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# Brief for the Petitioner Third Annual Benton National Moot Court Competition Briefs, 18 J. Marshall L. Rev. 1033 (1985)

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NO. 1984

IN THE SUPREME COURT
OF THE STATE OF MARSHALL

ROGER CARTER,
Petitioner,
- vs. -
PEOPLE OF THE STATE OF MARSHALL,
Respondents.

On Leave To Appeal
From The Appellate Court Of The
State Of Marshall

BRIEF FOR THE PETITIONER

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## QUESTIONS PRESENTED FOR REVIEW

I. Whether a student has a legitimate expectation of privacy in his education records in view of the Family Educational Rights and Privacy Act of 1974, the Marshall Constitution, and the United States Constitution and if so, whether the unauthorized disclosure of those records constitutes a violation of his state and federal constitutional right to privacy?

II. Whether the user of a cordless telphone which is located in his residence has a legitimate expectation of privacy in his communications under the Marshall Constitution, the United States Constitution and Title III of the Omnibus Crime Control and Safe Streets Act of 1968?

III. Whether a finding of probable cause is constitutionally permissible under the Marshall Constitution or the United States Constitution if made solely on the basis of an anonymous letter, an unrelated anonymous telephone call, and the intercepted portion of a telephone conversation?

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BRIEF FOR PETITIONER

## OPINIONS BELOW

The opinions of the Appellate Court of the State of Marshall (R. 4-10) and the Circuit Court of Lincoln County, State of Marshall (R. 1) are unreported decisions.

## CONSTITUTIONAL STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves U.S. Const. amend. I; U.S. Const. amend. IV; U.S. Const. amend. XIV; Mar. Const. art. 1, § 6; 20 U.S.C. § 1232g (Supp. IV, 1980); 18 U.S.C. § 2510 *et seq.* (1983); 34 C.F.R. § 99.01 *et seq.* (1983). The texts of these provisions are set forth in pertinent part in the appendix.[ix]

## STATEMENT OF THE CASE

Petitioner, Roger Carter, was not an initial suspect in the narcotics trafficking investigation being conducted by MBI agent Bruce Collins. The primary targets were two of Petitioner's fellow students at the State University of Marshall, Alfred Rose and Barney Cooper. (R. 2). On May 13, 1983, in a pre-arranged meeting be-

tween Agent Collins and Gary Drummer, Dean of Students, Agent Collins managed to eliminate any need to seek out other independent sources of information concerning backgrounds and activities of Ross and Cooper, since Dean Drummer readily complied with Collins' informal request to review the students' education records. (R. 2). Only one file was maintained for each student, and every shred of information gathered about the student was contained therein. (R. 3). Although it is unclear whether either Ross or Cooper had ever given their written consent necessary for Agent Collins to gain access to records without proper legal process, Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g(b)(2) (Supp. IV. 1980), (FERPA), Petitioner had not. FERPA was first implicated when Collins was allowed to gain access to Petitioner's name, which was included in both files, since no "personally identifiable information" concerning Petitioner could be released without his prior written consent or proper legal process. *Id.* Petitioner's name was included in the student records of Ross and Cooper at least in the context of their associational ties, as the three studentes belonged to the same campus organizations and social fraternity. (R. 2).⊥ ⊥x

Petitioner had never objected to the disclosure of personally identifiable information designated as directory information by the University in a public notice. (R. 3). However, any personally identifiable information beyond his "name, address and telephone number," (R. 3) could not be disclosed to any unauthorized third parties, *see* 34 C.F.R. §§ 99.5(a)(3), 99.31(a)(9), 99.37(c) (1)-(2) (1983), since he never signed a written consent form. (R. 3-4).

The mandates of FERPA again came into question when Agent Collins was granted complete access to Petitioner's education records without the benefit of prior written consent or proper legal process. (R. 2, 3, 4); 20 U.S.C. § 1232g(b) (2). In Petitioner's file, Agent Collins found an undated letter from an anonymous "concerned citizen" accusing Petitioner of being "a drug peddler and a menace to the young people of the coummunity." (R. 2). No other details were contained in the anonymous letter. (R. 2).

Ten days later, on May 23, Agent Collins was reminded of Petitioner's existence when the MBI received an anonymous telephone call. (R. 2). An unidentified "neighbor," who claimed to had seen a cordless telephone in Petitioner's home, suspected him of being a "drug dealer." (R. 2). In explanation, she reported that the previous night around dinner time, she had intercepted a conversation over her FM radio. Claiming that she recognized Petitioner's voice, she stated that he said he had just recieved a "case of coke." (R. 2). She offered no explanation of why she thought Petitioner was engaged in the sale of drugs. (R. 2).⊥ ⊥xi

For the next six days, Agent Collins and Agent Randall Brown of the MBI staked-out Peitioner's home in an unmarked car parked 500 feet from the house. (R. 2). Despite the fact they had no warrant authorizing an interception of Petitioner's private communications, they continuously monitored Petitioner's cordless telphone conversations originating from his home from the FM radio of their car. (R. 2-3). Their unflagging surveillance included looking for any known addicts or drug dealers, but none were ever seen in the entire area. (R. 3). Finally, at 10 p.m. of the sixth day, they intercepted a conversation over their radio in which someone identifying himself as Roger Carter said he had some "good stuff" for sale. (R. 3). The MBI agents tape recorded the entire conversation. (R. 3).

On May 30, the next morning, Agent Collins submitted a sworn statement alleging this series of events and was issued a search warrant by Lincoln County magistrate authorizing a search of Petitioner's home and seizure of any illegal narcotics and cordless telephones therein. (R. 3). By 11 a.m., the MBI agents had executed the warrant and had seized "two pounds" of cocaine and a cordless telephone from the Petitioner's home (R. 3). Petitioner was arrested and charged with the illegal possession of controlled substances pursuant to chapter 56½, section 1402 of the Marshall
lxii Revised Statutes.[1] (R. 1).

At his pre-trial hearing, Petitioner filed a motion to quash warrant and suppress the evidence, based on violations of his state and federal constitutional rights as well as violations of federal statutory law. (R. 3). The only affidavit filed in support of the State's response to the motion was Dean Drummer's sworn statement which explained the University's records system, its specification of categories of directory information by public notice, and Carter's failure to object to the disclosure of his "name, telephone number or address" from his own file. (R. 3).

The trial court found that the anonymous letter and anonymous phone call lacked the reliability necessary to satisfy the standards of *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969). (R. 4). The court also found that seizure of the anonymous letter by the MBI agents from Petitioner's student records was violative of Petitioner's state and federal constitutional right to privacy, as well as FERPA. Furthermore, the court found that the MBI's warrantless interception and recording of Petitioner's cordless telephone conversation was in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. 18 U.S.C. § 2510 *et seq.* (1976). Concluding that neither the anonymous letter illegally seized from Petitioner's education records nor the

1. Mar. Rev. Stat. (1983).

illegally intercepted conversation could support the magistrate's finding of probable cause, the Petitioner's motion to quash the warrant and suppress the evidence was granted. (R. 4).

The trial court granted the state's request for an interlocutory appeal. (R. 4). The appellate court, in reliance on ⊥ *United States v.* ⊥xiii *Miller*, 425 U.S. 435 (1976) and *Illinois v. Gates*, 103 S. Ct. 2317 (1983), reversed the trial court's order suppressing the evidence and remanded. (R. 5, 7, 8).

On May 1, 1984, this Court granted Petitioner leave to appeal the decision of the appellate court in order to review all the issues raised by the record. (R. 9).⊥ ⊥xiv

## SUMMARY OF THE ARGUEMENT

Petitioner enjoys a legitimate expectation of privacy in his student records by virtue of the Congressional policy underlying the Family Educational Rights and Privacy Act of 1974. Notwithstanding this express statutory recognition, article I, section 6 of the Marshall Constitution contains strong proscriptive language which is rendered meaningless unless Petitioner is afforded a legitimate expectation of privacy in his student records. Furthermore, Petitioner has a privacy interest in his student records, which is protected under the first, fourth and fourteenth amendments of the United States Constitution.

Petitioner enjoys a legitimate expectation of privacy in his cordless telphone conversations under article I, section 6, which prohibits interceptions of communications, especially where technological developments threaten the privacy of those communications. The first, fourth and fourteenth amendments of the United States Constitution provide a recognizable zone of privacy which protects Petitioner from interceptions of communications when they originate in a private residence. And finally, the interception of Petitioner's private communications was in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 since the privacy interest of a cordless telephone user is protected under Title III and outweighs the law enforcement concerns embodied therein.

