Supreme Court No. 90577-1
(CoA No. 69226-7-1)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL REEDER,

Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Washington Supreme Court

Wasington Court of Appeals

United States Supreme Court

Other Appellate Courts

Statutes

Other Authorities

Court Rules

A. IDENTITY OF MOVING PARTY AND DECISION BELOW

Petitioner Michael Reeder, the defendant and appellant below, asks this Court to accept review the published Court of Appeals opinion, No. 69226-7-I (issued June 23, 2014). A copy of the slip opinion is attached as an Appendix.

B. ISSUE PRESENTED FOR REVIEW

1. Bank records are private affairs in Washington into which the state may not intrude without a proper warrant or the functional equivalent. Where no warrant was obtained and the State used the procedures of the special inquiry judge to obtain subpoenas duces tecum based on less than probable cause, does the authority of law purportedly provided by RCW 10.27.170 violate the state constitution and federal constitutions, and the decisions of this Court?

2. The constitutional and statutory right to counsel includes an attorney free from conflicts of interest and, therefore, prohibits the representation where clients are adverse to each other or where there is a risk the representation of one client may limit the lawyer's responsibilities to the other. Here a lawyer was consulted and provided legal advice to a potential witness for the opposing party or

a potential co-conspirator. Is that attorney precluded from subsequently representing another party and is that bar imputed to the other attorneys in his firm under the decisions and Rules for Professional Conduct promulgated by this Court?

3. The double jeopardy bar of the state and federal constitutions prohibit multiple punishments for a single offense. Where the prosecutor alleged a grand and ongoing scheme to obtain money from a specific investor by a series of fraudulent or deceptive representations, and the legislature established a singular unit of prosecution for such offenses, and the jury was not directed to find separate and distinct act unanimously, does the imposition separate sentences for these multiple counts of securities fraud and theft violate the state constitution and federal constitutions, and the decisions of this Court?

C. STATEMENT OF THE CASE

Mr. Reeder and William McAllister created a corporation for the purposes of developing Bellevue and Snohomish properties.[1] They agreed that McAllister would loan the necessary capital and Mr. Reeder would

[1] Trial RP 270-80.

acquire the properties.[2] In furtherance of his obligation, McAllister wrote Mr. Reeder a total of 14 checks totaling $1.7 million throughout the course of their dealing.[3] Neither the Bellevue nor the Snohomish deals were ever completed and Mr. Reeder did not return the money.[4] The King County Prosecutor charged Mr. Reeder with 29 counts of securities fraud and first-degree theft by color and aid of deception based on the 14 checks that McAllister wrote in support of their endeavors.[5]

A large portion of the State's case against Mr. Reeder was derived from bank records obtained by subpoena duces tecum issued by a special inquiry judge based on showing of mere reasonable suspicion.[6] The Court of Appeals and the trial court, however, failed to fully appreciate the critical privacy interests at issue in these fishing expeditions and the statutory and constitutional limitations on the special inquiry judge procedures implicated by the failure to suppress this evidence.

Mr. Reeder was also the subject of a mortgage fraud case.[7] Mr. Reeder believed that his sister, Ms. Cuzak, was implicated in that case as well. When she was contacted by prosecutors, she consulted attorney David Roberson regarding those proceedings. Although Roberson worked

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[2] Trial RP 282, Exhibit 10.
[3] Trial RP 287-89.
[4] Trial RP 297-302.
[5] CP 1-38.
[6] CP 99-107.
[7] 4/18/12RP 3.

for another firm at the time of that consultation, he was subsequently employed by the same firm at which Mr. Reeder's appointed counsel was now employed, Society of Counsel Representing Accused Persons (SCRAP).[8]

The trial court recognized the potential conflict of interest, but rather than providing new counsel, the judge ruled that: "On [the mortgage fraud case] there's an arguable conflict of interest. I still think it's resolvable by the...Chinese wall."[9] In light of the material nature of the conflict, the limited nature of the trial court's inquiry and the ultimate inadequacy of the Chinese wall, Mr. Reeder's right to effective assistance of counsel and a fair trial was compromised.

Finally, the court imposed multiple punishments for the same underlying offenses of securities fraud and theft which originated out of the ongoing obligations McAllister and Mr. Reeder in financing the properties for development.

The Court of Appeals affirmed Mr. Reeder's conviction and sentence. Mr. Reeder now seeks review in this Court pursuant to RAP 13.4

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[8] 4/18/12RP 3.
[9] 4/18/12RP 8-9.

D. ARGUMENT

1. THIS COURT SHOULD REVIEW THE CONSTITUTIONAL QUESTION PRESENTED BY THE USE OF THE SPECIAL INQUIRY JUDGE AND THE REASONABLE SUSPICION STANDARD IN THE SEARCH AND SEAIZURE OF PRIVATE BANK RECORDS CONTRARY TO THIS COURT'S DECISIONS IN MILES AND GARCIA SALGADO

a. Washington has a heightened protection of privacy interests and narrowly construes warrantless searches.

The Washington Constitution in Article 1, Section 7 requires that "[n]o person shall be disturbed in his private affairs, or his home invaded, without the authority of law."[10] Private affairs include bank records.[11] The 'authority of law' extends to warrants and subpoenas when issued by a neutral magistrate.[12] Special inquiry judges qualify as neutral magistrates and may issue subpoenas – but only in limited circumstances. As a matter of constitutional law and policy, Mr. Reeder contends they may only issue

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[10] Wash. Const. Art. I, § 7.

[11] State v. Miles, 160 Wn.2d 236, 247, 156 P.3d 864 (2007) ("Little doubt exists that banking records, because of the type of information contained, are within a person's private affairs.").

[12] See Id. at 247 ("As a general principle, our cases have recognized that a search warrant or subpoena must be issued by a neutral magistrate to satisfy the authority of law requirement.").

such subpoenas based upon a determination of probable cause. Evidence gathered in violation of these limitations must be suppressed.[13]

b. The Court of Appeals erroneously failed to apply the probable cause standard to subpoena duces tecum required by *Miles* and *Garcia Salgado*.

This Court should review of the Court of Appeals' opinion determining that a subpoena duces tecums issued by a special inquiry judge need not be justified by probable cause. The Washington Constitution places greater emphasis on the right to privacy than the United States Constitution.[14] Warrantless searches are presumptively unreasonable and exceptions are narrowly drawn.[15] The warrant requirement is critical because it ensures that a thoughtful determination has been made based on verified representations that support the scope of invasion.[16]

Although Washington allows for "special inquiry" proceedings,[17] unlike grand juries, special inquiries do not actively investigate criminal

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[13] See State v. Garcia-Salgado, 170 Wn.2d 176, 188, 240 P.3d 153 (2010) (reversing because the prosecution did not meet its burden of showing that the court order was based upon probable cause); State v. Gaines, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005) ("Generally, evidence seized during an illegal search is suppressed under the exclusionary rule"); State v. Manning, 86 Wn.2d 272, 275, 543 P.2d 632 (1975) (affirming the suppression of evidence because the evidence was obtained after prosecution charged the accused).

[14] See State v. Young, 123 Wn.2d 173, 179, 867 P.2d 593 (1994) (citing State v. Stroud, 106 Wn.2d 144, 148, 720 P.2d 436 (1986); State v. Simpson, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980)).

[15] State v. Eisfeldt, 163 Wn.2d 628, 635, 185 P.3d 580 (2008); State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002)).

[16] State v. Jackson, 150 Wn.2d 251, 263, 76 P.3d 217 (2003).

[17] RCW 10.27.170.

activity or issue indictments.[18] While grand juries gather evidence to support an indictment, special inquiry judges merely assist in gathering evidence.[19] The subpoenas issued by special inquiry judges, like warrants, are still court orders.[20] Accordingly, they are explicitly subject to warrant requirements, including probable cause. State v. Garcia-Salgado, 170 Wn.2d 176, 186, 240 P.3d 153, 158 (2010)

> A court order may function as a warrant as long as it meets the constitutional requirements ...[It] must be entered by a neutral and detached magistrate, [and] must be describe the place to be searched and times to be seized, and **must be supported by probable cause** based on oath or affirmation...

Id., (emphasis added).

Here, the Court of Appeals erroneously equated special inquiry proceedings with grand juries, relied on inapposite federal jurisprudence,

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[18] State v. Neslund, 103 Wn.2d 79, 85, 690 P.2d 1153 (1984) (quoting Washington State Judicial Coun., *Twenty-Second Biennial Report* 17-18 (1969-70)) ("[T]he special inquiry judge will only sit as a judicial officer to hear and receive evidence...Special inquiry judge proceedings are viewed by the Judicial Council as supplementary to a regular grand jury which as the power to actively investigate evidence of crime and corruption, a power not granted to the special inquiry judge.").

