06AP1114

STATE OF WISCONSIN
SUPREME COURT

COPY

CASE NO. 06-AP1114-CR

STATE OF WISCONSIN,

Plaintiff-Appellant

vs.

MICHELLE R. POPENHAGEN,

Defendant-Respondent-Petitioner

ON REVIEW FROM A DECISION BY THE COURT OF APPEALS REVERSING AN ORDER SUPPRESSING EVIDENCE THAT WAS ENTERED IN THE ONEIDA COUNTY CIRCUIT COURT, THE HONORABLE MARK MANGERSON PRESIDING ONEIDA COUNTY CASE #04-CF-192

BRIEF OF DEFENDANT-RESPONDENT-PETITIONER

James B. Connell
State Bar No. 1015474
CROOKS, LOW & CONNELL, S.C.
Attorneys for Defendant-
Respondent-Petitioner
531 Washington Street
P.O. Box 1184
Wausau, WI 54402-1184
(715) 842-2291

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES:

OTHER REFERENCES:

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does Michelle Popenhagen have a State constitutional right to the expectation of privacy in her bank records?

Answered by the trial court: Yes.

Answered by the Court of Appeals: No.

2. Is suppression of evidence a remedy for a violation of Sec. 968.135 which requires probable cause for the issuance of a subpoena for documents?

Answered by the trial court: Yes.

Answered by the Court of Appeals: No.

3. Does Michelle Popenhagen have a Fourth Amendment right to the expectation of privacy in her bank records?

Answered by the trial court: Yes.

Answered by the Court of Appeals: No.

4. Does the court have the inherent authority to order the suppression of evidence due to the misuse of process?

Not answered by the trial court or the Court of Appeals.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested.

This case involves important constitutional and statutory issues and oral argument will be useful in fully presenting and meeting the issues on appeal and in fully developing the theories and legal authorities on each side.

Publication is also requested.

The issues involved in this case are of substantial and continuing public interest. The decision in this case will clarify existing law with regard to the right to the expectation of privacy in financial records.

STATEMENT OF THE CASE

On September 20, 2004, Michelle Popenhagen was charged in a Criminal Complaint with one count of felony theft in a business setting contrary to Sec. 943.20(1)(b), Wis. Stats.

After waiving a preliminary hearing and after a not guilty plea was entered, Ms. Popenhagen moved the court for an order suppressing evidence. The trial judge, the Honorable Mark A. Mangerson, conducted a hearing on November 11, 2005, and issued a decision on that day. The trial court found that the bank records were obtained in violation of Ms. Popenhagen's federal and state constitutional rights and suppressed the evidence obtained including Ms. Popenhagen's statement.

The State filed an appeal and the Court of Appeals, in a two to one decision, reversed the order of the trial court suppressing the evidence. The Decision was dated and filed on December 12, 2006. Ms. Popenhagen appeals from that Decision.

STATEMENT OF FACTS

In 2003, Michelle Popenhagen worked for Save-More Foods, a supermarket in Minocqua, Wisconsin. Save-More's owner contacted the Minocqua Police Department and told police that Ms. Popenhagen was suspected of stealing money when she deposited funds into an ATM and that she was cashing checks for herself that had been returned due to a closed account or insufficient funds.

Minocqua Police Officers then requested and obtained three subpoenas for Ms. Popenhagen's bank records through the Oneida County District Attorney's office. No showing of probable cause was made as required by Sec. 968.135, Wis. Stats. No attempt was made to establish probable cause.

The State concedes that the subpoenas were issued without a criminal action being filed and without a showing of probable cause as required by law.

The subpoenas were served and the banks provided the requested records. When the police confronted Ms. Popenhagen with the records, she made statements which, with the records, formed the basis of a felony theft charge.

ARGUMENT

I. MICHELLE POPENHAGEN HAS A RIGHT TO THE REASONABLE EXPECTATION OF PRIVACY IN BANK RECORDS UNDER THE WISCONSIN CONSTITUTION.

Michelle Popenhagen contended in the trial court that she was entitled to a reasonable expectation of privacy in her bank records under the Wisconsin Constitution. Judge Mangerson agreed and found a violation of the State Constitution in this case. (R-26, p. 25).

The Court of Appeals reversed the decision of the trial court holding that the decision in State v. Swift, 173 Wis.2d 870, 496 N.W.2d 713 (Ct. App. 1993), was controlling and that the court was, therefore, bound to follow the Swift decision.

In Swift, the Court of Appeals ruled against the defendant's privacy interest argument based upon the United States Supreme Court decision in United States v. Miller, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976).

In Miller, the court held that bank customers have no protectable interest in the privacy of bank account records under the Fourth Amendment. The Swift decision noted that Wisconsin courts interpret Article I, Sec. 11 of the Wisconsin Constitution in conformity with the United States Supreme Court's interpretation of the Fourth Amendment.

In this case, Judge Cane issued a strong dissent to the majority opinions of the Court of Appeals. Ms. Popenhagen

contends that Judge Cane's analysis and reasoning is in line with the Wisconsin Constitution and that the decision in State v. Swift should be reversed.

Article I, Section 11 of the Wisconsin Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized."

The provisions of Article I, Section 11 of the Wisconsin Constitution are nearly identical to those contained in the Fourth Amendment to the United States Constitution. The Constitution of the State of Wisconsin, however, is an independent law enacted by the people of this State to limit the exercise of State power. State constitutions may offer a level of protection for individual liberties greater than the level of protection afforded by the Federal Constitution. Each of the fifty states have the right to provide constitutional protections that provide greater protection for individual rights and liberties than those mandated by the Federal Constitution. States may provide individuals with as much or more protection than does the Federal Constitution but they may not provide less. In this regard, states are free to develop their own independent state constitutional

jurisprudence. Gardner State Constitutional Rights as Resistance to National Power Toward a Functional Theory of State Constitutions, 91 Georgetown Journal L. 1003 (2003).

Independent state constitutional interpretations can help develop the law, including federal constitutional law, because of the persuasiveness of the reasoning used in state constitutional adjudication and also by providing a reference point for federal constitutional law.

In applying the exclusionary rule, the United States Supreme Court has emphasized the deterrent effectof the exclusionary rule. It will deter law enforcement from violating Fourth Amendment rights. Wisconsin courts have applied the exclusionary rule on a much broader basis, that is the exclusionary rule came into existence not to simply deter law enforcement, but rather to protect the people of the State of Wisconsin. Justice Eschweiler wrote: "Sec. 11, Art I, Wis. Const., is a pledge of the faith of the State government that the people of the state all alike . . . shall be secure. . ." Hoyer v. State, 180 Wis. 407, 417, 193 N.W. 89 (1923).

The Wisconsin Supreme Court has recognized that it is the prerogative of the State of Wisconsin to afford greater protections to the liberties of persons within its boundaries under the Wisconsin Constitution than is mandated by the United States Supreme Court under the Fourth Amendment. In

State v. Doe, 78 Wis.2d 161, 264 N.W.2d 210 (1977), Justice Heffernan observed:

> "This court has demonstrated that it will not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the constitution of Wisconsin and the laws of this State require that greater protection of citizens' liberties ought to be afforded." 78 Wis.2d at 172.

This principle was recently reiterated by the Wisconsin Supreme Court in State v. Knapp, 2005 WI 127, 285 Wis.2d 86, 700 N.W.2d 899, and State v. Dubose, 2005 WI 126, 285 Wis.2d 143, 699 N.W.2d 582.

In his concurring opinion in State v. Knapp, Justice Crooks explained why Wisconsin courts should refuse to mechanically apply decisions based on federal law to the rights guaranteed by the State Constitution. He stated:

> "As early as 1977, United States Supreme Court Justice William J. Brennan, Jr., recognized and encouraged the emerging pattern of state court decisions interpreting their own constitutions and declining to follow Federal precedent - they found 'unconvincing even where the state and federal constitutions are similarly or identically phrased'. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights,* 90 Harv. L. Rev. 489, 500 (1977). Justice Brennan emphasized the fact that the 'decisions of the [U.S. Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them'. . . . This trend of state courts' 'asserting a role for state constitutions

> in the protection of individual liberties and the resolution of legal disputes', has become known as 'new federalism'. Shirley S. Abrahamson, *State Constitutional Law, New Judicial Federalism, and the Rehnquist Court*, 51 Clev. St. L. Rev. 339, 341 (2004)." 2005 WI at 131.

The principles of "new federalism" apply to search and seizure questions as well. Recent decisions of the Wisconsin Supreme Court indicate a new willingness to interpret the State Constitution independently of its federal counterpart in search and seizure law. The court's position was recently stated in State v. Young, 2006 WI 98, 294 Wis.2d 1, 717 N.W.2d 729:

> "Typically, this court interprets Article I, Sec. 11 of the Wisconsin Constitution in tandem with the Fourth Amendment jurisprudence of the United States Supreme Court. Griffith, 2000 WI 72, 236 Wis.2d 48, p. 24, n. 10, 613 N.W.2d 72. Of course, we do not always follow the Supreme Court's lead (n. 9) and the court does not require us to do so when we supplement the United States Constitution's protections with protections under our own constitution. See *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), ('it is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions'.)" 2006 WI at 98.

The Wisconsin Supreme Court held in State v. Eason, 2001 WI 98, 245 Wis.2d 206, 629 N.W.2d 625, that Article I, Sec. 11 of the Constitution guarantees more protection than the Fourth Amendment of the United States Constitution. In adopting a "good faith" exception to the exclusionary rule, the Wisconsin Supreme Court held that the Wisconsin Constitution requires

greater protection than that afforded by the United States Supreme Court in United States v. Leon, 468 U.S. 897, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984).

The "good faith" exception applies in this State only if the prosecution establishes that the warrant process included a significant investigation and a review by an attorney or other official knowledgeable about the law of probable cause and reasonable suspicion. State v. Eason, supra. The Eason decision demonstrates the Wisconsin Court's willingness to interpret the protections of the Wisconsin Constitution more broadly than federal courts interpret the Federal Constitution in the area of search and seizure.

Michelle Popenhagen contends that the Article I, Section 11 provides her with a protectable privacy interest in her bank records.

The courts of other states have applied state constitutional provisions and held that citizens have a reasonable expectation of privacy in bank records. In a case that predates United States v. Miller, supra, the California Supreme Court in Burrows v. Superior Court, 13 Cal. 3d. 238, 118 Cal. Rptr. 166, 529 P.2d 590 (1974), held that under the California Constitution, a bank customer had an expectation of privacy in his bank records. The court held:

> ". . .For all practical purposes, the disclosure by individuals or business firms of their financial

> affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account. In the course of such dealings, a depositor reveals many aspects of his personal affairs, opinions, habits and associations. Indeed, the totality of bank records provides a virtual current biography. . . To permit a police officer access to these records merely upon his request, without any judicial control as to relevancy or other traditional requirements of legal process, and to allow the evidence to be used in any subsequent criminal prosecution against a defendant, opens the door to a vast and unlimited range of very real abuses of police power." 13 Cal.3d at 247.

In cases decided since United States v. Miller, supra, courts of other states have rejected the Miller rationale and applied state constitutions to uphold the privacy of bank records. In Charnes v. DiGiacomo, 612 P.2d 1117 (1980), the Colorado Supreme Court held that bank customers have a reasonable expectation of privacy under the Colorado Constitution in their bank records and, therefore, have a standing to challenge a subpoena issued to a financial institution for records.

In Commonwealth v. DeJohn, 403 A. 2d 1283 (1979), Cert denied 444 U.S. 1032, 62 L.Ed.2d 668, 100 S.Ct. 704, the Pennsylvania Supreme Court relied upon its state constitution which provided bank customers with a legitimate expectation of privacy in records pertaining to their affairs kept at the bank. The court upheld the suppression of evidence seized

pursuant to an invalid warrant issued without court process. Other decisions have held that state constitutions offer protection for the reasonable expectation of privacy which individuals have in their bank records. These decisions include People v. Jackson, 452 N.E.2d 85 (Ill. App. 1983); Winfield v. Division of Pari-mutual Wagering, 477 So.2d 544 (Fla 1985); State v. Thompson, 810 P.2d 415 (Utah 1991); and State v. McCallister, 875 A. 2d 866 (NJ 2005).

In a recent decision, the Wisconsin Supreme Court held that it will follow Fourth Amendment precedent if "we perceive soundness in Supreme Court analysis and value in uniform rules". State v. Young, supra.

The Court of Appeals in State v. Swift, supra, held that bank records were entitled to the same level of protection under the Wisconsin Constitution as they were under the Fourth Amendment. The court relied on the United States Supreme Court decision in Unites States v. Miller, supra, for the proposition that there is no reasonable expectation of privacy in bank records.

The United States Supreme Court analysis in United States v. Miller, is not sound. In Miller, the defendant was accused under federal law with running an illegal liquor still in Georgia. Some of the evidence used against him at trial consisted of microfilmed bank records obtained from several

pursuant to an invalid warrant issued without court process. Other decisions have held that state constitutions offer protection for the reasonable expectation of privacy which individuals have in their bank records. These decisions include People v. Jackson, 452 N.E.2d 85 (Ill. App. 1983); Winfield v. Division of Pari-mutual Wagering, 477 So.2d 544 (Fla 1985); State v. Thompson, 810 P.2d 415 (Utah 1991); and State v. McCallister, 875 A. 2d 866 (NJ 2005).

In a recent decision, the Wisconsin Supreme Court held that it will follow Fourth Amendment precedent if "we perceive soundness in Supreme Court analysis and value in uniform rules". State v. Young, supra.

The Court of Appeals in State v. Swift, supra, held that bank records were entitled to the same level of protection under the Wisconsin Constitution as they were under the Fourth Amendment. The court relied on the United States Supreme Court decision in Unites States v. Miller, supra, for the proposition that there is no reasonable expectation of privacy in bank records.

The United States Supreme Court analysis in United States v. Miller, is not sound. In Miller, the defendant was accused under federal law with running an illegal liquor still in Georgia. Some of the evidence used against him at trial consisted of microfilmed bank records obtained from several

banks through the use of a subpoena from a federal prosecutor. Miller argued that the bank records were illegally obtained because they contained private and confidential information for which a search warrant should have been required. The government argued that the Fourth Amendment did not protect Miller's bank records from a warrantless search because the microfilm was the bank's property. Miller was convicted at a trial in which the bank records were introduced. The Court of Appeals reversed the conviction finding that Miller had a protected Fourth Amendment interest in his bank records.

The United States Supreme Court disagreed with the Court of Appeals and reversed. The court held that bank records were not Miller's property but the bank's property and because the contents of the records were exposed to bank employees, there was no reasonable expectation of privacy in the records under the Fourth Amendment.

The Miller decision was met with nearly unanimous disapproval. Critical articles include: La Fave, 1 Search and Seizure 511 (2nd Ed. 1987); Alschuler, Interpersonal Privacy and the Fourth Amendment 4 N.Ill U.L. Rev. 1 (1983); Comment, Reasonable Expectations of Privacy in Bank Records: A Reapproval of United States v. Miller and Bank Deposition Privacy Rights, 72 J. Crim. L & Crim. 243 (1981); Note, Government Access to Bank Records, 83 Yale L.J. 1439 (1974),

Alexander and Spurgeon, Privacy, Banking Records and the Supreme Court, A Before and After Look at Miller, 10 SW L. Rev. 13 (1978).

Executive and legislative response to the Miller decision was swift. In 1977, a Presidential Commission released a report recommending strict procedures for the issuance of subpoenas for medical, banking and other personal records. Personal Privacy in an Information Society: The Privacy Protection Study Commission. (Submitted to President Carter on July 12, 1977). The Commission recommended that Congress provide individuals by statute "with an expectation of confidentiality in a record identifiable to him maintained by a private-sector record keeper in its provision of financial services..." Report pg. 13. The recommendation was based on "the protection for private papers and effects articulated in the Fourth Amendment and the due process protections articulated in the Fifth Amendment to the Constitution of the United States." Report, pg. 13.

In United States v. Katz, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the United States Supreme Court held that the bugging of a telephone booth by governmental agents without a warrant violated the Fourth Amendment. The court declared "the fourth amendment protects people, not places". 389 U.S. at 351. The Katz decision recognized the right of

privacy as an interest separate from a strict property right. It is impossible to reconcile the Miller and Katz decisions. In Miller, the court rejected the Katz justifiable expectation of privacy analysis and opted for a mechanical property interest analysis which is ill suited in its application to twenty-first century technology. The observations of Justice Mosk of the California Supreme Court in Burrows are particularly on point:

> "Cases are legion that condemn violent searches and seizures and invasions of an individuals right to privacy of his dwelling. The imposition upon privacy although not so dramatic may be equally devastating when other methods are employed. Development of photocopying machines, electronic computers and other sophisticated instruments have accelerated the ability of government to intrude into areas which a person normally chooses to exclude from prying eyes and inquisitive minds. Consequently judicial interpretations of the reach of the constitutional protection of individual privacy must keep pace with the perils created by these new devices." 13 Cal.3d at 248.

This case presents a classic example of an unreasonable governmental intrusion that the Constitution was written to guard against. Wisconsin courts should side with Professor La Fave who has stated:

> The result reached in Miller is dead wrong and the courts woefully and adequate reasoning does great violence to the theory of fourth amendment protection which the court had developed in Katz ..." La Fave, Search & Seizure, p. 511.

Wisconsin citizens are entitled to a reasonable expectation of privacy in bank records. Our constitution should be interpreted to provide this protection.

II. MICHELLE POPENHAGEN HAS A STATUTORY RIGHT TO THE EXPECTATION OF PRIVACY IN HER BANK RECORDS AND SUPPRESSION IS THE APPROPRIATE REMEDY FOR VIOLATION OF THIS RIGHT.

The Court of Appeals held that, although it was undisputed that the subpoenas in this case were issued in violation of Wisconsin law, suppression was not an available remedy. The court held that suppression of evidence is only required if the statute specifically provides for it as a remedy. Section 968.135 does not specifically provide this remedy.

