

No. 69359-0-1

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

JOHN F. KLINKERT,

Petitioner

v.

WASHINGTON STATE LIQUOR CONTROL BOARD,

Respondent

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PETITION FOR REVIEW BY  
THE WASHINGTON SUPREME COURT

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Petitioner Pro Se

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## **I. INTRODUCTION**

This case is about my complaint of the unconstitutionality of portions of a certain Washington statute, RCW 70.155.100, which permit administrative agencies (the Washington State Liquor Control Board and the Office of Administrative Hearings) to adjudicate alleged violations of the crime defined in RCW 26.28.080, which makes it a gross misdemeanor to sell tobacco to minors. I am petitioning the Washington Supreme Court to correct the error of the Court of Appeals, Division One, which ruled against me and erroneously failed to find that RCW 70.155.100 (3) and RCW 70.155.100 (4) are unconstitutional on their face.

## **II. PETITIONER'S IDENTITY**

I, Petitioner John F. Klinkert, was the Appellant in the Court of Appeals (Division One), the Petitioner in the trial court, and the Petitioner at the administrative hearing.

## **III. CITATION TO APPELLATE DECISION TO BE REVIEWED**

I request the Washington Supreme Court to review the Washington Court of Appeals' unpublished opinion in John F. Klinkert, Appellant v. Washington State Liquor Control Board, Respondent, No. 69359-0-I, Washington Court of Appeals, Division One (November 12, 2013), herein the "Opinion." I have included a copy of the Opinion in Appendix A. In

his Petition I will cite it by using O1 to refer, for example, to Page 1 of the Opinion.

#### **IV. ISSUES PRESENTED FOR REVIEW**

##### **A. Significant question of law under the U. S. Constitution**

This case involves a significant question of law under the U. S. Constitution because it raises the issue of whether RCW 70.155.100 (3) and RCW 70.155.100 (4), when read together with RCW 70.155.100(8), conflict with the Sixth Amendment and are therefore unconstitutional on their face.

##### **B. Significant question of law under the Washington Constitution**

This case involves a significant question of law under the Washington Constitution because it raises the issue of whether RCW 70.155.100 (3) and RCW 70.155.100 (4), when read together with RCW 70.155.100(8), conflict with Article I, Section 22 of the Washington Constitution and are therefore unconstitutional on their face.

#### **V. STATEMENT OF THE CASE**

[Note: A few times, because of a clerical error, when I refer to documents contained in the “Certified Appeal Board Record” I will not use the designation “CP”, as I do almost everywhere else in this Petition for Review, but I will call it “WSLCB Record” and will refer to page

numbers within the WSLCB Record rather than using possibly incorrect CP page numbers.]

#### **A. Factual background**

The tobacco sting. On March 16, 2011 around 4:15 p.m. the King County Health Department ran a tobacco compliance check (a “tobacco sting”) at Walgreens drugstore No. 4157 in Seattle where I was working as a cashier. A minor woman, a decoy for the sting, came to my cash register and asked to buy a pack of cigarettes. Because she looked young, I asked for her ID. She presented her driver’s license and I keyed her birth date into my cash register. Because I inadvertently keyed in “02-22-1984” as her birth date instead of “02-22-1994”, the correct birth date on her license (an error of one digit out of eight), my cash register allowed the sale. The Washington State Liquor Control Board (LCB) issued me a pink Notice of Board Action on Tobacco Violation and filed a complaint against me with the Office of Administrative Hearings (OAH), charging me with a violation of a criminal tobacco statute, RCW 26.28.080 (a gross misdemeanor), and claiming monetary penalties of \$100 under portions of another tobacco statute, RCW 70.155.100(3) and RCW 70.155.100(4). RCW 70.155.100 (3) and RCW 70.155.100 (4).

