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NO. 56017-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL M. MILES

Petitioner.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY,
THE HONORABLE SHARON ARMSTRONG

BRIEF OF RESPONDENT

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I. Introduction

This Court should affirm Judge Armstrong's denial of the Defendant's Motion to Suppress and join the overwhelming majority of courts who have addressed the issue of whether an administrative subpoena issued to a third party record holder must be accompanied by notice to the customer whose records are requested. That overwhelming majority has said, for policy and legal reasons, that notice is not required.¹

This court should further join all courts addressing the issue of notice who have concluded, regardless of whether notice is required, that suppression is not the appropriate remedy.²

II. Cross-Assignments of Error³

The State, as explained in greater detail below, urges this court to uphold Judge Armstrong's order on the narrowest possible grounds. If the court is unable to uphold the order on the narrow grounds described, the State urges this court to uphold the order on a number of alternative

¹ See discussion below at V. A. 3).

² As described later in this brief, pp. 47-48, even Colorado, which held that notice was required, did not suppress the evidence obtained by a subpoena issued without notice.

³ The State argues on appeal that the decision of the trial court denying the Defense Motion to Suppress should be affirmed. If this court declines to uphold that decision on the stated grounds, the State contends that the trial court's decision should be affirmed on grounds other than those relied on by the trial court. On appeal a respondent may argue that the lower court's rulings should be affirmed on alternative grounds supported by the record without filing a cross-appeal or making cross-assignments of error. The State in the present case made cross-assignments of error in an abundance of caution. This court can and should affirm the trial court on any basis that is supported by record and the law. *State v. Carroll*, 81 Wn.2d 95, 101, 500 P.2d 115 (1992); *Sprague v. Sumitomo Forestry*, 104 Wn.2d 751, 758, 709 P.2d 1200 (1985).

grounds. To assert those alternative grounds the State cross-assigns error to the following findings/conclusions of the court:

1. The court erred in finding that bank records are part of an individual's private affairs that are entitled to the protections of art. I, section 7 of the Washington State Constitution. Those protections are broader than the protections of the Fourth Amendment to the U.S. Constitution.
2. The court erred in finding that "authority of law" may be supplied by a subpoena issued pursuant to statute, but only if the statute protects the individual's privacy interest, which includes notice of the subpoena to the affected customer.
3. The court erred in finding that where an administrative subpoena is issued to a third party record holder for records in which the customer has a recognized reasonable, objective privacy expectation, notice must be provided to the customer, or the subpoena is not "authority of law".
4. The court erred in finding that RCW 21.20.380 is not valid "authority of law" because it does not require notice to affected customers of subpoenas issued to third party record holders.

III. Issues Related to Cross-Assignments of Error

The parties have agreed and the trial court has stipulated as to the issue presented for review. That issue is stated in Brief of Petitioner on pp. 1-2.

IV. Statement of the Case

The State believes the appropriate standard for determining the validity of an administrative subpoena is the standard enunciated by the

United States Supreme Court dealing with administrative subpoenas (the subpoena be within the agency's authority, be sufficiently precise and seek relevant information, *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208, 66 S.Ct. 494, 90 L.Ed 614 (1946)). It is thus important for the Court to have before it the facts known to the Securities Division at the time the subpoena was issued, documents the subpoena requested, the civil remedies pursued by the Securities Division, the timing of the referral for criminal prosecution, and the general nature of investigations conducted by the Securities Division

The facts in Sections A and B below are taken directly from the factual statement before Judge Armstrong, provided by the State in the State's Response to Defense Motion to Suppress, pp. 3-8 CP 38-43. The facts in Section C from Declaration of Martin Cordell SuppCP ____.⁴

A. Julie Gillett complaint

On April 23, 2001 Julie Gillett called Michael Stevenson of the Securities Division of the State Department of Financial Institutions ("Securities Division") to complain about an investment she had made with

⁴ This document is the subject of a State's Motion to Supplement the Record. It was not clear to Respondent whether, if the Motion is granted, the document would be filed in Superior Court and designated as supplemental Clerk's Papers or should be referred to in some other manner. It is referred to here as SuppCP _____. (The document is only three pages long so references to particular sections should not be difficult to find.)

Michael Miles. A complaint form was mailed to Ms. Gillett that day.

The Securities Division was able to determine on 4/23/01 that Miles had a valid driver's license and insurance license, no prior listings in the Securities Division investigation files and no securities license.

On May 2, 2001 the Securities Division received the completed complaint form from Julie Gillett. That complaint is **Attachment B** to the State's Response to Defendant's Motion to Suppress CP 89-98.

In that complaint Ms. Gillett stated that Michael Miles persuaded her to allowing him to handle her investments. He did this by telling her he was an investment specialist, that he worked for a large investment firm and that his job was to invest people's money wisely. He told Gillett that commodities was his specialty and that he knew a sure fire way to make money that way.

He also told Gillett he would review her investment portfolio and give her some investment advice. After reviewing her portfolio Miles told Gillett that she was losing money because her portfolio was not performing. He proposed that she remedy this by investing her money with him and he could make her a lot more money.

Gillett was reluctant and did not agree to this at that time.

Miles called her afterwards telling her he could double her money.

He bragged that he had been given a half million dollars to invest for a client. He mentioned another woman whose funds he had doubled. He told Gillett that her principal would be guaranteed. He said he could double her money in 12 to 18 months.

Gillett was hesitant, not knowing even how she would sell her stock and transfer the funds. Miles told her how she could get her funds. Gillett was still reluctant. She told Miles this was a big deal because the investment funds included money from her dad that he had saved for years, her kids college funds and her divorce settlement.

Miles continued to call and socialize with Gillett and brag about the good investments he had for his clients. He told her that she would never be able to buy property of her own and send her children to college with what she was making and her current investments.

In response to Gillett's continued reluctance Miles told her he would write a letter documenting that her principal was guaranteed. This swayed her decision to invest.

In October, 1999 Gillett requested her funds from A.G. Edwards where they were invested and \$85,000 from that investment was sent to her. (It appears that A.G. Edwards sold her investment and deposited the proceeds in a money market account for which Ms. Gillett had checks.)

Gillett wrote a check on that money market account to Miles and gave him the check.

He called her several times after this inquiring when she would receive the remainder of her funds.

Ms. Gillett provided the Securities Division with copies of the checks she had given Miles. The first of these was dated October 23, 1999. It was a check Gillett wrote on her A.G. Edwards account to M.M. Miles in the amount of \$85,000.

On November 1, 1999 Gillett gave Miles a second check in the amount of \$27,000 which Miles apparently converted to a cashier's check. A third check was given Miles on December 7, 1999 in the amount of \$12,000.

The backs of these checks, as provided by Gillett to the Securities Division with her complaint, show they were endorsed by Miles and negotiated through Washington Mutual Bank.

Also included with the documents provided to the Securities Division by Gillett was a piece of paper from Miles documenting her investment. The note was on Miles' letterhead showing an office at 1111 E. Madison, Suite 142, Seattle. Printed at the bottom of the note was the following:

MM Miles is a private investment firm created to maximize profits for its clients by using heretofore non-traditional methods with a minimum of risk. To such an end MM Miles guarantees the return of principal to all who are involved with the program. While we cannot guarantee actual results we do on a regular basis double our clients profits over a twelve to eighteen month period. We are able to that [sic] because we use strategies that continually keep us in markets that are making excellent moves as opposed to the traditional buy and hold philosophy that governs most peoples investment attempts at investing. This type of environment will not last forever but we make the most of it while we can. MM Miles manages and invests directly, we do not necessarily use mutual funds or any one particular investment. It gives us a flexibility with our clients funds that allow us to maximize profits.

