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In the Matter of A Criminal Investigation 7th District Court No. CS-1 : Reply Brief

Utah Supreme Court

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Stephen B. Nebeker; John A. Adams; Ray, Quinney & Nebeker; F. Robert Reeder; Francis M. Wikstrom; Parsons, Behle & Latimer; Donald B. Holbrook; Elizabeth M. Haslam; George W. Pratt; Jones, Waldo, Holbrook & McDonough; Attorneys for Respondents.

David L. Wilkinson; Attorney General; Paul M. Warner; Robert N. Parrish; Assistant Attorneys General; Attorneys for Appellant.

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BRIEF

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DOCKET NO. 20268

IN THE SUPREME COURT OF THE

STATE OF UTAH

IN THE MATTER OF A
CRIMINAL INVESTIGATION,

:

: Case No. 20268

7th District Court No. CS-1

:

APPELLANT'S REPLY BRIEF

APPEAL FROM A FINAL ORDER OF THE SEVENTH JUDICIAL DISTRICT COURT, HONORABLE BOYD BUNNELL, JUDGE, DISMISSING THE CRIMINAL INVESTIGATIVE AUTHORIZATION IN THIS MATTER AND RULING THE SUBPOENA POWERS ACT UNCONSTITUTIONAL

DONALD B. HOLBROOK
ELIZABETH M. HASLAM
JONES, WALDO, HOLBROOK
& McDONOUGH
1500 First Interstate Place
170 South Main Street
Salt Lake City, Utah 84101
Attorneys for Respondents Stott,
Colby, and Maxfield

STEPHEN B. NEBEKER
JOHN A. ADAMS
P.O. Box 3850
Salt Lake City, Utah 84110-3850
Attorney for Respondent Utah Power and Light Co.

F. ROBERT REEDER
FRANCIS M. WIKSTROM
PARSONS, BEHLE & LATIMER
185 South State Street, Suite 700
P.O. Box 11898
Salt Lake City, Utah 84147
Attorneys for Respondent Emery Mining Corporation

MAX WHEELER
SNOW, CHRISTENSEN & MARTINEAU
Attorney for Thompson, Conklin & Ziemski
10 Exchange Place, Eleventh Floor
Salt Lake City, Utah 84110

DAVID L. WILKINSON
Attorney General
PAUL M. WARNER
Assistant Attorney General
ROBERT N. PARRISH
Assistant Attorney General
Attorneys for Appellant
236 State Capitol

FILED

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ELIZABETH M. HASLAM
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& McDONOUGH
1500 First Interstate Place
170 South Main Street
Salt Lake City, Utah 84101
Attorneys for Respondents Stott,
Colby, and Maxfield

STEPHEN B. NEBEKER
JOHN A. ADAMS
P.O. Box 3850
Salt Lake City, Utah 84110-3850
Attorney for Respondent Utah Power and Light Co.

F. ROBERT REEDER
FRANCIS M. WIKSTROM
PARSONS, BEHLE & LATIMER
185 South State Street, Suite 700
P.O. Box 11898
Salt Lake City, Utah 84147
Attorneys for Respondent Emery Mining Corporation

MAX WHEELER
SNOW, CHRISTENSEN & MARTINEAU
Attorney for Thompson, Conklin & Ziemski
10 Exchange Place, Eleventh Floor
Salt Lake City, Utah 84110

DAVID L. WILKINSON
Attorney General
PAUL M. WARNER
Assistant Attorney General
ROBERT N. PARRISH
Assistant Attorney General
Attorneys for Appellant
236 State Capitol

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APPELLANT'S REPLY BRIEF

ARGUMENT

POINT I

THE SUBPOENA POWERS ACT MEETS ALL CONSTITUTIONAL REQUIREMENTS FOR THE ISSUANCE OF INVESTIGATIVE SUBPOENAS

A. ALLEGED LACK OF JUDICIAL CONTROL

Respondents maintain in their respective briefs that the Subpoena Powers Act permits and even "encourages" abuses of fundamental freedoms and that the Act authorizes a criminal investigation to proceed without judicial control.

These assertions are simply without factual support in this case. The Act requires that the investigation may not be commenced except upon "application and approval of the district court, for good cause shown." This requirement, which respondents attempt to minimize, clearly mandates initial District Court approval for the investigation to begin.

Following the initial good cause showing, the District Court retains control over the progress of the investigation when a subpoena or other act of the prosecuting agency is challenged. Respondents Thompson, Conklin, Ziemski and Bowman suggest that the Attorney General's interpretation of the statute, "deprives the court of all ability to control the scope of the investigation or to assure that the investigation proceeds within the confines of the initial authorization".

This assertion, which is essentially shared by all of the respondents, simply does not square with the facts of this case nor with what could happen in any other investigations under the Act.

This investigation was initially authorized by Judge Bunnell and proceeded until challenged by the respondents. That challenge consisted of motions to quash and other motions heard by the Court. Some of the motions to quash were granted by the District Court. That court was in no essential way deprived of the ability to control the scope of the investigation or prevented from assuring that the investigation proceed within the initial authorization. That control and oversight was the very nature of the motions filed by the respondents. The fact that respondent's motions were reviewed by the Court and in part granted shows that the authorizing Court does retain control over the scope of the investigation and that the prosecuting agency

cannot conduct an investigation without restriction or judicial oversight. Obviously there are remedies to a party who chooses to resist a subpoena. But, the fact that the Court granted a motion to quash by holding a subpoena overbroad is not sufficient reason to hold the act unconstitutional.

Every evidence gathering procedure from police interview to court authorized wiretapping and search warrants are subject to potential abuse and thus the ultimate exclusion of evidence gathered pursuant to the investigative procedure used. The potential that a search warrant may be too broadly drawn or that law enforcement officials may search further than authorized has never been considered sufficient grounds to hold search warrant statutes unconstitutional.

The remedy for unauthorized police or investigative action is suppression of the unlawfully obtained evidence, not the invalidation of legislation authorizing the investigation at the outset. Clearly, the more reasoned approach is case by case analysis not wholesale and unnecessary invalidation.

An example of this is approach is found in State v. Ruggeri, 19 Utah 2d 216, 429 P.2d 969, (Utah, 1967). In that case this Court held that when an accused or target is called before a grand jury he must be warned of the charges against him and failure to do so would be to violate his privilege against self-incrimination. This court held that the target of a grand

jury investigation must be warned of his targeted status and that failure to do so would result in the suppression of the testimony elicited from him.

The grand jury statute in effect at the time of Ruggeri, supra, did not require the giving of a target warning, yet this Court did not strike down the statute but instead took the more reasoned approach and upheld the lower court's suppression of the evidence. The Court didn't rule the statute unconstitutional because of potential abuse or because in that situation the evidence was improperly gathered.

