* are present in the instant case. Judge Hancock issued the search warrant based upon a written affidavit. In signing that search warrant, Judge Hancock was not vouching for the credibility or the completeness of the information contained therein. Judge Hancock, who approved the search warrant in an ex parte proceeding, would know that the defendant may have a different position than that advocated by the police with respect to the adequacy of the search warrant.

Another distinction between the instant case and *Murchison* is that a public written record exists of everything that Judge Hancock considered in issuing the search warrant. This written record is the only thing that the trial court or this Court could consider in reviewing the adequacy of the search warrant application. The Texas Court of Criminal Appeals has found this factor sufficient to remove these matters from the rule announced in *Murchison*. See *Irwin v. State*, 441 S.W.2d 203, 209 (Tex. Crim. App. 1968).

Washington's Court of Appeals has once addressed a similar issue. In *State v. Smith*, 16 Wn.App. 425, 558 P.2d 265 (1976), review denied 88

Wn.2d 1011 (1977), the court held that a judge who was likely to be a witness in a subsequent trial was not disqualified from issuing a search warrant presented by police during their investigation. In *Smith* the defendant was an attorney who misappropriated client funds. In at least one instance the defendant employed a fraudulent court order to perpetrate his crimes. The order was over the typed signature of Superior Court Judge Allan R. Billett. During the investigation of the crimes, police presented applications for search warrants for the defendant's home and office to Judge Billett. The warrant applications included copies of the fraudulent court orders. Judge Billett issued the warrants and later testified at trial for the State.

Similar to the ACLU position, Smith sought to invoke the exclusionary rule based on the claim that the issuing judicial officer knew he was a potential witness at the time he was presented with the warrant applications. The Court of Appeals rejected the argument, noting that the exclusionary rule had no application in a situation where the crux of the defendant's challenge concerned the actions of a judicial officer:

The exclusionary rule which defendant seeks to invoke was designed as an administrative procedure to deter police conduct that violates the Fourth Amendment. 'Thus, in situations where there is no police deterrent effect to be served by exclusion of particular evidence, the United States Supreme Court has steadfastly rejected application of the

exclusionary rule.' *State v. McFarland*, 84 Wn.2d 391, 393, 526 P.2d 361 (1974).

In the instant case, Judge Billett's function was *totally divorced from the investigative or police function*. The information submitted to him by affidavit was sufficient to meet the constitutional requirement of probable cause. Any judicial officer would have been justified in issuing the warrants. *Police deterrence is simply not involved and the underlying purposes of the Fourth Amendment would not be advanced by invoking the exclusionary rule.* *State v. McFarland*, supra; see *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

State v. Smith, 16 Wn.App. 425, at 427-28 (1976) review denied 88 Wn.2d 1011 (1977)(emphasis added).

Like the judge in *Smith*, Judge Hancock in the instant case was totally divorced from the investigative function when he authorized the search warrant of Chamberlin's home. He merely fulfilled his function as a neutral and detached magistrate and made an independent determination of probable cause, protecting Mr. Chamberlin from potentially overzealous police officers. See *Smith*, 16 Wn.App. at 427 (citing *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948); *Shadwick v. Tampa*, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1972)).

The ACLU's arguments are launched from the premise that Judge Hancock was presumed not to be impartial. For example, the ACLU states, without supporting evidence, that he "cannot be wholly disinterested" and that he had "already formed an opinion." Amicus Br. at 11. ACLU asserts that a defendant "should not have to appeal to get a fair

and impartial review of the legality of the search warrant.” Amicus Br. at 8. This claim ignores the fact that the issuing judge gave the warrant a fair and impartial review at the time he or she issued it. There is no reason to believe that Judge Hancock, or any judge in his position, would not be impartial when reviewing a warrant in an adversarial setting after charges have been filed.

If the mere act of issuing a search warrant creates a bias in a judge (as it must if ACLU’s position is accepted), then so would many other judicial tasks that occur during the progression of a criminal (or for that matter, civil) case. For example, judges routinely make determinations of probable cause for issuance of summonses and arrest warrants.

The ACLU and Appellant then take their argument to its logical conclusion. They claim that Judge Hancock violated the Code of Judicial Conduct by failing to recuse himself. They make this claim without any factual support to believe he acted improperly or out of self-interest. If they genuinely believe that Judge Hancock had violated the CJC, it would be incumbent upon them to inform the “appropriate authority,” as strongly counseled under RPC 8.3, or be subject to discipline themselves.

Judge Hancock acted properly and consistently with Washington law, and the law of the majority of states. His actions in his judicial role of issuing a search warrant, and subsequently reviewing it, did not

implicate the defendant's right to privacy or the exclusionary rule remedy for violations of that right.