The following March Gillett asked Miles about her 1999 taxes. He told her to request an extension and he would forward the IRS all necessary paperwork that would show her funds were reinvested and she would not owe any taxes.

Gillett's complaint continued, saying that every time she saw Miles after that she asked about how her funds were doing. He always told her the funds were up - up 35%, then 45%. She asked him for a statement on several occasions. He told her that the type of investments he made did not provide such paperwork. It was then that Gillett started to realize what a terrible mistake she had made.

At the end of 2000 Miles invited Gillett to dinner and told her that her investment would be back on December 15 so she could buy her

condo. Gillett assumed that since Miles was returning her investment it must have already doubled.

Around December 15 Miles called and left a message saying the money had not yet arrived and asked her to be patient.

Gillett didn't hear from Miles until January when he left a message saying the money had arrived. She didn't hear from him for another two weeks so she called him at his office, Primerica and left a message with his boss who happened to answer the phone. A few days later Miles left a message to tell her to never call his office again or he would never give her back her money.

Several days later he left another message apologizing for his threat. He said the check had arrived but due to the large amount - over \$1 million - the bank could not immediately clear the check. The next excuse was that the person who had invested the money had previously bounced checks. This was the first time Gillett had heard about a third party. Miles told her he would keep her posted daily.

Miles left several more messages with various excuses. As of April 30, 2001, when she wrote the complaint to the Securities Division, Gillett had not heard from Miles since March.

B. Action by the Securities Division

On June 13, 2001 the Securities Division issued a subpoena to Washington Mutual Savings Bank. The subpoena is **Attachment A** to the State's Response to Defendant's Motion to Suppress CP 81-87. The subpoena requested records pertaining to all accounts assigned to or used by Michael M. Miles and all entities under his control from January 1996 to the present. The records included monthly statements, deposits and withdrawals and other items.

The subpoena contained the following language:

This subpoena is 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.

The subpoena was signed by Deborah Bortner, Securities Administrator, and included the Seal of the Securities Division. The subpoena was issued under the authority granted by RCW 21.20.380. That statute provides that the director of the Department of Financial Institutions or any officer designated by him, may

. . . administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence and require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records which the director deems relevant or material to the inquiry
. . .

The subpoena also informed Washington Mutual that if the bank

failed to comply with the subpoena the Securities Administrator would apply to superior court for enforcement of the subpoena, also authority granted by RCW 21.20.380.

In a cover letter accompanying the subpoena, Securities Division Investigator Andrew MacKay informed the bank that initially they were only requesting copies of the signature cards, monthly statements and all deposits of \$1,000 and above.⁵ Mr. MacKay also informed the bank that he was attaching copies of checks payable to Miles to assist the bank in locating his accounts or banking activity. Attached to the subpoena were copies of the checks provided by Ms. Gillett.

Washington Mutual complied with the subpoena.

C. Declaration of Martin Cordell

Martin Cordell is the Chief of Enforcement for the Securities Division. He manages the unit responsible for investigating potential violations of Washington's securities laws.

Prior to oral argument in front of Judge Armstrong below, the State asked Mr. Cordell for statistics showing the number of complaints received by the Securities Division and the number of those leading to

⁵ Although not required by the statute authorizing the use of this subpoena, it is useful to note that the Securities Division, at this very early stage of this investigation, voluntarily limited the scope of their intrusion into the defendant's financial records.

investigations. Of the investigations we further asked how many led to administrative actions and how many were referred to prosecutors as possible criminal matters. Mr. Cordell's answer, restated in his Declaration is that for the twelve months preceding December 2004 (when the request for statistics was made) the Division had received approximately 400 complaints and had opened approximately 100 investigations. Of those 100 investigations, administrative action was taken in approximately 65 cases, and six cases were referred to prosecutors. Declaration of Martin Cordell SuppCP _____. (Some of the cases referred for prosecution also had administrative action taken.) A portion of these statistics was provided to Judge Armstrong at oral argument. State's Argument on Motion to Suppress, pp. 8-9 CP 153-54.⁶

V. Argument

A. Preliminary Observations

1) Strong Policy Reasons Justify the Deference Shown to Administrative Subpoenas

The justification for the broad power given administrative agencies in monitoring compliance with regulatory schemes was best stated by Justice Jackson in *United States v. Morton Salt*, 338 U.S. 632, 642-43, 70 S.Ct. 357, 375 (1950):

⁶ The State below inaccurately referred to these as averages per year. In fact the cited statistics are for the twelve month period preceding December 2004.

The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.

2) Strong Policy Reasons Support Allowing the Issuance of Administrative Subpoenas Without Notice to the Target of the Investigation.

The defendant has stressed his privacy interest in his bank records but has paid little attention to the competing interests of the State.

What could happen to an investigation if the target is notified in the very early stages? The United States Supreme Court addressed this issue explicitly in *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735,750-51, 104 S.Ct. 2720, 81 L.Ed.2d 615 (1984). Justice Marshall, speaking for a unanimous court, emphasized the important policy considerations underlying the power to conduct private investigations:

A target given notice of every subpoena issued to third parties would be able to discourage the recipients from complying, and then further delay disclosure of damaging

information by seeking intervention in all enforcement actions brought by the Commission. More seriously, the understanding of the progress of an SEC inquiry that would flow from knowledge of which persons had received subpoenas 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. Especially in the context of securities regulation, where speed in locating and halting violations of the law is so important, we would be loath to place such potent weapons in the hands of persons with a desire to keep the Commission at bay.

As the charges in the case before this court demonstrate, the fear of interference with the investigation is not hypothetical.⁷ Witness intimidation, one of the specific concerns enumerated by Justice Marshall, is present in this case.

3) The Overwhelming Majority of Courts Facing This Issue Have Concluded that Notice is Not Required

For a more detailed analysis of decisions by other state's courts, see the case analysis contained in State's Argument on Motion to Suppress, pp. 13-17 CP 158-162. Since that document was written the law of New Jersey, the only state holding via case law that notice was required,⁸ has changed. In *State v. McAllister*, 184 N.J. 17, 8575 A.2d 866 (2005), the

⁷ Miles was charged with three counts of witness intimidation and four counts of witness tampering CP 5-7. These related to threats he made to victims about their cooperation with the Securities Division investigation (once he learned of the investigation several months after the subpoena was issued.)

⁸ California requires notice by statute. Cal. Gov.Code § 7676(a)(1)-(3)

New Jersey Supreme Court reversed the appellate court who had suppressed bank records obtained under a grand jury subpoena issued without notice to the defendant. The lower court held that notice was required. The *McAllister* court noted that while the New Jersey Constitution did provide its citizens with a reasonable expectation of privacy in bank records, they rejected both the application of a probable cause standard to grand jury subpoenas and the imposition of a notice requirement.⁹ *McAllister* at 867- 868.

Adding New Jersey to the list of jurisdictions not requiring notice means the list totals six (Florida, Illinois, Kansas, New Jersey and Pennsylvania plus the U.S. Supreme Court.) Only one state - Colorado - requires notice as a matter of constitutional law. (Several states including California have statutes requiring notice.)

