

61474-6

61474-6

NO. 61474-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

MICHAEL M. MILES

Respondent.

2009 NOV 15 PM 2: 26
JUDICIAL CENTER
STATE OF WASHINGTON

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

BRIEF OF APPELLANT

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I. Introduction

In an earlier stage of this case the Supreme Court held that the subpoena used by the Washington State Securities Division to obtain certain bank records was improper. The Court suppressed the bank records obtained under that subpoena. Following the mandate, under the independent source rule, the State obtained those bank records via a valid search warrant that was neither motivated by nor issued in reliance on any information derived from the tainted subpoena. Using an inappropriate legal standard, the trial court suppressed the records obtained under the search warrant and dismissed the case. The State, as appellant, seeks reversal of the trial court's suppression and dismissal.

II. Assignments of Error

- A. The State assigns error to the trial court's suppression of evidence. CP at 258-260.
- B. The State assigns error to numbered paragraph 2 of the trial court's findings/conclusions¹ in Court's Amended Order on Suppression and Dismissal. CP at 259. ("The independent source rule does not authorize the State to reacquire the records from Washington Mutual Bank with a judicially issued warrant or subpoena because there is no evidence the State would have come upon the evidence other than from referral by the Securities Division after its flawed investigation.")
- C. The State assigns error to numbered paragraph 3 of the trial court's findings in Court's Amended Order on Suppression and

¹ Paragraph 2 of the court's Order is a combination of facts and law.

Dismissal. CP at 259. ("Consequently, the bank records re-acquired pursuant to the judicially issued warrant or second subpoena² were also gained by unconstitutional means.")³

- D. The State assigns error to numbered paragraph 4, sentences one and two, of the trial court's findings in Court's Amended Order on Suppression and Dismissal. CP at 259. ("The Deputy Prosecuting Attorney sought a warrant from a judge other than the assigned judge, because the assigned judge was expected to be away from the court for four more business days. This conduct is troublesome because there is no emergent need for issuance of this second process and counsel has failed to explain adequately his reasons for seeking the ruling from another judge, especially in light of the defendant's objection.")⁴
- E. The State assigns error to the trial court's refusal to issue the trial subpoena requested in the State's letter of August 31, 2007 and attached to that letter. CP at 269-272.⁵

²Presumably the trial court is referring to the trial subpoena requested by the State but never ruled on by the trial court. See Assignment of Error 5.

³ It is not clear to what the court is referring in using the phrase "or second subpoena". Although the State requested a trial subpoena duces tecum, no subpoena was issued. See Assignment of Error E below.

⁴The State believes the trial court miscomprehended the motive for seeking the warrant from a separate judge (King County Superior Court Judge Richard Eadie) and the explanation for that action. (The court's original order stated the deputy prosecutor's conduct suggested a "lack of candor to the tribunal" without describing either what the lack of candor was or what tribunal was involved. Following a Motion by the State requesting either the deletion of this language or a referral of the issue to the Bar Association for formal investigation and resolution, CP at 239-242, the trial court deleted the offending language and substituted the language to which error is assigned.) An explanation for that action was contained in the affidavit presented to Judge Eadie for the warrant, CP at 273-275, and in a letter to the trial court dated August 31, 2007. CP at 269-271. Nevertheless, because the trial court concluded that the defendant was not prejudiced by the activity alleged in sentences one and two and consequently did not dismiss the case under CrR 8.3(b), the State will not further argue this issue unless it is the subject of a cross appeal or if this Court wishes further briefing. The assignment of error was made in the height of caution to avoid this finding/conclusion of the trial court from being a verity on appeal.

⁵The Clerk's Minute Entry reflects that the trial court denied the motion for issuance of subpoena at the 9/20/07 hearing. CP 183. The Verbatim Report of Proceedings shows that this issue was left open at the conclusion of this hearing. RP 15. In the State's

- F. The State assigns error to the trial court's failure to hold an evidentiary hearing regarding whether "the State would have come upon the evidence other than from referral by the Securities Division after its flawed investigation." CP at 234.
- G. The State assigns error to the trial court's denial of the State's Motion for Reconsideration. CP at 257.
- H. The State assigns error to the trial court's refusal to find the practical effect of the Court's Amended Order on Suppression and Dismissal was to terminate the case as to all counts. CP at 261-63, Supp CP at ____.⁶
- I. The State assigns error to the trial court's refusal to find the practical effect of the Court's Amended Order on Suppression and Dismissal was to terminate the case as to counts 1-2 and 4-19. CP at 261-63, Supp CP at ____.⁷
- J. The State assigns error to the trial court's refusal to find the practical effect of the Court's Amended Order on Suppression and Dismissal was to terminate the case as to count 3. CP at 261-63, Supp CP at ____.⁸
- K. The State assigns error to the trial court's dismissal of charges CP at 261-63.

(Assignments of Error H-J are included to preserve the State's argument in case the issue arises of whether review was improvidently granted.)

Motion for Reconsideration the State requested that if the trial court intended to deny the request for issuance of a trial subpoena duces tecum, this denial be made explicit. CP at 226. The Motion for Reconsideration was denied without comment. CP at 257.

⁶The State has requested that the trial judge file three documents in settlement of the record under RAP 7.2(b) and Title 9. The trial judge has not responded to that request. When those documents have been filed the State will file a Supplemental Designation of Clerk's Papers. This citation is to the second and third documents of those Supplemental Clerk's Papers.

⁷See n. 6 *supra*.

III. Issues Related to Assignments of Error

- A. Is evidence, once suppressed, admissible, when subsequent to suppression, it has been obtained under a valid warrant motivated by and issued solely on information independent from the tainted evidence?
- B. Is the trial court's "would the State have come upon the evidence other than from referral by the Securities Division after it's flawed investigation" the proper test to evaluate a claim of independent source?
- C. If this "come upon the evidence" test is the proper test, is there substantial evidence to justify a finding that the State would not have come upon the evidence in the absence of the improperly issued subpoena?
- D. If the trial court did not find persuasive the evidence presented by the State (in the form of a declaration) in support of the conclusion that the State would have come upon the evidence in the absence of an improperly issued subpoena, was it error for the trial court to refuse to conduct an evidentiary hearing, requested by the State, to hear such evidence?
- E. Can the trial court refuse to make a determination regarding whether the suppression of evidence has the practical effect of terminating a case in its entirety?
- F. Can the trial court use as its sole basis for refusing to dismiss a particular count in an Information the fact that the Supreme Court said there evidence justifying the *filing* of that count?
- G. Can the trial court compel the State to move for the dismissal of all charges as a condition to the trial court making a finding that the practical effect of a suppression order it to terminate the case in its entirety?

⁸See n. 6 *supra*.

(Issues E-G are included to preserve the State's argument in case the issue arises of whether review was improvidently granted.)

IV. Statement of the Case

In an earlier stage of this case the Supreme Court held that the subpoena used by the Washington State Securities Division to obtain certain bank records was improper. The Court suppressed the bank records obtained under that subpoena. Following the mandate, under the independent source rule, the State obtained those bank records via a valid search warrant that was neither motivated by nor issued in reliance on any information derived from the tainted subpoena. The trial court suppressed the records obtained under the search warrant and dismissed the case. The State, as appellant, seeks reversal of the trial court's suppression and dismissal.

The underlying facts are not in dispute and are contained in section A. below. What follows is the procedural history of this case.

A. The Initial Investigation and Charges

The State filed charges of Securities Fraud, Intimidating a Witness, Tampering with a Witness, Forgery and Theft against Miles. CP at 1-7, 34-42. These charges resulted from an investigation conducted by the

Securities Division of the Department of Financial Institutions of the State of Washington. CP at 8-24.

This investigation was initiated following receipt of a complaint from victim Julie Gillette with accompanying documentation. CP at 276-79, 281-92. Based on that complaint and accompanying documentation, the Division issued an administrative subpoena as authorized in RCW 21.20.380 for copies of Washington Mutual Banks records of an account at that bank in Miles' name. The charges were filed based in part on information obtained from those bank records. CP at 273.

The trial court denied the defendant's motion to suppress the bank records obtained via the administrative subpoena. CP at 46.

B. Suppression By the Supreme Court

In April 2007, after an interlocutory appeal, the Washington Supreme Court held the issuance of such a subpoena, without prior review by a neutral magistrate, violated Const. art I, §7. The Court suppressed the bank's records obtained via the invalid subpoena. *State v. Miles*, 160 Wn. 2d 236, 156 P.3d 864 (2007). The mandate was issued on August 6, 2007. CP at 43-72.

