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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
IN AND FOR DIVISION ONE

Court of Appeals No. 56017-4-I

STATE OF WASHINGTON v. *MICHAEL M. MILES*

State of Washington, Respondent,
Michael M. Miles, Petitioner.

REPLY OF THE PETITIONER

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1. TABLE OF CONTENTS

1. Table of Contents.....	i-ii
2. Table of Authorities.....	iii-v
3. Reply.....	1-25
I. Introduction.....	1
II. Reply to Statement of Case.....	1
III. Governmental Power is Subject To Constitutional Limitations.....	1-5
A. Political Power In Washington.....	1-2
B. The Nature Of The Right To Privacy In Washington.....	2-3
C. The Power Asserted.....	3-4
D. The Constitutional Limit On Arbitrary Power.....	4-5
IV. The Government Acted Beyond Constitutional Limitations.....	5-24
A. The Government Exceeded Constitutional Limits Under The Rules Of the Supreme Court.....	5-6
i. A Warrant Was Required.....	5-6
ii. The Subpoena Was Invalid.....	6
B. The Government Exceeded Constitutional Limits Under The Statute.....	6-14
i. Judicial Supervision Is Required To	

Limit Arbitrary Use Of Governmental Power	7-8
ii. Notice Was Constitutionally Required.....	8-14
C. The Government Exceeded Constitutional Limits Under The Common Law.....	14-20
D. The Federal Banking Statutes Do Not Give Notice Of A Diminution Of State Privacy.....	20-21
E. The Exception Cannot Be Used For A Criminal Investigation.....	21-23
V. Remedy.....	24-25
VI. Conclusion.....	25
4. Appendix.....	viii

2. TABLE OF AUTHORITIES

Washington State Constitution

Wash.Const. art 1, § 1	1
Wash.Const. art. 1, § 7	2

Washington Decisional Law

<i>Alverado v. WPPSS</i> , 111 Wn.2d 424, 440, 759 P.2d 427 (1988)	16
<i>Dept. Of Revenue v. March</i> , 25 Wn. App. 314, 610 P.2d 916 (1979)	8, 9
<i>In re Elliott</i> , 74 Wn.2d 600, 446 P.2d 347 (1968)	1
<i>In re Williams</i> , 147 Wn.2d 476, 55 P.3d 597 (2002)	19
<i>Love v. King County</i> , 181 Wash. 462, 44 P.2d 175 (1935)	1-2
<i>Murphy v. State</i> , 115 Wn. App. 297, 62 P.3d 533 (2003)	15
<i>Seattle v. McCready</i> , 123 Wn.2d 260, 868 P.2d 134(1994)	4
<i>State v. Boland</i> , 115 Wn.2d 571, 800 P.2d 1112 (1990)	2, 4, 6, 24
<i>State v. Butterworth</i> , 48 Wn.2d 152, 737 P.2d 1297 (1987)	10, 18
<i>State v. Clarke</i> , 30 Wash. 439, 71 P. 20 (1902)	2
<i>State v. Gunwall</i> , 106 Wn.2d 54,	

720 P.2d 808(1986)	5, 6
<i>State ex rel. Hodde v. Superior Court</i> , 40 Wn.2d 502, 507, 244 P.2d 668 (1952)	13
<i>State v. Ladson</i> , 138 Wn.2d 343, 979 P.2d 833(1999)	5, 6, 7, 23, 24
<i>State v. McKinney</i> , 148 Wn.2d 20, 60 P.3d 46 (2002)	2
<i>State v. Maxfield</i> , 125 Wn.2d 378, 886 P.2d 123 (1994)	6
<i>State v. Parker</i> , 139 Wn.2d 486, 987 P.2d 73 (1999)	2
<i>State v. White</i> , 135 Wn.2d 761, 957 P.2d 681(1998)	3
<i>State v. Young</i> , 123 Wn.2d 173, 867 P.2d 593 (1994)	4
<i>State v. White</i> , 126 Wn. App. 131, 107 P.3d 753 (2005)	8
<i>Steele v. State</i> , 85 Wn.2d 585, 537 P.2d 782(1975)	7-8, 9

United States Decisional Law

<i>California Bankers Assn v. Schultz</i> , 416 U.S. 21, 94 S.Ct. 1494, 39 L.Ed.2d 812 (Douglas, J. dissenting from plurality)(1974)	3, 5
<i>California Bankers Assn v. Schultz</i> , 416 U.S. 21, 94 S.Ct. 1494, 39 L.Ed.2d 812 (Plurality)	21
<i>Colonnade Catering Corp. v. United States</i> ,	

