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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.

BRIEF OF THE PETITIONER

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1 W. Lafave, *Search and Seizure*, § 2.7(c)(1978) 13, 14

C. ASSIGNMENTS OF ERROR

The Petitioner assigns error as follows:

- 1) The trial court erred in finding that a warrant is not necessary to obtain bank records protected as a part of a Washingtonian's private affairs under art. 1, § 7.
- 2) The trial court erred in finding that it is not necessary for a judge or neutral magistrate to sign a subpoena for the subpoena to constitute authority of law under art. 1, § 7.
- 3) The trial court erred in finding that participation in a pervasively regulated industry vitiates all privacy interests protected by art. 1, § 7.
- 4) The trial court erred in implicitly finding that an administrative subpoena, as opposed to a warrant, can be used by the government to search for evidence to be used in the prosecution of a crime.

D. ISSUES RELATED TO ASSIGNMENTS OF ERROR

It is likely that this proceeding differs from most in that it is brought under RAP 2.3(b)(4). The parties have agreed and the trial court has stipulated that the issue presented for review is as follows:

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 Petitioner's assignments of error turn, in the first instance, on the trial court's finding that a Washingtonian's bank records are protected under art. 1, § 7. Accordingly, the Petitioner also presents a *Gunwall* analysis in support of that portion of the trial court's order. *See State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

E. STATEMENT OF THE CASE¹

In May 2001, the Securities Division of the Washington Department of Financial Institutions received a complaint from Julie Gillette stating that Michael Miles had persuaded her to allow him to handle her investments. He had told her he was an investment specialist, worked for a large investment firm, specialized in commodities, and invested people's money wisely. He had reviewed her investment portfolio and had advised her to invest with him. He had told her that her principal would be guaranteed and he could double her money in 12 to 18 months. She gave him over \$100,000 to invest, which he did not return. CP 180

Fn. 1 This statement of the case is taken from Judge Armstrong's factual summary contained in the attached appendix and transmitted as a part of the record in this appeal. While Mr. Miles disputes the truth of Ms. Gillette's allegations, he agrees that the allegations were before the Securities Division at the relevant time.

In June 2001, the Securities Division issued a subpoena to Washington Mutual Bank for the bank records of the defendant and all entities under his control, as part of a regulatory investigation authorized by RCW 21.20.390.² Issuance of the subpoena was authorized by RCW 21.20.380. The Department did not give the Mr. Miles notice of the subpoena and requested the bank to keep the subpoena secret from him. Its letter transmitting the subpoena to the bank referred to the need for prompt response in light of a three year statute of limitations for theft. The bank complied, and the records led to further investigation, resulting in the filing of the charges at issue in the proceeding. CP 180

F. ARGUMENT

I. Introduction

Based on the factors announced in *Gunwall*, the trial court correctly found that a Washingtonian's bank records are a part of his or her private affairs. Because these records disclose discrete information concerning a Washingtonian's associations, activities, and beliefs, they are subject to higher protection under art. 1, § 7. *Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

However, the trial court erred by concluding that a warrant was not

Fn. 2 Mr. Miles believes this to be a scrivener's error and that the trial court actually meant to cite former RCW 21.20.370. CP 180

required to obtain these protected materials. A warrant is the standard requirement to obtain materials protected under art. 1, § 7. Given the high level of privacy Washingtonians possess in their bank records, a warrant was required.

Likewise, the trial court incorrectly concluded that a secret subpoena for constitutionally protected materials can be issued by a person who is not a neutral magistrate. Prior Washington Supreme Court precedent establishes that, absent an exception, a subpoena must be signed by a neutral magistrate to constitute authority of law.

The trial court correctly reasoned that a claimed exception for administrative subpoenas did not apply. Because that exception requires judicial supervision, it is not applicable in a case where the government obtains a Washingtonian's bank records by means of a secret subpoena. A secret process does not give an individual with a protected privacy interest an opportunity to obtain the necessary judicial supervision.

Likewise, the trial court correctly reasoned that this case does not fall within the statutory reasonableness analysis set forth in *Murphy v. State*, 115 Wn. App. 297, 62 P.3d 533 (2003). Because no Washington statute authorized a secret subpoena for bank records until a year later, *Murphy* does not apply.

But, the trial court erred in concluding that participation in a

pervasively regulated industry could reduce privacy in a manner similar to the statute in *Murphy*. Participants in a pervasively regulated industry may have a reduced expectation of privacy. If so, their privacy is reduced only insofar as authorized by statute. Because no statute authorized the secret process, it was unconstitutional even as to a participant in a pervasively regulated industry.

Finally, the trial court's order is incorrect because, absent a warrant, the government may not use the administrative process to search for evidence of a crime. In addition to urging secrecy, the cover letter for this subpoena stated in pertinent part:

“...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...”³

The cover letter indicates that the Securities Division used the administrative process to obtain evidence of a crime. Furthermore, it was a crime that was beyond the agency's authority to investigate.

Fn. 3 The cover letter and subpoena are contained in the State's Response Brief from the trial court proceedings. They are included in the clerk's papers at CP 33-98. However, those papers are not available at this writing due to a server error. The Petitioner will supply the precise pages by letter after reviewing the hard copies.

II. Private Affairs

The trial court correctly found that a Washingtonian's bank records are a part of his or her private affairs. While the State did not directly challenge this proposition below, it has reserved the right to disagree in this forum. Accordingly, the Defense contends a *Gunwall* analysis justifies the trial court's finding.

Because bank records disclose discrete information concerning a person's associations, activities, and beliefs, they are a part of a Washingtonian's private affairs. The *Gunwall* factors compel a more protective interpretation of art. 1, § 7 than the contrary meaning accorded by the Fourth Amendment. *Gunwall* itself rejected the assumption of the risk reasoning that underpins Fourth Amendment analysis. *See Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Art 1, § 7 states:

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

See Const. art 1, § 7.

1) Textual Language

Our Supreme Court consistently interprets this text as supplying broader protection than the Fourth Amendment. *State v. Ferrier*, 136 Wn.2d 103, 111, 960 P.2d 927 (1998); *State v. Young*, 135 Wn.2d 498,

867 P.2d 593 (1998); *State v. Boland*, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990); *State v. Stroud*, 106 Wn.2d 144, 148, 720 P.2d 436 (1986); *Gunwall*, 106 Wn.2d at 65.

