IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. DENNY D. GHIM, Defendant-Appellant, Petitioner on Review.	Washington County Circuit Court No. C111491CR CA A152065 SC S063021

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
On Appeal from the Judgment
of the Circuit Court for Washington County
Honorable GAYLE NACHTIGAL, Judge

Opinion Filed: December 10, 2014
Author of Opinion: Presiding Judge Sercombe
Concurring Judges: Judge Hadlock and Judge pro tempore Mooney

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INTRODUCTION

As part of an investigation into an apparent fraud scheme involving defendant's wife, state investigators—and, subsequently, the prosecutor in this case—subpoenaed records from Wells Fargo and Bank of America. The banks responded by providing records that involved at least one account that defendant shared with his wife.

Significantly, the records that the banks disclosed (1) were created and maintained by the banks for their own business purposes; and (2) contained information that defendant intended the banks to have. Information in those records led to additional evidence that ultimately was used to convict defendant of aggravated first-degree theft (for the theft of $50,000 or more) and of first-degree theft (for the theft of $5,000 or more).

The legal issue in this case is whether Article I, section 9, of the Oregon Constitution required the state to use a search warrant, or some recognized exception to the warrant requirement, to obtain the records that the banks provided. The answer is "no." Because the records at issue were created, maintained, and possessed by the banks, and because the information within them was information that defendant intentionally disclosed to the banks, defendant had no constitutionally protected "privacy interest" in those records.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

Question presented

Does a bank customer have a protected "privacy interest"—for purposes of Article I, section 9, of the Oregon Constitution—in bank records that document his or her use of the bank's services? More particularly, if the state uses a subpoena to obtain records of that nature from a bank, does it violate any Article I, section 9, right of the customer?

Proposed rule of law

If a bank creates, maintains, and possesses records that document a customer's use of the bank's services; if it does so for its own purposes; and if the records contain information that the customer intentionally disclosed to the bank, the state does not violate the customer's Article I, section 9 rights by using a subpoena to obtain those records from the bank.

SUMMARY OF ARGUMENT

Article I, section 9, gives a person a privacy right in "papers" or "effects" that he or she entrusts to a third party. Hence, if a person places his or her will in a bank's safe-deposit box for safekeeping, the person has a protected privacy interest in that will; to seize the will, the state would have to obtain a search warrant or satisfy an exception to the warrant requirement.

The records at issue here, however, are not "papers" or "effects" that defendant possessed and then entrusted to his banks. Instead, the records in

question were generated by the banks themselves for their own business purposes. Moreover, the pertinent information within those records was information that defendant had intentionally disclosed to his banks; when defendant undertook the actions that the bank records document, he *knew* that the bank would generate records that recorded his actions. Because the banks generated and possessed the records, because they did so for their own business purposes, and because the records contain information that defendant intended the banks to have, defendant had no constitutionally protected privacy interest in them. The trial court correctly reached that conclusion and correctly concluded that the state did not need to use a search warrant to obtain the records from defendant's banks.

Article I, section 9's text supports that conclusion. Although the provision refers to the people's right "to be secure in their * * * papers, and effects," it articulates no similar right with respect to *information* that a person has intentionally disclosed to a third party, or with respect to papers or effects that a third party has itself generated, maintained, and possessed.

Social and legal norms further demonstrate that defendant had no privacy interest in the records that the banks disclosed in response to the state's subpoenas. It is generally understood, accepted, and expected that banking is a highly regulated industry; that society has a legitimate interest in ensuring that banks are not used by their customers for criminal purposes; and that banks will

disclose their records if the records are subpoenaed as part of a criminal investigation. Although defendants historically have been entitled to prevent certain kinds of communications to third parties from being presented to a jury (communications to one's attorney, priest, or spouse, for instance), no similar tradition has protected communications to one's bank.

Ultimately, the circumstances here are analogous to circumstances in which a defendant visits his neighbor and discloses "private" or incriminating information about himself. If the neighbor then makes a diary entry recounting what the defendant disclosed, and if the state subsequently subpoenas the diary, the defendant would possess no constitutionally protected privacy interest in the neighbor's diary (or in the neighbor's testimony about defendant's statement), even if the neighbor had promised to keep the information secret. The defendant would have no constitutional basis to demand that the state use a search warrant to obtain the diary from the neighbor. A similar result applies here.

Although the Oregon Legislature certainly would be free to require the state to use a search warrant—or to otherwise satisfy a probable-cause requirement—to obtain bank records in cases such as this one, it has not done so, and Article I, section 9 embodies no such requirement. Defendant had no constitutionally protected privacy interest in the bank records at issue.

ARGUMENT

The issue in this case is whether Article I, section 9, of the Oregon Constitution—which provides that "[n]o law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure"[1]—required the state to use a search warrant to obtain the bank records at issue. Those records included account statements that documented deposit and debit entries for at least two Bank of America accounts that defendant shared with his wife, Ghim, along with Bank of America and Wells Fargo account statements associated with other accounts in defendant's wife's name. (*See* Exhibit 134, containing the subpoena directed to Bank of America, along with the records produced in response; Exhibit 133, containing the subpoena directed to Wells Fargo, along with the records produced in response). The records also included checks, or copies of checks, drawn on those various accounts. (*See, e.g.*, Exhibit 134, containing subpoena asking Bank of America for checks or copies negotiated against the specified

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[1] In full, the provision states:

> No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

Or Const, Art I, § 9.

accounts; Exhibit 134, letter from Bank of America stating that "[e]nclosed are the documented requested in the [s]ubpoena").