The State of Marshall must retain the *Aguilar-Spinelli* test under Article I, section 6, lest the supplementary protection it affords citizens of Marshall from unreasonable invasions of privacy and interceptions of communciations loseł its significance. Even if ⊥1 the anonymous letter and the intercepted portion of Petitioner's cordless telephone conversation could be considered in conjunction with the anonymous phone call in order to support a finding of probable cause, all these fail to pass muster under the *Aguilar-Spinelli* test. Furthermore, even if all three were considered under

the "totality of the circumstances" test applicable to the fourth amendment, the complete lack of corroboration and unreliability inherent in all three pieces of evidence fall far short of providing the substantial basis required to find that probable cause exists.

## ARGUMENT

### I. PETITIONER ENJOYS A LEGITIMATE EXPECTATION OF PRIVACY IN HIS STUDENT RECORDS AND THEREFORE HAS STANDING TO CHALLENGE THE SEARCH OF THOSE RECORDS UNDER STATE AND FEDERAL LAW.

The Petitioner enjoys a legitimate expectation of privacy in his student records which is recognized under the Family Education Rights and Privacy Act of 1974, the Marshall Constitution and the United States Constitution. The MBI agent's warrantless search of Petitioner's student records and subsequent seizure of the anonymous letter contained therein constitute an unreasonable violation of Petitioner's right to privacy in violation of the Marshall Constitution, the United States Constitution and the Family Educational Rights and Privacy Act of 1974 and therefore, must be suppressed. Accordingly, they cannot be used to support a finding of probable
12 cause to issue the search warrant.1

#### A. The Family Educational Rights and Privacy Act Of 1974 Is A Legitimate Source Of Petitioner's Expectation Of Privacy In His Student Records.

The appellate court erred in concluding that simply because the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (Supp. IV 1980), (FERPA), does not embody an express or implied private cause of action, a student has no legitimate expectation of privacy in his student records. FERPA was enacted to assure students "access to their education records and to protect such individuals right to privacy by limiting the transferability [and disclosure] of their records without their consent." *Rios v. Read*, 73 F.R.D. 589 (E.D.N.Y. 1977) (citing 120 Cong. Rec. S. 2187) (daily ed. Dec. 13, 1974) (joint remarks of Sen. Buckley and Sen. Pell, co-sponsors of FERPA). No better evidence than the express congressional purpose of a statute exists to reaffirm the legitimacy of Petitioner's expectation of privacy.

The Supreme Court recently confirmed that the existence of express or implied private causes of action is not determinative of whether privacy rights are implicated in a statutory scheme. *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199 (1984). In that case, a state procedural rule was deemed to have recognized an implicit privacy expectation because it established a significant means of restricting

otherwise liberal discovery rules. *Id.* at 2208 n.21. *See* Wash. Super. Ct. C.R. 26(c). Specifically, Rule 26(c) enabled the Washington courts to issue protective orders "for good cause shown" by the party seeking to bar or limit the release of information. *Id.* at 2208. The court summed up the source of the privacy interest when it stated that "[a]lthough the Rule⊥ contains no specific reference to ⊥3 privacy or to other rights or interest that may be implicated, such matters are implicit in the broad purpose and language of the Rule." *Id.* at 2208 n.21.

In comparison, FERPA requires that schools and agencies keep a list of all persons who have sought or received access to student records and "which will indicate specifically the legitimate interest that each such person . . . has in obtaining this information." 20 U.S.C § 1232g(b)(4)(A). Not only do the "good cause shown" and "legitimate interest" standards closely parallel each other, but FERPA goes a step farther and allows a student the right to edit his file if it contains any information which is in "violation of the privacy or other rights of the student." 20 U.S.C. § 1232g(a)(2). In view of these procedural rights, it is irrational to deny that the express purposes and impact of FERPA do not serve as an acknowledgement of the reasonable and legitimate privacy interest Petitioner expects in his education records.

The case law interpreting FERPA emphatically underscores the student's privacy interest operative within the statute. In *Rios v. Read*, 73 F.R.D. 589 (E.D.N.Y. 1977), the court addressed the question of whether information contained in FERPA-protected education records could be disclosed in order to satisfy a motion to compel answers to interrogatories under Rule 37(a) of the Federal Rules of Civil Procedure. The court determined that judicial approval of the release of the records made "the privacy violations . . . no less objectionable . . . unless, before approval [was] given, the party seeking disclosure [was] required to demonstrate a genuine⊥ need for the information that outwiegh[ed] the privacy inter- ⊥4 ests of the students." *Rios*, 73 F.R.D. at 599. *See also In re Grand Jury Subpoena Served Upon New York Law School*, 448 F. Supp. 822, 823 (S.D.N.Y. 1978) (student allowed to intervene as a matter of right in a lawsuit in which his education records were properly subpoened under FERPA, in order to prevent damage to his vital interest in the privacy of the records).

The courts' concern for the privacy expectations of students starkly contrasts with Agent Collins' unilateral decision that Petitioner's records were "discoverable" without judicial limitation. The exercise of such arbitrary and unfettered discretion by a law enforcement officer does not require an express or implied private cause of action to effectively sanction this abuse of position.

In light of the strong Congressional policy underlying FERPA, Petitioner's privacy interest at issue here is readily distinguishable from the depositor's assertion of legitimate expectation of privacy in his bank records in *United States v. Miller*, 425 U.S. 435 (1976), which was erroneously held to be controlling by the court below. (R. 5, 6).

The threshold question in any case in which the standing of a person's claim to protection under article I, section 6, of the Marshall Constitution or the fourth amendment of the United States Constitution is at issue is whether that person has a legitimate expectation of privacy. *Rakas v. Illinois*, 439 U.S. 128, 140 (1978); *Miller*, 425 U.S. at 440. The generally accepted test requires a showing "first, that a person have exhibited an actual (subjective) expec-
15 tation of⊥ privacy and second, that the expectation be one that society is prepared to recognize as "reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan J., concurring).

In a situation where the university kept all-inclusive education records concerning its students, Petitioner unequivocably displayed his subjective expectation of privacy in his file when he refused to sign the written consent form required under FERPA. 20 U.S.C. § 1232g(b)(2)(A); 34 C.F.R. § 99.30(a)(1), (c), (d); (R. 3,4). The suggestion that Petitioner lacked a subjective expectation of privacy is ludicrous given the stringent disclosure restrictions on third parties' access when a student refuses to give his written consent. In this case, the only means of obtaining access to his student records would require a "judicial order or . . . subpoena, upon the condition that . . . [he was] notified of all such orders or subpoenas in advance. . . ." 20 U.S.C. § 1232g(b)(2)(B).

Also, Congress not only recognized Petitioner's subjective expectation of privacy as being "reasonable," but it went so far as to condition the availability of federal funding on an institution's compliance with FERPA and the regulations promulgated thereunder. 20 U.S.C. § 1232g; 34 C.F.R. § 99.1 *et seq.*.

Notwithstanding the apparent success with which Petitioner satisfies the *Katz* test, the appellate court's misplaced reliance on *Miller* is relatively simple to discredit given a comparison of *Miller* and the instant case.

First, the distinct difference between the purpose of the Bank
16 Secrecy Act and the purpose of FERPA is indicative of the⊥ difference between the legitimacy of the privacy interest of a depositor and that of Petitioner. While the Bank Secrecy Act was designed "to facilitate the use of a proper and long-standing law enforcement technique by insuring that records are available when they are needed," *Miller*, 425 U.S. at 444 (1975) (footnote omitted), the fun-

damental purpose of FERPA is protection of privacy. *See*, 20 U.S.C. § 1232g(b); 34 C.F.R. § 99.37.

Second, the court in *Miller* relied heavily upon what it believed to be the inherently commercial nature of the depositer's bank records, stressing especially the voluntary act of passing negotiable instruments in the stream of commerce. *Miller*, 425 U.S. 442-3. In contrast, there is no support for a theory that entrusting highly personal, sensitive information to a fiduciary under law somehow parallels the act of writing a check. *See*, 20 U.S. § 1232g(b)(2); 20 U.S.C. § 1232g(b)(4)(A) (FERPA provisions imposing affirmative duties upon administration regarding education records). Any blind adherence to the easily distinguishable *Miller* "rule" is misplaced and erroneous.

To deny Petitioner standing to challenge the search of his student records on the basis that he has no legitimate expectation of privacy frustrates the express policy underlying FERPA. Where the access of third parties to student records have threatened the privacy interests of a student, the courts have managed to find a legitimate source of an expectation of privacy in student records to protect that interest. This search was a flagrant deprivation of Petitioner's right to the protection of judicial interposition; had Agent 17
Collins bothered to request a search warrant, his utter lack of "legitimate cause" could have been uncovered by a detached, neutral magistrate from the outset. *See Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199 (1984); *cf. Paul v. Davis*, 424 U.S. 693 (1976) (plaintiff lacked standing to challenge disclosure because he possessed no recognizable right at law and therefore was not deprived of procedural due process).