The statute reads:

> "Upon the request of the attorney general or a district attorney and upon a showing of probable cause under s. 968.12, a court shall issue a subpoena requiring the production of documents, as specified in s. 968.13(2). The documents shall be returnable to the court which issued the subpoena. Motions to the court, including, but not limited to, motions to quash or limit the subpoena, shall be addressed to the court which issued the subpoena. Any person who unlawfully refuses to produce the documents may be compelled to do so as provided in ch. 785. This section does not limit or affect any other subpoena authority provided by law."

The State concedes that the provisions of this statute with regard to the issuance of the subpoena for documents were not complied with in this case. Three subpoenas were signed

and issued to banks with no attempt to establish probable cause for their issuance.

The probable cause standard which must be met for the issuance of a subpoena under Sec. 968.135 is set forth in 9 Wiesman, Chiarkas and Blinka, Wisconsin Practice: Criminal Practice and Procedure, Sec. 2416 (1996):

> "The probable cause necessary to obtain a subpoena for records is essentially the same as that necessary to obtain a search warrant. Probable cause exists when the judge is presented with facts sufficient to 'excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime'. Though the probable cause standard is essentially identical, a subpoena demanding production of documents is not the equivalent of a search warrant, because the subpoena allows for a challenge to its demands by the target of the subpoena."

See also Custodian of Records v. State, 2004 WI 65, 272 Wis.2d 208, 680 N.W. 2d 792, reconsideration denied 2004 WI 49, 277 Wis.2d 48, 689 N.W.2d 908.

The standard for probable cause under Sec. 968.135, Wis. Stats., is the same as the constitutional standard for the issuance of a search warrant. The statute, therefore, establishes for persons whose records are subpoenaed a reasonable expectation of privacy in such records. Section 968.15, Wis. Stats., protects the reasonable expectation of privacy by providing procedural safeguards that even the procedure for the issuance of a search warrant does not

provide. Because Sec. 968.135 provides an ability to challenge a prospective subpoena before its return, it adequately protects the bank customer's right to privacy and may effectively substitute for the issuance of a search warrant. The statute creates a statutory expectation of privacy.

The remedy for violation of Sec. 968.135, Wis. Stats., should be suppression of evidence. In State v. Swift, supra, after rejecting constitutional challenges to the issuance of a subpoena for bank records, the Court of Appeals examined the affidavits which supported the issuance of subpoenas to determine whether they established probable cause.

There would have been no need for the court in Swift to explore the issue of probable cause if the bank customer had no remedy for the issuance of a subpoena without probable cause. The Swift decision is an implicit recognition of the remedy of suppression for the issuance of a subpoena for production of records when no probable cause has been established.

The language used by the legislature also supports the contention that suppression is an available remedy. The statute refers to motions "including, but not limited to motions to quash or limit the subpoena...". While the statute specifically refers to motions that can be brought before

compliance with the subpoena, Michelle Popenhagen had no opportunity to move to quash or limit the subpoena. By not restricting a challenge to a subpoena to motions to quash or limit, the legislature has recognized that other remedies such as suppression are also available for violation of the law.

The Wisconsin Supreme Court has suggested that suppression of illegally obtained evidence is the appropriate remedy for the violation of other privacy statutes.

For instance, the Wisconsin Electronic Surveillance Control Law, Sec. 968.31, Wis. Stats., does not expressly provide for suppression of evidence as a remedy for violation. In this regard, it is similar to Sec. 968.135, Wis. Stats. In State v. Waste Mgmt, Inc., 81 Wis.2d 555, 261 N.W.2d 147 (1978), the Supreme Court implicitly recognized that suppression of illegally obtained evidence would be required for a violation of the Wisconsin Electronic Surveillance Control Law.

Michelle Popenhagen contends Sec. 968.135, like other privacy statues, should be interpreted liberally to protect the privacy rights of individuals in this State. These statutes recognize a reasonable expectation of privacy. If these privacy statues are to be effective in protecting society's expectation of privacy in records and communications, suppression is a necessary remedy.

III. MICHELLE POPENHAGEN HAS A FOURTH AMENDMENT RIGHT TO THE EXPECTATION OF PRIVACY IN HER BANK RECORDS.

Judge Mangerson found that the State's action in this case violated Michelle Popenhagen's Fourth Amendment right to be free from unreasonable searches and seizures. The Court of Appeals reversed, relying upon United States v. Miller, supra, to support its position.

Michelle Popenhagen contends the Miller decision is no longer applicable and that subsequent developments in statutory law have, in effect, overruled the Miller decision.

In Miller, supra, the United States Attorney, without the depositor defendant's knowledge, issued a grand jury subpoena for all records of accounts in the depository's name from banks in which the defendant had accounts. The banks voluntarily produced copies of the depositor's checks and deposit slips. The United States Supreme Court decision applied property interest standards and held that because the check and bank deposit slips had been exposed to bank employees, there was no reasonable expectation of privacy in these records.

Because the Fourth Amendment was developed in the context of the eighteenth century fear of general search warrants and writs of assistance, the traditional analysis of Fourth Amendment problems applied a property test to determine whether a searched area is within a physical place protected

by the Fourth Amendment. The result was a collection of search and seizure cases which were constantly at tension with new technology. It was in this context that the United States Supreme Court adopted the reasonable expectation of privacy test.

Since Miller, Congress has passed the Right to Financial Privacy Act, 12 USC Sec. 340-122. It has lately passed other privacy laws such as the Graham Leach Bliley Act. 15 USC Sec. 6801 et seq.

The Right to Financial Privacy Act (RFPA) was enacted in 1978. This Act provides that bank customers have a protected privacy interest in their records. The law contained at 12 USC 3401-22 sets forth procedures by which banks may release records in response to law enforcement inquiries. The statute places affirmative duties on law enforcement officers. It requires that the customer be furnished with a copy of the legal process furnished to the bank before the return date of the process. The customer must be notified of his or her right to object to the government's request and be given an opportunity to be heard on the objection.

The prompt action by Congress in reaction to the Miller decision establishes that citizens have and are entitled to a reasonable expectation of privacy in their bank records.

Since Miller was decided, American society has undergone significant technological advances. The use of banks and other financial institutions for the storage of personal information is the norm, not the exception. Today, the disclosure by individuals of their financial affairs to a bank is not volitional since it is impossible to participate in the economic life of contemporary society without maintaining a bank account. Developments in statutory law have enhanced, not eliminated the privacy afforded to bank customers in their records. Given these developments, courts should no longer accept the fiction that there is no reasonable expectation of privacy in bank records. The decision of the United States Supreme Court in United States v. Miller is no longer controlling.

IV. THE COURT SHOULD SUPPRESS THE EVIDENCE IN THIS CASE BECAUSE OF THE MISUSE OF PROCESS.

In this case, the provisions of Sec. 968.135, Wis. Stats., were completely ignored. Subpoenas were placed before circuit judges without any probable cause showing. No testimony was taken and no affidavit submitted.

No explanation for this violation of law has ever been offered. No one from law enforcement or the prosecutor's office has stepped forward and taken responsibility for this violation. Judge Mangerson signed one of the three subpoenas at issue in this case. To his credit, he has taken

responsibility for the mistake made in this case. Judge Mangerson found:

> "In the end, the government got something to which it was not entitled in a manner that was not legitimate and shouldn't do that again. And the best way to impress on any government agency that it shouldn't do something wrong again is to suppress the use in the proceeding in which the information was originally obtained or for which it was obtained." (R-27, p. 62, APP. 42).

Judge Mangerson's determination that the illegally obtained evidence in this case should be suppressed was correct.

The Court of Appeals held:

> "Finally, Popenhagen argues the court had inherent authority to exclude evidence obtained in violation of Wisconsin Statute Sec. 968.135. She argues by analogy to civil suits where the court has both inherent and statutory power to sanction parties who fail to comply with procedural statutes and rules governing the suit...
>
> Assuming the court had the authority Popenhagen claims, her argument fails because the court never invoked its inherent authority in this case.
>
> Because the court never invoked its inherent authority, it necessarily did not discuss the legal standard involved, apply the facts to that standard, or conclude the evidence should be suppressed as a sanction. Inherent authority, therefore, is not grounds for affirming the order." App. 1, p. 12.

Michelle Popenhagen contends the Court of Appeals is incorrect in its ruling. The Court of Appeals decision is contrary to the usual standard of review used in appellate court cases that holds:

> "The appellate court need not reverse if it can conclude ab initio that facts of record applied to the proper legal standard support the trial court's conclusion." State v. Pittman, 174 Wis.2d 255, 496 N.W.2d 74 (1973)

Judge Mangerson's determination that the illegally obtained evidence in this case should be suppressed should not be disturbed on appeal.

Considerations of judicial integrity as well as the deterrence of illegal invasions of privacy and abuse of the judicial process justify suppression of the evidence in this case.

In Terry v. Ohio, 392 US 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the United States Supreme Court recognized that exclusion of tainted evidence serves the imperative of judicial integrity. Its purpose is to deter - to compel respect for the rule of law in the only available way - by removing the incentives to disregard it.

Courts have the inherent authority to exclude evidence to further conduct that courts deem to be in the public interest and to deter conduct that is not.

Courts have an inherent power to punish a party for failure to comply with proper pretrial procedures. This authority may be asserted to ensure the fair and efficient administration of justice. City of Sun Prairie v. Davis, 226 Wis.2d 738, 749, 595 N.W.2d 635 (1999). Admissibility,

presentation and order of evidence are within this realm. Exclusion of evidence and dismissal are among the sanctions that can be applied. Although often utilized in cases of discovery violations, the power of the court to exclude evidence is based not only on the need to administer judicial business efficiently and effectively, but also to protect the integrity of court proceedings.

This case involves a blatant violation of the law. No explanation has been offered for the misuse of process in this case. Subpoenas issued without probable cause are not only a clear violation of the law but are an affront to the judicial process.

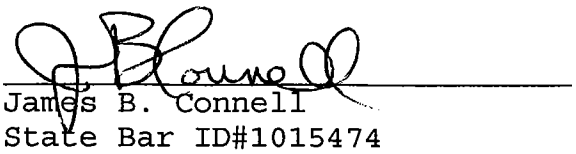
The only available remedy for this violation is exclusion of the tainted evidence.

CONCLUSION

For the reasons set forth above, Michelle Popenhagen requests the decision of the Court of Appeals be reversed and the order suppressing evidence entered by Judge Mangerson be affirmed.

Respectfully submitted,

CROOKS, LOW & CONNELL, S.C.

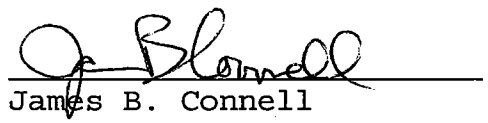


James B. Connell
State Bar ID#1015474
Attorneys for Defendant-
Respondent-Petitioner

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this Brief is 25 pages.

CROOKS, LOW & CONNELL, S.C.



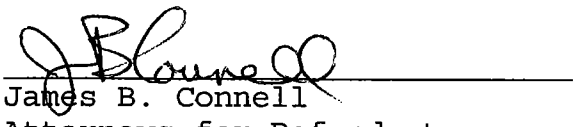
James B. Connell
Attorneys for Defendant-
Respondent-Appellant

CERTIFICATION

I hereby certify that filed with this Petition for Review, either as a separate document or as a part of this Petition, is an appendix that complies with Sec. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

CROOKS, LOW & CONNELL, S.C.



James B. Connell
Attorneys for Defendant-
Respondent-Appellant

APPENDIX

INDEX TO APPENDIX

COURT OF APPEALS
DECISION
DATED AND FILED

December 12, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1114-CR **Cir. Ct. No. 2004CF192**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

MICHELLE R. POPENHAGEN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Oneida County: MARK MANGERSON, Judge. *Reversed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. The State appeals an order suppressing Michelle Popenhagen's bank records and certain incriminating statements she made after the records were seized. The bank records were obtained without probable cause and in violation of state and federal statutes. However, because the State did not

violate Popenhagen's state or federal constitutional rights, suppression is not available as a remedy. We therefore reverse the order.

BACKGROUND

¶2 This case involves several alleged thefts by Popenhagen from her employer, Save More Foods. According to the criminal complaint, Popenhagen cashed dishonored checks at Save More and stole money from an ATM in the store. The total amount believed stolen was approximately $29,000.

¶3 Save More's owner contacted the Minocqua Police Department about Popenhagen on August 16, 2004. He told police Popenhagen was stealing money when she deposited funds into the ATM, and stated Popenhagen had cashed several checks for herself and her mother that had been returned due to a closed account or insufficient funds.

¶4 Minocqua police officers then requested subpoenas for Popenhagen's bank records through the Oneida County District Attorney's office. The subpoenas were signed by circuit court judges, although it is not clear what procedure was used in order to obtain the judges' signatures.[1] No determination of probable cause was made in connection with the judges' approval of the subpoenas, which was a violation of the applicable statutory procedure for obtaining a subpoena. *See* WIS. STAT. § 968.135.[2] The subpoenas were served on

[1] Judge Mangerson, whose signature appears on one of the subpoenas, stated he could not explain how his signature or that of his colleague came about. The subpoenas are not in the record.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

two banks, and the banks turned over all of Popenhagen's records, including bank statements and copies of deposit slips and cancelled checks.

¶5 On September 19, two officers interviewed Popenhagen about the alleged thefts. According to the police report of the interview, Popenhagen admitted writing checks on accounts containing insufficient funds to cover the checks, but stated she had intended to deposit cash to cover the checks. She denied all allegations that involved theft from Save More.

¶6 The officers then produced Popenhagen's bank records and confronted her with instances where she made deposits that corresponded to thefts from the Save More store and the ATM. At that point, Popenhagen made several incriminating statements.

¶7 Popenhagen was charged with theft, contrary to WIS. STAT. §§ 943.20(1)(b) and (3)(c). Popenhagen moved to suppress the bank records and statements she made after the police confronted her with the records. The court held Popenhagen had a legitimate privacy interest in the records, and the search pursuant to the subpoenas therefore violated her state and federal constitutional rights and WIS. STAT. § 968.35. The court further held the remedy for a violation of § 968.35 was suppression of the records obtained in violation of that section and the fruits of those records.

STANDARD OF REVIEW

¶8 This case requires us to apply the state and federal constitutions to undisputed facts. The application of constitutional principles to historical facts is a question of law reviewed without deference. ***State v. Eason***, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. This case also involves a question of statutory

interpretation. The meaning of a statute is a question of law we review without deference to the circuit court but benefiting from its analysis. ***Spiegelberg v. State***, 2006 WI 75, ¶8, 291 Wis. 2d 601, 717 N.W.2d 641.

DISCUSSION

¶9 Popenhagen argues the subpoenas of her bank records violated the Fourth Amendment, the Wisconsin Constitution, and the Wisconsin Statutes, and that the remedy for those violations is suppression. She also argues the court had inherent authority to exclude the records and their fruits in order to protect the integrity of the judicial process. We conclude neither the Fourth Amendment nor the Wisconsin Constitution recognizes an expectation of privacy in bank records, and therefore the subpoenas did not violate either. We also conclude that while the subpoenas did violate the Wisconsin Statutes, suppression is not available as a remedy for those violations. Finally, the court did not invoke inherent authority in support of its decision; therefore, inherent authority is not grounds for affirming the order.[3]

I. The Fourth Amendment

¶10 The Fourth Amendment protects against unreasonable searches and seizures. A "search" for Fourth Amendment purposes exists when an individual "manifested a subjective expectation of privacy in the searched object, and society is willing to recognize that expectation as reasonable." ***Kyllo v. United States,*** 533

[3] The State also argues Popenhagen does not have standing to pursue her Fourth Amendment claim and that she had no subjective privacy interest in her bank records. Because we conclude Popenhagen had no objectively legitimate Fourth Amendment privacy interest in her bank records, we need not address those arguments.

U.S. 27, 27-28 (2001); ***Katz v. United States***, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

¶11 The Supreme Court applied this principle to bank records in ***United States v. Miller***, 425 U.S. 435 (1976). It held there was no legitimate expectation of privacy in bank records, for two reasons. ***Id.*** at 442. First, banks are not "neutrals in transactions involving negotiable instruments, but parties to the instruments with a substantial stake in their continued availability and acceptance." ***Id.*** at 440 (internal citations omitted). As a result, banks' records are not their account holders' "private papers;" instead, they are "business records of the banks." ***Id.***

¶12 Second, the Court noted the records are

> not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.

Id. at 442. The Court noted the general rule that when information is divulged to a third party, no Fourth Amendment concerns arise when the third party passes the information on to the government, even when the third party received the information only for a limited purpose. ***Id.*** The Court saw no reason to apply a different rule where bank records were involved.

¶13 Popenhagen argues ***Miller*** is no longer good law, for three reasons: (1) subsequent legislation shows society is now prepared to recognize a privacy interest in bank records; (2) changes in society have rendered ***Miller***'s rationale no longer valid; and (3) ***Miller*** was met with "nearly universal disapproval" in scholarly criticism.

¶14 In support of her argument about subsequent legislation, Popenhagen focuses on the 1978 Right to Financial Privacy Act (RFPA).[4] The RFPA was enacted at least partly in response to ***Miller***. *See* ***United States v. Frazin***, 780 F.2d 1461, 1465 (9th Cir. 1986) (reviewing legislative history). The RFPA prohibited banks from disclosing a customer's financial information without the customer's consent, a valid warrant, or a valid subpoena.[5] ***Id.***; 12 U.S.C. § 3402. The RFPA provided civil remedies against the government and banks for disclosures made in violation of its terms, and made those remedies exclusive. 12 U.S.C. § 3417(d); ***Frazin***, 780 F.2d at 1466. The RFPA remedies do not include suppression. ***Frazin***, 780 F.2d at 1466. According to the court in ***Frazin***, Congress chose this combination of rights and remedies by balancing customers' right to privacy against the needs of law enforcement. ***Id.***

¶15 While the RFPA shows some congressional concern with bank customers' privacy, Congress specifically did not recognize a privacy interest that rose to the level of the Fourth Amendment. If it had, it could easily have crafted a remedy on par with remedies available for Fourth Amendment violations. The fact that Congress chose not to shows it believed bank customers were deserving of some protection, but not the level of protection available under the Fourth Amendment. The RFPA therefore does not show that society is now prepared to recognize a Fourth Amendment privacy interest in bank records.

