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DIVISION ONE  
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PROSECUTOR GENERAL  
CRIMINAL DIVISION

78656-9

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,	)	
Respondent,	)	NO. 56017-4-1
	)	PETITIONER'S ANSWER
v.	)	TO RESPONDENT'S
	)	MOTION TO
MICHAEL MILES,	)	SUPPLEMENT
Petitioner,	)	
	)	
	)	

**I. Identification of the Parties**

Michael Miles is the petitioner in Cause No. 56017-4-1. The State of Washington is the respondent in Cause No. 56017-4-1. Respondent, as moving party, has brought a motion to supplement the record. Petitioner answers.

**II. Relief Requested**

Petitioner asks the Commissioner to deny the motion and strike the respondent's brief without prejudice to redact and re-file.

**III. Introduction**

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The Commissioner should deny the motion because the trial court appropriately denied admission of the evidence in question. Contrary to respondent's claim, it was not petitioner's reply that resulted in the trial court's denial. Rather, respondent's own errors, tactical decisions, and lack of diligence resulted in the Court's denial of admission of the evidence. Especially given the limited probative value of the evidence at issue, petitioner asks that the Commissioner not grant an extraordinary equitable remedy under these circumstances.

#### **IV. Statement of the Case**

Petitioner moved to suppress evidence in the trial court because the government obtained his bank records through the use of a secret subpoena.<sup>1</sup> Petitioner contended that the procedure violated art. 1, § 7 of the Washington State Constitution. Respondent received petitioner's motion and brief on November 1<sup>st</sup>, 2004. (CP 10-30).

Respondent filed an answering brief on November 18<sup>th</sup>, 2004. In

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<sup>1</sup> Respondent's brief on the merits objects to the term "secret subpoena." Given that 1) the government did keep the subpoena secret from Mr. Miles and 2) the term of art listed in the cases- inquisition subpoena - is more pejorative, petitioner elects to continue to use the term secret subpoena. *See, e.g., Alpha Medical Clinic v. Anderson*, Kansas Supreme Court Docket No. 93, 383 (Kan. 2/3/06); *In Re Subpoena Duces Tecum*, 228 F.3d 341, 350 (4<sup>th</sup> Cir. 2000); *Shwutah, Gutierrez v. Medley*, 972 P.2d 913, 917-918 (Stewart, J. Concurring); (Utah 1998); *People v. Delaire*, 240 Ill. App.3d 1012, 1024, 610 N.E 2d 1277 (1993); *Matter of Cr. Invest.*, 754 P.2d 653, 656 (Utah 1988); *Complaint Concerning Kirby*, 354 N.W2d 410, 421 (Minn. 1984).

this brief, respondent argued that the subpoena was valid under RCW 21.20.380. However, respondent cited to an amended version of the statute containing a secrecy provision added one year after the date the subpoena issued. (CP 56).

Petitioner noted this error in a reply brief submitted on December 6<sup>th</sup>, 2004. There is no claim that petitioner's reply was not timely. (CP 101, 103, 130-132)

Rather than requesting a continuance or giving notice of additional facts and witnesses, respondent chose a novel tactic. Respondent submitted his oral argument in writing on December 9<sup>th</sup>, 2004. This written oral argument contained factual allegations attributed to Martin Cordell. (VRP 11-12, CP 153-155).

Judge Armstrong appropriately denominated this material as facts not in record and refused to admit the evidence:

Mr. Orton: ...I asked Marty Cordell, who is Chief of Enforcement of State Securities, I asked him yesterday why was that legislative proposal put forward in 2002. He said its because we've had some banks who are not complying with our requests. There was no doubt that we had the authority to request that they not disclose it, but we became convinced that there was at least some doubt as to whether we could require that they not disclose it. So, the purpose of that statute....

Judge Armstrong: No. I don't think that's on the record, right?

Mr. Orton: Do you want me to get an affidavit from Mr. Cordell? I mean in the two days that I had, I didn't have time to do that.

Judge Armstrong: No.