In Brief Of Petitioner, p. 34, Miles attempts to minimize the holding in the U.S. Supreme Court decision, *SEC v. Jerry T. O'Brien*, 467 U.S. 735, 104 S.Ct. 2720, 81 L.Ed.2d 615 (1984) because the Court had previously held there was no privacy interest in bank records, *United States v. Miller*, 425 U.S. 435, 96 S.Ct 1619, 48 L.Ed.2d 71 (1976), and thus notice

⁹ As noted in the final section of this brief, the *McAllister* court did request that this matter be further studied to see if additional safeguards should be provided for account holders by court rule.

served no purpose. But the *Jerry T. O'Brien* Court assumed *arguendo* that the target had substantive rights to assert. *SEC v. Jerry T. O'Brien* at p. 749. Even assuming such rights the Court found that notice was neither required nor appropriate. *Id.* at pp. 749-750. Of the five states not requiring notice, four (all but Kansas) had previously or contemporaneously found a privacy interest in bank records and yet did not require notice.

Miles makes a similar argument about the Kansas decision that notice is not required. Like the Supreme Court in *SEC v. Jerry T. O'Brien*, however, the Kansas Supreme Court in *Brant v. Bank of America*, 272 Kan. 182, 31 P.3d 952 (2001) made two independent analyses of the issues. One issue was notice, the other was privacy interest in bank records. The court justified lack of notice separate from the customer's lack of a privacy interest in bank records. The defendant's effort to distinguish other cases cited (or contained within cases cited) by Judge Armstrong is equally unconvincing.

B. For Legal and Policy Reasons This Case Should Be Decided on the Narrowest Possible Grounds

This case involves a narrowly drawn administrative subpoena issued at the initial stage of an investigation into compliance with the regulatory scheme imposed on the securities industry. The subpoena was

issued to a third party record-holder by the Securities Division of the Department of Financial Institutions pursuant to a statutory scheme specifically authorizing such a subpoena. The interests of the Securities Division in this issue are fully represented in the briefs and argument that will be heard.

A decision in this case has the potential to have extremely broad impact, far outside the scope of the interests of the Securities Division. This court could potentially rule on the following previously undecided issues:

- Whether records of a bank constitute the private affairs of citizens of Washington;
- Whether bank records can be obtained only by search warrant;
- Whether every subpoena for bank records must be signed by a neutral magistrate;
- Whether every subpoena for bank records must be accompanied by notice to the account holder whose records are being subpoenaed;
- Whether the answer to the above questions apply to other records besides bank records.

The views of most of those who have strong interest in these issues are not before the court. It is incumbent upon this court to avoid, if possible, making broad pronouncements, particularly on constitutional issues, when the views of the parties in interest on those issues are not before this court. *See, e.g., City of Kirkland v. Steen*, 68 Wn.2d 804, 416 P.2d 80

(1966) (The issue of the constitutionality of a statute will not be passed upon if the case can be decided without reaching that issue.)

To find examples of these parties whose interest are not before this court, but who may be deeply impacted by this court's decision, one need only refer to the long list of agencies granted subpoena authority by the legislature similar to the subpoena power granted to the Securities Division, as cited by the State in its Response to the Defendant's Motion to Suppress, pp. 23-32 CP 58 - 67. For example, the State argued below and argues earlier in this brief the reasons why a potential target of an investigation into compliance with the regulatory scheme imposed on the securities industry should not be notified, as a routine matter, of subpoenas issued at the outset of such an investigation. Those administrative agencies with similar subpoena authority, such as the Commission on Judicial Conduct (RCW 2.64.060), the Board of Health involved in the Discipline of Health Care Professionals (RCW 18.130.050), and the Superintendent of Public Education involved with Teacher Certification issues in cases involving allegations of sexual misconduct towards a child (RCW 28A.410.095) may have equally or more compelling arguments against routinely requiring notice to the target of an investigation. A broad ruling by this court may even have the result of requiring subpoenas issued in

civil cases to be signed by a neutral magistrate and clearly the interests of the parties impacted by this ruling are not before the court.

C. The Narrowest Grounds for Upholding Judge Armstrong's Order Denying the Defendant's Motion to Suppress

While Judge Armstrong's order touched on many subjects, the crucial basis for her decision can be found at Order on Defendant's Motion to Suppress, pp. 10-13, CP 188-191, where she found the defendant, by virtue of his participation in the securities industry - a pervasively regulated industry, was put on notice of his reduced expectation of privacy in his records related to securities transactions. As such, further notice to him of the issuance of an administrative subpoena investigating compliance with securities regulations was not required.

If Judge Armstrong's decision can be upheld on this or similar grounds, this court need not reach the other issues which have the potential to broadly impact parties whose interests are not represented before this court.

In addition, if Judge Armstrong's decision cannot be upheld solely on this basis, this court should look to other narrowly drawn bases which might support her opinion before turning to the broad issues raised by the defendant.

1) Judge Armstrong's Decision

To assist this court in determining whether Judge Armstrong's decision can be upheld and if so, what the narrowest basis for that is, the State presents the following summary/outline of Judge Armstrong's decision.

- A. Bank Records are part of an individual's private affairs that are entitled to the protections of art. I, section 7 of the Washington State Constitution. Those protections are broader than the protections of the Fourth Amendment to the U.S. Constitution
- B. Where law enforcement is conducting a search or seizure, "authority of law" may be supplied by a subpoena issued pursuant to statute but only if the statute protects the individual's privacy interest, which includes notice of the subpoena to the affected customer. RCW 21.20.380 does not require notice (and notice was not provided in this case) and as such is not valid "authority of law" if the Securities Division is deemed to be "law enforcement".
- C. Administrative subpoenas will be upheld if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant.
- D. Where an administrative subpoena is issued to a third party record holder, for records in which the customer has a recognized reasonable, objective privacy expectation, notice must be provided to the customer or the subpoena is not "authority of law".
- E. Participation in a pervasively regulated industry like the securities industry limits the participator's reasonable, objective privacy expectation.
- F. Where a statutory or other scheme puts a defendant on notice of a reduced expectation of privacy, further notice of

the issuance of an administrative subpoena is not required.

a) Miles' Objection to this Decision

Miles raises several objections to this decision (a warrant is required to obtain bank records, if they can be obtained by subpoena, a neutral magistrate must sign such a subpoena - Assignments of Error 1 and 2) but raises two fundamental objections to the paragraphs E and F above - the crucial bases for Judge Armstrong's decision. Miles argues:

- Participation in a pervasively regulated industry does not eliminate the need for a validly issued subpoena (Assignment of Error 3); and
- The administrative subpoena here was not validly issued because it was searching for evidence of a crime (Assignment of Error 4).

b) Response to Miles' Objections

Part F (as outlined above) of Judge Armstrong's decision flowed from her analysis of *Murphy v. State*, 115 Wn. App. 297, 62 P.3d 533 (2003).

As explained by Judge Armstrong in her Order on Defendant's Motion to Suppress, pp. 9-10, CP 187-188, *Murphy* explains that a person's otherwise reasonable expectation of privacy can be greatly (and constitutionally) diminished when the person is put on notice of a diminished expectation of privacy. In *Murphy* the diminished expectation resulted from a statutory scheme regulating pharmacies.

Miles disagrees that *Murphy* is applicable for two reasons.

