
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0643

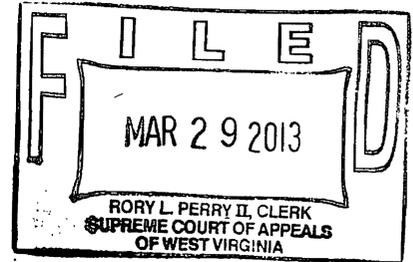
STATE OF WEST VIRGINIA,

Respondent,

v.

JOSHAWA CLARK,

Petitioner.



SUPPLEMENTAL BRIEF OF RESPONDENT

**PATRICK MORRISEY
ATTORNEY GENERAL**

**ROBERT D. GOLDBERG
ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, West Virginia 25301
Telephone: (304) 558-5830
State Bar No. 6335
E-mail: rdg@wvago.gov**

Counsel for Respondent

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii - iii
I. STATEMENT OF THE CASE	1
II. SUMMARY OF ARGUMENT	2
III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION	3
IV. STATEMENT OF FACTS	3
V. ARGUMENT	9
A. The facts adduced at the suppression hearing prove that special DEA agent Bevins properly issued the administrative subpoena to Petitioner's phone carrier	9
B. Even if this Court were to find that the subpoena was not properly issued, the Petitioner has failed to state why the exclusionary rule applies	13
VI. CONCLUSION	14

TABLE OF AUTHORITIES

CASES	PAGE
<i>Administrative Subpoena Walgreen Co. v. U.S. Drug Enforcement Admin.</i> , No. 2:12-mc-43, 2012 WL 6697080 (E.D. Va. 2012)	11
<i>Securities and Exchange Commission v. ESM Government Securities, Inc.</i> , 645 F.2d 310 (5th Cir. 1981)	13
<i>State v. Lacy</i> , 196 W.Va. 104, 468 S.E.2d 719 (1996)	2
<i>Smith v. Maryland</i> , 442 U.S. 735 (1979)	12, 14
<i>State v. McGill</i> , No. 11-1386, 2013 WL 1113493 (W. Va. 2013)	5
<i>Tafflin v. Levitt</i> , 493 U.S. 455 (1990)	11
<i>United States v. Ceccolini</i> , 435 U.S. 268 (1978)	5
<i>United States v. Golden Valley Electric Association</i> , 689 F.3d 1108 (9th Cir. 2012)	10
<i>United States v. Hossbach</i> , 518 F.Supp. 759 (D.C. Pa. 1980)	4
<i>United States v. Leon</i> , 468 U.S. 897 (1984)	13
<i>United States v. Medic House, Inc.</i> , 736 F.Supp. 1531 (W.D. Mo. 1989)	13
<i>United States v. Mountain States Telegraph and Telegraph Co., Inc.</i> , 516 F.Supp. 225 (D.C. Wyo. 1981)	10
<i>United States v. Bank of Moulton</i> , 614 F.2d 1063 (5th Cir. 1980)	14
<i>United States v. Powell</i> , 379 U.S. 48 (1964)	3, 12
<i>United States v. Ventresca</i> , 380 U.S. 102 (1965)	14
STATUTES	
18 U.S.C. §§ 1961-1968	11
21 U.S.C. §§ 841, 876(a)	2

21 U.S.C. § 873 13

21 U.S.C. § 876 4, 9, 11

21 U.S.C. § 878(a)(2) 2, 10

Pub. L. N. 91-513, 84 Stat. 1236 (1970) 2, 4

W. Va. Code § 57-5-4 4, 5

OTHER

28 C.F.R. § 0.103(a)(2) 13

W. Va. Const. art. III, § 6 1

W. Va. R. Crim. P. 17 4

28 C.F.R. Part 0.100(b), Subpart R § 4 2, 10

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0643

STATE OF WEST VIRGINIA,

Respondent,

v.

JOSHAWA CLARK,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

I.

