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NORM MALENG
PROSECUTING ATTORNEY
FRAUD DIVISION

~~COPY TO COURT OF APPEALS APR 5 2005~~

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

560174

STATE OF WASHINGTON,)
Co-Petitioner/Plaintiff,)

NO. 03-1-09574-1 SEA
NOTICE FOR DISCRETIONARY REVIEW
TO THE COURT OF APPEALS,
DIVISION ONE

v.)

UPON AGREED MOTION OF THE PARTIES
AND SUPERIOR COURT CERTIFICATION
PURSUANT TO RAP 2.3(b)(4)

MICHAEL M. MILES,)
Co-Petitioner/Defendant.)

To: Hon. Norm Maleng
King County Prosecuting Attorney
Ivan Orton
Senior Deputy Prosecuting Attorney
Fraud Division
and the State of Washington, respondents,
Union Bank of California Building
900 4th Avenue, Room 1002
Seattle WA 98164

To: Associated Counsel for The Accused
Kevin McCabe
Attorney at Law
110 Prefontaine Pl. S. Suite 200
Seattle, WA 98104
Attorneys for Michael M. Miles who
Resides at
10000 44th Ave SW
Seattle, WA 98146

Associated Counsel for the Accused
110 Prefontaine Pl. So. Suite 200
Seattle, Washington 98104
(206) 624-8105

1 Please take notice that Michael M. Miles, the Defendant in
2 King County Cause No. NO. 03-1-09574-1 SEA, and the State of
3 Washington, the Plaintiff in King County Cause No. NO. 03-1-09574-1
4 SEA, pursuant to the agreement of the parties to proceed by agreed
5 motion for discretionary review based on RAP 2.3(b)(4) and pursuant
6 to the Superior Court's Certification in conformity with RAP
7 2.3(b)(4), do hereby seek discretionary review in the Court of
8 Appeals, Division I, of the Order Denying the Defendant's Motion to
9 Suppress entered by the Hon. Sharon Armstrong, Judge of the King
10 County Superior Court, on March 4th, 2005.

11 This notice is filed pursuant to RAP 2.3(a). Copies of the
12 Stipulation of the Parties and the Superior Court's Certification
13 conforming to the requirements of RAP 2.3(b)(4) are attached. A
14 copy of the Superior Court's Order on Defendant's Motion to
15 Suppress is also attached.

16 By separate motion, filed in the Superior Court and the Court
17 of Appeals, Mr. Miles will move the Court of Appeals for the State
18 of Washington, Division One, for an order waiving the filing fee
19 based on indigence.

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Presented by:

Ivan Orton BY Kevin McCabe (PER TELEPHONE APPROVAL)
Ivan Orton WSBA #7723
Senior Deputy Prosecuting Attorney
King County Prosecuting Attorney's Office,
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(206) 624-8105 extension 259 (voice)

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON,
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,)	Cause No. 03-1-09574-1 SEA
Plaintiff,)	COURT'S CERTIFICATION
)	PURSUANT TO RAP 2.3(b)(4)
v.)	
)	
MICHAEL M. MILES,)	
Defendant.)	
)	
)	
)	

Pursuant to RAP 2.3(b)(4), the Court certifies that its Order on Defendant's Motion to Suppress, filed on March 4th, 2005, involves a controlling question of law as to which there is substantial ground for a difference of opinion, to wit:

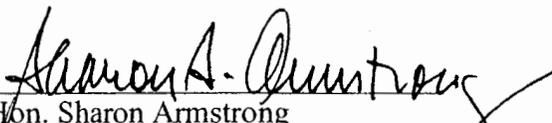
Under art. 1, § 7 of the Washington State Constitution and RCW 21.20.370 & .380, may a regulatory agency obtain a citizen's personal bank records from his or her bank without prior review by a neutral magistrate by way of an administrative subpoena enforceable against the bank, when: 1) the citizen is not given notice of the subpoena; 2) the citizen engages in a pervasively regulated industry; 3) the agency requests that the bank keep the subpoena secret from the citizen; and 4) the agency requests that the bank act promptly because there is a three year statute of limitations on theft?

