

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.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SHARON ARMSTRONG

REPLY BRIEF OF APPELLANT

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FILED
COURT OF APPEALS
DIVISION I
2010 MAR 29 PM 4:53

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I. Introduction

The Appellant, State of Washington, files this Reply to the Defendant's Response Brief ("Response Brief").

II. Issues Raised in Response Brief, Addressed in this Reply

This brief replies to the following issues raised in the Response:

- This is an inevitable discovery case, not an independent source case;
- Evidence, once suppressed is forever suppressed;
- The proper measure of motivation under *Murray*;¹
- The findings of the trial court.

III. Statement of the Case

Because much of the defendant's argument centers on Washington's rules regarding suppression of illegally obtained evidence, it is important to distinguish the two seizures that occurred in this case and the records obtained in each seizure.

A. The Initial Illegal Administrative Subpoena and Records Obtained via Illegal Administrative Subpoena in June 2001

In June 2001, the Securities Division of the Washington Department of Financial Institutions obtained records via administrative subpoena from Washington Mutual Bank, of the banking activity of the defendant Michael Miles. CP 273. Although authorized by statute, the Supreme Court found this subpoena to be in violation of Const. art. I, § 7.

¹ *Murray v. United States*, 487 U.S. 533, 542, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988).

State v. Miles, 160 Wn.2d 236, 156 P.3d 864 (2007).

This initial seizure will be hereinafter referred to as the “illegal administrative subpoena” and the records suppressed will be referred to as the “records obtained via illegal administrative subpoena.”

B. Records Obtained via Illegal Administrative Subpoena Released from State Control and Returned to Bank

Following the mandate, the State relinquished control of and returned the records obtained via illegal administrative subpoena to the party from whom they had been obtained, Washington Mutual Bank. CP 273.

C. Records Obtained by Valid Search Warrant

After returning the records obtained via illegal administrative subpoena, the State sought a search warrant. CP 273-92.

The search warrant did not call for the production of the previously seized documents. CP 271, 274, 293-94. The warrant called for copies of records maintained by Washington Mutual as required by federal law.

CP 274. The warrant specifically called for the production of:

For all accounts in the name of MM Miles, Michael M. Miles or Michael Miles, active in November and December, 1999, for the period of time from when the accounts were open until the present:

- Signature Cards
- Monthly Statements
- Withdrawal Items including offsets
- Deposit slips and deposit items including offsets

- Information on any loans including applications
- Correspondence

CP 293-94.²

To distinguish this subsequent seizure from the illegal administrative subpoena, this seizure is referred to as the “valid search warrant.”³

D. Records Received under Valid Search Warrant

In response to the search warrant Washington Mutual provided records covered by the warrant. These will be referred to as “records received under valid search warrant.”

IV. Argument

The defendant finds himself in a difficult legal position.

In a recent case relied on by the defendant, *State v. Winterstein*, 167 Wn.2d 620, 633-34, 220 P.3d 1226 (2009), the Court, while striking down the inevitable discovery rule, reaffirmed Washington’s long-standing tradition of recognizing the independent source doctrine as an exception to the exclusionary rule. In the face of this decision, Miles seeks to cloak himself with the *Winterstein* ruling by magically transforming this case into an inevitable discovery case. Response Brief at 13-27.

² As noted in the application to Judge Eadie for the valid search warrant, in producing its records responsive to the warrant, the bank was given the option of submitting some or all of the returned records.

³ While the defendant challenges the motivation for obtaining this warrant, he has never challenged the facial validity of the warrant, i.e., that there was probable cause for issuance of the warrant and that none of the information derived from the records obtained via illegal administrative subpoena were presented to the search warrant judge.

In the face of long-standing recognition in Washington that the independent source exception to the exclusionary rule, and *Murray*'s two-pronged analysis of that doctrine is compatible with Const. art. I, § 7, the defendant attempts to argue that other factors outside the *Murray* test should measure whether a subsequent valid search warrant is independent of earlier illegal activity.

In the face of a finding by the Commissioner that the trial judge did not use the correct legal standard in deciding this issue, *Commissioner's Ruling Granting Discretionary Review, Slip Op.* at 8-9, ("*Commissioner's Ruling*"), the defendant, rather than defending the trial court's reasoning, retreats to arguing that the trial court's decision can be affirmed on other bases, specifically his claim that this is an inevitable discovery case. Response Brief at 14.