Mr. Orton: Then I'll state the argument without reference to Mr. Cordell....

(VRP, 23-24).

The Court ruled on the motion three months later. (CP 179-191).

The parties asked the trial court to certify the issue now before the Court of Appeals. (CP 191-198). The trial court certified the issue and the parties brought an agreed motion for discretionary review. (CP191-98). This Court granted review.

**V. Question Presented and Brief Answer**

**A) Question Presented**

**Under RAP 9.10 or RAP 9.11, should the Commissioner grant a motion to admit supplemental evidence on appeal, when evidence is of limited probative value and the party seeking admission, did not list the declarant as a potential witness, had an opportunity to timely request a continuance prior to oral argument and failed to do so, chose instead to attempt to present evidence through the oral argument of counsel, and did not file a motion to reconsider or to vacate?**

**B) Brief Answer**

**No. RAP 9.10 is limited to corrections or supplementation of papers or proceedings actually in the trial court's record. The declaration at issue is not of record below.**

**By contrast, RAP 9.11 addresses the introduction of new evidence on review. Assuming that the Commissioner acts under RAP 1.2 and RAP 18.8 to entertain respondent's motion in the first instance, the petitioner asks the Commissioner to deny the motion under RAP 9.11.**

**Respondent:**

- 1) erroneously cited a non-existent statutory provision;**
- 2) incorrectly implies petitioner created an emergency to petitioner; when respondent**
- 3) failed to exercise diligence and timely use available remedies at law;**  
**and**
- 4) attempted to use oral argument for the purposes of bearing witness;**
- 5) for the purpose of admitting evidence of low probative value.**

**Under these circumstances, a petitioner asks that the Commissioner deny an extraordinary equitable remedy on review.**

## **VI. Argument**

### **A) The Motion Is Not Proper Under RAP 9.10**

RAP 9.10 addresses situations where an incorrect or incomplete record is transmitted to the Court of Appeals. Under those circumstances, the Court of Appeals can direct transmission of additional clerk's papers and exhibits from the trial court. The Court of Appeals can also direct the correction of error in or supplementation of the verbatim report of the proceedings. *See* RAP 9.10.

RAP 9.10 does not authorize the taking of additional evidence on review. It pertains only to the record of earlier trial court proceedings. *See Harrison v. Garden Vly. Outfitters*, 69 Wn. App. 590, 593; 849 P.2d 669 (1993)(rule does not authorize admission of an affidavit not considered below). Therefore, petitioner asks that the Commissioner deny the motion under RAP 9.10.

### **B) The Motion Is Not Proper Under RAP 9.11**

Admission of additional evidence on review is an extraordinary and infrequent remedy. *Fed'n of State Employees v. State*, 99 Wn.2d 878, 885-886, 665 P.2d 1337 (1983)(allowing additional evidence when trial was conducted under emergency circumstances, the evidence first became

available post-trial, and was critical to the decision in the case). RAP 9.11 only allows admission of additional evidence on review on the appellate court's own motion. *Fed'n of State Employees*, 99 Wn.2d at 884. Unless the appellate court acts under the authority of RAP 1.2 and RAP 18.8, a party's motion under RAP 9.11 should not be entertained. *Mission Ins. Co. v. Guarantee Ins. Co.*, 37 Wn. App. 695, 683 P.2d 215 (1984).

Normally, RAP 9.11 is a limited remedy that will be granted only if all six of its criteria are met.<sup>2</sup> *State v. Ziegler*, 114 Wn.2d 533, 541, 789 P.2d 79 (1990). However, the appellate court can waive some or all of the requirements under the authority of RAP 1.2 and RAP 18.8, if the interests of justice are served. *Sears v. Grange Ins. Ass'n*, 111 Wn.2d 636, 640, 762 P.2d 1141 (1988)(noting the ability to waive, but refusing to waive the rule's requirements); *Fed'n of State Employees*, 99 Wn.2d at 884 n. 4 (applying RAP 1.2 and RAP 18.8 to entertain the motion, but granting the motion only after finding all six conditions met); *In Re Brooks*, 94 Wn. App. 716, 723-724, 973 P.2d 486 (1999)(waiving some

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<sup>2</sup> "...(a) **Remedy Limited.** The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issue on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through post-judgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court." *See* RAP 9.10(a).

requirements).