397 U.S. 72, 76, 90 S.Ct. 774, 25 L.Ed. 60 (1970)	15, 16
<i>Cordt v. Office of Inspector General</i> , Civ. No. 99-1589(RHK/RLC)(Minn. 2000)	22
<i>Donaldson v. United States</i> , 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971)	22
<i>In re Pacific Railway Comm'n</i> , 32 F. 241 (N.D.Cal 1887)	4
<i>In Re Subpoena Duces Tecum Nos.</i> <i>A99-0001, A99-0002, A99-0003, and A99-0004</i> , 51 F.Supp.2d 726 (W.D.Va.1999)	16
<i>Marshall v. Barlow's Inc.</i> , 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978)	17
<i>New York v. Burger</i> , 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed 2d 601(1987)	17, 19, 20
<i>Oklahoma Press Publishing Co. v. Walling</i> , 327 U.S.186, 66 S.Ct. 494, 90 L.Ed.2d 614 (1946)	7, 9, 16, 25
<i>.SEC v. Jerry T. O'Brien</i> , 467 U.S. 735, 104 S.Ct. 2720, 81 L.Ed..2d 615(1984)	13
<i>United States v. Art-Metal-USA Inc.</i> , 484 F.Supp 884(D.N.J. 1980)	22
<i>United States v. Biswell</i> , 406 U.S. 311, 315, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972)	16
<i>United States v. LaSalle National Bank</i> , 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221(1978)	22
<i>United States v. Morton Salt</i> , 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950)	7, 9
<i>United States v. Powell</i> , 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964)	13

United States v. Weingarden,
473 F.2d 445 (6th Cir. 1973) 22

Decisional Law From Other States

*A.G. Edwards, Inc. v. The Secretary of State,
The Department of Securities of the State of Illinois*,
331 Ill. App. 3d 1101, 772 N.E.2d 362(2002) 12

Brant v. Bank of America,
272 Kan. 182, 31 P.3d 952 (2001) 14

Burrows v. Superior Court of San Bernardino County,
13 Cal.3d, 238, 244, 118 Cal.Reptr 166,
529 P.2d 590 (1974) 12

Commonwealth v. EFAW, 565 Pa. 445 (2001) 12

Commonwealth v. Digiacom, 486 Pa 32,
403 A.2d 1283 (1979) 12

In Re Cr. Invest., 754 P.2d 633 (Utah 1988) 11

People v. Jackson, 116 Ill. App 3d 430,
452 N.E.2d 85 (1983) 12

People v. Mason, 989 P.2d 757(Colo 1999) 11

State v. McAllister, 184 N.J. 17, 875 A.2d 866 (2005) 12

State v. Thompson, 810 P.2d 415, 418 (Utah 1991) 11

Winfield v. Division of Pari-Mutuel Wagering,
443 So.2d 445 (Fla.App 4 Dist. 1984) 13

Winfield v. Division of Pari-Mutuel Wagering,
477 So.2d 544 (Fla. 1985) 13

Washington Statutes & Session Laws

RCW 19.86.110 8

RCW 21.20.040	19
RCW 21.20.100	18, 19
Former RCW 21.20.370	4
Former RCW 21.20.380	4, 8, 9, 10, 17, 18
RCW 21.20.460	4
RCW 32.04.250	10
RCW 43.17.010	3
RCW 82.32.110	8
Laws 2002, ch. 65, § 7	10
Washington State Legislative Bills	
HB 2916 (Wash 2006)	19
SB 6593 (Wash 2006)	19
Washington Court Rules	
CR 45	6
CrR 4.8.	6
United States Code	
12 U.S.C. 3405	21
12 U.S.C. 3422	21
15 U.S.C. 78	21
New York Statutes	
Veh. & Traf. Law § 415-a5	17, 20

I. Introduction

The Defense asks the Court to find that the government violated art., § 7 by performing a warrantless search of a Washingtonian's bank records. Based largely on policy, the State answers with a demand that the Court vest the regulatory state with the power to issue secret process on an unprecedented scale. The Defense replies that state constitutional limits on arbitrary power preclude that result.

II. Reply To Statement Of The Case

The Defense objects to any facts presented outside those contained in the order on appeal. The Defense maintains the position that the allegations Judge Armstrong referred to in the order were in the hands of the Securities Division, but denies the truth of those allegations. The Defense specifically objects to supplementary evidence the State presents.

III. Governmental Power Is Subject To Constitutional Limitations

A. Political Power In Washington

The government receives its just powers only from the consent of the governed and only to protect and maintain individual rights. Wash. Const. art 1, § 1. The state constitution is a limitation on the actions and power of the legislature, not a grant of power. *In re Elliott*, 74 Wn.2d 600, 604, 446 P.2d 347 (1968). The legislature represents the people's sovereignty, but its power is subject to constitutional limits. *Love v. King*

County, 181 Wash. 462, 467-468, 44 P.2d 175 (1935). Limitations expressly declared are those that are most frequently invaded by arbitrary power. *State v. Clarke*, 30 Wash. 439, 443-444, 71 P. 20 (1902).

Art. 1, § 7 expressly declares Washingtonians' right to privacy.

Art. 1, § 7 declares:

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

See Wash.Const. art. 1, § 7.

Because the right to privacy was expressly declared, it follows that it is among those constitutional limitations most frequently invaded by arbitrary power. *Clarke*, 30 Wash. at 444.