C. Actions to Obtain Bank Records Using Independent Source Information, Subsequent to Mandate from Supreme Court

1) Search Warrant For Bank Records under Independent Source Doctrine

On August 27, 2007, in compliance with this decision, the State returned the records to the party from whom they had been obtained, Washington Mutual Bank. CP at 269. On August 28, 2007, the State sought a search warrant for bank records from Washington Mutual. King County Superior Court Judge Richard Eadie authorized this warrant that day. The warrant was served on Washington Mutual on August 28, 2007. CP at 270.

In the affidavits for that warrant Judge Eadie was advised of the history of this matter, CP at 273-275, and the reasons for bringing this warrant before him. CP at 273-74. Other than this history, the only information provided to Judge Eadie in support of the warrant was information known by the Securities Division prior to the issuance of the subpoena to Washington Mutual on June 13, 2001. CP at 273-292. The State represented to Judge Eadie that the State's motive in seeking this warrant was not based on any information obtained or derived from the records obtained from Washington Mutual under the tainted subpoena. CP at 274. The State was motivated to seek these bank records by virtue

of the nature of the allegations and the crime involved. CP at 274. This warrant was served on Washington Mutual on August 28, 2007. The State agreed not to take possession of the documents covered by the warrant until after September 4, 2007 CP 270. (The State did not take possession of the documents covered by this warrant until September 17, with additional documents being provided on September 27, 2007.)

2) Request for Trial Subpoena Duces Tecum for Bank Records under Independent Source Doctrine

Following the mandate, a case setting hearing, for the purpose of setting the omnibus and trial dates, was scheduled for September 4, 2007 in front of King County Superior Sharon Armstong.⁹ This hearing would be Miles' first appearance following the mandate and would trigger the running of the speedy trial rule. CP at 183, 269.

The State also requested that a trial subpoena duces tecum be issued at the September 4, 2007 hearing to Washington Mutual for the same bank records covered by the search warrant authorized by Judge Eadie. CP at 269. The information justifying the issuance of this subpoena came from information provided by Ms. Gillett prior to the

⁹ Judge Armstrong was the assigned trial judge in the earlier preceding and would presumably be the trial judge in the subsequent preceding. The affidavit for search warrant was not presented to her because she was unavailable at the time the warrant was sought. CP at 269-71, 273-74.

issuance of the administrative subpoena at issue in the earlier appeal. None of the information justifying the subpoena came directly or indirectly from any records obtained under the administrative subpoena. CP at 269, 273-92. In requesting this subpoena the State attached the affidavits provided to Judge Eadie, incorporating the arguments regarding the State's motive in seeking these bank records. CP at 270, 274.

The trial court never ruled on the State's request for this subpoena. CP at 226, 257, 269-72.

D. Defense Motion to Suppress and Quash

At the September 4, 2007 case setting and first appearance hearing Miles filed a motion entitled "Motion for Order on Mandate and to Dismiss". CP at 73-181. This was treated by the parties and the trial court as a motion to suppress the evidence obtained under the warrant issued by Judge Eadie on August 28, 2007 and an objection to the issuance of the trial subpoena duces tecum requested by the State. CP at 186.

Following briefing by the parties, CP at 73-181, 184-200, 201-215, the trial court heard oral argument on September 20, 2007, RP at 1-16. Near the end of that argument the trial court asked the State: "[I]f the [Securities] division had not received the documents from its administrative subpoena, would they have referred the case to the

prosecutor?" RP at 13. The State, speculating on what the Securities Division answer to that question would be, concluded that the allegations made by the complainant Julie Gillett to the Securities Division would have caused the Division to refer the matter to the prosecutor had they not been able to obtain bank records using an administrative subpoena. RP at 13-14. It was not clear at the time from the trial court's question that this was a determinative issue. In fact, – shortly after asking the above question, during the same hearing, the trial court characterized the issue to be whether or not this was a confirmatory search. RP at 14.

E. Trial Court's Ruling on Motion to Suppress and Dismiss

By Order dated November 14, 2007, the trial court granted the defendant's motion to suppress and denied the motion to dismiss. CP at 223-225. In this Order the trial court made it clear the basis for the suppression was its conclusion that "there is no evidence the State would have come upon the evidence other than from referral by the Securities Division after its flawed investigation." CP at 224.

In denying the defendant's motion to dismiss the trial court cited the Supreme Court's observation that "The State already validly possessed the canceled checks from Gillett [the complainant] along with her statement, which supports the filing of some charges" and stated that

"[t]he State should be given the opportunity to prove charges against the defendant without bank records or the fruits of its two unlawful searches."

CP at 260

F. State's Motion for Reconsideration, Request for Ruling on Request for Issuance of Trial Subpoena Duces Tecum and Declaration of Martin Cordell¹⁰

The State filed a timely motion for reconsideration arguing that the trial court's "Would the State have come upon the evidence" test was not the proper test for whether evidence was obtained from an independent source. CP at 226-236. The State also argued that if even if this was the correct test, the State had met the test, attaching a Declaration from Martin Cordell, Chief of Enforcement for the Washington State Department of Financial Institutions, Securities Division. CP at 234-36, 237-38. In his Declaration, Cordell stated under penalty of perjury that had the Division not been able to obtain Miles' bank records by administrative subpoena or voluntarily, they would have referred the matter to the Prosecutor's Office. CP at 237-38. In the Motion for Reconsideration, on the issue of whether the State would have come upon the evidence absent the tainted administrative subpoenas, the State requested that if the trial court was not

¹⁰Simultaneous with the Motion for Reconsideration the State filed a Motion to Delete Allegation of Ethical Misconduct, CP at 239-242. The court deleted the allegations by amended order, as discussed below.

persuaded by Cordell's Declaration, an evidentiary hearing be set to present Cordell's testimony in court. CP at 234.

In the Motion for Reconsideration the State also requested a ruling on the State's request for issuance of a trial subpoena duces tecum. CP at 226.

G. Trial Court's Ruling on Motion for Reconsideration

By order dated February 29, 2008, the trial court denied the Motion for Reconsideration without comment. The trial court did not rule on, and thus presumably denied, the State's request for issuance of a trial subpoena duces tecum and the State's request for an evidentiary hearing. CP at 257.

H. Trial Court's Amended Order on Suppression and Dismissal

In an order dated February 29, 2008, filed March 3, 2008, the trial court, in response to the State's Motion to Delete Allegation of Ethical Misconduct, amended the previous order dated February 29, 2008 to delete the allegation of ethical misconduct. In all other respects the amended order remained the same as the original order. CP 258-60

I. Order Terminating the Case and Dismissing All Counts

On March 4, 2008, the State, via email, provided the trial court with a proposed motion, certification and agreed order terminating the case and dismissing all counts. The proposed order stated:

Based on the Motion of the State of Washington and the agreement of the parties, under RAP 2.2(b)(2) this court explicitly finds that the practical effect of the Court's Amended Order on Suppression and Dismissal is to terminate the case in its entirety. As a consequence, all counts are dismissed.

The trial court was advised that both the State and the defense attorney were willing to sign the proposed order. Supp CP ____.¹¹ By return email Judge Armstrong stated:

Counsel, I have reviewed your proposed order. I cannot make the finding that "the practical effect of the Court's . . . Order is to terminate the case in its entirety." That is a decision for the Prosecuting Attorney who is familiar with the evidence, not the court. I am prepared to dismiss the case in the format attached. . . . If you wish me to sign the order of dismissal in the format I have approved, please advise.

Supp CP at ____.¹²

¹¹Prior to the State sending this proposed order to Judge Armstrong, defense attorney Lisa Dworkin stated via email that she would agree to the entry of the order. See n. 6 *supra*. This citation is to the first document of the Supplemental Clerk's Papers.

¹²See n. 6 *supra*. This citation is to the third document of the Supplemental Clerk's Papers. (Although the order she proposed to sign was worded as follows ("Based on the Motion of the State of Washington and the agreement of the parties, all counts are dismissed"), the actual order entered by Judge Armstrong was the original proposed order with portions of the order stricken.) Supp CP at ____.

J. Appellate Procedural History

The State filed Notice of Appeal on March 25, 2008, and filed its opening brief on July 14, 2008. The defendant filed a Motion to Dismiss State's Appeal on October 24, 2008. By written opinion dated November 24, 2008, Commissioner Mary Neal denied the motion, struck the State's opening brief, and ordered the State to file and note any motion for discretionary review by December 12, 2008, which the State did.