But, the cases do not stand for the proposition that an appellate court should excuse a party's own failure to properly offer evidence in the trial court. Failure to exercise due diligence in presenting evidence in the court below has not been excused. *See Ziegler*, 114 Wn.2d at 541 (refusing to supplement when medical articles were not available until after trial, but defendant did not offer or assign error to the trial court's refusal to admit evidence of his own medical records or testimony from his physician that were available); *Sears v. Grange Ins. Ass'n*, 111 Wn.2d at 639-640 (finding it was not equitable to excuse a party's failure when the evidence was available for five years); *Fed'n of State Employees*, 99 Wn.2d at 886 (finding equity when the evidence was not available until after the lawsuit); *Harbison*, 69 Wn. App. at 594 citing (refusing to allow evidence known at the time of the proceedings below), *Grange Insurance v. MacKenzie*, 37 Wn. App. 695, 702-703, 683 P.2d 215 (1984)(not equitable to excuse party's failure to present evidence to the trial court even though evidence not available at time of trial, due diligence required a motion to vacate for newly discovered evidence and admission in the appellate court by way of RAP 7.2(e)).

These cases stand for the proposition that the moving party must demonstrate due diligence in the trial court to obtain this remedy in the

appellate court. Because respondent did not demonstrate due diligence, the Commissioner should deny the motion to supplement.

Respondent's failure to exercise due diligence began with his initial response brief and carried through to the end of the proceedings below. When faced with a claim of violation of art. 1, § 7, respondent contended that the subpoena was valid under *amended* RCW 21.20.380.<sup>3</sup>

In reply, petitioner pointed out that respondent's contention that *amended* RCW 21.20.380 supplied authority of law lacked merit because the legislature passed the amendment a year after the relevant subpoena issued. The amendment states in pertinent part:

"...(3) A subpoena issued to a financial institution under this section may, if the director finds it necessary or appropriate in the public interest or for the protection of investors, include a directive that the financial institution subpoenaed shall not disclose to third parties that are not affiliated with the institution, other than to the institution's legal counsel, the existence or content of the subpoena..."

*See* Laws of 2002, ch. 65, § 7 (inserting subsec. (3)). The original statute, in effect on the day the relevant subpoena issued, contained no language whatsoever regarding non-disclosure.

To reply to this argument, respondent chose to interview Martin

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<sup>3</sup> Contrary to the implication that respondent attempts to raise, it was respondent's burden to prove a narrow exception to art. 1, §7's warrant requirement. *See e.g. State v. Robinson*, 102 Wn. App. 795, 813 (2000). It was not incumbent on the petitioner to make this argument for the government and entirely proper to reply to the erroneous statutory citation the government did claim.

Cordell. Then, respondent sought to incorporate factual allegations attributed to Mr. Cordell into petitioner's written oral argument.

The relevance of Mr. Cordell's statements is debatable at best and their probative value is low. Cordell offered statistical information for 2004, the subpoena issued in 2001. Cordell offered an opinion on legislative intent, but Cordell was not a member of the legislature and did not cite to any committee report or floor debates. Cordell offered an opinion on Securities Division policy, but did not cite to any published regulation or internal policy manual in support of his statement. There is no claim that Cordell had any direct knowledge of the investigation at issue or the subpoena in this case. Finally, it has never been the case that agency action alone, without statutory authorization, could supply the authority of law required by art. 1, § 7. *See State v. Butterworth*, 48 Wn. App. 152, 157-158, 737 P.2d 1297 (1987) (Legislature cannot confer on agencies the authority to vary state constitutional privacy protections by regulation or rule). Under these circumstances, Cordell's statement is of low probative value.