B. The Nature of the Right to Privacy In Washington

Art. 1, § 7 protects the privacy of a Washingtonian's discrete activities, beliefs, and associations. *State v. McKinney*, 148 Wn.2d 20, 29, 60 P.3d 46(2002); *State v. Boland*, 115 Wn.2d 571, 580-581, 800 P.2d 1112(1990). It is these privacy interests that citizens of this state “have held, and should be entitled to hold, safe from governmental trespass, absent a warrant.” *See State v. Parker*, 139 Wn.2d 486 at 493-494, 987 P.2d 73(1999). The inquiry focuses not on an individual's actual or subjective privacy interest, but rather on those privacy interests Washington citizens have held in the past and are entitled to hold in the

future. *State v. White*, 135 Wn.2d 761, 768, 957 P.2d 681(1998).

In its opening brief, the Defense set forth a *Gunwall* analysis justifying Judge Armstrong's finding that a Washingtonian's bank records are a part of his or her private affairs protected by art. 1, § 7. For now, it is enough to state that a person's bank records reveal at least as much about that person's discrete activities, beliefs, and associations as his or her trash. As a great Washingtonian once noted:

“...In a sense, a person is defined by the checks he writes. By examining them the agents get to know his doctors, lawyers, creditors, political allies, social connections, religious affiliation, educational interests, the papers and magazines he reads, and so on ad infinitum...”

See California Bankers Assn v. Schultz, 416 U.S. 21, 85, 94 S.Ct. 1494, 39 L.Ed.2d 812 (Douglas, J. Dissenting from plurality)(1974).

C. The Power Asserted

The State asserts the power of the Securities Division of the Washington State Department of Financial Institutions. The Department of Financial Institutions is an executive, as opposed to a legislative, administrative agency. RCW 43.17.010.

The power asserted is the executive power to enforce the law. RCW 43.17.010 (agency's duties are to execute, enforce, and administer). The power to investigate civil violations, identify and detect criminal activities, and to subpoena in aid of investigations under the securities title

were vested in the director. Former RCW 21.20.370(1)&(2), former RCW 21.20.380(1). The director was authorized to delegate that power to the administrator of the Securities Division. *See* RCW 21.20.460. Subject only to constitutional limits, all power was vested in one individual.

Accordingly, the State asserts an executive law enforcement power vested in one individual to both investigate violations and to issue secret process for private records without recourse to a neutral magistrate.

E. The Constitutional Limit On Arbitrary Power

The constitutional limit on governmental power to obtain a Washingtonian's private records is the authority of law required by art. 1, § 7. When the police or other governmental agents conduct a search, then art. 1, § 7 is implicated and the search must be conducted pursuant to a warrant or fall within one of the recognized exceptions to the warrant requirement. *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994). The relevant inquiry in determining whether there has been a search is "whether the State has unreasonably intruded into a person's 'private affairs.'" *Young*, 123 Wn.2d at 181 citing *Boland*, 115 Wn.2d at 577. The limit applies to the actions of administrative agencies. *Seattle v. McCready*, 123 Wn.2d 260, 868 P.2d 134(1994); *see also In re Pacific Railway Comm'n*, 32 F. 241 (N.D.Cal 1887).

Our Supreme Court has already decided that obtaining private

records from a third party without authority of law constitutes a search. *State v. Gunwall*, 106 Wn.2d 54, 68, 720 P.2d 808(1986). Under those circumstances, the government unreasonably intrudes into a person's private affairs. *Gunwall*, 106 Wn.2d at 68.

IV. The Government Acted Beyond Constitutional Limits

The authority of law required by art. 1, § 7 for the government to obtain private records includes authority granted by a valid, (*i.e.*, constitutional) statute, the common law, or a rule of the Washington Supreme Court. *Gunwall*, 106 Wn.2d at 68-69. The normal requirement is a warrant. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833(1999).

A. The Government Exceeded Constitutional Limits Under The Rules of the Supreme Court

i) A Warrant was Required

As noted above the standard requirement for authority of law is a warrant. A subpoena may suffice to supply authority of law in some cases involving private records. *Gunwall*, 106 Wn.2d at 69 (long distance). A warrant is required for others. *Gunwall*, 106 Wn.2d at 69 (pen register).

Because of the nature of this privacy interest, a warrant is required. Bank records reveal nearly every detail of a Washingtonian's private life. *California Bankers Assn*, 416 U.S. at 85-86 (Douglas, J. Dissenting from plurality). They are like the pen register records at issue in *Gunwall*.

State v. Maxfield, 125 Wn.2d 378, 395-396 n. 32, 886 P.2d 123 (1994).

Certainly, bank records deserve as high a level of protection as trash.

Boland, 115 Wn.2d at 578 (search of trash requires a warrant). Because bank records reveal extensive information regarding a Washingtonian's discrete activities, beliefs and associations, a warrant is required.

ii. The Subpoena Was Invalid

As already extensively argued, the Defense maintains that a subpoena must be signed by a judge or neutral magistrate to constitute valid authority of law. *Ladson*, 138 Wn.2d at 352 n. 3 (citing cases).

This is certainly true under the court rules. No application was made to a judge or other neutral magistrate. There was no cause pending before any court in whose name an attorney could have issued process. CR 45 & CrR 4.8.

