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BY C.J. HERRITT

NO. 78656-9

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL M. MILES,

Petitioner.

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL

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ORIGINAL

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Attorney General represents state officials, Departments and agencies in litigation. RCW 43.10.045. The Attorney General also advises state officials, Departments, and agencies on legal matters. *Id.* This case involves the statutory authority of the Department of Financial Institutions (DFI) to issue investigative subpoenas. Many state regulatory agencies represented by the Attorney General have similar statutory authority. The agencies have an interest in maintaining their statutory authority to conduct administrative investigations, issue investigative subpoenas, and (where appropriate) to make referrals to law enforcement.

The legislature has created numerous state regulatory programs designed to protect the public by delegating to state agencies the responsibility to regulate individuals engaged in certain activities. These regulatory programs include grants of subpoena authority to secure records and testimony during an investigation.¹ The agencies conduct investigations and enforce laws and regulations concerning such varied

¹ See, e.g., RCW 21.20.380 (Department of Financial Institutions); RCW 18.130.050 (Department of Health/Regulation of Health Professions – Uniform Disciplinary Act); RCW 70.94.141(2), .142(4) (Department of Ecology – Washington Clean Air Act); RCW 18.235.030(3) (Department of Licensing – Uniform Regulation of Business and Professions Act); RCW 48.135.040(1)(g) (Office of the Insurance Commissioner); RCW 48.03.070 (Department of Labor and Industries – Washington Industrial Safety and Health Act); RCW 49.60.140, .160 (Human Rights Commission – Washington Law Against Discrimination); RCW 74.04.290 (Department of Social and Health Services – Public Assistance); RCW 82.32.110 (Department of Revenue – Excise Taxes).

activities as health care provider licenses, liquor sales, campaign finance reporting, and business licenses. When analyzing the constitutional constraints on state administrative agency subpoenas, this Court has followed United States Supreme Court precedent interpreting the Fourth Amendment of the United States Constitution.

DFI and other state administrative agencies with statutory subpoena authority wish to advise this Court of their interests in and position on the state constitutional questions regarding administrative investigative subpoenas that have been raised in this case.

II. ISSUES OF INTEREST TO AMICUS

(1) Whether administrative investigative subpoenas issued by state agencies pursuant to their enabling statutes are issued under “authority of law” within the meaning of article I, section 7 of the Washington Constitution.

(2) Whether a statutorily-authorized administrative investigative subpoena for bank records in the pervasively regulated securities industry is valid.

(3) Whether a state agency may share records or information obtained pursuant to an administrative investigative subpoena with a criminal prosecutor when there is evidence of possible criminal activity.

III. SUMMARY OF ARGUMENT

This Court should reject Miles' argument that an administrative subpoena of a bank's records pertaining to a customer may be issued only upon a finding of probable cause, or order of a neutral magistrate, or with prior notice to the customer. The legislature has granted subpoena authority to administrative agencies to issue subpoenas as part of their regulatory powers, without imposing requirements of prior court approval or notice to the subject of the investigation. These statutory grants of subpoena authority constitute "authority of law" under article I, section 7 of the state constitution.

The Court need not and should not address broader issues in deciding this case. Instead, this Court should affirm the trial court's decision that Miles was engaged in a pervasively regulated industry, for which no prior notice before issuing a subpoena was required. Although the trial court chose to rule on the other issues raised by Miles (whether a customer has a privacy interest in bank records under article I section 7; whether prior court approval or notice of the investigative subpoena is constitutionally necessary), this Court need not reach those issues.

Finally, regulatory agencies may provide documents and information to prosecutors when there is evidence of criminal activity.

IV. ARGUMENT

A. Statutorily-Authorized Administrative Investigative Subpoenas Are Issued Under “Authority of Law” and Are Constitutional

1. Under Either The State Or Federal Constitution, The Test For A Valid Administrative Subpoena Is Whether It Is Issued Under Authority Of Law And Is Reasonable In Scope

Article I, section 7 of the Washington Constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Authority of law “has been defined by this Court to include authority granted by a valid (*i.e.*, constitutional) statute.” *State v. Gunwall*, 106 Wn.2d 54, 68-69, 720 P.2d 808 (1986). This Court has already recognized the legislature’s power to grant subpoena authority to state agencies, and upheld that subpoena power in response to Fourth Amendment challenges. *See generally Steele v. State*, 85 Wn.2d 585, 537 P.2d 782 (1975); *Murphy v. State*, 115 Wn. App. 297, 62 P.3d 533, *rev. denied* 149 Wn.2d 1035 (2003); *Dep’t of Revenue v. March*, 25 Wn. App. 314, 610 P.2d 916 (1980). Thus, the Washington state courts have previously upheld, in challenges under the federal constitution, the constitutionality of statutes that grant investigatory subpoena authority to state administrative agencies.