Commissioner Neal granted the State's motion on April 15, 2009, concluding that the trial judge had asked the wrong question in deciding the suppression motion:

Regardless of how the second question¹³ is phrased, in the cited cases the focus of the inquiry is on what prompted the State to seek a warrant. Here, the test the trial court applied – whether the State would have come upon the evidence other than from referral by the Securities Division after its flawed investigation – appears to ask and answer a different question.

Commissioner's Ruling Granting Discretionary Review, Slip Op. at 8-9

The defendant moved to modify this ruling, such motion being denied on August 4th, 2009, and this appeal started again.

V. Argument

Summary

¹³ Referencing the second test enunciated in *Murray v. United States*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988)

In *State v. Miles, supra*, the Supreme Court suppressed records obtained from a bank by an invalid subpoena. Subsequently records of the defendant's bank account were obtained from the bank under a valid search warrant issued by Judge Eadie. Judge Eadie was presented with, and relied solely upon, information independent of the results of the original tainted subpoena. The State was not motivated to seek the warrant by anything obtained or discovered in the original tainted subpoena. The warrant falls four square within the confines of the independent source rule and the evidence obtained thereunder should be admissible.

Judge Armstrong's legal basis for denying legitimacy to Judge Eadie's search warrant was: "[T]here is no evidence the State would have come upon the evidence other than from referral by the Securities Division after its flawed investigation." CP at 259. As Commissioner Neal noted, this is not the correct legal standard for evaluating a claim of independent source. It is more akin to the doctrine of inevitable discovery or the oft rejected "but for" test for evaluating fruit-of-the-poisonous-tree claims.

Using independent source information to obtain a valid warrant for evidence previously obtained illegally has long been recognized as an exception to the exclusionary rule by both the Washington Supreme Court,

see State v. Gaines, 154 Wn.2d 711, 717, 116 P.3d 993 (2005) (citing *State v. Warner*, 125 Wn.2d 876, 888-89, 889 P.2d 479 (1995) and the United States Supreme Court, *see Murray v. United States*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988), (citing *Silverthorne Lumber Co., v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920) levels.

Finally, even if the trial court used the correct legal standard, the State met the requirements of that test through Martin Cordell's declaration. CP at 237-38. There is not substantial evidence to support the trial court's conclusion to the contrary¹⁴.

A. The Exclusionary Rule and its Exceptions

A proper evaluation of the trial court's stated basis for rejecting the evidence obtained under Judge Eadie's warrant requires an understanding of the independent source rule. The independent source rule is thus explored in some detail before the trial court's stated basis is examined.

1) The Exclusionary Rule

Absent an exception to the warrant requirement, a warrantless search is impermissible under the Fourth Amendment to the U.S. Constitution and Article I, Section 7 of the Washington Constitution. *State v. Richman*, 85 Wn. App. 568, 933 P.2d 1088, *review denied*, 133 Wn.2d

1028 (1997). The exclusionary rule is “a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect” by excluding evidence that is the fruit of an illegal, warrantless search. *United States v. Calandra*, 414 U.S. 338, 347, 94 S. Ct 613, 38 L. Ed. 2d 561 (1974). Evidence derived directly or indirectly from illegal police conduct is an ill-gotten gain, “fruit of the poisonous tree,” that should be excluded from evidence. *Wong Sun v. United States*, 371 U.S. 471, 484-85, 83 S. Ct 407, 9 L. Ed. 2d 441 (1963).

2) The Three Exceptions to the Exclusionary Rule

As noted in *United States v. Smith*, 155 F.3d 1051 (9th Cir.1998) there are three oft-stated exceptions to the “fruits of the poisonous tree” exclusionary rule:

In *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) the Supreme Court articulated the basic standard for analyzing "fruit of the poisonous tree" issues: "The . . . questions in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' " *Id.* at 488, 83 S.Ct 407 (quoting John McArthur Maguire, *Evidence of Guilt*, 221 1959)). The Court has fashioned three distinct exceptions to the "fruits" exclusionary rule: (1) the "independent source" exception; (2) the "inevitable discovery" exception; and (3) the "attenuated basis" exception. See *United States v. Ramirez-*

¹⁴ Paragraph 2 of the trial court's findings/conclusions in Court's Amended Order on Suppression and Dismissal. CP at 259

Sandoval, 872 F.2d 1392, 1396 (9th Cir. 1989).

Id. at 1060.

As noted in *Murray v. United States*, 487 U.S. 533, 537, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988):

Almost simultaneously with our development of the exclusionary rule, in the first quarter of this century, we also announced what has come to be known as the "independent source" doctrine.

3) The Inevitable Discovery Rule and the Independent Source Rule Differ in Fundamental Ways.

The inevitable discovery rule and the independent source rule are related and are sometimes used interchangeably. They are, in fact, distinctly different rules. Because it appears the trial court below has confused the two or merged elements of the inevitable discovery rule into the independent source rule, it is crucial to understand the fundamental differences between the rules. The inevitable discovery rule applies to evidence that *would have* been discovered by legal means. The independent source rule applies to evidence that *actually was* discovered by legal means.

As noted by LaFave, the inevitable discovery rule:

[I]n a sense, is a variation upon the independent source theory, but it differs in that the question is not whether the police did in fact acquire certain evidence by reliance upon an untainted source but instead whether evidence found

because of a [constitutional] violation would inevitably have been discovered lawfully." Wayne R. LaFave, 5 Search and Seizure §11.4(a), 241 (3d ed. 1996).

State v. Hall, 183 Or.App. 48, 64, 50 P.3d 1258 (2002).

This crucial difference between the two rules – distinguishing evidence that has actually been obtained via independent source from evidence that hypothetically might have been obtained – has been noted repeatedly.

[U]nder the independent source doctrine, evidence that was *in fact* discovered lawfully, and not as a direct or indirect result of illegal activity, is admissible. In contrast, the inevitable discovery doctrine, applied in *Nix*, permits the introduction of evidence that *inevitably would have been* discovered through lawful means, although the search that actually led to the discovery of the evidence was unlawful. The independent source and inevitable discovery doctrines thus differ in that the former focuses on what actually happened and the latter considers what would have happened in the absence of the initial search.

United States v. Herrold, 962 F.2d 1131, 1140 (3d Cir.1992). *See also*

Hatcher v. State, 177 Md.App. 359, 935 A.2d 468 (Md.App.2007), *State v. Teal*, 282 Ga. 319, 324, 647 S.E.2d 15 (2007).

B. The Independent Source Rule

1) History and Purpose

(The below text (pp. 19-34) draws heavily on both the logic and the language of *United States v. Hanhardt*, 155 F.Supp.2d 840 (N.D. Ill, 2001). The issues in *Hanhardt* paralleled the issues in the *Miles* case

before this court. In *Hanhardt* the State illegally searched a briefcase. The results of that search were suppressed in one prosecution (for witness intimidation). The briefcase was then obtained and searched under a subsequent warrant without reliance upon the contents viewed in the first, illegal search, and charges relating to a jewelry theft were filed. Evidence from the briefcase relating to the jewelry thefts was used in the second prosecution. The cited decision approved of this use under the independent source rule.

Judge Norgle's decision in *Hanhardt* states, in an eloquent and convincing manner, many of the arguments the State would like to make in this case. The State does not feel that paraphrasing or restating Judge Norgle's argument does it justice. Thus much of the below text comes verbatim or nearly verbatim from Judge Norgle's ruling. This is a convenience only and the use of language from *Hanhardt* is not intended as citational authority except where proper citation is made.)

The independent source doctrine traces its beginning to *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920). In *Silverthorne*, Justice Holmes wrote that the Fourth Amendment forbids the Government from using information obtained during an illegal search, but does not forever bar that information from

admission at trial. *Silverthorne*, 251 U.S. at 392, 40 S.Ct. 182. Justice

Holmes stated:

The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. *Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others....* (emphasis added)

Id.

The Supreme Court's most detailed analysis of the independent source doctrine came in *Murray v. United States*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988). *Murray* arose when police officers, who had reason to believe that a warehouse held contraband, forced entry into the warehouse, where they saw burlap covered bales. The officers did not disturb the bales, and left the warehouse, keeping it under surveillance while they obtained a search warrant. In obtaining the warrant, the officers did not inform the issuing magistrate of their warrantless forced entry, nor did they tell the magistrate about what they saw in the warehouse. The search warrant was issued approximately eight hours after the unlawful entry. At that time, the officers re-entered the warehouse, searched the bales, discovered they were marijuana, and seized them along with other incriminating evidence. *Id.* at 535-36, 108 S.Ct. 2529..