C. The Text Of The Washington Constitution Is Silent Regarding Whether Evidence Must Be Excluded For Constitutional Violations.

The ACLU's brief overlooks the fact that the exclusionary rule is *not* contained within the Washington constitution at all. Rather, the rule is a judicially-created remedy for constitutional violations, and application of the remedy has followed generally the application of the rule by federal courts. Both court systems have struggled to interpret their constitutions in a manner that will balance the interest in deterring police abuse, against society's interest in punishing the guilty, without extracting too high a cost on society. The ACLU is simply mistaken in asserting that this Court's prior case law mandates that all procedural rules related to a motion to suppress should be weighted in favor of vindicating a defendant's right with no consideration of competing interests. The Washington constitution does not demand such a rule, the drafters would have rejected such a rule, and such a rule has never existed in Washington.³ See

³For further discussion of the Fourth Amendment, constitutional analysis and its relationship to the exclusionary rule, and to state constitutional law, see Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J.Crim.L. & Criminology 63, 111-123 (1996). See also: Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 811-816 (1994).

generally *State v. O'Bremski*, 70 Wn.2d 425, 429, 423 P.2d 530 (1967) (“[i]n each case the rights of the accused must be balanced against the rights of the public).

A review of the procedural rules governing a defendant’s vindication of his right to privacy reveals that the right to the exclusion of evidence is not automatic, that this right must be timely asserted, and that any such request must be supported by a prima facie showing. *See, e.g., State v. Blake*, 71 Wn.2d 356, 359, 428 P.2d 555 (1967) (“‘exclusion of improperly obtained evidence is a privilege....’ and it must be asserted in a timely fashion.”)(quoting *State v. Smith*, 50 Wn.2d 408, 411, 314 P.2d 1024 (1957)); *In re Rountree*, 35 Wn. App. 557, 668 P.2d 1292 (1983) (a defendant who did not file a suppression motion prior to trial may not obtain relief in a personal restraint petition based upon a claim that the evidence introduced at trial had been illegally seized); CrR 3.6(a) (“Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion.”).

Absent an exception to the warrant requirement, a warrantless search is impermissible under the Fourth Amendment to the U.S.

Constitution and Article I, Section 7 of the Washington Constitution. *State v. Richman*, 85 Wn. App. 568, 933 P.2d 1088, review denied, 133 Wn.2d 1028 (1997). The exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect" by excluding evidence that is the fruit of an illegal, warrantless search. *United States v. Calandra*, 414 U.S. 338, 347, 94 S. Ct 613, 38 L. Ed. 2d 561 (1974). Evidence derived directly or indirectly from illegal police conduct is an ill-gotten gain, "fruit of the poisonous tree," that should be excluded from evidence. *Wong Sun v. United States*, 371 U.S. 471, 484-85, 83 S. Ct 407, 9 L. Ed. 2d 441 (1963).

Washington's exclusionary rule is comparable to the federal rule. The Washington State Constitution, adopted in 1889, provides that, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. The meaning and scope of a constitutional provision is determined by examining the law at the time of enactment. *State v. Smith*, 150 Wn.2d 135, 75 P.3d 934 (2003).

At common law, courts took no notice whatsoever of whether evidence was properly seized; if relevant, the evidence was admissible. *Commonwealth v. Dana*, 43 Mass. 329 (2 met. 1841); 4 J. Wigmore, Evidence § 2183 (2nd ed. 1923). This was the rule recognized in

Washington in 1889. *State v. Nordstrom*, 7 Wash. 506, 35 P. 382 (1893); *State v. Burns*, 19 Wash. 52, 52 P. 316 (1898).

In 1886, the United States Supreme Court appeared to signal a different approach when it suppressed private papers seized pursuant to a court order, holding that seizure and use of the private papers as evidence was tantamount to compelling the defendant to testify against himself. *Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886). State supreme courts almost universally rejected the *Boyd* approach,⁴ and the United States Supreme Court essentially repudiated *Boyd* in *Adams v. New York*, 192 U.S. 585, 598, 24 S. Ct. 372, 48 L. Ed. 575 (1905) (“...the English, and nearly all the American, cases have declined to extend this doctrine to the extent of excluding testimony which has been obtained by such means, if it is otherwise competent”).

Like most courts at that time, the Washington Supreme Court specifically rejected *Boyd* and held that relevant evidence was admissible, regardless of its source. *State v. Royce*, 38 Wash. 11, 80 P. 268 (1905) (evidence derived from improper search of burglary suspect need not be suppressed).