Miles asserts in this case that article I, section 7 of the state constitution further requires either prior court approval or prior notice to a

bank customer when an agency issues a subpoena for bank records. Miles has the burden to show that article I, section 7 of the state constitution is sufficiently different than the Fourth Amendment of the federal constitution so as to warrant such procedural protections. *Gunwall*, 106 Wn.2d at 61-63. In the past, this Court has construed article I, section 7 differently than the Fourth Amendment in some specific contexts. However, “even where a state constitutional provision has been subject to independent interpretation and found to be more protective in a particular context, it does not follow that greater protection is provided in all contexts.” *Ino Ino, Inc. v. City of Bellevue*, 132 Wn. 2d 103, 115, 937 P.2d 154 (1997), *amended* 943 P.2d 1358, *cert. denied* 522 U.S. 1077, 118 S.Ct. 856, 139 L.Ed. 2d 755 (1998).

In applying the *Gunwall* factors² to this case, Miles fails to satisfy the fourth and sixth factors because state law gives the bank records in question here no greater protection than provided by the federal constitution, in the context of administrative investigative subpoenas. Washington courts have long held that administrative subpoenas targeting business related records are constitutional, without explicitly requiring

² The six *Gunwall* factors are: (1) textual language of the state constitution; (2) significant differences in the texts of the parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest and local concern. *Gunwall*, 106 Wn.2d at 61-63.

prior court approval or notice to the person under investigation. *See, Steele, March, and Murphy, supra.* The legislature has granted subpoena power to administrative agencies in many regulatory statutes that do not expressly require court approval or notice. *See, e.g.,* footnote 1, *supra.* Thus, there is a decades old history of administrative investigations without the procedures Miles now claims are constitutionally necessary.

In *March*, the appellant asserted that a Department of Revenue summons issued under a state statute violated the Fourth Amendment because it required him to produce records without a showing of probable cause. 25 Wn. App. at 320. The court, in holding that the summons was proper, stated:

The provisions of the fourth amendment to the United States Constitution and any parallel provisions of the Washington State Constitution requiring probable cause are simply not applicable in a tax audit case as a condition precedent to the issuance of the summons.

Id. at 322.³ In *Steele*, this Court held that a civil investigative demand issued by the Attorney General, pursuant to statutory authority in the Consumer Protection Act, was constitutionally valid. 85 Wn.2d at 594. The Court concluded that “. . . [w]e are convinced that the instant civil investigative demand did not violate the prohibitions of the Fourth

³ “[T]he investigative authority so provided is not limited to situations in which there is probable cause, in the traditional sense, to believe that a violation of the tax laws exists.” *March*, 25 Wn.App. at 321 (citing *United States v. Bisceglia*, 420 U.S. 141, 146, 95 S.Ct. 915, 919, 43 L.Ed. 2d 88, 93 (1975)).

Amendment.” *Id.* at 595. Finally, the statutory authority to conduct a warrantless examination and seizure of a patient’s prescription information was upheld in *Murphy v. State*, 115 Wn. App. at 313, 308 (“[c]onstitutional privacy protections are not absolute and must be balanced against the need for comprehensive and effective governmental oversight of prescription narcotic use and distribution.”)

Given this case law, there is no preexisting state law, or issue of state concern, that compels a different interpretation of article I, section 7 than this Court’s existing interpretation of the Fourth Amendment.

This Court has already adopted a standard that it applies to agencies when they exercise their subpoena power:

[T]he test . . . for determining the reasonableness of a subpoena duces tecum or similar order . . . requires (1) the inquiry is within the authority of the agency; (2) the demand is not too indefinite; and (3) the information sought is reasonably relevant.