Authorities sought those records after Marvin Von Renchler told Ruth Johnson, of the Oregon Department of Consumer and Business Services (DCBS), that he had "concerns about an investment that he had made" with defendant's wife. (Tr 482; *see also* Exhibit 105, police report noting Von Renchler's statement that Ghim convinced him "to invest $16,500 in the short sale of a home with a promise of a $50,000 to $70,000 return").[2] Von Renchler said that he and his wife "had made an investment and * * * were supposed to be getting a payment back." (Tr 483). Instead, they received a Wells Fargo check from defendant's wife that subsequently was returned as "NSF" and denoted as "not any good." (Tr 483, 487). DCBS then subpoenaed records from bank accounts associated with Ghim at Bank of America and Wells Fargo. (Tr 484-87). Because Ghim and defendant "were both signers" on at least one of those accounts, the banks provided records that pertained to defendant as well. (Tr 487-88).

[2] Ruth Johnson testified after defendant's bench trial began in this case, but she was called as part of the litigation over whether the subpoenaed bank records should be suppressed. (*See* Tr 477-81, discussing need to place Johnson's testimony on the record).

The state subsequently commenced a criminal prosecution against defendant and his wife. Defendant moved to suppress evidence of the bank records and, after the trial court determined that the DCBS subpoenas failed to satisfy the service requirements in ORS 192.596 (Tr 442-45), the prosecutor re-subpoenaed—and received—the same records under ORS 136.583. (Tr 520; Exhibits 133 and 134, containing subpoenas; *see also* Pet Br 6, acknowledging that state obtained the "same records" after issuing subpoenas under ORS 136.583).[3] The trial court correctly concluded that defendant possessed no constitutionally protected "privacy interest" in the records, and that Article I, section 9 did not require the state to use a search warrant. To fully understand how and why that conclusion is correct, it first is important to understand who

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[3] ORS 192.596(1) provides that "[a] financial institution may disclose financial records of a customer to a state or local agency, and a state or local agency may request and receive such records, pursuant to a lawful summons or subpoena, served upon the financial institution, as provided in this section * * * ." ORS 136.583(1) states that "criminal process authorizing or commanding the seizure of production of papers, documents, records or other things may be issued to a recipient," and ORS 136.583(11)(d) defines "criminal process" as "a subpoena, search warrant or other court order."

Defendant suggests that the state's failure to satisfy the subpoena requirements in ORS chapter 192 would have rendered any "search" that occurred, in obtaining the records at issue, "unreasonable" for purposes of Article I, section 9. (Pet Br 32-37). Defendant does not suggest, however, that the failure to comply with those statutory requirements provided an independent basis for suppressing evidence contained in or derived from those records.

created, maintained, and possessed the records at issue, and to understand the purposes that those records served.

A. The records at issue were generated, maintained, and possessed by defendant's banks for their own business purposes, and contained information that defendant intentionally provided to them.

Wells Fargo and Bank of America generated, maintained, and possessed the records in question, and they did so for their own business purposes; as a result, the records qualify as the *banks'* records. Further, the records document the manner in which bank services were used by defendant, and they contain information that defendant had intentionally disclosed to them.

1. The records were generated, maintained, and possessed by the banks as part of their "regularly conducted business activities," and they document defendant's use of their services.

The records in question were records that the banks generated, maintained, and possessed. Exhibit 133, for example, contains records that the state subpoenaed from Wells Fargo, along with a cover sheet from Wells Fargo entitled "Declaration for Records of Regularly Conducted Business Activity." (Exhibit 133, Declaration at 1; bold and capitals omitted). In Wells Fargo's declaration, it stated that the disclosed records were "[m]ade by regularly conducted activity as a regular practice, by the personnel of the business"; were "[m]ade at or near the time of the occurrence, condition or event"; and were "[k]ept in the course of regularly conducted activity." (*Id.*). "The enclosed

records are true copies of bank records in the custodian's possession * * * ." (*Id.*). The provided records include "monthly statement[s]" that were "prepared immediately after the closing date of the monthly account cycle as indicated on the statement," along with other records that "were prepared or received at or near the time of their creation" and that "were stored by the Bank in the ordinary course of business." (*Id.*).

Although Bank of America did not provide a similarly detailed declaration, defendant acknowledges that the records from both banks (which were admitted as Exhibits 133 and 134) were generated, maintained, and possessed by them. (*See also* Tr 471, containing trial court's findings that the records at issue "are the bank's records" and are "maintained by the bank about the business conducted at the banks"; Pet Br 8, conceding that "the bank is creator and a custodian of the records"). It also is undisputed that the records document defendant's use of the banks' services.