[19] See Id. "*The special inquiry judge does not have the power to issue indictments as does the grand jury*, but can turn over evidence produced at the proceedings before him to any subsequent grand juries called pursuant to the statute. Thus, *although not actively participating [sic] in an investigative role himself,* the special inquiry judge provides the prosecutor an added investigatory tool." (emphasis in original).

[20] See BLACK'S LAW DICTIONARY 712 (9th ed. 2009) (order 2. written direction or command delivered by a court or judge. The word generally embraces final decrees as well as interlocutory directions or commands.); 1-7 WA Criminal Practice in Courts of Limited Jurs § 7.07 ("A subpoena duces tecum is a command to a named person to appear in court on a date specified, bringing documents or other property listed in the subpoena.").

failed to provide appropriate protections to the private interests recognized in bank records and failed to appreciate the crucial part the probable cause standard plays in protecting those interests.

The different purposes, where grand juries are organized to indict but special inquiries are organized to simply assist investigations, is not basis for eroding the special privacy protections recognized in the state for bank records. The Court of Appeals fails to justify this intrusion in light of the mere "supplementary" investigatory powers created by the special inquiry proceedings. No compelling need justifies this invasion in the absence of probable cause.

The Court of Appeals also erroneously interprets Washington case law in its grand jury-special inquiry analogy. Precedent explicitly distinguishes between the two. In Washington, the purpose and methodology of special inquiries align more closely with warrants. Further, the Special Inquiry Judge in this case issued a subpoena duces tecums, which, as a court order, must be issued based on probable cause. Garcia-Salgado, 170 Wn.2d at 186.

c. The probable cause standard is consistent with sound public policy.

Requiring probable cause for special inquiry subpoenas of private bank records is consistent with the state's policy of heightened privacy

protections and "jealously and carefully drawn" warrant requirement exceptions.[21] The Court of Appeals opinion fails to distinguish between these and the myriad of other records or documents which might be sought.

The Court of Appeal's expansive interpretation of the statute to justify these special inquiry subpoenas erodes the most crucial aspects of our privacy protections under the warrant requirement. Police and prosecutors can simply skirt the inconvenience of probable cause requirement, by merely requesting the gathering of a special inquiry, and then compelling evidence based upon their "reasonable" belief. This result strikes directly at Washington's heightened privacy protections and warrants further review by this Court.

Ultimately, the Court of Appeals failed to recognize that its holding that special inquiry subpoenas do not require probable cause contradicts the decisions of this Court and violates the important privacy provisions of Art. 1, section 7 of the Washington Constitution. The erroneous admission of these bank records was highly prejudicial. Accordingly, this Court should grant review and overturn the Court of Appeal's decision.

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[21] State v. Garcia-Salgado, 170 Wn.2d 176, 184, 240 P.3d 153 (2010) (quoting State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009)).

2. THIS COURT SHOULD REVIEW THE IMPORTANT CONSTITUTIONAL QUESTION PRESENTED BY DIVISION ONE'S ERRONEOUS APPLICATION OF CONFLICT OF INTEREST LAW.

a. The Court of Appeals erred in concluding the record failed to establish a conflict and overlooked the trial court's failure to adequately inquire.

The Court of Appeals opinion erroneously concludes that the record is inadequate, however, the offer of proof was sufficiently specific to warrant relief. Mr. Roberson specifically advised the trial court that,

> ... Ms. Cuzak called me. I gave her advice at Northwest- when I was at Northwest Defender regarding the suit, so it's not simply whether or not she should take to Mr. Seaver. There was contact made years ago regarding the civil matters where I think the subject matter was either the same or very similar.

4/18/12RP 8. Where the State has alleged Mr. Reeder's conduct was part of an ongoing effort, these overlapping schemes present a cognizable conflict for which new counsel was required.[22]

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[22] The Court of Appeals asserts at footnote 15 that the record contains no transcript for the June 20, 2012, hearing at which Mr. Reeder renewed his complaints regarding his appointed counsel. The hearing was bound together and filed by the court reporter along with the hearing on April 18, 2012 and July 2, 2012, in the Court of Appeals on December 27, 2012, according to the Court's docket. 6/20/12RP 20-25. If the Court no longer has its copy, counsel can provide another. As for the hearing on July 2, 2012, as an alternative to a motion to continue the trial, Mr. Reeder's attorney moved to withdraw as counsel, obviously requiring the appointment of substitute counsel, because he was not prepared. 7/2/12RP 26-32. The appellate record fully supports the factual assertions made in the appellant's briefing.

While acknowledging that even a short consultation may create an attorney-client relationship, the Court of Appeals ignores the most cogent facts in support of the his claim, i.e., the attorney's representation that "she contacted me for legal advice, I gave it to her." 4/18/12RP 5. While Ms. Cuzak may not have been an indispensable witness for the State in this particular prosecution, her part in Mr. Reeder's ongoing efforts created a conflict of interest for which he should have been provided new counsel.

Furthermore, it is the duty of the trial court to adequately investigate the conflict-of-interest issue.[23] Deficiencies in the trial court's execution of its obligations should not be held against the accused. A trial court must investigate potential attorney-client conflicts of interest if it knows or reasonably should know that a potential conflict exists.[24] Reversal is required if the accused makes a timely objection to a conflict and the trial court fails to conduct an adequate inquiry.[25]

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[23] See State v. McDonald, 143 Wn.2d 506, 513, 22 P.3d 791 (2001) ("[W]e held the failure of the trial court to inquire into a possible conflict of interest between the defendant and defense counsel is reversible error and prejudice is presumed"); State v. Regan, 143 Wn.App. 419, 425-26, 177 P.3d 783 (2008) ("Reversal of a conviction is required if a defendant or his attorney makes a timely objection to a claimed conflict and the trial court fails to conduct an adequate inquiry. **But if** the defendant does not make a timely objection in the trial court, a conviction will stand **unless** the defendant can show that his lawyer had an actual conflict that adversely affected the lawyer's performance.") (internal citations omitted) (emphasis added).

[24] State v. Regan, 143 Wn.App. at 425-26 (citing Mickens v. Taylor, 535 U.S. 162, 167-72, 122 S.Ct. 1237 (2002)).

[25] Holloway v. Arkansas, 435 U.S. 475, 484, 98 S.Ct. 1173 (1978).

The Sixth Amendment requires that an adequate inquiry must be "searching" or "targeted at the conflict issue."[26] This inquiry seeks to ascertain the seriousness of the risk of an unfair trial posed by the conflict.[27] To make an adequate inquiry, the trial court must examine the nature and extent of the conflict of interest.[28]

In the present case, Mr. Reeder timely objected to the conflict of interest between himself and his appointed attorney.[29] Therefore, the first step of review should have been to determine whether the trial court satisfied its duty to adequately inquire about the conflict of interest's seriousness. The Court of Appeals opinion merely acknowledges the trial court allowed the parties to address the motion to substitute counsel.[30] The

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[26] See State v. Dhaliwal, 113 Wn.App. 226, 237, 53 P.3d 65 (2002).

[27] See Atley v. Ault, 191 F.3d 865, 871 (1999) (relying on Holloway v. Arkansas, 435 U.S. 475 (1978)).

[28] A clear example of the adequate inquiry standard is found in Atley v. Ault, 191 F.3d at 871 (1999). Here, the Tenth Circuit held that the Iowa Supreme Court unreasonably applied U.S. Supreme Court precedent regarding adequate inquiries. Id. at 872. The Iowa Supreme Court upheld a conviction after the state trial court opined that the relevant parties "[would] not be inclined to testify any differently than they would be otherwise." Id. at 868. In doing so, it excused the trial court's failure to ask questions that ascertained the nature and extent of the conflict of interest. Id. at 871. The Tenth Circuit held that U.S. Supreme Court precedent could not be interpreted so broadly to condone the trial court's inquiry, or lack thereof. Id. at 872. It reasoned:

> [T]he trial court must do more than substitute its opinions...for an actual inquiry into the factual basis of [defense counsel]'s motion. Stated differently, the trial court's dialogue improperly assumed answers to questions that were never asked and were necessary to its determination of whether the alleged conflict of interest required new counsel.

Id. Accordingly, the Tenth Circuit ruled that adequate inquiries must ascertain the conflict of interest's seriousness of the risk of an unfair trial.

[29] 4/18/12RP 3.