- He argues that unlike *Murphy* where the statutory scheme clearly allowed the records to be collected and to be reviewed by law enforcement, there was no statutory authority for the Securities Division to issue a subpoena without providing notice to Miles.
- He also argues that unlike *Murphy*, the instant case involves a long-held privacy protection being eroded by gradual legislative intrusion.

The first argument is a subset of Miles' argument that the subpoena in question was not a valid administrative subpoena. That argument will be addressed below as part of the larger topic of the legitimacy of the subpoena at issue in this case.

In support of his second argument Miles asserts that, unlike the instant case, *Murphy* involved a long standing statutory scheme "that required record-keeping for the purpose of inspection for *inter alia* criminal conduct." Brief of Petitioner at p. 29 Miles states:

But in this case the bank records were not kept for the purposes of criminal investigation. 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).

Id. at p. 30 .

Miles is apparently under the impression that the only reason banks maintain records of customer transactions is for purposes of complying

with Washington's bank examination statutes. He is wrong.

The law mandating that Washington Mutual keep the records that were obtained by the Securities Division by administrative subpoena is the Bank Secrecy Act of 1970 and the implementing regulations promulgated thereunder by the Secretary of the Treasury. 12 U.S.C. §§ 1730, 1829b, 1951-1959, and 31 U.S.C. §§ 1051-1062, 1081-1083, 1101-1105, 1121, 1122.

Title I of the Act, and the implementing regulations promulgated thereunder by the Secretary of the Treasury, require financial institutions to maintain records of the identities of their customers, to make microfilm copies of certain checks drawn on them, and to keep records of certain other items.

The U.S. Supreme Court, in holding this act to be constitutional in *California Bankers Association v. Shultz*, 416 U.S. 21, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974), stated:

[The Act] was enacted by Congress in 1970 following extensive hearings concerning the unavailability of foreign and domestic bank records of customers thought to be engaged in activities entailing criminal or civil liability.

Id. at 416 U.S. 26.

The Court noted that the express purpose of the Act was to: require the maintenance of records, and the making of

certain reports, which 'have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.' 12 U.S.C. §§ 1829b(a)(2), 1951; 313 U.S.C. § 1051.

Id.

The Court further noted that historically most banks had voluntarily kept and retained these records and that much of the required reporting of domestic transactions had been required by earlier Treasury regulations in effect for nearly 30 years. *Id.* at p. 30.

Contrary to Miles' assertion, then, and just like Sheriff Murphy, Miles was on notice that banks maintained copies of customer records for the purpose, in part, of assisting in criminal investigations. While the lineage of this legislation does not go back to 1891 like the pharmacy regulations in *Murphy*, the Bank Secrecy Act was enacted 36 years ago and banks had historically maintained these records for an even longer time.

Contrary to what Miles contends, the primary difference between *Murphy* and this case has nothing to do with the reason the records are maintained. Miles is presumed to have been as aware as Murphy was presumed to be aware that the records in question were maintained for purposes of criminal investigation. The relevant difference is that the pharmacy statute explicitly provided that the records, maintained by pharmacies, could be inspected by any officer of the law who was authorized to

enforce the relevant chapters of RCW. RCW 18.64.245. The regulations implementing the Bank Secrecy Act, on the other hand, provided that inspection, review, or access to the records required by the Act to be maintained, was to be governed by existing legal process. *California Bankers Association* at p. 34. The Act did not dispense with legal process as the pharmacy statute apparently does. Neither, however, did it establish special requirements for access. *United States v. Miller*, 425 U.S. at 446.

Thus the fact that Miles was on notice that copies of his bank records were being maintained for purposes of criminal investigation is not the end of our inquiry, because for those records must still be obtained by legal process. And that brings us to the ultimate justification for Judge Armstrong's decision that Miles' bank records were obtained under authority of law - the pervasively regulated industry exception.

D. Pervasively Regulated Industry

Miles does not argue that he was not a participant in the securities industry and does not dispute that the securities industry is a pervasively regulated industry.¹⁰ Nor does he dispute that his reasonable, objective

¹⁰ As noted by Judge Armstrong in her Order on Defendant's Motion to Suppress, p. 11 CP 189, the securities industry is a pervasively regulated industry. *United States v. Szur*, 1998 WL 132942 (S.D.N.Y. 1998) citing *New York v. Burger*, 482 U.S. 691, 700, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987).

In a footnote (Brief of Petitioner, p. 36, n. 8) Miles argues that mere participation, without licensing, does not bring a person within the reach of all securities regulations. The defendant did not assign error to Judge Armstrong's ruling to the

privacy expectations are diminished as a result.

Miles argues, rather, that even participants in pervasively regulated industry are entitled to certain protections and those protections were not provided in the procedure used by the Securities Division.

He advances three fundamental arguments in support of his claim that the subpoena issued to Washington Mutual did not provide this protection.

First, he argues that even in a pervasively regulated industry case, the rules for administrative *searches* require certain procedures and protections and those procedures and protections were not present in the instant case.

Second, he argues that even in a pervasively regulated industry case, administrative subpoenas must be valid and the statute under which the instant subpoena was issued, RCW 21.20.380, does not authorize the issuance of a subpoena without notice to the target/customer impacted by the subpoena.

contrary. Order on Defendant's Motion to Suppress, p. 12 CP 190. He ignores logic in making such an assertion. To say Miles is not subject to securities regulation because he is not licensed is, in the words of *Shulansky v. Cambridge-Newport Financial Services Corp.*, 42 Conn.Supp. 439, 443, 623 A.2d 1078, 1080, 8 Conn. L. Rptr. 452

[L]udicrous. If the commissioner were able to investigate only those persons he has licensed, then he would be unable to discover any facts that would enable him to bring enforcement actions against those who sell securities in Connecticut without a license.

Third, he argues that administrative subpoenas, even in a pervasively regulated industry case, cannot be used for the purpose of a criminal investigation, and that the instant subpoena was for purpose of a criminal investigation.

1) Differences between Administrative Searches and Administrative Subpoenas

Miles describes the standard for administrative *searches*. He fails to note, however, that administrative searches are different from administrative subpoenas. All the cases Miles cited in support of his argument on this topic, at pp. 31-34 of Brief of Petitioner involve administrative searches, not administrative subpoenas.¹¹

The differences between administrative searches and administrative subpoenas were analyzed carefully and clearly in *In re: Subpoenas Duces Tecum Nos. A99-0001, A99-0002, A99-0003 and A99-0004*, 51 F.Supp.2d 726 (W.D.Va.1999). That case involved the legitimacy of subpoenas served on a physician and three health care providers by the U.S. Attorney pursuant to the Health Insurance Portability and Accountability Act, 18 U.S.C. § 3486. The subpoenas in question were issued, as authorized by statutes, by the Department of Justice and signed by an Assistant

¹¹ Except the references to *Oklahoma Press*, 327 U.S. 186, and *Morton Salt*, 338 U.S. 632 contained within one administrative search case.

U.S. Attorney. The subpoenas were not reviewed by a neutral magistrate before issuance. Notice was not provided to the patients whose records were subpoenaed.

The *In re: Subpoenas Duces Tecum* court reviewed the law regulating searches of pervasively regulated industries and cited the same case cited by Miles, *New York v. Burger*, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987). The *Burger* Court held that a warrantless search would be held reasonable in the context of a pervasively regulated business if 1) there is a "substantial" government interest that underlies the regulatory scheme pursuant to which the search is made; 2) the warrantless inspection must be necessary to further the regulatory scheme; and 3) the inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. *In re: Subpoenas Duces Tecum* at p. 732, citing *Burger* at 482 U.S. 702-03.