2. The banks generated the records for their own business purposes.

The banks generated the records as a regular part of their own business activities. Moreover, generating and maintaining those records served the banks' interests. Doing so enabled the banks to protect against potential claims that they had not correctly credited defendant's accounts, enabled them to determine whether they needed to impose any fees or penalties on defendant

with respect to his accounts, and assisted them in quickly and accurately determining how much money they possessed that could then be loaned elsewhere—which is the main way that banks make money. As the United States Supreme Court has observed, banks "are not conscripted neutrals in transactions involving negotiable instruments, but parties to the instruments with a substantial stake in their continued availability and acceptance." *California Bankers Association v. Schultz*, 416 US 21, 94 S Ct 1494, 39 L Ed 2d 812 (1974). With respect to transactions that banks are required to record or report under federal law, for example, "[t]he bank is not a mere stranger or bystander," "[t]he bank is itself a party," it "earns portions of its income from conducting such transactions, and [prior to legislatively created record-keeping requirements] may have kept records of similar transactions on a voluntary basis for its own purposes." *Id.*, 416 US at 66.

It also is worth noting that a bank customer's interests occasionally will conflict with the bank's interests. *See* ORS 79.0342 (describing a particular action that a bank may take, but noting that it is not required to so "even if its customer so requests or directs"); ORS 74.4010 (authorizing banks to "charge against the account of a customer an item that is properly payable from that account even though the charge creates an overdraft"). In addition, the banks undoubtedly generated and maintained at least some of the records at issue to comply with federal regulations that require banks to keep certain records, and

to thus protect their own interests in that way as well. *See California Bankers Association*, 416 US at 30 (discussing regulations "requir[ing] financial institutions to * * * make microfilm copies of certain checks drawn on them, and to keep records of certain other items"); 31 CFR § 1020.410(c)(3)-(4) (requiring banks to retain the original or a copy of certain checks and debits exceeding $100). By generating and maintaining the records in question, the banks furthered their own business and legal interests.

3. It is undisputed that the records contained information that defendant intended the banks to obtain and possess.

Finally, defendant does not dispute that he intended and understood that the banks would obtain the information contained in the records. He also does not dispute knowing that the banks would make and maintain records documenting the financial transactions at issue. (*See* Pet Br 8, acknowledging that defendant "shared * * * information with the bank to allow the bank to create and maintain those records").

In sum, the records at issue are the *banks'* records—that is, the banks created, maintained, and possessed those records for their own purposes. Further, in documenting defendant's use of the banks' services, the records recount information that defendant intentionally disclosed to them; put slightly differently, they recount information that defendant had intentionally disclosed to a third party. As discussed below, those facts support the conclusion that,

when the banks disclosed the records in response to the state's subpoenas, defendant's Article I, section 9 rights were not implicated.

B. Text, pertinent case law, and history show that defendant had no constitutionally protected privacy interest in the bank records at issue.

In construing and applying Article I, section 9, this court's "goal is to determine the meaning of the constitutional wording, informed by general principles that the [Oregon Constitution's] framers would have understood were being advanced by the adoption of the constitution." *State v. Mills*, 354 Or 350, 354, 312 P3d 515 (2013). When construing original constitutional provisions, the court examines the provision's "specific wording, the case law surrounding it, and the historical circumstances that led to its creation." *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992). Here, those factors show that disclosure of the records at issue did not implicate any right that defendant possessed under Article I, section 9, and that the provision provided no basis to suppress evidence found in, or derived from, those records.

1. Article I, section 9's text does not expressly declare a protected interest in bank records or in information disclosed to a third party.

Article I, section 9, provides that "[n]o law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure."

By giving a person a right to be secure in their "persons, houses, papers, and effects," the provision's text declares a person's right to be secure with respect to their body, residence, and tangible property. *See Bouvier's Law Dictionary* at 351 (First American Edition 1839) (defining "effects" by stating that "[t]his word used *simpliciter* is equivalent to *property* or *worldly substance*" and that, "when it is preceded and connected with words of a narrower import," it is "confined to species of property *ejusdem generis* with those previously described"; emphasis in original); *Webster's Third New Int'l Dictionary* at 724 (unabridged ed 1993) (defining "effect," in part, by stating "**effects** *pl*: movable property: GOODS"; bold in original). The text thereby supports a conclusion that Article I, section 9, recognizes a privacy right in papers and effects that a person entrusts to a third party. In other words, if a person places his or her will in a bank's safe-deposit box, the person has a protected privacy interest in that will. The state, to seize the will, would have to use a search warrant (or satisfy an exception to the warrant requirement). *See State v. Tanner*, 304 Or 312, 314, 323, 745 P2d 757 (1987) (after the defendant gave stolen videotapes and equipment to Charles and Lori Best as collateral for a loan, he retained a constitutionally protected privacy interest in the stolen property, and a warrantless police search of the Best residence thus invaded his rights).

Nothing in Article I, section 9's text, however, expressly grants a right with respect to *information* that a person has intentionally disclosed to a third party. Further, nothing in the provision's text expressly grants a person a privacy right with respect to papers that a *third party* created for the purpose of documenting information that the person had disclosed to the third party.

The records at issue were not "papers" or "effects" that defendant possessed and then entrusted to his banks. Instead, the records were created, maintained, and possessed by his banks. Nothing in Article I, section 9's text expressly declares that a criminal defendant possesses a protected interest in such records.