STATEMENT OF THE CASE

The Respondent incorporates by reference the Statement of the Case from its November 17, 2011, brief to this Court. This case was argued and submitted under Rule 20 of Rev. R.A.P. on October 16, 2012. On November 16, 2012, this Court issued a Memorandum Order remanding it to the Cabell County Circuit Court and holding the Petitioner's appeal in abeyance until February 14, 2013.

Pursuant to this Court's Memorandum Opinion the issues on appeal are whether seizing Petitioner's phone records: (1) violated his reasonable expectation of privacy under W. Va. Const. art. III, § 6 as "judicial officers should have to seek a judicial showing of probable cause before a person's phone records can be seized"; (2) whether the Petitioner has standing to challenge an administrative subpoena for records generated and held by a third party; and, (3) whether the DEA lawfully issued the administrative subpoena.

This Court remanded this matter to the trial court to flesh out the factual record regarding issue three: whether the federal Drug Enforcement Agency (“DEA”) properly issued an administrative subpoena for phone records owned by the Petitioner’s phone-service carrier.

II.

SUMMARY OF ARGUMENT

The United States Attorney General has the statutory authority to subpoena, *inter alia*, any papers, documents, or other tangible things which constitute evidence in any investigation relating to its functions under the Comprehensive Drug Abuse Prevention and Control Act. (Pub. L. N. 91-513, 84 Stat. 1236 (1970). *See also* 21 U.S.C. §§ 841, 876(a). Title 21 U.S.C. § 878(a)(2) authorized the Attorney General to delegate this statutory subpoena power to other enforcement personnel within the Justice Department such as DEA Special Agents-in-Charge. *See* 28 C.F.R. Part 0.100(b), Subpart R § 4. This authority encompasses all investigations conducted under the Act: both regulatory and criminal.

The evidence adduced at the second suppression hearing proves that the investigating officers were seeking information about Petitioner’s distribution of controlled substances when they issued the administrative subpoena. Therefore, Special Agent Bevins was properly using his administrative subpoena power. The trial had the opportunity to observe each witness testify, and made its credibility determinations. There is no evidence that these determinations were clearly erroneous. *See* Syl. pt. 1, in part, *State v. Lacy*, 196 W. Va. 104, 107, 468 S.E.2d 719, 722 (1996) (as trial court had opportunity to observe witnesses this Court will only overturn its factual findings for clear error). The evidence demonstrates that the DEA subpoena was properly issued.

Nor has the Petitioner ever offered this Court any reason to apply the exclusionary rule if its finds the subpoena to be improper. Counsel just assumes this to be the appropriate remedy. The exclusionary rule was designed to protect a citizen's Fourth Amendment rights, and to deter police misconduct. Administrative subpoenas are not issued pursuant to the warrant clause of the Fourth Amendment; Congress passed legislation which grants federal agencies the authority to issue these subpoenas. Because these subpoenas are not self-executing, the State is not required to demonstrate probable cause. *United States v. Powell*, 379 U.S. 48 (1964).

Suppressing this evidence will not curb police misconduct; the testimony adduced at the suppression hearing reveals that all of these officers acted in good faith. Punishing them, and the citizens of this state by releasing a dangerous felon, by suppressing this evidence, will not curb police misconduct. Furthermore, the phone records were relevant to the investigation, the Petitioner had no reasonable expectation of privacy in these numbers¹, and Agent Bevins narrowly tailored the subpoena to minimize any burden to the phone service carrier.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Court has already resolved this issue. The Respondent's Motion to Continue Oral Argument is still pending.

IV.

STATEMENT OF FACTS

Counsel for the Respondent incorporates by reference the facts set forth in his initial brief to this Court.

¹The Petitioner was at work, not inside his home, when he dialed these numbers.