This is not to suggest that in the present case the trial court was correct in its assessment that some of the subpoenas were overbroad, but assuming arguendo any violation of constitutional rights, the proper remedy is suppression not invalidation of the authorizing investigative act.

Respondents Thompson, Conklin and Ziemski also suggest that the court is deprived of an opportunity to review challenged subpoenas in light of the investigation as a whole, and a person actually accused is deprived of the opportunity to evaluate the legality of the procedure followed. These assertions also will not stand analysis in that both the authorizing court and the court where the evidence is to be introduced may review at length the challenged subpoenas and evidence through motions to quash and by motions to suppress filed at appropriate times.

Additionally, a party may, if charged, file a discovery request pursuant to Rule 16 of the Utah Rules of Criminal Procedure, (U.C.A. § 77-35-16 to obtain the following information and discovery:

- 77-35-16. Rule 16 -- Discovery.** (a) Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:
- (1) Relevant written or recorded statements of the defendant or co-defendants;
 - (2) The criminal record of the defendant;
 - (3) Physical evidence seized from the defendant or co-defendant;
 - (4) Evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and
 - (5) Any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for defendant to adequately prepare his defense.
- (b) The prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead. The prosecutor has a continuing duty to make disclosure. . . .

For failure to provide this discovery the Court may under § 77-35-16(g) U.C.A. prohibit the prosecution from "introducing evidence not disclosed."

B. POWER OF COURT TO REVIEW SUBPOENAS

Respondents have also claimed that the power of the authorizing Court to review the subpoenas is inadequate or

illusory and fails to protect the rights of those under investigation.

Of course, those under investigation in any criminal investigation may protect their own rights only through themselves, not through others. In SEC. v. Jerry T. O'Brien, 467 U.S. _____, 81 L.E.2d 615, 104 S.Ct. 2720 (1984), targets of a Securities and Exchange investigation brought an action to prevent third parties from complying with subpoenas issued by the SEC. The United States Supreme Court held that targets of the investigation were not entitled to notice of issuance of subpoenas to third parties. Thus, a target may not seek protection of his rights through third parties, but only as he is subpoenaed to provide testimony or documentary evidence.

Respondents, Thompson, Bowman, Conklin and Ziemski suggest that they are denied protection when material is sought from third parties. The Supreme Court in O'Brien addressed those contentions directly:

It is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities. United States v. Miller, 425 U.S. 435, 443, 96 S.Ct. 1619, 1624, 48 L.Ed.2d 71 (1976). Relying on that principle, the court has held that a customer of a bank cannot challenge on Fourth Amendment grounds the admission into evidence in a criminal prosecution of financial records obtained by the Government from his

bank pursuant to allegedly defective subpoenas, despite the fact that he was given no notice of the subpoenas. Id., at 443, and n.5, 96 S.Ct. at 1624, and n.5. See also Donaldson v. United States, 400 U.S. 517, 522, 91 S.Ct. 534, 538, 27 L.3d.2d 580 (1971) (Internal Revenue summons directed to third party does not trench upon any interests protected by the Fourth Amendment). These rulings disable respondents from arguing that notice is subpoenas issued to third parties is necessary to allow a target to prevent an unconstitutional search or seizure of his papers. . . . Id. at 272b.

The Court also held,

Two considerations underlie our decision on this issue. First, administration of the notice requirement advocated by respondents would be highly burdensome for both the Commission and the courts. The most obvious difficulty would involve identification of the persons and organizations that should be considered "targets" of investigations. The SEC often undertakes investigations into suspicious securities transactions without any knowledge of which of the parties involved may have violated the law. To notify all potential wrongdoers in such a situation of the issuance of each subpoena would be virtually impossible. . . . The complexity of that task is apparent. Even in cases in which the commission could identify with reasonable ease the principal targets of its inquiry, another problem would arise. In such circumstances, a person not considered a target by the Commission could contend that he deserved that status and therefore should be given notice of subpoenas issued to others. To assess a claim of this sort, a district court would be obliged to conduct some kind of hearing to determine the scope and thrust of the ongoing investigation. Implementation of this new remedy would drain the resources of the judiciary as well as the Commission.

Second, the imposition of a notice requirement on the SEC would substantially increase the ability of persons who have something to hide to impede legitimate investigations by the Commission. . . . Id. at 81 L.Ed 626 30.

Respondents Thompson, Conklin, Bowman and Ziemski cite People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955) as standing for the proposition that a non-subpoenaed individual should be able to challenge a subpoena to another and have excluded evidence taken from third parties.

The "Martin" rule as it came to be known was the law in California but is not the law federally or in Utah. Further the Martin rule was abrogated by Proposition 8 in California and so recognized in People v. Daan, 207 Cal. Rptr. 228 (Cal. App., 1984).

The court held,

We hold section 28(d) abrogates California's vicarious exclusionary rule, the court correctly denied the motion to suppress the evidence seized from Bryan and affirm Daan's conviction and sentence." Id. at 233.

The Utah rule was expressed by this Court in State v. Purcell, Utah 580 P.2d 441 (1978) where it was held that a defendant had no standing to attack the search of a stolen automobile in which he had no possession or proprietary interest. Most recently in State v. Valdez, No. 18855, Sept. 11, 1984, this Court held,

We do not reach the question of whether this search was permissible under the state or federal constitution. Defendant concedes that he did not own the car or the attache case containing the evidence complained of, and he has failed to show that he had any legitimate expectation of privacy in the effects searched. Under long-established precedent, he lacks any standing to complain of the resulting search. E.g., State v. Purcell, Utah, 586 P.2d 441 (1978); Rakas v. Illinois, 439 U.S. 128 (1978).

Id. at p.2

Thus, respondent's argument falls on two separate though related grounds. First, in Utah the accused has no right to challenge evidence used against him obtained from a third party even if it were obtained illegally and second, assuming suppression was a proper remedy, a suppression motion in the appropriate court would be the appropriate remedy not wholesale invalidation of the Subpoena Powers Act.

C. EFFECTIVENESS OF PRE-COMPLIANCE REMEDY

Each of the Respondents allege that the pre-compliance remedy of a motion to quash a subpoena is ineffective because neither the subpoenas nor the Act gives notice to witnesses that such a remedy is available. The Act does, of course, require notice of the right to counsel and counsel is presumed to know that any subpoena issued by any authority is subject to a motion to quash. Utah Power and Light complains that some witnesses can't afford counsel or won't think it is necessary because the subpoena appears sanctioned by a court. Such complaints have no

place on the faacts of this case, where every witness ever subpoenaed was represented by counsel, and did challenge subpoenas, thus respondents are again attempting to assert the rights of others in circumstances unrelated to this case. However, their claims are also meritless.