#### **B. Procedural Background**

The WSLCB's citation. On March 24, 2011 the Washington State Liquor Control Board issued me a citation entitled "Notice of Administrative Violation" alleging that I had violated RCW 26.28.080, selling tobacco to a minor, which is a crime, a gross misdemeanor. (WSLCB Record, p. 173, paragraph 3.1) The WSLCB in its Notice also requested a statutory penalty of \$100 under RCW 70.155.100 because I had previously paid a \$50 fine for a prior tobacco violation, my first violation, in January, 2011. (WSLCB Record, pp. 145-146; p. 174, paragraph 3.9; p. 175, paragraph 4.5)

I requested an administrative hearing. (WSLCB Record, p. 146)

In response to my request for a hearing, on May 20, 2011 the WSLCB filed a Complaint with the Office of Administrative Hearings (OAH) charging me with a violation of RCW 26.28.080; claiming penalties under RCW 70.155.100 (3) and RCW 70.155.100 (4); and requesting OAH to assign an administrative law judge (ALJ) for the hearing. (WSLCB Record, pp. 94-96)

Washington's Administrative Procedure Act (APA), RCW 34.05 et seq., allows a superior court to grant relief from a final order of the WSLCB if the court determines that

“[t]he order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face...”. [Emphasis added] RCW 34.05.570(3)(a).

In preparation for the August 25, 2011 telephone hearing I submitted motions and an accompanying brief which explained the basis of my constitutional attack on RCW 70.155.100 and also argued that the OAH had no jurisdiction to adjudicate alleged violations of RCW 26.28.080 because it is a criminal statute. (WSLCB Record, pp. 126-132; p. 171, paragraph 2.1)

After the hearing, ALJ Smith issued his decision in his “Findings of Fact, Conclusions of Law, and Initial Order” dated October 24, 2011. He denied my motion that challenged the WSLCB’s and the OAH’s jurisdiction and said that OAH jurisdiction was clear. (WSLCB Record, p. 172, paragraph 2.3)

In my November 10, 2011 Petition for Review of Initial Order, submitted to the WSLCB, I argued again that RCW 70.155.100 (3) and RCW 70.155.100 (4) were unconstitutional.

On December 27, 2011 the WSLCB issued its short Final Order, which simply adopted ALJ Smith’s “Findings of Fact, Conclusions of Law, and Initial Order” in its entirety. (WSLCB Record, p. 198)

I filed my Petition for Judicial Review of Agency Action in Snohomish County Superior Court on January 23, 2012

I paid the \$100 penalty under protest on January 25, 2012. (CP 61)

The hearing on my Petition for Judicial Review of Agency Action was held on August 8, 2012, in Snohomish County Superior Court, the Honorable Ellen J. Fair presiding. At the conclusion of oral argument, the judge found in favor of Respondent WSLCB and directed the attorney for the prevailing party, Assistant Attorney General Stephanie Happold, to prepare findings of fact, conclusions of law and an order, which the judge signed on August 30, 2012 and filed the same day. (CP 8-13)

I filed my Notice of Appeal on September 28, 2012 in the Court of Appeals, Division One. (CP 1)

The Court of Appeals filed its Opinion affirming the trial court and denying my appeal on November 12, 2013. I then filed this Petition for Review requesting the Washington Supreme Court to reverse the Court of Appeals.

## **VI. ARGUMENT**

**A. Standard of review:** The proceeding in superior court for the judicial review of administrative agency action, and my appeal to the Court of Appeals, Division One, dealt with the statutory interpretation and alleged unconstitutionality of several Washington tobacco statutes.

Statutory interpretation presents a question of law over which this court exercises de novo review. Jackson v. Fenix Underground, Inc., 142 Wn.App. 141, 145, 173 P.3d 977 (2007). Likewise, appellate courts also

review de novo a challenge to the constitutionality of a statute. State v. Schultz, 138 Wn.2d 638, 643, 980 P.2d 1265 (1999).

**B. Preview: What I will show**

I argue below in section **C.** that the Court of Appeals improperly failed to find that RCW 70.155.100 (3) and RCW 70.155.100 (4), when read together with RCSW 70.155.100 (8), conflict on their face with the Sixth Amendment of the U. S. Constitution and with Article I, Section 22 of the Washington Constitution. In section **D.** I analyze the statutes in question, showing that they are unconstitutional on their face.