2) Comparison with Federal Text

The Fourth Amendment's text contains express limitations, but art. 1, § 7 protects privacy with no express limitations. *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999); *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Art. 1, § 7 is not limited in scope to subjective expectations of privacy. It more broadly protects "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass, absent a warrant." *Parker*, 139 Wn.2d at 493-494; *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984).

3. State Constitutional and Common Law History

In adopting art. 1, § 7, the framers rejected language identical to the Fourth Amendment. *Journal of the Washington State Constitutional Convention, 1889* at 497 (B. Rosenow ed. 1962). Their intentional rejection will not support a narrower interpretation than the Fourth Amendment, but does support broader protection, particularly of an individual's right to privacy. *State v. Young*, 123 Wn.2d 173, 179, 867 P.2d 593 (1994); *State v. Simpson*, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980).

4. Pre-Existing State Law

a) Decisional Law

The decisional law of this state compels the conclusion that bank records are a part of a Washingtonian's private affairs. The result is compelled by the extent to which bank records reveal discrete information concerning a person's activities, associations, and beliefs.

At the time of the Convention, federal privacy guarantees were expansive, yet the framers chose broader protections. *See Young*, 123 Wn.2d at 179-180; *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct 524, 29 L.Ed 746 (1886). Time demonstrated the framers' wisdom as *Boyd's* expansive privacy guarantees evaporated under constant federal erosion. *See, e.g., Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906).

The federal erosion of privacy in papers, generally, and bank records, specifically, was completed in *United States v. Miller*, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). The U.S. Supreme Court abrogated federal privacy in bank records by stating a person assumed the risk of disclosure to the government by exposing the records to a third party, to wit: the bank. *See Miller*, 425 U.S. at 441.

This rationale became the first casualty of a mature state constitutional analysis in *Gunwall*. That benchmark case rejected the federal assumption of the risk analysis as applied to pen register records. *See Gunwall*, 106

Wn.2d at 67-68, 70 n. 34. The rejected federal case was a direct application of *Miller. Smith v. Maryland*, 442 U.S. 735, 743-745, 99 S.Ct. 2577, 61 L.Ed.2d 220(1979) citing *Miller*, 425 U.S. 442-444.

Gunwall rejected the federal analysis because disclosures made to telephone companies do not transpose the private nature of the information into an assumption of the risk of disclosure to the government. The largely non-volitional disclosures are made to obtain a necessity of modern life. *Gunwall*, 106 Wn.2d at 67-68; *People v. Sporleder*, 666 P.2d 135, 141 (Colo. 1983); *State v. Hunt*, 91 N.J. 338, 347, 450 A.2d 952 (1982).

Latent in *Gunwall* is a concern with the privacy of a person's beliefs and associations. *State v. McKinney*, 148 Wn.2d 20, 29, 60 P.3d 46 (2002). What was latent in *Gunwall* became patent in *Boland*.

Like *Gunwall*, *Boland* directly rejected federal assumption of the risk analysis. *Boland*, 115 Wn.2d at 580-81 rejecting *California v. Greenwood*, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed. 30 (1988).

Importantly, the Court said:

“People reasonably believe that the government is not free to rummage 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.”

See Boland, 115 Wn.2d at 578; *see also Young*, 123 Wn.2d at 183-184 (infrared surveillance is particularly intrusive because it discloses a

person's activities); *McKinney*, 148 Wn.2d at 29 (nature and extent of information learned concerning a person's contacts and associations determines whether an "expectation is one which a citizen of this state *should be entitled to hold*")(*emphasis in the original*).

Because bank records reveal discrete information concerning activities, associations, and beliefs, our Supreme Court has noted that the level of privacy in bank records is comparable to pen register records. In distinguishing PUD records the Court said:

" An individual's expectation of privacy is far less than that expected in bank records and telephone numbers. Unlike telephone and bank records, power records disclose no discrete information about an individual's activities."

See State v. Maxfield, 125 Wn.2d 378, 395-396, 886 P.2d 123 (1994). *See also In re Maxfield*, 133 Wn.2d 332, 354, 195 P.2d 196 (1997) (Guy, J., dissenting from plurality) ("electrical consumption information, unlike telephone or bank records or garbage, does not reveal discrete information about a customer's activities").

The course of decisional law regarding private affairs compels a finding that Washingtonians' bank records are protected. To an even greater extent than trash or telephone numbers, bank records reveal a person's activities, associations and beliefs. These records clearly enjoy

state constitutional protection as a part of a person's private affairs.⁴

b) Statutory Law

While decisional law should be determinative, statutory law also supports finding that bank records are included within a Washingtonian's private affairs. Washington statutes establish that bank records are confidential. The same statutes establish that not only the bank, but the bank's customers, share this privacy interest.

Statutory law clearly demonstrates that bank records are confidential. RCW 30.04.060 mandates that the Department of Financial Institutions periodically examine banks for financial soundness. RCW 30.04.060(1). In addressing the nature of bank records obtained in such examinations, RCW 30.04.075 states:

“(1) All examination reports and all information obtained by the director and the director's staff in conducting examinations of banks, trust companies, or alien banks ... is confidential and privileged information and shall not be made public or otherwise disclosed to any person, firm, corporation, agency, association, governmental body...”

RCW 30.04.075(1) (emphasis added). *Accord*, RCW 32.04.220 (mutual savings bank), RCW 33.04.110 (savings and loan).

In addressing the process necessary for law enforcement to obtain such

Fn. 4 The real possibility and prior occurrence of governmental abuse of private information was noted in *Gunwall*. *Gunwall*, 106 Wn.2d at 68 citing *State v. Hunt*, 91 N.J. 338, 347, 450 A.2d 952.

records, RCW 30.04.075 states:

“...(2) Subsection (1) of this section notwithstanding, the director may furnish all or any part of examination reports prepared by the director’s office to:...

2) Officials empowered to investigate criminal charges subject to legal process, valid search warrant, or subpoena. If the director furnishes any examination report to officials empowered to investigate criminal charges, the director may only furnish that part of the report which is necessary and pertinent to the investigation, and the director may do this only after notifying the affected bank, trust company, or alien bank and any customer of the bank, trust company, or alien bank who is named in that part of the examination or report ordered to be furnished unless the officials requesting the report obtain a waiver of the notice requirement from a court of competent jurisdiction for good cause...”

See RCW 30.04.075(2)(c)(emphasis added). *See also* RCW

32.04.220(2)(c) (mutual savings); RCW 33.04.110(2)(savings and loan).