During the first suppression hearing, defense counsel argued that the DEA abused its subpoena power by requesting information which was not relevant to any investigation arising under the Comprehensive Drug Abuse Prevention and Control Act. (Pub. L. N. 91-513, 84 Stat. 1236 (1970). (Supp. Hr'g. 3.) In fact, counsel argued, when State law enforcement asked DEA Agent Bevins for the subpoena, they intended to use the records to prosecute the Petitioner in State court for the robbery. Therefore, the DEA lacked the statutory authority to issue the subpoena, and its fruits were inadmissible.

Counsel also argued that the State provided the trial court with inconsistent reasons for obtaining these records. (Supp. Hr'g. at 4.) Counsel then cited to *United States v. Hossbach*, 518 F. Supp. 759 (D.C. Pa. 1980). In *Hossbach*, DEA agents conducting an investigation under the Comprehensive Drug Abuse Prevention and Control Act obtained phone records from a third party provider by administrative subpoena. *Hossbach*, 518 F. Supp. at 764. Hossbach's counsel argued that the DEA had overstepped their authority by using their statutory subpoena power in a criminal case. *Hossbach*, 518 F. Supp. at 766. The Court ruled that the DEA's subpoena power under 21 U.S.C. § 876(a), "encompassed all investigations conducted under the Comprehensive Drug Abuse Control and Prevention Act of 1970." *Hossbach*, 518 F. Supp. at 767. Thus, the statute authorized the DEA to use administrative subpoenas in criminal investigations.

Petitioner's counsel then argued that the State could have subpoenaed the phone records under State law. *See* W. Va. R. Crim. P. 17; W. Va. Code § 57-5-4. Counsel then argued that these

subpoenas couldn't be used for a "fishing expedition."² See *State v. McGill*, No. 11-1386, 2013 WL 1113493 (W. Va. 2013) (West Virginia guards the power of subpoena jealously) (citation omitted). Counsel's argument compared apples and oranges. A federal administrative subpoena is not the same thing as a subpoena issued under W. Va. R. Crim. P. 17 or W. Va. Code § 57-5-4. It is not subject to the same statutory limitations. It is not authorized under state law; it is authorized by federal statute.

The trial court deferred ruling on the Petitioner's motion until it had a chance to review it. Although the State did introduce the phone records at Petitioner's trial, Petitioner's co-defendant also testified against him as part of his plea agreement. See *United States v. Ceccolini*, 435 U.S. 268, 276-277 (1978) (when testimony of live witness is at issue test is on effect of witnesses' willingness to testify and less on whether illegal conduct led to discovery of witnesses' identity). One way or another, evidence of the Petitioner's participation in the robberies was coming in.

Pursuant to this Court's Memorandum Opinion, the trial court convened another suppression hearing on February 5, 2013. The State's first witness was retired Huntington police officer J.T.

²To call this administrative subpoena a "fishing expedition" is not consistent with the record. The investigating officers narrowly tailored the subpoena to a list of phone numbers called by the Petitioner over a two-day period. The subpoena was prepared by Agent Bevins in good faith, and was limited in scope. The Petition to obtain records of the co-defendant's phone calls was extended to two days before the July robbery and two days after. This was consistent with a drug investigation. Neither subpoena was overly broad "fishing expedition." Agent Bevins testified that he limited the scope of his administrative subpoenas, because he would receive too much irrelevant information if he didn't. (Supp. 42).

Combs.³ (Supp. 4.) Before retiring, Officer Combs worked twenty-four years for the Huntington Police Department. From 2008 to 2012 he was part of a joint federal-state task force with the Bureau of Alcohol, Tobacco and Firearms (“BATF”) operating as an undercover narcotics officer. (Supp. 5-6.) He also moonlighted at the Pullman Square Marquee Cinema as a part-time security guard. The theater was robbed three times; once in November 2008⁴; July of 2009; and October of 2009.