**C. The Court of Appeals appears to have misunderstood the gist of my complaint**

(I am hampered here in my criticism of the Court of Appeals' opinion, because it contains no citations to my Appellant's Opening Brief or my Appellant's Reply Brief. Yet I don't think this lack detracts from my rebuttal.)

On Page 1 of its Opinion the Court of Appeals said I failed to prove beyond a reasonable doubt that "the statute authorizing the Liquor Control Board to impose civil penalties for the sale of tobacco to minors is unconstitutional." O1. The Court's claim here is slightly off-center because the gist of my complaint about the tobacco statute RCW 70.155.100 is that before the LCB or OAH, both of which are Washington

administrative agencies, can assess a monetary penalty, they first adjudicate whether a crime was committed – and they are not constitutionally forbidden to do that by the Sixth Amendment of the U. S. Constitution or by Article I, Section 22 of the Washington Constitution, both of which require public criminal jury trials.

Again on Page 3 of its Opinion the Court appears to have misunderstood the gist of my complaint:

“Klinkert sought judicial review in Snohomish County Superior Court challenging the constitutionality of statutes authorizing the Board to impose civil penalties for violations of RCW 28.26.080, and seeking costs under RCW 4.84.350.” O2

On Page 3 of its Opinion the Court says – and this puzzles me --

“...Klinkert cites no relevant authority to support his claims and his analysis is incorrect.” O3

To the contrary, I certainly did cite authority for my arguments. My arguments on Pages 19 - 27 of my Appellant’s Opening Brief cite Washington statutes, federal and state constitution provisions, and several cases.

In the same paragraph on Page 3 of its Opinion, the Court claims

“He further argues that RCW 70.155.100 is unconstitutional because it purports to ‘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.” O3

However, the reason I provided no citation is that there is no such law – which is precisely what my paraphrase of the combined operation of RCW 70.155.100 (3), RCW 70.155.100 (4) and RCW 70.155.100 (8) was intended to show.

At the bottom of Page 3 of its Opinion, the Court implies that I asserted that the “state or federal constitutions” prevent the [Washington] “Legislature from providing for civil monetary penalties by referring to a statute defining particular conduct as a criminal offense” , and the Court, in a footnote on Page 4 of its Opinion, cites as support for its own assertion to the contrary the case of Winchester v. Stein, 135 Wn.2d 835, 852-53, 856, 959 P.2d 1077 (1988). In the Page 4 footnote the Court characterizes the holding of Winchester v. Stein, supra, as follows:

“(the fact that same conduct leading to civil monetary sanctions is also criminal in nature is insufficient to prevent imposition of civil sanction under the criminal profiteering act on double jeopardy grounds)”. O4

Now, first, I have never claimed that “state or federal constitutions” prevent the “Legislature from providing for civil monetary penalties by referring to a statute defining particular conduct as a criminal offense”.

Second, The Court's summary of the holding in Winchester v. Stein, supra, is incomplete and therefore misleading. The Court should have added after the last word in its summary of the holding (i.e., after the word "grounds") the phrase "following a criminal conviction for the conduct." That was the true holding of Winchester v. Stein, where one of the defendants, Stein, had already had a criminal jury trial in which the jury found him guilty of the same conduct. I myself never had a previous criminal trial for the alleged violation of RCW 26.28.080 for which the Liquor Control Board issued its citation, and I surmise that no one else cited by the Liquor Control Board for violating RCW 26.28.080 has had a criminal trial either, because the only adjudication ever made for these alleged violations is made by an administrative law judge under the purported authority of the Administrative Procedures Act (supposedly granted by RCW 70.155.100 (8)).