At issue in *Murray* was whether the second search and seizure pursuant to the warrant was truly independent of the first illegal entry into the warehouse. *Id.* at 542, 108 S.Ct. 2529. “The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here.” *Id.* The Court said that the second search pursuant to the warrant would not be independent if the officers’ “decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.” *Id.* The factual record was not sufficiently developed to determine these questions, so the Court remanded the case to the District Court. *Id.* at 543, 108 S.Ct. 2529.

In *United States v. Markling*, 7 F.3d 1309 (7th Cir.1993), the Seventh Circuit provided a thorough analysis and history of the independent source doctrine. *Markling*, 7 F.3d at 1315-18. Of primary concern in its analysis were the competing interests at stake in deciding whether to exclude evidence on Fourth Amendment grounds. *Id.* at 1315. The purpose of the exclusionary rule is to deter police misconduct by prohibiting the introduction of evidence obtained in violation of the Fourth Amendment. *Id.* (citing *Murray*, 487 U.S. at 536, 108 S.Ct. 2529 and *United States v. Salgado*, 807 F.2d 603, 607 (7th Cir.1986)). The

exclusionary rule, however, exacts a significant societal cost by depriving juries of probative evidence of crimes, and is in tension with the public's interest in detecting and punishing criminal behavior. *Markling*, 7 F.3d at 1315. The independent source doctrine is a means of balancing these competing interests. *See id.*

[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position than they would have been in if no police error or misconduct had occurred.... When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been absent any error or violation.

Murray, 487 U.S. at 537, 108 S.Ct. 2529 (quoting *Nix v. Williams*, 467 U.S. 431, 443, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984)).

2) The Two Inquiries Involved In Assessing a Claim of Independent Source

To balance these interests and determine whether challenged evidence truly has an independent source, the court must conduct two inquiries. See *Markling*, 7 F.3d at 1315-16 (discussing *Murray*). First, was the magistrate's decision to issue the warrant affected by, or in reliance on, information obtained from an illegal search? *Markling*, 7 F.3d at 1315-16; *United States v. Herrold*, 962 F.2d 1131, 1141-44 (3rd Cir.1992). Second, was the officer's decision to seek a warrant prompted by what he had seen

during the illegal search? *Markling*, 7 F.3d at 1315-16. The second question is often re-worded as “would the officer have sought the warrant regardless of the illegal search?” *See Murray*, 487 U.S. at 543, 108 S.Ct. 2529; *Markling*, 7 F.3d at 1315-16. (As noted by Commissioner Neal in her Ruling Granting Discretionary Review, “In some instances [this] rephrasing [of] the inquiry has confused the analysis.” *Slip Op* at 8.) If the answers to these questions are such that the magistrate did not rely on information found in an illegal search, and the officer's illegal search did not prompt the decision to obtain a warrant, then the challenged evidence has an independent source, and is admissible at trial. *See Murray*, 487 U.S. at 542, 108 S.Ct. 2529. The reason is that excluding evidence that has a source independent of any police error or illegality would put the police in a worse position than they would have been without the error or illegality. *See id.* at 537, 108 S.Ct. 2529.

a) Was Judge Eadie's Decision to Issue the Warrant Affected By, or Issued in Reliance On, Information Obtained From an Illegal Search

In this case, the inquiry into the facts that Judge Eadie relied on in making his probable cause determination is a simple one. The defense does not dispute that the State submitted to Judge Eadie only facts in existence prior to the issuance of the tainted subpoena by the Securities

Division on June 13, 2001. The State did not attempt to use facts obtained via the tainted subpoena in order to bootstrap a finding of probable cause to seize the bank records. Thus, this prong of *Murray* supports application of the independent source doctrine.

b) Was the State Motivated to Seek the Warrant from Judge Eadie by the Response to the Tainted Subpoena

The answer to the second, or motivational, prong of *Murray* requires further analysis. The primary evil that the motivational inquiry seeks to root out is the so-called “confirmatory search.” *See Murray*, 487 U.S. at 540 n. 2, 108 S.Ct. 2529 (noting that the officers in the *Murray* case may have misjudged the circumstances, but “there [was] nothing to suggest that they went in merely to see if there was anything worth getting a warrant for.”); *see also* LaFave, *Search and Seizure A Treatise on the Fourth Amendment*, § 11.4(f) at 299-303 (3rd ed.1996) (discussing the motivational prong of *Murray*). A confirmatory search occurs when officers conduct a search to get assurance that evidence is present before taking the time and effort to obtain a warrant. LaFave, *supra*, § 11.4(f) at 299; *see also United States v. Pena*, 924 F.Supp. 1239, 1256 (D.Mass.1996) (citing LaFave and describing a confirmatory search as one where “officers conduct an initial warrantless search to determine whether they would uncover evidence worth the trouble of obtaining a warrant.”).

The different wordings of the motivational inquiry are designed to get to the same issue - whether any information gleaned from an illegal search motivated officers to seek a warrant. *See Murray*, 487 U.S. at 542, 108 S.Ct. 2529; *Silverthorne*, 251 U.S. at 392, 40 S.Ct. 182; *Markling*, 7 F.3d at 1315-16. Did the contents of the tainted bank records motivate the application for the warrant from Judge Eadie?

As noted, the motivational prong of *Murray* is often truncated from “was the officer's decision to obtain a warrant prompted by what he had seen during the illegal search?” to “would the officer have sought the warrant regardless of the illegal search?” *See Murray*, 487 U.S. at 543, 108 S.Ct. 2529; *Markling*, 7 F.3d at 1315-16. Miles relied heavily below on the truncated wording of the motivational inquiry by arguing that the State's failure to seek a warrant at or near the time of the initial search forever bars it from obtaining a warrant based on independent probable cause. In other words, Miles argued, the independent source doctrine does not apply unless the State always had the intention of seeking a warrant, regardless of an illegal search.

At first blush the different wordings of the motivational inquiry lead to different conclusions. Miles asserted, and the State candidly concedes, that the State had no intention of seeking a warrant until it

became clear from the Supreme Court's ruling that the subpoenas under which the bank records were initially obtained were constitutionally infirm.¹⁵ Looking at the original wording of the motivational inquiry from *Murray* (whether the officer's decision to seek a warrant was prompted by information learned during an illegal search, *Murray*, 487 US 542), there is no evidence that the State's decision to obtain a warrant was prompted by anything discovered under the June 13, 2001 subpoena. On the other hand, looking at the "re-worded" inquiry (whether the officers would have sought a warrant regardless of the illegal search), the State had no intention of seeking a warrant until the Supreme Court's ruling.

The crucial question is why do some courts use the "re-worded" inquiry (would the officers have sought a warrant regardless of the illegal search) as a shorthand answer to the fundamental question of whether the information gained from the illegal search motivated the inquiry. The answer to this question lies in the concepts in analytical logic of "necessary" and "sufficient" conditions. A *necessary* condition is one which must be satisfied before a statement can be true. A *sufficient*

¹⁵The State does argue, however, that if the Securities Division had not had the statutorily created subpoena authority at all in 2001 they would have referred the matter to the Prosecuting Attorney for the purpose of obtaining the bank records under a valid subpoena or warrant. See discussion of Martin Cordell's Declaration at pp. 46-48 below.

condition is one which, if satisfied, assures the truth of the statement, but which, if not satisfied, does not prove the falsity of the statement.

Moving from philosophical logic concepts to the case before this court, the statement to be proved is: "The State was not motivated to seek the warrant based on anything observed during the earlier tainted search." If the officers can be shown to have intended to seek a warrant all along, without regard to the tainted evidence, then it is clear they were not motivated in seeking the warrant by the tainted evidence, thus answering the ultimate question. Evidence that the officers intended to seek a warrant all along, is thus *sufficient* proof - a shorthand way - of showing that they were not motivated by the tainted evidence. It is not, however, *necessary* proof. There are other ways to answer the ultimate question of motivation.

Miles' reliance below on the "did-the-State-intend-to-seek-a-warrant-all-along" re-wording is an overly narrow view of *Murray's* motivational prong when applied to the facts of this case. His position takes the analysis away from what State obtained via the tainted subpoena and the bar on using that information in obtaining a warrant, towards a simple inquiry into whether the State ever had an intent to get a warrant. In this case, where the State concedes that it did not have such an intent at

the time of the search, stopping the analysis at that concession does not end the motivational inquiry, is not an adequate balancing of the societal interests embodied in the independent source doctrine and ends up placing the State in a worse position than it would have been absent the June 13, 2001 subpoena. *Murray*, 487 U.S. at 537, 108 S.Ct. 2529; *Markling*, 7 F.3d at 1315-16.