Steele, 85 Wn.2d at 593-94 (citing *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208, 66 S.Ct. 494, 90 L.Ed.2d 614 (1946)); accord *Kinnear v. Hertz Corporation*, 86 Wn.2d 407, 417-18, 545 P.2d 1186 (1976). The test this Court adopted in *Steele* is the same test enunciated by the United States Supreme Court for determining the reasonableness of an administrative subpoena under the Fourth Amendment, reasoning:

[This] investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury’s, or the court’s in

issuing other pretrial orders for the discovery of evidence and is governed by the same limitations. These are that [an agency] shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be "limited" . . . by . . . forecasts of the probable result of the investigation.

Oklahoma Press Pub. Co., 327 U.S. at 216; *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652, 70 S.Ct. 357, 94 L.Ed.2d 401 (1950).

2. Neither The State Nor Federal Constitutions Require Administrative Agencies To Provide Prior Notice To The Subject Of The Records

Strong public policy reasons exist to reject Miles' argument that article I, section 7 of the state constitution imposes a blanket notice requirement when an agency issues an administrative subpoena. To effectively investigate, it may be necessary to obtain records without alerting potential violators. *Jerry T. O'Brien*, 467 U.S. 735, 748, 104 S.Ct. 2720, 81 L.Ed.2d 615 (1984). The United States Supreme Court recognized this necessity, even in the context of a warrantless search, where privacy interests generally are higher than in the subpoena context:

[I]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible.

New York v. Burger, 482 U.S. 691, 710, 107 S.Ct. 2636, 96 L.Ed.2d 601(1987) (warrantless search of an automobile junkyard). Requiring

notice whenever a subpoena is issued would enable “an unscrupulous target to destroy or alter documents, intimidate witnesses, or transfer securities or funds so that they could not be reached by the government.” *Jerry T. O’Brien*, 467 U.S. at 750. Further, requiring notice to persons under investigation would “substantially increase the ability of persons who have something to hide to impede legitimate investigations.” *Id.* This is particularly true in the context of securities regulations, where “speed in locating and halting violations of the law is so important.” *Id.*

In *Jerry T. O’Brien*, the United States Supreme Court held that the Fourth Amendment does not require an agency to notify a person under investigation for securities violations when the agency issues a subpoena for business records; only the person who possesses the business records and is required to respond to the subpoena is entitled to notice. 467 U.S. at 742. The weight of authority in the federal and other states’ courts is that notice of a bank record subpoena to the person under investigation is not a constitutional requirement, either because the courts found no

privacy interest in bank records,⁴ or because notice was not a constitutional requirement.⁵ *See* Brief of Respondent at 13-15.

The Court should reject Miles' invitation to make a blanket ruling that notice is always constitutionally required. Such a ruling would undermine the purpose of the statutes that do not either implicitly or explicitly impose a prior notice obligation.⁶ Addressing the broad question would also be inconsistent with this Court's history of deciding such issues on a case by case basis, after reviewing statutes that have been enacted and balancing an individual's privacy interest against the government's regulatory interest. *See, e.g., Murphy*, 115 Wn. App. at 308; *Peters v. Sjolholm*, 95 Wn.2d 871, 631 P.2d 937 (1981).

3. Neither The State Nor Federal Constitutions Requires Prior Court Approval Of Administrative Subpoenas

This Court should reject any blanket requirement that a showing of probable cause or prior court approval is necessary before records could be obtained under an administrative subpoena. *See* Br. of Petitioner at 1-2. The standards to evaluate the reasonableness of an administrative investigation are different than those that apply to a criminal proceeding.

⁴ *State ex rel. Brant v. Bank of America*, 272 Kan. 182, 31 P.3d 952, 960 (2001); *United States v. Miller*, 425 U.S. 435, 442, 96 S.Ct. 1619, 48 L.Ed. 2d 71 (1976); *State v. Klattenhoff*, 71 Haw. 598, 801 P.2d 548, 606 (1990).

⁵ *State v. McAllister*, 184 N.J. 17, 875 A.2d 866, 881 (N.J. 2005); *Winfield v. Division of Pari-Mutuel Wagering*, 477 So.2d 544, 548 (Fla. 1985); *People v. Jackson*, 116 Ill. App. 3d 430, 452 N.E.2d 85, 87, 89-90 (Ill. App. 1983).

⁶ For example, the Securities Act specifically states that DFI may conduct "private" investigations. RCW 21.20.370(1). A notice requirement would be inconsistent with this legislative direction.