[30] Slip Op. 6-7.

opinion fails to consider the lack of substance in the actual questions asked, the extent to which the questions explored the conflict-of-interest, and the weight that the conflict would have on the ensuing trial.

b. <u>The Chinese wall failed to cure the conflict.</u>

The trial court opined that a "Chinese wall" would resolve any potential conflicts. The simple fiction is not sufficient between counsels' conflicting obligations did not overcome the conflict and could not mitigate the damage to the Mr. Reeder's Sixth Amendment right to a fair trial. In addition to the constitutional concerns, good public policy also supports the need for further appellate review of the scope of the trial court's inquiry. This case presents an important example of why such review is crucial. Without it, inadequate inquiries slip by unnoticed, and a body of precedent builds which seriously impedes the accused's Sixth Amendment rights. The court's superficial questions were not sufficient. In order to protect the accused's weighty constitutional rights, trial judges must be required, and be held accountable on appellate review, to inquire in a thorough and probative manner about the nature of the conflict-of-interest at issue.

c. Petitioner's right to counsel and a fair trial were prejudiced.

If the accused fails to make a timely objection, he must show that his lawyer had an actual conflict that adversely affected the lawyer's performance.[31] A harmless error analysis is not required.[32] These conflict of interest rules apply to "any situation where defense counsel represents conflicting interests."[33]

The Court of Appeals appears to have erroneously resorted to an abuse of discretion standard, citing *Stenson*,[34] without first resolving the legal question regarding the conflict itself. *Stenson* dealt with appointment of new counsel and not the specific conflict of interest question presented here.[35] The Court of Appeal's resort to this standard without fully engaging in the conflict analysis detailed, supra, led it to afford undue deference to the trial court ruling. Review under an abuse of discretion is inconsistent with the decisions of this Court and the other appellate divisions in Washington.[36]

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[31] Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S.Ct. 1708 (1980).

[32] Holloway, 435 U.S. at 489 ("...the assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as a harmless error'") (quoting Chapman v. California, 386 U.S. 18, 23, 87 S.Ct. 824 (1967)).

[33] McDonald, 143 Wn.2d at 513.

[34] Slip Op. 4-5, citing State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997).

[35] Id. ("[Defendant] fails to point to anything in the record which would demonstrate that the trial court abused its discretion when it denied [Defendant]'s request for new counsel and a continuance....").

[36] See State v. McDonald, 143 Wn.2d at 513; State v. Regan, 143 Wn.App. at

The Court of Appeals erred both by applying the wrong standard of review and failing to address a critically important analytical step. In doing so, it compromised the accused's constitutional right to effective assistance of counsel and a fair trial. Accordingly, this Court should grant review and reverse the Court of Appeals.

3. THIS COURT SHOULD REVIEW THE IMPORTANT CONSTITUTIONAL QUESTION PRESENTED BY DIVISION ONE'S ERRONEOUS REJECTION OF MR. REEDER'S DOUBLE JEOPARDY CLAIM

a. The Court of Appeals double jeopardy analysis failed to appreciate the statutory ambiguity.

The Court of Appeals summarily determined that Mr. Reeder's actions did not "inhere in the same transaction."[37] Yet, pursuant to Washington law, particularly as presented to the jury here, this is exactly what Mr. Reeder's actions did.

The power of the prosecutors to charge multiple violations of the same statutes is limited by the "unit of prosecution" the Legislature intended as punishable.[38] The unit of prosecution is determined by using standard principles of statutory interpretation to find the legislative intent.[39] Several factors help determine legislative intent, including: 1) the

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425-26.

[37] Slip Op. 29.

[38] See State v. Mason, 39 Wn.App. 680, 685-87, 644 P.2d 710 (1982).

[39] See Peter Westen & Richard Drubel, *Toward a General Theory of Double*

act's title; 2) any perceivable connection between the various acts set forth; 3) the acts' consistencies; and 4) whether the acts may inhere in the same transaction.[40] Acts may be connected if they are in furtherance of the same goal.[41] Acts are also consistent with each other if the accomplishment of one does not disprove the others.[42] Finally, acts may 'inhere in the same transaction' if they are not readily distinguishable.[43] In the event of ambiguity, the rule of lenity requires that transactions be viewed as a single offense instead of multiple ones.[44]

Here, the Court of Appeals concluded that because "the State based each count upon a separate transaction; the charged acts did not "inhere in the same transaction."[45] Moreover, Washington law is clear that:

> 'where successive takings are the result of a single, continuing criminal impulse or intent and are pursuant to the execution of a general larcenous scheme or plan, such successive takings constitute a single larceny regardless of the time which may elapse between each taking'

Jeopardy, 1978 Sup.Ct.Rev. 81, 113; Note, *Twice Jeopardy*, 75 Yale L.J. 262, 313 (1965).

[40] State v. Arndt, 87 Wn.2d 374, 379, 553 P.2d 1328 (1976)

[41] Id., at 381.

[42] Id., at 383.

[43] Id., at 384 (noting that the acts at issue were not inherently different from each other, but instead were "almost indistinguishable.")

[44] Arndt, 87 Wn.2d at 385 ("Doubts in the construction of a penal statute will be resolved in favor of lenity...so in a case of ambiguity the construction will be against turning a single transaction into multiple offenses." (quoting Commonwealth v. Colonial Stores, Inc., 350 S.W.2d 465, 467 (Ky. 1961)).

[45] Slip. Op. 29.

State v. Dash, 163 Wn.App. 63, 68, 259 P.3d 319 (2011) (emphasis added) quoting State v. Vining, 2 Wn.App. 802, 808-09, 472 P.2d 564 (1970); State v. Mermis, 105 Wn.App. 738, 745, 20 P.3d 1044 (2001);

Here, Mr. Reeder's actions were repetitive but otherwise virtually indistinguishable from a legal perspective. McCallister made every payment pursuant to his initial agreement with Mr. Reeder. All payments where in furtherance of the single criminal goal alleged, the property development scheme. Throughout the course of their dealings, Mr. Reeder's interacted with McCallister in very similar ways and the jury was required to find "the acts were part of an ongoing criminal enterprise with a single objective" or to find a "continuing criminal impulse" the jury was required to find "the defendant's criminal impulse or intent continued unabated throughout the acts." CP 178-79.

Even if the acts could theoretically be distinguished, as with an assault that may involve multiple punches over an extended period of time, they further the single criminal enterprise. Any ambiguity regarding the scope of the transactions must be resolved by finding a single transaction.

The Court of Appeals glossed over the issue by stating that the legislature's prohibiting of false or misleading acts in connection with "any" security and "every" sale indicated its intent of separate crimes. However, the false or misleading act that the Court of Appeals recognized refers, in this case, to the initial formation of the enterprise between Mr. Reeder and McCallister. In a single agreement, McCallister promised to provide a continuing source of capital for the development of each of the properties. McCallister's future payments were made pursuant to his initial original obligation, not based on new instances of fraud but a continuing effort to complete the original scheme. The Court of Appeals' opinion thus overlooked the inherent ambiguity within its own synopsis, as well as the ambiguity readily apparent in the statute itself. In doing so, it violated Mr. Reeder's constitutional right against double jeopardy. Accordingly, this Court should grant review and overturn the lower court.

b. The jury received improper instructions.

Jury instructions must make the relevant legal standard manifestly apparent to the average juror, not just cover the law at issue.[46] Jury instructions that misstate the law are constitutional errors and are presumed prejudicial.[47] When multiple counts allegedly occur within the same charging period, the jury instructions must make it manifestly

[46] State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).
[47] Id.

apparent that each count is based on proof of a separate and distinct underlying act.[48]

In this case, the jury instructions failed to inform the jury that it was required to find "separate and distinct acts" for each count of securities fraud. The instructions informed the jury about the distinct crimes, and that it must decide separately on each count, but the court failed to mention the critical piece that the underlying conduct must also be distinct. The Court of Appeals dismissed this constitutional violation by noting that each instruction detailed a separate transaction. Yet, as discussed above, proper analysis of multiple verses single offenses, combined with ambiguity and rule of lenity, shows that Mr. Reeder's actions were all part of the same underlying offense. Furthermore, although the prosecution possesses considerable latitude to aggregate or bring multiple charges, its latitude is not so broad as to impinge an accused's constitutional rights against double jeopardy.

The Court of Appeals neglected the proper analysis and glossed over the statutory ambiguity, both of which lead to the conclusion that Mr. Reeder acted in continuance of a single offense. Both of the court's determinations violated Mr. Reeder's constitutional rights. Accordingly, this Court should grant review and overturn the Court of Appeals.

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[48] State v. Borsheim, 140 Wn.App. 357, 367-68, 165 P.3d 417 (2007).

E. CONCLUSION

For the foregoing reasons, Mr. Reeder requests this Court should grant review and provide relief for the constitutional violations which lead to his conviction and sentence.

DATED this 23rd day of July, 2014.