What is beyond debate is the impropriety of respondent's tactics. Faced with a serious error in analysis, respondent did not timely request a continuance or even list Cordell as a potential witness. Instead, respondent proceeded to oral argument and attempted to offer factual allegations not

of record. It was only after Judge Armstrong denied argument on facts not in record that respondent made any effort to remedy the situation.

Nor did respondent attempt to cure this situation thereafter in the trial court. As noted above, the trial court deliberated on this motion for 90 days. Respondent did not move to reconsider at any point during this 90 day period.

Likewise, respondent did not subsequently move to vacate that portion of the trial court's decision during the pendency of the agreed motion for discretionary review. It is no answer to state that post-judgment motions do not apply to interlocutory decisions. Clearly, CrR 7.8(b) supplied an avenue because it is not applicable solely to final judgments, but also applies to any order or proceeding. *See* CrR 7.8(b).

Stated strictly in the terms of RAP 9.11, the petitioner asks the Commissioner to deny respondent's motion because:

(1) Additional proof of facts are not needed to fairly resolve the issue on review. The probative value of Cordell's statements is low. The Court of Appeals can fairly resolve the issue without reference to an offer of statistics from 3 years after the events of the case, an unsupported statement of legislative intent by a non-legislator, an opinion on agency policy unsupported by regulation or manual, or inferential application of

those policies by a person who did not conduct the investigation at issue. This is particularly true in the context of art.1, § 7, where even a published regulation cannot supply authority of law. *Butterworth*, 48 Wn. App. at 157-158.

(2) the additional evidence would probably not change the decision being reviewed. It can hardly be said that statistics from the wrong year, an unsupported statement of legislative intent, a statement of agency policy unsupported by regulation or manual, offered by a person without personal knowledge of the investigation or subpoena before the Court of Appeals is dispositive.

(3) it is not equitable to excuse respondent's failure to present the evidence to the trial court. Respondent was quite obviously aware of Mr. Cordell, but did not list him as a witness. Respondent claims surprise, but any surprise resulted from respondent's own error. Even if excusable negligence were proper to interpose, respondent did not seek to do so by timely requesting a continuance or even listing declarant Cordell as a witness. Rather, respondent went forward with oral argument (in written form) and did not attempt to seek recourse to a legal remedy until after the trial court properly refused to allow respondent's incorporation of factual allegations. Thereafter, respondent did not seek reconsideration.

(4) the remedy available to the respondent through post-judgment

motions in the trial court was not inadequate or unnecessarily expensive. Rather, respondent simply did not seek these remedies during the pendency of decision below or acceptance in this Court.

(5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive. Petitioner agrees this requirement is inapplicable and should be waived under the circumstances. Given the interlocutory posture of this review, trial has not taken place.

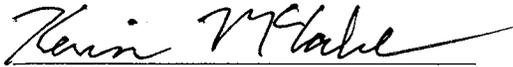
(6) it is equitable to decide the case solely on the evidence already taken in the trial court. Respondent failed to seek any of the remedies at law available below. There was no timely request for a continuance, no listing of Mr. Cordell, no pursuit of a motion to reconsider, and no recourse to vacation. The only attempt at recourse to a legal remedy was untimely and inappropriate. Respondent should have timely requested a continuance prior to offering facts during oral argument, not simply because this inappropriate tactic did not work. Having failed to avail himself of a remedy at law in the trial court, respondent should not be heard in equity in the Court of Appeals.

## **VII. Conclusion**

For the reasons cited above, the petitioner asks the Commissioner to deny the motion to supplement. There is no support in the decisional law for the proposition that a motion to supplement is proper when the

evidence was available below and the trial court properly refused to admit it. Respondent should not be allowed to fail to timely avail itself of the remedies at law available in the trial court and seek an extraordinary equitable remedy in the Court of Appeals. This is particularly true when the evidence is of low probative value. Under these circumstances, the requirements of RAP 9.11 are not met and it is not equitable to waive them.

Respectfully submitted by:



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