It is axiomatic that any witness who voluntarily appears and testifies in compliance with a subpoena has waived any opportunity to challenge the subpoena. If the witness also chooses not to be represented, he has waived that right as well. Thus, any witness who voluntarily appears and testifies in complaince with a subpoena has waived any opportunity to challenge the subpoena. If the witness also chooses not to be represented, he has waived that right as well. Thus, any witness subpoenaed under the Act knows or should know of the existence of a remedy prior to complaince.

Appellant is aware of no setting in which subpoenas issued by courts or by any investigatory body are required to warn to subpoenaed individual of the availability of a challenge to the subpoena through a motion to quash. Yet such a remedy is inherently available in any process in which subpoenas are used. See e.g. Stanford Daily v. Zurcher, 353 F.Supp. 124 (N.D. Cal. 1972). Thus, respondents' argument that notice is required to make the remedy effective fails, especially in light of the procedures followed in this proceeding.

D. POTENTIAL FOR ABUSE AND PROCEDURAL SAFEGUARDS

Respondents insist that because the potential for abuse exists that the Act must fall. This reasoning makes no more sense than to urge the invalidation of search warrant or wire tapping statutes, where the potential for abuse also exists.

Respondents also claim that the Subpoena Powers Act is deficient in setting forth sufficient procedural safeguards. The applicable case in this regard is, as noted in the State's Appellant's brief, Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).

The standards set forth in Walling, supra, are clearly met by the Subpoena Powers Act. Those standards set forth in the State's brief are:

1. The investigation must be for an authorized purpose.
2. The subpoena must seek relevant information.
3. The subpoena must be specific in nature.

The Subpoena Powers Act by requiring judicial approval to commence the investigation and by the inherent right to challenge subpoenas as respondents did in this case, guarantees the Walling standards will be met. Respondents challenge the "relevance" portion of the standard claiming that relevance may not constitutionally be determined by the investigating agency at the outset. Walling, supra, specifically provides otherwise, holding,

We think, therefore, that the Courts of Appeals were correct in the view that Congress has authorized the Administrator, rather than the District Courts in the first instance, to determine the question of coverage in the preliminary investigation of possibly existing violations; in doing so to exercise his subpoena power for securing evidence upon that question, by seeking the production of petitioners' relevant books, records and papers; and, in case of refusal to obey his subpoena, issued according to the statute's authorization, to have the aid of the District Court in enforcing it. No constitutional provision forbids Congress to do this. On the contrary, its authority would seem clearly to be comprehended in the "necessary and proper" clause, as incidental to both its general legislative and its investigative powers. Id. at 214.

. . .
Persons from whom he seeks relevant information are not required to submit to his demand, if in any respect it is unreasonable or overreaches the authority Congress has given. To it they may make "appropriate defense" surrounded by every safeguard of judicial restraint. Id. at 217.

Thus the Supreme Court has held under circumstances very similar to those involved in this case that the powers like those granted under the Subpoena Powers Act are not unconstitutional and the constitutional rights guaranteed all citizens are sufficiently protected. Further, the final determination of relevance of a challenged subpoena is made by the court whenever a subpoena is challenged. Respondents' point misses the mark.

The Utah legislature, much like the Congress had in Walling has declared "as a matter of legislative determination,

that it is necessary to grant subpoena powers in aid of criminal investigations." § 77-22-1, U.C.A. Respondents suggest that the controlling cases in this setting are Hannah v. Larche, 363 U.S. 420, 4 L.Ed 2d 1307 (1960) and Jenkins v. McKeithen, 395 U.S. 411, 23 L.Ed 2d 404 (1969).

The Hannah case essentially sets forth the standard that investigatory proceedings, by an investigatory body, do not require that witnesses be informed of specific charges being investigated, identity of complainants or the right to cross examination. The court held that since the Civil Rights Commission, the investigating agency, did not adjudicate rights it need not be bound by adjudicatory procedures.

In Jenkins, supra, the Court held that the procedures of a Louisiana commission created to investigate criminal violations in the field of labor management violated due process. In Jenkins, one of the functions of the Commission was as follows:

The Commission is required to determine, in public findings, whether there is probable cause to believe violations of the criminal laws have occurred. . . .

The findings are to be a matter of public record. Id at 416, 417.

The Court further observed,

[E]verything in the Act points to the fact that it is concerned only with exposing violations of criminal laws by specific individuals. In short, the Commission very clearly exercises an accusatory function; it

is empowered to be used and allegedly is used to find named individuals guilty of violating the criminal laws of Louisiana and the United States and to brand them as criminals in public. Id. at 427-428. (emphasis added)

Comparing the Subpoena Powers Act to the statutory scheme disapproved in Jenkins, it is obvious that the Act under review by this Court, does not require or even allow "public findings" to be made by those investigating. Nor is the investigating agency be it the Attorney General or a county attorney required to make probable cause findings as to whether the violations of the criminal laws have occurred. Also, despite the urging of respondents the Subpoena Powers Act does not authorize nor may it be used in an accusatory manner. The Act mandates none of the things which the United States Supreme Court found objectionable in Jenkins, supra.

Respondents' reasoning on this point is extremely shallow. They state that prosecutors serve "solely an accusatory function" and since the Act allows accumulation of information necessary to accuse, the investigation must be accusatory. This argument misses the mark - no one's rights are adjudicated during investigation or even upon charging. When the charge is by information, a finding of probable cause by a neutral magistrate at a preliminary hearing provides protection for the accused.

The need for the power to investigate criminal activity is implicit in the statutory duties of the Attorney General and the States 29 county attorneys.

Section 67-5-1, U.C.A. provides:

It is the duty of the Attorney General:
(1) To attend the Supreme Court, and all

courts of the United States, a prosecute and defend all causes to which the state . . . is a party.

Section 17-18-1, U.C.A. provides:

The county attorney is a public prosecutor, and must: (1) Conduct on behalf of the state all prosecutions for public offenses committed within his county . . .

These duties cannot be properly discharged without investigation. To be sure that investigation should be within constitutional guidelines and with a view to constitutional protections. The Subpoena Powers Act permits investigation and fully protects the constitutional rights of the citizens of the state.

POINT II.

THE ACT GRANTING THE ATTORNEY GENERAL AND COUNTY ATTORNEY SUPOENA POWERS IN AID OF CRIMINAL INVESTIGATION IS NOT UNCONSTITUTIONALLY VAGUE OR OVERBROAD

Respondents Stott, Colby and Maxfield argue that the United States Supreme Court's vagueness analysis in Kolender v. Lawson, 461 U.S. 352, 75 L.Ed.2d 903, 103 S.Ct. 1855 (1983), should be applied to the provisions of Utah Code Ann. § 77-22-1, et seq., (Rev. 1953), as amended. The result they contend is that the statute fails constitutionally because it doesn't "establish minimum guidelines to govern law enforcement." (Stott, Colby, Maxfield, pp. 36-37). The argument is misguided. The statute challenged by Edward Lawson, in Kolender, supra, was § 647(e), California Penal Code:

Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor; . . .