Therefore, Washington statutory law establishes a Washingtonian’s bank records are confidential. The privacy interest inheres in the customer and applies regardless of institutional form.

Pre-existing state law establishes that a Washingtonian’s bank records are a part of the person’s private affairs. Washington decisional law compels, and Washington statutory law supports, this conclusion.

5. Differences in Structure Between the Federal and State Constitutions

This factor also supports a finding that a Washingtonian’s bank records are a part of that person’s private affairs. The federal constitution is a grant

of enumerated powers, while the state constitution places limits on an otherwise plenary power. These limits apply to the sovereign power that inheres directly in the people and indirectly in the legislature. The explicit recognition of the right to be left undisturbed by the state government in one's private affairs is a guarantee of that right, not a restriction of it.

Gunwall, 106 Wn.2d at 62 & 66-67; *Young*, 123 Wn.2d at 180.

6. Matters of Particular State Interest or Local Concern

This factor also supports interpreting art. 1, § 7 as providing broader protections than the Fourth Amendment. The dispositive question is whether the subject matter is local in character or whether there appears to be a need for national uniformity. *Gunwall*, 106 Wn.2d at 62.

Constitutional law from other states demonstrates that there is no need for national uniformity as to state treatment of privacy in bank records.

Federal rejection of privacy in bank records has been criticized ever since the U.S. Supreme Court first announced its decision in *Miller*. See e.g., 1 W. Lafave, *Search and Seizure*, § 2.7(c)(1978). One court paraphrased Professor Lafave's criticism of *Miller* as follows:

“He points out, citing respectable precedent, that banks are a necessity in the transaction of daily life and that people do not, by their use, knowingly expose or surrender their personal histories to public scrutiny. Rather, they expose information in their checks to their banks for the sole purpose of debiting, crediting, or balancing their accounts.

Moreover, banks recognize their role as the agent of their depositors and they keep customer transactions private. The bank has virtually no occasion to reconstruct a customer's life, or any interest in doing so from its cursory viewing of underlying transactional information. To give the government the right to that, says Lafave, is "pernicious."

See New Mexico v. McCall, 101 N.M. 616, 624, 686 P.2d 958 (1983).

Several states have reached a conclusion similar to Professor Lafave and find a state constitutional privacy interest in bank records. Under the circumstances of the case, New Mexico did not decide the issue, but did note that California, Colorado, and Pennsylvania all found bank records private under their state constitutions. *See McCall*, 101 N.M. at 624 citing *Burrows v. Superior Court of San Bernardino County*, 13 Cal.3d 238, 118 Cal.Rptr 166, 529 P.2d 590 (1974); *People v. Blair*, 25 Cal.3d 640, 159 Cal.Rptr 818, 602 P.2d 738 (1979); *Charnes v. DiGiacomo*, 200 Colo. 94, 612 P.2d 1117 (1980); *Commonwealth v. DeJohn*, 486 Pa. 32, 403 A.2d 1283 (1979).

In addition to the states noted by *McCall*, at least four other states have found their citizens possess a privacy interest in their bank records under their state constitutions. The state constitutions of New Jersey, Utah, Florida, and Illinois include bank records in the privacy interests of their states' citizens. *See State v. McAllister*, 184 N.J. 17, 29, 875 A.2d 866 (2005); *State v. Thompson*, 810 P.2d 415 (Utah 1991); *Winfield v. Pari-*

Mutual Wagering, 477 So.2d 544, 548(Fla 1985); *People v. Jackson*, 116 Ill. App.3d 430, 452 N.E.2d 85 (1983).

Because at least seven states have departed from *Miller* on state constitutional grounds, there does not appear to be a need for national uniformity. Rather, a state's treatment of its citizens' privacy in bank records is a matter of particular local concern. This is proper in a system of government where the protection of a person's general right to privacy, like his or her life, is left largely to the law of the individual states. *Katz v. U.S.*, 389 U.S. 347, 350-351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

All six *Gunwall* factors support a finding that a Washingtonian's bank records are part of his or her private affairs. The trial court was correct: in Washington, a person's bank records are a part of his or her private affairs and enjoy constitutional protection.

III. Authority of Law

The trial court erred in holding that the secret administrative subpoena did not disturb Mr. Miles in his private affairs. The trial court erred in finding that a warrant is not required to obtain a Washingtonian's bank records. The trial court erred in finding that an administrative subpoena for a Washingtonian's bank records need not be signed by neutral magistrate. The trial court erred in finding that participation in a pervasively regulated industry completely vitiates privacy interests under art. 1, § 7. Finally, the

trial court erred by implicitly finding that an administrative subpoena can be used to search for evidence to be used in the prosecution of a crime.

**1. The Trial Court Erred By Finding
A Search Warrant Was Not Required**

The government may not disturb a Washingtonian's private affairs without authority of law. The authority of law required by art. 1, § 7 in order to obtain private records includes authority granted by a valid (*i.e.* constitutional) statute, the common law, or a rule of the Supreme Court. *See Gunwall*, 106 Wn.2d at 68.

Art. 1, § 7's normal requirement is a standard search warrant. *See State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). However, a subpoena may constitute the authority of law. *See Gunwall*, 106 Wn.2d at 69 (long distance toll records). Alternatively, a search warrant subject to enhanced criteria may be required. *See Gunwall*, 106 Wn.2d at 69 (pen register records); *see also In Re Maxfield*, 133 Wn.2d at 345-346 n 9 (Madsen, J., concurring) (under *Gunwall*, legislature may statutorily require greater, but not lesser, protections than the court or the constitution).

Because privacy in bank records has been likened to the pen register records considered in *Gunwall*, as opposed to the long distance records, a warrant, rather than a subpoena, was required. *C/f Maxfield*, 125 Wn.2d at

395-396 n. 32 (likening bank records to pen register records).

Therefore, the trial court erred by finding that a search warrant was not required to obtain a Washingtonian's bank records. Because the government did not obtain a search warrant in this case, there was a violation of art. 1, § 7.

2. The Trial Court Erred By Finding That A Subpoena For Constitutionally Protected Records Need Not Be Signed By A Judge or Neutral Magistrate

a) To Constitute Authority of Law a Subpoena Must be Signed by a Judge or Neutral Magistrate

Even if a subpoena would suffice to supply authority of law to obtain bank records, the trial court incorrectly rejected the requirement that a subpoena be signed by a neutral magistrate. To constitute authority of law under art. 1, § 7, the warrant or subpoena must be signed by a judge or other neutral magistrate. *Ladson*, 138 Wn.2d at 352 n. 3 citing *Gunwall*, 106 Wn.2d 54; *State v. Salinas*, 119 Wn.2d 192, 203, 829 P.2d 1068; *City of Seattle v. McCready*, 123 Wn.2d 260, 274, 868 P.2d 134 (1994); *In re Maxfield*, 133 Wn.2d 345-346 (Madsen, J. concurring).