As the government did not obtain a warrant or subpoena under the court rules, the State may not point to those rules as authority of law.

B. The Government Exceeded Constitutional Limits Under The Statute

While a valid statute may supply authority of law, it must be a constitutional statute. *Gunwall*, 106 Wn.2d at 68-69. Probable cause is the required constitutional standard because, ultimately, art. 1, § 7 is designed to guard against unreasonable search and seizure made without probable

cause. *Ladson*, 138 Wn.2d at 350-351.

**i. Judicial Supervision Is Required To Limit
Arbitrary Use Of Governmental Power**

The State misstates the rule from *Oklahoma Press*. In addition to those requirements that the State sets forth, *Oklahoma Press* requires judicial supervision of the administrative subpoena process:

“...The requirement of probable cause, literally applicable in the case of a warrant, is satisfied in that of an order for production, by the court’s determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry...”

See Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209, 66 S.Ct. 494, 90 L.Ed.2d 614(1946)(emphasis added). Judicial supervision provides probable cause - the constitutional standard.

The purpose of this requirement is to protect against arbitrary governmental power:

“...To protect against mistaken or arbitrary orders, judicial review is provided. Its function is dispassionate and disinterested adjudication, unmixed with any concern as to the success of either the prosecution or the defense.”

See United States v. Morton Salt, 338 U.S. 632, 643-644, 70 S.Ct. 357, 94 L.Ed. 401 (1950).

Washington decisional law also recognizes judicial supervision as a constitutional requirement for an administrative subpoena. *Steele v.*

State, 85 Wn.2d 585, 595, 537 P.2d 782(1975)(protection against arbitrary agency subpoena is ability to petition the superior court); *Dept. Of Revenue v. March*, 25 Wn. App. 314, 610 P.2d 916 (1979) (citizen's protection from arbitrary summons is through enforcement proceedings).

Washington's statutes track the constitutional decisions of her courts. The Defense has submitted approximately seventy statutes that provide recourse to judicial supervision in the administrative subpoena context. The most important statute, however, is the one at issue in this case.

As required by *Oklahoma Press*, *Morton Salt*, *Steele*, and *March*, former RCW 21.20.380 provided Washingtonians with the right to judicial supervision. The right was contained in former RCW 21.20.380's resort to enforcement proceedings. Former RCW 21.20.380(3); *Steele*, 85 Wn.2d at 595 (RCW 19.86.110(7)); *March*, 25 Wn. App. at 322 (RCW 82.32.110)).

The government may not evade the constitutional requirement through secrecy. Absent notice, a statutory provision for enforcement proceedings fails to supply probable cause under *Oklahoma Press*.

ii. Notice Was Constitutionally Required

It is difficult to imagine how a person who has not been given notice of a subpoena can move to quash it. *Cf.*, *State v. White*, 126 Wn. App. 131, 134, 107 P.3d 753 (2005) (notice to adverse party of subpoena

on third party required under court rules). Absent notice, it is impossible for a Washingtonian with a protected privacy interest to obtain judicial supervision of an administrative subpoena seeking private records.

As the substitute for probable cause, judicial supervision is the core constitutional requirement of an administrative subpoena seeking private material. The method of achieving the right is by objection in the superior court. Without provision for this objection, an administrative subpoena process fails to supply the required probable cause and fails to protect against arbitrary governmental power. *Oklahoma Press Publishing Co.*, 327 U.S. at 209; *Morton Salt*, 338 U.S. at 640-641; *Steele*, 85 Wn.2d at 595; *March*, 25 Wn. App. at 322.

When used in secrecy, former RCW 21.20.380 was not constitutionally valid statutory authority of law under art. 1, § 7. Absent notice, an enforcement proceeding is unavailable to Washingtonians with a privacy interest. If the enforcement proceeding is unavailable, then the substitute for probable cause is absent and the government is free to use power in an arbitrary manner.

The State seeks to delineate the Securities Division's request that Washington Mutual keep the subpoena secret from a demand that they do so. Given that the Securities Division is not free to create authority of law, it is a distinction without a difference.

Initially, the State argued below that the legislature authorized the secret process. Since the legislature had not authorized secret process on the relevant date, the State falls back on the argument that it was a request. *Compare*, former RCW 21.20.380 *with* Laws 2002, ch. 65, § 7.

Leaving aside the fact that the ‘request’ is made in the context of a power relationship where the requesting agency is vested with supervisory authority over the bank, the theory still fails. *See* RCW 32.04.250 (authorizing the Department of Financial Institutions to file charges against mutual savings banks). The theory fails because the Security Division cannot, itself, supply authority of law under art. 1, § 7.

The legislature may not confer upon an agency the judicial power to determine the constitutional rights of citizens. *State v. Butterworth*, 48 Wn.2d 152, 158, 737 P.2d 1297 (1987). When Washingtonians have a constitutionally protected privacy interest, an administrative agency cannot negate it simply by adopting a rule to that effect. *Butterworth*, 48 Wn.2d at 158. The Securities Division was not free to waive the *Oklahoma Press* probable cause standard to increase its powers.