The *In re: Subpoenas Duces Tecum* court then noted that an even weaker standard is used to evaluate the legitimacy of administrative subpoenas (as compared to administrative searches):

Furthermore, the Supreme Court has found that even the weaker probable cause standard applicable to administrative searches does not govern the issuance of an administrative subpoena. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208, 66 S.Ct. 494, 90 L.Ed 614 (1946); *Reich v. Sturm, Ruger & Co., Inc.*, 903 F.Supp

239, 243 (D.N.H.1955). In such cases the Court has held that the Fourth Amendment, at most, ensures that the inquiry is one the demanding agency is authorized by law to make and that the materials sought are relevant to the authorized inquiry and guards against abuse by way of too much indefiniteness or breadth in the things required to be "particularly described." *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. at 208, *United States v. Morton Salt Co.*, 338 U.S. 632, 652-53, 70 S.Ct. 357, 94 L.Ed. 401 (1950). "The gist of the protection is in the requirement, . . . that the disclosure sought shall not be unreasonable." *Walling*, 327 U.S. at 208, 66 S.Ct. 494.

In re: Subpoenas Duces Tecum at p. 733.

When a court is reviewing an administrative subpoena, issued to insure compliance with an administrative regulatory scheme:

[T]he court should limit its inquiry to determining whether the investigation is within the agency's authority, whether the subpoena is too indefinite and whether the information sought is reasonably relevant. *United States v. Comley*, 890 F.2d 539, 541 (1st Cir.1989) (quoting *EEOC v. Tempel Steel Co.*, 814 F.2d 482, 485 (7th Cir.1987)).

Id.

And so we return to where we started. The standard for determining the validity of the Securities Division subpoena to Washington Mutual in a pervasively regulated industry case is whether the investigation is within the agency's authority and the specificity and relevance of the information sought.

Miles has never disputed the last two of these criteria: there has

never been a claim that the subpoena to Washington Mutual was too indefinite or that the information sought by that subpoena was not reasonably relevant. At bottom Miles' argument in this case boils down to his two arguments that the subpoena was not valid because notice was not provided to the defendant and because, he claims, it was issued in a criminal investigation.

2) RCW 21.20.380 Allows the Issuance of a Subpoena Without Notice to the Defendant

Miles has stated repeatedly that this statute did not authorize the issuance of a subpoena accompanied by a request that the target not be notified.¹² First, the crucial issue is not the accompanying request that the target not be notified - the crucial issue is whether the target was notified. Second, the request was just that, a request. It was not mandatory (and

¹² For pejorative impact Miles has inaccurately referred to such a subpoena as a "secret subpoena" instead of the more accurate descriptor provided by the state - a subpoena issued without notice to the target. The phrase "secret subpoena" has never been used by a Washington court to describe a subpoena issued without notice to the target. In fact the phrase "secret subpoenas" can be found in a search of all cases in the United States only in reference to a civil subpoena issued without notice to the opposing party in a handful of cases. *See, e.g., Welch v. Centex Home Equity Co. LLC*, 2004 WL 2331921 (D.Kan) The phrase "secret warrant" is found in a very small number of cases, primarily in reference to the highly criticized practice in the early 1800s of secret proceedings and secret warrants of arrest. *See, e.g., United States, ex rel Martinez-Angosto v. Mason*, 344 F.2d 673 (2nd Cir.1965). The term "secret subpoena" as used by Miles could more appropriately be used to refer to "sneak and peek" search warrants authorized under the Patriot Act, 18 U.S.C. 3103a(b) which authorizes the issuance of search warrants without notice to the person whose property is searched. "Sneak and peek" warrants are significantly more invasive than administrative subpoenas issued without notice to targets, and are subject to great restriction. Miles' use of the phrase "secret subpoenas" to describe the subpoenas issued by the Securities Division is both inaccurate and offensive.

frequently was not followed by bank recipients.¹³⁾ Third and most importantly, there was no statutory requirement that the target be notified.¹⁴ Without such a requirement, the subpoena issued by the Securities Division, even with a request for nondisclosure, does not run afoul of the authorizing statute. The defendant gives no citation to any authority holding that a request that a target not be notified of a subpoena must be specifically authorized by the statute authorizing the subpoena, else the subpoena is invalid. If the statute authorizing the subpoena does not create a right to notice then nothing the subpoena issuer does regarding notice invalidates the subpoena.¹⁵

3) The Administrative Subpoena issued to Washington Mutual was not a "Mask" for a Criminal Investigation as Miles Claims

Miles cites numerous cases for the legal proposition that an administrative subpoena, under a relaxed standard, cannot be used in a criminal investigation. What Miles does not do is provide any indication of the legal standard for determining whether an inquiry is sufficiently criminal

¹³ Reference Marty Cordell certification

¹⁴ Judge Armstrong made such a finding in her Order on Defendant's Motion to Suppress, p. 8 CP 186. Miles did not assign error to this finding.

¹⁵ It is important to remember that this portion of the defendant's argument depends upon the issued subpoena being invalid under the statute authorizing the subpoena, not under separate constitutional principles.

that this prohibition comes into play. Nor does Miles describe any aspect of the actual practices of the Securities Division, in general or specifically in this case that would make this inquiry a prohibited criminal inquiry.

Miles' entire analysis focuses on the cover letter accompanying the subpoena. He uses this letter, rather than any substantive aspect of the investigation, to support his argument that this was a criminal inquiry.

a) The Standard for Determining When an Administrative Subpoena is Issued For an Improper Purpose

There is a wide body of law, not cited or analyzed by Miles, that provides guidance on this subject. The basic rules for distinguishing between proper use of an administrative subpoena for civil/regulatory purposes and improper use of such a subpoena for criminal purposes can be found in *United States v. LaSalle National Bank*, 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221 (1978). In that case the District Court had denied enforcement of two IRS summonses on the ground that the summonses were issued in aid of an investigation solely for criminal purposes. The Supreme Court reversed this decision.

The special agent in charge of the investigation testified that the nature of the assignment was "[t]o investigate the possibility of any criminal violations of the Internal Revenue Code." *Id* at 437 U.S. 300. As part

of his investigation the agent issued summonses to a bank holding records related to the taxpayer. The bank resisted the summonses and the IRS petitioned for enforcement.

The agent testified that when the petition for enforcement was filed he had not determined whether criminal charges were justified. The bank contended that the agent told them the investigation "was strictly related to criminal violations of the IRS code." *Id* at 303.

The District Court, while recognizing "that in any criminal investigation there's always a probability of civil tax liability" focused its attention on the purpose of the special agent. *Id*. The District Court held that it was an improper use of the summons to serve it solely for the purpose of obtaining evidence for use in a criminal prosecution. *Id* at 304.

The *LaSalle* court referenced the earlier decision in *Donaldson v. United States*, 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971) where the Court concluded that Congress had authorized the use of summonses in investigating potentially criminal conduct. The *Donaldson* court saw no reason to force the IRS to forgo the use of congressionally authorized summonses or to abandon the option of recommending criminal prosecution to the Department of Justice and concluded that:

As long as the summonses were issued in good-faith pursuit of the congressionally authorized purposes, and prior to any

recommendation to the Department for prosecution, they were enforceable.