The requirement that a subpoena be signed by a neutral magistrate was first announced by Justice Madsen's concurring opinion in *In Re Maxfield*. *In Re Maxfield*, 133 Wn.2d 345-346 (Madsen, J. concurring).

In Re Maxfield was a split opinion, with four justices finding art. 1, § 7 protection, four justices finding no protection, and Justice Madsen finding protection on statutory grounds. *In Re Maxfield*, 133 Wn.2d 332.

Because Justice Madsen’s concurrence established the narrowest grounds for the Court’s decision to suppress, it should be read as the opinion of the Court. *United States v. Antelope*, 395 F.3d 1128, 133 n. 1 (9th Cir. 2005); *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977); *c/f, In Re Young*, 122 Wn.2d 1, 38, 857 P.2d 989 (1993)(citing “Justice O’Connor’s crucial concurring opinion” in *Foucha* to distinguish RCW 71.09 from Louisiana’s unconstitutional insanity acquittee scheme).

Justice Madsen’s statement cannot be dismissed as dicta because that concurrence established that the statute at issue did not confer authority of law under the state constitution. *In Re Maxfield*, 133 Wn.2d 345-346 n. 8, n. 9 (Madsen, J. concurring). Justice Madsen reasoned that, absent a well recognized exception, a statute could not establish “authority of law” that fell below the constitutional minimum defined as “a valid search warrant or subpoena issued by a neutral magistrate.” *In Re Maxfield*, 133 Wn.2d 345-346 n. 8, n. 9 (Madsen, J. concurring) citing *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563(1996). Because this definition of the constitutional minimum was necessary to establish the concurrence’s

precise point of departure from the plurality, it forms the opinion of the Court on the narrowest grounds. Accordingly, it is not dicta.

Moreover, this concurring opinion was subsequently adopted by a majority of the Court. *Ladson*, 138 Wn.2d at 352 n. 3. In *Ladson* it was again necessary for the Court to articulate the precise relationship between the legislature and the court, where a statute purports to authorize a warrantless search. *Ladson*, 138 Wn.2d at 352 n. 3. The Court found that a statute can authorize a court to issue a warrant, but cannot dispense with the warrant requirement. *Ladson*, 138 Wn.2d at 352 n. 3. Rather, unless an exception applies, art. 1, § 7 requires a warrant or subpoena issued by a neutral magistrate. *Ladson*, 138 Wn.2d at 352 n. 3 (emphasis added).

This portion of the *Ladson* cannot be dismissed as dicta because it forms the premise for the majority's rift with the dissent. The majority found that a statute can authorize a warrant or subpoena signed by a neutral magistrate, but cannot statutorily authorize an unconstitutional exception as authority of law. *Ladson*, 138 Wn.2d at 351, 352 n. 3. By contrast, the dissent found that a statute that contains a constitutional standard supplies authority of law. *Ladson*, 138 Wn.2d at 362.

Thus, the majority holding in *Ladson* is premised on the limits of the legislature's power. A statute that authorizes a judge or neutral magistrate

to sign a warrant or subpoena may supply valid authority of law. A statute that purports to authorize an unconstitutional exception, may not. This is not dicta, it is the necessary starting point of the majority's analysis.

Therefore, the trial court erred in finding a subpoena can constitute authority of law under art. 1, § 7, even when the subpoena is not signed by a neutral magistrate. Absent a narrowly drawn exception, Washington Supreme Court precedent mandates prior recourse to a neutral magistrate.

**b) The Administrative Subpoena in
this Case was Not Signed by a Judge
or Neutral Magistrate**

In this case, no neutral magistrate signed a warrant or a subpoena. Rather, the State obtained the bank records by means of a secret administrative subpoena issued by the Administrator of the Department of Financial Institutions' Securities Division. Because the Administrator was not a magistrate and was not neutral, the subpoena was not signed by a neutral magistrate prior to disturbing Mr. Miles in his private affairs.

RCW 2.20.020 defines the class of persons who are magistrates:

- “The following persons are magistrates:
(1) The justices of the supreme court,
(2) The judges of the court of appeals,
(3) The superior judges, and district judges,
(4) All municipal officers authorized to exercise the powers
and perform the duties of district judges.”

See RCW 2.20.020.

Deborah Bortner, the person who issued the secret administrative subpoena, was the Administrator of the Department of Financial Institutions' Securities Division. Ms. Bortner was not a magistrate as defined by RCW 2.20.020. Because she was not a magistrate, Ms. Bortner lacked authority to sign a subpoena for Mr. Miles' bank records. Likewise, Ms. Bortner was not neutral.

The statutory authority to investigate for violations of RCW 21.20 was vested in the director of the Department of Financial Institutions. *See* former RCW 21.20.370(1). The statutory authority to detect and identify criminal activities subject to that chapter was likewise vested in the director. *See* former RCW 21.20.370(2). Importantly, the statutory authority to issue administrative subpoenas was also vested in the director. *See* former RCW 21.20.380.

Read together, the two statutes vested unlimited discretionary authority in the Director of Financial Institutions to both perform investigations and to compel the production of papers. By proxy, this authority inhered in Ms. Bortner, the Administrator of the Securities Division. *See* RCW 21.20.460.

This combined authority is antithetical to the concept of a neutral magistrate:

“Whatever else neutrality and detachment might entail, it is

clear that they require severance and disengagement from the activities of law enforcement.”

See State v. Neslund, 103 Wn.2d 79, 84, 690 P.2d 1153 (1984) citing *Shadwick v. Tampa*, 407 U.S. 345, 350, 92 S.Ct. 367, 32 L.Ed.2d 783 (1972); *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

Accordingly, the administrative subpoena could not, in and of itself, serve as authority of law. Because the subpoena was not signed by a judge or neutral magistrate prior to disturbing Mr. Miles in his private affairs, the subpoena did not constitute authority of law.