The State’s policy objections actually reflect latent demands for this increased power. The State cites its own allegations in support of this demand. But, this is an interlocutory appeal and Mr. Miles is presumed

innocent of those allegations.

The State also quotes several regulatory hypothetical examples and indicates the Securities Division's desire for secret process. Presumably, the State would extend the powers of secrecy to the entire bureaucracy.

Fortunately, it is the Court's constitutional analysis, as opposed to a policy of secrecy, that supplies the necessary limits on its opinion. So, too, it is this analysis that upholds the limits on arbitrary power.

The State seeks to bolster its policy argument with precedent from other jurisdictions. These cases are distinct and are not persuasive authority to set aside art. 1, § 7's authority of law requirement.

The State cases cited in "The State's Response To Defendant's Motion To Suppress" do not stand for the proposition that notice is not required. (CP 158-162). Rather they stand for the proposition that probable cause, in the traditional sense, is not required. This does not excuse failure to provide the probable cause standard that is required.

Of those cases that arise within the context of a state constitutional privacy protection, several require notice to the account holder or prior judicial review. *People v. Mason*, 989 P.2d 757(Colo 1999) (notice of subpoena required to account holder); *State v. Thompson*, 810 P.2d 415, 418 (Utah 1991) (subpoena issued to bank must be valid under Utah

Subpoena Powers Act); *In Re Cr. Invest.*, 754 P.2d 633, 636 (Utah 1988) (subpoena under Utah Subpoena Powers Act unconstitutional without prior judicial review); *Burrows v. Superior Court of San Bernardino County*, 13 Cal.3d, 238, 244, 118 Cal.Reptr 166, 529 P.2d 590 (1974) (noting cases allowing governmental invasions require judicial enforcement of subpoenas).

Others are distinguished because they interpose a grand jury. Compare, *Commonwealth v. EFAW*, 565 Pa. 445 (2001) (grand jury subpoena for insurance records valid without notice), with *Commonwealth v. Digiacomo*, 486 Pa 32, 403 A.2d 1283 (1979) (invalid judicial subpoena for bank records unconstitutional); compare, *People v. Jackson*, 116 Ill. App 3d 430, 436, 452 N.E.2d 85 (1983)(subpoena authorized by grand jury valid) with *A.G. Edwards, Inc. v. The Secretary of State, The Department of Securities of the State of Illinois*, 331 Ill. App. 3d 1101, 772 N.E.2d 362(2002)(administrative subpoena issued by state securities division for personal bank records unconstitutional); *State v. McAllister*, 184 N.J. 17, 875 A.2d 866 (2005) (grand jury subpoena valid, but Supreme Court to revisit protections under Court's rule-making power).

In fact, the State offers only one case in which notice of an administrative subpoena was denied under a state constitution protecting

privacy in bank records. *Winfield v. Division of Pari-Mutuel Wagering*, 477 So.2d 544 (Fla. 1985)(*Winfield II*). The Florida case is distinct because the subpoena at issue was a legislative, rather than executive, subpoena. *Winfield v. Division of Pari-Mutuel Wagering*, 443 So.2d 445 (Fla.App 4 Dist. 1984) (*Winfield I*).

The present case does not present the question of whether a legislative agency has the ability to subpoena without judicial supervision. That issue has been decided. *State ex rel. Hodde v. Superior Court*, 40 Wn.2d 502, 507, 244 P.2d 668 (1952). This is not a case where the legislature itself seeks facts to inform the lawmaking process. It is thus distinct both from *Hodde* and from *Winfield*.

The State presents a flawed construction of *SEC v. Jerry T. O'Brien*, 467 U.S. 735, 104 S.Ct. 2720, 81 L.Ed..2d 615(1984). That court did not assume arguendo that the respondent had a Fourth Amendment right to privacy in his bank records. *O'Brien*, 467 U.S. 73 at 749. Rather, it assumed arguendo that he was otherwise entitled to the good faith requirements announced in *United States v. Powell*, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964). *O'Brien*, 467 U.S. 73 at 749. The Court had already rejected the respondent's privacy argument because the Fourth

Amendment does not protect bank records. *O'Brien*, 467 U.S. 73 at 743.¹

Art. 1, § 7 requires authority of law and the relevant standard is probable cause. In the context of an administrative subpoena that invades a Washingtonian's right to privacy in bank records, this standard is not met unless the citizen is provided with notice. If an executive agency desires secrecy, it may obtain a warrant.

But, the agency cannot sua sponte waive the probable cause requirement announced in *Oklahoma Press*, adopted in *Steele* and *March*, and incorporated in former RCW 21.20.380(3). If the agency does so, it has exceeded the limits placed on arbitrary governmental power.

C. The Government Exceeded Constitutional Limits Under The Common Law

The exception to the warrant requirement for searches in pervasively regulated industries is a species of constitutional common law. The exception is the product of judicial interpretation of the Fourth Amendment's reasonableness clause.