LaSalle at 307, citing *Donaldson* at 536.¹⁶

In *Donaldson* the taxpayer argued that the mere potentiality of criminal prosecution should have precluded enforcement of the summons. The *Donaldson* court rejected that proposition in reaching the conclusion stated above that summons would be enforced if they were issued in good faith prior to a recommendation to DOJ for criminal prosecution. *Donaldson* at 400 U.S. 533-34.

The *LaSalle* court noted that matters investigated by the IRS involved potential civil and criminal liability (like matters investigated by the Washington Securities Division) and concluded that the Code "contemplated the use of the summons in an investigation involving suspected criminal conduct as well as behavior that could have been disciplined with a civil penalty." *LaSalle* at 311. The Court then explained that this suggested why the primary limitation on the use of a summons "occurs upon the recommendation of criminal prosecution to the Department of Justice." *Id.* The Court rejected the view that the special agent's view of the matter

¹⁶ The Washington Securities Act similarly authorizes the use of subpoenas in investigating potentially criminal conduct. RCW 21.20.370(1)(b) states that the director (of the Department of Financial Institutions) may "engage in the detection and identification of criminal activities subject to this chapter...." RCW 21.20.380(1) authorizes the issuances of subpoenas "for the purpose of any investigation or proceeding under this chapter...."

as solely criminal determined the issue.¹⁷ The Court then concluded that the question of whether an investigation had solely criminal purposes must be answered only by an examination of the institutional posture of the IRS. This meant that those opposing enforcement of a summons bear the burden of disproving the actual existence of a valid civil purpose. This burden, the Court added, was a heavy one. *Id.*

Indications of bad faith would include delay in submitting a recommendation to the Justice Department solely to gather additional evidence for the prosecution. Nor could the IRS become an information-gathering agency for other departments.

The Court then stated the rule for summons enforcement succinctly. The summons must be issued before a recommendation for criminal prosecution has been made to the Department of Justice, and the Service must use the summons authority in good-faith pursuit of the congressionally authorized purposes under the portions of the act relating to determining civil liability. *Id.* at 318. The Court, noting that in the case before it that a referral had not been made to the Justice Department and

¹⁷ "To do so would unnecessarily frustrate the enforcement of the tax laws by restricting the use of the summons according to the motivation of a single agent without regard to the enforcement policy of the Service as an institution. Furthermore, the inquiry into the criminal enforcement objectives of the agent would delay summons enforcement proceedings while parties clash over, and judges grapple with, the thought processes of each investigator." *LaSalle* at 316.

that there was no evidence the IRS, in an institutional sense, had abandoned its pursuit of civil tax liability, reversed the District Court's refusal to enforce the summons. *Id* at 319.

Other courts have adopted similar tests. Prior to *LaSalle* the Sixth Circuit, in *United States v. Weingarden*, 473 F.2d 445 (6th Cir.1973) held that if the investigation of a taxpayer was under the complete control of the prosecuting agency (the Department of Justice), and if that agency was in the process of prosecuting the taxpayer, it would not be permissible for the Department to contact the IRS and request their assistance in building a stronger case by obtaining additional documents under their civil investigative authority. *Id* at 459. Similarly, the court noted, where the *sole* purpose of the issuance of a summons was to aid a criminal prosecution it would also be invalid. *Id*. The court, noting that the validity of an IRS summons was to be determined by the facts as they existed at the time of the issuance of the summons, and that the burden was on Weingarden to establish that the sole purpose of the summons was to obtain evidence for a criminal prosecution, concluded there was no evidence to support such a conclusion, and ordered the summons enforced. *Id* at 461.

In *Cordt v. Office of the Inspector General*, 2000 WL 1336649 (D. Minn), Cordt was a US Postal employee under investigation by the Postal

Service for suspected embezzlement. Postal Inspectors first became suspicious of Cordt because of a shortage in her daily cash drawer accounting. They received an anonymous tip that Cordt had sustained gambling losses and investigated further. They found additional anomalies in her accounting. As a result of this investigation the Postal Service issued a subpoena under the provisions of the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422 for records of Cordt's credit union account. Cordt was notified as required by the RFPA (which governs federal but not state and local law agencies, *see GLIG, Inc. v. Burgher*, 4 Misc.3d 1028(A), 798 N.Y.S.2d 344 (2004)) and she moved to quash the subpoena. Cordt argued that the Postal Service was not authorized to issue a subpoena for financial records unless there was a civil purpose for doing so.

The RFPA authorized the issuance of a subpoena if there was reason to believe that the records sought were relevant to a legitimate law enforcement inquiry. 12 U.S.C. § 3405. Cordt did not challenge whether the subpoena was issued in furtherance of a legitimate law enforcement inquiry. Rather, she contended, if there is a likelihood of criminal proceedings the agency must have a civil purpose and the agency must not have made a formal recommendation to the Justice Department to prosecute.

In upholding the subpoena, the court, citing *United States v. Art*

Metal-U.S.A., Inc., 481 F.Supp. 884 (D.N.J.1980) held that an administrative subpoena was not issued for an improper purpose so long as (1) the agency in question had not itself made a formal recommendation to the Justice Department to prosecute; and (2) the summons or subpoena had a civil purpose (and the party opposing enforcement has the burden of showing the absence of a civil purpose.)¹⁸

b) Application of That Standard to the Miles Case

As noted earlier (see n. 16 above) the Securities Act of Washington, like the Internal Revenue Code, vests the investigative agency - the Securities Division of the Department of Financial Institutions - with dual investigative purposes. The Division is to investigate both civil and criminal non-compliance with the Act (RCW 21.20.370(1)(b)) and may refer criminal matters to the attorney general or appropriate prosecuting attorney (RCW 21.20.420(1)).

Under this regulatory scheme, almost any investigation, like any IRS investigation, includes both civil and criminal liability as potential final outcomes. To void the use of administrative subpoenas where criminal liability is a possibility is to void the use of administrative subpoenas in

¹⁸ The court then concluded that even this restriction (absence of a civil purpose) was not contained within the Right to Financial Privacy Act and the subpoena was properly issued.

most, if not all, securities investigations - a result clearly in conflict with the intention of the legislature.

The crucial issue, then, is what standard is to be used to separate valid uses of administrative subpoenas from invalid uses of such subpoenas? The cases previously discussed establish two bright line rules.

First, the subpoenas must be issued before the matter is formally referred to the prosecuting agency for prosecution.

Second, the subpoenas must be issued in good faith pursuit of the civil remedies authorized by the Act. The subpoenas cannot be issued where the sole purpose of the investigation is to gather criminal evidence. The burden of proof for establishing the absence of a civil purpose is on the party objecting to the subpoena.

As to the first rule, there is no doubt that the subpoena issued to Washington Mutual in June of 2001 was issued before the matter was referred to the King County Prosecuting Attorney some sixteen months later in October, 2002. Declaration of Martin Cordell SuppCP ____.

As to the second rule there is no doubt that the Securities Division was gathering evidence in support of the civil remedies available under the Securities Act. The Division in fact pursued such remedies after receiving

the evidence requested by the subpoenas.¹⁹ The defendant makes no claim that the Division was not gathering evidence in support of pursuing civil remedies under the Act. The best the defendant can say is that, in addition to gathering evidence for purposes of civil enforcement, the Division was *also* gathering evidence for purposes of criminal prosecution.