3) The Subpoena Did Not Fall Within A Narrow Exception For Administrative Subpoenas

The trial court correctly found that a claimed exception to the warrant requirement for administrative subpoenas did not apply in this case. An administrative subpoena for bank records that does not give the customer an opportunity to obtain judicial supervision falls outside the exception.

a) The State Has The Burden Establishing A Narrow Exception

Under art. 1, § 7 warrantless searches are unreasonable per se. *Hendrickson*, 129 Wn.2d at 70; *Ladson*, 138 Wn.2d at 349. The warrant requirement is subject to a few narrowly drawn exceptions. *Hendrickson*, 129 Wn.2d at 71; *Ladson*, 138 Wn.2d at 349. The exceptions fall into

several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops. *Hendrickson*, 129 Wn.2d at 71; *Ladson*, 138 Wn.2d at 349. The burden is on the State to prove the narrow exception. *Hendrickson*, 129 Wn.2d at 71; *Ladson*, 138 Wn.2d at 350.

b) The State Did Not Establish That A Narrow Exception For Administrative Subpoenas Applied

The trial court correctly rejected the State's argument that the secret subpoena fell within a claimed exception for administrative subpoenas. If this exception exists, it's parameters are governed by *Oklahoma Press* and *Morton Salt*, the cases that created it. See *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946); *United States v. Morton Salt*, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950).

i. Judicial Supervision Is A Requirement of the Claimed Exception

For a subpoena to be valid under *Oklahoma Press/Morton Salt*, it must meet four requirements. The first three requirements are that:

- 1) the investigation must be legislatively authorized;
- 2) it must be for a purpose that the legislature can authorize;
- 3) the documents sought must be relevant to the investigation.

Oklahoma Press, 327 U.S. at 195. The final requirement is that the validity of the first three requirements must be subject to judicial

supervision. *Oklahoma Press*, 327 U.S. at 195.

Judicial supervision is key to the application of this exception because it substitutes for probable cause supported by oath or affirmation. *Oklahoma Press*, 327 U.S. at 195. The government is only free to obtain records after a person has had an adequate opportunity to object. *Oklahoma Press*, 327 U.S. at 195. It is the court's determination that the subpoena is valid that substitutes for probable cause. *Oklahoma Press*, 327 U.S. at 195; *see also, Morton Salt*, 338 U.S. at 640-641 (“To protect against mistaken or arbitrary orders, judicial review is provided”).

**iii. Pre-Existing Washington Law
Requires Judicial Supervision of
Agency Subpoenas**

Pre-existing Washington law supports judicial supervision as a requirement for valid administrative subpoenas. Pre-existing Washington decisional law supports this proposition. Pre-existing Washington statutory law supports this proposition.

a) Decisional Law

Washington decisional law supports the proposition that judicial supervision is a constitutional pre-requisite for the validity of an agency subpoena. The three Washington cases that follow *Oklahoma Press* / *Morton Salt* with respect to agency subpoenas require judicial supervision.

In the first Washington administrative subpoena case, the Supreme Court reviewed a superior court decision setting aside a civil investigative demand under the Consumer Protection Act. *Steele v. State*, 85 Wn.2d 585, 537 P.2d 782 (1975). The Supreme Court found that *Oklahoma Press / Morton Salt* govern claims under the Fourth Amendment regarding subpoenas. *Steele*, 85 Wn.2d at 594. However, the Court noted that the right to petition the superior court to set aside the subpoena guaranteed protection against arbitrary demands. *Steele*, 85 Wn.2d at 595.

In the second case, the Supreme Court again found that *Oklahoma Press / Morton Salt* governed Fourth Amendment claims regarding an administrative subpoena issued pursuant to an interstate compact. *Kinnear v. Hertz Corp.*, 86 Wn.2d 407, 418, 545 P.2d 1186 (1976). The Court found that compact in question was valid. *Kinnear*, 86 Wn.2d at 418. But, the compact authorizing the commission's subpoena power specifically included a clause providing for judicial supervision. *Kinnear*, 86 Wn.2d at 409.

The only Washington case that speaks to the validity of this process under the Washington State Constitution also endorsed judicial supervision as a requirement. *Dept. Of Revenue v. March*, 25 Wn. App. 314, 321-322, 610 P.2d 916 (1979). The Court stated that protection against unreasonable requests was afforded by the fact that the subpoena

could only be enforced through court order. *March*, 25 Wn. App. at 321. This was the person's source of relief. *March*, 25 Wn. App. at 321-322. It was the relevant statute's provision for resort to the superior court in event of refusal to obey that provided the necessary constitutional protection. *March*, 25 Wn. App. at 322.

Washington decisional law clearly supports the proposition that the claimed exception for administrative subpoenas requires judicial supervision. Failure to meet this requirement places the process outside the claimed exception.

b) Statutory Law - Judicial Supervision

To an even greater degree, Washington statutory authority supports the judicial supervision requirement. The overwhelming majority of Washington statutes that authorize administrative subpoenas- including the statute at issue in this case- require judicial supervision.

Most statutes authorizing administrative subpoenas contain a provision for judicial supervision within the same section.⁵ Others contain a

Fn. 5. *See, e.g.*, RCW 9.46.140, RCW 15.65.090, RCW 15.66.070, RCW 18.44.220, RCW 19.09.410, RCW 19.100.245, RCW 19.110.140, RCW 19.118.080, RCW 21.30.110, RCW 28A.410.095, RCW 41.56.450, RCW 41.64.110, RCW 41.76.040, RCW 41.80.130, RCW 42.17.400, RCW 42.40.040, RCW 43.09.165, RCW 44.28.110-120, RCW 44.39.060, RCW 46.70.111, RCW 46.80.190, RCW 46.87.320, RCW 47.64.280, RCW 47.68.280, RCW 47.68.350, RCW 51.04.040, RCW 51.52.100, RCW 59.18.330, RCW 59.20.270, RCW 67.070.060, RCW 70.87.034, RCW 79.02.020, RCW 82.32.110, RCW 82.38.275, RCW 82.41.080, RCW 82.56.110, RCW 84.12.240, RCW 90.48.095, RCW 90.76.060.

provision for judicial supervision in a different section of the same chapter.⁶ Finally, the general administrative chapter supplies judicial supervision for others.⁷

The vast majority of Washington statutes require judicial supervision as a requirement for the validity of an administrative subpoena.

Washington decisional law also supports this proposition. Certainly, the statute claimed as a basis for the subpoena at issue in this case, former RCW 21.20.380(3), required judicial supervision. *See* former RCW 21.20.380(3).