Respectfully submitted:

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICHAEL J. REEDER, Appellant.	)	NO. 69226-7-I DIVISION ONE PUBLISHED OPINION FILED: June 23, 2014

LEACH, J. — Michael Reeder appeals his conviction for 14 counts of securities fraud and 14 counts of theft in the first degree. He challenges the trial court's denial of his motions to appoint new counsel, to suppress evidence obtained with a special inquiry judge subpoena, and to dismiss some or all of the State's charges as barred by the statute of limitations. He also claims that his sentence for multiple counts of the same crimes violated the prohibition against double jeopardy. Because Reeder fails to show that his attorney had a conflict of interest, that the challenged subpoena violated his constitutional rights, or that the statute of limitations expired before the State filed criminal charges against him and because he was not subject to double jeopardy where each count was based on a discrete, fraudulent transaction, we affirm.

APPENDIX

FACTS

William McAllister, a Seattle resident, met Reeder through a company that provided nonbank real estate financing. Between March 2006 and June 2007, McAllister made a series of payments to Reeder for two real estate investments.

Reeder first told McAllister that he had an option to purchase two parcels of land in Lake Stevens, Washington. Reeder and McAllister formed a limited liability company and opened a bank account for the purpose of buying these two parcels of land. McAllister wired $200,000 to Reeder on May 26, 2006, and wrote a check to Reeder for $150,000 on June 16, 2006, to use for the down payment. Reeder and McAllister signed an agreement documenting these loans, which stated that Reeder had already entered into purchase and sale agreements for the properties. Reeder never purchased the land in Lake Stevens, nor did he return the $350,000 to McAllister.

On March 7, 2006, Reeder told McAllister that he had an opportunity to purchase property in Bellevue for $1.4 million. Reeder showed McAllister a fraudulent purchase and sale agreement and quitclaim deed for the property, as well as an appraisal report stating that the property was worth $2 million. At the time, Reeder knew that the owners did not want to sell the property. Based upon Reeder's representations, McAllister made a series of payments to Reeder totaling $1.4 million to use for its purchase. Reeder provided promissory notes

for many, but not all, of these payments. The promissory notes indicated that the loans were "exclusively for business and commercial purposes and not for personal use." Reeder never purchased the property and did not use any of the funds to buy the property. He did not return McAllister's money.[1]

The State obtained Reeder's bank and credit card records with subpoenas issued by a special inquiry judge under RCW 10.27.170. These records showed that McAllister made payments to Reeder totaling $1,725,700. The bank and credit card records also showed that Reeder withdrew McAllister's money in cash or used it to purchase cashier's checks payable to Reeder. He used the funds in casinos and for personal expenses.

On April 8, 2011, the State charged Reeder by information with 14 counts of securities fraud and 15 counts of first degree theft by deception based upon the 15 separate payments that McAllister provided. The State filed an amended information on June 15, 2012.

Before trial, Reeder moved to substitute counsel based on an alleged conflict of interest. The court denied this motion.

Before trial, Reeder also moved to suppress evidence obtained with the special inquiry judge subpoenas. He also moved to dismiss the securities fraud

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[1] On May 12, 2009, McAllister obtained a judgment against Reeder for $2,832,370.52. McAllister v. Reeder, No. 08-2-00063-2 (Skagit County Super. Ct., Wash. May 12, 2009).

counts, alleging that the statute of limitations barred these charges. The trial court denied the motions.[2] Later, the court granted the State's motion to dismiss count 29 charging first degree theft.

The jury found Reeder guilty of 14 counts of securities fraud and 14 counts of first degree theft and returned special verdicts finding that each crime was a major economic offense or series of offenses. The court imposed an exceptional sentence above the standard range.

Reeder appeals.

ANALYSIS

Reeder raises four issues. First, he claims that his trial attorney had a conflict of interest that deprived Reeder of effective assistance of counsel. Second, he challenges the trial court's denial of his motion to suppress evidence obtained with a special inquiry judge subpoena. Third, he asserts that the statute of limitations barred some or all of the charges against him. Finally, he argues that his sentence violated the prohibition against double jeopardy. We reject Reeder's contentions and affirm.

Motion To Appoint New Counsel

Reeder claims that his trial counsel had a conflict of interest that prejudiced him throughout the proceedings. We review for abuse of discretion a

[2] The court granted the State's motion to admit summaries of Reeder's bank records.

trial court's decision to deny a motion to substitute counsel.[3] "Whether the circumstances demonstrate a conflict under ethical rules is a question of law, which is reviewed de novo."[4] A defendant "'must show good cause'" before the trial court will allow substitution of counsel, "'such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.'"[5]

The Sixth Amendment right to counsel includes the right to conflict-free counsel.[6] Reeder invokes several Rules of Professional Conduct to support his claim. RPC 1.7(a) prohibits a lawyer from representing a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if "the representation of one client will be directly adverse to another client" or if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."[7]

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[3] State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997).

[4] State v. Regan, 143 Wn. App. 419, 428, 177 P.3d 783 (2008) (citing State v. Vicuna, 119 Wn. App. 26, 30-31, 79 P.3d 1 (2003); State v. Ramos, 83 Wn. App. 622, 629, 922 P.2d 193 (1996)).

[5] State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004) (quoting Stenson, 132 Wn.2d at 734).

[6] State v. Davis, 141 Wn.2d 798, 860, 10 P.3d 977 (2000) (citing Wood v. Georgia, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981)).

[7] RPC 1.7(a).

RPC 1.10 prohibits lawyers associated in a firm from knowingly representing a client "when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9."[8]

To establish that an actual conflict of interest deprived him of effective assistance of counsel, Reeder must show both that his attorney had a conflict of interest and that the conflict adversely affected counsel's performance.[9] We presume prejudice if Reeder satisfies this two-part inquiry.[10] Demonstrating a mere possibility of a conflict of interest does not entitle him to relief.[11] "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance."[12]

Reeder claims that his attorney, Matthew Pang, had a conflict of interest because another attorney at Pang's law firm, David Roberson, previously gave legal advice to Reeder's sister, Billy Jo Cuzak. Cuzak was neither a witness nor a party in this case. Here, the trial court allowed both parties, as well as

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[8] RPC 1.10(a).

[9] Mickens v. Taylor, 535 U.S. 162, 174-75, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002); State v. White, 80 Wn. App. 406, 411, 907 P.2d 310 (1995).

[10] Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Cuyler v. Sullivan, 446 U.S. 335, 349-50, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); In re Pers. Restraint of Richardson, 100 Wn.2d 669, 679, 675 P.2d 209 (1983).

[11] State v. Dhaliwal, 150 Wn.2d 559, 573, 79 P.3d 432 (2003).

[12] Sullivan, 446 U.S. at 350.

Roberson, to address Reeder's motion to substitute counsel based upon this alleged conflict of interest.

Roberson told the court that before the State filed criminal charges against Reeder in this case and while Roberson was working at a different law firm, Cuzak called Roberson for legal advice "regarding a civil matter where I think the subject matter was either the same or very similar." Roberson told the court that he created no file. He also notified his supervisor at his current firm and the attorney originally assigned to Reeder's case about these events; his supervisor decided that no conflict existed.

The trial court denied Reeder's motion to substitute counsel. In its oral ruling, the court reasoned,

> I just don't see a conflict of interest here. Even if there is one, the Court will deem it resolvable by a Chinese wall, and Mr. Roberson is now ordered not to discuss this with anyone at all. Mr. Pang is ordered not to discuss with Roberson, Mr. Pang is ordered to advise all—any investigators that they are not to discuss it with Mr. Roberson. There's no file to warn off so that doesn't make any difference.

"The existence of an attorney/client relationship is a question of fact, the essence of which may be inferred from the parties' conduct or based upon the

client's reasonable subjective belief that such a relationship exists."[13] Even a short consultation may create an attorney-client relationship.[14]

Reeder argues that the conflict of interest "was real and legally cognizable" and that "the trial court's retreat behind a 'Chinese Wall' was ineffectual in resolving the conflict." Reeder claims that this conflict prejudiced him because "defense counsel failed to understand the nature of the case, the relevant evidentiary standards and ultimately presented no defense."

Reeder presents no facts or citations to the record to support his contentions.[15] Although he claims that "Mr. Roberson continues to owe a duty of loyalty to Ms. Cuzak," Reeder cites insufficient facts to establish that Cuzak ever reasonably believed an attorney-client relationship existed. He fails to identify any interest Cuzak had that was adverse to his own or any responsibility owed to

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[13] Teja v. Saran, 68 Wn. App. 793, 795, 846 P.2d 1375 (1993) (citing Bohn v. Cody, 119 Wn.2d 357, 363, 832 P.2d 71 (1992)).

[14] Teja, 68 Wn. App. at 795-96.