The Court also certifies that immediate review of the order may

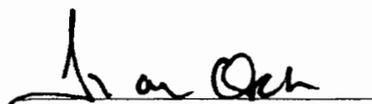
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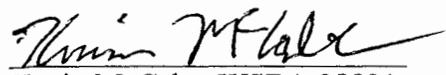
materially advance the ultimate termination of the litigation.

Done on this 28th day of March, 2005 by:


Hon. Sharon Armstrong
Judge, King County Superior Court

Presented by:


Ivan Orton, WSBA 7723
Senior Deputy Prosecuting Attorney
King County Prosecuting Attorney's
Office, Fraud Division
For the State of Washington; and


Kevin McCabe, WSBA 28821
Attorney at Law
Associated Counsel for the Accused
For Michael M. Miles

PARTIES' STIPULATION PURSUANT TO RAP 2.3(b)(4)

The parties agree and stipulate as follows:

1) That the State of Washington and Michael M. Miles are the only parties to this litigation.

2) That the King County Superior Court's Order on the Defendant's Motion to Suppress involves a controlling question of law as to which there is substantial ground for a difference of opinion, to wit:

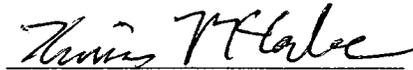
Under art. 1, § 7 of the Washington State Constitution and RCW 21.20.370 & .380, may a regulatory agency obtain a citizen's personal bank records from his or her bank without prior review by a neutral magistrate by way of an administrative subpoena enforceable against the bank, when: 1) the citizen is not given notice of the subpoena; 2) the citizen engages in a pervasively regulated industry; 3) the agency requests that the bank keep the subpoena secret from the citizen and 4) the agency requests that the bank act promptly because there is a three year statute of limitations on theft?

3) That immediate review of the order may materially advance the ultimate termination of litigation.

Sworn under penalty of perjury, under the laws of the State of Washington this 28th day of March, 2005 in Seattle Washington by:



Ivan Orton, WSBA 7723
Senior Deputy Prosecuting Attorney
King County Prosecuting Attorney's
Office, Fraud Division
For the State of Washington



Kevin McCabe, WSBA 28821
Attorney at Law
Associated Counsel for the
Accused
For Michael M. Miles

AGREED MOTION

The State of Washington, by and through the King County Prosecuting Attorney's Office, Fraud Division, Ivan Orton Senior Deputy Prosecuting Attorney and Michael M. Miles, by and through his attorneys of record, Kevin McCabe and the Associated Counsel for the Accused, move the Court of Appeals of the State of Washington for the following relief:

Discretionary review of the Order of the King County Superior Court on Defendant's Motion to Suppress in King County Cause No. 03-1-09574-1 SEA filed March 4th, 2005.

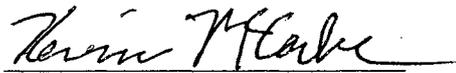
This motion is made pursuant to RAP 2.3(b)(4). The motion is accompanied by the parties' stipulation and the trial court's certification pursuant to that rule.

Additionally, Mr. Miles files a memorandum in support of the motion adhering to the requirements of RAP 17.3(b). The State of Washington will file a memorandum in support of the motion adhering to the requirements of RAP 17.3(b) in response to Mr. Miles' memorandum.

Mr. Miles will file a reply.



Ivan Orton, WSBA 7723
Senior Deputy Prosecuting Attorney
King County Prosecuting Attorney's
Office, Fraud Division
For the State of Washington



Kevin McCabe, WSBA 28821
Attorney at Law
Associated Counsel for the
Accused
For Michael M. Miles

FILED
KING COUNTY, WASHINGTON

MAR 04 2005

SUPERIOR COURT CLERK
BY JENNIFER SIZEMORE
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

MICHAEL M. MILES,

Defendant,

No. 03-1-09574-1 SEA

ORDER ON DEFENDANT'S MOTION
TO SUPPRESS

This matter comes before the court on defendant's motion to suppress defendant's bank records obtained by the Department of Financial Institutions' Securities Division pursuant to an administrative subpoena duces tecum issued to Washington Mutual Savings Bank. Defendant seeks suppression of the bank records and all evidence flowing from it.

The court considered:

- Defendant's Motion to Suppress Brief in Support
- State's Response to Defendant's Motion to Suppress
- Reply to State's Response Regarding Suppression
- Defendant's Supplemental Authority
- Defendant's Second Supplemental Authority

1 The Court also heard oral argument from counsel Ivan Orton for the State and Kevin
2 McCabe for the defendant. For the reasons described below, the motion is denied.