After the July robbery, Officer Combs noticed that the Petitioner began wearing an expensive leather jacket and a motorcycle helmet.⁵ After work, Officer Combs followed the Petitioner to the parking lot and saw him get on a motorcycle and drive away. (Supp. 10.) Because of what he had seen, Officer Combs talked to the theater manager. He wanted to know how a part-time employee who lived in Marcum Terrace, a government-subsidized housing complex, had the money to buy a new leather jacket, helmet and motorcycle.⁶ (Supp. 9.) The manager told him that the Petitioner had received a bonus when he volunteered to serve in the army. Investigating officer, Huntington Police Detective Cass McMillian, later discovered this wasn’t true. (Supp. 19.) The theater’s assistant manager told Officer Combs that the Petitioner was making money selling marijuana.⁷

³Officer Combs’ testimony evinces some confusion about the date of the three robberies. According to this Court’s Memorandum Opinion the first robbery occurred in November 2008, the second on July 13, 2009, and the third on October 19, 2009. The Huntington Police were not able to connect the Petitioner to the November 2008 robbery.

⁴That matter remains unsolved.

⁵Officer Combs shared this information Investigating Officer McMillian. (Supp. 73.)

⁶There is a high degree of drug activity at Marcum Terrace. (Supp. 26.)

⁷On cross-examination, Officer Combs stated that an employee had told him. He was never asked the employee’s name. Although the information was hearsay, Officer Combs followed up on it.

Officer Combs shared office space with DEA Special Agent Tom Bevins. He told Agent Bevins that he believed the Petitioner was involved in the theater robberies and was using the money to finance his drug distribution operation.⁸ (Supp. 10.) He also told Agent Bevins about the the Petitioner's new clothing, the fact he lived in subsidized housing⁹, that he only worked part-time, that the Petitioner was working both nights the theater was robbed, and the assistant manager's statement that the Petitioner was involved in selling marijuana. The Petitioner also lied about joining the army, but it is not clear whether Officer Combs knew this when he spoke with Agent Bevins. (Supp. 10-11.) Because of his experience as a narcotics officer, Officer Combs suspected there was a link between the robberies and Petitioner's involvement with controlled substances.

He asked Special Agent Bevins to issue an administrative subpoena to Petitioner's phone service carrier for Petitioner's phone records from July 12, 1999, to July 13, 1999.¹⁰ (Supp. 11-12.) This request was not authorized by Detective McMillian. (Supp. 16.) Upon their receipt, Agent Bevins sent the records directly to Detective McMillian. (Supp. 17, 22). After the robberies, Officer Combs continued to monitor the Petitioner for evidence of drug distribution activity. (Supp. 27.)

The State's next witness was DEA Special Agent Tom Bevins. Mr. Bevins testified that he worked both state and federal cases, and was also a member of Officer Combs' BAFTA task force. (Supp. 32.) The task force was created to investigate, and arrest, violent drug offenders in Huntington. It was designed to foster federal-state cooperation and to pool their resources. (Supp. 35.) The task force regularly used administrative subpoenas as an investigative tool if the Special Agent uncovered evidence that there was a potential drug nexus. (Supp. 33.)

⁸The BATF joint task force and the DEA shared office space. (Supp. 10.)

⁹Marcum Terrace is known to Huntington law enforcement as a high crime area. (Supp. 26.)

¹⁰The records did not belong to the Petitioner; they belonged to his phone service carrier.

Agent Bevins issued the administrative subpoena on July 21, 2009. (Supp. 41.) Sprint responded on the 23rd or 24th. After reviewing them, Agent Bevins turned the records over to Officer Combs.¹¹ (Supp. 41.) Bevins noticed that the Petitioner repeatedly called one number both before and after the robbery. A second administrative subpoena revealed that he was calling Dustin Shaver, Jr., his co-defendant.

When Agent Bevins retrieved the a copy of the subpoena for discovery, he accidentally typed the wrong date. When he pulled up the subpoena, he entered the date he pulled it up, June 2008, as opposed to the date he drafted it. (Supp. 46-48.) Clearly, this was a misprint. The subpoena requests phone records from July 12, 2009, to July 13, 2009. The compliance deadline was August 5, 2009.