[15] Reeder offers a number of arguments without citing to the record for support. We do not address these arguments. RAP 10.3(a)(6); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (noting that an appellate court does not consider argument unsupported by citation to the record or authority). First, Reeder asserts, "The prosecution has alleged she is a witness, perhaps even an accomplice." The State disputes this claim and nothing in the record supports it. Second, although Reeder states that "the parties returned to court in June, at which time Mr. Reeder expressed his continuing concerns regarding his representation," the record contains no transcript from the cited date. Third, Reeder states that he "renewed his request" to substitute counsel on July 2, 2012, but that "the trial court again denied his prayer for relief." The trial transcript from July 2 contains no indication that Reeder requested substitute counsel on that date.

Cuzak that materially limited his attorney's representation. Reeder identifies no facts showing that the attorneys did not impose a proper Chinese wall or that this Chinese wall did not resolve any alleged conflict of interest.[16] Reeder fails to show a conflict of interest or prejudice. Because he must demonstrate both, the trial court did not abuse its discretion in denying his request to substitute counsel.

Suppression of Evidence Obtained through the Special Inquiry Judge

Reeder challenges the trial court's denial of his motion to suppress his bank and credit card records on three grounds. First, he claims, "[O]btaining these private records without a valid search warrant, or the functional equivalent, violated the Fourth Amendment, Article 1, section 7 of the Washington Constitution, and State v. Miles."[17] Second, he alleges that the procedure used to issue the subpoenas did not meet the requirements of chapter 10.27 RCW. Finally, he claims, "The procedures of the special inquiry judge violate the constitutional guarantee of open administration of justice."

Preliminarily, we note that Reeder failed to present some of these arguments to the trial court. Generally, a failure to present an issue in the trial

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[16] See State v. Stenger, 111 Wn.2d 516, 522-23, 760 P.2d 357 (1988) ("[W]here a deputy prosecuting attorney is for any reason disqualified from a case, and is thereafter effectively screened and separated from any participation or discussion of matters concerning which the deputy prosecuting attorney is disqualified, then the disqualification of the entire prosecuting attorney's office is neither necessary nor wise.").

[17] 160 Wn.2d 236, 156 P.3d 864 (2007).

court waives the right to raise the issue on appeal.[18] RAP 2.5(a)(3) allows a party to raise for the first time on appeal a "manifest error affecting a constitutional right." Thus, a court previews the merits of the constitutional argument first raised on appeal to determine if it is likely to succeed.[19]

When presented with arguments under both the state and federal constitutions, Washington courts start with the state constitution.[20] Article I, section 7 of the Washington Constitution states, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision prohibits the State from unreasonably intruding upon a person's private affairs[21] and places a greater emphasis on the right to privacy than the Fourth Amendment to the United States Constitution does.[22] It provides a broad privacy right and requires legal authorization to disturb it.[23] Although article I, section 7 is not grounded in notions of reasonableness, reasonableness, along with history, precedent, and common sense, plays a role in deciding the scope of intrusion

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[18] RAP 2.5(a).

[19] State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001) (citing State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)).

[20] State v. Athan, 160 Wn.2d 354, 365, 158 P.3d 27 (2007) (citing State v. Carter, 151 Wn.2d 118, 125, 85 P.3d 887 (2004)).

[21] State v. White, 141 Wn. App. 128, 135, 168 P.3d 459 (2007) (citing State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002)).

[22] State v. Young, 123 Wn.2d 173, 179, 867 P.2d 593 (1994) (citing State v. Stroud, 106 Wn.2d 144, 148, 720 P.2d 436 (1986); State v. Simpson, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980)).

[23] State v. Chacon Arreola, 176 Wn.2d 284, 291, 290 P.3d 983 (2012).

that may be authorized by law.[24] A statute can authorize state intrusion into this broad privacy right but only to the extent "reasonably necessary to further substantial governmental interests that justify the intrusion."[25]

A comparison of a bank customer's privacy rights in bank records under the federal and state constitutions illustrates the greater protection provided by the Washington Constitution. The Fourth Amendment does not provide a bank customer with any constitutionally protected privacy interest in bank records.[26] In contrast, article I, section 7 protects bank records as part of an individual's private affairs.[27] Because the challenged subpoena disturbs Reeder's valid privacy interest in his bank records, we must determine if "'authority of law'" justifies this intrusion.[28]

The legislature created the special inquiry judge proceeding in the Criminal Investigatory Act of 1971, chapter 10.27 RCW,[29] "enacted on behalf of the people of the state of Washington to serve law enforcement in combating

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[24] Chacon Arreola, 176 Wn.2d at 291.
[25] Chacon Arreola, 176 Wn.2d at 292.
[26] United States v. Miller, 425 U.S. 435, 444, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976).
[27] Miles, 160 Wn.2d at 244.
[28] Miles, 160 Wn.2d at 244.
[29] LAWS OF 1971, 1st Ex. Sess., ch. 67.

crime and corruption."[30] The statute appears to have resulted from a study of the Washington State Judicial Council.[31] The Judicial Council Report states,

> This added law enforcement aid is patterned after the one man grand jury law of Michigan. . . . Special inquiry judge proceedings are viewed by the Judicial Council as supplementary to a regular grand jury which has the power to actively investigate evidence of crime and corruption, a power not granted to the special inquiry judge. The special inquiry judge does not have the power to issue indictments as does the grand jury, but can turn over any evidence produced at the proceedings before him to any subsequent grand juries called pursuant to the statute. Thus, although not actively participating in an investigative role himself, the special inquiry judge provides the prosecutor an added investigatory tool. . . . This will aid the prosecutor in his fight against crime by providing him information not generally otherwise available.[32]

A special inquiry judge is "a superior court judge designated by a majority of the superior court judges of a county to hear and receive evidence of crime and corruption."[33] RCW 10.27.170 states,

> When any public attorney, corporation counsel or city attorney has reason to suspect crime or corruption, within the jurisdiction of such attorney, and there is reason to believe that there are persons who may be able to give material testimony or provide material evidence concerning such suspected crime or corruption, such attorney may petition the judge designated as a special inquiry judge pursuant to RCW 10.27.050 for an order directed to such persons commanding them to appear at a designated time and place in said county and to then and there answer such questions concerning the suspected crime or corruption as the special inquiry judge may approve, or provide evidence as directed by the special inquiry judge.

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[30] RCW 10.27.010.

[31] State v. Manning, 86 Wn.2d 272, 273, 543 P.2d 632 (1975).

[32] JUDICIAL COUNCIL OF STATE OF WASH., THE TWENTY-SECOND BIENNIAL REPORT 17-18 (Jan. 1, 1971).

[33] RCW 10.27.020(7), .050.

Although a special inquiry judge functions and has some powers similar to a grand jury, a special inquiry judge cannot initiate a special inquiry, actively investigate criminal activity, or make a decision to prosecute.[34]

Special inquiry proceedings are secret.[35] RCW 10.27.090(4) grants the public attorney access to all special inquiry judge evidence and permits the public attorney to "introduce such evidence before any other grand jury or any trial in which the same may be relevant." RCW 10.27.090(5)(a) permits the court to, "upon proper application and upon a showing of good cause, make available to a defendant in a subsequent criminal proceeding other testimony or evidence . . . [w]hen given or presented before a special inquiry judge, if doing so is in the furtherance of justice."

RCW 10.27.170 authorizes a special inquiry judge to issue a subpoena when the petitioner "has reason to suspect crime or corruption . . . , and there is reason to believe that there are persons who may be able to give material testimony or provide material evidence concerning such suspected crime or corruption."[36] Thus, the authorizing statute does not require that a petitioner establish probable cause to obtain a subpoena from a special inquiry judge.

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[34] State v. Neslund, 103 Wn.2d 79, 87-88, 690 P.2d 1153 (1984); Manning, 86 Wn.2d at 274 (citing former RCW 10.27.150 (1971) (the only difference between the current and former version of this section is the substitution of gender neutral language)).

[35] RCW 10.27.090(3).

[36] RCW 10.27.170 (emphasis added.)

Reeder contends RCW 10.27.170 can satisfy the "authority of law" requirement of article I, section 7 of the Washington State Constitution only if it requires that probable cause support a special inquiry judge's decision to issue a subpoena. We must decide the appropriate level of justification required for this state intrusion under article I, section 7—is it probable cause or something less?