Therefore, the trial court properly found that the process used in this case did not fall within the claimed exception for administrative subpoenas. As the trial court correctly reasoned, a secret process does not give a person with a privacy interest in bank records recourse to judicial supervision. *Cf State v. White*, 126 Wn. App. 131, 134 (2005).

4. The Trial Court Erred In Finding

Fn. 6. *See, e.g.*, RCW 2.64.070 (for RCW 2.64.060), RCW 34.05.588(1) (for RCW 34.05.446), RCW 34.05.681 (for RCW 34.05.675), RCW 49.60.160 (for RCW 49.60.140), RCW 42.52.400 (for RCW 42.52.390), RCW 49.60.140 (for RCW 49.60.160), RCW 74.20A.350(7)(a) (for RCW 74.20.225), RCW 78.52.033 (for RCW 78.52.031), RCW 80.04.020 (for RCW 80.04.015).

Fn. 7. *See, e.g.*, RCW 34.05.588(1) & (2) (judicial enforcement of agency subpoenas), RCW 7.60.060, RCW 15.35.100, RCW 16.67.093, RCW 18.04.045, RCW 18.64.310, RCW 18.130.050, RCW 19.146.235, RCW 19.230.130, RCW 31.04.145, RCW 31.45.100, RCW 34.05.446, RCW 41.50.137, RCW 43.27A.090, RCW 43.63A.470, RCW 43.70.170, RCW 48.03.070, RCW 67.08.130, RCW 70.45.050, RCW 70.45.100, RCW 70.94.141.

**That Notice And Judicial Supervision
Were Unnecessary Based On Participation
In A Pervasively Regulated Industry**

The trial court's erred conclusion that Mr. Miles was not entitled to notice and an opportunity to obtain judicial supervision because he engaged in a pervasively regulated industry is incorrect. The trial court correctly reasoned that this case does not fit within the statutory analysis presented in *Murphy*. *Murphy*, 115 Wn. App. 297 (2003). However, the trial court incorrectly concluded that participation in a pervasively regulated industry can work a similar diminution in a person's private affairs without statutory authorization.

a) *Murphy* Does Not Authorize A Reasonableness Analysis In This Case

The trial court correctly reasoned that this case does not fit within the statutory analysis presented in *Murphy*. This case does not fit that analysis for two reasons. First, there was no statutory authorization for the secret administrative subpoena the government used. Second, unlike *Murphy*, this is a case of a long-held privacy protection being eroded by gradual legislative intrusion.

i. The Secret Process Used Was Not Authorized By Statute

The trial court correctly characterized *Murphy* as requiring a two-part

analysis. First, whether a statute granted the administrative agency authority to use a given form of process. Second, assuming that such statutory authorization was present, whether that statutory authority violates the constitutional protections.

The trial court correctly concluded that there was no statutory authority for a secret subpoena of a person's bank records. At the time the subpoena issued, former RCW 21.20.380 did not authorize the director to require a bank to keep the existence of a subpoena for a customer's bank records secret from the customer. Rather, that authority was supplied by an amendment that became effective a year later. *Compare* former RCW 21.20.380 with RCW 21.20.380(3). Because that statutory authority was lacking, *Murphy* does not authorize the process used in this case.

**ii. *Murphy* Does Not Purport
To Authorize Governmental
Erosion Of Privacy**

Additionally, even if there had been statutory authority for the process, *Murphy* is still distinguished by the duration of the statutory scheme. In *Murphy*, the Court specifically noted that it was not dealing with an erosion of privacy based on gradual governmental intrusion. *Murphy*, 115 Wn. App. at 313. Rather, it was dealing with a statutory scheme in place since 1891 that required record-keeping for the purpose of inspection for *inter alia* criminal conduct. *Murphy*, 115 Wn. App. at 310 n. 4, 313 citing

McKinney, 148 Wn.2d at 31.

But in this case, the banks records were not kept for the purposes of criminal investigations. To the extent that the records are kept for any governmental purpose, they are kept for the limited purpose of regulating the bank's conduct and may only be disclosed during a criminal investigation with notice to the customer. RCW 30.04.075(2); RCW 32.04.220(2); RCW 33.04.110(2). Contrary authorization was not effective until a year after the date of the subpoena in this case. *See* Laws 2002, ch. 65 § 7(inserting subsection 3 and re-designating former subsection 3 as subsection 4 in RCW 21.20.380), *compare* former RCW 21.20.380 with RCW 21.20.380. This was the actual process of erosion of privacy through gradual governmental intrusion.

**b) The Process Used Cannot Be
Justified By Participation In
A Pervasively Regulated Industry**

The trial court incorrectly ruled that Mr. Miles was not entitled to notice to obtain judicial supervision based on participation in a pervasively regulated industry. Participation in a pervasively regulated industry diminishes privacy only insofar as a statute specifies. Furthermore, no administrative search, including those of pervasively regulated industries, justifies a search for evidence to be used in a criminal prosecution.

i. Participation Diminishes Privacy

Only Insofar As A Statute Specifies

The trial court incorrectly ruled that participation in the securities industry eliminates privacy. One who participates in a pervasively regulated industry does suffer a diminution of privacy under the Fourth Amendment. However, even under that lower standard, privacy is diminished no more than a statute specifies.

The pervasively regulated industries exception is a special case of federal administrative reasonable analysis. This analysis began in *Camara* with a finding that a person has a privacy interest in their residence requiring an administrative search warrant to invade. *Camara v. Municipal Court*, 387 U.S. 523, 534, 87 S.Ct 1727, 18 L.Ed.2d 930 (1967). The probable cause requirement, however, is lower than that required in a criminal search in that it does not require a specific allegation of a code violation at a particular dwelling. *Camara*, 387 U.S. 523.

Camara was extended to commercial premises in *See. See v. City of Seattle*, 387 U.S. 541, 545, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967). For support for the warrant requirement in administrative searches of commercial premises, the Court cited to *Oklahoma Press. See*, 387 U.S. at 544-545 citing *Oklahoma Press*, 327 U.S. 186. The Court specifically cited the importance of *Oklahoma Press / Morton Salt* requirement of prior judicial review as a limitation on the discretion of administrative

authority. *See*, 387 U.S. at 544-545. An administrative warrant was justified to assure this same limitation on discretion and to assure the lawfulness of the requested inspection. *See*, 387 U.S. at 544-545.