Washington court precedent has established in a variety of contexts and statutory schemes that a court order is not required prior to issuance of an administrative subpoena. “[I]n upholding the right to summon and require production, the Supreme Court has noted that the taxpayer’s protection from unreasonable requests is afforded by the fact that the summons can be enforced only by court order.” *March*, 25 Wn. App. at 321.⁷ Since the *Steele* case was decided in 1975, no published decision has required an administrative agency to demonstrate probable cause or obtain permission of a neutral magistrate. There is no reason to change this Court’s precedent in this case.

Administrative subpoenas are not self-enforcing. If there is a question regarding the validity or reasonableness of a subpoena, the agency must go to court to enforce the subpoena. This process has been held to provide sufficient protection for persons subject to the subpoena. *March*, 25 Wn. App. at 322 (“The provisions of RCW 82.32.110 providing for resort to Superior Court in the event of refusal to obey the summons secures the [required] constitutional protection . . .”). The DFI statute provides that in the event of disobedience to the subpoena, a court of competent jurisdiction may compel obedience. RCW 21.20.380(4). Case law relating to the Securities and Exchange Commission holds that this is sufficient, and is persuasive in this regard:

⁷ The United States Supreme Court used the same rationale in *United States v. Powell*, 379 U.S. 48, 85 S. Ct. 248, 13 L.Ed.2d 112 (1964) (lack of probable cause finding prior to Internal Revenue Service summons is not necessary because the taxpayer may challenge the summons “on any appropriate ground” before the summons can be enforced).

The SEC has expansive powers to issue and seek enforcement of subpoenas... SEC subpoenas may be challenged on an appropriate ground and the court may inquire as to the underlying reasons for the subpoena...However, challenges to an SEC subpoena are restricted in order to minimize the risk that customers' objections to subpoenas will delay or frustrate agency investigations. *Jerry T. O'Brien, Inc.* . . . Subpoena enforcement proceedings should not be delayed "while parties clash over, and judges grapple with, the thought processes of each investigator. . ." See *U.S. v. LaSalle National Bank*, 437 U.S. 298, 315, 98 S.Ct. 2357, 57 L.Ed.2d 221 (1978)(footnote omitted).

Greer v. New Jersey Bureau of Securities, 288 N.J. Super. 69, 78-79, 671 A.2d 1080, 1084 (1996).

To depart from this existing Washington state and federal case law would seriously undermine the ability of administrative agencies to manage their investigations. If DFI and other state agencies were required to obtain court approval before issuing an administrative subpoena, judicial resources would be impacted significantly. More importantly, agencies would be hindered from carrying out their statutorily-authorized regulatory function.

In conclusion, an individual who challenges an agency's investigative subpoena must demonstrate that the subpoena is outside the agency's authority, is too indefinite, or its scope is not reasonably related to the investigation. This is a case specific analysis that does not warrant the broad constitutional ruling Miles has requested from this Court.

B. An Administrative Subpoena For Bank Records In The Pervasively Regulated Securities Industry Is Valid

As discussed above, the Court should not accept Miles' invitation to abandon the principle that administrative subpoenas, issued without notice or court approval, are constitutional. Indeed, the Court need not address the broad question posed by Miles but may decide this appeal on a narrow issue: whether a person engaged in a pervasively regulated industry has an expectation of privacy in bank records, such that a subpoena may only issue with court approval or prior notice to the bank customer. The answer to the question is "no" because (1) the weight of authority holds that a person does not have a privacy interest in bank records; and (2) even if such an interest does exist, it is outweighed by the need for effective investigations in pervasively regulated industries.

1. The Weight Of Authority Is That Agencies May Constitutionally Obtain Bank Records Through Investigative Subpoenas

Under a Fourth Amendment analysis and federal law, a person does not have a reasonable expectation that his bank records will be kept private from regulatory, taxing, and criminal authorities. *United States v. Miller*, 425 U.S. 435, 440-43, 96 S.Ct. 1619, 48 L.Ed. 2d 71 (1976); *California Bankers Association v. Schultz*, 416 U.S. 21, 94 S.Ct. 1494, 39

L.Ed 2d 580 (1974).⁸ The United States Supreme Court has accordingly decided that bank records are not in the protected zone of privacy when the context is a government enforcement action, reasoning that documents held by the bank pertain to negotiable instruments circulating in commerce, are not the bank customer's "private papers," and are the business records of the bank. *Miller*, 425 U.S. at 440-42.

State and federal laws may create greater privacy protections for bank records, but are not required to do so by the constitution. For example, the federal Right to Financial Privacy Act created a general rule that prohibits banks from disclosing bank records to federal agencies without prior notice to the bank's customers; but the same Act creates many exemptions for specific federal investigative agencies. *See* 12 U.S.C. §§ 3405, 3413, 3414.