---

[4] Popenhagen also mentions the 1999 Gramm Leach Bliley Act. However, she focuses on the RFPA, and does not argue the 1999 Act should be analyzed differently than the RFPA. We therefore focus on the RFPA as well.

[5] The parties agree the subpoenas here violated the RFPA, but Popenhagen relies on the RFPA only so far as it is relevant to the Fourth Amendment analysis, not as an independent source of a remedy.

¶16 Finally, Popenhagen argues changes in society subsequent to ***Miller*** render ***Miller*** obsolete. She argues today "the use of banks and other financial institutions for the storage of personal information is the norm not the exception." However, this argument does not call into question either premise of the ***Miller*** decision. That is, it does not change the fact that bank records can be considered "business records of the bank" rather than individual property, or that bank records consist of information divulged to third parties. *See* ***Miller***, 425 U.S. at 440-42. Rather, Popenhagen's argument mirrors the ***Miller*** dissent, where Justice Brennan argued:

> For all practical purposes, the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account. In the course of such dealings, a depositor reveals many aspects of his personal affairs, opinions, habits and associations. Indeed, the totality of bank records provides a virtual current biography.

Miller, 425 U.S. at 451 (Brennan, J., dissenting).

¶17 Popenhagen's argument is virtually the same as Justice Brennan's. Justice Brennan's statement that it would be "impossible to participate in the economic life of contemporary society" without a bank account makes clear that in 1976 the storage of personal information in bank records was already the rule, not the exception. We are not convinced that the necessity of maintaining a bank account or the kind of information available from bank records has changed significantly from 1976, and therefore reject Popenhagen's argument.

¶18 Finally, Popenhagen points to what she characterizes as "nearly universal" scholarly criticism of ***Miller***. This is essentially an argument that ***Miller*** was wrongly decided, not an argument that ***Miller*** has been eroded or

overruled.[6] The vote of legal scholars—unanimous or otherwise—is hardly enough to overrule Supreme Court precedent. Popenhagen fails to point to any Supreme Court or other cases questioning the continued validity of *Miller*. Absent such cases, *Miller* remains controlling law.

II. The Wisconsin Constitution

¶19 Popenhagen next argues even if the Fourth Amendment does not recognize a right to privacy in bank records, the Wisconsin Constitution does. Because this issue is controlled by *State v. Swift*, 173 Wis. 2d 870, 883, 496 N.W.2d 713 (Ct. App. 1993), we reject Popenhagen's argument.

¶20 The Wisconsin Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

WIS. CONST. Art. I, § 11. The text of this provision is virtually identical to that of the Fourth Amendment.[7]

¶21 In 1993, we held bank records were entitled to the same level of protection under WIS. CONST. Art. I, § 11, as they were under the Fourth

---

[6] This is especially true in view of the fact that most of the articles were contemporaneous responses to *United States v. Miller*, 425 U.S. 435 (1976). The most recent article Popenhagen cites was published in 1987, and most of the others were published within five years of the *Miller* decision.

[7] The differences are certain "inconsequential" variances in punctuation, capitalization, and use of the plural. *State v. Guzman*, 166 Wis. 2d 577, 586-87, 480 N.W.2d 446 (1992); *see also* U.S. CONST. AMEND. IV.

Amendment. *Swift*, 173 Wis. 2d at 883. We based our holding on our supreme court's statements that it "consistently and routinely conformed the law of search and seizure under the Wisconsin Constitution to the law developed by the United States Supreme Court under the Fourth Amendment." *State v. Guzman*, 166 Wis. 2d 577, 586-87, 480 N.W.2d 446 (1992). This was due to the consistent text of the two provisions and the practical difficulties police would encounter if they were required to apply a standard that varied from the Fourth Amendment. *Id.*

¶22 Popenhagen argues *Swift* has been called into question by *Eason*. *Eason* involved the "good faith" exception to the exclusionary rule. *Id.*, 245 Wis. 2d 206, ¶28. The court adopted a narrower "good faith" exception than exists under the Fourth Amendment, and stated that WIS. CONST. Art. I, § 11, guarantees more protection than the Fourth Amendment with regard to that particular point of law. *Id.*, ¶60. However, the court stated its decision was consistent with prior case law, under which the court, despite stated reluctance to give different meanings to the two provisions, recognized it was "conceivable" that the United States Supreme Court might interpret the Fourth Amendment in a way that was inconsistent with Art. I, § 11. *Id.*; *State v. Fry*, 131 Wis. 2d 153, 174, 388 N.W.2d 565 (1986).

¶23 It may well be true, as Popenhagen argues, that *Eason* shows a new willingness by our supreme court to interpret our state constitution independently of its federal counterpart. *See State v. Knapp*, 2005 WI 127, ¶86, 285 Wis. 2d 86, 700 N.W.2d 899 (Crooks, J., concurring) (explaining decisions like *Eason* as part of a trend toward a more independent role for state constitutions in protecting individual rights). However, *Eason* did not overrule *Swift* or even call that case into question. It merely applied the standard existing when *Swift* was decided to a different question, and reached a different result. *Swift* is therefore controlling

law, and we are bound to follow it. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). We therefore reject Popenhagen's argument that a right to privacy in bank records is recognized by the Wisconsin Constitution.

III. The Wisconsin Statutes

¶24 In relevant part, WIS. STAT. § 968.135 provides: "Upon the request of the attorney general or a district attorney and upon a showing of probable cause under s. 968.12, a court shall issue a subpoena requiring the production of documents .... This section does not limit or affect any other subpoena authority provided by law." The State concedes § 968.135 applies to this case, and further concedes the subpoena of Popenhagen's bank records was issued in violation of that section. It argues suppression is not available as a remedy, however, because suppression is available only for violations of state or federal constitutional rights or where a statute specifically provides for suppression as a remedy. We agree.

¶25 The supreme court recently held: "The suppression of evidence is ... a judge-made rule used to deter misconduct by law enforcement officials. Suppression is only required when evidence has been obtained in violation of a defendant's constitutional rights, or if a statute specifically provides for the suppression remedy." ***State v. Raflik***, 2001 WI 129, ¶15, 248 Wis. 2d 593, 636 N.W.2d 690 (internal citations omitted).

¶26 In ***Raflik***, the court reviewed a telephone warrant application that had not been recorded. ***Id.***, ¶¶5-6. The State conceded this was a violation of WIS. STAT. § 968.12, which regulates issuance of search warrants. ***Id.***, ¶14. Nonetheless, the court concluded suppression was not required because no violation of Raflik's constitutional rights had occurred. ***Id.***, ¶¶15, 17, 42.

¶27 The same situation presents itself here. WISCONSIN STAT. § 968.135 provides a procedure for issuance of a subpoena for documents. In many cases under § 968.135—cases where the subpoena calls for release of constitutionally protected documents—a violation of the probable cause requirements of that section will necessarily coincide with a constitutional violation and suppression. However, like violations of WIS. STAT. § 968.12, not all violations of § 968.135 are constitutionally significant. Because the violation here was not constitutionally significant, suppression was not available as a remedy.

IV. Inherent authority

¶28 Finally, Popenhagen argues the court had inherent authority to exclude evidence obtained in violation of WIS. STAT. § 968.135. She argues by analogy to civil suits, where the court has both inherent and statutory power to sanction parties who fail to comply with procedural statutes and rules governing the suit. *See* WIS. STAT. § 804.12(2); ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 273-74, 470 N.W.2d 859 (1991). Those sanctions include exclusion of evidence and dismissal of the suit. ***Id.*** A court's decision to grant sanctions is a discretionary one and will be upheld if the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Id.*** at 273-74.

¶29 Assuming the court had the authority Popenhagen claims, her argument fails because the court never invoked its inherent authority in this case. Instead, the court held:

> But it is clear to me that there is now a [state and federally recognized] right to privacy in one's personal banking records. And I'm convinced that obtaining those records over which there is an umbrella of privacy by violating 968.135 of the statutes, should result in suppression. [To

> hold otherwise] would emasculate the clear directives of 968.135....

Because the court never invoked its inherent authority, it necessarily did not discuss the legal standard involved, apply the facts to that standard, or conclude the evidence should be suppressed as a sanction. Inherent authority therefore is not grounds for affirming the order.

By the Court—Order reversed.

Recommended for publication in the official reports.

¶30 CANE, C.J. (*dissenting*). The majority concludes neither the Fourth Amendment nor the Wisconsin Constitution recognizes an expectation of privacy in bank records and therefore suppression of the State's unlawfully obtained bank records and tainted evidence is not an available remedy in a criminal proceeding. Because I would hold people have a constitutional right under the Wisconsin Constitution against unlawful searches and seizures of their bank records, I respectfully dissent.

¶31 WISCONSIN CONST. Art. I, § 11, provides:

> The right of the people to be secure in their persons, houses, *papers, and effects* against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. (Emphasis added).

Here, the State concedes that it obtained Michelle Popenhagen's bank records in violation of WIS. STAT. § 968.135. It admits it did not even attempt to comply with the probable cause requirement. Section 968.135 provides:

> Upon the request of the attorney general or a district attorney *and upon a showing of probable cause* under s. 968.12, a court shall issue a subpoena requiring the production of documents, as specified in s. 968.13(2). The documents shall be returnable to the court which issued the subpoena. Motions to the court, including, but not limited to, motions to quash or limit the subpoena, shall be addressed to the court which issued the subpoena. Any person who unlawfully refuses to produce the documents may be compelled to do so as provided in ch. 785. This section does not limit or affect any other subpoena authority provided by law. (Emphasis added.)

¶32 The issue in this case centers on whether people have a reasonable expectation of privacy in their bank records. In my opinion they do. The right to be secure in one's papers has been applied to a person's private papers since 1886. ***Boyd v. United States***, 116 U.S. 616, 621 (1886).

¶33 I recognize that in ***United States v. Miller***, 425 U.S. 435, 442 (1976), the United States Supreme Court held there was no legitimate expectation of privacy under the Fourth Amendment in bank records. However, since ***Miller***, which has been criticized in many academic circles, both Congress and the Wisconsin Legislature responded with legislation strengthening a customer's legitimate right to privacy in bank records. I will confine myself to Wisconsin's legislative response, as I apply only our Wisconsin Constitution and state laws.

¶34 It has been recognized and established for some time that it is the prerogative of Wisconsin to afford greater protection to a person's liberties within the boundaries of its constitution and laws. ***State v. Doe***, 78 Wis. 2d 161, 171, 254 N.W.2d 210 (1977). The State does not dispute this.

¶35 Thus, we first have our Wisconsin Constitution protecting our citizens' right to their papers and effects from unreasonable seizure without a search warrant establishing probable cause. The legitimate expectation of privacy to a person's bank records was reinforced by our legislature in 1979 when it created WIS. STAT. § 968.135, which protects a customer's right to documents such as bank records from subpoenas unless the attorney general or district attorney shows the same probable cause as required in search warrants.

¶36 It is noteworthy this statute is included in WIS. STAT. ch. 968, our procedural statute for commencement of criminal proceedings, and follows WIS. STAT. § 968.12, which lists the requirements for a search warrant. Importantly, it

is not under a general civil procedure for obtaining a citizen's private bank records. Nor is this a situation where a nongovernmental agency acquired the bank records. WISCONSIN STAT. § 968.135, in my opinion, establishes our citizens' reasonable expectation of privacy in bank records in the context of criminal proceedings.

¶37 The State's argument that WIS. STAT. § 968.135 does not include a provision stating that suppression is a sanction for unlawfully subpoenaed bank records is unpersuasive. Interestingly, when one looks at the legislative requirements for a search warrant, the sanction of suppression, or any other sanction for that matter, is not specifically stated. That sanction arises from our constitutional right to be free from unreasonable searches and seizures.

¶38 Therefore, in my opinion, people have a legitimate expectation of privacy in their bank records and when the attorney general or district attorney fails to show probable cause for the subpoena, not only must the subpoena be quashed or limited, but the records and evidence obtained unlawfully must not be used in any criminal proceedings. It is no different from the attorney general or district attorney obtaining a search warrant without establishing probable cause. When the State unlawfully obtains a search warrant or, as in this case, unlawfully obtains subpoenaed bank records, the evidence must be suppressed so that it is not used in the criminal proceeding.

¶39 Finally, this case involves the flagrant violation of WIS. STAT. § 968.135. No attempt was made to comply with the statute, nor has any explanation been offered for the abuse of this process. Yet the State wants us to ignore the statute and allow evidence resulting from its unlawful seizure to be used in a criminal proceeding. I am not persuaded. The only appropriate remedy in

this criminal proceeding is the exclusion of the records and tainted evidence, as the trial court correctly concluded. Accordingly, I respectfully dissent.

MR. LUCARELI: At some point, Judge, I would like to be heard regarding Mr. Michlig's concern about lack of a remedy.

THE COURT: No, I'm not going to hear you, Mr. Lucareli. I'm going to rule in your client's favor.

MR. LUCARELI: I never want to argue under those circumstances.

THE COURT: Here is the situation. We're dealing, like I said, with a very specific statute that allows a district attorney or the attorney general, upon a showing of probable cause, to get a Court-issued subpoena for the production of documents. 968.135 authorizes that special type of search. And it is a precharging secret search. It is directly analogous to a search warrant.

I have indicated why I think there is a distinction between the general civil subpoena and a subpoena for purposes of criminal prosecution. 968.135 gives the district attorney or the attorney -- or the attorney general the right and also imposes requirements. The requirements are, the district attorney approaches the Court or the attorney general on probable cause and specifies the documents. The Court can issue the subpoena. The documents must be returned to the Court which issued the subpoena. That hasn't even been done to

this date. This Court doesn't know what law enforcement got from Ms. Popenhagen pursuant to the subpoena. So the rights are there. The requirements haven't been met.

Now, what is the remedy for that? Well, there is no remedy stated in the statutes for seizing property without a search warrant. That's purely case law, and that's Federal case law that's drifted down to the Courts through the 14th Amendment. Mr. Michlig, on behalf of the State, repeatedly cites State v. Swift, and calls the Court's attention to the principle of stare decisis; that is, that the trial court must acknowledge and follow the rulings of the higher courts. But I don't think Swift applies for a number of reasons. And I think, in fact, Swift enforces my finding that there is an expectation of privacy today and at the time these records were seized in personal bank records.

First of all, Donnal Swift was convicted of six counts of security fraud -- securities fraud. In that case, the State used the provisions of 968.135 to obtain records. But the State, in that case, used good subpoenas. They had subpoenas with probable cause affidavits. They submitted them to a Judge. The Judge made the requisite findings. The subpoenas were issued and the documents were received from the financing -- financial institutions.

The main concern in Swift was that the financial institutions produced more and more than law enforcement requested. That was the -- the major focus of Swift. And it's in that context that the Swift court, the Court of Appeals, the Court of Appeals, our district, but a Court of Appeals, made a rather casual reference to there being no recognized right of privacy in bank records.

We need to look at the way they did that. And this is where I think the Swift decision reinforces my ruling. And I am reading at Page 882, "Swift contends that art. I, SS 11, of the Wisconsin Constitution grants him a right to privacy in his bank accounts and that the bank records from the K & S Administration account were obtained in violation of this right. Swift concedes that United States v. Miller, 425 U.S. 435, holds that bank customers have no protectable interest in the privacy of bank records relating to their accounts under the fourth amendment to the United States Constitution.

"He argues, however, that several Wisconsin cases have assumed, without deciding" -- note that language, have assumed without deciding -- "that the Wisconsin Constitution affords bank customers greater protection of bank records relating to their accounts. His reliance on those cases is misplaced."

And then there is a survey of some cases. And then our Court of Appeals goes on to say, "we assumed without deciding" that Wisconsin Constitution -- "that the Wisconsin Constitution requires judicial authorization to inspect bank records as part of our analysis of a factual issue" in State v. Hoffman.

"Here, as in Hoffman, the state had judicial authorization in the form of a subpoena to inspect Swift's bank records.

"Further, our supreme court has recently reaffirmed its past decisions to interpret art. I, SS 11 of the Wisconsin Constitution in conformity with the United States Supreme Court's interpretation of the fourth amendment. State v. Guy," citation omitted. "Therefore, we conclude that Swift's constitutional privacy interest argument must fail."

What our Court there is saying is, first of all, they are deciding the case with reference to Miller, which is the U.S. Supreme Court case that, in essence, said there was no 14 -- or, no Fourth Amendment right to privacy in individual bank records. The Court of Appeals then went on to say that our Wisconsin Constitution standard under art. I, SS II (sic) is the same as the Fourth Amendment standard. Obviously, in Swift, defense counsel didn't argue, and the Court wasn't aware of the

Federal right to privacy act.

The Federal right to privacy act was enacted in 1978 before Swift, and, most notably, the right to Federal privacy act of 1978 "protects the confidentiality of personal financial records by creating a statutory Fourth Amendment protection for bank records. The Act was . . . a reaction to the" United States "Supreme Court's 1976 ruling in United States v. Miller, where the Court found that bank customers had no legal right to privacy in financial information held by financial institutions." I'm reading this right from the synopsis of The Right to Financial Privacy Act.

So, in Swift, our Court of Appeals says it's relying on State v. Miller to find that there is no right to privacy. Swift says that the Wisconsin Constitution mirrors the United States Constitution on the right to privacy. And the Federal right to privacy act specifically created a statutory Fourth Amendment right to privacy in personal bank records. So, obviously, in Swift, the Court didn't know about the Federal right to privacy act. But, by saying the State standard is the same as the Federal standard by inference, they would adopt the same reasoning I'm making today.

The Federal Government said, after Miller, in a Federal act applying to all of the states through the

Fourth Amendment, that there is a right to privacy in personal banking records.