(e) who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification. (Emphasis added.)

At issue in Kolender, supra, was whether the statute, like vagrancy statutes before it, see Papachristou v. Jacksonville, 405 U.S. 156 (1972), described with sufficient particularity what a suspect must do in order to satisfy the statute and avoid committing a crime. Kolender, 361. The Supreme Court found that it did not. Id., 361. In dicta, but still in reference to the California Criminal Statute before her, Justice O'Connor, observed, as the respondents correctly point out, that whenever a legislature, in a penal statute, fails to provide minimum guidelines to govern law enforcement in its application, the statute will fail for being vague. The application addressed refers to when to arrest a person for violating a criminal law. This is nothing more than what this court has already said about the vagueness standard against which statutes describing crimes in Utah must be measured. See State v. Packard, 250 P.2d 561 (Utah 1952); Bueller v. Stone, 553 P.2d 292 (Utah 1975); State v. Haag, 578 P.2d 873 (Utah 1978); State v. Harrison, 601 P.2d 922 (Utah 1979); State v. Owens, 638 P.2d 1182 (Utah 1981); State v. Fontana, 680 P.2d 1042 (Utah 1984).

Kolender and the Utah cases cited above do not address themselves to criminal investigations or procedure. They are not, therefore, of any use in interpreting Utah Code Ann. § 77-

22-1, et seq. Utah Code Ann. § 77-22-1, et seq. which does not forbid conduct. Neither does it penalize behavior. It is not, in short, a penal statute. It merely authorizes the use of a certain device in aid of criminal investigations. Generally speaking, it does little more than the search warrant provisions found in Utah Code Ann. § 77-23-1, et seq.; that is, it gives law enforcement a tool, with basic instructions on how it can be used. The vagueness test suggested by the respondents simply doesn't fit these circumstances.

The argument of Stott, Colby and Maxfield that Utah Code Ann. § 77-22-3 is vague, and thus void, because of its secrecy provisions, misses the point as well. Again, the statute is not a penal statute. The underlying reason for requiring a certain degree of specificity in a criminal statute doesn't exist insofar as Utah Code Ann. § 77-22-3 is concerned. Because § 77-22-3 does not prescribe conduct or penalize criminal behavior a vagueness analysis is inappropriate. A man of common intelligence, See State v. Packard, supra, has no need to conform his conduct to the requirements of § 77-22-3 to avoid committing a crime and being punished for his acts. Whether or not the provisions of that section are as clear as they might be or whether that section goes too far in accomplishing the Legislature's stated purpose in passing Utah Code Ann. § 77-22-1 et seq., that is, that;

as a matter of legislative determination
... [it is necessary] ... to provide a
method of keeping information gained from
investigations secret both to protect the
innocent and to prevent suspects from having
access to information prior to prosecution
.....

are not subjects of relevant inquiry insofar as vagueness is concerned.

The respondents fail to articulate any harm that comes from keeping secret what Utah Code Ann. § 77-22-3 allows a court to order be kept secret. Respondents are protected if they are ever charged with crimes detected as a result of any investigation in which section 77-22-1 et seq. was used to gather evidence, by discovery as allowed under Rule 16, Utah Rules of Criminal Procedure, and by the affect of disclosure required of the prosecution under Brady v. Maryland, 373 U.S. 83 (1963). These rights of respondents to discovery and disclosure like so many of the others they contend are not specifically guaranteed them by the language of the Act exist independent of any statute. The sanctions attended upon the prosecution's failure to comply with the rules of discovery and disclosure are obvious, specific, severe, and effective. They are well known to anyone who practices criminal law. Suppression of evidence or sanctions against its use and the possible dismissal of an information or an indictment if the abuse strikes at the heart of the defense are adequate remedies to correct error and keep prosecutors from engaging in prosecutorial misconduct.

The secrecy provisions of Utah Code Ann. § 77-22-3 do not pose a threat of any kind to the innocent and do not prevent one charged with a crime from discovery or having disclosed to him information covered by the same secrecy provisions when it is critical to him and his defense. Those same provisions do, however, prevent witness and evidence tampering and preserve the

integrity of an investigation so that culpable parties cannot collaborate or concoct stories to confuse, divert or misdirect an investigation. See e.g. SEC v. O'Brien, supra.

As far as the procedural safeguards associated with Utah Code Ann. § 77-22-2 are concerned, the statute need not restate the Fourth and Fifth amendments to the Constitution nor any of the Articles of the Utah Constitution, or the holding in Miranda, or any other provision or case establishing a right to which a criminal suspect or the target of an investigation is constitutionally entitled independent of any statute. Those rights can be protected adequately by a trial court on motions to suppress prior to trial.

Stott, Colby and Maxfield argue that the provisions of section 77-22-1, et seq. ought to be declared unconstitutional on their face. That position is merely a reiteration of arguments made in other parts of their brief. It builds on the error inherent in their analysis of Kolender; their lack of a thorough understanding of the real protections enjoyed by those to whom subpoenas authorized by section 77-22-1 et seq. might be directed; that is, the right to move to quash subpoenas because compliance would be unreasonable, or because the subpoenas exceed the scope of the authorizing order or cannot for some other valid reason compel production or appearance, and the right to seek suppression of the evidence obtained through the use of the subpoenas if the evidence obtained results in criminal charges and if the party asking the court to exclude evidence can show standing and harm. It also illustrates their myopic and naive view of the role of the criminal prosecutor.

Kolender, supra, as discussed above, has no legitimate place in the analysis of Utah Code Ann. § 77-22-1, et seq. The void for vagueness doctrine simply does not apply in the case of a statute which is not a penal statute.

The vehicle by which evidence is obtained, be it search warrant or investigative subpoena matters little when evidence is sought to be suppressed. Indeed evidence obtained by search warrant may be much more difficult to suppress than evidence collected by subpoena for the very reasons argued by the respondents to attempt to show that § 77-22-1, et seq. is defective. When a warrant issues, a magistrate has, upon sworn submission, already determined that the required probable cause for its issuance exists. Defendant clearly has no standing to object to the issuance or execution of a search warrant prior to issuance or execution. The resultant seizure of evidence pursuant to a warrant is rarely controvertible. Evidence gathered under subpoena, however, may be more vulnerable because determining whether compliance is reasonable can be done before any evidence is gathered. This process is, despite the respondents arguments, an adequate and effective deterrent to any possible abuse by the prosecution.