Washington cases recognize the general principle that a subpoena must be issued by a neutral magistrate to satisfy article I, section 7's authority of law requirement.[37] This neutral magistrate requirement limits government invasion into private affairs by ensuring "that some determination has been made which supports the scope of the invasion."[38] A special inquiry judge qualifies as a neutral magistrate, even for those cases before the judge on special inquiry.[39]

In State v. Miles, our Supreme Court considered a claim that the issuance of an administrative subpoena for a defendant's bank records without prior judicial review violated the defendant's privacy rights.[40] The court held, "A search of personal banking records without a judicially issued warrant or subpoena to the subject party violates article I, section 7."[41] The court voided the subpoena because no judge determined if the State had satisfied any particular

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[37] Miles, 160 Wn.2d at 247.
[38] Miles, 160 Wn.2d at 247.
[39] Neslund, 103 Wn.2d at 88.
[40] Miles, 160 Wn.2d at 252.
[41] Miles, 160 Wn.2d at 252 (emphasis added).

level of justification before the subpoena issued. Indeed, the statutory process under review allowed "the state to intrude into private affairs for little or no reason."[42]

The court noted specifically that both the warrant process and "the opportunity to subject a subpoena to judicial review" ensure a determination supporting the scope of an intrusion and reduce mistaken state intrusions.[43] The court's opinion makes clear that its identification of two separate procedures, the warrant process and a judicially reviewed subpoena, was deliberate because the court names both procedures together in at least four separate sentences. Therefore, a subpoena subjected to judicial review can satisfy article I, section 7's authority of law requirement.

Because no Washington case directly addresses the level of justification required before a special inquiry judge can issue a subpoena, we look to grand jury jurisprudence for guidance. In United States v. R. Enterprises, Inc.,[44] the United States Supreme Court concluded, "[T]he Government cannot be required to justify the issuance of a grand jury subpoena by presenting evidence sufficient

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[42] Miles, 160 Wn.2d at 248.

[43] Miles, 160 Wn.2d at 247.

[44] 498 U.S. 292, 297, 111 S. Ct. 722, 112 L. Ed. 2d 795 (1991); see also In re M.H., 648 F.3d 1067, 1071 (9th Cir. 2011) ("The Government is not required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause because the very purpose of its inquiry is to establish whether probable cause exists to accuse the taxpayer of violating our tax laws.").

to establish probable cause because the very purpose of requesting the information is to ascertain whether probable cause exists."

Similar to a federal grand jury, a purpose of a special inquiry proceeding is to obtain evidence about suspected crimes for determining probable cause that a crime has been committed.[45] The general public has a substantial interest in the effective enforcement of criminal statutes. Also, a special inquiry proceeding cannot be used to gather evidence against a charged defendant.[46] Therefore, the appropriate level of justification for state intrusion must be something less than probable cause.

RCW 10.27.170 requires showing a reasonable suspicion, a showing at least as great as that required to satisfy the requirements for a grand jury subpoena under the Fourth Amendment.[47] Here, a neutral magistrate determined that evidence presented by the petitioner established a reasonable suspicion that Reeder had committed a crime and reason to believe the records described in the subpoena would provide material evidence of that crime. Because reasonableness, along with history, precedent, and common sense, plays a role in deciding the scope of intrusion that may be authorized by law, we conclude that the process used to obtain Reeder's bank and credit card records

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[45] Manning, 86 Wn.2d at 275.
[46] Manning, 86 Wn.2d at 275.
[47] See Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 208-09, 66 S. Ct. 494, 90 L. Ed. 614 (1946).

did not violate his constitutional privacy right.[48] The process provided judicial oversight over the decision to intrude and the scope of the intrusion.

To support his argument that article I, section 7 requires probable cause, Reeder relies upon State v. Garcia-Salgado.[49] There, the defendant challenged a trial court order, entered after the defendant was charged, requiring him to submit to a DNA (deoxyribonucleic acid) swab.[50] The court concluded that the court's order could function as a warrant if it met the constitutional requirements of a search warrant but found the challenged order deficient because the record did not establish what evidence the State presented to the trial court before the judge issued the order.[51] Therefore, the record could not support the trial court's determination of probable cause.[52] Garcia-Salgado provides no guidance for the level of justification required to obtain a special inquiry judge subpoena.

Next, Reeder claims that the special inquiry judge did not issue the subpoenas for Reeder's bank and credit card records in accordance with the

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[48] Reeder also alleges that the prosecutor "does not assert, even second hand, that the information provided to the magistrate was given under oath." But the cited document is the prosecutor's signed and sworn declaration. The portion of this document that Reeder cites contains the trial court's findings in McAllister v. Reeder, No. 08-2-00063-2 (Skagit County Super. Ct., Wash. May 12, 2009). Thus, Reeder's argument is baseless. Nothing in the statute specifies a particular form that a petition must take.

[49] 170 Wn.2d 176, 240 P.3d 153 (2010).

[50] Garcia-Salgado, 170 Wn.2d at 183.

[51] Garcia-Salgado, 170 Wn.2d at 187.

[52] Garcia-Salgado, 170 Wn.2d at 187-88.

requirements of chapter 10.27 RCW. Specifically, he alleges, "The county prosecutor only serves as a 'public attorney' under the statute where a grand jury is impaneled." Reeder cites RCW 10.27.020(2), which defines a "public attorney" as "the prosecuting attorney of the county in which a grand jury or special grand jury is impaneled." Because Reeder did not raise this issue in the trial court and makes no claim that it involves manifest error, we do not consider it.

Reeder also argues, "The record fails to establish the subpoena was issued by a neutral magistrate selected in accordance with RCW 10.27.020(7)." He claims, "No subpoena has been produced . . . , nor has a neutral magistrate been identified, either by name, number or any other designation." As discussed above, our Supreme Court has held that a special inquiry judge can act as a neutral and detached magistrate.[53] At trial, the parties discussed with the court Reeder's access to the subpoenas:

> THE COURT: Did I hear you say, Mr. Peterson, that when you are asked, you do provide copies of the inquiry judge's subpoena?
>
> MR. PETERSON: Yes.

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[53] Neslund, 103 Wn.2d at 88. Reeder presents no facts showing that the special inquiry judge did not manifest the neutrality and detachment required of a judicial officer. Cf. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326-28, 99 S. Ct. 2319, 60 L. Ed. 2d 920 (1979) (judge who accompanied police on a raid of a pornographic bookstore, where he reviewed material for obscenity and added it to a previously signed search warrant, did not manifest the neutrality and detachment required of a judicial officer).

> THE COURT: So, that's been asked for.
>
> MR. PETERSON: Actually, we photocopied several of them. . . .
>
> MR. PANG: That's what I requested because that was part of what I requested when I was able to go through some of the records.
>
> THE COURT: So, you do have that?
>
> MR. PANG: I don't know which ones I have because I was only able to go through two. . . .
> So, for example, the two boxes that I have gone through, I haven't read everything. . . .
>
> THE COURT: Fair enough. I am going to take Mr. Peterson's representation at this time that those will be made available to you.

Although Reeder's trial counsel appears to have received copies of at least some of the challenged subpoenas, Reeder identifies nothing in the record supporting his arguments on this claim. Therefore, we reject it.

Finally, Reeder alleges that the secrecy of the special inquiry proceedings is "inconsistent with the constitutional dictate of open courts." He cites article I, section 10 of the Washington State Constitution, which states, "Justice in all cases shall be administered openly, and without unnecessary delay."

No Washington case has addressed the public's right to attend special inquiry proceedings. Washington has adopted the two-part experience and logic test to determine if a public trial right attaches to a particular proceeding.[54] The

[54] State v. Sublett, 176 Wn.2d 58, 72-73, 292 P.3d 715 (2012).

experience prong asks if the place and process have historically been open to the press and general public.[55] The logic prong asks if public access plays a significant positive role in the functioning of the challenged process.[56] Applying this test, we conclude that denying public access to special inquiry proceedings does not violate article I, section 10 of the Washington State Constitution.

For purposes of our analysis of this issue, we consider special inquiry proceedings to be analogous to grand jury proceedings. We first address the experience prong. Grand jury proceedings in Washington have been closed to the public continuously since territorial days.[57] The federal courts have "a long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts."[58]

We next address the logic prong. The Washington Supreme Court has agreed with the United States Supreme Court's description of a grand jury proceeding as the classic example of a government operation whose proper

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[55] Sublett, 176 Wn.2d at 73.

[56] Sublett, 176 Wn.2d at 73.

[57] See LAWS OF 1854, § 57, at 111; LAWS OF 1873, § 176, at 222; CODE OF 1881, ch. LXXX, § 992; REM. REV. STAT. § 2040 (Supp. 1932); former RCW 10.28.100 (LAWS OF 1854, § 57, at 111), repealed by LAWS OF 1971, 1st Ex. Sess., ch. 67, § 20; RCW 10.27.100.

[58] United States v. Procter & Gamble Co., 356 U.S. 677, 681, 78 S.Ct. 983, 2 L. Ed. 2d 1077 (1958).

functioning depends upon secrecy and "'would be totally frustrated if conducted openly.'"[59] Thus, Reeder has failed to establish a violation of article I, section 10.