By the way, in State v. Swift, they were business records, which isn't addressed by the right to financial privacy act or United States v. Miller. Counsel for the defense has also made reference to the Gramm-Leach-Bliley Act, which talks about privacy, but I don't think that act really applies. It does create some rights in account holders to be advised as to with whom their bank will be sharing its information. But the Gramm-Leach-Bliley Act, which was enacted in November of 1999, deals primarily with how banks share information with banks and their subsidiaries. So I don't think that act applies.

But it is clear to me that there is now a Federally- and Wisconsin-recognized right to privacy in one's personal banking records. And I'm convinced that, obtaining those records over which there is an umbrella of privacy by violating 968.135 of the statutes, should result in suppression.

If we would allow those documents to be subpoenaed, and tell the defendant she may have a personal right to sue the police department because they violated her rights, and then allowed the information that was illegally obtained in at the criminal trial,

then we would emasculate the clear directives of 968.135, I would be legislating from the bench.

Now, typically, suppression is to deter illegal police conduct and, historically, it has been bad police conduct. I don't mean to infer by today's -- I don't mean to imply by today's ruling that there was some evil intent here. It's just that the subpoenas were apparently prepared by the police officers. There wasn't an affidavit put together by the district attorney's office. The naked affidavit -- or naked subpoenas were submitted to two judges for signature. There is fault that lies there because both judges should have checked the statute and required the probable cause statement; although, I suspect they looked like any of the several other subpoenas we sign every day.

But the naked subpoenas were delivered to the banks and the statute was violated. And I don't care where the blame lies. In the end, the Government got something to which it was not entitled in a manner that was not legitimate and shouldn't do that again. And the best way to impress on any Government agency that it shouldn't do something wrong again is to suppress the use in the proceeding in which the information was originally obtained or for which it was obtained.

In that regard, I am suppressing from use at

trial the business records obtained from the banks pursuant to the subpoenas. In regard to the statement of Ms. Popenhagen, I'm finding that the fruit of the poisonous tree doctrine does apply here just as it would in a bad search, standard search case without a warrant. There is no good faith exception here because the basics of the statute weren't complied with. The information was never properly before a Judge. It's not where a Judge had all the information and made a judicial error on probable cause which would ordinarily result in a good faith exception.

And so the fruit of the poisonous tree doctrine here applies, and I would suppress Ms. Popenhagen's statement through the reference on Page 3 to the officer stating that he needed to check on something, whereby he left the room and came back carrying the bank records. From there on, I think it's all the product of the illegally obtained business records.

MR. LUCARELI: Thank you, Your Honor.

THE COURT: As to your Bill of Particulars, it looks to me like they are talking about either effective check kiting, or perhaps taking money directly from Sav-Mor, or perhaps the ATM machine scheme. But they all seem to me to be taken by the same employee, from the same employer, and I think they can be lumped together

STATE OF WISCONSIN CIRCUIT COURT ONEIDA COUNTY

STATE OF WISCONSIN,

Plaintiff,

Vs.

ORDER

MICHELLE R. POPENHAGEN, D.O.B. 06-20-71,

Case No. 05 CF 192

Defendant.

For the reasons set forth on the record of the hearing of November 11, 2005, the court grants the defendant's suppression motion with respect to the defendant's bank records and statements that the defendant made to police when confronted with her bank records. In all other respects, the suppression motion is denied.

Dated this 28 day of March, 2006.

BY THE COURT:

HONORABLE MARK A. MANGERSON
Circuit Court Judge - Branch II
Oneida County, Wisconsin

APPENDIX "C"

STATE OF WISCONSIN | CIRCUIT COURT | ONEIDA COUNTY

STATE OF WISCONSIN

vs.

SUBPOENA AND

CERTIFICATE OF SERVICE

The State of Wisconsin to:

F&M Bank
625 Chippewa Street
Rhinelander, Wisconsin 54501

(715) 356-1444

SERVICE INFORMATION

Date Served: 8-23-04 Time Served: 2:00 P

Manner Served:
✓ Personal
___ Substitute _____

Serving Agency: Minocqua P.D

Served by: Todd Hanson

PURSUANT TO SECTION 805.07 OF THE WISCONSIN STATUTES, YOU ARE HEREBY COMMANDED TO APPEAR IN PERSON AND GIVE EVIDENCE:

APPEARANCE INFORMATION

ONEIDA COUNTY CIRCUIT COURT: DATE: **August 30, 2004** TIME: **9:30 a.m.**

LOCATION: **Oneida County Courthouse / Rhinelander, Wisconsin**

PRESIDING OFFICIAL: **Honorable Robert E. Kinney**

Subpoena Duces Tecum: **Bringing with you all bank records for the account of Michelle Popenhagen from January 2003 to August 2004. In lieu of appearing, copies may be mailed to Sergeant Todd Hanson of the Minocqua Police Department, P. O. Box 346, Minocqua, Wisconsin 54548.**

FAILURE TO APPEAR MAY RESULT IN PUNISHMENT FOR CONTEMPT, WHICH MAY INCLUDE MONETARY PENALTIES, IMPRISONMENT & OTHER SANCTIONS

If you have any questions about this Subpoena, please contact:
Name: Patrick F. O'Melia
Title: District Attorney
Address: P.O. Box 400
Rhinelander, WI 54501
Telephone: (715)369-6133 / (800)841-8030

BY: Robert E. Kinney

DATE: August 18, 2004

WITNESS INFORMATION

Date Witness Appeared: _____

Telephone Number: _____ Mileage: _____

APPENDIX "D"

Address Correction: Signature of Witness _____

STATE OF WISCONSIN | CIRCUIT COURT | ONEIDA COUNTY

STATE OF WISCONSIN vs.	**SUBPOENA AND** **CERTIFICATE OF SERVICE**

The State of Wisconsin to:

River Valley Bank
8590 Highway 51 North
Minocqua, Wisconsin 54548

(715) 358-3434

SERVICE INFORMATION

Date Served: 8-23-04 Time Served: 2:30 P

Manner Served:
✓ Personal
___ Substitute _____

Serving Agency Minocqua P.D.

Served by: _____

PURSUANT TO SECTION 805.07 OF THE WISCONSIN STATUTES, YOU ARE HEREBY COMMANDED TO APPEAR IN PERSON AND GIVE EVIDENCE:

APPEARANCE INFORMATION

ONEIDA COUNTY CIRCUIT COURT: DATE: **August 30, 2004** TIME: **9:30 a.m.**

LOCATION: **Oneida County Courthouse / Rhinelander, Wisconsin**

PRESIDING OFFICIAL: **Honorable Robert E. Kinney**

Subpoena Duces Tecum: Bringing with you all bank records for the account of Michelle Popenhagen from January 2003 to August 2004. In lieu of appearing, copies may be mailed to Sergeant Todd Hanson of the Minocqua Police Department, P. O. Box 346, Minocqua, Wisconsin 54548.

FAILURE TO APPEAR MAY RESULT IN PUNISHMENT FOR CONTEMPT, WHICH MAY INCLUDE MONETARY PENALTIES, IMPRISONMENT & OTHER SANCTIONS

If you have any questions about this Subpoena, please contact:
Name: Patrick F. O'Melia
Title: District Attorney
Address: P.O. Box 400
Rhinelander, WI 54501
Telephone: (715)369-6133 / (800)841-8030

BY: _____

DATE: August 18, 2004

WITNESS INFORMATION Date Witness Appeared: _____

Telephone Number: _____ Mileage: _____

Address Correction: Signature of Witness _____

STATE OF WISCONSIN | CIRCUIT COURT | ONEIDA COUNTY

STATE OF WISCONSIN vs.	**SUBPOENA AND** **CERTIFICATE OF SERVICE**

The State of Wisconsin to:

US Bank
9670 Highway 70 West
P. O. Box 787
Minocqua, Wisconsin 54548

(715) 356-9531

SERVICE INFORMATION

Date Served: 9-2-04 Time Served: 1:00 PM

Manner Served:
✓ Personal
___ Substitute _____

Serving Agency Minocqua P.D.

Served by: [signature]

PURSUANT TO SECTION 805.07 OF THE WISCONSIN STATUTES, YOU ARE HEREBY COMMANDED TO APPEAR IN PERSON AND GIVE EVIDENCE:

APPEARANCE INFORMATION

ONEIDA COUNTY CIRCUIT COURT: DATE: **September 15, 2004** TIME: **9:30 a.m.**

LOCATION: **Oneida County Courthouse / Rhinelander, Wisconsin**

PRESIDING OFFICIAL: **Honorable Mark A. Mangerson**

Subpoena duces tecum: **Bringing with you all bank records for the account of Michelle Popenhagen from January 2003 to August 2004.**

FAILURE TO APPEAR MAY RESULT IN PUNISHMENT FOR CONTEMPT, WHICH MAY INCLUDE MONETARY PENALTIES, IMPRISONMENT & OTHER SANCTIONS

If you have any questions about this Subpoena, please contact:
Name: Patrick F. O'Melia
Title: District Attorney
Address: P.O. Box 400
Rhinelander, WI 54501
Telephone: (715)369-6133 / (800)841-8030

BY: [signature]

DATE: August 31, 2004

WITNESS INFORMATION Date Witness Appeared: _____

Telephone Number: _____ Mileage: _____

Address Correction: Signature of Witness:

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2006AP1114-CR

STATE OF WISCONSIN,
Plaintiff-Appellant,

v.

MICHELLE R. POPENHAGEN,
Defendant-Respondent-Petitioner.

ON REVIEW OF A COURT OF APPEALS' DECISION
REVERSING A SUPPRESSION ORDER
ENTERED IN ONEIDA COUNTY CIRCUIT COURT,
THE HONORABLE MARK A. MANGERSON,
PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

J.B. VAN HOLLEN
Attorney General

JAMES M. FREIMUTH
Assistant Attorney General
State Bar #1012732

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8904

TABLE OF CONTENTS

Page

Page

CASES CITED

Page

Page

Page

Page

Page

Page

Page

STATUTES CITED

OTHER AUTHORITIES

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2006AP1114-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICHELLE R. POPENHAGEN,

Defendant-Respondent-Petitioner.

ON REVIEW OF A COURT OF APPEALS' DECISION
REVERSING A SUPPRESSION ORDER
ENTERED IN ONEIDA COUNTY CIRCUIT COURT,
THE HONORABLE MARK A. MANGERSON,
PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in most cases accepted by this court for full briefing, both oral argument and publication appear warranted.

STATEMENT OF THE CASE

This case is in a pretrial posture. Following is a summary of the procedural history.

Underlying charge.

By complaint filed September 20, 2004, in Oneida County Circuit Court Case No. 04-CF-192, and amended three days later, Defendant Michelle R. Popenhagen was charged with one count of theft of more than $10,000 in a business setting, contrary to Wis. Stat. § 943.20(1)(b) and (3)(c) (2003-04) (*see* 1; 3).

According to the complaint and attached police reports, between October 2003 and September 2004, Popenhagen allegedly stole approximately $29,000 from the Save More grocery store in Minocqua (1; 3). Popenhagen, who was working in a financial capacity at the store, allegedly cashed dishonored checks on the store account and stole money from the automatic teller machine (1; 3).

On December 1, 2004, Popenhagen waived a preliminary examination and was bound over for trial, at which time the State filed an information repeating the theft charge set forth in the complaint (7; 8).

Suppression ruling.

By pretrial motion filed May 9, 2005, and amended June 8, 2005, with supporting affidavits and briefs, Popenhagen sought to suppress all evidence derived from the issuance and execution of subpoenas for records of her accounts at three area banks (15; 17 to 20; 22). The prosecutor opposed the motion (16; 21; 23; 24).

After hearings on August 10, 2005, and November 11, 2005, Judge Mark A. Mangerson granted the motion, ordering the suppression of Popenhagen's bank records – specifically, deposit slips, canceled checks

and checking and savings account statements (*see* 1:3-5; 27:6, 28-30, 39-40) – as well as her ensuing admissions to police (27:56-63). Judge Mangerson concluded that the warrantless seizure of Popenhagen's bank records violated the Fourth Amendment to the federal constitution and Art. I, § 11 of the state constitution (26:23-25). He also concluded that even if police could obtain the bank records by subpoenas, the subpoenas were improperly issued without a predicate showing of probable cause, as required by Wis. Stat. § 968.135 (*see* 26:20-22).

State's appeal.

A formal suppression order was filed March 28, 2006 (28), and the State appealed (29). In a 2-1 published decision, the court of appeals reversed the suppression order – *State v. Popenhagen*, 2007 WI App 16, ___ Wis. 2d ___, 728 N.W.2d 45. By order of April 17, 2007, this court granted Popenhagen's petition for review.

ISSUES PRESENTED AND SUMMARY OF STATE'S POSITION

Popenhagen offers four alternative reasons why evidence of her three bank accounts (and ensuing admissions to police) should be suppressed from use at trial. For reasons outlined here and developed in the Argument sections of this brief, the State respectfully asks this court to reject Popenhagen's arguments and affirm the court of appeals' decision.

(1) Fourth Amendment.
(Argument I. of this brief)

In *United States v. Miller*, 425 U.S. 435, 440-43 (1976), the United States Supreme Court expressly rejected the Fourth Amendment claim that Popenhagen is making, holding that a bank depositor has no reasonable expectation of privacy in bank records – namely, copies of deposit slips and canceled checks retained by the bank.

That is, under the Fourth Amendment, a person does not enjoy a reasonable expectation of privacy in certain objects voluntarily conveyed to third parties (referred to herein as the "third-party doctrine"). *Id.* This court is bound by *Miller*, which remains the governing law on warrantless seizures of bank records under the Fourth Amendment.

Further, in this state criminal case, neither the Right to Financial Privacy Act, 12 U.S.C. §§ 3401 et seq. (2003), nor the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801 et seq. (1999), applies to Popenhagen, and in any event, neither federal statute authorizes suppression of evidence for violation of the statute.

(2) <u>Wisconsin Constitution Art. I, § 11</u>.
(Argument II. of this brief)

The nearly 160-year-old language of Art. I, § 11 of the Wisconsin Constitution is "virtually identical to that of the Fourth Amendment." *State v. Pallone*, 2000 WI 77, ¶ 82, 236 Wis. 2d 162, 613 N.W.2d 568. In that time, this court apparently has interpreted Wisconsin's search-and-seizure provision differently from the United States Supreme Court's interpretation of the Fourth Amendment only once – and even then, only marginally, and not with respect to the "third-party doctrine" at issue in the present case. *See State v. Eason*, 2001 WI 98, ¶ 74, 245 Wis. 2d 206, 629 N.W.2d 625 (recognizing the "good faith" exception to the exclusionary rule under Art. I, § 11, discussed more fully in Argument II.). In effect, this court consistently "has not afforded heightened privacy protections under the state constitution than [exist] under the Fourth Amendment." *Pallone*, 236 Wis. 2d 162, ¶ 82.

The present circumstance of a bank depositor's account records does not warrant this court embarking on an historic departure from the "third-party doctrine" explained in *Miller*, which is no less valid today than it was when *Miller* was decided in 1976, as the track record among state courts reflects.

(3) **Wis. Stat. § 968.135 (subpoenas for documents).** (Argument III. of this brief)

Popenhagen lacks standing under Wis. Stat. § 968.135 to challenge the issuance of judicial subpoenas to her three banks for copies of her deposit slips, canceled checks and account statements. Under this statute, only the banks, as targets of the subpoenas, could move "to quash or limit the subpoena[s]" for lack of probable cause, and they did not do so before relinquishing the subpoenaed records to police.

Moreover, in any event, suppression of evidence is not a proper remedy for violation of the "probable cause" requirement of Wis. Stat. § 968.135, because the statute does not "specifically provide[] for the suppression remedy." *State v. Raflik*, 2001 WI 129, ¶ 15, 248 Wis. 2d 593, 636 N.W.2d 690.

(4) **Suppression for alleged "misuse of process."** (Argument IV. of this brief)

Although the State applied for the subpoenas of Popenhagen's bank records without making a showing of probable cause to the trial court in the form of an affidavit or oral testimony under Wis. Stat. § 968.135, the record does not reflect such "clear abuse" of the subpoena process, *State v. Cummings*, 199 Wis. 2d 721, 745, 546 N.W.2d 406 (1996), to warrant suppression of the bank records as a remedy for a procedural "due process" violation. *State v. Noble*, 2002 WI 64, ¶ 28, 253 Wis. 2d 206, 646 N.W.2d 38.

The police officer who obtained the bank records testified that he actually "filled out an affidavit in support of subpoena[s] [for] bank records" (27:5-6). Although the prosecutor conceded that his office used the wrong subpoena form – namely, the "civil" subpoena form of Wis. Stat. § 805.07, and without attaching any affidavit – the record reflects that two different judges nevertheless issued the subpoenas to the three banks (17:21-23; 23:1, 3;

26:8). Moreover, a police report attached to the amended complaint reflects that the officer actually possessed probable cause for the subpoenas in advance of applying for them (3:7-9).

STATEMENT OF FACTS

To avoid undue repetition, the State discusses the relevant facts in the course of its Argument, which follows.

ARGUMENT

I. THE OBTAINING OF POPENHAGEN'S BANK RECORDS WITHOUT A WARRANT DOES NOT VIOLATE THE FOURTH AMENDMENT.

A. Introduction.

Popenhagen asserts that she "has a Fourth Amendment right to the expectation of privacy in her bank records," the violation of which requires suppression of those records (Popenhagen's brief at 20; capitalization and boldface removed). She argues that although the United States Supreme Court declared otherwise in *United States v. Miller*, 425 U.S. at 440-43, that decision has been abrogated by federal statutes, referring to the Right to Financial Privacy Act ("RFPA") and the Gramm-Leach-Bliley Act ("GLBA") (Popenhagen's brief at 20-21).

For reasons outlined in the opening summary of this brief and developed more fully below, Popenhagen's arguments warrant short shrift.

B. General principles.

The Fourth Amendment to the federal constitution protects against "unreasonable searches and seizures."[1]

An actionable Fourth Amendment challenge entails two requirements: (1) a "government" search or seizure must have occurred; and (2) the challenger must show that she has "a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy'" in the place searched or the object seized. *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (citations omitted).