In the absence of any rulings by the trial court on the second prong of the independent source doctrine enunciated in *Murray v. United States*, 487 U.S. 533, 542, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988) (was the decision to seek the warrant prompted by what had been seen in the earlier illegal search), the defendant seeks to turn the trial court's statements made under an inappropriate legal standard into findings of fact prejudicial to the State. Response Brief at 28-41.

In short, the defendant, finding himself on the wrong side of fed-

eral and Washington precedent, views the world through his own curious looking glass and concludes that everyone else's view is distorted.

A. The Two Different Searches and the Two Different Seizures

In the Statement of the Case above, the State distinguished the illegal administrative subpoena and the records obtained via illegal administrative subpoena – the initial seizure in June 2001 -- from the valid search warrant and the records received under valid search warrant – the subsequent seizure in September 2007. It is important to keep this difference in mind because the defendant is often not careful, in his argument and application of case law, to explain which seizure he is referring to.

B. This is an Independent Source Case

1. The Difference Between The Independent Source And Inevitable Discovery Doctrines

What is the singular difference between the Independent Source doctrine and the Inevitable Discovery doctrine? The State, in its opening brief at 18-19, cited case and treatise authority for the proposition that the primary difference is that “the [independent source doctrine] focuses on what actually happened and the [inevitable discovery doctrine] focuses on what would have happened in the absence of the initial search.” *United States v. Herrold*, 962 F.2d 1131, 1140 (3d Cir. 1992).

Rather than responding to this argument and legal authority, the defendant, in his response brief, sets out his own theory of these two doc-

trines – one that turns on whether there was an initial illegal seizure. The defendant’s theory conflicts with every court decision that has discussed the differences between the two doctrines.

2. How Does The Defendant Support His Theory

The defendant’s sole legal support for his proposition (that the inevitable discovery, not the independent source, doctrine applies when evidence was actually illegally seized) is a footnote in *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005) wherein the Court referenced the observation in *State v. Coates*, 107 Wn.2d 882, 887, 735 P.2d 64 (1987) that the inevitable discovery doctrine is applicable only if evidence has been seized illegally.⁴

A more correct assessment of the cited language in *Coates* is that examination of the inevitable discovery doctrine is not necessary if the court determines that the “inevitably discovered” evidence was in fact legally seized. In *Coates*, where the admissibility of the murder weapon was in dispute, the knife had been obtained under a search warrant issued following an illegal interrogation of the defendant. 107 Wn.2d 886. The defendant claimed that the only basis for admitting the knife was the inevi-

⁴ One would think that if the Supreme Court, as the defendant contends, actually intended to hold that Const. art. I, § 7 requires a different interpretation than the United States Constitution as to when the independent source doctrine applies they would have done so in some manner other than a summary sentence in a footnote.

table discovery doctrine and claimed that doctrine was inconsistent with Const. art. I, § 7. *Id.* The statement cited to by Miles and the *Gaines* court was simply the *Coates* court stating that they need not reach that issue if the evidence was in fact legally seized. The statement, in context, can in no way be interpreted to be the “signaling” of a different understanding the defendant claims in Response Brief at 14.

The *Coates* court went on to find that that the search warrant challenged in that case could be upheld because, after excluding the defendant's illegally obtained statement, the remaining information in the warrant affidavit independently established probable cause to believe the weapon was in his car. *Id.* at 887. In short, the weapon was ultimately validly seized and a discussion of inevitable discovery was unnecessary.

Similarly, the *Gaines* court determined that the inevitable discovery doctrine need not be decided because they determined, *using the independent source doctrine*, that the evidence was ultimately validly seized. *Gaines*, 154 Wn.2d at 718-19. The *Gaines* court does not “signal” a different understanding of the significance of an initial illegal seizure. *Gaines* stands four square against the novel theory argued by the defendant.