Statute of Limitations

Reeder also claims that the statute of limitations expired before the State filed the information.[60] "If the to-convict instruction permits the jury to convict the defendant based solely on acts committed beyond the statutory limitation period, reversal is required."[61] The State bears the burden of establishing that it charged Reeder within the applicable limitations period.[62]

On April 8, 2011, the State charged Reeder with 14 counts of securities fraud and 14 counts of first degree theft by deception based upon 14 separate investment transactions between McAllister and Reeder.[63] On June 15, 2012, the State filed an amended information, which added no new counts.[64] Counts 1

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[59] Tacoma News, Inc. v. Cayce, 172 Wn.2d 58, 76, 256 P.3d 1179 (2011) (quoting Press-Enter. Co. v. Superior Court, 478 U.S. 1, 9, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)).

[60] Although he moved to dismiss only the securities fraud counts at trial based upon the expiration of the statute of limitations, Reeder may also challenge the first degree theft counts on appeal because the criminal statute of limitations creates an absolute bar to prosecution. State v. Mehrabian, 175 Wn. App. 678, 696, 308 P.3d 660 (2013) (quoting State v. Dash, 163 Wn. App. 63, 67, 259 P.3d 319 (2011)), review denied, No. 89103-6 (Wash. Nov. 6, 2013).

[61] Mehrabian, 175 Wn. App. at 696 (citing Dash, 163 Wn. App. at 65).

[62] State v. Walker, 153 Wn. App. 701, 707, 224 P.3d 814 (2009).

[63] We do not include count 29, which the court ultimately dismissed.

[64] Cf. State v. Eilts, 23 Wn. App. 39, 42, 596 P.2d 1050 (1979) (statute of limitations barred counts added by amended information after period of limitations had run).

and 3 of the information charged Reeder with securities fraud during a period of time intervening between March 7, 2006, and June 20, 2007, and March 9, 2006, and June 20, 2007. The State based these counts upon checks that McAllister wrote to Reeder on March 7 and March 9, respectively. The remaining counts of securities fraud arose from 12 different investment transactions based upon checks that McAllister wrote to Reeder from May 4, 2006, until June 20, 2007.

The State also charged Reeder with 14 counts of first degree theft by deception. In the amended information, the State charged counts 2, 4, 6, 8, 10, 12, and 14 as a continuing course of conduct beginning on various dates from March 7, 2006, to July 5, 2006, and ending on June 20, 2007. In the remaining counts, the State charged Reeder based upon seven separate transactions occurring from August 2, 2006, until June 20, 2007.

The statute of limitations for securities fraud under The Securities Act of Washington, chapter 21.20 RCW, is five years after the violation or three years after the actual discovery of the violation, whichever date is later.[65] Reeder argues that the applicable statute of limitations is three years under the Washington Criminal Code, chapter 9A.04 RCW, which states, "No other felony may be prosecuted more than three years after its commission."[66]

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[65] RCW 21.20.400(3).
[66] RCW 9A.04.080(1)(h).

Reeder claims that the rule of lenity requires the court to apply the shorter limitation period. He argues, "[T]wo separate statutes appear to set the limits for prosecuting securities fraud. . . . Because they set very different periods of limitation, they cannot be reconciled and the shorter period should be applied and the charges dismissed."

We apply the rule of lenity to construe an ambiguous statute; we must apply the interpretation most favorable to the defendant.[67] "The rule of lenity operates in the absence of clear evidence of legislative intent. It applies only if the statute is ambiguous."[68]

"'It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act and thus conflict with it, the special act will be considered as an exception to, or qualification of, the general statute.'"[69] Here, both statutes provide a limitations period. Because these statutes are not ambiguous and they include the same matter and thus conflict, The Securities Act provision applies to the securities fraud counts as an exception to, or qualification of, the general provision.

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[67] State v. Datin, 45 Wn. App. 844, 845, 729 P.2d 61 (1986) (citing State v. Welty, 44 Wn. App. 281, 283, 726 P.2d 472 (1986)).

[68] Datin, 45 Wn. App. at 845 (citing State v. Pentland, 43 Wn. App. 808, 811, 719 P.2d 605 (1986)).

[69] Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council, 165 Wn.2d 275, 309, 197 P.3d 1153 (2008) (quoting Wark v. Wash. Nat'l Guard, 87 Wn.2d 864, 867, 557 P.2d 844 (1976)).

The statute of limitations for first degree theft by deception was three years until 2009, when the legislature extended the limitations period to six years.[70] "'When the Legislature extends a criminal statute of limitation, the new period of limitation applies to offenses not already time barred when the new enactment was adopted and became effective.'"[71] Because none of the theft counts were time barred when the legislature extended the statute of limitation, the six-year limitation period applies to the theft counts.

Reeder further alleges that insufficient evidence supported the jury's finding that he engaged in a "continuing criminal impulse." He asserts, "[T]he conduct of Mr. Reeder and the related criminal intent were each complete at the point he received the money from McAllister and converted it to other uses." We review a challenge to the sufficiency of the evidence for substantial evidence,[72] viewing all evidence and reasonable inferences in the light most favorable to the State.[73] Substantial evidence is evidence sufficient to persuade a fair-minded,

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[70] See former RCW 9A.04.080(h) (2009); RCW 9A.04.080(1)(d)(iv).

[71] State v. Sutherland, 104 Wn. App. 122, 134, 15 P.3d 1051 (2001) (quoting State v. Hodgson, 108 Wn.2d 662, 666-67, 740 P.2d 848 (1987)).

[72] State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005).

[73] State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (citing State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

rational person that a finding is true.[74] We defer to the trier of fact on issues of conflicting testimony, witness credibility, and overall weight of the evidence.[75]

When successive takings are the result of a single and continuing criminal impulse and the defendant commits the takings as part of a single criminal plan, the takings may constitute a single theft.[76] In such a case, the defendant does not complete the crime until the criminal impulse terminates.[77] "When a continuing criminal impulse exists, the statute of limitations does not begin to run until the crime is completed."[78] The jury determines as a question of fact if a criminal impulse continues into the statute of limitations period.[79]

The jury instructions for all counts of securities fraud required the jury to find that the State proved beyond a reasonable doubt that Reeder's acts charged as securities fraud "were part of a continuing course of conduct and were

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[74] In re Estate of Palmer, 145 Wn. App. 249, 265-66, 187 P.3d 758 (2008) (citing Rogers Potato Serv., LLC v. Countrywide Potato, LLC, 152 Wn.2d 387, 391, 97 P.3d 745 (2004)).

[75] Thomas, 150 Wn.2d at 874-75 (quoting State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).

[76] Mehrabian, 175 Wn. App. at 697 (citing Dash, 163 Wn. App. at 68; State v. Reid, 74 Wn. App. 281, 290, 872 P.2d 1135 (1994); State v. Carrier, 36 Wn. App. 755, 757, 677 P.2d 768 (1984); State v. Vining, 2 Wn. App. 802, 808-09, 472 P.2d 564 (1970)).

[77] Mehrabian, 175 Wn. App. at 697 (citing Dash, 163 Wn. App. at 68; Reid, 74 Wn. App. at 290).

[78] Mehrabian, 175 Wn. App. at 697 (citing Dash, 163 Wn. App. at 68; Reid, 74 Wn. App. at 290-91).

[79] Mehrabian, 175 Wn. App. at 697 (quoting State v. Mermis, 105 Wn. App. 738, 746, 20 P.3d 1044 (2001)).

committed under a continuing criminal impulse that did not terminate until after April 7, 2006." The court instructed the jury that to convict Reeder of first degree theft, it had to find the State proved beyond a reasonable doubt "[t]hat the acts were part of a continuing course of conduct." To find that Reeder's acts constituted a "continuing course of conduct," the jury had to find that the acts "were part of an ongoing criminal enterprise with a single objective." To find a "continuing criminal impulse," the jury had to find that Reeder's "criminal impulse or intent continued unabated throughout the acts."

Here, Reeder continuously misrepresented to McAllister that he intended to use McAllister's funds to acquire and develop land. Instead, Reeder used the money at casinos and for personal expenses. Throughout the charging period, Reeder continued to solicit investments from McAllister while maintaining no intent to acquire the properties. Thus, each time that McAllister gave money to Reeder as part of this fraudulent scheme, Reeder committed another act of securities fraud and theft and restarted the limitations period. Because the State charged Reeder within five years of his last act in 2007, we conclude that the statute of limitations does not bar the securities fraud or the theft counts.