The tenuous analogy between *Miller* and the case at bar drawn by the appellate court fails in view of the irreconcilable variance of purpose between FERPA and the Bank Secrecy Act, as well as the privacy interest inherently protected by FERPA. Because Petitioner plainly has a legitimate expectaton of privacy in his education records, the appellate court erred in finding *Miller* to be controlling under article I, section 6 and the fourth amendment.

### B. Petitioner Has A Legitimate Expectation of Privacy Under The Greater Protections Granted By Article I, Section Six Of The Marshall Constitution.

States are free to impose a higher standard for the scrutiny of searches and seizures under their own state constitution. *Cooper v. California*, 386 U.S. 58, 62 (1967). When a state constitution contains an express provision not contained in the federal constitution, state court jurists should be wary of simply mirroring the United States Supreme Court's interpretation of the federal constitution

absent "good evidence that the framers acted without a serious prescriptive intention and inserted human rights language into the state constitution merely for its rhetorical value." *See* Kelman,
18 *Rediscovering the State Constitutional Bill of Rights*,⊥ 27 Wayne L. Rev. 413, 414 (1981). Article I, section 6, unlike its federal counterpart, contains express language prohibiting "invasions of privacy." Mar. Const. art. I, § 6 (1971).

The appellate court's summary dismissal of Petitioner's claim to a privacy interest in his student records under the Marshall Constitution was improvident, particularly in view of *Massachusetts v. Upton*, 104 S. Ct. 2085 (1984), and *People v. Jackson*, 116 Ill. App. 3d 430, 452 N.E.2d 85 (1983). This perfunctory review was precisely the sort of disregard of the state's role as the "primary guardian of the liberty of the people" for which Justice Stevens admonished the Massachusetts Supreme Court in *Massachusetts v. Upton*, 104 S. Ct. 2085, 2091 (1984) (Stevens, J., concurring). Justice Stevens chastised the court for resolving the issues by means of the minimum fourth amendment guarantees instead of basing its decision upon its own state constitution as required by the principles of federalism and reservation of rights to the people embodied in the ninth amendment. *Upton*, 104 S. Ct. at 2089-91 (Stevens, J., concurring).

In light of the directive of *Upton*, it is instructive to look to *People v. Jackson*, in which Illinois rejected the Supreme Court's *Miller* analysis. In *Jackson*, the court construed article I, section 6 of the Illinois Constitution, which is identical to article I, section 6 of our Constitution, to grant protection of a depositor's reasonable expectation of privacy in her bank records. *Jackson*, 116 Ill. App.3d at 434-35, 452 N.E.2d at 88-89. *Cf. United States v. Miller*, 425 U.S.
19 435 (1975). Logic dictates that this Court should⊥ attribute more weight to a sister state's interpretation of parallel protective clauses, than to the Supreme Court's construction of the federal counterpart which lacks "this express proscription against invasion of privacy." *Jackson*, 116 Ill. App. 3d at 434, 452 N.E.2d at 88.

The court in *Jackson* felt it was duty bound to offer "protection for the reasonable expectation of privacy which [Illinois] citizens have in their bank records," *id.* at 88-89, precisely because of the additional state constitutional provisions. In reaching its decision, the court expressly rejected the *Miller* determination that opening a bank account constituted "a waiver of an expectation of privacy." *Id.*

Illinois is not alone in rejecting the *Miller* analysis. In varying factual contexts, California has reached the same conclusion. *See Burrows v. Superior Court*, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974), bank records; *People v. Blair*, 25 Cal. 3d 640, 602

P.2d 738, 159 Cal. Rptr. 818 (1979), credit records; *People v. Mejia*, 95 Cal. App. 3d 828, 157 Cal. Rptr. 233 (1979), telephone records.

Two states with constitutional provisions similar to the fourth amendment, *see* Pa. Const. art. I, § 8; Col. Const. art. II, § 7, have embraced the inherent logic of *Burrows* and have found legitimate expectations of privacy in bank records. *Commonwealth v. DeJohn*, 486 Pa. 32, 403 A.2d 1283 (1979); *Charnes v. DiGiacomo*, 200 Colo. 94, 612 P.2d 1117 (1980).

In view of the states which have exercised their role as the principal guardians of their citizen's liberty interests, the appellate court was wrong to ignore the extra protections afforded by our state constitution. Where "invasions of⊥ privacy" are expressly pro- ⊥10
scribed by our state, it is erroneous to rely upon the faulty reasoning in *United States v. Miller*.

Under *Burrows* analysis, since it is reasonable for depositors to expect protection from disclosure of the contents of their bank records, which reveal aspects of their "personal affairs, opinion, habit and associations which provide a current biography of [their] activities," the inappropriate disclosure to third parties of a student's record is equally or more revealing and is therefore just as intolerable an invasion of privacy as the disclosure of ordinary bank records. Article I, section 6 must be held to protect Petitioner's privacy interest in this context, lest its specific prohibitions be rendered meaningless.

### C. The Emanations From The Penumbra Of Rights Implicit In The Concept Of Ordered Liberty Protect Petitioner's Student Records From Warrantless, Arbitrary Intrusions By State Investigators Under The Due Process Clause Of The Fourteenth Amendment.

The course of history reflects the judiciary's reliance upon the emanations from one or more of the rights specifically enumerated under the federal constitution as the means for identifying other protected interests which are fundamental to our concept of a democratic and civilized society. One such right is the amorphous right of privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965), which applies to the individual states through the liberty protections under the due process clause of the fourteenth amendment. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

Petitioner's situation is no differnet from countless others who have sought and received relief from an impartial⊥ judiciary, espe- ⊥11
cially where prior decisions have not squarely addressed the harms they incurred. Within such a case-by-case framework, the recognition of rights of privacy by the federal court constitute an independent, persuasive basis for redressing Petitioner's state-inflicted injuries. For this reason the Appellate Court's myopic interpreta-

tion of the *ratio decedendi* in *Griswold* is erroneous. The lower courts decision completely disregards an individual's privacy interest in the non-disclosure of his personal affairs which was set forth in *Griswold*, 381 U.S. at 483-84, and more fully explored in *Whalen v. Roe*, 429 U.S. 589 (1977).

At issue in *Whalen* was a statutory scheme requiring the compilation of a central registry containing the names of patients receiving certain narcotics under prescriptions. The patients asserted that their right to anonymity could be implicated if their names were improperly divulged. They feared that, if their legitimate drug use was made public knowledge, they would bear the stigma of drug addiction. *Whalen*, 429 U.S. at 595, 600. However, no breaches of the procedural safeguards built into the New York system to prevent against unwarranted disclosures were proven by the plaintiffs. *Id.* at 601. On this basis, the court determined that the state's compelling interests in public health and preventing the abuse of dangerous drugs overrode the plaintiffs' interest in non-disclosure, and the statute was upheld. *Id.* at 603-04. But the court expressly reserved the question of whether under different circumstances or where actual harm has occurred in fact, the ever-increasing ac-
112 cumulation of highly personal information and the potential for its abuse would justify an opposite result. *Id.* at 605-06.

Petitioner lacks the proof problems inherently fatal to the plaintiffs in *Whalen*. His personal biography was placed before a state investigator who lacked any legal right to obtain access to Petitioner's student records. FERPA was encated for the express purpose of protecting students from unwarranted intrusions into the private matters contained in their student files. While the Dean breached his fiduciary duties under FERPA by not preventing the agent's fishing expedition, Officer Collins' further use of the contents of the file irreparably exacerbated the initial injury. Petitioner's fundamental right to non-disclosure is further buttressed by the protections in FERPA and the unlawful invasion of his privacy must be vindicated.

1. *The first amendment protects Petitioner's right to association and the State's use of membership lists to implicate Petitioner in a crime is a patent abuse of official authority.*

The freedoms we enjoy in our society are contingent upon our continued ability to associate with whomever we choose without the constant fear of furtive, unsupervised governmental scrutiny. The unilateral abrogation of Petitioner's right of association by Officer Collins squarely confronts this protection embodied in the first amendment speech and assembly clause. No legitimate challenge to

Petitioner's standing to raise this constitutional issue can be mustered; where the blatant exploitation of his associational ties led directly to the deprivation of his personal liberty, his right to protect his private life from illegal invasions by the⊥ state is at its zenith. ⊥113 *See Shelton v. Tucker*, 346 U.S. 479 (1960). *See also NAACP v. Alabama*, 357 U.S. 449, 461-66 (1958) ("Inviobility of privacy in group association may . . . be indispensible to preservation of freedom of association.").