Although the validity of the defendant's claim is disputed (see below), the important point is that the legal standard for determining when administrative subpoenas are used for invalid purposes specifically permits such dual purpose investigations absent a showing of bad faith (such as delaying a criminal referral for the sole purpose of gathering additional evidence in support of a criminal prosecution.)

Not only does Miles not analyze the legal standard for determining when an administrative subpoena is being inappropriately used in a criminal investigation, he doesn't even examine the facts of the investigation itself.

What does he examine?

Does Miles examine the nature of the evidence before the Division at the time the subpoena was issued to establish that the Division had clear evidence of a criminal violation at the time the subpoena was issued? No,

¹⁹ A final cease and desist order was entered against Miles on December 21, 2002. Declaration Of Martin Cordell SuppCP ____.

he does not, because any cursory examination would show that the Division had only the bare allegations of one victim. Even if that victim's story was true, any number of facts would make a criminal case against Miles unwarranted. What if Miles had invested the money through a broker who had then stolen the money through no fault of Miles? What if Miles had invested the money in investments which had done poorly? The Division had no basis, at the time the subpoena was issued, to believe this would in fact become a criminal case.

Does Miles examine the language of the subpoena for indications that the subpoena is requesting information relevant to a criminal investigation, but largely irrelevant to a civil investigation. He does not, because the information request was both narrowly drawn and focused on information that would be relevant to the civil investigation. The information would also be useful in a criminal case but dual usefulness is not an indication that the subpoena was issued for an improper purpose.

Does Miles examine the relationship between the Securities Division and the Prosecutor's Office to show that the Securities Division was acting as the agent for, and at the bequest of, the Prosecutor in gathering this evidence? He does not, for there is no evidence of such a relationship. The prosecutor was not consulted about this case until it was referred for

criminal prosecution more than 16 months after the subpoena was issued.

Declaration of Martin Cordell SuppCP ____.

Does Miles examine or contest the statistics contained in Declaration of Martin Cordell SuppCP ____ to establish that it was likely or probable that this investigation would result in criminal prosecution? No, he does not. He does not contest those statistics²⁰ because they are true. The overwhelming majority of investigations initiated by the Securities Division do not result in criminal referrals, let alone criminal prosecutions.

Does Miles examine the steps taken by the Division following the issuance of the subpoena to Washington Mutual to show that the claim of an investigation for civil purposes was a ruse? No he does not, for an examination of those steps would show the Division followed the routine steps of a civil investigation including issuing other subpoenas and interviewing witnesses.

Instead of looking at anything substantive to determine whether this was a criminal investigation Miles looks only to the cover letter asking that the requested evidence be provided promptly. Because that letter

²⁰ Although the State only recently moved to supplement the record with the Declaration Of Martin Cordell SuppCP ____, the statistics contained in that certification regarding the number of matters referred for criminal prosecution, relative to the the total number of complaints and investigations, was presented in the argument to Judge Armstrong on this motion. Order on Defendant's Motion to Dismiss, pp. 8-9 CP 153-154.

referenced the three year statute of limitations period for theft Miles claims the investigation was clearly for the purposes of investigating a theft. To state the claim in this context is to show the absurdity of the claim.

The Chief of Enforcement for the Securities Division explained why this language was used. Declaration of Martin Cordell SuppCP _____. The inclusion of this language did not enable the Division to obtain information outside the scope of its authority that it would not otherwise have been able to obtain? There is no claim that information outside the scope of their authority was obtained by the subpoena. Miles makes no analysis of the impact of the language of the cover letter other than its existence.

Miles falls short of his burden, under the legal standard announced in *LaSalle*, 437 U.S. 298, and affirmed in numerous other cases, that the party challenging the validity of an administrative subpoena has the burden of proving there was no civil purpose behind the subpoena.

In sum, the subpoena was validly issued. The defendant participated in the securities industry, a pervasively regulated industry. He deposited funds he obtained through that participation in a bank account and co-mingled those funds with his personal funds. He is presumed to know that for 36 years, and historically for an even longer time, banks legally

made and maintained copies of customer transactions, in part for the purpose of assisting in criminal investigations. He is presumed to know that he has no Fourth Amendment privacy interest in those bank records and that, prior to this case, no Washington court has held he has an art. I, section 7 privacy interest in those records. He is presumed to know that the only requirement that a bank customer receive notice of a subpoena for the customer's records is one under the federal Right to Financial Privacy Act and that notice requirement only applies to efforts by federal agencies to obtain those records. He is presumed to know that there is no Washington equivalent of this act requiring notice when a state or local agency seeks records of his bank account. He is presumed to know that only in one narrow area, where bank records are examined by bank examiners, does state law impose limits on access to his bank records and require notice to him of such access, but that in seventy other statutes the Washington legislature has given administrative agencies, including the Department of Financial Institutions, broad authority to compel the production of documents and records, including his bank records, where relevant to the agency's investigation, and none of those seventy statutes require him to receive notice of the request for his records.

As Judge Armstrong concluded in her written opinion, the

defendant cannot therefore be heard to complain that his records of his transactions in the securities industry are protected from discovery, any more than Sheriff Murphy could complain about access to his prescription records. *Murphy v. State*, 115 Wn. App. 297.

E. Other Arguments Supporting Judge Armstrong's Denial of the Defendant's Motion to Suppress

The State has urged this court to uphold Judge Armstrong's ruling on the narrowest grounds - that participating in a pervasively regulated industry put Miles on notice that he had a diminished expectation of privacy in records related to that participation held by a third party. If the court does not uphold the ruling on that grounds the State urges this court to uphold Judge Armstrong's ruling on any number of alternative grounds including;

1. Art. I, section 7 does not provide broader protection than the Fourth Amendment with regard to a bank's records of customer transactions because of the lengthy Washington history of providing administrative agencies access to such records without a warrant, without a subpoena signed by a neutral magistrate, and without prior notice to the customer. See the arguments made in the State's Response to Defendant's Motion to Suppress, pp. 20-34.
2. The law governing administrative subpoenas is that of *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208, 66 S.Ct. 494, 90 L.Ed 614 (1946), *United States v. Morton Salt Co.*, 338 U.S. 632, 652-53, 70 S.Ct. 357, 94 L.Ed. 401 (1950), *Kinnear v. Hertz Corp.*, 86 Wn.2d 407, 418, 545 P.2d 1186 (1978), *Steele v. State*, 85 Wn.2d 585

(1975), and *Dep't of Revenue v. March*, 25 Wn.App. 314, , 610 P.2d 916 (1979) as explained in the State's Response to Defendant's Motion to Suppress, pp. 12-16 CP 47-51. The only notice required for an administrative subpoena is notice to the party subpoenaed.

3. Subpoenas are authority of law under *State v. Gunwall*, 106 Wn.2d 61, 70, 917 P.2d 563 (1996). Subpoenas need not be signed by a neutral magistrate to be valid. A person whose records are subpoenaed under a valid subpoena need not be notified of the fact of the subpoena if the subpoena is otherwise valid. See the arguments advanced in State's Response to Defendant's Motion to Suppress, pp. 34 - 40 CP 69-75.

F. Remedy

Other than the brief discussion of the exclusionary rule in Miles' Motion to Suppress, Brief in Support, pp. 20-21, Miles does not discuss the appropriate remedy if the court finds that notice of the subpoenas should have been provided to Miles. The State raised the remedy issue on two occasions below following Miles' initial brief (State's Response to Defendant's Motion to Suppress, pp. 40-41, CP 75-76, and State's Argument on Motion to Suppress, pp. 17-18, CP 162-163, but Miles did not return to the issue.