In turn, the challenger must show: (1) that she "'exhibited an actual (subjective) expectation of privacy'" in the area searched or the object seized; and (2) that the "expectation of privacy is 'one that society is prepared to recognize as "reasonable,"' . . . [that] the individual's expectation, viewed objectively, is 'justifiable' under the circumstances." *Id.* (citations omitted). The challenger must make this dual showing "'by a preponderance of the credible evidence.'" *State v. Whitrock*, 161 Wis. 2d 960, 972, 468 N.W.2d 696 (1991) (citation omitted).

In large measure, whether a person has exhibited an actual, subjective expectation of privacy in an area or object will turn on historical facts, which must be affirmed

---

[1]The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

unless contrary to "the great weight and clear preponderance of the evidence." *Whitrock*, 161 Wis. 2d at 973.[2]

Whether the asserted expectation of privacy is "reasonable," "justifiable," or "legitimate," depends on the totality of the circumstances and, ultimately, presents a question of constitutional fact, subject to independent judicial review. *Id.* at 973-74. Relevant factors include, for example:

> whether the accused had complete dominion and control [over the area or object] and the right to exclude others; . . . whether the accused took precautions customarily taken by those seeking privacy; . . . whether the property was put to some private use; [and] whether the claim of privacy is consistent with historical notions of privacy.

State v. Bruski, 2007 WI 25, ¶ 24, ___ Wis. 2d ___, 727 N.W.2d 503 (citations omitted).

If a protected Fourth Amendment privacy interest is established, then the government may invade that interest only with a valid warrant or pursuant to a recognized exception to the warrant requirement. *See generally State v. Milashoski*, 159 Wis. 2d 99, 111-12, 464 N.W.2d 21 (Ct. App. 1990), *aff'd*, 163 Wis. 2d 72, 471 N.W.2d 42 (1991). If a Fourth Amendment violation occurs, exclusion of evidence is the judicially created remedy. *See Mapp v. Ohio*, 367 U.S. 643, 657-58 (1961).

---

[2]In this case, the State concedes that Popenhagen had the same subjective expectation of privacy in her bank records as any typical, individual customer of the banks in question, in accordance with the banks' "privacy," or "confidentiality," policies (*cf.* 18:1 at ¶ 6. (Popenhagen's affidavit)). Those policies variously authorized disclosures to other specified types of businesses (19:8); or "as permitted by law," including "in response to a subpoena" (19:4, 7); or "in certain [presumably specified] circumstances" (19:9).

C. Under *United States v. Miller*, which still governs Fourth Amendment challenges, a bank depositor, like Popenhagen, does *not* have a reasonable expectation of privacy in bank records, such as canceled checks, deposit slips and account statements.

1. The rationale of *Miller*.

Narrowly stated, the Fourth Amendment does not protect a bank depositor's deposit slips and checks from government seizure. *See Miller*, 425 U.S. at 440-43.

In *Miller*, 425 U.S. at 438, 442, federal agents obtained copies of the defendant's checks and deposit slips from the defendant's banks. The agents had served grand jury subpoenas on the banks, which turned over the bank records in lieu of appearance and without notifying the defendant. *Id.* at 438. The subpoenas allegedly were defective "because they were issued by the United States Attorney rather than a court, no return was made to a court, and the subpoenas were returnable on a date when the grand jury was not in session." *Id.* at 439.

After indictment, the defendant moved to suppress the bank records. *Id.* at 436. The district court denied the motion, and the defendant was convicted of federal crimes. *Id.* at 436-37. On appeal, the Fifth Circuit Court of Appeals reversed, finding a Fourth Amendment violation. *Id.* at 439. The Supreme Court, however, reversed the Fifth Circuit. *Id.* at 440. Without addressing the propriety of the subpoenas, the Court concluded that "there was no intrusion into any area in which [the defendant] had a protected Fourth Amendment interest." *Id.*

As discussed below in Argument II., the *Miller* Court's rationale in 1976 for finding no reasonable

expectation of privacy in a bank depositor's checks and deposit slips stills hold sway today not only under the Fourth Amendment but under judicial interpretation of analogous provisions of all but a few state constitutions. That rationale is as follows:

- First, "[o]n their face, the [subpoenaed bank records] are not [the defendant's] 'private papers.' . . . [The defendant] can assert neither ownership nor possession. Instead, these are the business records of the bank." *Miller*, 425 U.S. at 440 (brackets added).

- Second, because the bank depositor has knowingly exposed his or her bank records to the public, such records are "'not a subject of Fourth Amendment protection.'" *Id.* at 442 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). Rather:

> The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.

Miller, 425 U.S. at 442.

- Third, the bank depositor "takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government." *Id.* at 443. As the *Miller* Court recalled:

> This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

Id.

Over the ensuing thirty years, the Supreme Court has not departed from *Miller*, but rather has consistently reconfirmed its vitality. A few examples are instructive.

In *Smith v. Maryland*, 442 U.S. at 741-45, the Court held that a telephone company's use of a "pen register" to record the phone numbers dialed is not a "search" under the Fourth Amendment. Analogizing to *Miller*, the Court observed that when the defendant used his phone, he "voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business," thereby "assum[ing] the risk that the company would reveal to police the numbers he dialed." *Id.* at 744.

Similarly, in *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 741-43 (1984), the Court relied on *Miller* en route to holding that the Fourth Amendment did not entitle the target of a Securities and Exchange Commission investigation to notice that subpoenas had been issued to third parties who possessed the target's business papers.

Perhaps most enlightening for purposes of the present case is *United States v. Payner*, 447 U.S. 727 (1980). In *Payner*, *id.* at 730, Internal Revenue Service agents obtained the defendant's bank records by breaking into a third party's briefcase and photographing "approximately 400 documents." Although the Court assailed "the unconstitutional and possibly criminal behavior of those who planned and executed this 'briefcase caper,'" *id.* at 733, the Court nevertheless held, in accordance with *Miller*, that the bank records were admissible against the defendant due to the defendant's lack of any reasonable expectation of privacy in them. *Id.* at 731-33.[3]

Because, to the State's knowledge, the Supreme Court has neither overruled *Miller* nor abrogated its

[3]The Supreme Court also declined to exercise its supervisory power to suppress the unlawfully obtained bank records. *See Payner*, 447 U.S. at 733-37.

rationale, the *Miller* Court's pronouncement of Fourth Amendment law with respect to a warrantless seizure of bank records is binding on Wisconsin's courts. *See Oregon v. Hass*, 420 U.S. 714, 719 (1975); *State v. Weide*, 155 Wis. 2d 537, 546, 455 N.W.2d 899 (1990).

2. Neither the RFPA nor GLBA trumps *Miller*.

As noted, Popenhagen argues that two federal statutes enacted in the wake of *Miller* now "establish[] that citizens have and are entitled to a reasonable expectation of privacy in their bank records" (Popenhagen's brief at 21). For the reasons that follow, Popenhagen's assertion sweeps too broadly.

Right to Financial Privacy Act. Enacted in 1978, the RFPA, which is set forth at 12 U.S.C. §§ 3401 et seq., provides natural persons and partnerships of five or fewer persons who are customers of financial institutions with certain rights and remedies concerning disclosure of customer records. *See generally*, Richard Cordero, *Construction and Application of Right to Financial Privacy Act of 1978*, 112 A.L.R. Fed 295 (1993). Two features of the RFPA are pertinent to the present case.

First, the RFPA, "by its very terms, does [not] apply to *state* law enforcement agencies." *State v. McAllister*, 840 A.2d 967, 972 (N.J. Super. Ct. App. Div. 2004) (emphasis added), *rev'd on other grounds*, 875 A.2d 866 (2005) (as noted in Argument II. of this brief). The RFPA defines "[g]overnment authority" as "any agency or department of the United States, or any officer, employee, or agent thereof." 12 U.S.C. § 3401(3).

Rather, the RFPA bars financial institutions from providing the *federal* government with information concerning customer records, unless the customer authorizes disclosure or the government obtains a valid warrant or subpoena. *See* 12 U.S.C. § 3402.

Second, where disclosure of customer records has occurred in violation of the RFPA, only civil penalties or injunctive relief are authorized, *see* 12 U.S.C. § 3417, and suppression of records seized by the government is *not* an available remedy, as articulated in § 3417(d). *See, e.g., United States v. Daccarett*, 6 F.3d 37, 52 (2d Cir. 1993); *United States v. Kington*, 801 F.2d 733, 737-38 (5th Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987); *United States v. Frazin*, 780 F.2d 1461, 1466 (9th Cir. 1986), *cert. denied*, 479 U.S. 839, and 479 U.S. 844 (1986); *United States v. Davis*, 953 F.2d 1482, 1496 (10th Cir. 1992), *cert. denied*, 504 U.S. 945 (1992).

Gramm-Leach-Bliley Act. Enacted in 1999, the GLBA, which is set forth at 15 U.S.C. §§ 6801 et seq., requires financial institutions to provide privacy notices that explain their information-sharing practices, gives customers a right to "opt out" if they do not want their nonpublic personal information shared with certain third parties, and bars certain disclosures to third parties.

The GLBA, however, does not authorize any private cause of action as remedy for a disclosure violation, much less the suppression of records seized by the federal government. Rather, various federal regulators have enforcement responsibilities. *See generally* Jolina C. Cuaresma, *The Gramm-Leach-Bliley Act*, 17 Berkeley Tech. L. J. 497, 514 (2002).

D. Summary.

For the reasons set forth, the obtaining of Popenhagen's bank records without a warrant does not violate the Fourth Amendment. On this subject, this court is bound by the United States Supreme Court's decision in *Miller*. Moreover, in this state criminal prosecution, neither the FRPA nor the GLBA applies to Popenhagen, and in any event, neither federal statute authorizes suppression of evidence for violation of the federal statute.

II. THE OBTAINING OF POPENHAGEN'S BANK RECORDS WITHOUT A WARRANT DOES NOT VIOLATE WISCONSIN CONSTITUTION ART. I, § 11.

A. Introduction.

As her lead argument, Popenhagen also asserts that she "has a right to the reasonable expectation of privacy in [her] bank records under the Wisconsin Constitution," specifically, Art. I, § 11, the violation of which also would require suppression of those records (Popenhagen's brief at 5; capitalization and boldface removed).

In support of her state constitutional argument, Popenhagen relies on the following authorities: (1) this court's power to interpret the Wisconsin Constitution to provide greater protection of state citizens' liberties; (2) recent examples of this court's departures from federal constitutional precedent in interpreting the Wisconsin Constitution; (3) cases reflecting that seven other state courts have departed from *United States v. Miller*; and (4) the rationale of the California Supreme Court in the pre-*Miller* case of *Burrows v. Superior Court*, 529 P.2d 590 (1974) (*see* Popenhagen's brief at 5-16).

For the reasons that follow, this court should conclude that Art. I, § 11 of the Wisconsin Constitution – like its Fourth Amendment counterpart – does *not* provide for a protected privacy interest in a bank depositor's canceled checks, deposit slips and account statements.

B. General principles.

As a threshold proposition, "[i]t is plain that United States Supreme Court interpretations of the United States Constitution do not bind the individual state's power to mold higher standards under their respective state constitutions." *State v. Knapp*, 2005 WI 127, ¶ 57, 285 Wis. 2d 86, 700 N.W.2d 899; *see also Cooper v.*

California, 386 U.S. 58, 62 (1967) (individual states have power "to impose higher standards on searches and seizures than required by the Federal Constitution"); *Oregon v. Hass*, 420 U.S. at 719 ("a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards").

For independently interpreting a provision of the Wisconsin Constitution, this court has set forth the following analysis:

> (1) the plain meaning of the words in the context used; (2) the historical analysis of the constitutional debates and of what practices were in existence in 1848; and (3) the earliest interpretation of the provision by the legislature as manifested in the earliest law passed following the adoption of the constitution.

Polk County v. State Public Defender, 188 Wis. 2d 665, 674, 524 N.W.2d 389 (1994); *see also State v. Beno*, 116 Wis. 2d 122, 136-37, 341 N.W.2d 668 (1984). When the foregoing considerations "do not provide an answer, the meaning of a constitutional provision may be determined by looking at the objectives of the framers in adopting the provision." *Beno*, 116 Wis. 2d at 138.

C. Analysis.

1. The factors outlined in *Polk County* and *Beno* do not show a protected privacy interest in bank records under Art. I, § 11.

First, except for fewer commas, a semi-colon substituting for a comma, no first-letter capitalization or plural form of the word "warrant," and no first-letter capitalization of the word "oath," Art. I, § 11 of the

Wisconsin Constitution is identical to the Fourth Amendment.[4]

Second, the framers of the Wisconsin Constitution apparently found the Fourth Amendment precisely to their liking, because the history of the state constitutional conventions reflects no debate over its language:

> The [Wisconsin] constitution of 1846, in common with the other state constitutions of the period, contained a lengthy declaration of rights, the provisions of which [included] . . . in criminal cases[,] freedom from unreasonable searches and seizures. . . . The committee in charge of the article [Article I] in the 1848 convention adopted this article without material changes, and so generally accepted were they, that no debate arose of the above matters.

Ray A. Brown, *The Making of the Wisconsin Constitution, Part II*, 1952 Wis. L. Rev. 23, 57. Noting that the search-and-seizure provision was adopted without discussion, this commentator further observed that "[c]ounterparts of the[se] procedural provisions on the Wisconsin Declaration of Rights[] will be found in either the New York Constitution of 1846, or in that of Michigan of 1835." *Id.* at 58.

Third, whether to establish banks was one of the most contentious subjects of the Wisconsin constitutional conventions, with many attendees vehemently opposed, especially in the wake of territorial bank failures. *See, eg.*, Gordon B. Baldwin, *Celebrating Wisconsin's Constitution 150 Years Later*, 1998 Wis. L. Rev. 661, 669-70;

---

[4]Wisconsin Constitution Article I, § 11 provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Wisconsin Historical Society, *The Attainment of Statehood* at 483-550 (Milo M. Quaife, editor, 1928). The abiding distrust of banks reasonably suggests that the framers would not readily have embraced the prospect of privacy in bank records had it been raised.

Indeed, not until November 1902, with the adoption of Art. XI, § 4 of the Wisconsin Constitution, was the legislature authorized "to enact a general banking law for the creation of banks, and for the regulation and supervision of the banking business." Moreover, even today, nothing in Chapter 404 of the Statutes, governing "BANK DEPOSITS AND COLLECTIONS," provides privacy protection for customers' bank records.

Fourth, and significantly, in the nearly 160 years that the search-and-seizure provision of Art. I, § 11 has endured, this court apparently has interpreted it differently from the United States Supreme Court's interpretation of the Fourth Amendment only once.

As noted at the outset of this brief, the lone exception is *State v. Eason*, 245 Wis. 2d 205, and *Eason* did *not* concern extending the "reasonable expectation of privacy" requirement for challenging a search or seizure to objects in the possession of a third party, such as bank records. Rather, *Eason* actually brought Art. I, § 11 *in line with the United States Supreme Court's Fourth Amendment jurisprudence* by recognizing a "good faith" exception to the exclusionary rule for certain deficiencies in searches and seizures made under warrant, as the Supreme Court had done in *United States v. Leon*, 468 U.S. 897, 921-22 (1984). This court then went further and added state constitutional requirements that a warrant application include a substantial investigation and review by an experienced police officer or government attorney before "good faith" applies. *Eason*, 245 Wis. 2d 206, ¶ 74.

Overlooked by Popenhagen is this court's unwavering history of interpreting Art. I, § 11 precisely as the United States Supreme Court has interpreted the Fourth Amendment. A *non-exhaustive* list of such decisions, with their general subject matter, includes the following:

- *State v. Paszek*, 50 Wis. 2d 619, 624, 184 N.W.2d 836 (1971) (standard of probable cause to arrest);

- *State v. Fillyaw*, 104 Wis. 2d 700, 710-11, 312 N.W.2d 795 (1981) ("expectation of privacy" test for standing to challenge a search);

- *State v. Callaway*, 106 Wis. 2d 503, 519-20, 317 N.W.2d 428 (1982), and *State v. Wisumierski*, 106 Wis. 2d 722, 727-28, 317 N.W.2d 484 (1982) (no automatic standing for persons accused of possession offenses);

- *State v. Boggess*, 115 Wis. 2d 443, 453-57, 340 N.W.2d 516 (1983) (totality test for determining probable cause);

- *State v. Rodgers*, 119 Wis. 2d 102, 115, 349 N.W.2d 453 (1984) (third-party consent to enter residence to effect arrest);

- *State v. Fry*, 131 Wis. 2d 153, 170-76, 388 N.W.2d 565 (1986) (search incident to arrest in automobile cases), *cert. denied*, 479 U.S. 989 (1986);

- *State v. Anderson*, 138 Wis. 2d 451, 461-64, 406 N.W.2d 398 (1987) (truthfulness of statements in affidavit for search warrant);

- *State v. Tompkins*, 144 Wis. 2d 116, 130-37, 423 N.W.2d 823 (1988) (automobile exception to search warrant);

- *State v. Murdock*, 155 Wis. 2d 217, 226-28, 455 N.W.2d 618 (1990) (scope of search incident to arrest);

- *State v. Weide*, 155 Wis. 2d at 545-49 (inventory search of closed containers);

- *State v. Richardson*, 156 Wis. 2d 128, 137-42, 456 N.W.2d 830 (1990) (anonymous tip for investigative traffic stop);

- *State v. Guzman*, 166 Wis. 2d 577, 586-91, 480 N.W.2d 446 (1992) ("special needs" exception to warrant requirement);

- *State v. Guy*, 172 Wis. 2d 86, 93-95, 492 N.W.2d 311 (1992) (scope of patdown during investigative stop);

- *State v. Bohling*, 173 Wis. 2d 529, 536-45, 494 N.W.2d 399 (1993) ("exigent circumstances" for warrantless blood draw);

- *State v. Betterley*, 191 Wis. 2d 406, 415-24, 529 N.W.2d 216 (1995) (warrantless "second look" at item in jail property box);

- *State v. Harris*, 206 Wis. 2d 243, 251-58, 557 N.W.2d 245 (1996) (all occupants are "seized" in vehicle stop);

- *State v. Andrews*, 201 Wis. 2d 383, 388-90, 549 N.W.2d 210 (1996) (scope of "premises" search warrant);

- *State v. Phillips*, 218 Wis. 2d 180, 195-97, 577 N.W.2d 794 (1998) (voluntariness of consent for "consent" search);

- *State v. Ward*, 2000 WI 3, ¶¶ 53-63, 231 Wis. 2d 723, 604 N.W.2d 517 ("no-knock" execution of warrant);

- *State v. Richter*, 2000 WI 58, ¶¶ 26-43, 235 Wis. 2d 524, 612 N.W.2d 29 ("hot pursuit" exception to warrant requirement);

- *State v. Pallone*, 236 Wis. 2d 162, ¶¶ 31-83 (scope of search incident to arrest and automobile search);

- *State v. Hajicek*, 2001 WI 3, ¶¶ 35-42, 240 Wis. 2d 349, 620 N.W.2d 781 (probation search);

- *State v. Rutzinski*, 2001 WI 22, ¶¶ 12-38, 241 Wis. 2d 729, 623 N.W.2d 516 (informant motorist's tip for investigative stop);

- *State v. Kelsey C.R.*, 2001 WI 54, ¶¶ 29-37, 243 Wis. 2d 422, 626 N.W.2d 777 (whether a "seizure" has occurred);

- *State v. Young*, 2006 WI 98, ¶¶ 27-52, 294 Wis. 2d 1, 717 N.W.2d 729 (whether a "seizure" has occurred);

- *State v. Bruski*, 2007 WI 25, ¶¶ 20-46 (possible trespasser's expectation of privacy in vehicle and contents).