⁴ See Stanford E. Pitler, Comment, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 Wash.L.Rev. 459, 467 n 45 (1986). Although this Comment is a useful survey of the exclusionary rule caselaw, its conclusions are fundamentally flawed. See *infra*, at n. 5.

Nine years later, the United States Supreme Court reintroduced an exclusionary rule. *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914). The exclusionary rule was later reaffirmed by the Supreme Court in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1920),⁵ and again in *Amos v. United States*, 255 U.S. 313, 41 S. Ct. 266, 65 L. Ed. 654 (1921). The next year, this Court followed the United States Supreme Court's lead and announced that an exclusionary rule would be recognized in Washington, quoting at great length from the *Amos* opinion. *State v. Gibbons*, 118 Wash. 171, 184-85, 203 P. 390 (1922).

The ensuing decades of exclusionary rule jurisprudence can only be described as chaotic, as both state and federal courts struggled to find the proper balance between the need to protect constitutional rights and the interest in admitting relevant evidence. See e.g. *State v. Young*, 39 Wn.2d 910, 917, 239 P.2d 858 (1952).⁶ During these decades, exclusionary rule decisions of this Court varied widely as to result and

⁵ The *Silverthorne* opinion also held, however, that the exclusionary rule did not render tainted evidence "sacred and inaccessible," thus announcing the independent source doctrine. *Silverthorne v. United States*, 251 U.S. at 183.

⁶"We do not wish to recede one iota from our [previous holding]. It is the duty of courts to protect citizens from unwarranted, arbitrary, illegal arrests by officers of the law. But we should not permit our zeal for protection of constitutional rights to blind us to our responsibility to other citizens who have the right to be protected from those who violate the law."

rationale, so as to defy any meaningful assessment. Pitler, *supra*, at 473-85.⁷

In a more recent case, not dealing with which judge may preside over a suppression hearing, this Court noted in dicta that the exclusionary rule in Washington preserves the integrity of the courts by disallowing use of illegally seized evidence, and that strict application of the rule is required under art. I, § 7. *State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982). The five-member majority cited only five exclusionary rule cases, out of dozens of similar cases, to support its constitutional dicta. *White*, 97 Wn.2d at 110. The cases *not* discussed by the majority contain a virtual potpourri of rationales for the exclusionary rule. *See* Pitler, *supra*, at 469-90. Moreover, although it purported to consider “historical evidence” regarding the intent of the constitutional drafters, the Court did not address the fact that in 1889 *no* court would have suppressed evidence for a violation of art. I, § 7. Thus, it can hardly be said that the drafters intended such a result. Rather, the drafters almost certainly believed that, pursuant to the common law tradition, constitutional violations would not

⁷ Law student author Pitler seems to conclude from this jumble of state and federal decisional history that Washington’s approach was “independent” of the federal approach. Although Washington courts sometimes did, and sometimes did not, cite to the federal constitution, given the lack of clarity and consistency in the federal and state decisions, it hardly seems warranted to conclude that Washington courts were deliberately following their own path.

restrict use of evidence in a criminal case, but would be redressed through the civil law.

The most that can be said of Washington's erratic treatment of the exclusionary rule is that Washington's use of the rule stems from an interest in the integrity of the courts and an interest in deterrence. Nonetheless, this Court has generally followed the application of the rule in federal courts. As this Court said in *O'Bremski*, 70 Wn.2d at 428, when it expressly adopted the independent source doctrine, "[w]e have consistently adhered to the exclusionary rule expounded by the United States Supreme Court..." See also *State v. Biloche*, 66 Wn.2d 325, 327, 402 P.2d 491 (1965) ("The law is well established in this state, consistent with the decisions of the U.S. Supreme Court, that evidence unlawfully seized will be excluded..."). Accordingly, the analysis above establishes that Washington's exclusionary rule has followed the general contours, progression, and application of the federal exclusionary rule. The rejection of the per se disqualification policy championed by the ACLU and Chamberlin would be consistent with this history.

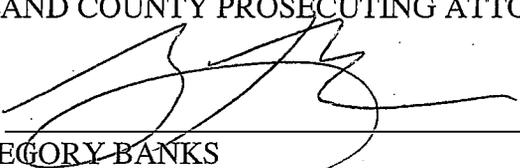
II. CONCLUSION

This Court should join the majority of states which have held that a trial court judge is not per se disqualified from presiding over criminal

charges arising from evidence collected pursuant to a search warrant that was authorized by the trial court judge.

Respectfully submitted this 30th day of April, 2007.

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY

By: 

GREGORY BANKS
PROSECUTING ATTORNEY
WSBA # 22926, OIN 91047