Upon close examination, the State's argument is that an otherwise

¹ Likewise, Kansas did not assume arguendo that its citizens had a constitutional privacy interest in their bank records and reject notice. *Brant v. Bank of America*, 272 Kan. 182, 31 P.3d 952 (2001). Rather, while noting that *Winfield* had rejected a notice requirement even when its citizens had a constitutional privacy interest, the Kansas Supreme Court specifically cited the fact that its citizens did not as central to its statutory interpretation analysis. *Brant v. Bank of America*, 272 Kan. at 191.

unconstitutional administrative subpoena can serve as authority law, if a person participates in a pervasively regulated industry. The argument is flawed because privacy under the exception is diminished only insofar as authorized by a constitutionally valid statute.

While it is conceivable that the exception might work a diminution of privacy in the sense recognized in *Murphy*, it did not do so here. *Murphy v. State*, 115 Wn. App. 297, 62 P.3d 533 (2003). The exception diminishes privacy only insofar as authorized by a constitutionally valid statute. Former RCW 21.20.380 was not constitutionally valid for the purpose of issuing secret process. The actual authorization for searches under the exception lies in RCW 21.20.100, a statute that is inapplicable to the facts of this case.

The exception allows the legislature to authorize warrantless searches within the subject industry. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76, 90 S.Ct. 774, 25 L.Ed. 60 (1970). The search in *Colonnade* was held to be unconstitutional because it was not authorized by Congress. *Colonnade Catering Corp.*, 397 U.S. at 77. Because Congress authorized a fine, rather than forcible entry, the search was not constitutional. *Colonnade Catering Corp.*, 397 U.S. at 77. Where Congress has not authorized a particular procedure, the *See* warrant

requirement applies to limit administrative discretion. *Colonnade Catering Corp.*, 397 U.S. at 77 citing *See*, 387 U.S. at 543.

The authority to search under the exception depends on a valid statute. *United States v. Biswell*, 406 U.S. 311, 315, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972). The statute must provide a constitutionally adequate substitute for a warrant. *Alverado v. WPPSS*, 111 Wn.2d 424, 440, 759 P.2d 427 (1988).

If the appropriate constitutional standard is supplied by *Oklahoma Press*, then the application of the statute was not an adequate substitute for a warrant. The analysis in *Oklahoma Press* is almost diagrammatic: it specifies that judicial supervision is the necessary substitute for probable cause in an administrative subpoena. *Oklahoma Press Publishing Co.*, 327 U.S. at 209. Without the necessary probable cause, the subpoena did not serve as an adequate substitute for a warrant.²

If *Burger* supplies the relevant constitutional standard, then the statute was not an adequate substitute for a warrant. *New York v. Burger*, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed 2d 601(1987). Under *Burger*, the

² Ironically, in the case cited by the State for the proposition that the *Oklahoma Press* probable cause standard is weaker than the standard set by *Burger*, the Court was performing the office of judicial supervision and quashed a subpoena for financial records. *In Re Subpoena Duces Tecum Nos. A99-0001, A99-0002, A99-0003, and A99-0004*, 51 F.Supp.2d 726 (W.D.Va.1999).

statute:

“...must perform the two basic functions of a warrant. It must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope and it must limit the discretion of the inspecting officers...”

See Burger, 482 U.S. at 703. Absent judicial supervision, former RCW 21.20.380 did neither.

Former RCW 21.20.380 purports to notify all Washingtonians that the Securities Division could subpoena their bank records, but only with judicial supervision. The preliminary determination of relevance and materiality were left entirely within the director’s discretion. Former RCW 21.20.380(1). The actual check on scope was the ability to be heard in an enforcement proceeding. Former RCW 21.20.380(3); *see also, Marshall v. Barlow’s Inc.*, 436 U.S. 307, 324 n. 22, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978) (delineation of scope particularly important with documents).

This is entirely unlike the regulatory scheme in *Burger*. There, the statutory scheme was specifically limited to persons required to be registered as vehicle dismantlers. *Burger*, 482 U.S. at 608, n.1, 711 *citing* N.Y. Veh. & Traf. Law § 415-a5. Moreover, it was specifically limited to those records that vehicle dismantlers were statutorily required to maintain. *Burger*, 482 U.S. at 711-712.

By contrast, former RCW 21.20.380 was made applicable to all Washingtonians and was not limited to records that were required to be maintained. Former RCW 21.20.380 did not, and was never meant to, provide for warrantless searches within the exception. The Securities Division was no more free to waive *Burger's* requirements, than those of *Oklahoma Press. Butterworth*, 48 Wn.2d at 158. In purporting to do so, the Securities Division devolved absolute discretion onto itself.

RCW 21.20.380 cannot be claimed as diminishing privacy in this case. To have diminished privacy the process used had to be authorized by a constitutionally valid statute. Because the statute was did not supply an adequate substitute for a warrant under either *Oklahoma Press* or *Burger*, privacy was not diminished in the sense recognized in *Murphy*.

RCW 21.20 actually has a provision for administrative searches conducted under the exception. In contrast to former RCW 21.20.380(3)'s provision for enforcement proceedings, RCW 21.20.100 authorizes searches of those records that registrants are statutorily required to keep. *Compare* former RCW 21.20.380(3) with RCW 21.20.100(4).