The entire series of Officer Collins' chilling actions began when he utilized the student records of Ross and Cooper to key him into potential targets for his unfocused "investigation." In his desperation to locate "suspects", Officer Collins was reduced to matching names of other students which were included in each of the two files, with the hope that he could find some shred of information about any student which would justify the continuation of an inquiry. (R. 2). Because Petitioner belonged to the same campus organizations and social fraternity as the other two students, he was unfortunate enough to satisfy the agent's *ad hoc* criteria, and his education records were the next to be purged. (R. 2).

This covert activity took place despite the blanket of protection against any illegitimate disclosures of the contents of student records under FERPA. The statute seeks to preserve the vital role schools serve as one of the principal forums for the exchange of ideas, the expansion of knowledge through inquiry and exposure to new concepts, and the acquisition of the social skills needed to accommodate disparate lifestyles in our heterogeneous nation. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Where governmental activity intrudes upon these special interests, it is subjected to the most exacting scrutiny for "[t]he vigilant protection of constitutional freedoms is nowhere more vital⊥ than in the com- ⊥114 munity of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

In *Shelton*, an Arkansas statute requiring teachers in the state schools to disclose the names of any groups with which teachers were affiliated was declared to be unconstitutional. Central to the court's resolution was its staunch affirmance that "scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study, and to evaluate." *Id.* at 487 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 240).

It is impossible to distinguish the potential chilling effect recognized in *Shelton* from the actual injury that Petitioner has sustained. Prior to Officer Collins' random selection of criminal suspects from student files, he was unaware of Petitioner's existence. Upon finding the anonymous letter, Petitioner suddenly be-

came the focal point of the agent's attention. Had a court of law been allowed to review the agent's initial suspicions of the University students, his survey of suspects would have been checked at its inception. Petitioner does not claim that his first amendment freedom is an absolute right. But Petitioner vehemently denies that the state possesses the power to investigate his associational ties without first seeking and obtaining the approval of an impartial magistrate. Any holding to the contrary would effectively force students to scrutinize the acquaintances with the utmost care in order to avoid being stigmatized by the insinuation of misconduct or impropriety. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom or expression at the
115 schoolhouse gate." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). The restrictions on access to student records under FERPA reflects congressional concern for the right of privacy implicit in the first amendment. The result of any dilution of FERPA safeguards is a chilling effect on students' right to association. A firm statement by this Court is needed to emphasize that the flaunting of official authority in the face of this deleterious effect on legitimate privacy expectations can not be tolerated.

### 2. *Petitoner's reasonable expectation of privacy in his student records was violated under the fourth amendment by the MBI agent's warrantless search.*

FERPA exemplifies society's recognition of a student's reasonable expectation of privacy in his education records which is violated by any nonconsensual and/or procedurally defective disclosure of the file's contents. This law merely gives import to the meaning of "effects" as expressed in the fourth amendment. To draw distinctions between files retained in one's home versus those entrusted to another in this instance would be ludicrous. Where the records relate to information of an indisputably detailed, personal nature, the unauthorized rifling of that file can be deemed nothing less than a violation of the subjective and objective expectations of privacy of the student affected. Petitioner had no more intent to expose his private affairs to unknown persons than did the hapless caller in *Katz v. United States*, 389 U.S. 347, in which the Supreme Court declared that ". . . what he seeks to preserve as pri-
116 vate, even in an area accessible to the public, may be constitutionally protected." *Katz v. United States*, 389 U.S. at 351-52.

This is true because the "Fourth Amendment protects people, not places." *Id.* at 351. Here, Petitioner's refusal to execute a consent form was the only measure he could employ to safeguard his education records against warrantless intrusions. Where a student

takes the normal steps to protect strictly private information, he fully manifests his reasonable expectation of privacy in its continuing confidentiality. *Rawlings v. Kentucky*, 448 U.S. 98 (1980).

Thus, without a warrant, Officer Collins' search of Petitioner's file was *per se* unreasonable. *Mapp v. Ohio*, 367 U.S. 643 (1973). There are only a few narrow exceptions to this well-established rule, one of which is consent. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). This limited consent exception allows a third party to consent to a search under very limited circumstances. *Stoner v. California*, 376 U.S. 483 (1964).

In Petitioner's case, the Appellate Court summarily determined that the Dean's ostensible authority to consent to searches of student files somehow legitimized the conduct of Officer Collins. (R. 6). The lower court's unsubstantiated conclusion that these circumstances could be pigeonholed into the narrow limits of the consent exception exemplifies its misapprehension of what serves as legal third-party consent under the state and federal constitutions.

Here, the record unambiguously discloses that Dean Drummer possessed no actual authority to divulge the entire contents of Petitioner's student file. (R. 6). Certainly he had Petitioner's implied 117
or express permission to use Petitioner's education records to perform his administrative tasks. But this limited authority cannot be stretched to allow the ransacking of a student's file by a state agent in the absence of the student's prior written consent or a valid judicial order or subpoena. 20 U.S. § 1232g(b)(2)(A), (B).

Under even the federal minimum standards of good faith, the legal fiction of apparent authority has no validity in instances where a police officer should have known that a third party lacked the authority to consent to a search. Hotel proprietors do not possess the actual or apparent authority to permit searches of hotel rooms for weapons or other contraband where no warrant has been obtained. *Stoner v. California*, 376 U.S. 483 (1964). Nor can a lessor grant permission for others to enter his leased premises if the purpose of the entry exceeds the owner's limited retained rights of access. *Chapman v. United States*, 356 U.S. 610 (1961); *State v. Zindros*, 189 Conn. 228, 456 A.2d 288 (1983). *Cf. United States v. Matlock*, 415 U.S. 164 (1974) (mistress sharing room with defendant gave valid consent to a search).

Our Marshall Constitution adds an extra layer of protection against unreasonable searches with the prohibition against "invasions of privacy." The state cannot come before this Court and argue that Officer Collins' ignorance of the mandates of FERPA should serve as an excuse for his actions. If consent by Dean Drummer is categorized as the sort that vitiates the search warrant requirements, then entire statutory schemes can be abrogated with

impunity. It cannot be said that Congress's interest in the efficacy
118 of its laws⊥ gives way to the mere whim of state actors. The State of Marshall must not be allowed to profit from the illegitimate and illegal conduct of its law enforcement officers and university officials.

The exclusionary rule under the fourth amendment, as a minimum guarantee of protection against unreasonable searches and seizures in the form of a deterrent safeguard, is equally applicable under article I, section 6. *Mapp v. Ohio*, 367 U.S. 643 (1961). This rule of law simply but firmly requires that evidence obtained in violation of the Constitution "shall not be used at all." *Id.* at 268.

It follows that the same principles cause the "fruit of the poisonous tree" doctrine to be applicable under our state constitution. *Wong Sun v. United States*, 371 U.S. 471 (1963). The anonymous letter, seized as a result of the MBI agent's illegal search of Petitioner's student files, is thus considered "tainted" as the product of illegal actions, *id.* at 488, and cannot be considered in a determination of probable cause to issue a warrant. Therefore where constitutional rights have been conveniently suspended by state actors, the exclusionary rule will serve as a swift and fair reminder that such conduct is impermissible.

## II. PETITIONER HAS A LEGITIMATE EXPECTATION OF PRIVACY IN HIS CORDLESS TELEPHONE COMMUNICATIONS AND THEREFORE HAS STANDING TO CHALLENGE THE WARRANTLESS SEIZURE OF HIS TELEPHONE CONVERSATION UNDER STATE AND FEDERAL LAW.

The Petitioner enjoys a legitimate expectation of privacy in his cordless telephone conversations which is recognized under the Marshall Constitution, the United States Constitution and Title III
119 of the Omnibus Crime Control and Safe⊥ Streets Act of 1968. The MBI agent's warrantless interception of Petitioner's private communications over a cordless telephone constitutes an unreasonable violation of Petitioner's right to privacy. The evidence obtained in violation of the Marshall Constitution, the United States Constitution and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 must be suppressed and cannot be used to support a finding of probable cause to issue the search warrant. Therefore, the decision of the Lincoln County Circuit Court's order to suppress the evidence must be reinstated.

### A. Article I, Section 6 Affords Its Citizens Greater Protection Than Its Federal Counterpart And Consequently, Petitioner Has A Legitimate Expectation of Privacy In his Cordless Telephone Communications.