On Page 4 of its Opinion, the Court, relying on its Page 4 footnoted summary (within parentheses) of the holding in Winchester v. Stein, supra, asserts that "The Board [i.e., the Liquor Control Board] assesses civil penalties in civil proceedings based on conduct that is also subject to separate criminal proceedings." 04. Although it is true that prosecutors might charge persons with violations of RCW 26.28.080, nonetheless the tobacco statute RCW 70.155.100 (3), RCW 70.155.100 (4)

and RCW 70.155.100 (8) purport to authorize the Liquor Control Board and the Office of Administrative Hearings to do exactly the same thing as prosecutors (which these agencies did with me) by serving a citation called “Notice of Administrative Violation” on me and holding an administrative hearing under Chapter 34.05 RCW to adjudicate the alleged violation of a criminal statute, namely RCW 26.28.080..

The Court of Appeals says on Page 4 of its Opinion, in regard to my citation,

“Although the citation refers to RCW 26.28.080, indicating the alleged violation involved sale of tobacco products to a minor, it does not include any reference to a criminal charge, a prosecuting authority, or criminal court proceeding.” [Emphasis added] O4

My answer to the Court of Appeals’ claim here is twofold: (1) The citation itself is a criminal charge. It charges a person with violating RCW 26.28.080, a criminal statute. (2) That the citation does not include any reference to a[nother] criminal charge” is actually its failing, because the citation would need to do that in order to satisfy the Court’s attempted analogy to Winchester v. Stein, supra; that is, in order to validly assert a civil monetary penalty for previously adjudicated criminal violations. The citation does not do that because the Liquor Control Board and the Office of Administrative Hearings adjudicate the alleged criminal violation of RCW 26.28.080 themselves – and that is unconstitutional under both the

Sixth Amendment of the U. S. Constitution and Article I, Section 22 of the Washington Constitution. The main tobacco statute I complain about, RCW 70.155.100, contains no proviso that the Liquor Control Board must base its “finding” of a violation of RCW 26.28.080 upon a previous criminal conviction under that statute, i.e., that the Board cannot itself adjudicate alleged violations. In light of this omission, it is reasonable to assume that the Legislature intended the Liquor Control Board and the Office of Administrative Hearings to adjudicate alleged violations, but such adjudication is unconstitutional.

Finally, the Court of Appeals says that I did not “allege or demonstrate that the Board’s administrative procedure here resulted in a criminal conviction or the imposition of a criminal sentence.” [Footnote omitted] My reply is: Of course not, because the APA does not give administrative law judges the authority to impose criminal sentences, and because administrative hearings cannot result in criminal convictions. Any attempt to do either of those things would be struck down by the courts immediately. But that is all the more reason that the Liquor Control Board and administrative law judges should not make the initial and only adjudication of whether a person has violated the criminal statute in question in this case, namely, RCW 26.28.080. Currently, given the same situation as in my case, people who receive these citations are

justified in fearing that if an administrative law judge in a proceeding under Chapter 34.05 RCW “finds” them to have violated RCW 26.28.080 (“find” being the crucial word in RCW 70.155.100 (3) and (4) because it means to adjudicate, i.e., to determine guilt or innocence), then they will have a criminal record showing a gross misdemeanor, and this fear is constitutes subtle coercion to avoid contesting the Liquor Control Board’s citation and, instead, to pay the monetary penalty and increase the Board’s enforcement statistics.

**D. Analysis of the offending portions of the tobacco statute: RCW 70.155.100 (3), RCW 70.155.100 (4), and RCW 70.155.100 (8)**

According to RCW 9A.20.010, Washington has five classifications of crimes: Class A felony, Class B felony, Class C felony, gross misdemeanor and misdemeanor:

“RCW 9A.20.010  
Classification and designations of crimes.

(1) Classified Felonies. (a) The particular classification of each felony defined in Title 9A RCW is expressly designated in the section defining it.

(b) For purposes of sentencing, classified felonies are designated as one of three classes, as follows:

- (i) Class A felony; or
- (ii) Class B felony; or
- (iii) Class C felony.