There is, simply, nothing about the Act that encourages a prosecutor to abuse it, given the protections described above. A prosecutor who seeks authorization from a court for the purpose of using the Subpoena Powers Act to conduct an investigation must keep in mind when making the showing required that his subsequent acts will be, as they were in this case, subject to close

scrutiny. Wild and irresponsible claims, reckless disregard for the truth, carelessly drafted affidavits filed in support of the request for authority to use the subpoenas authorized by the Act, will be exposed at some time in the process. They are likely to be exposed to the first reviewing judge asked to quash a subpoena. Every subpoena issued and every item of evidence gathered must be reviewed for whether it will withstand a defendant's effort to keep it from being used at trial. Statements taken from witness and targets must be taken with a view to their ultimate utility in any subsequent proceeding. Rights warnings and making sure that a witnesses rights are observed are the only means a prosecutor has of protecting his evidence so that it will have some value to him later on. All of this and more the prosecutor and investigator must do in order to avoid coming to the end of an investigation and finding themselves with information that might point to criminal conduct but which is worthless because it is inadmissible as evidence in a criminal trial. For a prosecutor or investigator to do less than observe the rule scrupulously would be contrary to his own interest and would be foolhardy.

For respondents to assert that prosecutors have a "sworn duty to obtain convictions and put people in jail" (Stott, Colby and Maxfield brief, p.24, 48) and to say that "in their zeal to fulfill this function all of these prosecutors cannot reasonably to apply [the Subpoena Powers Act] in a way that safeguards Constitutional rights" besides being statements that contradict themselves, betrays respondents' ignorance of the

prosecutor's function. It is a further example of their confused thinking when it comes to criminal matters.

In case after case prosecutors are reminded that their duty is not conviction but to see that justice is done. In Berger v. United States, 55 S.Ct. 629, 633 (1935) Justice Sutherland observed insofar as the United States Attorney's Office was concerned:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aid of which is that guilt shall escape or innocence suffer. He may prosecute with earnestness and vigor - indeed he should do so. But while he may strike hard blows he is not at liberty to strike foul ones.

Justice Sutherland's observation is no less true of a state prosecutor whether he be an employee of the Attorney General's Office or of a County Attorney.

The Code of Professional Responsibility, specifically Ethical Considerations 7-13, also reminds the public prosecutor of his duties and responsibilities:

The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice not merely to convict. This special duty exists because; (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to

prosecute; (3) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those effecting the public interest should be fair to all; and (4) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses the prosecutor has a responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence known to him that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.

Overreaching on the part of a prosecutor is counter to his own interest because it can result in severe sanctions, including the dismissal of his case.

When looked at in a true light the respondents' arguments built as they are on the notation that the possibility exists that the Subpoena Powers Act will be abused because of the dangerous proclivity of public prosecutors to violate the rights of citizens at will without penalty or fear of consequence, and on their belief that because the Act does not specifically spell out or incorporate the limitations on investigations and prosecutions that exist independent of the Act, it is somehow defective, are truly transparent.

B.

Respondents Utah Power and Light Company (UP&L) also argue that section 77-22-2 should be declared unconstitutionally vague. UP&L relies on Kolender, supra, and cites Smith v. Goguen, 415 U.S. 566 (1974) (involving Massachusetts General

Laws Annotated c. 264, section 5, a flag mis-use statute making it punishable by a fine of not less than ten nor more than one hundred dollars or by imprisonment for not more than one year, or both, for anyone to publically mutilate, trample upon, defame or treat contemptuously the flag of the United States.), and Grayned v. City of Rockford, 408 U.S. 104 (1972) (involving two Rockford, Illinois city ordinances. One, an anti-picketing ordinance, punished as disorderly conduct picketing or demonstrating on a public within 150 feet of a primary or secondary school in session. The other.. anti-noise ordinance, made it a crime for anyone to "willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace and good order" of a school or class in session), in support of the proposition that penal statutes are not favored constitutionally when they lack the specificity necessary to prevent those who enforce them from having too great a latitude in determining what is or isn't the conduct prohibited by the statute. It is obvious in every case that the Supreme Court was talking about substantive criminal statutes, not statutes involving criminal procedure or, as in this case, statutes giving the government nothing more than investigative devices to use in detecting crime. They have no application in analyzing the Subpoena Powers Act a statute that makes nothing criminal.

UP&L acknowledges the weakness in their argument by admitting the distinction between this case and the cases they rely on as authority.

UP&L's assertion that Utah Code Ann. § 77-22-2 gives prosecutors "carte blanche" to set their own standards for criminal procedure thus making it unconstitutionally vague, is not supported by the language of the Act, the history of its use or, common sense. The Subpoena Powers Act does contain procedural requirements that are spelled out clearly on the face of the statute; in order for the Attorney General or a county attorney to make use of the Acthe must first file an affidavit in the District Court in sufficient detail to allow that court to determine whether good cause exists to authorize the use of the subpoena power in furtherance of his investigation. Once authorized, the Attorney General or county attorney must still issue subpoenas to specific people for enumerated items or evidence. The District Court has inherent authority to grant equitable relief, that is to quash subpoenas if compliance therewith would be unreasonable. The court that authorizes the use of the subpoenaes under section 77-22-2 can, if it chooses, there being nothing in this statute to prevent it, monitor the investigation on its motion and at will.

The Court that authorizes the use of subpoenas under Section 77-22-2 can, if it chooses, there being nothing in the statute to prevent it, monitor the investigation on its own motion and at will. The Attorney General and County Attorneys do not, therefore, have the unlimited or unfettered control over the

process permitted by the Subpoena Powers Act, that Utah Power and Light would like the Court to think they have. There simply is no "carte blanche." This proceeding is ample evidence of that point. The Subpoena Powers Act is no more dangerous than the search warrant provisions of the Act. Every procedural safeguard available in the case of a search warrant both before and after its execution, including prior review by a magistrate, is available in the case of an investigative subpoena before anyone's rights are ever put in jeopardy. The review by a magistrate can be accomplished on a motion to quash any subpoena issued under authority of the Act. The statute and those who use it simply are not the boogie man respondents fear.

POINT III

THERE IS NO STRICT PROHIBITION AGAINST THE
USE OF EVIDENCE OBTAINED IN A CRIMINAL
INVESTIGATION IN A COMPANION CIVIL ACTION.

The prohibition against the automatic disclosure of matters occurring before a federal grand jury for use in civil actions that was announced by the United States Supreme Court in United States v. Sells Engineering, 103 S.Ct. 3133 (1983), and the prohibition against disclosing matters occurring before a federal grand jury solely for the purpose of determining a target's civil liability, United States v. Baggott, 103 S.Ct. 3164 (1983), is limited in application to matters arising under Rule 6, Federal Rules of Criminal Procedure, a provision which

has no counterpart in Utah criminal practice, and is restricted in any case to matters involving grand juries. Those cases have no application in the matter before this Court.