This court has explained that conforming its interpretation of Art. I, § 11 to the Supreme Court's interpretation of the Fourth Amendment "reduces to a minimum the confusion and uncertainty under which the police must operate." *Fry*, 131 Wis. 2d at 175. This court further has observed that such uniformity "is not only consistent with the text of Wisconsin's search and seizure provision, its constitutional history and its judicial history, but it is also in accord with sound public policy." *Id.* at 175-76. True to this conclusion, this court recently declared that "Article I, § 11 of the Wisconsin

Constitution affords individuals no greater privacy expectations than those provided under the Fourth Amendment." *Pallone*, 236 Wis. 2d 162, ¶ 81.

Finally, with respect to bank records specifically, the Wisconsin court of appeals has relied on this court's history of construing Art. I, § 11 in accordance with the Fourth Amendment to follow the *Miller* Court's decision that bank depositors have no constitutionally protected privacy interest in their bank records. *See State v. Swift*, 173 Wis. 2d 870, 882-83, 496 N.W.2d 713 (Ct. App. 1993); *but see State v. Starke*, 81 Wis. 2d 399, 419-23, 260 N.W.2d 739 (1978) (Abrahamson, J., concurring, and arguing in favor of a state constitutional right to privacy in bank records).

In short, the factors outlined in *Polk County* and *Beno* for undertaking analysis of a state constitutional provision do not support finding a protected privacy interest in bank records under Art. I, § 11.

2. Most state courts have *not* found a protected privacy interest in bank records under their respective constitutions.

Apparently, state courts in fifteen states have expressly addressed whether their respective constitutions protect a privacy interest in bank records, and these courts are evenly divided on the question.

State courts in seven states have answered "yes" to a state constitutional privacy interest in bank records. *See Burrows*, 529 P.2d at 592-96 (pre-*Miller* decision of the California Supreme Court discussed below); *Charnes v. DiGiacomo*, 612 P.2d 1117, 119-22 (Colo. 1980); *Winfield v. Div. of Pari-Mutuel Wagering*, 477 So. 2d 544, 546-48 (Fla. 1985); *People v. Jackson*, 452 N.E.2d 85, 88-89 (Ill. App. Ct. 1983); *State v. McAllister*, 875 A.2d 866,

873-75 (N.J. 2005); *Commonwealth v. DeJohn*, 403 A.2d 1283, 1287-91 (Pa. 1978); *State v. Thompson*, 810 P.2d 415, 416-18 (Utah 1991). However, in two of these cases, the state courts relied upon a distinct state constitutional provision that provided "privacy" protection *independent of* a search-and-seizure provision. *See Winfield*, 477 So. 2d at 547-48 (Florida); *Jackson*, 452 N.E.2d at 88-89 (Illinois).

Also, in California, a 1982 constitutional amendment eliminated suppression of evidence as a remedy for a state constitutional violation, effectively emasculating the *Burrows* decision. *See People v. Lance*, 694 P.2d 744, 749 (Cal. 1985).

State courts in eight states (including the Wisconsin court of appeals in *Swift*) have answered "no" to a state constitutional privacy interest in bank records. *See State v. Klattenhoff*, 801 P.2d 548, 606 (Hawaii 1990); *State v. Cox*, 392 N.E.2d 496, 496-97 (Ind. Ct. App. 1979); *State v. Schultz*, 850 P.2d 818, 822-30 (Kan. 1993); *State ex rel. Brant v. Bank of America*, 31 P.3d 952, 959-60 (Kan. 2001); *State v. Fredette*, 411 A.2d 65, 66-67 (Me. 1979); *Norkin v. Hoey*, 586 N.Y.S.2d 926, 931 (N.Y. App. Div. 1992); *State v. Melvin*, 357 S.E.2d 379, 381-82 (N.C. Ct. App. 1987); *State v. Union State Bank*, 267 N.W.2d 777, 779-81 (N.D. 1978).

Some state courts simply have applied *Miller* without discussing their respective state constitutions. *See, e.g., Ex Parte Clark*, 630 So. 2d 493, 498 (Ala. Crim. App. 1993); *In re Petition of State's Attorney, Cook County, Illinois*, 425 A.2d 588, 590 (Conn. 1979); *Culpepper v. State*, 274 S.E.2d 616, 617 (Ga. Ct. App. 1980); *Smith v. State*, 389 A.2d 838 (Md. 1978), *aff'd*, 442 U.S. 735 (1979); *People v. Perlos*, 462 N.W.2d 310, 313, 316 (Mich. 1990); *State v. Milliman*, 346 N.W.2d 128, 130 (Minn. 1984); *McAlpine v. State*, 634 P.23d 747, 749 (Okla. Crim. App. 1981); *Pontbriand v. Sundlun*, 699 A.2d 856, 870 (R.I. 1997).

Also, in some states, statutes govern the disclosure of bank records. *See, e.g.*, Minn. Stat. Ann. § 13A.02 (2005); N.H. Rev. Stat. Ann. § 359-C:9 and C:10(II) (1995); Or. Rev. Stat. § 192.565 (2003).

More telling may be the fact that in the thirty years since *Miller* was decided, courts in thirty-nine states have *not* departed from the Supreme Court's holding that, constitutionally, a person retains no reasonable expectation of privacy in information revealed to a third party (the "third-party doctrine") – whether the information consists of bank records, garbage, telephone numbers dialed or other disclosures of personal data. A recent, comprehensive survey of this subject discloses the following breakdown of state court decisions and leanings:

- Eleven states have "reject[ed]" the federal third-party doctrine (although one of those states, Hawaii, as noted above, has not done so with respect to bank records);

- Ten other states "might reject," but have not so far rejected, the federal third-party doctrine;

- Eleven states "provide no reason to believe they will reject" the federal third-party doctrine; and

- Eighteen states, including Wisconsin, "have not diverged from the substantive Fourth Amendment."

Stephen E. Henderson, *Learning from All Fifty States: How to Apply the Fourth Amendment and Its State Analogs to Protect Third Party Information From Unreasonable Search*, 55 Cath. U. L. Rev. 373, 395-412 & ns. 118-168 (2006) (capitalization omitted).

Thirty years later, *Miller* remains the prevailing constitutional opinion on the issue of privacy in bank records.

3. Sound policy reasons underscore the *Miller* Court's conclusion of no constitutionally protected privacy interest in bank records.

Lastly, for additional sound "policy" reasons, this court should interpret Art. I, § 11 of the Wisconsin Constitution in accordance with the *Miller* Court's interpretation of the Fourth Amendment in finding no constitutionally protected privacy interest in bank records.

First, banks invariably forewarn customers, like Popenhagen, that the customer enjoys only a limited expectation of privacy in their bank records, which may be disclosed "as permitted by law," including "in response to a subpoena" (19:4, 7).

Second, in *Miller*, the Supreme Court distinguished the *Burrows* rationale of the California Supreme Court, suggesting that the non-constitutional process of "subpoena Duces tecum" provides sufficient judicial oversight for obtaining bank records. *See Miller*, 425 U.S. at 445 n.7. In *Burrows*, 529 P.2d at 593, the officer had obtained the bank records by informal oral request. As one commentary, critical of *Burrows*, observes:

> [T]he bank, not the government, breached Burrows' expectation that the information he disclosed would remain confidential. . . . The bank could have refused to disclose some or all of the information. A constitution which is designed to control the actions of a government is not a suitable means of enforcing duties owed by one private party to another. Yet the California Supreme Court's equation of constitutionally recognized expectation of privacy with an expectation of confidentiality does exactly that.

Philip Blumstein & Linda A. Pohly, *Confidentiality, Access and Certainty: Disclosure of Customer Bank Records*, 1 Ann. Rev. Banking L. 101, 112-13 (1982).

Third, as of 1993, according to the Kansas Supreme Court, only "[a]bout one-third of the 50 states ha[d] enacted a state equivalent of the [federal] Right to Financial Privacy Act." *Schultz*, 850 P.2d at 827. Wisconsin apparently has not done so. This lukewarm response to the *Miller* decision, coupled with the fact that the federal RFPA *excludes* suppression of evidence as a remedy for a violation of the Act, further reflects public opinion that bank customer records are undeserving of constitutional privacy protection.

Finally, whether it is possible "to participate in the economic life of contemporary society without maintaining a bank account," *Burrows*, 529 P.2d at 596, begs the question of whether such participation deserves full insulation from law-enforcement authorities absent a valid search warrant. In *Miller*, the Supreme Court correctly struck the balance in favor of no Fourth Amendment protection. Wisconsin's constitutional history, judicial precedents and other policy considerations fully support reaching the same conclusion under Wisconsin's identically-worded, constitutional analog – Art. I, § 11.

III. POPENHAGEN LACKS STANDING UNDER WIS. STAT. § 968.135 TO CHALLENGE THE SUBPOENAS TO HER BANKS, AND IN ANY EVENT, SUPPRESSION OF HER BANK RECORDS IS NOT A REMEDY FOR VIOLATION OF THE STATUTE'S "PROBABLE CAUSE" REQUIREMENT.

A. Introduction.

As an alternative to her constitutional "privacy" arguments, Popenhagen seeks suppression of evidence derived from her bank records on *statutory* grounds. Specifically, she argues that the State violated Wis. Stat. § 968.135 by obtaining judicial subpoenas for the bank

records without making any predicate showing of "probable cause" (Popenhagen's brief at 16-19).

Although the State failed to make the required predicate showing of probable cause for a judicial subpoena under Wis. Stat. § 968.135, suppression of Popenhagen's bank records is not warranted for either of two alternative reasons: (1) The statute does not give Popenhagen standing to challenge the issuance of judicial subpoenas to her three banks; and (2) In any event, suppression of evidence is not an available remedy under the statute.[5]

B. General principles.

Determining Popenhagen's rights and remedies under Wis. Stat. § 968.135 presents questions of statutory interpretation, governed by the following general principles.

"[T]he purpose of statutory interpretation is to determine what a statute means so that it may be given the full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110.

Statutory interpretation "'begins with the language of the statute.'" *Id.* at ¶ 45 (citation omitted). Statutory language "is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* at ¶ 45. Further:

> [S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or

[5]For reasons set forth below in Argument IV., suppression also is not a "proper" remedy under the fact of this case – either through the trial court's exercise of its inherent authority or this court's exercise of its supervisory power.

> closely-related statutes; and reasonably, to avoid absurd or unreasonable results.

Id. at ¶ 46. Consequently, "scope, context, and purpose are perfectly relevant to a plain-meaning interpretation of an unambiguous statute" so long as they are "ascertainable from the text and structure of the statute itself, rather than extrinsic sources, such as legislative history." *Id.* at ¶ 48.

If the meaning of the statute is plain, "'the statute is applied according to this ascertainment of its [plain] meaning.'" *Id.* at ¶¶ 45-46 (citations omitted).

Conversely, a statute is ambiguous "if it is capable of being understood by reasonably well-informed persons in two or more senses," . . . that is, "'whether the statutory . . . language *reasonably* gives rise to different meanings.'" *Id.* at ¶ 47 (citation omitted; emphasis in original). Thus, ambiguity "can be found in the words of the statutory provision itself, or by the words of the provision as they interact with and relate to other provisions in the statute and to other statutes." *State v. Sweat*, 208 Wis. 2d 409, 416, 561 N.W.2d 695 (1997).

If statutory language is ambiguous, the reviewing court examines "the scope, history, context, subject matter, and purpose of the statute" to determine the legislative intent. *Sweat*, 208 Wis. 2d at 418; *see also Kalal*, 271 Wis. 2d 633, ¶ 51.

Ultimately, statutory interpretation is "a question of law" that each level of reviewing court determines independently. *Sweat*, 208 Wis. 2d at 414-15.

C. Analysis.

1. Relevant facts and relevant statute.

Wrong statute. In the present case, the State obtained three judicial subpoenas for Popenhagen's bank records signed by two different judges (17:21-23). Those standard-form subpoenas duces tecum, however, were labeled as arising pursuant to "Section 805.07 of the Wisconsin Statutes" (capitalization removed), and they lacked a completed caption or case number (*id.*). Each subpoena listed an "appearance" court date, but advised the bank that copies of "all bank records for the account of Michelle Popenhagen" could be mailed to the identified police officer "[i]n lieu of appearing" (*id.*). Questions were to be directed to the Oneida County District Attorney (*id.*). Each bank gave the officer copies of the requested bank records – Popenhagen's deposit slips, canceled checks and checking and savings account statements – without making a court appearance (27:6).

Correct statute. The State concedes that the wrong standard-form subpoenas – "civil" subpoenas – were used in this case. Under Wis. Stat. § 805.07(1) and (2), a subpoena duces tecum may be issued "by any attorney of record in a civil action or special proceeding." These provisions plainly do not apply to a criminal investigative subpoena under Wis. Stat. § 968.135, which only a court may issue upon a finding of probable cause.

Wisconsin Statute § 968.135 (2003-04) states in full as follows (and still reads the same today):

> **968.135 Subpoenas for documents.** Upon the request of the attorney general or a district attorney and upon a showing of probable cause under s. 968.12 [governing search warrants], a court shall issue a subpoena requiring the production of documents, as specified in s. 968.13(2). The documents shall be returnable to the court which issued the subpoena. Motions to the court,

> including, but not limited to, motions to quash or limit the subpoena, shall be addressed to the court which issued the subpoena. Any person who lawfully refuses to produce the documents may be compelled to do so as provided in ch. 785 [contempt process]. This section does not limit or affect any other subpoena authority provided by law.

In turn, Wis. Stat. § 968.13(2) provides that "'documents' includes, but is not limited to, books, papers, records, recordings, tapes, photographs, films or computer or electronic data." Bank account records such as deposit slips and checks plainly fit this definition of "documents."

2. Section 968.135 does not give Popenhagen standing to challenge the judicial subpoenas.

Plain language of the statute. In the present case, the trial court explained that when a return is made on a search warrant or a subpoena for documents, the return "is held in a special file in the clerk's office until a criminal complaint is filed," and if a complaint later is filed, the warrant and return are "then placed in the particular defendant's criminal file" (26:19). The trial court explained the operative difference between a search warrant and a subpoena for documents as follows:

> [Section 968.135] differs from the search warrant statute[,] because [§] 968.135 gives that [third-party] institution [such as a bank or a telephone company] an opportunity to appear and object. Unlike a search warrant, there is no opportunity for a defendant to appear and object. So out of courtesy to these [third-party] institutions, we give them a date and time when they can object. It's effectively putting the matter on the general appearance calendar.

(26:19; brackets added.)

In relevant part, the trial court's explanation matches that provided by the court of appeals in *Swift*:

> [Under § 968.135,] a subpoena demanding the production of documents is not equivalent to a search warrant. First, subpoenas, unlike search warrants, do not authorize the state to enter an area, search it and seize things without giving the target an opportunity to contemplate what is to be searched and seized. A subpoena for documents is a demand that the person [or institution] upon whom it is served produce certain documents or types of documents. The subpoena's target has the opportunity not only to contemplate what is being demanded but also to challenge the demand in court.
>
> Second, persons [or institutions] served with subpoenas may, in their discretion, produce more than what is demanded of them. . . .
>
> Third, ... [the subpoenaed institution or person] must determine for itself [or himself or herself] which documents the subpoena orders [the institution or person] to produce.

Swift, 173 Wis. 2d at 885-86 (brackets added).

In the present case, as discussed, Popenhagen does not have "standing" under the Fourth Amendment or Art. I, § 11 of the Wisconsin Constitution to challenge the judicial subpoenas, because she has no reasonable expectation of privacy in her bank records. Accordingly, Popenhagen must find some other source of "standing" to challenge the judicial subpoenas.

Contrary to Popenhagen's suggestion, however, nothing in the plain language of Wis. Stat. § 968.135 (or of any other statutory or constitutional provision of which the State is aware) gives Popenhagen "standing" to challenge the subpoenas for documents.

In particular, the following italicized language of § 968.135 is unavailing: "Motions to the court, *including but not limited to, motions to quash or limit the subpoena*, shall be addressed to the court which issued the subpoena." This statutory language identifies only the

types of "[m]otions to the court" that may be brought. Moreover, in context, it plainly refers solely to the person or institution who has been subpoenaed to produce documents. Beyond the person or institution who has been subpoenaed, the statute does *not* expand the persons or entities who may object to the subpoena to anyone who later may become a defendant in a criminal action and face the prospect that subpoenaed third-party documents may be used against him or her.