2. Case law shows that defendant had no constitutionally protected privacy interest in the bank records at issue.

The requisite methodology also requires this court to examine "the case law surrounding" the constitutional provision at issue. *Priest* 314 Or at 415-16. This court's case law has explained that Article I, section 9, "applies only when government officials engage in a 'search' or a 'seizure.'" *State v. Howard/Dawson*, 342 Or 635, 639, 157 P3d 1189 (2007). "A 'search' occurs when a person's privacy interests are invaded." *State v. Owens*, 302 Or 196, 206, 729 P2d 524 (1986). The pertinent inquiry is whether the state's conduct invaded "privacy to which [the defendant] has a right." *State v. Campbell*, 306

Or 157, 164, 759 P2d 1040 (1988 306 Or at 164 (italics omitted). If not, no "search" occurs, and Article I, section 9 is not implicated.

Case law further explains that, to assess whether government conduct implicated a constitutionally protected privacy right, courts must not focus on a defendant's subjective expectations of privacy or ask whether the defendant possessed a "reasonable expectation" of privacy. *See Howard/Dawson*, 342 Or at 643 ("defendants' subjective expectations are not necessarily dispositive to our analysis under Article I, section 9"); *Campbell*, 306 Or at 164 ("expressly reject[ing]" "reasonable expectation of privacy" standard). This court has rejected the suggestion that the question is whether, if the state engaged in the conduct at issue wholly at its discretion, freedom from scrutiny would be significantly reduced. *See Howard/Dawson*, 342 Or at 642 (rejecting suggestion in Court of Appeals' dissent that "the officers' acts invaded a constitutionally protected privacy interest because those acts, 'if engaged in wholly at the discretion of the government, will significantly impair the people's freedom from scrutiny'"). As case law demonstrates, the state constitution does not enshrine a right to remain free from *all* scrutiny, or to keep any and all information "secret from the government." *See Campbell*, 306 Or at 166 ("[t]he constitutional provisions against unreasonable searches and seizures do not protect a right to keep any information, no matter how hidden or 'private,' secret from the government"); *id.* at 170 (the protected interest "is not

one of freedom from scrutiny in general, because, if that were the case, any form of scrutiny * * * would be considered a search").

Rather, this court's case law frames the central inquiry—in assessing whether the government conducted a "search" for Article I, section 9's purposes—as whether "social and legal norms" show that the defendant had a recognized right to keep the information at issue from the government. *See Campbell*, 306 Or at 170, 171 (stating that "individual freedom from scrutiny is determined by social and legal norms of behavior, such as trespass laws and conventions against eavesdropping," while cautioning that those norms "cannot govern the scope of the constitutional provision, which itself plays a substantial role in shaping those norms").

Case law requires this court to assess whether social and legal norms suggest that defendant had a constitutional privacy right in the records that his banks provided to the state. As discussed below, those norms reflect no such privacy right.

a. Social norms (which case law describes as a pertinent factor) show that defendant had no privacy interest in the records at issue.

Social norms support the conclusion that defendant had no constitutional right to privacy with respect to the bank records at issue.

Although it generally is considered impolite to ask strangers or acquaintances how much money they possess, or to otherwise inquire about

their financial health, that is of negligible significance. Here, defendant intentionally disclosed financial information to third parties (his banks), while knowing that those third parties would document, and retain records of, his use of the bank's services. That is significant because it is generally recognized that, when a person discloses information to a third party, he or she assumes a risk that the third party might disclose that information to others. Even if the person and the third party had agreed contractually that the information would be kept confidential, the agreement would, at most, give the person a civil remedy against the third party if that third party violated the agreement. The person would not, however, generally possess any other remedy, or be entitled—absent an applicable evidentiary privilege (as discussed later in this brief)—to suppress the disclosed information as evidence at a trial.

It also is significant that, although what one does with one's own money is generally considered "private" in polite society, what a person does with *someone else's* money—particularly with money that others have invested with the person—is not considered private to the same extent. In this case, defendant and his wife deposited large checks from others after promising a significant financial reward to those who wrote the checks. (*See* Tr 99-100, 112-17, containing testimony that Ben Kang lost a $60,000 investment; Tr 172-83, containing testimony that Julieta Woo lost a $6,000 investment). To the extent that the bank records documented the fate of money that came from other

people, and to the extent that they reflected those people's interest in tracking money that they entrusted to another, social norms do not reflect a right of *defendant* to keep that information private.

b. Legal norms (which case law describes as a pertinent factor) show that defendant had no privacy interest in the records at issue.

Legal norms also support the conclusion that defendant had no constitutional privacy interest in the records that Wells Fargo and Bank of America produced. The banking industry is highly regulated, and state and federal statutory schemes do not require law-enforcement authorities to obtain a search warrant when seeking records from a bank or financial institution. More generally, legal norms traditionally have entitled prosecutors to use subpoenas to obtain evidence from third parties. Those norms have not generally entitled a criminal defendant to suppress evidence that the defendant had disclosed to a third party.

(1) Legal norms in the world of banking reflect no protected privacy interest in records that a bank generated.

With respect to banks and financial institutions, legal norms do not suggest that a customer has a constitutionally protected privacy interest in records that those entities create.

As this court has commented, "[t]he constitutional provisions against unreasonable searches and seizures do not protect a right to keep any

information, no matter how hidden or 'private,' secret from the government." *Campbell*, 306 Or at 166. And, as is discussed below in greater detail, governmental regulation and oversight of banks furthers important societal economic and criminal-justice goals. Hence, society's willingness to recognize a protected privacy interest in bank records is significantly diminished when the state is attempting to confirm whether a bank customer has used the bank to advance criminal objectives.