Although *Coates* and *Gaines* both involved situations where no evidence was initially seized, the crucial issue for both courts was not, as

the defendant contends, whether the evidence was illegally seized earlier, but whether it was ultimately legally seized – in *Coates* by excising the offensive portions of the affidavit and concluding the affidavit still established probable cause, and in *Gaines* by application of the independent source doctrine. If it was ultimately legally seized, the inevitable discovery rule is not applicable.

On this crucial issue, the case before this court is identical to the issue before the *Gaines* court – was the evidence ultimately legally seized under a valid warrant. If so, it is admissible and there is no need to discuss the inevitable discovery doctrine.

The defendant also asserts that *Gaines* “implicitly recognized” that an initial illegal seizure (as in the case before this court) was a greater intrusion than the glance involved in *Gaines*. Response Brief at 15-16.

Note initially that it is hard to understand where the defendant finds support for his claim of implicit recognition of a greater intrusion in *Gaines*. The citation is to *Gaines* at 721. There is but one reference to the glance on p. 721, a reference that in no way compares the intrusion of a glance vs. a seizure.

Not only is there no legal basis for the defendant’s assertion, there is no logical basis. Keep in mind that nothing was seized from the defendant in this case. The initial seizure under the administrative subpoena

was from Washington Mutual, of *copies* of records of the defendant's transactions held by the bank. The defendant was not deprived of anything except his privacy. That privacy would be equally invaded by the police *viewing* those records as it would by the police *seizing* the records. And yet the defendant would allow the independent source doctrine to apply if all the police had done was illegally *view* the records. It is a distinction without a difference, both legally and logically.

C. The Defendant's Novel "Once Suppressed, Forever Suppressed" Theory is Not Supported Either Legally or Logically

The defendant states repeatedly that Washington's exclusionary rule requires suppression of illegally seized evidence, e.g., Response Brief at 9-10. It is here where the defendant fails to distinguish between the records obtained via illegal administrative subpoena in June 2001 and the records received under valid search warrant in September 2007. In light of the Supreme Court's ruling in *Miles*, 160 Wn.2d 236, all would agree that both the federal and state constitution mandate exclusion of the records obtained via illegal administrative subpoena. But the exclusionary rule requires a finding that the evidence at issue was illegally seized. The evidence at issue in this case is not the records obtained via illegal administrative subpoena, it is the records received under a valid search warrant. The defendant must do more than circularly cite the exclusionary rule as a

basis for concluding the records received under valid search warrant were illegal. The exclusionary rule only applies once an illegality is found. It is a result, not a determinant.

How does the defendant deal with the valid search warrant? He ignores it. (“The fact that the State later obtained the ill-gotten evidence again is of no moment. . . .” Response Brief at 10.) Under the defendant’s theory, if evidence was illegally seized it is *forever excluded* no matter how it was subsequently obtained or how attenuated the second seizure was from the first.

1. The Defendant’s “Once Suppressed, Forever Suppressed” Theory Is Not Logically Supportable

Examine the logical implications of the defendant’s argument in the following scenarios.

Assume the suspect is the suspect in a homicide where the murder weapon is crucial to the State’s case. The police illegally seize the weapon. The prosecutor reviews the facts of the seizure, concludes the seizure was illegal, and declines prosecution. The weapon is returned to the suspect. Two years later the suspect is legally arrested on another matter. The weapon from the earlier case is found in a legal search incident to arrest. Miles would argue that the weapon cannot be used in the earlier homicide because once illegally seized, it is forever excluded.

Or, alternatively, two weeks after the weapon is returned to the suspect, the suspect's live-in girlfriend finds the weapon in the suspect's dresser drawer and without any prompting from the police, turns the weapon over to the police. Again, the defendant in the case before this court would argue that the weapon is inadmissible because once illegally seized, it is forever excluded.

Or assume a suspect in a burglary is known to have stayed in a motel near residences he burglarized on previous occasions. Following a new burglary, police visit the motel nearest the most recent burglary and without a warrant or other legal authority, obtain a copy of the motel registry showing the suspect stayed at the motel on the night in question. The prosecutor, on learning of this, draws the police's attention to *State v. Jordan*, 160 Wn.2d 121, 156 P.3d 893 (2007) (outlawing such a view of the motel register) and encourages them to apply for a search warrant. Using evidence they had developed prior to obtaining the copy of the motel register, the police apply for and obtain a search warrant to obtain a copy of the same page in the motel register. Miles would argue the second copy was inadmissible because once illegally seized, it is forever seized.