(2) Misdemeanors and Gross Misdemeanors. (a) Any crime punishable by a fine of not more than one thousand dollars, or by imprisonment in a county jail for not more than ninety days, or by both such fine and imprisonment is a misdemeanor. whenever the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the committing of such act shall be a misdemeanor.

(b) All crimes other than felonies and misdemeanors are gross misdemeanors.” [Emphasis added]

RCW 26.28.080, the criminal tobacco statute, states:

“RCW 26.28.080  
Selling or giving tobacco to minor – Belief of  
Representative capacity, no defense – Penalty.

Every person who sells or gives, or permits to be sold or given to any person under the age of eighteen years any cigar, cigarette, cigarette paper or wrapper, or tobacco in any form is guilty of a gross misdemeanor....”  
[Emphasis added]

And here are the relevant portions of the offending unconstitutional tobacco statute:

“RCW 70.155.100  
Penalties, sanctions, and actions against licensees.  
.....

(3) The liquor control board may imposed 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**, 70.155.030, 70.155.040. 70.155.050, 70.155.070, or 70.155.090. [Emphasis added]

(4) The monetary penalty that the liquor control board may impose based upon one or more **findings** under subsection (3) of this section may not exceed the following:

(a) For violation of **RCW 26.28.080** or 70.155.020, fifty dollars for the first violation and one hundred dollars for subsequent violation;

..... [Emphasis added]

(8) All proceedings under subsections (1) through (6) of this section shall be conducted in accordance with **Chapter 34.05 RCW**.

.....” [Emphasis added]

Chapter 34.05 RCW is Washington’s Administrative Procedure Act. Note the purported grant of authority in RCW 70.155.100 (8) to conduct hearings on alleged violations of subsections (1) through (6) of RCW 70.155.100 (which includes the Liquor Control Board’s “finding” violations of RCW 26.28.080) “in accordance with Chapter 34.05 RCW”, which is Washington’s Administrative Procedures Act. If a statute is unconstitutional on its face, a reasonable interpretation of the statute’s wording conflicts openly with the relevant constitutional provisions to which one is comparing the statute. Parmalee v. O’Neel, 145 Wash.App. 223, 235, 186 P.3d 1094, 1100 (2010). The rights granted to persons by the Washington Constitution and the U. S. Constitution make any purported infringements of those rights by Washington statutes, in particular by any statutes such as RCW 70.155.100(3), RCW 70.155.100 (4) and RCW 70.155.100 (8), when read together, unconstitutional. Because the unconstitutionality of these tobacco statutes is visually

obvious from a reasonable reading of their words alone, the statutes are unconstitutional on their face, beyond a reasonable doubt.

**E. RCW 70.155. 100 (3) and RCW 70.155.100 (4), when read together with RCW 70.155.100 (8), conflict with the Sixth Amendment and are therefore unconstitutional on their face.**

The U. S. Constitution, and therefore also the Sixth Amendment, is the supreme law of the land, i.e., its authority outranks any other legal authority. McCulloch v. Maryland, 4 Wheat. 316, 17 U.S. 9, 4 L.Ed. 579 (1819). This principle is acknowledged in the Washington Constitution, Article I, Section 2:

“The Constitution of the United States is the supreme law of the land.”

The Sixth Amendment of the U. S. Constitution, requires a jury trial in criminal cases. The relevant portion of the Sixth Amendment states:

“In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...”

In Duncan v. Louisiana, 391 U.S. 145, 161, 88 S. Ct. 1444, 20 L.Ed.2d 491 (1968), the U. S. Supreme Court used the doctrine of selective incorporation to impose part of the U. S. Constitution’s Sixth Amendment on the states. See Justice Black’s discussion, in Duncan, 391 U.S. at 162, of the doctrine of selective incorporation. In particular, the Supreme Court made the Sixth Amendment’s requirement of a jury trial in criminal

cases applicable to the states when the maximum potential imprisonment is more than six months. Ibid. at 159, reaffirmed in Baldwin v. New York, 399 U.S. 66, 74, 90 S. Ct. 1886, 26 L.Ed.2d 437 (1970).