Respondent Utah Power and Light states that it is the general rule that "evidence gathered in a criminal investigation cannot be used for civil enforcement." (UP&L brief p. 47) Emery Mining assumes that proposition when it argues that the Subpoena Powers Act contains no standards to prohibit the improper use of evidence gathered in criminal investigations. (Emery brief pp. 23-24) Both rely on federal cases arising under Rule 6(a), Federal Rules of Criminal Procedure, as authority for that proposition.

Rule 6(e), Federal Rules of Criminal Procedure, is an elaborate set of restrictions and requirements associated with the recording of and disclosure of proceedings and matters occurring before federal grand juries. It has no counterpart in Utah law. Utah Code Ann. § 77-11-9(4), (5), (6) and Utah Code Ann. § 77-11-10 deal with the secrecy requirements imposed in Utah grand jury proceedings but in none of the detail contained in Rule 6(e). There is no provision for disclosure of matters occurring before grand juries on a showing of particularized need, for example.

The most recent and most important cases dealing with the use of matters occurring before a federal grand jury in civil

cases are United States v. Sells Engineerng, cited by Emery Mining, and its companion case, United States v. Baggott, supra. While Emery would have the court believe that Sells is authority for the proposition that evidence obtained by a federal grand jury may never be used in civil actions, neither Sells nor Baggott say anything of the sort. In Sells, supra, the Supreme Court simply forbade the automatic disclosure of grand jury materials allowed under Rule 6(e)(3)(A)(i). Disclosure to justice department civil division attorneys could be had, however, under Rule 6(e)(3)(C)(i), that is, when directed by a court preliminarily to or in connection with a judicial proceeding, on a showing of particularized need. Id., 3144-3149.

In Baggott, the Supreme Court merely held that an IRS tax audit was not preliminary to or in connection with a judicial proceeding within the meaning of Rule 6(e)(3)(C)(i) and therefore disclosure of grand jury materials to the IRS could not properly be ordered. Id., 3166-3169. Nowhere in the language of either case is there a statement of the general rule postulated by Utah Power and Light and Emery. Indeed, in addition to misinterpreting Sells and the other cases they cite on this point, respondents miss the critical significance of these cases: they involve grand juries, federal grand juries specifically. None of the cases cited control in any way the conduct of affairs under the Subpoena Powes Act.

Utah Power and Light's statement that "it is beyond dispute that there are extraordinary instances in which limited information from a criminal investigation properly may be authorized to be used in a civil action," (UP&L brief, p. 48) goes much too far. It goes much further than Sells, supra, or Baggott, supra, permit. Nothing in either of the cases applies to criminal investigations generally as Utah Power and Light's statement boldly implies. Only when a federal grand jury is involved does the structure described by Rule 6(e) and interpreted by Sells, supra, and Baggott, supra, and the other federal cases cited by respondents, have any meaning. Evidence obtained by federal criminal investigators independent of a grand jury even if presented to a grand jury after it is collected, can be disclosed and used in civil cases without consequences. See In re Grand Jury Matter (Garden Court Nursing Home, Inc.), 697 F.2d 511, 516 (3d Cir. 1982) (Garth, J., concurring) ("when testimony or data is sought for its own sake--for its intrinsic value in furtherance of a lawful investigation--rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information is revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury."); United States v. Interstate Dress Carriers, Inc., 280 F.2d 51, 54 (2d Cir. 1960); SEC v. Dresser Industries, Inc., 628 F.2d 1368, 1383 (D.C. Cir. 1980);

In re Grand Jury Investigation (New Jersey State Commission of Investigation), 630 F.2d 996, 1000 (3d Cir. 1980), cert. den. 449 U.S. 1081 (1981); United States v. Stanford, 589 F.2d 285, 291 (7th Cir. 1978), cert. den. 440 U.S. 983 (1979); In re Grand Jury Matter (Catania), 682 F.2d 61, 64 (3d Cir. 1982); In re Grand Jury Investigation (Lance), 610 F.2d 202 (5th Cir. 1980); In re Special April 1977 Grand Jury, 587 F.2d 889 (7th Cir. 1978); SEC v. Everest Management Corporation, 87 F.R.D. 100, 107 (S.D.N.Y. 1980).

Furthermore, Utah Power and Light's statement that:

. . . the use of such evidence [evidence obtained in a criminal investigation] is permitted only after a showing of particularized need which necessarily means the practice is not favored, . . . (UP&L brief, pp. 48-49).

is meaningless unless it refers solely to the disclosure of matter occurring before a grand jury as authorized by Rule 6(e), Federal Rules of Criminal Procedure.

Certainly, as discussed above, disclosure of evidence obtained outside the grand jury for use in any way seen fit by the government, including civilly, is not forbidden or unusual or disfavored. The statement has no origin in state law. It has no meaning insofar as Utah grand juries are concerned. None of Utah's grand jury statutes say anything about disclosure on particularized need. It is most significant that the statement has no application at all when it comes to matter obtained or

gathered as a result of a state criminal investigation conducted without the aid of a grand jury. While the secrecy provisions of the Subpoena Powers Act have some of the trappings associated with grand juries, an investigation conducted using the devices allowed by the Act, is, simply stated, not a grand jury investigation or a grand jury proceeding. The secrecy that can be ordered by a court for the purposes set out in the Act is not the secrecy required of grand jury proceedings in Utah. The State contends that any order imposed by a district court pursuant to § 77-22-2(3) can be lifted by that court for any reason not forbidden by the statute, including so that evidence obtained in the criminal investigation might be used in civil proceedings.

Analogizing the conduct of affairs under the Act to the conduct of a grand jury investigation is illustrative, not controlling. It is helpful for this Court to look at cases and statutes dealing with the rights of targets before state grand juries or before federal grand juries for guidance in enumerating what warnings or protections must be afforded those subpoenaed or required to produce evidence pursuant to the Subpoena Powers Act. Similarly, cases dealing with the scope of grand jury criminal investigations are illustrative of how far investigators might go with the tools the Act gives them. The Court is not, however, bound by any rule or statute governing the grand jury when interpreting Section 77-22-1, et seq.

Calling the statute Utah's "Mini Grand Jury Act" was convenient for the Court in KUTV v. Conder, 635 P.2d 412 (1981) but was mistaken. The Subpoena Powers Act does not create a mini grand jury in any sense of the word. It merely authorizes the use of subpoenas to compel production and testimony in aid of criminal investigations. The act should not be tied to the statutes governing Utah grand juries simply because at one point in time a court felt it useful to tag it with the misnomer, "Mini Grand Jury Act."