In a subsequent case, the Court held that the liquor industry was exempt from the administrative warrant requirement. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76, 90 S.Ct. 774, 25 L.Ed. 60 (1970). History reflected an ability in Congress to approve warrantless searches in this closely regulated industry dating to laws passed by the same Congress that authorized the Fourth Amendment. *Colonnade Catering Corp.*, 397 U.S. at 75-76. However, such searches are only constitutional to the extent that Congress authorizes by statute; they may not be left to the discretion of executive or administrative personnel.

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 requirement that a legislature specifically authorize the administrative search method used is reflected in all subsequent U.S.

Supreme Court pervasively regulated industries cases. *United States v. Biswell*, 406 U.S. 311, 315, 92 S. Ct. 1593, 32 L.Ed. 2d 87 (1972) (legality of search in pervasively regulated industry depends on authority of valid statute, not consent); *Marshall v. Barlow's Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305, 323 (1978) (warrantless searches under OSHA statute unconstitutional because the statute devolves almost unbridled discretion upon executive and administrative officers); *Donovan v. Dewey*, 452 U.S. 594, 603-605, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981) (warrantless search applicable to all mines constitutional because congress statutorily limited administrative discretion by tailoring timing and purpose of inspections and provided for prior judicial review); *New York v. Burger*, 482 U.S. 691, 711, 107 S.Ct. 2736, 96 L.Ed.2d 601 (1987) (statute authorizing warrantless searches of junkyards constitutional because inspections do not constitute discretionary acts by inspector but are conducted pursuant to statute).

As the U.S. Supreme Court explained in *Burger*, a participant in a closely regulated industry has reduced expectation of privacy. *Burger*, 482 U.S. at 702. However the reduction is not total: warrantless searches within the context of even that reduced privacy interest will be deemed constitutional only if the statute performs the traditional office of a warrant. *Burger*, 482 U.S. 702-703. The statute must inform the person

that the search is made pursuant to the law, has a properly defined scope, and it must limit the discretion of the inspecting officers. *Burger*, 482 U.S. 703.

Washington case law is in accord with federal precedent on this point. *Alvarado v. WPPSS*, 111 Wn.2d 424, 439-440, 759 P.2d 427 (1988) (applying *Burger* and *Dewey* to conclude that statute providing for prior notice of urinalysis requirement to participant supplied constitutionally acceptable substitute for a warrant); *State v. Mach*, 23 Wn. App. 113, 594 P.2d 1361 (1979) (following *Biswell*).

The majority of the cases cited by the trial court from other state courts and federal courts are either distinguished by context or support Mr. Miles' contention.

The cases that are distinguished by context are distinct in that there was no protected privacy interest at issue. *SEC v. Jerry T. O'Brien* is distinct because there was no privacy interest in that case due to *Miller*. *SEC v. Jerry T. O'Brien*, 467 U.S. 735, 743, 104 S.Ct. 2720, 81 L.Ed.2d 615 (1984) citing *Miller*, 425 U.S. at 443. *Brant v. Bank of America* is likewise distinct because Kansas also follows *Miller* in denying its citizens privacy in their bank records under the Kansas state constitution. *Brant v. Bank of America*, 272 Kan.182, 192, 31 P.3d 952.

The majority of the rest of the cases cited by the trial court support Mr.

Miles' contention in that they either require prior notice to the customer or the intercession of a neutral decision-maker. In *People v. Jackson* a grand jury supervised by a judge caused the subpoena to issue. *Jackson*, 116 Ill. App.3d 430, 452 N.E.2d 85 (1983). Similarly, New Jersey allows such subpoenas, if they are issued by a grand jury. *McAllister*, 184 N.J. 17, 875 A.2d 866. *See also, People v. Mason*, 989 P.2d 757, 759-760 (Colo. 1999) (notice to customer of subpoena for bank records and opportunity to quash required); *Burrows*, 13 Cal.3d 238, 118 Cal.Rptr 166, 529 P.2d 590 (1974) and Cal. Gov. Code § 7474 (requiring notice to the customer or prior judicial review of governmental subpoenas for bank records); *State v. Thompson*, 810 P.2d 415 (Utah 1991) (prior judicial finding of good cause to investigate necessary for lawful secret subpoena). *C/f Commonwealth v. DeJohn*, 486 Pa. 32, 403 A.2d 1283 (1979)(suggesting that signature of judge required for lawful subpoena). *Contra, Winfield v. Pari-Mutual Wagering*, 477 So.2d at 548.

Even a participant in a pervasively regulated industry has a privacy interest that may not be vitiated absent statutory authorization. While participation may subject the person to a full arsenal of government regulation, it does not subject that person to weapons that the legislature

has not placed in that arsenal.⁸ This requirement is entirely consistent with art. 1, § 7's requirement that governmental disturbance of a person's private affairs requires authority of law.

**ii. There Was No Statutory
Authorization For A
Secret Subpoena**

As the trial court correctly noted when reviewing the inapplicability of *Murphy*, no Washington Statute authorized the use of secret subpoenas by the Department of Financial Institution's Securities Division on the day this subpoena issued. *See* Laws 2002, ch. 65 § 7(inserting subsection 3 and re-designating former subsection 3 as subsection 4 in RCW 21.20.380), *compare* former RCW 21.20.380 with RCW 21.20.380(3). Other statutes informed the public that its bank records were confidential and could not be reached by subpoena without notice to them. *See* RCW 30.04.075(2)(c); RCW 32.04.220(2)(c); RCW 33.04.110(2).

Therefore, it was incorrect to conclude that participation in a

Fn. 8. It is worth noting that participation alone does not bring a person within the reach of all statutory procedures. Washington has a specific statute that allows the inspection of the books of registered broker dealers and investment advisers without notice or recourse to a judge or neutral magistrate. *See* RCW 21.20.100(4). Persons and entities so registered waive privacy as to their books as a condition of licensing. *See* RCW 21.20.100(1). It is possible for a legislature to impose similar inspection requirements on participants, as opposed to registrants. *See Burger*, 482 U.S. at 694 n. 1 citing N.Y. Veh. & Traf. Law § 415-a5 (applying inspection scheme to all persons required to be registered). Such a legislative authorization would be of doubtful constitutionality in Washington. *See State v. Thorp*, 71 Wn. App. 175, 179-180, 856 P.2d 1123 (1993). In any event, Washington has never done so. *See* RCW 21.20.100

pervasively regulated industry supplied authority of law for a secret subpoena. Because there was no statutory authorization for a secret subpoena on the relevant date, the privacy interest of a participant in a pervasively regulated industry could not be reduced in this manner.