Petitioner's legitimate expectation of privacy in his cordless telephone communications must first be analyzed in accordance with the fundamental principles underlying article I, section 6. *See Massachusetts v. Upton*, 104 S. Ct. 2085, 2091 (1984) (Stevens, J., concurring). ⊥120

Both the Illinois and Marshall Constitutions contain express prohibitions against "invasions of privacy or interceptions of communications by eavesdropping devices or other means." Ill. Const. art. I, § 6 (1970); Mar. Const. art. I, § 6 (1971). Therefore, Illinois law is persuasive in analyzing article I, section 6 of our constitution. ("[S]ection 6 was drafted to prohibit interceptions of communications by using new forms of technology unforeseeable in 1970."). *See* Ill. Ann. Stat., 1970 Const., Art. I, sec. 6, Constitutional Commentary, 317, 318 (Smith-Hurd 1971).⊥

In *People v. Giannopoulos*, 20 Ill. App. 3d 338, 314 N.E.2d 237 (1974), the court formulated a test to determine whether there was a violation of article I, section 6. In essence, the test looks to whether the defendant's conversation was "intercepted," and if so, whether it was accomplished by "eavesdropping devices or other means." *Id.* at 343, 314 N.E.2d at 240. Assuming these two elements are met, then it must be determined whether the interception was "unreasonable" and therefore violative of article I, section 6. *Id.* As incorporated in the *Giannopoulos* test, an "interception" occurs when there is a third party to the communication and neither party has consented to the "eavesdropping." *Id.*

Using this analysis, the MBI agents' monitoring and tape-recording of Petitioner's cordless telephone conversation constitutes a non-consensual "interception." The appellate court's interpretation of the use of a cordless telephone as a knowing consent to the interception of communications has no basis in fact and constitutes a meritless abrogation of the express protection Marshall citizens enjoy against the inevitable invasions of privacy which accompany technological advancements. It is obvious that the framers intended for article I, section 6 protection to extend to technological innovations utilized by citizens. It is equally evident that the MBI agents were not invited "parties" to the communication, as the appellate court's strained interpretation of consent collapses under its own weight. When the MBI agents staked-out Petitioner's home far enough away to escape⊥ detection, yet close enough to tune into ⊥121 the limited range of signals emanating from the hand-held unit to the base unit inside the house, a non-consensual "interception" oc-

curred. The use of a radio and a tape-recorder undoubtedly constitutes the use of an "eavesdropping device." Finally, the "unreasonableness" of this interception is indisputable since interceptions "which are made without the consent of at least one party . . . are unconstitutional." *People v. Childs*, 67 Ill. App. 3d 473, 475, 385 N.E.2d 147, 149 (1979).

Illinois is not the only state to afford its citizens greater protection in their private communications than does the federal constitution. States whose constitutional provisions do not contain nearly as strong or express a proscription against interceptions of communications and even states whose constitutional provisons are nearly verbatim renditions of the federal constitution have construed their respective constitutions as affording their citizens more protection. *See, e.g., State v. Glass*, 583 P.2d 872, 879 (Alaska 1978) (Alaska's privacy amendment to constitution prohibits secret electronic monitoring of conversations even with the consent of participant); *State v. Brackman*, 582 P.2d 1216 (Mont. 1978) (state constitution prohibits secret broadcast of conversation by a participant to the police unless a compelling state interest is shown); *People v. Deavers*, 393 Mich. 554, 227 N.W.2d 511 (1975) (use of electronic device by a participant in the conversation thereby transmitting incriminating statements made by defendant in his own home to police outside of home is unconstitutional without search warrant); *White v. Davis*,
122 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975)1 (secret tape recording of students' discussions in private and public meetings and in university classrooms by police disguised as students constituted violation of state constitutional privacy amendment); *Quinto v. City and Borough of Juneau*, 664 P.2d 630 (Alaska Ct. App. 1983) (non-consensual tape-recording of pre-arrest conversation between citizen and uniformed law enforcement officers requires search warrant under state constitution).

These states have given close consideration to their state constitutions and have adopted the principle that "[i]n a free society, people ought not to have to watch their every word so carefully." *State v. Glass*, 583 P.2d at 877 (quoting *Lopez v. United States*, 373 U.S. 427, 452 (1963) (Brennan, J., dissenting)). Acting on the principles of federalism and the reservation of rights to their citizens under the ninth amendment, *Massachusetts v. Upton*, 104 S. Ct. 2085, 2091 (1984) (Stevens, J., concurring), they have heeded the directive of the Supreme Court in *Katz v. United States* as it relates to state protection of privacy rights: "[T]he protection of a person's *general* right to privacy—his right to be left alone by other people—is, like the protection of his property and his very life, left largely to the law of the individual States." *Katz*, 389 U.S. at 350-51 (footnote omitted) (emphasis in original). The duty imposed on the Supreme

Court of Marshall, by viture of the express language of article I, section 6, requires that the appellate court's finding that Petitioner had no legitimate expectation of privacy be reversed.⊥ ⊥23

**B. Petitioner Enjoys A Legitimate Expectation Of Privacy Under The Fourth Amendment Which Was Violated By The MBI Agents' Warrantless Interception.**

The preceding discussion of the interplay of technological advances and zones of privacy highlights the reprehensible nature of the state's intrusion into Petitioner's home under the proscriptive mandates of our state constitution. Yet, even under the minimal standards of the fourth amendment, the agent's actions cannot be condoned.

It is established that Officer Collins and Officer Brown continuously monitored the comings and goings from Petitioner's house for a six-day period. (R. 2,3). At the same time, they had their car radio tuned into an FM frequency. (R. 3). On the sixth day, their patience was rewarded when they intercepted a small, ambiguous fragment of a phone conversation originating from Petitioner's home, which they immediately construed to be incriminating in nature. The following morning, Officer Collins included this occurrence and the content of the conversation in his sworn statement to the magistrate, believing that his actions were perfectly legitimate. But what the agents failed to recognize was that their monitoring was as certain an intrusion into Petitioner's home as if they had stormed in his front door at the time of the phone conversation. The fourth amendment is especially intolerant of actions which violate the inner sanctum of one's home. *Boyd v. United States*, 116 U.S. 616 (1885), and electronic monitoring without a warrant is as much an illegal entry into one's residence as an actual trespass. *United States v. Karo*, 104 S. Ct. 3296 (1984) (electronic monitoring⊥ ⊥24 of a beeper secreted within a container which was subsequently carried into a private home violates the fourth amendment).

The home receives this heightened protection, not on the basis of property principles, but because there is no better place where one can reasonably expect to enjoy uninterrupted peace and privacy. *See Steagald v. United States*, 451 U.S. 204, 211-12 (1981). *Cf. United States v. Knotts*, 460 U.S. 276 (1983) (no expectation of privacy in automobile). Merely because technology has outstripped Congressional action, the MBI agents cannot shield themselves from condemnation by capitalizing on a narrow gap in the law. *Karo*, 104 S. Ct. at 3302, 3305. It is impossible to draw a distinction between the means employed by the Government to pierce through the walls of Karo's residence and the intentional and successful capture of Petitioner's conversation by the MBI agents. Here, as in

*Karo*, the product of the privacy invasion cannot be used to condemn Petitioner.

Warrantless searches are presumptively unreasonable, *Mapp v. Ohio*, 367 U.S. 643 (1961), and since none of the narrow exceptions are applicable, the interception of Petitioner's private telephone conversation by the state agents is violative of both state and federal constitutionally protected interests.

The principles which protect Petitioner's right to privacy in regard to his student records under the exclusionary rule are equally applicable to the unreasonable infringement on his right to be free from unreasonable interceptions of communications. *Mapp v. Ohio*, 367 U.S. 643 (1961). Unauthorized intrusions by state officials into
125 the privacy of⊥ one's home have been deemed particularly violative in a variety of contexts. *See, e.g., Steagald*, 451 U.S. 204, 221-24 ( 1981); *United States v. Karo*, 104 S. Ct. 3296 (1984). The exclusion of Petitioner's tape-recorded cordless telephone conversation is mandatory in view of the basic purpose of the exclusionary rule which seeks to vindicate individual rights contained in article I, section 6 and the fourth amendment. Therefore, the recorded telephone conversation must be suppressed and cannot be used to support a finding of probable cause.