RCW 9.92.020, cited immediately below, fixes the maximum possible punishment for gross misdemeanors like RCW 26.28.080 (i.e., a criminal statute which contains no statement of the punishment that can be imposed for the gross misdemeanor) at a maximum potential imprisonment of 364 days, or a maximum fine of \$5,000, or both:

“RCW 9.92.020  
Punishment of gross misdemeanor when not fixed  
by statute.

Every person convicted of a gross misdemeanor for which no punishment is prescribed in any statute in force at the time of conviction and sentence, shall be punished by imprisonment in the county jail for a maximum term fixed by the court of up to three hundred sixty-four days, or by a fine in an amount fixed by the court of not more than five thousand dollars, or by both such imprisonment and fine.”

Thus the Sixth Amendment of the U. S. Constitution requires a jury trial in Washington for gross misdemeanors, because gross misdemeanors have a maximum potential punishment of 364 days, which is more than six months. Because a violation of RCW 26.28.080 is a gross misdemeanor, anyone charged with a violation of that tobacco statute is entitled to a jury trial, so any other tobacco statutes such as RCW 70.155.100 (3) and RCW 70.155.100 (4) when read together with RCW

70.155.100 (8) -- which purport to grant jurisdiction to the Office of Administrative Hearings (OAH) under the Administrative Procedure Act to adjudicate an alleged violation of RCW 26.28.080) -- are unconstitutional on their face beyond a reasonable doubt.

**F. RCW 70.155.100 (3) and RCW 70.155.100 (4), when read together with RCW 70.155.100 (8), conflict with Article I, Section 22 of the Washington Constitution and are therefore unconstitutional on their face.**

The Washington Constitution in Article I, Section 22 states that all persons charged with a crime are entitled to a jury trial:

“SECTION 22 RIGHTS OF THE ACCUSED. In criminal Prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases....” [Emphasis added.]

The Washington Constitution outranks any other Washington legal authority, including statutes enacted by the legislature. As the Washington Supreme Court has said,

“...the power of the legislature to enact all reasonable laws is unrestrained except where, either expressly or by fair inference, it is prohibited by the state and federal constitutions. Where the validity of a statute is assailed, there is a presumption of the constitutionality of the legislative enactment, unless its repugnancy to the constitution clearly appears or is made to appear beyond

a reasonable doubt.” [Citations omitted] [Emphasis added]  
Clark v. Dwyer, 56 Wash.2d 425, 431, 353 P.2d 941, 945  
(1960)

In particular the Washington Constitution outranks any statute such as RCW 70.155.100 (8), which tries to place adjudication of RCW 70.155.100 (3), RCW 70.155.100 (4), and RCW 26.28.080 under

The Washington Supreme Court case that has interpreted Article I, Section 22 of the Washington Constitution ruled that in Washington, jury trials in criminal cases are required even for misdemeanors. City of Pasco v. Mace, 98 Wash.2d 87, 101, 653 P.2d 618, 625 (1982). Although the U. S. Supreme Court’s interpretation of the Sixth Amendment, made applicable to the states via the 14<sup>th</sup> Amendment by Duncan, *supra*, 391 U.S. 145, 162, and Baldwin, *supra*, 399 U.S. 66, 74, establishes the minimum protection under the Bill of Rights which a state must respect, state courts are at liberty to find in their own constitutions greater protection than is afforded by the federal constitution, according to the U. S. Supreme Court. Oregon v. Hass, 420 U.S. 713, 719, 95 S. Ct. 1215, 43 L.Ed.2d 570 (1975). And the Washington Supreme Court has done so in regard to the right to a jury trial in criminal cases, as I pointed out above. That is, in interpreting Article I, Section 22 of the Washington Constitution, the Washington Supreme Court has stated that persons charged with misdemeanors in Washington have a right to a jury trial for

misdemeanors. City of Pasco, supra, 98 Wash.2d 87 at 101, citing Oregon v. Hass, supra.