Miles' argument also overlooks the idea that *Murray's* motivational inquiry is intended to weed out confirmatory searches, of which there is no evidence in this case. LaFave, *supra*, § 11.4(f) at 299-303. In short, the independent source doctrine is concerned with the use of information that officers obtain in violation of Const. art I, §7, instead of a rote determination of whether the officers ever intended to obtain a warrant. Accordingly, this court should find Miles' position unpersuasive.

3) Applying the Motivational Test

The crucial question, thus, is whether anything resulting from the June 13, 2001 subpoena prompted the State to obtain the warrant on August 28, 2007. The starting point in making that determination is an examination of the State's claimed motivation.

When evaluating motivation, the State's claimed reason for seeking a warrant should be examined but is not to be given dispositive effect.

Murray, 487 U.S. at 540 n. 2, 108 S.Ct. 2529. If the facts render the stated reason for obtaining a warrant implausible, the independent source doctrine does not apply. *Id.*; see also LaFave, *supra*, § 11.4(f) at 299-303.

The State claims that the reason it sought a warrant was the Supreme Court's decision on the earlier suppression litigation. This stated reason is plausible, and is supported by the factual record. The defense did not offer any contrary explanation.

In *U.S. v. Hanhardt*, 155 F.Supp.2d 840, the court analyzed the State's motive for seeking a warrant. The government stated the reason for seeking the warrant was the Seventh Circuit's decision upholding the suppression of the evidence seized without a warrant. The *Hanhardt* court, stating the rule that "if the facts render the stated reason for obtaining a warrant implausible, the independent source doctrine does not apply" held the government's explanation to be plausible. *Id.* at 849. They noted that the Seventh Circuit's opinion was issued on 9/5/00. The government moved for a rehearing en banc which was denied on 11/2/00. The government sought the warrant ten weeks later. This sequence supported the government's stated reason.

Therefore, the record supports the Government's stated reason that the Seventh Circuit's decision in case number 99 CR 196 prompted the decision to seek the warrant. This stated reason is not based on anything found in the

briefcase on February 23, 1999 or thereafter, and is not an invalid reason to seek a warrant that would bar the application of the independent source doctrine. *See United States v. Mulder*, 889 F.2d 239, 241 (9th Cir.1989); *United States v. Johnson*, 994 F.2d 980, 986-88 (2nd Cir.1993).

Id.

The sequence in the Miles case is even more persuasive. The mandate terminating review was issued on August 6, 2007. On August 20, 2007 the State attempted to inform the trial court of its intention to seek a search warrant but the trial court was unavailable until September 4. On August 28, three weeks and a day after the mandate, the State sought and obtained a warrant from Judge Eadie.

The *Mulder* and *Johnson* opinions cited in the quotation from *Hanhardt* above offer guidance. The *Mulder* case is actually two opinions, which are referred to as *Mulder I* and *Mulder II*. In *Mulder I*, the Government conducted a warrantless seizure of pills from a hotel room, and subjected the pills to sophisticated testing that established the pills were contraband. *See United States v. Mulder*, 808 F.2d 1346, 1348-49 (9th Cir.1987). The District Court denied Mulder's motion to suppress, but the Ninth Circuit reversed. *Id.* After the reversal and remand, the Government obtained a warrant and re-tested the pills, which led to *Mulder II*. *See United States v. Mulder*, 889 F.2d 239 (9th Cir.1989). In *Mulder II*, the District Court again denied Mulder's motion to suppress on

the basis of probable cause developed prior to and independently of the initial warrantless search. *Id. at 240*. On appeal, the Ninth Circuit applied the independent source doctrine, despite the fact that there was a two year delay between the initial warrantless search and the subsequent issuance of a warrant and re-testing of the pills. *Id. at 240-42*. The Ninth Circuit reasoned that motivation to seek the warrant was independent of the initial search, and that the time delay resulted from the appeals process rather than any improper delay on the part of the Government. *Id.* This situation is similar to the *Miles* case, in that there is a similarly long delay due to the appeal of a denial of a motion to suppress. Also similar is that there were ample independent facts to establish probable cause, as is true here.

In *Johnson*, Government agents seized audio tapes and listened to them on the mistaken belief that they did not need a warrant to do so.¹⁶ *Johnson*, 994 F.2d at 987. Once the District Court expressed reservations about the agents' warrantless review of the tapes, the agents sought and received a warrant. *Id.* The Second Circuit ruled that the Government's reliance on the District Court's unease with the warrantless search was not

¹⁶The "good faith" aspect of *Johnson* was not relevant to the court's decision. "Whether the agents made their mistake in good faith is not relevant to this inquiry. What is key is the fact that their error did not result in the government obtaining evidence it would not otherwise have obtained. The government would have acquired the evidence on the tapes without the agents' mistaken prior review of the tapes, since the warrant application was prompted not by the prior review but by the obvious relevance of the tapes and the district." *United States v. Johnson, id. at 987*.

an improper motivation to seek a warrant. *Id.* The *Miles* case is analogous, in that the State sought a warrant soon after the Supreme Court issued the mandate in *State v. Miles, supra*.

Murray's first inquiry focuses on the information submitted in support of a search warrant to ensure that the information is independent of any Fourth Amendment violation. But, that same information is also relevant to the motivational inquiry. *Cf. United States v. Grosenheider*, 200 F.3d 321, 328 (5th Cir.2000) (examining the submissions to obtain a search warrant, and finding that the decision to seek a warrant was not prompted by illegally discovered evidence). If an officer relies extensively on illegally obtained information in seeking a warrant, there is a strong inference that such information prompted the officer to seek the warrant. Such an inference leads to the conclusion that there is no attenuation between illegally obtained information and a later warrant. That is not the case here. There is no dispute that the State's submission to Judge Eadie contained a wealth of information to support probable cause, all of it preceding the June 13, 2001 tainted subpoena. The State was also candid with Judge Eadie, informing him of the tainted subpoena and the Supreme Court's earlier decision regarding that subpoena. These facts support a

finding of attenuation between the June 13, 2001 subpoena and the August 28, 2007 warrant.

C. The Trial Court Used the Wrong Legal Standard

With that understanding of the independent source rule and the judicially approved tests for evaluating evidence under that rule, we turn to the trial court's basis for its order of suppression. The trial court concluded in Paragraph 2 of Court's Amended Order on Suppression and Dismissal CP at 259, that:

The independent source rule does not authorize the State to reacquire the records from Washington Mutual Bank with a judicially issued warrant or subpoena because *there was no evidence the State would have come upon the evidence other than from referral by the Securities Division after its flawed investigation.* (emphasis added)

The State contends that at best the trial court has stated a reason for suppressing the bank records under the inevitable discovery doctrine. The trial court's stated reason does not match the standards established by case law for evaluating the independent source doctrine advanced by the State.

1) **The Trial Court's “Would the State have Come Upon the Evidence” Test Erroneously Uses the Standard for Evaluating Inevitable Discovery Rather than Independent Source or has Erroneously Imported the Inevitable Discovery Requirement Into the Independent Source Rule**

The decisive portion of the trial court's order ("would the State have come upon this evidence") is not framed in the manner in which the Supreme Court has framed independent source discussions. The trial court either erroneously confused the inevitable discovery and independent source rules or erroneously imported the inevitable discovery requirement into the independent source rule.

As noted earlier, the inevitable discovery exception to the exclusionary rule poses the hypothetical question of whether the tainted evidence *would have* been inevitably discovered later by valid methods. The independent source rule focuses not on what would have been discovered but on what was discovered. The crucial test under the independent source rule is the motivation of the State in seeking the subsequent, valid warrant.

The trial court's inquiry into what *would have happened* absent the tainted inquiry turns the motivational inquiry into simply another form of the inevitable discovery rule. If the rules were simply different ways of wording the same exception this might be a proper approach, but, as noted

earlier, the independent source and inevitable discovery rules are distinctly different, with different underpinnings, different justifications as exceptions to the exclusionary rule and most importantly, different tests to discern their applicability. By re-framing the independent source test as an inevitable discovery test, the trial court vitiated the independent source exception completely.

2) The Trial Court's "Would the State have Come Upon the Evidence" Test Has Been Rejected By Other Courts

In *United States v. Smith, supra*, the defendant, Smith, had made favorable trades in his company's stock shortly before unfavorable news about the company became public. He was convicted of insider trading.

Amidst this flurry of activity Smith had left an incriminating voice mail message with another employee (Bravo) of the company. Unbeknownst to Smith or the recipient of the voice mail, a third employee (Gore) had guessed Bravo's password and had accessed Bravo's voice mail. Gore recorded the message into a tape recorder. She then approached a co-worker (Phillips), told him of the general nature of the conversation and provided him with a copy of the voice mail.