Miles urges a different interpretation of article I, section 7 of the state constitution, but relies on statutes that have no bearing on whether

⁸ Additionally, the Bank Secrecy Act, states in pertinent part:

(a) the Congress finds that certain records maintained by [banks] have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings...

(b) It is the purpose of this chapter to require the maintenance of appropriate types of records ... where such records or reports have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

12 U.S.C. §1951.

bank records are confidential in the context of this case.⁹ When analyzing the existence of a privacy interest in the context of an administrative investigation, there is no statutory privacy right to bank records under Washington statutes. Washington does not have a statute similar to the federal Right to Financial Privacy Act.¹⁰ Therefore, for purposes of analyzing the fourth *Gunwall* factor, the pre-existing Washington statute law that should be considered is the absence of any federal or state statute that makes bank records confidential in the context of a state agency investigative subpoena; and the fact that Washington's common law has followed federal court interpretations of the Fourth Amendment with respect to administrative subpoenas.

In reaching its decision, the trial court examined Washington common law and decided to compare bank records in the possession of a bank to business records in an individual's trash. This comparison is not well taken. Information contained in bank records is frequently not confidential because it is used and disclosed in financial transactions. As

⁹ Miles relies on state statutes that pertain to records provided by banks to state banking regulators for the purposes of official examinations of the banks' assets and liabilities. RCW 30.04.075, 32.04.220, 33.04.110. The purpose of these statutes is to protect a financial institution against a "run on the bank." *Consumers Union v. Heimann*, 589 F.2d 531, 534 (D.C. Cir. 1978).

¹⁰ Some states followed Congress's example and adopted financial privacy statutes analogous to the federal Right to Financial Privacy Act. The Kansas Supreme Court found the absence of a state financial privacy statute a persuasive indication that Kansas citizens have no privacy interest in bank records. *State ex rel. Brant, supra*, 31 P.3d at 960 (2001).

one example, “a person who writes or passes a bad check drawn on his or her bank account cannot have any justifiable expectation that the status of the account at that time will remain private.” *State v. Farmer*, 80 Wn. App. 795, 800-01, 911 P.2d 1030 (1996).¹¹

The courts have recognized this principle that the nature of the privacy interest is affected when information has been disclosed to others. “An expectation of privacy in commercial premises . . . is . . . less than, a similar expectation in an individual’s home.” *New York v. Burger, supra*, 482 U.S. 691, 700. Although not dispositive,¹² one factor to weigh in determining the existence or scope of a privacy interest is whether that information has been disclosed to third parties. *Jerry T. O’Brien*, 467 U.S. at 743. In *Gunwall*, 106 Wn.2d at 68-69, the Court distinguished between telephone records held by the telephone company – for which a “subpoena issued pursuant to a valid (i.e., constitutional) statute” is sufficient – and a

¹¹ Other examples include check and deposit transactions, because they provide information about that person’s banking activity. A retailer who accepts a check from a customer obtains bank account information, as does a person who writes a check and obtains the cancelled check that displays information about where and when the check was cashed or deposited. In *Miles’* case, DFI knew which bank to subpoena because *Miles’* customer had *Miles’* banking information on her cancelled check. In summary, “[bank] checks are not confidential communications but negotiable instruments to be used in commercial transactions.” *Miller*, 425 U.S. at 442.

¹² This Court has stated that the location of information is not determinative of a privacy interest. *State v. Boland*, 115 Wn.2d 571, 580, 800 P.2d 1112 (1990). However, some members of the Court continued to view this as a factor to be weighed. *Boland*, 115 Wn.2d at 591, *Guy, J., dissenting*.

pen register which, because it is like electronic eavesdropping, required a court order.

An individual's privacy in bank records must be balanced against the public's interest in effective investigations by regulatory agencies. The better course is to approach bank record privacy as a statutory, and not a constitutional issue. The Court should decline to find a constitutional privacy interest in bank records under article I, section 7 that could hamper regulatory investigations.

2. In Pervasively Regulated Industries, There Is No Constitutional Privacy Expectation In Business Records

Because the trial court properly recognized that Miles was engaged in a pervasively regulated industry, it correctly ruled that Miles had no reasonable privacy expectation in the bank records the agency had reason to believe were related to his unlawful activity in the securities industry. The authorities relied on by the trial court, and cited in the Respondent's Brief, amply support the trial court's ruling on this point. Order on Defendant's Motion to Suppress at 10-13.