### C. Petitioner's Cordless Telephone Conversation Was Intercepted By the MBI Agents In Violation Of Title III Of The Omnibus Crime Control And Safe Streets Act Of 1968.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.* (1976), (Title III), was enacted by Congress to strike a balance between the privacy interests of citizens and the needs of law enforcement, particularly to combat organized crime. *See* Title III, Pub. L. No. 90-351, § 801, 1968 U.S. Code Cong. & Ad. News 257 (Congressional findings). Congress proposed that if organized crime was exploiting technology, then law enforcement should be able to utilize the same technology in the interests of justice. However, in order to protect the privacy of communications of the public, Congress imposed safeguards on the use of electronic surveillance. *Id. See* 18 U.S.C. §§ 2511, 2515, 2516. Title III contains a broad statutory exclusionary rule intended to deter abuse of technology by providing that whenever wire or oral communications are
126 intercepted in violation of Title III, "no part of the contents of such⊥ communication and no evidence derived therefrom may be received in evidence in any trial . . . or other proceeding in or before any court . . . of the United States, a State, or a political subdivision thereof. . ." 18 U.S.C. § 2515. Because the MBI agents intercepted Petitioner's cordless telephone conversation without prior judicial authorization in violation of Title III, the substance of that conver-

sation can not be used to support a finding of probable cause and the contraband seized as a result must be suppressed as well. 18 U.S.C. § 2515.

1. *The nature of communications transmitted by use of a cordless telephone are properly characterized as a "wire communication" under Title III.*

The threshold question in determining the applicability of Title III to the interception of communications is whether the communications fall within the definition of "wire" or "oral" communications under section 2510. 18 U.S.C. § 2510. "Oral" communications are protected when a person exhibits "an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 U.S.C. § 2510(2). "Wire" communications are defined as "any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception. . ." 18 U.S.C. § 2510(1).

The congressional policy underlying Title III would not be served by refusing to classify a cordless telephone as a wire communication. In *United States v. Hall*, 488 F.2d 1931 (9th Cir. 1973), the 127
court was compelled to classify a radio-telephone conversation as a "wire" communication under § 2510(1) due to the plain language contained therein and the express legislative history stating that coverage of "wire communications" was "intended to be comprehensive." *Id.* at 197 (quoting S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 2178).

The court in *Hall* determined that where the statute expressly included communications carried over wire, in part, the decision to exclude radio telephones rested solely with Congress' power. *Id.* at 198. Therefore, the appellate court's assumption that the cordless telephone conversation was an "oral communication" is at odds with its characterization of the communications as "radio broadcasts from the mobile unit held by the user to the base unit which then transmits the signals *over conventional telphone lines*." (R. 7). *Cf.* 18 U.S.C. § 2501(1) (emphasis added).

Furthermore, the difference between the operation of radio and cordless telephones lends support to the classification of cordless telephone conversations as "wire communications." Whereas radio telephones transmit signals from the user's location to a centralized mobile telephone network receiver, which are then transmitted over conventional telephone lines, *id.* at 195, 197, Petitioner's cordless telephone operates by transmitting signals from the hand-held unit to the base unit, both of which are located

in Petitioner's home. From the base unit, signals are then carried
128 over conventional telephones lines.

This distinction between radio and cordless telephones is one the court in *State v. Howard*, 679 P.2d 197 (Kan. 1983), failed to make. The court tried to justify its rejection of *Hall* on the basis of the Title III criminal and civil penalties for interception, *Howard*, 679 F.2d at 205, but failed to point out that those penalties require specific intent in order to deter intentional invasions of privacy. 18 U.S.C. § 2511. Accordingly, *Howard* should be afforded much less weight than the strict statutory construction properly utilized in *Hall*. Therefore, Petitioner's cordless telephone conversation should be characterized as a "wire" communication under section 2510(1).

2. *Petitioner has a justifiable expectation of privacy in his cordless telephone conversation under Title III.*

"Oral" communications are defined as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectations." 18 U.S.C. § 2510(2). This requires "the speaker to have a subjective expectation of privacy that is objectively reasonable." *United States v. Rose*, 669 F.2d 23, 25 (1st Cir. 1982).

No evidence has been introduced which proves that Petitioner did not expect the exact degree of privacy in his cordless telephone conversations as he did in his conventional telephone conversations. (R. 4). *Cf. State v. Howard*, 679 F.2d at 206 (owners manual fully advised owners of a certain brand of cordless telephone of its limited broadcast nature.)

The appellate court has held, in effect, that citizens who expect
129 to hold private telephone conversations within their own homes must sacrifice technological advances for the price of the protection of a judicial system that is not ready to reconcile concepts of what is "reasonable" in the modern world with what is "realistic" in the modern world. *Cf. United States v. Karo*, 104 S. Ct. 3296, 3303 (1984) (beeper smuggled into plaintiff's home violated his expectation of privacy). However, the judiciary is uniquely equipped to keep apace of this modern-day technological explosion, and its statutory interpretation must consider the realistic impact of new developments.

This is especially true when law enforcement officers take advantage of legislative and judicial loopholes caused by technological progress with unbridled discretion in order to seize information that would not otherwise be available to them. Title III was originally enacted to enable law enforcement officers to combat the use

of illegal eavesdropping devices by organized crime. But where a cordless telephone is used legally within the confines of a citizen's home the overriding law enforcement interest is simply not present.

Under these facts, the appellate court erred in failing to heed Congressional intent to protect the preeminent privacy expectations of individuals. Accordingly, no part of Petitioner's cordless telephone conversaton may be used to support a finding of probable cause, and the contrabrand seized as a result of the unauthorized interception must be suppressed.⊥ ⊥30

## III. WHETHER REVIEWED UNDER THE *AGUILAR/SPINELLI* TEST OR UNDER THE *GATES* TEST, THE TWO ANONYMOUS TIPS AND THE RECORDED TELEPHONE CONVERSATION DO NOT PROVIDE A SUBSTANTIAL BASIS TO SUPPORT THE MAGISTRATE'S FINDING OF PROBABLE CAUSE.

This court is the final arbiter of the import of the express language of article I, section 6. The explicit recognition of the right of privacy is eliminated by judicial fiat unless the standard for determining probable cause remains stringent enough to obviate the potential for undue invasions of privacy.

### A. The *Aguilar/Spinelli* Test Is The Proper Standard By Which To Evaluate Informant's Tips As Supporting A Finding Of Probable Cause Under Article I, section 6.

The Appellate Court was derelict in its duty to the constitution and people of the State of Marshall when it *sua sponte* declared that *Aguilar/Spinelli* test for probable cause to issue a warrant lost its vitality as the proper standard under our state system of criminal justice. The court's breach stems from its failure to keep foremost in mind that federal rulings in this sensitive area establish only the minimum standard for resolving issues arising under state constitution. *State v. Ringer*, 100 Wash.2d 686, 674 P.2d 1240 (1983). *See Massachusetts v. Upton*, 104 S. Ct. 2085, 2091 (1984) (Stevens, J., concurring). Something more is needed to justify the abrogation of long-standing state precedent than the fact that the Supreme Court has chosen to follow a different course under the federal Constitution. Any belief to the contrary assumes that the citizens of our state engaged in a futile exercise when they adopted article I, section 6, and reduces our state courts to the role of acting as adjuncts for the federal system. Without a sounder reason than that⊥ given ⊥31 by the appellate court for dismantling the extra layer of protections included in our state constitutional scheme, this court must con-

tinue to adhere to the probable cause standard that has promoted the well-being of the citizenry of Marshall for the last fifteen years.

1. *As the only piece of information left which may properly be considered in a determination of probable cause, the anonymous telephone call fails both prongs of the* Aguilar/Spinelli *test.*

The first step in reviewing a finding of probable cause which rests on an anonymous informant's tip is to determine whether the magistrate had been adequately "informed of some of the underlying circumstances from which the informant concluded" that the criminal activity or evidence was present where he claimed it was. *Aguilar v. Texas*, 378 U.S. 108, 144 (1964). The anonymous caller reported that she had seen a cordless telephone in Petitioner's home, she had heard Petitioner over her radio referring to a "case of coke," and she suspected him of being a "drug dealer." (R. 2). Given these three pieces of raw data, the magistrate could only determine that the informant knew first hand of a cordless telephone and a "case of coke." The magistrate could not, however, logically find that the informant's bald accusation was based on any personal knowledge whatsoever, since at best, the informant had merely jumped to the tenuous conclusion that Petitioner was a "drug dealer" upon merely hearing him mention a "case of coke." In the alternative, the magistrate could evaluate the informant's tip based on the detail describing the criminal activity so that the magistrate could be sure that "he was relying on something more substantial
132 than a casual rumor . . . or an accusation based merely on an individual's reputation." *Spinelli v. United States*, 393 U.S. 410, 416 (1968). *See, e.g., Winkles v. States*, 634 S.W.2d 289 (Tex. Crim. 1982) (although defendant had called the white powdery substance "speed," the facts were not sufficient to conclude that he was referring to a drug rather than a cleaning powder). The informant's tip here, however, is devoid of any detail and therefore fails.