Banks serve a central role in the national and local economy. The government, and society at large, have an interest in regulating banks and other financial institutions, in part to protect the financial interest of bank customers, and in part to monitor and ensure the continued health of the banks themselves. Moreover, when private parties use banks to engage in financial transactions, those transactions regularly have tax consequences, sometimes implicate criminal enterprises, often implicate other legitimate governmental regulatory concerns, and can implicate national security concerns as well. As the United States Supreme Court observed when discussing the 1970 Bank Secrecy Act, Congress—in adopting that act 45 years ago—perceived "a need to insure that domestic banks and financial institutions continue to maintain adequate records of their financial transactions with their customers." *California Bankers Association*, 416 US at 26. At the same time, "Congress found that the recent growth of financial institutions in the United States had been paralleled by an

increase in criminal activity which made use of these institutions." *Id.* at 26-27. "[I]n recent years some larger banks had abolished or limited the practice of photocopying checks, drafts, and similar instruments," and the "absence of such records * * * was thought to seriously impair the ability of the Federal Government to enforce the myriad criminal, tax, and regulatory provisions of laws which Congress had enacted." *Id.* at 27.

Legislative recognition that government access to information in bank records can serve a vital purpose is nothing new: In Oregon, satutes enacted in the early years of statehood entitled the state to exercise regulatory authority of banks without regard to a depositor's "privacy": Banks were obliged to disclose customer names and account balances to facilitate the taxing of those depositors, and bank officers could be fined for refusing to do so. *See* 1 *Hill's Annotated Laws of Oregon* 986 (1887), § 1998 ("[i]f any president or directors of any bank or express company shall fail to furnish a list as stated in section 1 of the act to empower assessors to assess bank deposits, approved October 29, 1870, he or they shall be fined in the sum of five hundred dollars"); 2 *Hill's Annotated Laws of Oregon* 1290 (1887), § 2767 (enacted October 29, 1870) ("[i]t shall be the duty of the county assessors in this state, when making their assessments for each year, to apply to the proper officer of every banking institution or express company in his county, and procure a certified sworn statement of the names of depositors of money or other valuables, with the

amounts of money or valuables deposited, attached to the name of each depositor, for the purpose of assessing the same").[4]

In sum, the government's significant interest in regulating banks, and in ensuring that banks are not used for criminal purposes, is longstanding and well established. That interest is consistent with the notion that when the state—as in this case—has some reason to believe that a bank customer has used a bank for criminal purposes, society is less inclined to recognize the customer's right (in the *Campbell* court's words) to keep bank records "secret from the government."

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[4] The ACLU cites *State v. Security Savings Company*, 28 Or 410, 43 P 162 (1896), for the proposition that "[s]ince at least 1896, this court has recognized the inherent privacy and confidentiality in the relationship between a bank depositor and her bank." (Amicus Br 8). The ACLU quotes this court's statement, at 28 Or at 421, that the governor "has no authority * * * to require the bank not only to disclose, but to make a public record of, the confidential and private relations existing between it and its depositors." (Amicus Br 8). Notably, however, the *Security Savings Company* court did not purport to construe Article I, section 9, or assert that a bank customer has a constitutionally protected privacy interest in records generated by his or her bank. The court instead construed the "bill of discovery" statute, which authorized the governor to authorize a district attorney to file a "bill of discovery" requesting banking information only if the governor "is informed, or has reason to believe," that the bank possesses funds that had "escheated" to the state. 28 Or at 419-20 (quoting Hill's Code, § 3143). In *State v. Security Savings Company*, this court held merely that the record *in that case* showed that the governor did not possess the requisite information to trigger a bill of discovery: "as we read the statute, he has no authority" to require the bank "to make a public record of the confidential and private relations existing between it and its depositor, *without a showing of any kind that the whole proceeding will not be fruitless in every way*." 28 Or at 421 (emphasis added).

In addition, current "legal norms"—as expressed in statutes governing access to bank records—do not require prosecutors and other government officials to obtain a warrant when seeking records from a bank or financial institution. Instead, Oregon statutes entitle the state to obtain such records by using a subpoena. *See* ORS 192.596(1) ("[a] financial institution may disclose financial records of a customer to a state or local agency, and a state or local agency may request and receive such records, pursuant to a lawful summons or subpoena, served upon the financial institution, as provided in this section"); ORS 59.315(1) (authorizing Director of DCBS to subpoena witnesses and require the "production of * * * documents or records which the director deems relevant or material to [an Oregon Securities Law] inquiry"); ORS 59.331(1)(c) (authorizing Attorney General to subpoena witnesses and "require the production of * * * documents or records that the Attorney General considers relevant or material" to a Securities Law investigation). Federal statutes similarly authorize officials to obtain "financial records" pertaining to a financial institution's customer without first obtaining a search warrant. *See* 12 USC § 3402(2), (4), (5) (authorizing government to obtain "financial records of a[] customer from a financial institution" by using an administrative subpoena, judicial subpoena, or "formal written request"); 12 USC §§ 3405(1), 3407(1), 3408(3) (identifying requirements for subpoenas and written requests referenced in 12 USC § 3402 and, rather than requiring government to satisfy

probable-cause standard, requiring "reason to believe" records are "relevant to a legitimate law enforcement inquiry").[5]

Legal norms that pertain to banking support the conclusion that defendant had no constitutionally protected privacy interest in the records that his banks generated and possessed.