Whether obtained directly from the defendant or from a third party, whether the same evidence or copies of the original source, none of these scenarios seem logically to demand the exclusion of the ultimately legally

seized evidence so long as the information obtained initially was not involved, either as motivation for or used in, the ultimate legal acquisition and yet Miles' theory would mandate exclusion.

2. There Is No Legal Basis For The Defendant's Once Suppressed, Forever Suppressed Theory

Initially, the defendant argues that a court decision holding evidence to have been illegally obtained cannot be the impetus for seeking a legal means to obtain evidence. Response Brief at 10. The defendant provides no legal support for this assertion, only a general citation to the exclusionary rule, completely unrelated to whether a court decision can be the impetus for seeking a valid search warrant. As explained in the State's opening brief, *United States v. Hanhardt*, 155 F.Supp.2d 840, 849 (N.D. Ill, 2001), *United States v. Mulder*, 889 F.2d 239, 241 (9th Cir. 1989) and *United States v. Johnson*, 994 F.2d 980, 987 (2nd Cir. 1993) are in direct opposition. Miles attempted to distinguish *Hanhardt* by arguing that the evidence discovered via the subsequent legal search in *Hanhardt* led to new charges against the defendant. Response Brief at 37. Without conceding this as a valid distinction, it in no way distinguishes *Hanhardt's* conclusion that it is proper, in an independent source case, for the motivation for the subsequent search to be an intervening court decision. Miles makes no attempt to distinguish *Mulder* and argues only in a footnote, Re-

response Brief at 22, n.3, that *Johnson* did not rely on a court decision suppressing evidence. Technically correct, but barely. In a suppression hearing, the District Court Judge suppressed some evidence and expressed concern about whether the tapes in question had been legally seized. (The issue of whether the tapes had been legally seized was not before the court.) This motivated the government to get a valid warrant. “The district court expressed concern that the review of the tapes might not be allowed as incident to arrest, prompting the government to apply for a warrant to review the tapes.” *Johnson*, at 982.

Then Miles argues at p. 15 of Response Brief that *Gaines*, 154 Wn.2d at 716, n.5, 717 and 720, drew a distinction between evidence seized in the earlier illegal search and evidence observed during the earlier search. The statement at 716, n.5 was addressed in section IV.B.2 above. The *Gaines* comment at 717 recognized that the gun was not seized from the trunk during the initial search, but was seized under the independent source warrant but this was to distinguish it from cases where the evidence was seized illegally, with no subsequent legal seizure. Finally, *Gaines* at 720 does note that both *Coates* and *Gaines* involved situations where the evidence was not seized during the initial illegal search, only during the subsequent legal search. But there is not the slightest indication in *Gaines* that this factual description results in the momentous separation from ex-

isting independent source law the defendant claims. Neither in *Gaines* nor any other decision can the defendant point to language suggesting the interpretation he puts forth.

3. The Defendant Does Not Do A *Gunwall* Analysis To Support His Argument That Const. Art. I, § 7 Forever Excludes Evidence Once Illegally Seized

The defendant admits his view of the independent source doctrine is contrary to interpretation of that doctrine under the United States Constitution (see Response Brief at 14, citing *Murray*, 487 U.S. at 542.) The portion of *Murray* referenced by the defendant is directly contrary to the defendant's contention.

It seems to us, however, that reseizure of tangible evidence already seized is no more impossible than rediscovery of intangible evidence already discovered. The independent source doctrine does not rest upon such metaphysical analysis, but upon the policy that, while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied.

Furthermore, Washington courts applying the independent source doctrine have consistently adopted the rules established by *Murray*. See *State v. Gaines*, 154 Wn.2d 711, 717-18, 721; *State v. Sadler*, 147 Wn. App. 97, 126-27, 193 P.3d 1108 (2008); *State v. Spring*, 128 Wn. App. 398, 402-06, 115 P.3d 1052 (2005); *State v. Smith*, 113 Wn. App. 846, 855-56, 55 P.3d 686 (2002), *rev. denied*, 149 Wn.2d 1014 (2003); *State v. Hall*, 53 Wn. App. 296, 304-05, 766 P.2d 512 (1989).