The evidence obtained by use of the subpoenas authorized by the Subpoena Powers Act, is not for any reason articulated by any of the respondents foreclosed from use in civil proceedings brought before, contemporaneous with, or after the filing of criminal charges in this case, regardless of whether the same attorneys are involved in both the civil and criminal cases. If, perhaps, the cases had been brought in federal court and the evidence used to obtain an indictment from a grand jury was developed using the grand jury, the propriety of using the same evidence in a companion civil case or the wisdom of employing the same attorneys to do both the civil and criminal cases would be at issue under the rules of Sells, supra, and Baggott, supra, but that is not the case. The law governing the federal grand jury does not apply in this case. State law does not prohibit what has been done. No reason that can be found in

state or federal constitutional law prohibits what was done. Respondents simply have no authority for their position that the act is either defective in some way because it does not forbid the use of evidence obtained by subpoena under the Act in companion civil cases or because the act was abused in some way because evidence that was subsequently used in a companion civil case came into the hands of criminal investigators involved in a criminal investigation through.

POINT IV

THOSE SUBPOENAED UNDER THE AUTHORITY GRANTED THE ATTORNEY GENERAL AND COUNTY ATTORNEYS PURSUANT TO THE SUBPOENA POWERS ACT NEED NOT BE AFFORDED THE SAME PROTECTION ALLOWED THOSE SUBPOENAED TO APPEAR BEFORE A UTAH GRAND JURY.

A. The State contends that the Subpoena Powers Act is not a grand jury statute. It provides the Attorney General and the County Attorneys with an investigative tool; the investigative subpoena. There is no greater reason to require that witnesses subpoenaed under the Act be afforded anything more in terms of constitutional protection than other witnesses involved in a criminal matter or suspects or targets of ordinary criminal investigations. The magic attributed to the grand jury by respondents does not exist in reality. The grand jury is not the "buffer" respondents would like this court to believe it is. Practically speaking, the target of a criminal investigation conducted in part as authorized by the Subpoena Powers Act, who

becomes a defendant in a criminal information filed on evidence developed through the use of subpoenas obtained under Section 77-22-2 is probably better protected by the preliminary examination required by Rule 7, Utah Rules of Criminal Procedure, than he would ever be as a defendant under indictment returned by a state grand jury. Respondents fail to acknowledge that following a grand jury indictment, there is no intervening protection for an accused before trial.

The logical end of respondents' arguments about the adequacy of protection afforded a target of an investigation under the Subpoena Powers Act to compel appearance and the production of documents and other evidence is that trial by information would be improper and forbidden in any case because the protection afforded those charged by information and those indicted is not precisely the same. Everyone would have to be tried on indictment. Grand juries would be required in every case. That they reach this conclusion is not surprising, since they misinterpret the Subpoena Powers Act to allow an "accusatory" process.

We know, however, that prosecution by information in Utah is constitutional. Maxwell v. Dow, 19 Utah 495, 57 P. 412, affirmed 176 U.S. 581, 44 L.Ed. 597, 20 S.Ct. 448 (1900). There is no due process or equal protection problem in trial by information. There is no adequate reason articulated by

respondents that investigation conducted with the help of investigative subpoenas rather than should fare differently in constitutional analysis than investigation conducted by a grand jury pursuant to its subpoena power.

The need to warn one that he is a target of an investigation has roots not so much in grand jury practice, but in the notions of voluntariness, knowledge and the intelligent exercise of one's constitutional rights in the face of the government's efforts to detect and punish crime. Concededly, these warnings must be given when required in order for the evidence obtained thereby to be of any value at all in subsequent proceedings. They would be required, of course, whenever the issue of the voluntary, intelligent or knowing waiver of a constitutionally protected right was at stake. Warning one that he is a target of an investigation is of some benefit in that regard. Advising a witness of his right to have counsel with him is also helpful. Disclosing to the target the nature of the charges being investigated might also be necessary to insure that voluntary, intelligent and knowing waivers occurred. Whether full blown Miranda warnings ought to be given or whether anything more or less would be acceptable ought to depend on the circumstances in each case. For those who are not targets of an investigation, warnings are essentially meaningless. For those who are targets at the time they produce the evidence or are

compelled to provide statements, the warnings guarantee that they are on notice of what is at stake for them. For those who become targets after having produced protected or privileged information whether disclosures or admissions or other vital and protected or privileged material were made or delivered up voluntarily, intelligently or without adequate notice and knowledge under the circumstances can be determined on motions to suppress the evidence if the target becomes a defendant in a criminal proceeding in which the prosecution seeks to use the items and information furnished as evidence against the defendant.

There is simply no compelling reason and no reason articulated by the respondents for carving out special rules relating to warnings or targets insofar as the Subpoena Powers Act is concerned. Again, the analogy of the Act to a Utah State grand jury need not be taken to absurd extremes.

The differences between the grand jury process and the process of investigation under the Subpoena Powers Act also shows the fallacy in Emery's argument that the Act violates separation of powers principles. Besides the fact that this argument was never raised in the district court, the Act does not convert the prosecutor into an extension of the functions of the judicial branch of government. The Act is simply a tool to allow investigation of crime, following which the prosecutor may decide to file criminal charges - both of which are proper functions of the executive branch of government.

POINT V.

THIS COURT CAN REQUIRE THAT THE SUBPOENA POWERS ACT BE USED IN A MANNER CONSISTENT WITH RIGHTS THAT EXIST INDEPENDENT OF THE STATUTE.

Colby, Stott and Maxfield contend that the Act is defective because its specific language does not require investigators to warn or advise witnesses or targets of rights already granted them or already guaranteed them under the Constitution as interpreted by the courts. In order to accept their argument, one must concede that a statute, particularly one like the Act, has to incorporate in its language all of the protection already available to suspects or witnesses in ordinary criminal investigations under both the state and federal constitutions and cases like Miranda, Escobedo, and the like. Respondents cite no authority for that proposition. Indeed, to require that to occur before a statute can be found adequate would not only be unnecessary but would involve an incredible waste of time and effort. The simple answer, is to allow the Act to be read side by side with Miranda and every other case or statute that might apply as the circumstances warrant.

No authority cited by any of the respondents requires that a statute incorporate in its language every right one might exercise or be entitled to in relation to a statute's use or application.