Because a violation of RCW 26.28.080 is a gross misdemeanor, anyone charged with a violation of that tobacco statute is entitled to a jury trial, and any other tobacco statutes such as RCW 70.155.100 (3) and RCW 70.155.100 (4) when read together with RCW 70.155.100 (8) (which purport to grant jurisdiction to the Office of Administrative Hearings (OAH) under the Administrative Procedure Act to adjudicate an alleged violation of RCW 26.28.080), are unconstitutional on their face.

#### VII. CONCLUSION

Because the Court of Appeals Opinion raises significant issues of law under the Sixth Amendment of the U. S. Constitution and under Article I, Section 22 of the Washington Constitution, and because the Court of Appeals appears to have misunderstood the gist of my complaint, the Washington Supreme Court should accept review and reverse the Court of Appeals.

Dated this 11<sup>th</sup> day of December, 2013

Respectfully submitted,

  
John F. Klinkert  
Petitioner Pro Se

# **Appendix**

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

|                         |   |                                 |
|-------------------------|---|---------------------------------|
| JOHN F. KLINKERT,       | ) | No. 69359-0-1                   |
|                         | ) |                                 |
| Appellant Pro Se,       | ) | DIVISION ONE                    |
|                         | ) |                                 |
| v.                      | ) |                                 |
|                         | ) |                                 |
| WASHINGTON STATE LIQUOR | ) | UNPUBLISHED                     |
| CONTROL BOARD,          | ) |                                 |
|                         | ) |                                 |
| Respondent.             | ) | FILED: <u>November 12, 2013</u> |
|                         | ) |                                 |

Cox, J. — A statute is presumed to be constitutional, and the party challenging its constitutionality bears the burden of proving beyond a reasonable doubt its unconstitutionality.<sup>1</sup> Here, John Klinkert fails in his burden to prove beyond a reasonable doubt that the statute authorizing the Liquor Control Board to impose civil penalties for the sale of tobacco to minors is unconstitutional. We affirm.

In March 2011, a Washington State Liquor Control Board (“Board”) officer issued a written citation alleging that Walgreen’s employee John Klinkert sold tobacco to a minor, and seeking a \$100 penalty under RCW 70.55.100. Klinkert contested the citation at an administrative hearing. After a hearing on stipulated facts, an administrative law judge found that Klinkert violated Washington law by selling tobacco to a person under the age of 18 years, contrary to RCW 26.28.080. The judge upheld the \$100 penalty pursuant to RCW 70.155.100(3)

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<sup>1</sup> Madison v. State, 161 Wn.2d 85, 92, 163 P.3d 757 (2007).

and (4)(a). Klinkert petitioned the Board for review. The Board adopted the findings of fact of the administrative law judge and sustained the penalty.

Klinkert sought judicial review in Snohomish County Superior Court, challenging the constitutionality of statutes authorizing the Board to impose civil penalties for violations of RCW 26.28.080, and seeking costs under RCW 4.84.350. The court affirmed the Board's final order and did not award costs.

Klinkert appeals.

### CONSTITUTIONALITY OF STATUTES

The Administrative Procedure Act (APA) governs our review of the Board's final order.<sup>2</sup> We may reverse such an administrative decision if "[t]he order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied," or "[t]he order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law."<sup>3</sup> Klinkert bears the burden of demonstrating the invalidity of the Board's action.<sup>4</sup>

We review constitutional challenges to a statute de novo.<sup>5</sup> A statute is presumed to be constitutional, and the party challenging its constitutionality bears the burden of proving beyond a reasonable doubt its unconstitutionality.<sup>6</sup>

RCW 70.155.100 provides in pertinent part:

(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....

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<sup>2</sup> Tapper v. Employment Sec. Dep't, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

<sup>3</sup> RCW 34.05.570(3)(a) & (b).

<sup>4</sup> RCW 34.05.570(1)(a).

<sup>5</sup> City of Bothell v. Barnhart, 172 Wn.2d 223, 229, 257 P.3d 648 (2011).