The defendant attempts to sidestep his responsibility to provide a *Gunwall*⁵ analysis when arguing Const. art. I, § 7 provides greater protection than the Fourth Amendment in the independent source arena. He claims that since the Court has already held that Const. art. I, § 7 provides broader protection than the Fourth Amendment, no *Gunwall* analysis is required. But the Court's pronouncements on when a *Gunwall* analysis is not required are not as broad as the defendant desires and claims.

Absent controlling precedent, a party asserting a provision of the state constitution offers more protection than a similar provision in the federal constitution must persuade the court this is so by means of the analysis set forth in *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808, 76 A.L.R.4th 517 (1986). . . . Once this court has conducted a *Gunwall*-type analysis and has determined that a provision of the state constitution ***independently applies to a specific legal issue***, in subsequent cases it is unnecessary to repeat the *Gunwall*-type analysis ***of the same legal issue***. [Citations omitted.] It is already well established that article I, section 7, of the state constitution has broader application than does the Fourth Amendment of the United States Constitution. [Citations omitted.] In *City of Seattle v. Mesiani*, 110 Wash.2d 454, 755 P.2d 775 (1988), article I, section 7, was interpreted independently of the Fourth Amendment ***in the context of the same legal issue which is present in this case, namely warrantless stops of automobiles for the purpose of investigation***. *Mesiani*, 110 Wash.2d at 457, 755 P.2d 775. Therefore, pursuant to established precedent governing this case, we appropriately turn directly to an examination of article I, section 7. (Emphasis added.)

⁵ *State v. Gunwall*, 106 Wn.2d 54, 67, 720 P.2d 808 (1986), providing a principled rather than arbitrary basis for determining whether an issue merits independent state constitutional interpretation.

State v. Ladson, 138 Wn.2d 343, 348-49, 979 P.2d 833 (1999).

To avoid a *Gunwall* analysis it is not sufficient merely to indicate that the Court has interpreted Const. art. I, § 7 broader than the Fourth Amendment, such interpretation must have done so *in the context of the same legal issue which is present in this case*, namely whether the scope of the independent source doctrine is narrower under Const. art. I, § 7 than under the Fourth Amendment. While the defendant claims it is the State that seeks an “unprecedented and unjustified expansion of the independent source doctrine” (Response Brief at 23), it is in fact the defendant who seeks an unprecedented and unjustified constriction of that doctrine. Every Washington case interpreting Const. art. I, § 7 in the context of the independent source doctrine has expressly found that the doctrine established by *Murray* comports with Const. art. I, § 7. *See e.g., Gaines*, 154 Wn.2d 718; *Smith*, 113 Wn. App. 855-56. It is incumbent upon the defendant to do at least some form of *Gunwall* analysis before this court should consider his claim for an interpretation of the independent source doctrine inconsistent with prior federal and state interpretations.

D. The Defendant Acknowledges that Under Both the United States and Washington Constitutions the Independent Source Doctrine Properly Balances the Individual’s Privacy Interest and the State’s Interest in Prosecuting Criminal Activity

The defendant acknowledges at p. 12 of his Response Brief that

under both the Fourth Amendment and Const. art. I, § 7, proper application of the independent source leaves the State in “no better or worse position as a result of the illegal search.” *Winterstein*, 167 Wn.2d 634 (citing *Gaines*, 154 Wn.2d 720). But, he argues, such a balance becomes relevant only after the tainted evidence is disregarded. This is but one of many instances where the defendant, by oversight or by intent, fails to distinguish the tainted evidence, the records obtained via illegal administrative subpoena, from the untainted evidence, the records received under valid search warrant. *Gaines* at 720 engages in the precise balancing the defendant derides, as a way of determining whether evidence seized legally following an earlier illegal search should be admitted. The tainted evidence is discarded and the court balances the competing interests in determining whether the challenged evidence, obtained legally following the earlier illegality, should be admitted.

E. The Defendant Simply Disagrees with the Independent Source Doctrine

At oral argument on the State’s Motion for Discretionary Review, the Commissioner observed that defendant’s objection seemed to be aimed at the independent source doctrine itself, not its application in this case.