Phillips then contacted the United States Attorneys Office, told the AUSA to whom he spoke that he had information about a crime and

played the tape to the AUSA several times. The AUSA forwarded Phillips' information to the FBI and the Securities and Exchange Commission who opened an investigation. The SEC conducted an investigation and referred the matter back to the United States Attorneys Office for prosecution. In that prosecution Smith moved to suppress the tape of the voice mail and all evidence obtained following the provision of that tape. The trial court granted the motion as to the tape but denied the motion as to the remainder of the government's evidence.

After an extensive (and extremely complicated) analysis of whether the acquisition of the voice mail message constituted a violation of the Wiretap Act or the Stored Electronic Communications Act, the Ninth Circuit concluded that the acquisition of the voice mail message violated the Wiretap Act and as such was subject to suppression. The issue then became whether the evidence derived from that voice mail message was also subject to suppression.

After analyzing the exceptions to the fruit of the poisonous tree exclusionary rule (stated earlier in this brief) the Court ruled that the derivative evidence need not be suppressed, and affirmed the conviction. Although the *Smith* Court focused on the "attenuated basis" exception,

their admonitions are applicable in analyzing the reasoning used by the trial court in granting Miles' suppression motion.

In arguing for suppression, Smith, like the trial court below, advocated an “impetus” test for determining taint. Smith pointed to the district court's “factual finding” that “it's fairly obvious that the intercepted message was the impetus for starting the investigation.” *Smith, id* at 1060.

In rejecting Smith's “impetus” argument the Ninth Circuit talked of the consistently rejected “but for” causation standard in the “fruit of the poisonous tree” doctrine. They noted that the Supreme Court had “declined to adopt a ‘per se or “but for” rule’ that would make inadmissible any evidence . . . which somehow came to light through a chain of causation that began with an illegal arrest.” *Smith, id*, citing *United States v. Ceccolini*, 435 U.S. 268, 98 S.Ct. 1054, 55 L.2d.2d 268 (1978).¹⁷

The test endorsed by the Ninth Circuit was whether “anything seized illegally, or any leads gained from illegal activity, tend[ed] significantly to direct the investigation toward the specific evidence

¹⁷ Other courts have also rejected the “impetus” test. See *United States v. Hoang Anh Thi Duong*, 156 F.Supp.2d 564, 576 (E.D. Virginia,2001)

sought to be suppressed." *Smith, id*, citing *United States v. Cales*, 493 F.2d 1215, 1216 (C.A.Ariz 1974) (emphasis added by *Smith* court.)

Applying this test to the *Miles* case the defense (and the trial court) might be in a more defensible position had the acquisition of bank records through the now-invalidated subpoenas led the State to focus on bank records – such records not having theretofore been an avenue of investigation that would normally have been pursued by the State. In that case the exploitation of the illegally seized records would be obvious.

But such was not the case - there has been neither argument nor evidence nor finding that the bank records seized in the August 2007 search at issue were seized because of anything obtained under the earlier improper subpoena, or for any other motivation other than the suppression order of the Supreme Court. The only facts before the trial court on the issue of motivation was in the affidavit presented to Judge Eadie in support of the requested warrant, where the State noted that bank records, like those sought in the warrant, were routinely sought in virtually every suspected securities fraud or economic crimes investigation involving allegations similar to those in Ms. Gillett's complaint. CP at 274. Similar declarations were made to Judge Armstrong. CP at 235

The error in the trial court's test is demonstrated by comparing that test to the test used by other courts and showing that had the trial court's test been used in those other cases a different outcome would have ensued.

a) Washington Cases

In *State v. Glenn*, 115 Wash.App. 540, 62 P.3d 921 (2003), the defendant confessed to church elders that he was involved with pornography. He confessed to misconduct with specific victims. The defendant later restated his confession in general terms to other church members, but without the specific details. After the meeting he drafted apology letters to the victims on one of the church member's (not a church leader or ordained minister) computer.

The church leaders reported the defendant's acts to the police.

It appears that following the police report the police determined the names of the specific victims both from the church elders to whom the defendant had confessed and from the computer records containing the drafts.

The defendant sought suppression of his statements to the church elder, the letters to the victims, and statements of the victims. He argued that the letters were part of his communication with the elders because they required him to write the letters. He argued that because the victims'

names were obtained from his confession to the elders they were fruit of the poisonous tree.

The trial court suppressed the confession to the elders but admitted the letters and the victim statements/testimony. The appellate court affirmed the ruling both against appeal by the State and cross-appeal by the defendant. The portions of that decision relevant to the *Miles* case can be found at pp. 555-56.

The court rejected the defendant's cross appeal regarding the admission of the victims' statements, claiming they were fruit of the poisonous tree. The court rejected this argument because, they concluded, the State obtained the victims' names from an independent source.

Had the reasoning the trial court used in granting Miles' motion to suppress been applied in the *Glenn* case the State likely would not have prevailed. Under the trial court's reasoning, since the initial report to the police was made by the church elders and all parts of that communication were considered privileged, the State would have had to prove that the police would have "come upon" this matter had the elders not reported it to them. The trial court's reasoning would likely have led to a different result in *Glenn*.

In *State v. Rothenberger*, 73 Wn.2d 596, 440 P.2d 184 (1968), the defendant and another were stopped, arguably illegally, for a routine check to see if the driver had a valid driver's license. The driver did not and was issued a citation. The passenger showed his driver's license and was allowed to drive the car. The police officer subsequently determined that the passenger, now the driver, was wanted on felony charges. The officer radioed ahead, a road block was set up, the car was stopped, and the driver was searched and arrested. Items relating to a burglary were found and charges followed. The defendant argued that the stop was unlawful and his identity would not have been known absent the earlier, arguably illegal stop, and thus the items found in the search of the car should be suppressed as fruits. The Court concluded that even if the original stop were illegal, the officer determined from independent sources that the driver had a warrant for his arrest and affirmed the denial of the suppression motion.

Had the trial court below's reasoning been applied, the State would have been required to show that the second officer would have "come upon" the car without the initial illegal stop. Since there was no evidence to that effect, the trial court's reasoning would have led to a different result in *Rothenberger*.

In *State v. Early*, 36 Wash.App. 215, 674 P.2d 179 (1983), the defendant was convicted as an accomplice to a robbery in Spokane. The Spokane crime occurred on May 23, 1979. About a month later a robbery was committed in North Carolina. In investigating that crime North Carolina police arguably conducted an illegal search. Some of the information seized in that search led to the production by the FBI of an informational flyer. A Spokane County Sheriff's detective saw the flyer and recognized the M.O. of the North Carolina robbery as being similar to the May, Spokane robbery. The detective obtained a photo of the suspect from North Carolina police. The defendant was identified from the photograph by the robbery victims. The defendant sought to suppress any information flowing from the illegal search in North Carolina. She argued that none of the evidence tying her to the crime would have been developed but for the information gathered in the North Carolina search.

The trial and appellate courts concluded that the information used to convict the defendant was all gathered by the Spokane authorities. Assuming arguendo that the North Carolina search was illegal they held that under prevailing law the issue was whether the evidence used to convict the defendant came from exploitation of the evidence seized in North Carolina. The Court explicitly rejected the theory that the test was whether the Spokane investigation began because of the evidence seized in

North Carolina. The test rejected by the Early court is essentially the test espoused by the trial court below - whether the Spokane detective would have come upon the evidence at issue without the North Carolina search. (The Court went on to rule against the defendant because there was no evidence the evidence used against the defendant came from exploitation of the North Carolina evidence.)

b) Non-Washington Cases

Similar results are found by examining cases from outside Washington.

In *United States v. Mulder*, 889 F.2d 239, *supra*, suspected controlled substances were tested in an invalid manner. The results of this test were suppressed on appeal. The government then obtained a warrant to search/re-test the controlled substances. The application for the warrant was not based on the results of the first test or any other information not known before the first test. The defendant's motion to suppress the results of this subsequent warrant was denied. The denial was upheld on appeal.

In reaching this result the Court rejected the defendant's argument that the agents, in seeking the second warrant, must have been affected by their knowledge of the results of the prior, illegal search. The Court's common sense examination of the probable case available to the

subsequent search agents outside the initial test results vitiated this claim by the defendant.

This result is inconsistent with the trial court's "come upon the evidence" test.

(The Mulder decision was cited with approval by the Supreme Court in *State v. Gaines*, 154 Wn.2d 711, 721-22 (2005).)