(2) More generally, legal norms traditionally have entitled prosecutors to subpoena information that a defendant disclosed to a third party, and have not generally entitled defendants to suppress such evidence.

When a criminal defendant has intentionally disclosed information to a third party, the state and federal governments traditionally have had authority to subpoena the third party for records containing that information, and to subpoena the third party to testify about the defendant's disclosures. Prosecutors historically have been entitled to use subpoenas in that manner , whether or not they possess probable cause to believe that the third party possesses incriminating information. *See* Deady, *General Laws of Oregon*

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[5] The provisions cited above are part of the Federal Right to Financial Privacy Act of 1978 (12 USC § 3401 *et seq.*), which the ACLU describes as "prohibit[ing], with certain exceptions, the disclosure of a customer's records by a financial institution to a government authority without the customer's consent." (Amicus Br 8-9). Although 12 USC § 3402(1) authorizes disclosure pursuant to a customer's authorization, subsections (2), (4), and (5)—as noted above—also entitle the government to use a subpoena or written request to obtain such records.

1845-1864 at p 493, § 303 ("[t]he process by which the attendance of a witness before a court or magistrate is required, is a subpoena"); § 305 ("[t]he district attorney may issue subpoenas, subscribed by him, for witnesses within the state, in support of the prosecution, or for such other witnesses as the grand jury may direct, to appear before the grand jury upon an investigation before them"); § 306 ("[t]he district attorney may, in like manner, issue subpoenas for witnesses within the state, in support of an indictment, to appear before the court at which it is to be tried"); Deady, *General Laws of Oregon 1845-1864* at p 494, § 309 (entitling district attorney to require subpoenaed person to bring papers or books as directed).[6] Current statutes also grant prosecutors the general authority to subpoena third parties in order to obtain information that a criminal defendant might have disclosed to those parties, and those statutes also contain no probable-cause requirement. ORS 136.555-.595.

Defendant does not contend otherwise. Nor does he suggest that Oregon or federal case law has ever applied a constitutional probable-cause requirement to those circumstances. The state is unaware of any such authority. *See California Bankers Association*, 416 US at 53 (noting that "[w]e decided long ago that an Internal Revenue summons directed to a third-party bank was not a violation of the Fourth Amendment rights of * * * the person under

[6] The Deady Code statutes cited above were adopted in 1864.

investigation by the taxing authorities"), citing *First National Bank v. United States*, 267 US 576, 45 S Ct 231, 69 L Ed 796 (1925).

Similarly, evidentiary rules have not generally entitled a criminal defendant to suppress evidence that the defendant disclosed incriminating information to a third party. Hearsay rules, for example, permit a third party to testify about such evidence, even if the defendant had sworn the third party to secrecy. *See* OEC 801(4)(b)(A) (a statement is not hearsay if it "is offered against a party and is * * * [t]hat party's own statement," and testimony about that statement thus is not barred by OEC 802's prohibition against hearsay); Fed R Evidence 801(d)(2)(A) (defining as not hearsay a statement "offered against an opposing party" that "was made by the party").[7] Although certain types of confidential communications—for example, communications to one's attorney, priest, or spouse—traditionally have been "privileged," such that a defendant might be able to prevent a jury from hearing about them, no similar

[7] Hearsay rules also permit—and traditionally have permitted—a party to introduce, through the "business records" exception to the hearsay rule, records "kept in the course of a regularly conducted business activity," "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." *See* OEC 803(6) (permitting such records to be admitted despite OEC 802's general prohibition against out-of-court statements offered for their truth; Fed R Evidence 803(6) (same); Kwestel, *The Business Records Exception to the Hearsay Rule—New is Not Necessarily Better*, 64 Missouri Law Review 595 and n 2 (Summer 1999) (noting that "[t]he exception is primarily grounded on the common law business entries rule and the shop book doctrine").

privilege has applied to information that a bank customer discloses to a bank.[8] Defendant has not suggested otherwise.

c. Defendant fails to identify social and legal norms suggesting that he had a constitutionally protected privacy interest in the records at issue.

Defendant suggests that banks, including Wells Fargo, generally promise a "commitment to security and privacy." (Pet Br 25 n 10). Although that may be true, it is also common knowledge—as reflected in the statutory provisions discussed above—that banks will disclose their records when those records are subpoenaed. In fact, the source that defendant cites, in referring to the "level of commitment to security and privacy" that banks promise, supports that conclusion. Defendant refers to promotional information contained in a Wells Fargo website. (Pet Br 25 n 10, citing https://www.wellsfargo.com/privacy-security/ (accessed by defendant July 10, 2015)). Yet that website (as accessed