3 **Factual Summary**

4 In May 2001, the Securities Division of the Washington Department of Financial
5 Institutions received a complaint from Julie Gillett stating that defendant Michael Miles had
6 persuaded her to allow him to handle her investments. He had told her he was an investment
7 specialist, worked for a large investment firm, specialized in commodities, and invested
8 people's money wisely. He had reviewed her investment portfolio and had advised her to
9 invest with him. He had told her that her principal would be guaranteed and he could double
10 her money in 12 to 18 months. She gave him over \$100,000 to invest, which he did not
11 return.
12

13 In June 2001, the Securities Division issued a subpoena to Washington Mutual
14 Savings Bank for bank records of defendant and all entities under his control, as part of a
15 regulatory investigation authorized by RCW 21.20.390. Issuance of the subpoena was
16 authorized by RCW 21.20.380. The Department did not give defendant notice of the
17 subpoena, and requested the bank to keep the subpoena secret from the defendant. Its letter
18 transmitting the subpoena to the bank referred to the need for a prompt response in light of
19 the statute of limitations for the crime of theft. The bank complied, and the records led to
20 further investigation, resulting in filing of the charges at issue in this proceeding.
21

22 Defendant argues that art. I, section 7 of the Washington State Constitution requires
23 that defendant's bank records cannot lawfully be obtained without a warrant or a subpoena
24 issued by a neutral magistrate. Defendant therefore seeks suppression of the records and all
25 evidence that flows from the subpoenaed records. The State asserts that the law of
26

1 administrative agency subpoenas should control. The State does not argue that a special
2 needs framework should be used in this case.

3 **Private Affairs and Gunwall Analysis**

4 Art. I, section 7 of the Washington State Constitution provides:

5 No person shall be disturbed in his private affairs, or his home invaded,
6 without authority of law.

7 The inquiry under this provision is whether the State has unreasonably intruded into a
8 person's private affairs. *State v. Boland*, 115 Wash.2d 571, 577 (1990), citing *State v.*
9 *Myrick*, 102 Wash.2d 506, 510 and *State v. Simpson*, 95 Wash.2d 170, 178 (1980). The
10 appropriate analysis under art. 1, section 7 focuses "on those privacy interests which citizens
11 of this state have held, and should be entitled to hold, safe from governmental trespass absent
12 a warrant." *Myrick*, 102 Wash.2d at 511.

13
14 The U.S. Supreme Court has held that an individual's privacy interest in his bank
15 records is not protected under the Fourth Amendment when the bank is subpoenaed, because
16 he has assumed the risk the information would be disclosed to third persons. *U.S. v. Miller*,
17 425 U.S. 435, 442 (1976). The first issue for consideration here is whether the Washington
18 Constitution requires a different result.

19
20 The Court in *State v. Gunwall*, 106 Wash.2d 54, 58 (1986), set forth six factors to be
21 considered in determining whether the Washington Constitution is more protective than the
22 federal constitution in a specific context. Only factors No.4 (pre-existing state law) and No.
23 6 (matters of particular state interest or local concern) need be addressed here, as the other
24 factors were conclusively analyzed for art. I, section 7 in *Gunwall*. See, e.g., *Robinson v.*
25 *Seattle*, 102 Wash.App 795, 809 (2000). For purposes of this ruling, only the privacy interest
26

1 in the information sought, not the method by which it was obtained, is analyzed under
2 *Gunwall*.

3 The fourth factor requires an examination of preexisting state law to determine what
4 protection this state has historically afforded an individual's bank records. *State v. Boland*,
5 115 Wash.2d 571 (1990), involved a warrantless search of the defendant's trash. The search
6 was held unlawful on privacy grounds. The Court reasoned:

7
8 People reasonably believe that the government is not free to rummage
9 through their trash bags to discover personal effects. Business records,
bills, correspondence, magazines, tax records, and other tell-tale refuse
can reveal much about a person's activities, associations, and beliefs.

10 *Boland*, 115 Wash.2d at 578. An individual's bank records are similar to business records,
11 bills and tax records, and reveal a person's activities, associations, and beliefs (e.g., checks
12 written as donations to religious organizations).