Double Jeopardy

Finally, Reeder claims that his sentence violated the prohibition against double jeopardy because the trial court imposed multiple punishments for the

same offense. A double jeopardy claim presents a question of law that we review de novo.[80] The guaranty against double jeopardy in the United States and Washington State Constitutions protects against multiple punishments for the same offense.[81] A defendant may raise a double jeopardy challenge for the first time on appeal.[82]

When the State charges a person with violating the same statutory provision numerous times, multiple convictions survive a double jeopardy challenge only if each is a separate "unit of prosecution."[83] To analyze a double jeopardy claim, we must determine what "unit of prosecution" the legislature intends as a punishable act under the statute.[84] To make this determination, we apply the rules of statutory construction to the statute at issue.[85] We construe any ambiguities in favor of lenity.[86]

We begin by examining the statute in question. RCW 21.20.010 defines securities fraud as follows:

> It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:

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[80] State v. Frodert, 84 Wn. App. 20, 25, 924 P.2d 933 (1996).
[81] State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995).
[82] State v. Adel, 136 Wn.2d 629, 631-32, 965 P.2d 1072 (1998).
[83] State v. Turner, 102 Wn. App. 202, 206, 6 P.3d 1226 (2000) (citing Adel, 136 Wn.2d at 633-34).
[84] Turner, 102 Wn. App. at 206 (citing Adel, 136 Wn.2d at 634; State v. Bobic, 140 Wn.2d 250, 261, 996 P.2d 610 (2000)).
[85] Turner, 102 Wn. App. at 206-07 (citing Adel, 136 Wn.2d at 634).
[86] Turner, 102 Wn. App. at 207 (quoting Adel, 136 Wn.2d at 634-35).

> (1) To employ any device, scheme, or artifice to defraud;
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
> (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

"'Sale' or 'sell' includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value."[87]

The legislature's choice to prohibit false or misleading acts in connection with the sale of "any" security, as well as its choice to define "sale" to include "every" sale, indicates its intent for each separate sale of a security or interest in a security to constitute a separate crime. Thus, the statute's plain language indicates that each transaction between McAllister and Reeder constituted a separate crime.

Reeder claims that the unit of prosecution for securities fraud is "the scheme itself and is represented by Count 1 which alleges these practices stretched across the charging period as part of a singular criminal impulse. . . . The remaining counts must be vacated and dismissed." He cites State v. Mahmood[88] to support his argument, but that case addressed only whether the State could charge the separate alternatives listed in RCW 21.20.010(2) as separate crimes:

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[87] RCW 21.20.005(14).
[88] 45 Wn. App. 200, 206, 724 P.2d 1021 (1986).

> [F]or the purposes of RCW 21.20.010, making an untrue statement and omitting to make a material statement are not separate offenses: They are connected by the object of deceiving; they may inhere in the same transaction and they are consistent and not repugnant to each other. Such an analysis is consistent with the rule of lenity described above. RCW 21.20.010 is very similar to the public assistance frauds statute, RCW 74.08.331, which . . . defines a single crime that can be committed in several different ways.

Here, in contrast, the State based each count upon a separate transaction; the charged acts did not "inhere in the same transaction." Therefore, Mahmood does not support Reeder's claim that the legislature intended each scheme to constitute a single unit of prosecution regardless of the number of securities sold as part of the scheme. The time periods alleged here reflect the time periods for which Reeder's criminal impulse continued for those counts.

Reeder also asserts that the jury instructions "never advised the jury that it was required to find 'separate and distinct acts' for each count of securities fraud." Citing State v. Borsheim,[89] Reeder argues, "[T]he court did not inform the jury that they must unanimously agree about the act alleged, nor that they cannot rely on the conduct to support conviction on different counts." The court instructed the jury: "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count."

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[89] 140 Wn. App. 357, 367-68, 165 P.3d 417 (2007).

In Borsheim, the State alleged that the defendant committed four counts of rape within the same charging period.[90] We held that the trial court's single "to convict" instruction for all four counts failed to properly inform the jury that it needed to find a separate act of rape for each count.[91] Here, in contrast, the court gave separate "to convict" instructions for each count. Each instruction included a distinct date and evidence of a separate transaction supporting the individual count. Further, the prosecutor explained during the State's closing argument that each check McAllister wrote to Reeder constituted a separate count of securities fraud and theft:

> Each transaction, every check between Mr. Reeder and Mr. McAllister is two crimes. One is Securities Fraud and the other one is Theft by Deception in the First Degree.
>
> You see in Count I and Count II, for example, have the same date because it's the same check, the same transaction, same as III and IV. All the odd numbers counts are Securities Fraud, and all even counts are Theft by Deception.

The jury instructions, evidence of the transactions at issue, and the State's closing argument properly informed the jury that the State did not seek multiple convictions for the same transaction.

Reeder cites State v. Turner[92] in challenging his conviction of 14 counts of first degree theft. He asserts, "Washington's first degree theft statute does not

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[90] Borsheim, 140 Wn. App. at 363, 367.
[91] Borsheim, 140 Wn. App. at 367-68.
[92] 102 Wn. App. 202, 209, 6 P.3d 1226 (2000).

expressly define the unit of prosecution, but is ambiguous as to whether multiple theft schemes or plans over the same period of time and against the same victim may be punished separately." He argues that the court should construe this ambiguity in his favor.

RCW 9A.56.020(1)(b) defines "theft" as "[b]y color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." A party "'wrongfully obtains'" or "'exerts unauthorized control'" over another's property when he or she, having that property in their possession, custody, or control as an agent, "secrete[s], withhold[s], or appropriate[s] the same to his or her own use or to the use of any person other than the true owner or person entitled thereto."[93] Former RCW 9A.56.030(1) states, "A person is guilty of theft in the first degree if he or she commits theft of . . . [p]roperty or services which exceed(s) one thousand five hundred dollars in value."[94]

In Turner, Turner embezzled money from his employer in 72 individual acts of theft over a 10-month period.[95] He used four different methods or "schemes," which were concurrent during the 10-month period, to embezzle the money.[96] The State charged Turner initially with one count of theft for all 72

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[93] Former RCW 9A.56.010(19)(b) (2006).
[94] Former RCW 9A.56.030(1)(a) (2005).
[95] Turner, 102 Wn. App. at 204.
[96] Turner, 102 Wn. App. at 204.

transactions but later amended the information to charge him with four counts of first degree theft by grouping the acts into the four schemes he used to steal the money.[97] A jury convicted him on three of the four counts.[98]

On appeal, the State argued that "its discretion under former RCW 9A.56.010(17)(c) (1998) to aggregate various third degree thefts to first degree theft demonstrates that the relevant unit of prosecution here is each of the multiple schemes or plans under which Turner stole funds."[99] Engaging in a unit of prosecution analysis, this court disagreed with the State and reversed two of the three convictions, explaining,

> The first degree theft statute makes no mention of schemes or plans in distinguishing the seriousness of the crime from other degrees of theft. And there is no wording in the statute that indicates any other relevant distinction between multiple acts of theft committed against the same person over the same period of time.
>
> We conclude that the lack of clarity creates ambiguity whether multiple schemes or plans constitute separate units of prosecution under the first degree theft statute. Thus, the rule of lenity dictates that we construe this ambiguity in favor of Turner.[100]

This case does not involve multiple schemes as considered in Turner. Further, the court in Turner did not hold that the State is prohibited from charging multiple counts based on separate, unauthorized withdrawals:

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[97] Turner, 102 Wn. App. at 204.
[98] Turner, 102 Wn. App. at 204.
[99] Turner, 102 Wn. App. at 207 (footnote omitted).
[100] Turner, 102 Wn. App. at 209 (footnote omitted).

> We do not address whether the State was free to charge 72 individual counts of theft in this case.
>
> Because of our resolution of the double jeopardy issue, we need not reach the question of whether the court erred by determining that the multiple counts did not constitute the same criminal conduct.[101]

Turner does not change the well-established rule that prosecutors have considerable latitude either to aggregate charges or to bring multiple charges.[102] The unit of prosecution under former RCW 9A.56.030(1)(a) for first degree theft was $1,500 for each fraudulent transaction. Because the State had discretion to charge Reeder with a separate count of securities fraud and theft for each discrete transaction, he was not subject to double jeopardy.

CONCLUSION

Reeder fails to allege facts showing that his trial attorney had a conflict of interest that deprived him of effective assistance of counsel. The State did not violate his privacy right by obtaining his bank and credit card records through the special inquiry proceedings. The statute of limitations periods did not expire

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[101] Turner, 102 Wn. App. at 212.

[102] See, e.g., State v. Lewis, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990) (recognizing that prosecutors have wide discretion in determining how and when to file criminal charges); State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984) ("Whether the incidents are to be charged separately or brought as one charge is a decision within prosecutorial discretion."), overruled on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988); State v. Pettitt, 93 Wn.2d 288, 295, 609 P.2d 1364 (1980) (acknowledging that prosecutorial discretion in charging assumes a prosecutor "will exercise [that discretion] after an analysis of all available relevant information").

before the State charged Reeder. The State acted within its discretion when it charged Reeder with separate counts for each discrete fraudulent transaction. For these reasons, we affirm.

Leach, J.

WE CONCUR:

Ann, J. Schindler, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69226-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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