In *U.S. v. Hanhardt*, 155 F.Supp.2d 840 (N.D. Ill, 2001), cited and drawn upon extensively above, the State illegally searched a briefcase. The results of that search were suppressed in one prosecution (for witness intimidation). The briefcase was then obtained and searched under a subsequent warrant without reliance upon the contents viewed in the first, illegal search, and charges relating to a jewelry theft were filed. Evidence from the briefcase relating to the jewelry thefts was used in the second prosecution.

As noted earlier the *Hanhardt* Court's reasoning and conclusion largely parallel the position of the State in the *Miles* case stated earlier in this brief and will not be repeated here. What will be noted here is that had the trial court below's "would not have come upon the evidence" test been used, the outcome in *Hanhardt* would almost certainly have been different. The trial court below would have required the government in

Hanhardt to prove they would have “come upon” the evidence in the briefcase absent the prior illegal search. From the information contained in the decision it appears likely the government could not have met this burden. But the *Hanhardt* Court did not use this “come upon” test – it used the tried and true tests applied by the other courts viewing this issue – the *Murray* test of whether anything obtained in the prior search motivated the decision to seek a subsequent warrant – was any evidence obtained in the prior search exploited in the second search. Their answer was “no” and they affirmed the trial court’s denial of the suppression motion.

D. If The Trial Court's “Would the State have Come Upon the Evidence” Test is the Appropriate Legal Standard, The State has Met that Test

The legal conclusions of the Court in Paragraphs 2 and 3 are based on the Court's factual conclusion that “[T]here is no evidence the State would have come upon the evidence other than from referral by the Securities Division after its flawed investigation.” This factual conclusion is not supported by substantial evidence.

The trial court first posed that question to the Deputy Prosecuting Attorney making oral argument. The Deputy Prosecutor was not the person to answer the Court’s question during oral argument as to what the Securities Division would have done with Julie Gillette's complaint absent

the subpoena authority. Such a question needed to be answered by the Securities Division itself. It was not apparent, until later, when the court issued its order granting the suppression motion, that the answer to this question was the deciding factor for the court. Thus the State supplied the declaration from Martin Cordell attached to the Motion for Reconsideration. CP at 237-38. (In the reconsideration motion the State also requested that, if the court was not persuaded by Cordell's declaration, an evidentiary hearing be held where the State would call the Securities Division witness in court to answer questions. CP at 234.)

In Cordell's Declaration he states that the Division would have asked Mr. Miles to voluntarily provide his bank records. (In fact this is apparently what the Supreme Court says the Division should have done. *State v. Miles*, 160 Wn. 2d at 249.) Had they done this one of two things would have happened. Either Miles would have provided these records voluntarily in which case there would be no dispute as to the legality of their acquisition, or he would have refused to voluntarily cooperate. CP at 238

Had Miles refused to provide the information voluntarily, Mr. Cordell states the Division would have referred the matter to the Prosecutor's Office for Criminal Investigation. CP at 238. Had that

happened the undersigned Deputy Prosecuting Attorney attested to the trial court that judicially reviewed Special Inquiry Judge Subpoenas would have been issued and the record would have been obtained in a constitutional manner. CP 235, 274.

Thus, in answer to the Court's inquiry as to whether this matter would have come to the Prosecutor's attention absent the information obtained under the invalid subpoenas, the answer is "yes". Even assuming the question the Court poses is the appropriate question, the answer belies the Court's factual conclusion.

Without the factual conclusion that the State would not have come upon this evidence other from referral by the Securities Division after its flawed investigation, the Court cannot justify the legal conclusions reached in Paragraphs 2 and 3 as to the unconstitutionality of the subsequent search.

VI. Conclusion

This court should apply the commonly accepted test for claims of independent source evidence, conclude that there is no evidence the State

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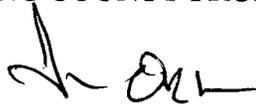
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was motivated to seek the warrant from Judge Eadie by anything obtained via the tainted subpoena, and reverse the trial court's order of suppression and dismissal.

RESPECTFULLY SUBMITTED

DANIEL T. SATTERBERG
KING COUNTY PROSECUTING ATTORNEY

BY:



IVAN ORTON, WSBA No. 7723
Sr. Deputy Prosecuting Attorney
Economic Crimes Unit, Criminal Division
King County Prosecuting Attorney
Attorney for Respondent State of Washington

Orton, Ivan

From: Dworkin, Lisa
Sent: Tuesday, March 04, 2008 11:49 AM
To: Orton, Ivan
Subject: RE: Michael Miles

ok.

From: Orton, Ivan
Sent: Tuesday, March 04, 2008 11:38 AM
To: Dworkin, Lisa
Subject: RE: Michael Miles

If you're there I'll be by in about 10 minutes with an original

Ivan Orton
Sr. Deputy Prosecuting Attorney
Complex Prosecutions & Investigations Division
King County Prosecuting Attorney
Seattle, WA
NOTE NEW EMAIL ivan.orton@kingcounty.gov

From: Dworkin, Lisa
Sent: Tuesday, March 04, 2008 11:06 AM
To: Orton, Ivan
Subject: RE: Michael Miles

Ivan: For some reason, I cannot print the whole version of the copy you sent me. Would you try and send again?
Thanks. Lisa

From: Orton, Ivan
Sent: Tuesday, March 04, 2008 9:10 AM
To: Dworkin, Lisa
Subject: RE: Michael Miles

My mistake - I meant 2.2(b)(2).

Attached is a proposed motion, cert and order. if this is okay I can walk it over to your office later this morning and get it to Judge Armstrong ASAP.

IVAN

From: Dworkin, Lisa
Sent: Tue 3/4/2008 8:58 AM
To: Orton, Ivan

ATTACHMENT A

6/30/2008

Subject: RE: Michael Miles

Ivan: By agreeing to a dismissal under RAP 2.3(b)(2), you are essentially asking us to agree to a motion for discretionary review and agree to the fact that the court committed error.. We cannot do that. What we propose is a dismissal under 2.2 (b)(2). Does that make sense?

I am leaving at 1:30 for a doctor appt. way up north and will not be back this afternoon. Is it possible to get this resolved before I leave so I know if I need to meet you in the a.m. to go to Kent?

Thanks. Lisa

From: Orton, Ivan
Sent: Monday, March 03, 2008 3:20 PM
To: Dworkin, Lisa
Subject: RE: Michael Miles

Yes, the ultimate result is a dismissal under RAP 2.3(b)(2). I'll talk to Jim Whisman (our appellate guy) as early as he's available on Tuesday and then send you a proposed motion and order for review if we're going to do what I'm currently thinking.

Ivan Orton
Sr. Deputy Prosecuting Attorney
Complex Prosecutions & Investigations Division
King County Prosecuting Attorney
Seattle, WA
NOTE NEW EMAIL ivan.orton@kingcounty.gov

From: Dworkin, Lisa
Sent: Monday, March 03, 2008 2:54 PM
To: Orton, Ivan
Subject: RE: Michael Miles

Ivan: This is fine with me so long as a dismissal order is entered. I assume that is what you have in mind? Yes?
Lisa

From: Orton, Ivan
Sent: Monday, March 03, 2008 1:21 PM
To: Dworkin, Lisa
Subject: Michael Miles

In the most recent version of her suppression order (sent last Friday) Judge Armstrong denied Kevin's request for a dismissal of all counts, holding that:

Even though it suppressed the defendant's bank records obtained from Washington Mutual, the Washington Supreme Court observed that there may be sufficient additional evidence to support a charge. The Court stated "The State already validly possessed the cancelled checks from Gillett [the complainant] along with her statement, which supports the filing of some charges." The State should be given the opportunity to prove charges against the defendant without bank records or the fruits of its two unlawful searches.

Based on the foregoing, IT IS HEREBY ORDERED that the motion to suppress is GRANTED and the motion to dismiss is DENIED.

6/30/2008

Based on my evaluation of the potential case we have left involving Julie Gillett (the original complainant) it is my preliminary thought that we will be requesting that Judge Armstrong make a finding under RAP 2.3(b)(2) that the practical effect of the suppression order is to terminate the case in its entirety. I need to talk to our appellate expert who is unavailable until Tuesday before making a final decision on this but wanted to know if you would object to such a request. If you have no objection I assume we could make this request and get a resolution on Tuesday sufficient so that we would not need to go to Kent on Wednesday.

Whatta you think?