It is likely that the State does not argue this statute because it is clearly inapplicable to the facts of the present case. Unlike the statute at issue in *Burger*, RCW 21.20.100 only authorizes searches as to persons

registered under the securities title. Moreover, because it is specifically limited to those records that registrants are required to keep, personal records are beyond its reach. RCW 21.20.100.

The State decries the argument that RCW 21.20.100 is applicable only to registrants. Whatever the wisdom of the position that the statute could be made applicable to participants, the fact of the matter is that the legislature has not chosen not to do so.

The legislature knows full well how to bring participants within the exception, when it is so inclined. RCW 21.20.040(5)(a) is a prime example of a related statute where the legislature has chosen to apply the securities chapter to both registrants and persons required to register. *See* RCW 21.20.040(5)(a). The legislature has simply chosen not to do so in RCW 21.20.100. *In re Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002) (*expressio unius est exclusio alterius*).

Moreover, the legislature considered applying the exception to non-registrants this past session, but did not. The Washington Uniform Laws Commission requested that the Senate consider SB 6593 and that the House consider HB 2916. SB 6593 (Wash 2006) & HB 2916 (Wash 2006). Both bills sought to amend RCW 21.20.100 and replace it with a new section subjecting not only registrants to examinations of their

records, but also persons who are “required to be registered.” SB 6593 § 31(4) (Wash 2006) & HB 2916 § 31(4) (Wash 2006).

This is exactly the type of language that brought the defendant in *Burger* within reach of the exception. *Burger*, 482 U.S. at 608, n.1, 711 *citing* N.Y. Veh. & Traf. Law § 415-a5. Arguably, legislation of this type might also have sufficiently tailored scope. Administrative searches would be limited to records required to be kept and time and place limits would have been placed. Had the legislature acted four years ago and inserted similar language, there might be an issue. But, it has declined to do so.

Accordingly, the search did not fall within the exception. Whether measured by the constitutional standards announced in either *Oklahoma Press* or *Burger*, a secret subpoena issued under RCW 21.20.380 does not supply an adequate substitute for a warrant. This is not surprising, as the actual statutory authorization for searches under the exception is RCW 21.20.100. But, that statute is not applicable to the search at issue in this case. Since the search does not fall within the exception, the exception does not put Washingtonians on notice of a diminished right of privacy.

D. The Federal Banking Statutes Do Not Give Notice Of A Diminution Of State Privacy

In a related diminution argument, the State cites to several federal

banking statutes. But the State fails to inform the Court of two important considerations affecting the applicability of those statutes.

Assuming a federal statute could give notice of a diminution of state constitutional privacy, the cited statutes do not. The plurality opinion that the State cites for statutory notice indicates that the records are kept for federal, as opposed to state, law enforcement purposes. *California Banker's Assn.*, 416 U.S. at 26-27. Moreover, if federal law enforcement chooses to access those records by way of administrative subpoena, they must give notice to the account holder. 12 U.S.C. 3405. The Federal Securities and Exchange Commission is subject to this subsection's requirements as modified by 15 U.S.C. 78. 12 U.S.C. 3422. That statute does allow for an administrative subpoena without notice to the customer, but only after review by a federal district court. 15 U.S.C. 78.

In short, the federal statutes cited by the State as giving notice that state law enforcement could invade privacy do nothing of the sort. They are limited to federal law enforcement and federal law enforcement is limited in exactly the manner that art. 1, § 7 requires. Either notice to the customer, or prior recourse to a neutral magistrate, is required for a valid federal administrative subpoena for bank records.

E. The Exception Cannot Be Used For A Criminal Investigation

In the main, the State answers the Defense contention that an administrative subpoena cannot be issued to search for the fruits and instrumentalities of a crime with federal case law. The cases cited are inapposite. In those cases, enforcement proceedings were provided and the right to privacy was not at issue.

None of the federal cases occur within the context of a constitutionally protected privacy interest and in each case an enforcement hearing was held. *United States v. LaSalle National Bank*, 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221(1978); *Donaldson v. United States*, 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971); *United States v. Weingarden*, 473 F.2d 445 (6th Cir. 1973); *United States v. Art-Metal-USA Inc.*, 484 F.Supp 884(D.N.J. 1980); *Cordt v. Office of Inspector General*, Civ. No. 99-1589(RHK/RLC)(Minn. 2000).

This highlights the contradictions inherent in the State's position. In each of these cases, the federal constitution did not, in the first instance, require a warrant. There simply was no privacy interest at issue. Non-the-less, the persons whose records were at issue were given the opportunity to litigate the issue under the lesser good faith standard. Here, there was a protected privacy interest and there was no opportunity given to defend it.

Art. 1, § 7 clearly applies with the same and separate force to

governmental violations of privacy for civil enforcement. Perhaps the most common application of art. 1, § 7 occurs within the context of the civil enforcement of the traffic code. *See e.g., Ladson*, 138 Wn.2d 343. It was clearly incumbent on the State to provide judicial enforcement, even as to a civil investigation.