Agent Bevins further testified that he intended any drug-related investigation to start in State court. If anything important was revealed during that investigation, the United States Attorney would open a new case in federal court. Agent Bevins also believed that Detective McMillian would handle the investigation of the movie theater robberies. (Supp. 58.) Although the subpoena requested records from the date of the robbery, the subpoena for the records documenting the co-defendant's use of his phone started two days before the robbery and ended two days after. Agent Bevins testified that these extra days indicated an intent to engage in a drug investigation in addition to the robbery investigation. (Supp. 64.) Special Agent Bevins was the State's last witness.

¹¹Agent Bevins believed that there were two investigations; one regarding the robberies which was handled by Detective McMillan, and one involving the potential drug distribution, handled by Officer Combs. (Supp. 57). Both investigations remained open after Agent Bevins got the phone records. (*Id.*)

The Petitioner's only witness was Huntington Police Detective Cass McMillian. (Supp. 65.) Detective McMillian had presented the Petitioner's robbery case to the Cabell County Grand Jury. He could not recall presenting any evidence regarding the distribution of marijuana. (Supp. 67.) Detective McMillian conceded that he had testified at Petitioner's preliminary hearing that the Petitioner first became a suspect in both robberies was because he was the "common connector." Detective McMillian also testified that the robbery investigation was a joint effort involving the Persons Crimes Unit and the Department's SEU-SEI Unit.

Although he could not specifically recall, Detective McMillian assumed he was present when the decision to request the records from Petitioner's phone carrier was made. He could not recall when he first saw these records.

Detective McMillian saw the investigation as split into two parts, Officer Combs and Special Agent Bevins were investigating Petitioner's alleged drug activity. Detective McMillian testified that he had no idea how they were running their investigation. He didn't know what information Officer Combs gave to Agent Bevins before Bevins issued the subpoena. (Supp. 73.)

V.

ARGUMENT

A. THE FACTS ADDUCED AT THE SUPPRESSION HEARING PROVE THAT SPECIAL DEA AGENT BEVINS PROPERLY ISSUED THE ADMINISTRATIVE SUBPOENA TO PETITIONER'S PHONE CARRIER.

Pursuant to 21 U.S.C. § 876(a) the Attorney General has the authority to issue administrative subpoenas in furtherance of any investigation conducted pursuant to the Comprehensive Drug Abuse Prevention and Control Act (1970):

(a) Authorization of use by the Attorney General.

In any investigation relating to his functions under this subchapter with respect to controlled substances, listed chemicals, tableting machines, or encapsulating machines, the Attorney General may subpoena witness, compel the attendance and testimony of witness, and require the production of any records (including books, papers, documents, and other tangible things which constitute or contain evidence) which the Attorney General finds relevant or material to the investigation. The attendance of witnesses and the production of records may be required from any place in the State or in any territory or other place subject to the jurisdiction of the United States at any designated place of hearing; except that a witness shall not be required to appear at any hearing more than 500 miles distant from the place where he was served with a subpoena. Witnesses summoned under this section shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

The plain language of this statute reveals its intent. Congress chose to afford the Attorney General broad subpoena power. *See U.S. v. Mountain States Tel. and Tel. Co., Inc.*, 516 F. Supp. 225, 228-229 (D.C. Wyo. 1981) (broad interpretation of the term “in any investigation” as used in § 876(a) is consistent with Congresses recognition that restricting illegal drug trafficking is a compelling interest); *United States v. Golden Valley Electric Association*, 689 F.3d 1108 (9th Cir. 2012) (“Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970, *inter alia*, to ‘strengthen law enforcement tools against the traffic of illicit drugs.’”) quoting *Gonzales v. Raich*, 545 U.S. 1, 10 (2005).