13
14 Existing Washington law differs from federal courts' assumption of the risk analysis
15 set forth in *United States v. Miller*, 425 U.S. 435, 443 (1976). The court in *State v. Gunwall*,
16 for example, held that disclosures to telephone companies are largely non-volitional and are
17 made to obtain a necessity of modern life. Such disclosures are made "for a limited business
18 purpose and not for release to other persons for other reasons." *Gunwall*, 106 Wash.2d at 67-
19 68. Having a bank account is similarly necessary in modern life, and an individual does not
20 assume the risk these records will be disclosed to the government when he opens an account.

21
22 Washington statutes also establish that, at least in some contexts, bank records are
23 confidential. While the Department of Financial Institutions has the authority to examine
24 banks for financial soundness, the records obtained during the examination are

25 . . . confidential and privileged information and shall not be made public
26 or otherwise disclosed to any person, firm, corporation, agency,
association, governmental body, or other entity.

1 RCW 30.04.075(1). Law enforcement agencies may obtain these specified bank records
2 only with a valid search warrant or subpoena and only after notice to the affected customer,
3 absent waiver of this requirement by a court.
4

5 (2) . . . the director may furnish all or any part of examination reports
6 prepared by the director's office to: . . .

7 (c) Officials empowered to investigate criminal charges subject to legal
8 process, valid search warrant, or subpoena. If the director furnishes any
9 examination report to [said] officials, the director may only furnish that
10 part of the report which is necessary and pertinent to the investigation, and
11 the director may do this only after notifying the affected bank . . . and any
12 customer of the bank . . . unless the officials requesting the report obtain a
13 waiver of the notice requirement from a court of competent jurisdiction for
14 good cause.

15 RCW 30.04.075(2)(c). The bank statutes do not, however, declare all bank records
16 confidential or require advance notice to customers before disclosure is made in every
17 circumstance.
18

19 The sixth *Gunwall* factor asks whether the subject matter is local in character or
20 whether there is a need for national uniformity. Many state courts have departed from the
21 federal assumption of the risk analysis as to bank records. (The state court decisions are ably
22 cited in State's brief and will not be cited here.) There appears to be no need for national
23 uniformity in this arena; rather, states should determine the privacy protections for bank
24 records as a matter of state law.
25

26 In sum, the *Gunwall* analysis supports a conclusion that bank records are part of an
individual's private affairs that are entitled to the privacy protections of art. I, section 7 of the
Washington State Constitution, and those protections are broader than the protections
provided by the Fourth Amendment to the U.S. Constitution.

Authority of Law

1 Defendant's motion presents the issue of whether a subpoena issued by an
2 administrative agency pursuant to a statute constitutes "authority of law" for constitutional
3 purposes. For the reasons described below, in this context the fact that a statute authorizes
4 the subpoena does not resolve the inquiry.

5 The "authority of law" required by art 1, section 7 of the Washington State
6 Constitution is not limited to judicially-issued warrants and may include a subpoena under
7 certain circumstances.
8

9 Generally speaking, the "authority of law" required by Const. art. 1,
10 section 7 in order to obtain records includes authority granted by a valid
11 (i.e., constitutional statute), the common law, or a rule of this court. In the
12 case of long distance toll records, "authority of law" includes legal process
13 such as a search warrant or subpoena.

14 *Gunwall*, 106 Wash.2d at 68-69. *Gunwall* cites for this proposition *State v. Fields*, 85
15 Wash.2d 126, 129 (1975), in which the issuance of a court's warrant pursuant to CrR 2.3(b)
16 was challenged. The *Fields* decision, which discusses the court's authority to promulgate the
17 then new criminal rules, is not authority for the broad statement in *Gunwall*, and *Gunwall*
18 does not clarify the source of the "subpoena" language. *State v. Butterworth*, 48 Wash.App
19 152, 156 (1987), cites but does not interpret the *Gunwall* "subpoena" language.

20 In *Personal Restraint of Maxfield*, 133 Wash.2d 332, 342, the Court noted that a
21 statute authorizing a subpoena may be sufficient "authority of law," but only under limited
22 circumstances.