More importantly, the federal cases are inapposite because, absent a warrant, the government bears the burden of proving the exception. This includes pretextual searches. *Ladson*, 138 Wn.2d at 351 (refusing to adopt an exception based on pretext).

Again, the language from the cover letter could not be more clear:

“The response time of the bank is very important as not to impair our ability to complete our investigation within statutory time limits. The statute of limitations for theft is three years from the transaction date. If we are unable to meet this deadline, the investor may have no other recourse and the crime may go unpunished.”

CP 81-87 at page 87.³

Despite the post-hoc rationalizations offered by a Securities Division officer who took no part in the process, the purpose of the subpoena was clear. It was meant to collect evidence of a crime, a crime beyond the agency’s statutory authority to investigate.

³ A copy of this letter is attached as Appendix A of this reply.

V. Remedy

Washington's exclusionary rule predates the federal mandate that states apply the rule in Fourth Amendment cases. *Boland*, 115 Wn.2d at 583. Application of the rule is mandatory when the government violates a Washingtonian's art. 1, § 7 privacy rights. *Boland*, 115 Wn.2d at 582. There is no balancing of interest involved when the government violates a person's privacy rights. *Boland*, 115 Wn.2d at 582. Rather, whenever the government unreasonably disturbs a Washingtonian's private affairs, exclusion of the poison fruit is required. *Ladson*, 138 Wn.2d at 359.

In contrast to the federal exclusionary rule, Washington's exclusionary rule serves not one, but three important purposes. *Boland*, 115 Wn.2d at 582. Like the federal rule, it is expected to be a deterrent to law enforcement. *Boland*, 115 Wn.2d at 582. But, it also serves to protect privacy interests from unreasonable governmental intrusion and to preserve the dignity of the judiciary by refusing to consider evidence that has been illegally obtained. *Boland*, 115 Wn.2d at 582.

Of these three purposes, it is the protection of privacy from unreasonable intrusion that is the most important. *Boland*, 115 Wn.2d at 582. It is this concern that the Defense has raised since litigation began.

Oklahoma Press clearly allows the assertion of a privilege during

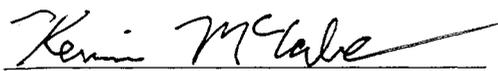
enforcement proceedings. The petitioner in the case raised the Fifth Amendment and the court fully considered it. *See generally, Oklahoma Press Publishing Co.*, 327 U.S. 186. Certainly, Washington's right to privacy - the right to keep safe from governmental intrusion religious and political affiliation - has its place in such a hearing. An order quashing or protective orders would almost certainly be considered.

These considerations weigh heavily against departing from the exclusionary rule. As Justice Douglas observed, a Washingtonian's thoughts, beliefs, religious and political affiliations - the very definition of self - are reflected in his or her bank records. When the government violates this privacy, exclusion is the required remedy.

VI. Conclusion

For the reasons cited above and in the Petitioner's opening brief, the Defense asks that the Court reverse the trial court and order suppression of evidence.

Respectfully Submitted By:



Kevin McCabe WSBA #28821

Attorney for Michael Miles, Petitioner



State of Washington
DEPARTMENT OF FINANCIAL INSTITUTIONS

SECURITIES DIVISION

P.O. Box 9033 • Olympia, Washington 98507-9033
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<http://www.wa.gov/dfi/securities>

June 7, 2001

Washington Mutual Savings Bank
Deposit Operations Research
MS EET 1610
POB 834
Seattle, WA 98111-0834

Dear Ms Tammy Dobbs or Ann Maloney:

RE: Michael M. Miles

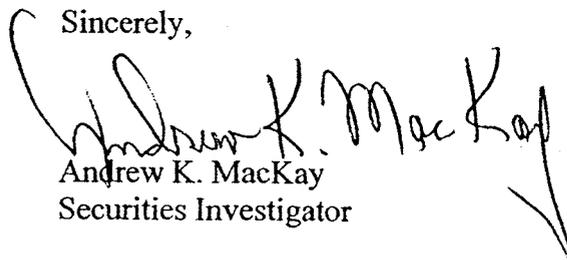
The enclosed subpoena is being issued as part of a non-public investigative matter. Therefore, it is hereby requested that you do not notify the subject of this subpoena as it may be detrimental to the investigation being conducted by the Securities Division.

Initially we request copies of signature card(s), monthly statements and all deposits of \$1,000.00 and above.

Attached are copies of checks made payable to Michael M. Miles, MM Miles, to assist in locating all accounts or banking activity.

The Securities Division of the Department of Financial Institutions is the state agency charged with investor protection in the area of securities and other investment vehicles. In the course of investigating many of the complaints that we receive, it is necessary for us to subpoena bank records to establish the purpose of the expenditure of investor funds. The investigation may lead to criminal charges. The response time of the bank is very important as not to impair our ability to complete our investigation within the statutory time limits. The statute of limitations for theft is three years from the transaction date. If we are unable to meet the deadline, the investor may have no other recourse and the crime may go unpunished. We would appreciate any assistance that could be given to expedite our request at this time.

Sincerely,



Andrew K. MacKay
Securities Investigator

MM 0863