**5. Administrative Searches
Cannot Be Used As A Mask
For Criminal Investigations**

While the law of administrative searches is complex, one tenet emerges with clarity : the government may not use an administrative inspection scheme to search for criminal violations. Because the government did so on this occasion, the secret administrative subpoena was unconstitutional by any measure.

The cover letter referred to in Judge Armstrong’s factual summary states in pertinent part:

“...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...”

**a) The Government May Not Use
An Administrative Scheme To
Search For Evidence Of A Crime**

Federal case law is unanimous with regard to the prohibition against using administrative schemes to search for evidence of a crime. *Michigan*

v. Clifford, 464 U.S. 287, 292, 104 S.Ct. 641, 78 L.Ed.2d 477 (1984)
(constitutionality of post-fire inspection “depends on whether the object of the search is to determine the cause of the fire or to gather evidence of criminal activity”); *Michigan v. Tyler*, 436 U.S. 499, 508, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978)(“if the authorities are seeking evidence to be used in a criminal prosecution, the usual standard of probable cause will apply”); *Donovan v. Dewey*, 452 U.S. at 596 n. 6 (“Warrant and probable cause requirements ... pertain when commercial property is searched for contraband or evidence of crime”); *Camara*, 387 U.S. at 539 (authorization for administrative searches on less than probable cause will not endanger time-honored doctrines applicable to criminal investigations); *See*, 387 U.S. at 549 (Clarke, J., dissenting)(nothing ...suggests that the inspection was...designed as a basis for criminal prosecution”); *Abel v. United States*, 362 U.S. 217, 226, 80 S.Ct. 683, 4 L.Ed. 668 (1960) (“the deliberate use by the government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts”); *id.*, at 248 (Douglas, J., dissenting)(government cannot evade the Fourth Amendment “by the simple device of wearing the mask of [administrative] officials while in fact they are preparing a case for criminal prosecution”) *Frank v. Maryland*, 359 U.S. 360, 365, 79 S.Ct. 804, 3 L.Ed.2d 877 (1959)

(evidence of criminal action may not ...be seized without a judicially issued search warrant”).

Burger also supports this position. While *Burger* did approve an administrative inspection statute designed to fight crime, the Court carefully delineated an unconstitutional direct search for evidence of a particular crime. *Burger*, 482 U.S. at 716 n. 27 (distinguishing the facial attack on the valid administrative inspection statute before the Court from an unconstitutional application of that same statute to perform a direct search for evidence of a particular crime in *People v. Pace*, 65 N.Y.2d 684, 481 NE.2d 250 (1985)); *see also*, *People v. Pace*, 101 A.D.2d 336, 475 N.Y.S.2d 443 (1984).

Washington State case law is consistent with the prohibition against the use of administrative inspections to obtain evidence to be used in the prosecution of a crime. The prohibition applies within the context of pervasively regulated industries. *Alvarado v. WPPSS*, 111 Wn.2d at 436 (“the urinalysis involved here is neither an attempt to find evidence of wrongdoing nor to verify compliance with law”). It is consistent with the general rule in Washington that an exception to the warrant requirement may not be used when the true reason for the search is not exempt from the warrant requirement. *Ladson*, 138 Wn.2d at 358. Moreover, it is consistent with the rule that a an administrative inspection scheme must be

carefully delineated in scope. *Massage Foundation v. Nelson*, 87 Wn.2d 948, 558 P.2d 231 (1976) (administrative search of industry claimed to be pervasively regulated over-broad if search is authorized for reasons beyond the agency's charter).

State v. Mach, should be distinguished because that case was decided under *Biswell* and prior to *Dewey*. *Mach*, 23 Wn. App. at 116. There, the Court of Appeals found that a statute authorizing an administrative search for evidence of a crime performed under the pervasively regulated industries exception did not violate the constitution. *Mach*, 23 Wn. App. at 116. However, the Court specifically noted that *Biswell* had not announced the same prohibition as to pervasively regulated industries that it had applied to administrative searches requiring a warrant. *Mach*, 23 Wn. App. at 116. It is logical to assume that *Mach* would have been decided differently after the prohibition was directly annunciated as to pervasively regulated industries in *Dewey*. *Dewey*, 452 U.S. at 596 n. 6; *see also*, *Burger*, 482 U.S. at 716 n. 27.

The situation presented in *Lansden* is also distinct because *Lansden* requires a valid warrant. *State v. Lansden*, 144 Wn.2d 654, 30 P.3d 483 (2001). There, police officers accompanied an inspector for the purpose of protecting him. *Lansden*, 144 Wn.2d at 660. Had they been lawfully located, plain view evidence would have been admissible. *Lansden*, 144

Wn.2d at 664. But, there was no statutory authorization for the issuance of the warrant. *Lansden*, 144 Wn.2d at 663-664. Therefore, the evidence was suppressed. *Lansden*, 144 Wn.2d at 664.

b) The Government Used The Administrative Scheme To Search For Evidence Of A Crime

As the cover letter makes clear, the government did use the administrative process to search for evidence of a crime. Additionally, the crime they were investigating did not fall within the Security Division's authority.

The cover letter specifically requested the bank to react quickly because the Security Division did not wish to impair its ability to complete its investigation within statutory time limits. The Security Division's reference to the crime of theft indicates its intent to gather evidence of a crime through the administrative process in violation of the long line of cases cited above.

Perhaps less obviously, the Security Division's citation to a three year statute of limitations also places this subpoena outside the *Oklahoma Press / Morton Salt* exception. One requirement of that exception is that the matter be within the authority granted to the agency. This agency's authority was limited to matters arising under RCW 21.20. *See* former

RCW 21.20.370. Crimes arising under that chapter were subject to a five year statute of limitations. *See* former RCW 21.20.400. By contrast, thefts arising under RCW Title 9A are subject to the three year statute of limitations cited in the cover letter. *See* RCW 9A.04.080(h) & RCW 9A.04.010(2). Thus, the Securities Division not only unconstitutionally used the administrative process to gather evidence of a crime, but did so with a crime that was beyond the agency's authority to investigate. *Nelson*, 87 Wn.2d at 954.

Accordingly, even if there had been authority to search under the pervasively regulated industries exception, the search was still unconstitutional. Because the Securities Division used administrative process to gather evidence to be used in a criminal prosecution, the government violated art. 1, § 7.

F. CONCLUSION

For the reasons cited above, the Defense asks that the Court reverse the trial court. The Defense asks that the case be sent back to the trial court with orders to suppress evidence.

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