23 ... the Legislature may enact a statute authorizing such disclosure so long
24 as at least some level of protection exists, e.g., the suspicion of criminal
25 activity requirement in RCW 42.17.314.

26 RCW 42.17.314 authorizes law enforcement to request an individual's utility records after a
showing to the utility that law enforcement suspects criminal activity. However, the

1 *Maxfield* Court states that such a statute is permissible only “because the privacy interest in
2 electric consumption records is minimal, more closely akin to the toll records addressed in
3 *Gunwall* than the pen register.” *Maxfield*, 133 Wash.2d at 342. It cannot be argued that a
4 statute would be necessarily constitutional if it sought records with a much greater privacy
5 interest, such as the bank records at issue here.

6
7 More recently, the Washington Supreme Court in *State v. Ladson*, 138 Wash.2d 343
8 (1999), noted that statutory authorization is sufficient for law enforcement to conduct a
9 pretextual warrantless traffic stop only when the statute authorizes a court to issue a warrant,
10 not when the statute dispenses with the warrant requirement altogether. *Ladson*, 138
11 Wash.2d at 352, n.3, citing *City of Seattle v. McCready*, 123 Wash.2d 260, 274. *Ladson* also
12 references a concurring opinion from *Restraint of Maxfield*, 133 Wash.2d 332, 345-46 for the
13 proposition that “Except in the rarest of circumstances, the ‘authority of law’ required to
14 justify a search pursuant to article I, section 7 consists of a valid search warrant or subpoena
15 issued by a neutral magistrate.” *Ladson*, 138 Wash.2d at 352, n. 3. While the “neutral
16 magistrate” language is not binding*, a subpoena is not authority of law simply because it is
17 authorized by statute. *See also, State v. Butterworth*, 48 Wash.App. 152 (1987), in which the
18 court rejected the argument that police reliance on a Utilities and Transportation Commission
19 regulation to obtain an individual’s private telephone records satisfied the authority of law
20 requirement.
21
22

23 The Legislature may not confer upon the Utilities and Transportation
24 Commission the judicial power to determine the constitutional rights of
25 citizens. If citizens have a constitutionally protected privacy interest in
26 their unpublished telephone listings, then the Commission cannot render
warrantless disclosure of those listings lawful by the simple expedient of
adopting a rule to that effect.

1 *Butterworth*, 48 Wash.App. at 158.

2 Where law enforcement is conducting a search or seizure, "authority of law" may be
3 supplied by a subpoena issued pursuant to statute, but only if the statute protects the
4 individual's privacy interest. The statute here, RCW 21.20.380, does not do so because it
5 does not require notice of the subpoena to the affected customer. If the Securities Division is
6 deemed to be "law enforcement" the securities statute is not valid "authority of law."
7

8 **Administrative Subpoena Exception**

9 The State argues that case law seems to recognize, without designating it as such, an
10 administrative subpoena exception to the warrant requirement. The State points to the many
11 Washington statutes that authorize administrative agencies to obtain information pursuant to
12 agency subpoena, without authorization by a court. The apparent "exception" is based on the
13 characterization of administrative subpoenas as "constructive searches." The State's
14 argument has merit where the privacy interests affected are only those of the party
15 subpoenaed. Since that party has notice of the subpoena, it can refuse to comply and await a
16 court enforcement action or challenge the subpoena in court. Either way, the subpoenaed
17 party's interests are protected by the court. A different rule applies where privacy interests of
18 a third party are at issue.
19

20 Two U.S. Supreme Court decisions, *Oklahoma Press Publishing Co. v. Walling*, 327
21 U.S. 186 (1946) and *United States v. Morton Salt Co.*, 338 U.S. 632 (1950) framed the issue
22 of administrative subpoena validity as one of balancing the public interest against private
23 security. The critical issue, according to the Supreme Court, is whether the disclosure sought
24 is unreasonable. The subpoena will be upheld if the inquiry is within the authority of the
25 agency, the demand is not too indefinite, and the information sought is reasonably relevant.
26

1 According to these cases, since the administrative subpoena is only a “constructive search”,
2 there is no requirement that it be issued pursuant to a warrant or that it be supported by
3 probable cause. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 216-217 (1946)
4 and *United States v. Morton Salt Co.*, 338 U.S. 632, 653 (1950).