The Attorney General delegated his administrative subpoena power to the D.E.A. *See* 21 U.S.C. § 878(a)(2); 28 C.F.R. Part 0.100(b), Subpart R § 4. But Congress never granted the Attorney General, nor the D.E.A. independent authority to enforce these subpoenas. Neither agency can compel a subpoenaed party to comply. To enforce compliance, it is necessary for the United States Attorney to bring an enforcement action in federal district court:

In the case of contumacy by or refusal to obey a subp[er]ona issued to any person, the Attorney General may invoke the aid of any court of the United States

within the jurisdiction of which the investigation is carried on or of which the subp[o]enaed person is an inhabitant, or in which he carries on business or may be found, to compel compliance with the subp[o]ena. The court may issue an order requiring the subp[o]enaed person to appear before the Attorney General to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey the order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in any judicial district in which such person may be found.

21 U.S.C. § 876(c).¹²

The testimony from the February 5th hearing unequivocally proves that Officer Combs and Agent Bevins were working on what they believed to be a drug related crime. Given the court's

¹²In his Reply Brief to this Court, the Petitioner includes a misleading footnote in which he claims this Court has the jurisdiction to enforce a federal administrative subpoena. To support this dubious claim he cites *Tafflin v. Levitt*, 493 U.S. 455 (1990). This case is obviously not dispositive.

Tafflin did not involve an administrative agency, it was a RICO case. The issue was whether state courts had concurrent jurisdiction over civil RICO cases pursuant to 18 U.S.C. §§ 1961-1968. The Court did hold that, "States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are presumptively competent, to adjudicate claims arising under the laws of the United States. "

Thus, any analysis starts with the presumption that there is concurrent jurisdiction. But the Court went on to hold, "This deeply rooted presumption in favor of concurrent state court jurisdiction is, of course, rebutted if Congress affirmatively ousts the state courts of jurisdiction over a particular claim." *Tafflin*, 493 U.S. at 459.

Under 876(c) an administrative agency has the power to file an enforcement action in, "any court of the United States." (emphasis added). The language should be read as it is written. The plain meaning of the statute limits jurisdiction over enforcement actions to federal courts. A state court, including this Court, may not quash a federal administrative subpoena under some unarticulated inherent power. See *Administrative Subpoena Walgreen Co. v. U.S. Drug Enforcement Admin.*, No. 2:12-mc-43, 2012 WL 6697080 * 6 (E.D. Va. 2012) ("From the text of [§ 876(c)], it is clear that it provides the Attorney General with the right to invoke *federal district court jurisdiction* to enforce an administrative subpoena.") (emphasis added).

broad interpretation of the phrase “any investigation,” and Officer Bevin’s testimony, the subpoena was properly issued.

Around the time of the theater robbery Officer Combs observed the Petitioner wearing new clothing and riding a newly purchased motorcycle. He did not understand how a part-time theater employee living in Marcum Terrace could afford this new gear. A co-worker told the officer that the Petitioner got his money from selling marijuana. This co-worker was not an anonymous stranger: he knew both Officer Combs and the Petitioner. Officer Combs tried to corroborate this tip, when he couldn’t, he asked Special Agent Bevins for help. He told Bevins that the Petitioner was selling marijuana, and was robbing the movie theater with his co-defendant to finance his operation.

Agent Bevins reasonably relied upon his fellow police officer’s representations. Since he was issuing an administrative subpoena it did not need to be supported by probable cause. *See United States v. Powell*, 379 U.S. 48 (1964). Neither Officer Combs nor Agent Bevins were trying to circumvent the Fourth Amendment; they didn’t have to. The Supreme Court has already held that a suspect has no reasonable expectation of privacy in the numbers he dials from his phone. *Smith v. Maryland*, 442 U.S. 735, 745-46 (1979).

Detective McMillian’s testimony proved that his contact with Officer Combs and Agent Bevins was minimal. There was no direct evidence that Officer Combs spoke with Detective McMillian before he asked Agent Bevins to subpoena the phone records. This would explain the inconsistencies. As stated before, this is an example of the left hand not knowing what the right hand was doing.