Nothing in any of the respondents' briefs suggests that this court lacks the power to interpret the Act in light of rights which exist independent of the statute. The respondents, in fact, ask the Court on nearly every page of their briefs to read the Act in light of established constitutional principles and individual rights. This Court can, the State contends, assure constitutional application of the Subpoena Powers Act by instructing those who will be using its provisions on the rights and privileges which must be protected or observed in its application. By doing so, it is not adding what the legislature left out or redrafting the statute in any way. A reading of the statute reveals no prohibition against advising one that he is a target of an investigation. Though the statute does not require same, in specific language, none of the authorities cited by the respondents, none of their arguments, and none of their reasoning suggests that the Court could not determine that in order for anyone who is a target of an investigation which uses subpoenas obtained under Section 77-22-2 to compel testimony or the production of evidence, to act voluntarily, knowingly or intelligently he must be given notice that he is a target and be advised of what other rights the court believes are necessary for that to happen. Nothing prohibits the court from suggesting sanctions if the warnings are not given just like the Supreme Court did in the case of custodial police interrogation in

Miranda. Nothing is being added to the statute. The Subpoena Powers Act is not being rewritten, nor is its language being interpreted. The statute is simply being read by the court in light of and in the context of the already existing body of criminal and constitutional law. That is precisely the function of this Court. Greaves v. State, 528 P.2d 805 (Utah, 1974), cited by Colby, Stott and Maxfield, is precisely on point: the Subpoena Powers Act should not be determined unconstitutional because a sensible interpretation of in the context suggested does allow it some practical effect. Likewise, the Act is entitled to the presumption of validity precisely because it can be read as suggested.

POINT VI

THE SUBPOENA POWERS ACT DOES NOT VIOLATE THE "ONE SUBJECT" PROVISION OF THE UTAH CONSTITUTION.

Respondents Maxfield, Stott, and Colby through their counsel Donald B. Holbrook, have suggested that the Subpoena Powers Act violates Article VI, Section 22 of the Utah Constitution. This section provides in part: ". . . Except general appropriation bills and bills for the codification and general revision of laws, no bill shall be passed containing more than one subject. . . ."

Respondents fail to point to any portion of the Act which they claim violates the foregoing provision or even to explain why the cited Constitutional provision is applicable.

Further, Judge Bunnell's ruling holding the Act unconstitutional makes absolutely no reference to the Act being defective for the reasons which respondents, Maxfield, Stott and Colby suggest. Neither these respondents nor any others ever suggested that this constitutional provision had any application to the Subpoena Powers Act.

CONCLUSION

Respondents simply do not want to be investigated regardless of the means employed. They fear the traditional means of challenging criminal evidence, that is, the suppression hearing, even though available to them if or when they are charged with criminal conduct, because they cannot articulate, indeed have not articulated in any of their pleadings or arguments, in any but the most sweeping and general terms, how they are improperly affected by the use of means provided under the Act or by the information or evidence sought pursuant to the subpoenas. Likewise, they have not and cannot articulate for this Court why the ordinary means of protecting people from investigative or prosecutorial abuse, that is, the quashal of subpoenas, the exclusion of evidence, the dismissal of an indictment or information because of prosecutorial abuse, or other sanctions based on the abuse of the power of the prosecutor, will not work if they succeed in showing that such abuse has occurred in this or in any other case. Because they

are unable to do any of this, they obfuscate and confuse the issues with irrelevant analysis. As discussed in this response, the simple analysis of the Subpoena Powers Act is the best and the most appropriate in this case. It is not and never was designed to be a grand jury statute. The requirements imposed on grand jury proceedings do not apply. The protection of those identified as targets of criminal investigations which use the tools given them by the Act do not have their origin and are not grounded in the rights afforded those who are witnesses before or targets of a grand jury investigation but are founded in the basic principles of due process, that is to say, those who are identified as targets of investigations before they can knowingly, voluntarily and intelligently waive any right against self incrimination, or waive any right to have counsel present or waive any other constitutionally protected right must be advised of their target status and given whatever other information under the circumstances is necessary to put them on adequate notice.

The State concedes that that must be done when appropriate. It is not, however, in the State's view, appropriate in every case of every witness subpoenaed pursuant to Section 77-22-1. To require that would destroy the effectiveness of the investigation, would be burdensome, would be unnecessary, and would serve absolutely no purpose. To disclose anything more than the charges or the nature of the charges being

investigated would be an unreasonable imposition on those conducting the investigation and would jeopardize the integrity of the investigation by permitting those who are so inclined to tamper with evidence, obstruct justice, or collaborate on stories to confuse, misdirect or divert the attention of an ongoing investigation. The secrecy provisions provided by the legislature in 77-22-2(3) are designed precisely to avoid that result, and as well, to protect those who are innocent of criminal wrongdoing from public aprobrium.

The remedies available in case of abuse are plentiful and are adequate to deal with all of the problems identified by respondents in their briefs.

The simple fact as far as is that the Act does not suffer from constitutional or legal deficiencies. It, like any other statute, can and probably will at some time in the future be applied in a way that might violate someone's rights. The fact that it might be abused or that it will be abused or that it has been abused or that the authority granted pursuant to it has been abused does not logically, legally or any other way require a conclusion that the statute is legally or constitutionally defective. What it does do is require an analysis of the remedies available to correct abuse. As stated, those remedies as exist are adequate. That can be taken up by criminal defendants charged with criminal offenses in hearings, the

purpose of which is to examine specific evidence and determine whether it should be suppressed because a showing is made that rights were violated that should have been observed or protected.

DATED this 6th day of March, 1985.

DAVID L. WILKINSON
Attorney General
PAUL M. WARNER
Assistant Attorney General
Chief, Litigation Division

Robert N. Parrish
ROBERT N. PARRISH
Assistant Attorney General
Litigation Division

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the
foregoing ^{REPLY} BRIEF OF APPELLANT was mailed postage prepaid this
6th day of March, 1985, to the following:

Donald B. Holbrook, Esq.
Elizabeth M. Haslam, Esq.
JONES, WALDO, HOLBROOK & McDONOUGH
1500 First Interstate Place
170 South Main Street
Salt Lake City, Utah 84101

F. Robert Reeder, Esq.
Francis M. Wikstrom, Esq.
Michael L. Larsen, Esq.
PARSONS, BEHLE & LATIMER
185 South State Street
Suite 700
P.O. Box 11898
Salt Lake City, Utah 84147

Stephen B. Nebeker
P.O. Box 3850
Salt Lake City, Utah 84110-3850

Courtesy copies of the foregoing are provided to the following
with the understanding that the State of Utah contends that
these counsel represent individuals not parties to this case on
appeal.

Sumner J. Hatch, Esq.
HATCH & McCAUGHEY
72 East 400 South, Suite 330
Salt Lake City, Utah 84110

Max D. Wheeler, Esq.
SNOW, CHRISTENSEN & MARTINEAU
P.O. Box 3000
Salt Lake City, Utah 84110

Robert N. Parnish