<sup>6</sup> Madison, 161 Wn.2d at 92.

(4) The monetary penalty that the liquor control board may impose based upon one or more findings under subsection (3) of this section may not exceed the following: (a) For violation of RCW 26.28.080 ... fifty dollars for the first violation and one hundred dollars for each subsequent violation ....

(8) All proceedings under subsections (1) through (6) of this section shall be conducted in accordance with chapter 34.05 RCW.

RCW 26.28.080 provides in pertinent part: "Every person who sells or gives, or permits to be sold or given to any person under the age of eighteen years any cigar, cigarette, cigarette paper or wrapper, or tobacco in any form is guilty of a gross misdemeanor."

Noting that RCW 26.28.080 defines a crime, Klinkert argues that the challenged sections of RCW 70.155.100, by allowing the Board to adjudicate alleged violations of a criminal statute under the APA, violate the right to a jury trial in "criminal prosecutions" guaranteed by the state and federal constitutions.<sup>7</sup> He further argues that RCW 70.155.100 is unconstitutional because it purports to "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."

But Klinkert cites no relevant authority to support his claims and his analysis is incorrect. Contrary to Klinkert's unsupported assertions, nothing in the state or federal constitution prevents the Legislature from providing for civil monetary penalties by referring to a statute defining particular conduct as a

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<sup>7</sup> Const. art. I, § 22; U.S. Const. amend. VI.

criminal offense.<sup>8</sup> RCW 70.155.100 does not provide for or result in an adjudication of a criminal offense in an administrative agency proceeding. The Board assesses civil penalties in civil proceedings based on conduct that is also subject to separate criminal proceedings. There is no right to a jury trial or other constitutional guaranties that he asserts under these circumstances.

The Board issued a citation to Klinkert listing the following options on the back under the title "Administrative Violation Process:" (1) pay the monetary penalty to the Board; (2) request a settlement conference with a Board representative; or (3) request a formal administrative hearing. Although the citation refers to RCW 26.28.080, indicating the alleged violation involved sale of tobacco products to a minor, it does not include any reference to a criminal charge, a prosecuting authority, or criminal court proceedings. Moreover, the citation refers only to a \$100 penalty under RCW 70.155.100 for an "employee making sale." Following the administrative procedure, the Board entered a final order directing Klinkert to pay the \$100 monetary penalty within 30 days. Klinkert does not allege or demonstrate that the Board's administrative procedure here resulted in a criminal conviction or the imposition of a criminal sentence.<sup>9</sup> Under these circumstances, Klinkert fails to establish any constitutional violation or any agency action without authority.

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<sup>8</sup> See, e.g., Winchester v. Stein, 135 Wn.2d 835, 852-53, 856, 959 P.2d 1077 (1998) (the fact that same conduct leading to civil monetary sanction is also criminal in nature is insufficient to prevent imposition of civil sanctions under the criminal profiteering act on double jeopardy grounds).

<sup>9</sup> RCW 26.28.080 defines the crime of selling tobacco to minors as a gross misdemeanor and RCW 9.92.020 provides for punishment of imprisonment of up to 364 days or a fine up to \$5,000, or both, for a person "convicted of a gross misdemeanor."

## COSTS

Klinkert next contends he is entitled to costs under RCW 4.84.350, which provides for an award of fees and expenses to "a qualified party that prevails in a judicial review of an agency action," subject to an exception that is not relevant here. Because Klinkert has not prevailed, he is not entitled to an award of costs.

We affirm the Findings of Fact, Conclusions of Law and Order for Judgment. We deny his request for costs.

COX, J.

WE CONCUR:

Reach, C. J.

Cuppelwick, J.

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

JOHN F. KLINKERT,

Petitioner

vs.

WASHINGTON STATE  
LIQUOR CONTROL BOARD,

Respondent

NO. 69359-0-I

CERTIFICATE 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 attached Petition for Review 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 16<sup>th</sup> day of December, 2013 at Lynnwood, Washington.

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