Evidence that the defendant’s primary objection is the doctrine itself, not merely its application, permeates the Response Brief. For example, at page 26 he cites to commentators who have questioned the reason-

ing of *Murray*. His argument regarding fruit of the poisonous tree and *Wong Sun*⁶ at Response Brief, pp. 19-28 is equally illustrative of his fundamental objection to the independent source doctrine. *Murray* and its progeny make it clear that any “fruit of the poisonous tree” analysis of evidence seized legally following an earlier illegality is subsumed within the independent source doctrine, and the question of whether the later seized evidence comes from an independent source is measured by the two-prong test of *Murray*.⁷ But the defendant asserts a broader concept of the fruits of the poisonous tree doctrine than allowed under the independent source doctrine of *Murray*, repeatedly endorsed by Washington courts.

Notwithstanding the two-pronged *Murray* test accepted by Washington courts, *State v. Spring*, 128 Wn. App. 398, 402-03, 115 P.3d 1052 (2005), quoting *Murray* at 542

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. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry

⁶ *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

⁷ Was the magistrate's decision to issue the warrant affected by, or in reliance on, information obtained from an illegal search, and was the officer's decision to seek a warrant prompted by what he had seen during the illegal search? *United States v. Markling*, 7 F.3d 1309, 1315-16 (7th Cir. 1993), and *United States v. Herrold*, 962 F.2d 1131, 1141-44 (3rd Cir. 1992), discussing *Murray*.

was presented to the Magistrate and affected his decision to issue the warrant.

the defendant wants to ask and answer the question of whether evidence was obtained by a warrant independent of the unlawful action, using criteria outside the independent source doctrine. See discussion in Response Brief at pp. 19-28.

At bottom, the defendant is objecting to the independent source doctrine itself. In the face of Supreme Court decisions like *Gaines*, 154 Wn.2d 720, where the Court considered and rejected arguments similar to the defendant's ("Nevertheless, petitioners argue that exclusion of the trunk's contents is mandatory and that allowing a later warrant to authorize introduction of evidence first discovered by the police as a result of an illegal act would vitiate constitutional protections. Assuming application of some exclusionary remedy is appropriate, such remedy was provided here by striking all references to the initial, illegal search of the trunk from the warrant affidavit when assessing whether probable cause existed to issue the warrant. . . . This remedy finely balances the rights of the accused with society's interest in prosecuting criminal activity and ensures that the State is placed in neither better nor worse position as a result of the officers' improper actions.") (citation omitted) and the very recent Supreme Court decision in *Winterstein*, 167 Wn.2d 633-34, reaffirming the Court's

long-standing recognition of the compatibility of Const. art. I, § 7 with the independent source doctrine as an exception to the exclusionary rule, the defendant seems to want to fight a battle that has already been decided.

F. The Defendant Fails to Respond to the State's Analysis of the Measure of the Motivational Prong of *Murray*

In its opening brief at 24-29, the State provided an extensive analysis of the various wordings of the motivational prong of *Murray*, 487 U.S. 533. Using both logical and legal analysis, the State argued that the motivational prong measures just that – motivation. Was the State prompted or motivated by anything seen in the original illegal search, to request the subsequent warrant. One short-hand measure of motivation some courts have used is whether the State would have sought a warrant absent the illegal search. But, the State argued, the search warrant question is not *sine qua non* for a finding of the absence of improper of motivation, it is but one measure.

The defendant in his Response Brief, makes no reference to, and does not seek to rebut any of the State's arguments. Instead he simply restates his mantra that whether the State intended to seek a warrant all along is the *only* issue under the motivational prong. He cites cases where courts used that measure but provides no legal citation for his proposition that this is the *only* measure.

G. “Findings” of the Trial Court

The defendant spends 14 of the 45 pages of his brief attempting to persuade the reader that the trial court made factual findings that are both prejudicial to and binding on the State without regard to the fact that the court structured its inquiry by “ask[ing] and answer[ing] a different question” than that required by the independent source doctrine. *Commissioner’s Ruling*, at 8-9. The defendant never explains why any conclusion reached by the trial court when using an erroneous test, is of any value.