This issue is important for two reasons.

First, even if Miles is correct that the defendant should have received notice of the subpoena issued to Washington Mutual, on what basis would he have objected to the subpoena? As a New Jersey appellate court

noted:

Challenges to an SEC subpoena are restricted in order to minimize 'the risk that customer's objections to subpoenas will delay or frustrate agency investigations.' *SEC v. Jerry T. O'Brien, Inc.* 467 US 735, 745 (1984). In securities investigations 'speed in locating and halting violations of the law is so important . . . [that a court should] be loath to place . . . weapons in the hands of persons with a desire to keep the Commission at bay. *Id.* at 751. Subpoena enforcement proceedings should not be delayed 'while parties clash over, and judges grapple with the thought processes of each investigator . . .' *United States v. LaSalle National Bank*, 437 U.S. 298 (1978).

Greer v. New Jersey Bureau of Securities, 671 A.2d 1080 (Sup. Ct. Appellate Division NJ 1996).

Miles does not claim that the standard for determining the validity of the subpoena issued to Washington Mutual is anything other than the *Oklahoma Press/Morton Salt* standard (within the agency's authority, demand not too indefinite, information sought is relevant). Miles has not disputed, and cannot reasonably dispute, that the subpoena was valid under the latter two categories. His only dispute is that the request not to notify and the cover letter's reference to the theft statute of limitations made the subpoena outside the Securities Division's authority.

Those two issues are before this court regarding the validity of the subpoena. If this court finds, as argued earlier in this brief, that those two items do not invalidate the subpoena, then Miles would have had no basis

for objecting to the subpoena and his bank records would still have been obtained by the Securities Division. The failure to notify him of the subpoena was harmless error.

This same issue was before the Colorado Supreme Court in *People v. Lamb*, 732 P.2d 1216, 1220-21 (1987). The State argued that the records produced without notice should not be suppressed because the defendant was not prejudiced by their production. The court agreed.

The court noted that the trial court determined (as we suggest this court will) that the administrative subpoenas were issued in full compliance with statutory and constitutional requirements except for notice (following the *Morton Salt/Oklahoma Press* standard.) The court then said:

The same determination undoubtedly would have resulted had the hearing been conducted in advance of execution of the administrative subpoena. The requirement of notice had not been definitively established prior to our decision today. It had never been considered in the context of an investigation into violations of the securities laws. Under these circumstances, we conclude that the defendant suffered no prejudice as a result of the absence of notice and that suppression would be an inappropriately severe consequence to impose for the failure to give notice. Accordingly we conclude that the trial court order suppressing the bank records obtained by the Division of Securities pursuant to the six administrative subpoenas must be reversed.

732 P.2d at 1222.

Miles has repeatedly talked of his great privacy interest in his bank

records. If access to his bank records in all circumstances required probable cause, demonstrated in advance to a neutral magistrate, then it is that great privacy interest and accompanying heightened scrutiny that would have to be weighed against the State's interest in monitoring compliance with regulations.

If, on the other hand, as is argued here (and as Miles appears to ultimately accept), the only cognizable interest Miles has in an administrative subpoena is the *Oklahoma Press/Morton Salt* standard, then it is the loss of that lesser interest through absence of notice, that should be weighed against the State's interest in monitoring compliance with regulations without undue interference. Weighing those competing interests - the defendant's narrow right to demand that an administrative subpoena be authorized, definite and relevant against the State's interest in monitoring compliance with a regulatory scheme without undue interference or delay, particularly at the very earliest stages of investigation, and the State's interest in not alerting targets of investigations at the very earliest stages so as to avoid evidence destruction, witness intimidation or tampering, removal of assets and flight - would seem to heavily favor the interests of the State.

Second, as noted by the New Jersey Supreme Court in their recent conclusion that notice to the account holder is not required under the New
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Jersey Constitution in order for a subpoena for third party records to be valid, even when the account holder has a recognized privacy interest in those records, *State v. McAllister*, 184 N.J. 17, 37-44, 875 A.2d 866, 878-882 (2005), there are valid reasons for notice and valid reasons against notice. A blanket ruling that notice is required in all instances, as the defendant urges, would produce great inequities in a number of situations. A blanket ruling that notice is never required, would similarly produce inequities in several instances.²¹ These inequities result from the all-or-nothing result flowing from case resolution as opposed to rule making or legislation.

Following *United States v. Miller*, Congress and several states passed legislation designed to protect a bank customer's right to privacy in relation to his or her financial records kept by financial institutions with which he or she did business. These statutes uniformly provide for disclosure of these records under authority of a subpoena duces tecum. Most, if not all, permit disclosure without notice to the consumer in certain circumstances.²² If Washington had adopted its own Right to Financial Privacy

²¹ Judge Armstrong's ruling that notice is not required in this case is not so broad. It is limited to where a defendant participates in a pervasively regulated industry and deposits proceeds of participation in that industry in a bank account. In those narrow circumstances notice of statutorily authorized access to that bank account is not required. The State has urged this court to uphold Judge Armstrong's ruling on this narrow ground.

²² See Right to Financial Privacy Act, 12 U.S.C.A. § 3413(i).

Act, or if this matter were addressed by court rule, a more flexible solution could be crafted - one that might require notice in some situations but not in others. The New Jersey Supreme Court in *McAllister* recognized this problem and referred the issue to the Criminal Practice Committee for further study of the benefits and burdens of enhanced protections for bank records. *McAllister*, 184 N.J. at 42-43, 875 A.2d at 881. We urge this court to take a similar reasoned approach and not simply fashion an all-or-nothing remedy which involves suppression of the bank records in this case.

VI. Conclusion

Judge Armstrong parsed this extremely complex issue and got it right. This court should uphold Judge Armstrong's denial of the Defendant's Motion to Suppress but only address the narrow issues necessary to reach that conclusion and leave the broader issues for a more appropriate case.

RESPECTFULLY SUBMITTED

NORM MALENG
KING COUNTY PROSECUTING ATTORNEY

BY:



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Fraud Division
King County Prosecuting Attorney
Attorney for Respondent State of Washington

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,)	
)	
)	No. 56017-4-I
Respondent,)	
)	
vs.)	AFFIDAVIT OF SERVICE
)	
MICHAEL M. MILES,)	
)	
)	
Petitioner.)	
_____)	

STATE OF WASHINGTON)
) ss.
 COUNTY OF KING)

IVAN ORTON, being first duly sworn on oath, deposes and says: That he is an American citizen over 21 years of age, that on the 10th of February 2006, he served via legal messenger (ABC-Legal Messengers, Inc.) Kevin McCabe, The Associated Counsel for the Accused, 110 Prefontaine Pl. S., Suite 200, Seattle, WA 98104, attorney for Appellant Michael M. Miles, with two copies of *Brief of Respondent* (one for McCabe and one for Petitioner Miles.) The original plus one copy of said document was filed with the Court of Appeals, Division I.

RECORDED
 1/24/06
 W

Ivan Orton
 IVAN ORTON

SUBSCRIBED AND SWORN to before me this 10th day of February, 2006.

Val Epperson
 VAL EPPERSON

NOTARY PUBLIC in and for the State of Washington, residing at Renton