Extrinsic sources and policy concerns. To the argument that a third-party institution like a bank lacks self-interest in challenging a judicial subpoena for documents under Wis. Stat. § 968.135 that may implicate a customer in criminal activity, the State respectfully offers two responses.

First, a bank (or other third party) actually may possess a sufficient self-interest to challenge what it believes to be defects or omissions in a subpoena for documents to the extent that an improper or erroneous disclosure of documents opens the bank (or other third party) to a potential civil lawsuit.

As discussed, the federal RFPA provides civil remedies against financial institutions and the federal government for violations of that Act, *see* 12 U.S.C. § 3417, and a minority (one-third) of state jurisdictions have analogous statutes. *See Schultz*, 850 P.2d at 827 (collecting examples). Wisconsin, however, apparently does not have such a statute.

Second, regardless of why a bank (or other third party) may choose not to challenge a subpoena for documents issued to a third party, a criminal defendant cannot challenge evidence derived from the subpoena in the defendant's criminal case in the absence of a protected interest.

Contrary to Popenhagen's interpretation, Wis. Stat. § 968.135 simply does *not* protect a person's *privacy* in

bank records (or any other myriad documents or information) that the person knowingly and voluntarily has disclosed or revealed to third parties and which may become the subject of judicial subpoenas.

Rather, the legislative history of § 968.135 reflects an intent to *expand* the investigative authority of prosecutors to obtain information (by subpoena) from third parties not suspected of criminal activity, while also giving such third parties an opportunity to challenge the subpoenas in court. Section 968.135 was enacted by Laws of 1979, Chapter 81, stemming from 1979 Senate Bill 221, and except for numerical changes of internally referenced statutes, still reads the same today. In relevant part, a "Note" to an early draft of § 968.135 explains:

> The bill draft in this document protects persons not suspected of a crime from expensive governmental intrusions while granting new authority to prosecutors to conduct investigations. SECTIONS 1 and 2 of the draft [which are now incorporated in Wis. Stat. § 968.13 governing search warrants] provide that anything which constitutes evidence of any crime, or mere evidence, may be the subject of a search warrant if probable cause is shown that the evidence is under the control of a person who is reasonably suspected to be concerned in the commission of a crime. Anyone who is a party to a crime under s. 939.05(2), Wis. Stats., is concerned in the commission of a crime.
>
> By limiting the use of a search warrant for the discovery of mere evidence to those persons reasonably suspected to be concerned in the commission of a crime, the bill draft protects innocent third-parties from governmental searches. However, SECTION 3 of this bill draft [creating § 968.135] allows a prosecutor to continue his or her investigations. This SECTION creates a <u>new</u> power for a prosecutor by authorizing the attorney general or district attorney to request a court to issue a subpoena requiring the production of books, papers, documents or tangible things which may constitute evidence of any crime. The subpoena may only be issued upon a showing of probable cause. In other words, a subpoena may not issue when there is no

> showing of probable cause that the person to whom it is directed has, under his or her control, articles which may constitute evidence of any crime. At a prosecutor's discretion, the subpoena may be directed to any person, whether or not that person is reasonably suspected to be concerned in the commission of a crime.

(State's appendix at 102-103 (underline in original); available on microfiche at the Wisconsin State Law Library for Laws of 1979, Chapter 81).

In short, unless a subpoena for documents under Wis. Stat. § 968.135 is directed to the party or entity suspected of criminal activity, that suspect will lack standing to challenge the subpoena under the statute. In the present case, § 968.135 does not give Popenhagen standing to challenge the subpoenas issued to her three banks.

3. In any event, suppression of the bank records is not a remedy available under § 968.135.

Alternatively, even assuming Popenhagen somehow has "standing" to challenge the undisputed fact that the prosecutor or prosecutorial agent who applied for the subpoenas did not present an affidavit or oral testimony establishing probable cause, suppression of the bank records disclosed by her three banks is not a remedy available under Wis. Stat. § 968.135.

This court (and the Wisconsin court of appeals) long have held that:

> Suppression [of evidence] is only required when evidence has been obtained in violation of a defendant's constitutional rights, *State v. Hochman*, 2 Wis. 2d 410, 419, 86 N.W.2d 446, 451 (1957), or if a statute specifically provides for the suppression remedy. *State ex rel. Arnold v. County Court*, 51 Wis. 2d 434, 439-40, 187 N.W.2d 354 (1971); *see*

> *also State ex rel. Peckham v. Krenke*, 229 Wis. 2d 778, 787, 601 N.W.2d 287 (Ct. App. 1999); *State v. Verkuylen*, 120 Wis. 2d 59, 61, 352 N.W.2d 668 (Ct. App. 1984).

Raflik, 248 Wis. 2d 593, ¶ 15 (finding suppression of evidence unavailable absent any constitutional violation or any "specific statutory remedy provided for the failure to record a telephonic search warrant application").

In the cited example of *Peckham*, the court of appeals articulated this principle as follows:

> [W]rongfully or illegally obtained evidence is to be suppressed only where the evidence was obtained in violation of an individual's constitutional rights or in violation of a statute that *expressly* requires suppression [of evidence] as a sanction.

Peckham, 229 Wis. 2d at 787 (emphasis added; violation of administrative code regulation on opening and examining incoming legal mail of inmates).

For a non-exhaustive list of other statements of this principle, where suppression of evidence was not found to be a remedy for violations of particular statutes, *see also*:

- *State v. Piddington*, 2001 WI 24, ¶ 52, 241 Wis. 2d 754, 623 N.W.2d 528 (alleged violation of § 343.305(4) giving motorist right to receive a free, alternative blood-alcohol test);

- *State v. Repenshek*, 2004 WI App 229, ¶¶ 23-24, 277 Wis. 2d 780, 691 N.W.2d 369 (and internal cases; alleged violation of § 343.303 governing a motorist's implied consent to a preliminary breath test);

- *State v. Cash*, 2004 WI App 63, ¶ 30, 271 Wis. 2d 451, 677 N.W.2d 709 (violation of § 175.40(6)(d) for not adopting written policy on peace officer's extra-territorial jurisdiction);

- *State v. Wallace*, 2002 WI App 61, ¶ 25, 251 Wis. 2d 625, 642 N.W.2d 549 (violation of § 968.225 governing strip searches);

- *State v. Jackowski*, 2001 WI App 187, ¶ 17, 247 Wis. 2d 430, 633 N.W.2d 649 (violation of § 66.0119(2) governing "special inspection" warrants);

- *State v. Thompson*, 222 Wis. 2d 179, 189, 585 N.W.2d 905 (Ct. App. 1998) (alleged violation of § 146.82 when officer witnessed suspect's surgery);

- *State v. Mieritz*, 193 Wis. 2d 571, 574-77, 534 N.W.2d 632 (Ct. App. 1995) (violation of §§ 59.24(1) and 62.09(13) by officer acting outside jurisdiction);

- *State v. Verkuylen*, 120 Wis. 2d 59, 60-61, 352 N.W.2d 668 (Ct. App. 1984) (violation of § 757.69(1)(b) by court commissioner issuing search warrants).

In two John Doe cases, this court indicated that suppression of evidence *could be* available as a remedy for a "clear abuse" of the John Doe process specified in Wis. Stat. § 968.26, even though the statute does not expressly provide for such remedy. *See Cummings*, 199 Wis. 2d at 745 (observing that suppression of evidence would be an "appropriate" remedy for improperly using a John Doe proceeding "to gather evidence specifically relating to the crime for which the defendant [already] is being tried," but finding no such abuse in the case, *id.* at 746); *Noble*, 253 Wis. 2d 206, ¶¶ 28-31 (recognizing the same principle, but declining to suppress evidence as a remedy for improperly allowing a non-lawyer police officer to question a witness at a John Doe proceeding).

Importantly, however, in *Noble*, 253 Wis. 2d 206, ¶ 28, this court signaled that it was *not* "creating an

exception to the general rule, which requires – in the absence of a statutory violation providing for suppression as a remedy – a constitutional violation before suppression will be invoked." Rather, this court construed *Cummings* to mean that suppression may be a proper remedy when the "clear abuse" of the John Doe process "rise[s] to the level of a due process violation." *Id.*[6] *See* Argument IV.

D. Summary.

For alternative reasons, suppression of evidence derived from disclosure of Popenhagen's bank records is not an available *statutory* remedy for the State's conceded violation of Wis. Stat. § 968.135. The statute does not give Popenhagen standing to raise such challenge, and in any event, the statute does not expressly provide for suppression of evidence as a remedy for its violation.

IV. MORE BROADLY, SUPPRESSION OF POPENHAGEN'S BANK RECORDS IS NOT WARRANTED FOR "MISUSE OF PROCESS."

A. Introduction.

Lastly, Popenhagen asks this court to suppress evidence derived from her bank records for "misuse of process" (Popenhagen's brief at 22; capitalization removed). Popenhagen argues that "the provisions of Sec. 968.135, Stats., were completely ignored" without justifiable explanation (*id.*).

---

[6]At page 19 of her brief, Popenhagen mistakenly relies on *State v. Waste Management of Wisconsin, Inc.* 81 Wis. 2d 555, 261 N.W.2d 147 (1978), for the proposition that this court "implicitly recognized that suppression of illegally obtained evidence would be required for a violation" of Wis. Stat. § 968.31 (1978), governing electronic surveillance. Rather, this court observed that the "'admissibility into evidence of the contents of eavesdropping interceptions' . . . is 'governed solely by sec. 968.29(3), Stats. [(1978)]." *Waste Management* at 572-73 (citation omitted).

Popenhagen alternatively asks this court: (1) to affirm the trial court's use of its "inherent authority" to redress the "misuse of process" by suppressing the evidence in question (Popenhagen's brief at 23-24); or (2) to use its own "inherent power to punish a party for failure to comply with proper pretrial procedures" (Popenhagen's brief at 24).

For the reasons that follow, this court should decline Popenhagen's requests.

B. General principles.

In *City of Sun Prairie v. Davis*, 226 Wis. 2d 738, 749-50, 595 N.W.2d 635 (1999), this court explained that "[t]here are generally three areas in which courts have exercised inherent authority." They are: (1) safeguarding and facilitating "the internal operations of the court[;]" (2) "regulat[ing] members of the bench and bar[;]" and (3) "ensuring that the court functions efficiently and effectively to provide the fair administration of justice." *Davis*, 226 Wis. 2d at 749-50. Popenhagen recites the third enumerated sphere of inherent authority in support of her "misuse of process" argument for suppression (Popenhagen's brief at 24).

Broadly stated, this third enumerated sphere of "inherent authority" presumably enables the courts to redress conduct that rises to the *constitutional* level of a "due process" violation, whether substantive or procedural due process.

At one end of the "due process" spectrum is the doctrine, or defense, of "outrageous government conduct." *State v. Albrecht*, 184 Wis. 2d 287, 296-300, 516 N.W.2d 776 (Ct. App. 1994). The United States Supreme Court has identified this egregious type of "due process" violation as follows:

> [W]e may some day be presented with a situation in which the conduct of law enforcement agents is so

> outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.

United States v. Russell, 411 U.S. 423, 431-32 (1973). One example might be "'where the government itself [is] so enmeshed in the criminal activity that prosecution of the defendant [would be repugnant] to the American criminal justice system.'" *Albrecht*, 184 Wis. 2d at 297 (quoting *State v. Steadman*, 152 Wis. 2d 293, 301, 448 N.W.2d 267 (Ct. App. 1989)).

Much closer to the other end of the "due process" spectrum would be, for example, noncompliance with the limitations of the John Doe statute (Wis. Stat. § 968.26), as identified by this court:

> It is only when the John Doe is used [by the prosecutor] to gather evidence specifically relating to the crime for which the defendant [already] is being tried that an abuse of the procedure occurs. . . . [T]he appropriate remedy for such an abuse of the John Doe proceeding is suppression of any evidence so obtained.

Cummings, 199 Wis. 2d at 746 (citing *State v. Hoffman*, 106 Wis. 2d 185, 205-06, 316 N.W.2d 143 (Ct. App. 1982)); *see also Noble*, 253 Wis. 2d 206, ¶ 28 (equating such conduct to a "due process" violation when a "clear abuse" has occurred).

On a motion to suppress evidence for an alleged due process violation, "the defendant generally bears the burden of producing evidence to support [such] a constitutional violation." *Noble*, 253 Wis. 2d 206, ¶ 19. Whether a due process violation has occurred and what remedy a court should take to redress the violation in the exercise of its "inherent authority" presumably present questions of law for independent review. *See id.*

C. Analysis.

In the present case, for the reasons that follow, the State's violation of Wis. Stat. § 968.135 does not rise to the level of a "due process" violation for which suppression of evidence derived from Popenhagen's bank records would be a proper remedy.

First, the record does not reflect such a clear abuse of the subpoena process of § 968.135 to warrant suppression of evidence as a remedy. The police officer who obtained the bank records testified that he actually "filled out an affidavit in support of subpoena[s] [for] bank records" (27:5-6). Although the prosecutor conceded that his office used the wrong subpoena form and did not attach any affidavit, two different judges nevertheless issued the subpoenas to the three banks (17:21-23; 23:1, 3; 26:8). Popenhagen apparently never sought to elicit evidence as to how the error occurred or what became of the officer's alleged affidavit.

Because Popenhagen has neither a constitutional nor a statutory right to privacy in her bank records, the need for the State even to request a subpoena presumably stems from a recognition that due to a bank's own "privacy" policy, a bank may be unwilling to disclose customer records in the absence of "legal process."

Under more egregious circumstances than an improper subpoena, where federal agents broke into a third-party's briefcase to photograph the defendant's bank records, the Supreme Court concluded that "the supervisory power [of federal courts] does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court." *Payner*, 447 U.S. at 735.

Second, neither Popenhagen's banks nor the trial courts that issued the subpoenas asked for a showing of probable cause (26:20-21). Had either done so, the State's omission could readily have been rectified, because the

applicant police officer possessed probable cause before seeking the subpoenas (as discussed below). Fault does not lie with the officer or exclusively with the executive branch. The purpose of the exclusionary rule to deter police misconduct, not judicial error, *see Leon*, 468 U.S. at 918, is not advanced in this unusual situation.

"[I]n an ideal system[,] an unreasonable request for a warrant [or a § 968.135 subpoena for documents] would be harmless, because no judge would approve it." *Malley v. Briggs*, 475 U.S. 335, 345 (1986) (brackets added). But, "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment [or statutory] violations." *Leon*, 468 U.S. at 921.

In the present case, the subpoenas for documents were issued on August 18 and 31, 2004 (*see* 17:21-23). Probable cause for a subpoena for documents under Wis. Stat. § 968.135 is met "when the issuing judge is 'apprised of sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found'" in possession of the subpoenaed party. *Swift*, 173 Wis. 2d at 883 (citation omitted).

With respect to *pre-existing* probable cause to believe that Popenhagen's bank records may constitute evidence of the suspected crime of theft of money from her employer, a police report dated August 16, 2004, which is attached to the amended complaint, states in relevant part as follows:

- According to the owner of the Save More grocery store in Minocqua, Popenhagen worked there as "a book[]keeper" (3:7).

- According to the employer, in January 2004, the employer "caught Popenhagen in a lie" concerning "some checks Popenhagen had cashed at the store on a closed account" (3:7).

- According to the employer, in June 2004, the employer again caught Popenhagen in a lie concerning the acceptance of two checks at the store that had been written by Popenhagen's mother, but which were returned for insufficient funds (3:7). According to the employer, Popenhagen said the checks had been issued for change, while her mother said they had bought groceries (3:7). The employer said Popenhagen was then fired (3:7).

- The employer said a new accountant discovered that between October 2003 and June 2004, $28,480 had been "taken from the ATM account" at the store (3:8). The employer said Popenhagen was responsible for the ATM account (3:8). According to the employer, the daily accounting sheets showed the missing amounts (3:8).

At 3:00 p.m. on August 16, 2004, the officer then "faxed" to the district attorney's office requests for subpoenas for two of Popenhagen's banks (3:9). The foregoing information from the officer's report demonstrates probable cause to believe that Popenhagen's bank account statements and deposit slips may constitute evidence of the crime of theft by business employee.

In sum, in view of the unusual collection of events that led to the State obtaining Popenhagen's bank records through the wrong subpoena process, this court also should decline to find a due process violation warranting suppression of evidence derived from the bank records.

CONCLUSION

For the reasons set forth, the State respectfully asks this court to affirm the decision of the court of appeals, thereby permitting the State to use at a trial evidence derived from obtaining Popenhagen's bank records.

Dated at Madison, Wisconsin: June 7, 2007.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

James M. Freimuth

JAMES M. FREIMUTH
Assistant Attorney General
State Bar #1012732

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8904

BRIEF CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is 10,826 words.

James M. Freimuth

JAMES M. FREIMUTH
Assistant Attorney General

APPENDIX

STATE'S SUPPLEMENTAL APPENDIX INDEX

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with s. 809.19(2)(a) and that contains:

(1) a table of contents; and
(2) legislative history documents.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated June 7, 2007.

James M. Freimuth

JAMES M. FREIMUTH
Assistant Attorney General

AN ACT to amend 968.13 (2); and to create 968.13 (3) and 968.135 of the statutes, relating to search warrants.

The people of the state of Wisconsin, represented in Senate and Assembly, do enact as follows:

SECTION 1. 968.13 (2) of the statutes is amended to read:

968.13 (2) Anything which is the fruit of, or has been used in the commission of, ~~or which may constitute evidence of~~ any crime.

SECTION 2. 968.13 (3) of the statutes is created to read:

968.13 (3) Anything which may constitute evidence of any crime, if probable cause is shown that the evidence is under the control of a person who is reasonably suspected to be concerned in the commission of that crime under s. 939.05 (2).

SECTION 3. 968.135 of the statutes is created to read:

968.135 USE OF SUBPOENA. Upon the request of the attorney general or a district attorney and upon a showing of probable cause under s. 968.12 (1), a court shall issue a subpoena under s. 885.01 (1) requiring the production of books, papers, documents or tangible things which may constitute evidence of any crime. Any person who unlawfully refuses to produce evidence may be compelled to do so as provided in s. 885.12.