What findings/conclusions did the trial court reach? The crucial finding is number 2, CP 259-60, which states:

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.

Note initially, as the State has argued from its first brief to the trial court on this issue up through this brief, and as concluded by the Commissioner in granting the State’s Motion for discretionary review, *Commissioner’s Ruling*, at 8-9, the trial court’s “come upon” test is simply the wrong test for determining independent source questions. Because the trial court’s standard asks and answers the wrong question, any findings made under that standard are of limited, if any, use in applying the correct legal standard which asks a different question – the correct question –

whether in seeking the search warrant the State was motivated by what was obtained via the admittedly illegal administrative subpoena.

The defendant claims the trial court found the State would not have sought a warrant absent the illegal search.⁸

Of course the State's primary response is that the trial court's responsibility under *Murray*, as repeatedly urged by the State, CP 226-38, was to determine whether in seeking the search warrant the State was motivated by what was obtained via the admittedly illegal administrative subpoena.

But if the issue of whether the State would have sought a warrant has any bearing on the issue before this court, the State suggests that any implicit finding by the trial court that the State would not have sought a warrant is not supported by "substantial evidence," i.e., "evidence sufficient to persuade a fair-minded, rational person of the truth of the finding." *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). The trial court first posed the question of what would have happened, absent the illegal subpoena, at the end of oral argument, when it asked "[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.

⁸ The defendant actually states both that the trial court made no finding on this issue, Response Brief at 30, and that the trial court did make a finding adverse to the State, Response Brief at 32.

The State said that this question could best be answered by the Securities Division and, in its Motion for Reconsideration, attached a Declaration from Martin Cordell, Chief of Enforcement for the Washington State Department of Financial Institutions, Securities Division, in which 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.

This was the only evidence before the trial court. The defendant presented no evidence on this issue. Because the trial court did not comment on Cordell's Declaration, CP at 257, and because the trial court never framed the issue as to whether the State would have sought a search warrant, it is difficult to fathom the defendant's argument that the trial court made findings prejudicial to the State.

On the correct issue of whether, in seeking the valid search warrant, the State was motivated by what had been seen under the illegal administrative subpoena, the defendant states that the trial court simply disbelieved the State's representations. Response Brief at 34. In a curious twist of logic, the defendant contends that when the question is whether the State was motivated by the illegally observed records, the absence of a finding to the contrary, i.e., that the State was *not* motivated by the illegal observation, is a finding against the State. Response Brief at 34-35. The

trial court made no finding on this issue, not because it disbelieved the State but because it used an erroneous legal standard that “asked and answered” the wrong question.

To the extent this is a finding of fact (that the State was motivated by what it had illegally observed), this finding is simply not supported by “substantial evidence.” There was no evidence before the trial court in any way tying the State’s decision to seek the warrant for the bank records to the contents of the records obtained via illegal administrative subpoena. There was evidence before the court that the State always sought bank records in a economic crimes (like securities fraud) investigations. CP at 274. There was no evidence or argument to the contrary. No fair-minded, rational person would reach such a conclusion and the trial judge did not in fact reach such a conclusion.

H. Remedy

Although the failure of the trial court to use the proper legal standard might suggest that the appropriate remedy is a remand for findings under the correct legal standard, the law does not always require a remand. *State v. Gaines*, 154 Wn.2d 721-22, cited with approval *United States v. Mulder*, 889 F.2d 239, 241 (9th Cir. 1989) (“There is ample evidence however, that the search warrant was sought on the basis of probable cause developed independently of the first unlawful testing”) in support of

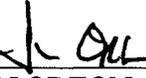
its conclusion that where the record below is sufficient to support the necessary conclusion by the appellate court, remand is not required.

V. Conclusion

The trial court used an erroneous legal standard and asked and answered the wrong question in concluding that the independent source doctrine does not authorize the acquisition of the records received under valid search warrant. The court's order suppressing should be reversed and the matter returned to the lower court for trial.

DATED this 29th day of March, 2010.

Respectfully submitted,
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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 **Reply Brief of Appellant**, in STATE V. MICHAEL M. MILES, No. 61474-6-1, 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

3/29/10
Date

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