5 These principles have been adopted by many states (see cases collected in State’s
6 memorandum at pp. 14-16) and by the Washington appellate courts where the interests of a
7 third party are not involved. *See, e.g., Kinnear v. Hertz Corp.*, 86 Wash.2d 407 (1978)
8 (permitting tax commission to subpoena taxpaying corporation under authority of *Morton*
9 *Salt*); *Steele v. State*, 85 Wash.2d 585 (1975) (upholding Attorney General’s civil
10 investigative demand for employment agency’s business records, noting that business entities
11 do not enjoy the full range of Fourth Amendment protections afforded individuals);
12 *Department of Revenue v. March*, 25 Wash.App. 314, 325 (1979) (summons issued to
13 taxpayer in aid of routine audit upheld; “the taxpayer’s protections from unreasonable
14 requests is afforded by the fact that the summons can be enforced only by court order”).

15
16
17 However, a different analysis applies where the administrative subpoena gathers
18 information about a third party without notice to that party. In that instance, the reasonable,
19 objective privacy expectation of the third party controls.

20 *Murphy v. State*, 115 Wash.App. 297 (2003), *cert. denied*, 124 S.Ct. 2812 (2004), is
21 instructive. In *Murphy*, the court addressed whether the privacy interests of a patient
22 receiving narcotic prescriptions were invaded when his pharmacy records were provided to
23 the state Pharmacy Board. The court conducted a two-part analysis: (1) whether the laws
24 regulating pharmacies give the Pharmacy Board and other law enforcement agencies the
25 authority to conduct such inspections; and (2) assuming they have such authority, whether
26

1 the grant of authority “runs afoul of the right to privacy guaranteed by the federal and state
2 constitutions.” *Murphy*, 115 Wash.App. at 305-306. After finding statutory authority for the
3 Board’s investigation, the court held that the individual must reasonably expect his records
4 will be available to government inspectors because a state statute makes them available for
5 inspection to law enforcement. The court held that the warrantless search of the patient’s
6 pharmacy records therefore did not violate art. I, section 7 of the Washington State
7 Constitution. *Murphy*, 115 Wash.App. at 306-307.
8

9 In this case, no Washington statute expressly authorizes disclosure of bank records to
10 law enforcement. While RCW 21.20.380(3) now authorizes the Department of Financial
11 Institutions to direct a subpoenaed bank to keep the fact of the subpoena confidential from
12 the customer, at the time this subpoena was issued in June 2001, the statute did not contain
13 such a provision, so a reasonable customer would not necessarily expect that his bank records
14 could be obtained without notice to him. Nevertheless, by participating in the securities
15 industry, the defendant knew or should have known that his records of securities transactions
16 were subject to inspection by the Securities Division.
17

18 **Pervasively Regulated Industry**

19 The courts recognize an exception to the warrant requirement for searches conducted
20 in pervasively regulated industries. *United States v. Biswell*, 406 U.S. 311, 315-316 (1972).
21 Warrantless invasions of privacy in pervasively regulated industries are deemed to be outside
22 the ambit of the Fourth Amendment’s protection because “when an entrepreneur embarks
23 upon such a business he has voluntarily chosen to subject himself to a full arsenal of
24 governmental regulation.” *State v. Mach*, 23 Wash.App. 113, 115 (1979), citing *Marshall v.*
25 *Barlow’s Inc.*, 436 U.S. 307, 313 (1978). See also, *State v. Thorp*, 856 P.2d 1123 (1993) (the
26

1 effect of finding that an industry is pervasively regulated is to justify, on complicit consent
2 theory, that governmental intrusion into business is reasonable).

3 *Mach* involved a conviction for unlawful possession of salmon during a closed
4 fishing season. The fish were confiscated during a warrantless search by fisheries patrol
5 officers. The court noted that fish runs require vigorous governmental protection and that
6 commercial fishing in Washington has a long tradition of close regulation. The court
7 concluded that one participating in the industry voluntarily subjected himself to government
8 regulation. "We conclude, therefore, that a commercial fisherman voluntarily chooses to
9 engage in a pervasively regulated business which subjects him to the full arsenal of
10 governmental intrusion." *Mach*, 23 Wash.App. at 115.