NOTE: In Zurcher v. Stanford Daily, 436 U.S. 547, 98 Supreme Court 1970 (1978), the United States Supreme Court basically held that the reasonableness requirement of the Fourth Amendment does not forbid states from issuing warrants to search for evidence simply because the owner or possessor of the place to be searched is not then suspected of criminal involvement. When there is sufficient probable cause to believe that incriminating evidence will be found in a particular place, a warrant authorizing search and seizure of this evidence may be issued without regard to whether the owner or occupant of the place to be searched is a suspect. The critical element in a reasonable search is not that the owner of the property is suspected of the crime, but that there is reasonable cause to believe that the specific things to be searched

for in a seizure are located on the property to which entry is sought.

According to Justice Stevens' dissent, the rules of the Zurcher case are an outgrowth of a previous Supreme Court decision which allows the subject of a search warrant to extend to mere evidentiary materials. [See Warden v. Hayden, 387 U.S. 294, 87 Sup. Ct. 1642 (1967).] The dangers of searching the property and place of a person not suspected of a crime, without a stringent definition of the term "probable cause," were cited by Justice Stevens: "Countless law abiding citizens - doctors, lawyers, merchants, customers, bystanders - may have documents in their possession that relate to an ongoing criminal investigation. The consequences of subjecting this large category of persons to unannounced police searches are extremely serious. The ex parte warrant procedure enables the prosecutor to obtain access to privileged documents that could not be examined if advance notice gave the custodian an opportunity to object. The search for the documents described in a warrant may involve the inspection of files containing other private matter. The dramatic character of a sudden search may cause an entirely unjustified injury to the reputation of the persons searched." [Zurcher, 98 Sup. Ct. at p. 1989, footnotes omitted.]

The bill draft in this document protects persons not suspected of a crime from expensive governmental intrusions while granting new authority to prosecutors to conduct investigations. SECTIONS 1 and 2 of the draft provide that anything which constitutes evidence of any crime, or mere evidence, may be the subject of a search warrant if probable cause is shown that the evidence is under the control of a person who is reasonably suspected to be concerned in the commission of a crime. Anyone who is a party to a crime under s. 939.05 (2), Wis. Stats., is considered to be concerned in the commission of a crime.

By limiting the use of a search warrant for the discovery of mere evidence to those persons reasonably suspected to be concerned in the commission of a crime, the bill draft protects innocent third-parties from governmental searches. However, SECTION 3 of this bill draft allows a prosecutor to continue his or her investigations. This SECTION creates a new power for a prosecutor by authorizing the attorney general or district attorney to request a court to issue a subpoena requiring the production of books, papers, documents or tangible things which may constitute

evidence of any crime. The subpoena may only be issued upon a showing of probable cause. In other words, a subpoena may not issue when there is no showing of probable cause that the person to whom it is directed has, under his or her control, articles which may constitute evidence of any crime. At a prosecutor's discretion, the subpoena may be directed to any person, whether or not that person is reasonably suspected to be concerned in the commission of a crime.

(End)

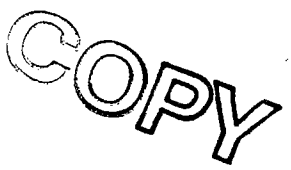
* This does not affect the statutory authority of district attorneys or attorney general to get search warrants for fruits, instrumentalities or contraband.

STATE OF WISCONSIN
SUPREME COURT

CASE NO. 06-AP1114-CR

STATE OF WISCONSIN,

Plaintiff-Appellant



vs.

MICHELLE R. POPENHAGEN,

Defendant-Respondent-Petitioner

ON REVIEW FROM A DECISION BY THE COURT OF
APPEALS REVERSING AN ORDER SUPPRESSING
EVIDENCE THAT WAS ENTERED IN THE
ONEIDA COUNTY CIRCUIT COURT,
THE HONORABLE MARK MANGERSON PRESIDING
ONEIDA COUNTY CASE #04-CF-192

REPLY BRIEF OF DEFENDANT-RESPONDENT-PETITIONER

James B. Connell
State Bar No. 1015474
CROOKS, LOW & CONNELL, S.C.
Attorneys for Defendant-
Respondent-Petitioner
531 Washington Street
P.O. Box 1184
Wausau, WI 54402-1184
(715) 842-2291

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other References:

I. THE PRIVACY OF BANK RECORDS IS A RIGHT GUARANTEED BY THE WISCONSIN CONSTITUTION.

The Wisconsin Constitution may provide greater protection to the people of this state than is required by the United States Constitution. State v. Knapp, 2005 WI 127, 285 Wis.2d 86, 700 N.W.2d 889. The exclusionary rule is an example. Forty years before the United States Supreme Court required state courts to employ the exclusionary rule in Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), the Wisconsin Supreme Court adopted the exclusionary rule as a necessary corollary of Article I, Section 11, of the Wisconsin Constitution which protects individuals from unreasonable searches and seizures. In Hoyer v. State, 180 Wis. 407, 193 N.W.2d 89 (1923), the Court held:

> "Sec. 11, art I, Wis. Const., supra, is a pledge of the faith of the state government that the people of the state, all alike (with no express or possible mental reservation that it is for the good and innocent only), shall be secure in their persons, houses, papers, and effects against unreasonable search ad seizure. This security has vanished and the pledge is violated by the state that guarantees it when officers of the state, acting under color of state-given authority, search and seize unlawfully. The pledge of this provision and that sec. 8 are each violated when use is made of such evidence in one of its own courts by other of its officers. 180 Wis. at 147 (emphasis in original).

Article I, Section 11 provides Michelle Popenhagen with a protectable privacy interest in her bank records. The State argues that the Wisconsin constitutional provision on search

and seizure must be interpreted in lockstep with federal interpretation of the Fourth Amendment of the United States Constitution. It cites the three factors set forth in Polk County v. State Public Defender, 188 Wis.2d 665, 524 N.W.2d 389 (1994), for interpreting provisions of the Wisconsin Constitution.

The first factor is the plain meaning of the words in the context used. Although the language used in the search and seizure provision of the Wisconsin and United States Constitutions are virtually identical, reasonable persons can differ on the meaning of the provisions. The United States Supreme Court, for instance, formerly interpreted the Fourth Amendment protection of "persons, houses, papers, and effects" narrowly. In Olmtead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), the Court held that the Fourth Amendment did not restrict government access to telephone conversations unless accompanied by trespass. In Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576, (1967), the Supreme Court reversed course and held that the Fourth Amendment prohibited warrantless electronic surveillance of telephone conversations taking place in a public telephone booth. The language of the constitutions is ambiguous and the plain meaning rule does not apply.

The second factor is a historical analysis of the

constitutional debates and of what practices were in existence in 1848. In support of its position, the State contends that the search and seizure provision was adopted without debate at the constitutional convention of 1848. Not pointed out is that no debate was offered on other provisions of the Wisconsin Constitution modeled on the New York Constitution of 1846 and the Michigan Constitution of 1835. These included the right to a trial by jury, the right to a speedy trial, the right of confrontation and the right to compulsory process to secure witnesses. Also adopted without debate, were prohibitions on compulsory self incrimination, excessive bail, double jeopardy, ex post facto laws and cruel and unusual punishment. Brown, The Making of the Wisconsin Constitution, 1952 Wis. L.Rev. 23.

The only conclusion that can be drawn from the absence of debate at the constitutional convention is that the delegates took it for granted that Wisconsin citizens would have the full panoply of civil liberties under the state constitution.

The State further contends that because regulation of the banking industry was one of the most contentious subjects of the constitutional convention that the delegates would not readily have embraced the prospect of privacy in bank records. Ms. Popenhagen contends to the contrary. The general distrust of the banking industry in the first half of the nineteenth

century would have made it more likely that a personal right of privacy would have been created in depositor's records in the hands of banks.

The third factor is the earliest interpretation of the provision by the legislature as manifested in the earliest law passed following the adoption of the constitution. The State cites no early interpretation of the provision of Article I, Section 11 by the legislature but contends that in the nearly 160 years since the adoption of the constitution, the Wisconsin Supreme Court has interpreted Article I, Section 11 differently than the United States Supreme Court's interpretation of the Fourth Amendment only once. The State provides a list of 26 cases to support its position. The earliest case cited is 1971.

In the first seventy years of Wisconsin's history, few cases involving Article I, Section 11 reached the Supreme Court. The passage of the federal prohibition law caused a change. In 1928, the Wisconsin Supreme Court commented that "(m)ore cases involving the validity of search warrants have come to this court in the last dozen years than during the entire history of the state." Glodowski v. State, 196 Wis. 265, 220 N.W. 227 (1928).

In Hoyer, Glodowksi and other prohibition era decisions, the Wisconsin Supreme Court affirmed the application of

Article I, Section 11, to protect the right of Wisconsin citizens to be free from unreasonable government intrusion.

The prohibition era decisions of the Wisconsin Supreme Court recognized the independent viability of Article I, Section 11.

The State next contends that most states have not found a state constitutional privacy interest in bank accounts and that United States v. Miller, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed. 71, is still the prevailing constitutional opinion on the issue of privacy in bank records. In support of its position, the State cites a recent, comprehensive survey on the subject of constitutional protection of third party information from unreasonable search. Henderson, Learning from all Fifty States: How to apply the Fourth Amendment and Its State Analogy to Protect Third Party Information From Unreasonable Search, 55 Cath. U.L. Rev. 373 (2006).

In the survey, Professor Henderson points out "while the 'new federalism' in state constitutionalism is no longer so 'new', many states have only recently expressed a willingness to diverge from Federal Fourth Amendment analysis". The author found:

> "This study reveals that eleven states reject the federal third-party doctrine and ten others have given some reason to believe they might reject it. When combined with the eleven states that have diverged from the Fourth Amendment on some

substantive issue, this is an impressive tally." 55 Cath. U.L. Rev. at 376.

The trend of state constitutional jurisprudence is to provide constitutional protection for bank records and other third party information.

The State contends that sound policy reasons exist why there should be no constitutionally protected privacy interest in bank records.

First, the State contends that notices given by banks to customers forewarn them of the limited expectation of privacy in bank records. On the contrary, the privacy notices reinforce, not diminish, the individual's reasonable expectation of privacy in bank records.

The State contends that non-constitutional process provides sufficient judicial oversight for obtaining bank records. This case, however, exemplifies why non-constitutional process is insufficient. Although Wisconsin has a statute which permits the issuance of a subpoena but only upon a judicial determination of probable cause, the police and prosecutors bypassed this statutory procedure and obtained records which all agree should not have been obtained. Non-constitutional process has been shown by what happened in this case to be insufficient to protect the privacy interests of individuals in their own bank records in this state.

The State contends that because Wisconsin has not enacted

a state law equivalent to the Federal Right to Privacy Act public opinion in this State must be lukewarm about the protection of privacy and particularly of the privacy of bank customer records.

The people of Wisconsin are not lukewarm about matters of privacy. The legislature has passed the law which requires the establishment of probable cause for the issuance of a subpoena for documents. Although Wisconsin has no comprehensive bank privacy law equivalent to the Federal Right to Financial Privacy Act, Wisconsin has adopted a general right to privacy law in §995.50, Wis. Stats. In addition, Wisconsin statutes do limit access and provide confidentiality in bank and finance records. Sec. 214.37, Wis. Stats., 215.26, Wis. Stats.

The public policy of this State is protect the right of individuals in records they may keep of their daily activities, their financial transactions, or their net worth. Such records should be held beyond government reach unless the State has established probable cause.

II. UNITED STATES V. MILLER IS NO LONGER CONTROLLING PRECEDENT REGARDING THE REASONABLE EXPECTATION OF PRIVACY IN BANK RECORDS.

In 1976, the United States Supreme Court, in a surprising decision, held that bank customers had no reasonable expectation of privacy in their bank records. Miller, supra.

The decision was surprising because, in 1967, the Supreme Court had struck down the use of complex property rules in Fourth Amendment law and declared that "the Fourth Amendment protects people, not places". United States v. Katz, supra. The Katz decision held that court issued warrants are required where there is an infringement on a person's "reasonable expectation of privacy". 389 U.S. at 351.

In reaction to the Miller decision, the United States Congress passed the Right to Financial Privacy Act (RFPA) in 1978. 12 USC 340. The RFPA recognized that bank customers have a protected privacy interest in bank records which is directly contrary to the Miller holding.

The RFPA established procedures by which banks may release records in response to law enforcement demands and placed affirmative duties on law enforcement agencies seeking information and records of bank customers. The RFPA requires law enforcement agencies to serve a copy of the legal process on the bank and on the customer before the return date of the process served on the bank. The customer must be advised of the right to object to the law enforcement demand and is given an opportunity, in most circumstances, to object. Finally, the law enforcement agency must certify to the bank in writing that it has complied with all of the Act's requirements before the bank can respond to process. 12 USC 3403(b).

In 1999, Congress passed another act, the purpose of which was to strengthen the customer's right to privacy in nonpublic information maintained by financial institutions. 15 USC 6801-6809. The Gramm-Leach-Bliley Act permits the release of financial records only in a response to ". . .a properly authorized civil, criminal, or regulatory investigation or subpoenas or summons by Federal, State or local authorities." 15 USC 6802(3)(8).

Developments in the law and developments in technology have rendered the reasoning in Miller obsolete. It should no longer be considered controlling precedent.

III. A BANK CUSTOMER HAS STANDING TO CHALLENGE A SUBPOENA ISSUED UNDER §968.135 AND SUPPRESSION IS THE PROPER REMEDY.

The State contends that §968.135, Wis. Stats., does not provide standing to a bank customer to challenge the issuance of a subpoena to his or her bank. The State contends the legislative history of §968.135, Wis. Stats., reflects an intent to expand the investigative authority of prosecutors to obtain information from third parties. In effect, the State argues that the subpoena is a tool that prosecutors can use to seize the records of an individual without being required either to give him an opportunity to dispute the action before his privacy is invaded or to challenge the presence of probable cause or a reasonable basis for the seizure after the fact. In this scenario, virtually no record in the control of

a third party record keeper would be immune from process and the individual would be without standing to protect a record about herself even if it is a bank, credit, employment, insurance or medical record. Since no notice to the individual is required, the individual may never know the extent to which prosecutors have obtained such personal information.

This is not what the legislature intended and it is not how the statute has been interpreted by the courts. The State misreads the legislative history. The requirements for a search warrant under §968.12, Wis. Stats., and for a subpoena under §968.135,Wis.Stats., were designed to protect the rights of an individual by requiring a showing of probable cause.

The reference in §968.135 to probable cause under §968.12, Wis. Stats., is undoubtedly the reason the Court of Appeals in State v. Swift, 173 Wis.2d 870, 496 N.W.2d 713 (1993), conducted an analysis of the affidavit submitted by the prosecution to the trial court to obtain bank records. The court concluded that the affidavit provides ample detailed facts to support a finding of probable cause.

By its terms, §968.135 permits "(m)otions to the court, including, but not limited to, motions to quash or limit the subpoena...". By its language, the legislature implicitly recognizes that a motion to suppress is available under §968.135, Wis. Stats.

IV. THE FLAGRANT MISUSE OF PROCESS IN THIS CASE REQUIRES SUPPRESSION AS A REMEDY.

The State contends that an unusual collection of events led to the prosecutor obtaining Ms. Popenhagen's records through the wrong subpoena process and that this is not such a clear abuse of process as to warrant suppression.

Judge Cane was correct when he observed in his dissenting opinion:

> "...this case involves the flagrant violation of Wis. Stat. §968.135. No attempt was made to comply with the statute nor has any explanation been offered for the abuse of this process...the only appropriate remedy in this criminal proceeding is the exclusion of the records and tainted evidence, as the trial court correctly concluded." 2007 WI App. 38.

The record in this case was developed in the context of a motion to suppress evidence. The burden of proof in such a proceeding is on the prosecution. During two days of hearings, no explanation was offered either by the District Attorney of Oneida County or by the Minocqua Police Department for the blatant disregard of proper legal process. No explanation was given for the issuance of a subpoena of the type issued by attorneys in civil cases after the commencement of legal action. No reason was offered as to why the procedure set forth in §968.135, Wis. Stats., for the subpoena for documents in criminal proceedings was ignored.

The State would characterize the matter as an issue

police were actually engaged in a fishing expedition and that, if presented to a magistrate, a subpoena under §968.135, Wis. Stats., or a search warrant under §968.12, Wis. Stats., would not have issued because either would have been based on sheer speculation.

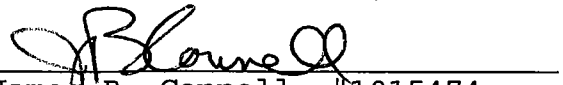
The court should, however, reject the State's attempt to establish retroactive probable cause. In State v. Tye, 2001 WI 124, 248 Wis.2d 530, 636 N.W.2d 473, the court refused to consider an investigator's sworn statement made after the warrant was issued upon an unsigned and unsworn affidavit and executed. This case, like State v. Tye, represents a "wholesale failure" of the required process. In Tye, the failure involved the process for obtaining search warrants. In this case, the process for subpoena of documents was violated. The remedies should be the same.

CONCLUSION

For the reasons set forth above, Michelle Popenhagen requests the decision of the Court of Appeals be reversed and the order suppressing evidence entered by Judge Mangerson be affirmed.

Respectfully submitted,

CROOKS LOW & CONNELL, S.C.

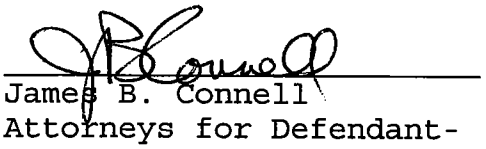


James B. Connell, #1015474
Attorneys for Defendant-
Respondent-Petitioner

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 13 pages.

CROOKS, LOW & CONNELL, S.C.



James B. Connell
Attorneys for Defendant-
Respondent-Appellant