But even if the informant's tip had met either of these elements, commonly referred to as the "basis of knowledge" prong of the *Aguilar/Spinelli* test, it is patently insufficient to meet the second half of this test. The "veracity" prong requires that the magistrate "be informed of some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.' " *Aguilar*, 378 U.S. at 114. The 'credibility' of the anonymous caller is impossible to demonstrate, since she has no "track record" of past performance verifying that her information is accurate. *McCray v. Illinois*, 386 U.S. 300, 304 (1967). As to her "reliability," no other circumstances were furnished which would otherwise guarantee her trustworthiness, such as a

statement against her penal interest. *United States v. Harris*, 403 U.S. 573, 579-80 (1971). As an alternative, the magistrate could consider any independent investigatory efforts which would lend credence to the informant's story. *Spinelli*, 393 U.S. at 417-18. But since the independent observations of the MBI agents may not properly be considered here, the informant's conclusory accusation cannot be verified at all. Therefore, the⊥ anonymous caller's state- ⊥33
ments are not sufficient to establish probable cause.

4. *Given all the evidence available, the magistrate still did not have a substantial basis under the* Aguilar/Spinelli *test to conclude that probable cause existed.*

Even assuming *arguendo* that other evidence was available to corroborate the anonymous telephone call, it still fails to meet the requirements of the *Aguilar/Spinelli* standard. First, the addition of the anonymous letter and the recorded telephone conversation are irrelevant in considering whether the anonymous phone call meets the "basis of the knowledge" prong; nothing contained in these two separate pieces of information can help in showing that the anonymous caller had first hand knowledge upon which to support her suspicion that Petitioner was a "drug dealer." Nor do they help provide the "self-verifying detail," *see Stanley v. State*, 19 Md. App. 508, 313 A.2d 847, 851 (1974), otherwise necessary to show that the informant was relying on something better than mere rumor or reputation.

Second, the anonymous telephone call still fails the "veracity" prong since neither piece of additional evidence is helpful in establishing the anonymous caller's "credibility" or "reliability." As to independent investigation, the addition of the recorded telephone conversation in which Petitioner mentioned he had "some good stuff," (R. 2), falls far short of the degree of corroboration necessary to "permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed." *Spinelli*, 393 U.S. at 418. As such, it is debatable whether⊥ the tip ⊥34
should have been taken into consideration in the magistrate's determination at all.

The probative value of the fragment of Petitioner's intercepted telephone conversation in which he stated that he had "some good stuff" for sale is equally dubious. In the absence of any additional evidence indicating that these words were spoken in a drug-related context, the Petitioner's statement is intrinsically innocent. The shallowness of the results of the MBI agent's six day surveillance is, instead, a confirmation of the fact that Petitioner was not involved in the criminal activity suggested by the anonymous telephone call.

The only part of the anonymous telephone call that this independent investigation to corroborate established was the fact that Petitioner owned a cordless telephone. Verification of this sort of innocent activity only shows that perhaps the informant is "not a total liar," *The Supreme Court, 1968 Term.* 83 Harv. L. Rev. 7, 181 (1969), and cannot be used to substantiate an otherwise inadequate tip. *Whiteley v. Warden*, 401 US. 560, 567 (1971).

However, the paucity of probative value of the anonymous phone call and the recorded telephone conversation pale in comparison to the utter insubstantiability of the anonymous letter, which labeled the Petitioner a "drug peddler and a menace to the young people of the community." (R. 2). This is a "bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision." *Spinelli*, 393 U.S. at 414 (citation omitted). As such, it may not "be used to give additional weight to allegations that would otherwise be insufficient." *Id.* at 418-19.
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Therefore, it is self-evident that the appellate court erred in concluding that the magistrate had been presented with a substantial bais for determining the existence of probable cause.

### B. Even A Consideration Of All The Evidence Under The *Gates* "Totality of the Circumstances" Standard Fails to Provide A Substantial Basis For the Magistrate To Conclude That Probable Cause Existed.

History teaches us that the judiciary, like a pendulum which has shifted too far to one side, will eventually swing back to middle ground. Given the strong explicit language of article I, section 6, no valid reason exists to force the citizens of Marshall to witness the emasculation of the constitutional protection implicit in article I, section 6, while the federal courts wait another fifteen years to recognize the fruits of the injustice sure to spring from the "totality of the circumstances" standard of *Illinois v. Gates*, 103 S. Ct. 2317 (1983). However, if this Court chooses to abandon the *Aguilar/Spinelli* standard in favor of the *Gates* "totality of the circumstances" test, the decision of the appellate court must be reversed since even under the latter standard no substantial basis for a finding of probable cause can be said to exist.

The primary difference between the *Gates* and *Aguilar/Spinelli* standard is that under the former, "overkill" on one prong may cure a deficit on the other prong, *see Gates*, 103 S. Ct. at 2328, n.5, if in view of all the evidence presented to the magistrate he has a "substantial basis for . . . conclud[ing] that probable cause exists. *Id.* at 2331.
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Under this considerably relaxed standard, the anonymous tips and the weak corroboration of the MBI agent's independent investi-

gation fail to provide the "substantial basis" required. Neither of the anonymous tips provide any basis for determining the source of their respective accusations that Petitioner was a drug dealer, nor do they provide any basis for concluding that either of the informants was "either honest or his information reliable." *Id.* at 2326. The anonymous letter in *Gates*, revealed details concerning dates, times, places, and travel plans of the defendant's drug deal. *Id.* at 2325. The Supreme Court concluded that this letter, standing alone, would not provide a sufficient basis for a finding of probable cause. *Id.* at 2326. The independent investigation, which corroborated a major part of the details in the letter, *id.* at 2325-26, and the self-verifying detail of the letter, viewed as a whole, were instrumental in satisfying the *Gates* test. *Id.* at 2336.

Neither of the tips in the instant case contain any detail at all, and the independent investigation by the MBI agents merely corroborated the existence of a cordless telephone. While the anonymous phone call and the intercepted conversation contained language which, under a strained construction at best, could be viewed as corroborating the existence of narcotics as suggested by the anonymous letter, this is not the method of probable cause determination envisioned by the Supreme Court in *Gates*. Like the " 'bare bones' affidavits in cases such as *Nathanson* and *Aguilar*," Officer Collins' sworn statement provided "the magistrate virtually no basis at all for making a judgment regarding probable cause."1 137 *Gates* at 2332. In this case, the magistrate has merely acted "as a rubber stamp for the police." *Aguilar*, 378 U.S. at 111. Accordingly, the appellate court's finding that the magistrate had a "substantial basis for conclud[ing]" that probable cause existed must be reversed.

Since the invalidation of the warrant renders the search illegal, the evidence seized as a result of the search must be suppressed. *Mapp v. Ohio*, 367 U.S. 643 (1961). Petitioner's case is a particularly appropriate subject for recognizing the continued validity of *Mapp*, since the rule was drafted to deny vesting ill-gotten gains with legal significance. In an instance such as this, where one wrong has been followed consistently by another, the full force of the exclusionary rule's deterrence power must be brought to bear. At this belated date the exclusionary rule is the only remedy which will ameliorate the substantial injury.

## CONCLUSION

Petitioner Roger Carter respectfully prays that the judgment of the Appellate Court of the State of Marshall be reversed and the judgment of the Trial Court of the State of Marshall granting Petitioner's motion to quash and suppress be reinstated for the reasons set forth above.

Respectfully submitted,

⊥38 Counsel for Petitioner⊥

## APPENDIX

U.S. Const. amend. I:

> Congress shall make up no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. IV:

> 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.

U.S. Const. amend. IX:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. Const. amend. XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mar. Const. art. I, sec. 6:

> The People shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy and interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

The pertinent provision of the Colorado Constitution, article II, section 7 provides in part:

> The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures . . . Colo. ⊥A-1 Const. art. II, sec. 7.⊥

The pertinent provision of the Illinois Constitution, article I, section 6 provides:

> The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy and interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized. Ill. Const. art. I, sec. 6.

The pertinent provision of the Pennsylvania Constitution, article I, section 7 provides in part:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures . . .
> Pa. Const. art. I, sec. 8.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. section 2510 *et. seq.*, provides in pertinent part:

> § 2510. Definitions
> As used in this chapter—
>
> (1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any such person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;
>
> (2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . .
>
> § 2511. Interception and disclosure of wire or oral communications prohibited.
>
> (1) Exept as otherwise specifically provided in this chapter any person who—
>
> (a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to in- ⊥A-2 tercept, any wire or oral communication;⊥
>
> (b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic,

mechanical, or other device to intercept any oral communication when—

. . .