12 Similarly, the court in *Alverado v. WPPSS*, 111 Wash.2d 424 (1988), upheld a
13 warrantless urinalysis drug testing requirement for prospective employees in a nuclear power
14 facility. Deciding the case under the Fourth Amendment because the field was preempted by
15 federal law, the court held that "[W]arrantless searches are constitutionally tolerable as an
16 exception to the warrant requirement for administrative inspections in 'pervasively regulated
17 industries.'" *Alverado*, 111 Wash.2d at 435 (1988).

19 The securities industry is a "pervasively regulated industry". *United States v. Szur*,
20 1998 WL 132942 (S.D.N.Y. 1998) citing *New York v. Burger*, 482 U.S. 691 (1987). When
21 defendant solicited securities business from Julie Gillett, he engaged in the pervasively
22 regulated securities industry. He persuaded Ms. Gillett to let him handle her investments by
23 telling her he was an investment specialist, that he worked for a large investment firm, and
24 that his job was to invest people's money wisely. He advised Ms. Gillett that commodities
25 were his specialty.
26

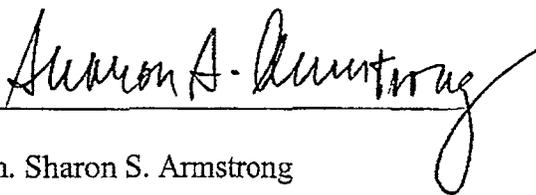
1 The Securities Act of Washington, RCW Ch 21.20 extensively regulates individuals
2 and firms that engage in purchase and sale of securities as well as individuals and firms that
3 provide investment advice and financial planning where the advice or recommendations
4 concern securities. RCW 21.20.005(2), (6), (12). They must be registered, RCW 21.20.040,
5 and are prohibited from engaging in any fraudulent act. RCW 21.20.010 and RCW
6 21.20.020. They are required to maintain records as prescribed by the Director of the
7 Department of Financial Institutions, RCW 21.20.100, are subject to investigation by the
8 Director, RCW 21.20.370, and are subject to both civil and criminal liability for fraud. RCW
9 21.20.410 and RCW 21.20.430. Commodities traders are similarly regulated. See RCW Ch
10 21.30.
11

12 A reasonable person engaging in the securities/commodities industry would have
13 known that his conduct was heavily regulated; that it is unlawful to engage in securities
14 trading or investment advising without being registered, RCW 21.20.040; that the Director is
15 authorized by state law to investigate securities violations, RCW 21.20.370; and the Director
16 is authorized to compel attendance of witnesses and production of documents as part of the
17 investigation. RCW 21.20.380. Although this defendant did not register with the
18 Department, a reasonable person engaging in securities transactions and holding himself out
19 as a securities salesperson/ investment advisor/ commodities salesperson, should have known
20 that by engaging in the activity he subjected himself to the "full arsenal of government
21 regulation." Defendant cannot therefore be heard to complain that his records of these
22 transactions, which happened to be his personal bank account records, are protected from
23 discovery by subpoena.
24
25
26

1 The U.S. Supreme Court in *SEC v. Jerry T. O'Brien*, 467 U.S. 735 (1984) upheld a
2 regulatory subpoena issued without notice to the target defendant. The Kansas Supreme
3 Court in *Brant v. Bank of America*, 31 P.2d 952 (2001) upheld the state Securities
4 Commissioner's issuance of a subpoena for a customer's records without notice to the
5 customer. See also, *State v. McAllister*, 840 A.2d 967 (N.J.App. 2004) and cases cited
6 therein. Contra, *People v. Lamb*, 732 P.2d 1216 (Colo. 1987).

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8 For these reasons, the motion to suppress the defendant's bank records is denied.

9 DATED this 4th day of March, 2005.

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13 Hon. Sharon S. Armstrong

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15 *This language is dicta because the issue in *Ladson* was not whether a subpoena issued by a
16 neutral magistrate was valid authority, but rather if in the absence of a warrant, a pretext
17 traffic stop was valid. Additionally, *State v. Hendrickson*, 129 Wn.2d 61, (1996), from
18 which the *Maxfield* concurring opinion drew the "neutral magistrate" language, uses "neutral
19 magistrate" to describe one who issues a warrant, i.e. a judge. *State v. Hendricksen* at 70.
20 Thus, the "neutral magistrate" reference in *Ladson* appears to be an error.
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