C. Records Lawfully Obtained Pursuant To An Administrative Investigative Subpoena May Be Disclosed To A Prosecutor When There Is Evidence Of Possible Criminal Activity.

Many state agencies, including DFI, are specifically authorized by statute to refer to prosecutors evidence of crime found in an administrative investigation. In DFI's administration of the Securities Act, its director is

given specific statutory authority to refer evidence “to the attorney general or the proper prosecuting attorney who may in his discretion with or without such a reference institute the appropriate criminal proceeding.” RCW 21.20.410. Similar language is found in other statutes establishing programs administered by DFI.¹³ In addition, many other state agencies have similar statutory direction to make referrals to prosecutors.¹⁴ As to some agencies, the legislature has directed that they *shall* report evidence of a crime to the prosecutors, for example in child welfare investigations under RCW 74.13.031(3).¹⁵

The discovery of evidence of a crime by an administrative agency through the lawful use of a subpoena does not make the subpoena or the agency’s investigation unlawful. The United States Supreme Court recognized this, stating:

Nor do we think that this administrative scheme is unconstitutional simply because, in the course of enforcing it, an inspecting officer may discover evidence of crimes, besides violations of the scheme itself. . . . The discovery

¹³ RCW 19.100.230 (Franchise Investment Protection Act); RCW 18.44.490 (Escrow Agent Registration Act); RCW 19.110.160 (Business Opportunity Fraud Act); RCW 21.30.360 (Commodity Transactions).

¹⁴ *See, e.g.*, RCW 18.235.180 (Department of Licensing/designated boards and commissions with jurisdiction to discipline under the Uniform Regulation of Business and Professions Act); RCW 46.70.220 (Department of Licensing/regulation and licensing of vehicle dealers and manufacturers); RCW 48.02.080 (Office of the Insurance Commissioner).

¹⁵ RCW 18.130.210 (Department of Health and designated boards and commissions with jurisdiction to discipline health professions under the Uniform Disciplinary Act); RCW 49.17.190(6) (Department of Labor and Industries/Washington Industrial Safety and Health Act).

of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal or the administrative scheme suspect.

Burger, 482 U.S. at 716. In *Burger*, the Court also recognized that a legislature “can address a major social problem *both* by way of an administrative scheme *and* through penal sanctions.” *Id.* at 712. The Washington Legislature has taken this approach in the Securities Act, which provides that willful violations of the Act (with some exceptions) are felony crimes. RCW 21.20.400. As a result, it is likely that some DFI investigations will lead to evidence of criminal violations. The legislature clearly recognized this when it authorized the DFI director to refer evidence of a crime to the prosecutor or attorney general. This Court should not, on constitutional grounds, thwart the public policy that willful violations of the securities laws should be prosecuted criminally.¹⁶

In *Murphy*, the court considered a challenge to the Pharmacy Board’s disclosure of records it had obtained from a pharmacy. After finding that the records had been lawfully obtained, the court turned to the question of whether the records could be disclosed to the prosecutor. The court reviewed whether certain laws imposed a duty on the Board not to

¹⁶ This is not to say that an agency may act as an arm of the prosecutor by using the agency’s subpoena power to obtain records for the sole purpose of turning them over to the prosecutor. An administrative agency’s authority to use the subpoena power is circumscribed by the scope of the investigation authorized by its enabling statute. *Murphy*, 115 Wn. App. at 314. See Respondent’s Brief at 30-44.

disclose the records, and finding those laws inapplicable, the court determined that the records were properly disclosed to the prosecutor. *Murphy*, 115 Wn. App. at 316.

Thus, when directed by statute to do so, or in the absence of a law restricting an agency from disclosing evidence, state agencies are allowed to share with criminal prosecutors evidence lawfully obtained through the proper use of their administrative subpoena process.

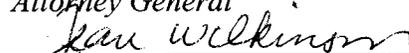
V. CONCLUSION

This Court should affirm the trial court's ruling that Miles is engaged in business in a pervasively regulated industry, and that he therefore has no privacy interest in the bank account he used for the business, such that prior court approval or notice of DFI's administrative subpoena was not constitutionally required.

RESPECTFULLY SUBMITTED this 10th day of October, 2006.

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