As for the alleged improper sharing of evidence, at that time, Officer Combs was a deputized federal agent working as a narcotics agent for a joint federal-state task force. This task force was set up, in part, to merge the resources of state and federal law enforcement. The DEA Administrator is authorized under 28 C.F.R. § 0.103(a)(2) to release information obtained by the DEA and DEA investigative reports to federal, state, and local prosecutors and to state licensing boards engaged in the institution and prosecution of cases before courts and licensing boards related to any controlled substances. *See also* 21 U.S.C. § 873(a) (“The Attorney General *shall* cooperate with local, State, tribal, and Federal Agencies concerning traffic in controlled substances and in suppressing the abuse of controlled substances.”); 21 U.S.C. § 873(a)(1) (Attorney General shall arrange for exchange of information between government officials concerning use and abuse of controlled substances).

B. EVEN IF THIS COURT WERE TO FIND THAT THE SUBPOENA WAS NOT PROPERLY ISSUED, THE PETITIONER HAS FAILED TO STATE WHY THE EXCLUSIONARY RULE APPLIES.

The DEA’s subpoena power is not derived from the warrant clause of the Fourth Amendment. Congress has passed legislation granting the Attorney General the power to issue these subpoenas.¹³ The exclusionary rule is a judicially created doctrine which was designed to deter police misconduct, and to protect citizen’s privacy rights under the Fourth Amendment. *United States v. Leon*, 468 U.S. 897, 916 (1984). Several courts have refused to apply it to the fruits of improper administrative subpoenas. *Securities and Exchange Commission v. ESM Government Securities, Inc.*, 645 F.2d 310 (5th Cir. 1981); *U.S. v. Medic House, Inc.*, 736 F. Supp. 1531 (W.D. Mo. 1989) (enforcement of administrative subpoenas is a matter for district courts under their

¹³Of course this legislation must be within the parameters of the Fourth Amendment. No one has argued that it isn’t.

supervisory power, rather than the exclusionary rule); *United States v. Bank of Moulton*, 614 F.2d 1063, 1065 (5th Cir. 1980) (the correct way to enforce a summons is to balance the seriousness of the violation against the degree of harm imposed).

In this case, there was no violation, serious or not. The trial court ruled that Officer Combs and Special Agent Bevins were investigating Petitioner's potential involvement in the distribution of marijuana. Both Officer Combs and Agent Bevins testified that they had a good faith belief that the evidence subpoenaed was relevant to this investigation. Agent Bevins' decision to issue the subpoena was not based on some anonymous tip, or a confidential informant; he was relying on the word of a deputized federal agent who worked as a narcotics officer for a federal-state task force. *See United States v. Ventresca*, 380 U.S. 102, 111 (1965) ("Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number.")

Nor was the Petitioner prejudiced. He had no reasonable expectation of privacy in the phone records held by a third-party. *See Smith v. Maryland*, 442 U.S. 735, 745-746 (1979) (defendant has no reasonable expectation of privacy in numbers dialed from his phone). Indeed, if Sprint had simply turned over the records it would have been acting in conformity with the Fourth Amendment.

VI.

CONCLUSION

Therefore, counsel for the Respondent once again requests that this Court affirm the judgment of the Cabell County Circuit Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read "R. D. Goldberg", written over a horizontal line.

ROBERT D. GOLDBERG, Bar No. 7370

ASSISTANT ATTORNEY GENERAL

Attorney for Respondent

Office of the Attorney General

812 Quarrier Street, 6th Floor

Charleston, West Virginia 25301

Telephone: (304) 558-5830

Fax: (304) 558-5833

E-mail: robert.goldberg@wvago.gov

CERTIFICATE OF SERVICE

I, ROBERT D. GOLDBERG, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *Supplemental Brief of Respondent* upon the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 29th day of March, 2013, addressed as follows:

Jason D. Parmer
Office of the Public Defender
Post Office Box 2827
Charleston, West Virginia 25330



ROBERT D. GOLDBERG