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[8] *See, e.g.*, Slobogin, *Subpoenas and Privacy*, 54 DePaul Law Review 805, 822 n 3 (2005) (citing *Rex v. Dixon*, 97 Eng Rep 1047 (KB 1765), as holding "that an attorney need not turn over a client's papers in connection with a forgery prosecution"); OEC 503 (recognizing lawyer-client privilege); 8 Wigmore, *Evidence* at p 213, § 2227 (McNaughton rev. 1961) ("the [marital] privilege may be said to have been understood to exist in some shape before the end of the 1500s and to have been firmly established by the second half of the 1600s"); OEC 505 (recognizing marital privilege); Walsh, *The Priest-Penitent Privilege: An Hibernocentric Essay in Postcolonial Jurisprudence*, 80 Indiana Law Journal 1037 and n 2 (describing *People v. Philips* (NY Ct Gen Sess 1813) as "establish[ing] the priest-penitent evidentiary privilege" in New York City in 1813); OEC 506 (recognizing clergy-penitent privilege).

on August 26, 2015), states that if Wells Fargo records are subpoenaed for law enforcement purposes, the bank *will* disclose the records, and the customer will *not* be able to prevent disclosure. (*See* App-1, Wells Fargo U.S. Consumer Privacy Policy, listing "respond[ing] to court orders and legal investigations" under "[r]easons we can share your personal information"; stating "**Yes**" in response to "**Does Wells Fargo share** [under those circumstances]**?**" and stating "**No**" in response to "**Can you limit this sharing?**"; bold in original).

Defendant further asserts that "a person who wishes to participate in everyday life has little choice whether to share financial information with a bank or financial institution," and must do so to obtain a mortgage, to obtain a paycheck via direct deposit, or to obtain other benefits in contemporary society. (Pet Br 30-31). But to conclude that a person was persuaded by economic or social forces to disclose information to a private bank (and in order to thereby derive certain benefits from his or her relationship with the bank) does not compel the conclusion that the person possesses a *constitutional* privacy right in records that the bank then creates to document the customer's use of its services.

Defendant asserts that "[l]egal norms in sister states suggest that a right to privacy includes the right to privacy in bank records," and that "[o]ther jurisdictions have interpreted their constitutional search and seizure provisions to protect bank records against state scrutiny." (Pet Br 26). Yet state-court

decisions hardly reflect an over-arching or universally acknowledged "legal norm" that supports defendant's argument in this case. In fact, some state supreme courts have concluded, when construing their state constitutional search-and-seizure provisions, that a person does not have a protected interest in records possessed by a bank. *See, e.g., State of Kansas v. Schultz*, 252 Kan 819, 850 P2d 818, 829-30 (1993); *State of Maine v. Fredette*, 411 A2d 65, 67 (Me 1979). And although defendant cites decisions from a number of other states whose courts have ruled differently, he does not contend that those decisions necessarily reflect the same social and legal norms that exist in Oregon today, or that have existed in this state historically.

Social and legal norms show that, when a person intentionally divulges information to a third party, and when that third party documents the information, the person does not have a recognized right to keep that information secret from the government. More particularly, social and legal norms reflect that a bank customer does not possess a recognized privacy right with respect to records that a bank has created and maintained for its own purposes.

d. In an analogous case, this court held that a defendant had no privacy interest in records that a business created for its "separate" and "legitimate" purposes.

In one final respect, this court's case law shows that defendant had no privacy interest in the bank records at issue. *State v. Johnson*, 340 Or 319, 131

P3d 173 (2006), supports the conclusion that the state's use of subpoenas in this case did not implicate defendant's Article I, section 9, rights.

In *Johnson*, this court held that the defendant had no Article I, section 9 privacy interest in records that his cell-phone provider had generated and maintained to document telephone numbers that the defendant had dialed. 340 Or at 335-36. The court emphasized that the cell-phone provider "generated and maintained those records from the provider's own equipment and for the provider's own, separate, and legitimate business purposes (such as billing)." 340 Or at 336. Because defendant had no constitutionally protected "interest in keeping private any records kept by a third party * * * respecting his cellular telephone usage," the state did not conduct a search by subpoenaing the records from the cell-phone provider, and it was not required to use a search warrant. 340 Or at 335-36. That holding further supports the conclusion that, in this case, the state invaded no constitutionally protected privacy interest by subpoenaing Wells Fargo and Bank of America records.

As had the cell-phone provider in *Johnson*, defendant's banks generated, maintained, and possessed the records at issue. And as with the cell-phone provider, the banks' conduct in creating and maintaining the records served their business purposes—doing so protected them against potential claims by defendant for not correctly crediting his accounts, enabled them to determine whether they needed to impose any fees or penalties, and helped them to

accurately determine how much money they possessed that could then be loaned elsewhere.

Defendant quotes the *Johnson* court's remark that a privacy interest existed in the "content" of the defendant's calls. (Pet Br 38); *see Johnson*, 340 Or at 336 (stating that "[d]efendant clearly had a cognizable privacy interest in the *content* of his telephone calls"; emphasis in original). According to defendant, it follows that he had a privacy interest in the "contents" of the bank records in this case—that is, in the information that they contained about his banking activity. In fact, the contents of the bank records in this case thus are distinguishable, in at least two crucial respects, from the "content of [the defendant's] telephone calls" that the *Johnson* court referred to.

First, the "contents" of the bank records is, in fact, information that banks need to document in order to further their own legitimate business interests. In contrast, it generally cannot be said that the content of a person's phone calls is information that a cell-phone provider needs to document and retain for its own legitimate business purposes. Nothing in the *Johnson* decision suggests that the cell-phone provider in question would have possessed any legitimate reason to generally document and retain the substance of the defendant's cell-phone conversations.