(ii) such device transmits communications by radio, or interferes with the transmission of such communication;

. . .

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications.

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§ 2516. Authorization for interception of wire or oral communications.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire and oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or conspiracy to commit any of the foregoing offenses.

The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, provides in pertinent part:

(a)(1)(A) No funds shall be made available under any applica-
1A-3 ble program to1 any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

. . .

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropiate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

. . .

(4)(A) For the purposes of this section, the term "education records means, except as may be provided in subparagraph (B), those records, files, documents, and other materials which—

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

. . .

(5)(A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized

activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

. . .

(b)(2) No funds shall be available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection unless—

(A) there is written consent from the student's parents specifying⊥ records to be released, the reasons for ⊥A-4 such release, and to whom, and with a copy of the records to be release to the student's parents and the student if desired by the parents, or

(B) such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

. . .

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to school officials and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student.

. . .

(d) For the purpose of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

The regulations promulgated under 20 U.S.C. § 1232g, Privacy Rights of Parents and Students, 34 C.F.R. § 99 *et. seq.*, provide in pertinent part:

§ 99.3 Definitions.

As used in this part:

. . .

"Directory information" includes the following information relating to a student: The student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, the most recent previous educational agency or institution attended by the student, and other similar information.

. . .

"Education records" (a) means those records which: (1) Are directly related to student, and (2) are maintained by an educational agency or institution or by a party acting for the agency or institution.

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"Eligible student" means a student who has attained eighteen years of age, or is attending an institution of postsecondary education.

. . .

"Personally identifiable" means that the data or information includes (a) the name of the student, the student's parent, or other family member, (b) the address of the student, (c) a per-

sonal identifier, such as the student's social security number or student number, (d) a list of personal characteristics which would make the student's identity easily traceable, or (e) other information which would make the student's identity easily traceable.

. . .

§ 99.4 Student rights.

(a) For the purposes of this part, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the rights accorded to and the consent required of the parent of the student shall thereafter only be accorded to and required of the eligible student.

. . .

§ 99.5 Formulation of institutional policy and procedures.

(a) Each educational agency or institution shall, consistent with the minimum requirements of section 438 of the Act and this part, formulate and adopt a policy of—

(1) Informing parents of students or eligible students of their rights under § 99.6;

(2) Permitting parents of students or eligible students to inspect and review the education records of the student in accordance with § 99.11, including at least:

(i) A statement of the procedure to be followed by a parent or an eligible student who requests to inspect and review the education records of the sudent;

(ii) With an understanding that it may not deny access to an education record, a description of the circumstances in which the agency or institution feels it has a legitimate cause to deny a request for a copy of such records;

(iii) A schedule of fees for copies, and

(iv) A listing of the types and locations of educational records maintained by the educational agency or institution and the titles and addresses of the officials responsible for those records;

(3) Not disclosing personally identifiable information from the education records of a student without the prior written consent of the parent or eligible student, except as otherwise permitted by §§ 99.31 and 99.37; the policy shall include, at least:

(i) A statement of whether the educational agency or institution will disclose personally identifiable information from the education records of a student under § 99.31(a)(1) and, if so, a specification of the criteria for determining which parties are "school officials" and what the

educational agency or institution considers to be a "legitimate educational interest", and

(ii) a specification of the personally identifiable information to be designated as directory information under § 99.21(c):

(4) Maintaining the record of disclosures of personally identifiable information from the education records of a student required to be maintained by § 99.32, and permitting a parent or an eligible student to inspect that record;

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(5) Providing that a parent of the student or an eligible student with an opportunity to seek the correction of education records of the student through a request to amend the records or a hearing under Subpart C, and permitting the parent of the student or an eligible student to place a statement in the education records of the student as provided in § 99.21(c);

(b) The policy required to be adopted by paragraph (a) of this section shall be in writing and copies shall be made available upon request to parents of students and to eligible students.

. . .

§ 99.11 Right to inspect and review education records.

(a) Each educational agency or institution, except as may be provided by § 99.12, shall permit the parent of a student or an eligible student who is or has been in attendance at the agency or institution, to inspect and review the education records of the student. The agency or institution shall comply with a request within a reasonable period of time, but in no case more than 45 days after the request has been made.

. . .

§ 99.12 Limitations on right to inspect and review education records at the postsecondary level.

. . .

(b) If the education records of a student contain information on more than one student, the parent of the student or the eligible student may inspect and review or be informed of only the specific information which pertains to the student.

. . .

§ 99.20 Request to amend education records.

(a) The parent of a student or an eligible student who believes that information contained in the education records of the student is inaccurate or misleading or violates the privacy or other rights of the student may request that the educational agency which maintains the records amend them.

. . .

(c) If the educational agency or institution decides to refuse to amend the education records of the student in accordance with the request it shall so inform the parent of the student or the eligible student of the refusal, and advise the parent or the eligible student of the right to a hearing under § 99.21.

§ 99.21 Right to hearing.

(a) An educational agency or institution shall, on request, provide an opportunity for a hearing in order to challenge the content of a student's education records to insure that information in the education records of the student is not inaccurate, misleading or otherwise in violation of the privacy or other rights of the students. The hearing shall be conducted in accordance with § 99.22.

. . .

§ 99.22 Conduct of the hearing.

. . .

(c) The parent of the student or the eligible student shall be afforded a full and fair opportunity to present evidence relevant to the issues raised under § 99.21, and may be assisted or represented by individuals of his or her choice at his or her own expense, including an attorney. . . .

. . .

§ 99.30 Prior consent for disclosure required.

(a)(1) An educational agency or institution shall obtain the written consent of the parent or a student or the eligible student before disclosing personally identifiable information from the education records of a student⊥ other than directory ⊥A-7 information, except as provided in § 99.31.

(c) The written consent required by paragraph (a) of this section must be signed and dated by the parent of the student or the eligible student giving the consent and shall include:

(1) A specification of the records to be disclosed,

(2) The purpose or puroses of the disclosure, and

(3) The party or class of parties to whom the disclosure may be made.

. . .

§ 99.31 Prior consent for disclosure not required.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student without the written consent of the parent of the student or the eligible student if the disclosure is—

. . .

(9) To comply with a judicial order or lawfully issued subpoena; *Provided*, that the educational agency or institution makes a reasonable effort to notify the parent or the student or the eligible student of the order or subpoena in advance of compliance therewith.

. . .

§ 99.32 Record of requests and disclosures required to be maintained

(a) An educational agency or institution shall for each request for and each disclosure of personally identifiable information from the education records of a student, maintain a record kept with the education records of the student which indicates:

(1) The parties who have requested or obtained personally identifiable information from the education records of the student, and

(2) The legitimate interest these parties had in requesting or obtaining the information.

. . .

§ 99.37 Conditions for disclosure of directory information.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student who is in attendance at the institution or agency if that information has been designated as directory information (as defined in § 99.3) under paragraph (c) of this section.

(b) An educational agency or institution may disclose directory information from the education records of an individual who is no longer in attendance at the agency or institution without following the procedures under paragraph (c) of this section.

(c) An educational agency or institution which wishes to designate directory information shall give public notice of the following:

(1) The categories of personally identifiable information which the institution has designated as directory information;

(2) The right of the parent of the student or the eligible student to refuse to permit the designation of any or all of the categories of personally identifiable information with respect to that student as directory information; and⊥ ⊥A-8

(3) The period of time within which the parent of the student or the elibible student must inform the agency or institution in writing that such personally identifiable information is not to be designated as directory information with respect to that student.

. . .

§ 99.65 Hearing procedures.

(b) *Procedural rules.* (1) With respect to hearings involving, in the opinion of the Panel, no dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the Panel shall take appropriate steps to afford to each party to the proceeding an opportunity for presenting his case at the option of the Panel (i) in whole or in part in writing or (ii) in an informal conference before the Panel which shall afford each party:

(A) Sufficient notice of the issues to be considered (where such notice has not previously been afforded); and

(B) an opportunity to be represented by counsel.

(2) With respect to hearings involving a dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the Panel shall afford each party an opportunity, which shall include, in addition to provisions required by paragraph (1)(ii) of this paragraph (b), provisions designed to assure to each party the following:

(i) An opportunity for a record of the proceedings;

(ii) An opportunity to present witnesses on the party's behalf; and

(iii)An opportuinity to cross-examine other witnesses either orally or through written interrogatories.

Wash. Super. Ct. C.R. 26(c) provides:

Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court: (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be dis-

closed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed enve-
⊥A-9 lopes to be opened as directed by the court. . . .⊥