Ivan Orton
Sr. Deputy Prosecuting Attorney
Complex Prosecutions & Investigations Division
King County Prosecuting Attorney
Seattle, WA
NOTE NEW EMAIL ivan.orton@kingcounty.gov

6/30/2008

Orton, Ivan

From: Orton, Ivan
Sent: Tuesday, March 04, 2008 12:05 PM
To: Court, Armstrong
Cc: Dworkin, Lisa
Subject: Scanned document from Orton, Ivan (ortoniv)

Attachments: CANONFRAUD_EXCHANGE_03042008-115958.PDF

Erica,

Attached is a signed final copy of the draft order I sent you earlier. Please let Lisa and I know as soon as you know whether this excuses us from appearing in court tomorrow morning.

Ivan Orton
Sr. Deputy Prosecuting Attorney
Complex Prosecutions & Investigations Division King County Prosecuting
Attorney Seattle, WA NOTE NEW EMAIL ivan.orton@kingcounty.gov

-----Original Message-----

From: Orton, Ivan
Sent: Tuesday, March 04, 2008 12:03 PM
To: Orton, Ivan
Subject: Scanned document from Orton, Ivan (ortoniv)



CANONFRAUD_EXC
ANGE_03042008-1.

ATTACHMENT B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

MICHAEL M. MILES,

Defendant.

No. 03-1-09574-1 SEA

STATE'S MOTION, CERTIFICATION AND
AGREED ORDER TERMINATING THE
CASE UNDER RAP 2.2(b)(2) AND
DISMISSING ALL COUNTS

MOTION

The State of Washington, Plaintiff, moves this Court for an Order Terminating the Case under RAP 2.2(b)(2), Dismissing all Counts. This Motion is based on the below Certification.

DANIEL T. SATTERBERG, King County Prosecuting Attorney

By


IVAN ORTON, WSBA No. 7723
Senior Deputy Prosecuting Attorney
Complex Prosecutions and Investigations Division
King County Prosecuting Attorney

CERTIFICATION

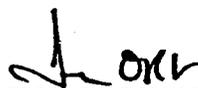
I am a Senior Deputy Prosecuting Attorney, assigned to this matter. I am familiar with this case and would be the prosecutor at trial on any of the charges remaining, following this Court's Order Amended Order on Suppression and Dismissal.

In that order this court declined to dismiss the count(s) involving victim Julie Gillett citing the Supreme Court's assessment that the evidence received from her before the subpoenas at issue were issued supported the filing of some charges. The court concluded that the State should be given the opportunity to prove charges against the defendant without bank records or the fruits of its two unlawful searches.

While the State is in agreement with both the Supreme Court and this court in concluding that the evidence exclusive of that obtained from or subsequently derived from the bank records supports the filing of some charges, the State has concluded that the likelihood of success at trial without the bank records and the evidence derived from those records is so limited as to make trial a futile act. As such we conclude that the practical effect of the court's Amended Order on Suppression and Dismissal is to terminate the entire case and request this court to explicitly so find.

Under penalty of perjury under the laws of the State of Washington I certify that the foregoing is true and correct.

Signed by me this 4th day of March, 2008 at Seattle, Washington.



IVAN ORTON, WSBA No. 7723
Senior Deputy Prosecuting Attorney
Complex Prosecutions and Investigations Division
King County Prosecuting Attorney

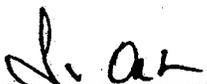
ORDER

Based on the Motion of the State of Washington and the agreement of the parties, under RAP 2.2(b)(2) this court explicitly finds that the practical effect of the Court's Amended Order on Suppression and Dismissal is to terminate the case in its entirety. As a consequence, all counts are dismissed.

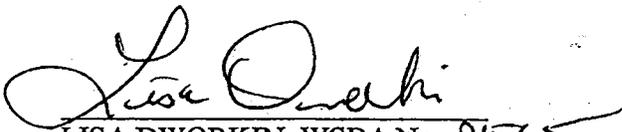
DONE IN OPEN COURT this _____ day of March, 2008.

JUDGE SHARON ARMSTRONG

Entry of Order Approved:



IVAN ORTON, WSBA No. 7723
Senior Deputy Prosecuting Attorney
Complex Prosecutions and Investigations Division
King County Prosecuting Attorney



LISA DWORKIN, WSBA No. 21565
Attorney for Defendant

Counsel, I have reviewed your proposed order. I cannot make the finding that "the practical effect of the Court's . . . Order is to terminate the case in its entirety." That is a decision for the Prosecuting Attorney who is familiar with the evidence, not the court. I am prepared to dismiss the case in the format attached. If the case is dismissed there would be no purpose to holding an omnibus hearing and the trial date would be stricken.

If you wish me to sign the order of dismissal in the format I have approved, please advise.

Judge Sharon S. Armstrong

King County Superior Court
Norm Maleng Regional Justice Center, 4C
Phone: 206-296-9363
Sharon.Armstrong@kingcounty.gov

From: Court, Armstrong

Sent: Tuesday, March 04, 2008 10:21 AM

To: Armstrong, Sharon

Subject: FW: State v. Michael Miles, 03-1-09574-1 SEA

Importance: High

Judge Armstrong,

Please see the e-mail below and let me know how you would like me to respond.

Thanks,

Erica Emory Sumioka

Bailiff and Law Clerk
Honorable Sharon S. Armstrong
King County Superior Court
Norm Maleng Regional Justice Center, 4C
Phone: 206-296-9363
Fax: 206-205-2669
Armstrong.Court@kingcounty.gov

From: Orton, Ivan

Sent: Tuesday, March 04, 2008 10:16 AM

To: Court, Armstrong; Dworkin, Lisa

Subject: RE: State v. Michael Miles, 03-1-09574-1 SEA

Erica

Attached is an unsigned copy of a proposed motion, cert and agreed order terminating the case and dismissing all counts. Ms. Dworkin has informed me she will sign this (as will I of course). I can get an electronic version of the signed document to you by around noon.

Would you check with Judge Armstrong and see:

1) Will she sign this

2) If so, since that terminates the case, the omnibus hearing and the trial date should be stricken. Can we thus NOT appear at the omnibus hearing scheduled for tomorrow morning?

IVAN

ATTACHMENT C

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

MICHAEL M. MILES,

Defendant.

No. 03-1-09574-1 SEA

STATE'S MOTION, CERTIFICATION AND
AGREED ORDER TERMINATING THE
CASE UNDER RAP 2.2(b)(2) AND
DISMISSING ALL COUNTS

MOTION

The State of Washington, Plaintiff, moves this Court for an Order Terminating the Case under RAP 2.2(b)(2), Dismissing all Counts. This Motion is based on the below Certification.

DANIEL T. SATTERBERG, King County Prosecuting Attorney

By IVAN ORTON, WSBA No. 7723
Senior Deputy Prosecuting Attorney
Complex Prosecutions and Investigations Division
King County Prosecuting Attorney

CERTIFICATION

I am a Senior Deputy Prosecuting Attorney, assigned to this matter. I am familiar with this case and would be the prosecutor at trial on any of the charges remaining, following this Court's Order Amended Order on Suppression and Dismissal.

In that order this court declined to dismiss the count(s) involving victim Julie Gillett citing the Supreme Court's assessment that the evidence received from her before the subpoenas at issue were issued supported the filing of some charges. The court concluded that the State should be given the opportunity to prove charges against the defendant without bank records or the fruits of its two unlawful searches.

While the State is in agreement with both the Supreme Court and this court in concluding that the evidence exclusive of that obtained from or subsequently derived from the bank records supports the filing of some charges, the State has concluded that the likelihood of success at trial without the bank records and the evidence derived from those records is so limited as to make trial a futile act. As such we conclude that the practical effect of the court's Amended Order on Suppression and Dismissal is to terminate the entire case and request this court to explicitly so find.

Under penalty of perjury under the laws of the State of Washington I certify that the foregoing is true and correct.

Signed by me this ____ day of March, 2008 at Seattle, Washington.

IVAN ORTON, WSBA No. 7723
Senior Deputy Prosecuting Attorney
Complex Prosecutions and Investigations Division
King County Prosecuting Attorney

ORDER

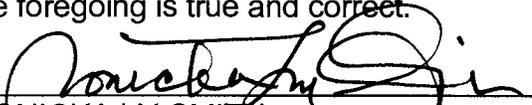
Based on the Motion of the State of Washington and the agreement of the parties,
all counts are dismissed.

DONE IN OPEN COURT this _____ day of March, 2008.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, the attorney for the respondent, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of **Brief of Appellant**, in STATE V. MICHAEL M. MILES, No. 61474-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



MONICKA LY-SMITH
Done in Seattle, Washington

11/6/09
Date