Second, although cell-phone customers generally do not intend or expect that their cell-phone provider will record and preserve their every conversation,

a bank customer generally does intend, and expect, that his or her bank will faithfully document each of his bank-related transactions. Defendant in this case, for example, does not dispute that he intended that Wells Fargo and Bank of America would make and keep records of the manner in which he used their services. In contrast, nothing in *Johnson* suggests that the defendant would have intended to disclose the contents of his phone conversations to his cell-phone provider, or that he would have had any reason to expect that the content of his conversations would generally be preserved.

As a result, the contents of the defendant's telephone calls in *Johnson* are not analogous to the "contents" of the bank records in this case. The bank records at issue instead resemble the records—records kept for "separate" and "legitimate" business reasons—that the cell-phone provider disclosed in *Johnson*. Just as the subpoenaed records in *Johnson* did not implicate any constitutionally protected privacy interest, the subpoenaed records in this case did not implicate any constitutional privacy interest that defendant possessed. *Cf. United States v. Miller*, 425 US 435, 440-42, 96 S Ct 1619, 48 L Ed 2d 71 (1976) (holding that government, in subpoenaing records from the defendant's bank, did not invade any Fourth Amendment right belonging to the defendant, because the records are "the business records of the banks" and "pertain to transactions to which the bank itself is a party," and because they "contain only

information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business").

In that manner as well, this court's case law shows that defendant had no constitutionally protected privacy interest in the Wells Fargo and Bank of America records in question.

3. Pertinent historical circumstances show that defendants have not been entitled historically to preserve the confidentiality of information that they provided to their banks and that the banks then recorded.

The final part of the *Priest v. Pearce* methodology is assessment of "the historical circumstances leading to" the adoption of the constitutional provision at issue." 314 Or 411, 415-16. Pertinent historical circumstances show that defendants have not historically been entitled to keep bank records—records that banks create for their own purposes, containing information that a customer intentionally provided to them—secret from the government.

As noted already, criminal defendants have not been entitled historically to prevent a jury from receiving evidence about information that the defendant disclosed to a bank, or from viewing bank records that contain such information. Moreover, the state historically was entitled to obtain certain information directly from banks about their customers. *See* 1 *Hill's Annotated Laws of Oregon* 986 (1887), § 1998 ("[i]f any president or directors of any bank or express company shall fail to furnish a list as stated in section 1 of the act to

empower assessors to assess bank deposits, approved October 29, 1870, he or they shall be fined in the sum of five hundred dollars"); 2 *Hill's Annotated Laws of Oregon* 1290 (1887), § 2767 (enacted October 29, 1870) ("[i]t shall be the duty of the county assessors in this state, when making their assessments for each year, to apply to the proper officer of every banking institution or express company in his county, and procure a certified sworn statement of the names of depositors of money or other valuables, with the amounts of money or valuables deposited, attached to the name of each depositor, for the purpose of assessing the same").

The practice engaged in here (the state's use of subpoenas to obtain records from Wells Fargo and Bank of America) traditionally has been deemed acceptable. Prosecutors traditionally have been entitled to subpoena records and testimony from third parties as part of a criminal prosecution. *See* Deady, *General Laws of Oregon 1845-1864* at p 493, § 306 ("[t]he district attorney may, in like manner [as that employed to call grand jury witnesses], issue subpoenas for witnesses within the state, in support of an indictment, to appear before the court at which it is to be tried"); Deady, *General Laws of Oregon 1845-1864* at p 494, § 309 (entitling district attorney to require subpoenaed person to bring papers or books as directed); Slobogin, *Subpoenas and Privacy*, 54 DePaul Law Review 805, 826 ("constitutional restrictions on subpoenas for papers in possession of third parties have always been lax"). As recounted

already, prosecutors also traditionally have been entitled, in general, to present evidence from third parties about information that a defendant disclosed to those parties.

Historical circumstances further support the conclusion that defendant had no constitutionally protected interest in the bank records that Wells Fargo and Bank of America provided in response to the state's subpoenas.

C. The subpoenas used by the state did not invade any privacy right that defendant possessed, and Article I, section 9 provided no basis for suppression.

The records at issue were generated, maintained, and possessed by Wells Fargo and Bank of America. In short, the records qualify as the *banks'* records. Further, those records documented information that defendant intended the bank to have. When the state subpoenaed Wells Fargo and Bank of America for the records in question, the subpoenas did not implicate any constitutionally protected privacy interest of defendant. Constitutional text, this court's case law, and pertinent historical circumstances support that conclusion.

The legislature is free, of course, to require state law-enforcement officials to obtain a search warrant, or to otherwise satisfy a probable-cause requirement, when attempting to review a bank's records as part of a criminal investigation. But it has not done so, and the state's use of subpoenas in this case did not implicate or violate defendant's rights under Article I, section 9. The trial court correctly denied defendant's motion to suppress.

CONCLUSION

This court should affirm the trial court and Court of Appeals' judgments.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 6, 2015, I directed the original Brief on the Merits of Respondent on Review, State of Oregon, to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Morgen E. Daniels, attorneys for defendant -appellant, Petitioner on Review, and Julia Elizabeth Markley, attorney for Amicus Curiae American Civil Liberties of Oregon, Inc., by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 8,362 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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