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NO. 69226-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL REEDER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

DAVID L. DONNAN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

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A. SUMMARY OF ARGUMENT.

Mr. Reeder's trial on a multi-count information was fundamentally flawed because his counsel was burdened by a conflict of interest which was not resolved by sequestration. This error was compounded by the trial court's failure to dismiss charges outside the statute of limitations and to suppress bank records obtained without a warrant or equivalent authority of law. Finally, Mr. Reeder's resulting sentence violates the constitutional prohibition against double jeopardy. He now seeks relief from these errors in this Court.

B. ASSIGNMENTS OF ERROR.

1. The trial court erred by failing to appoint a new attorney where the accused's appointed counsel was burdened with a conflict of interest.

2. The trial court erred in permitting the prosecution of conduct that occurred beyond the statute of limitations.

3. The trial court erred in failing to suppress bank and credit card records seized and searched without a properly obtained warrant or equivalent procedure.

4. The trial court erred in imposing multiple punishments for the same offense in violation of constitutional, statutory and common law protections against double jeopardy.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

1. The constitutional right to counsel includes an attorney free from conflicts of interest and, therefore, prohibits the representation where clients are adverse to each other or where there is a risk the representation of one client may limit the lawyer's responsibilities to the other. Where a lawyer was consulted and provided legal advice to an opposing parties' witness and potential co-conspirator, is he precluded from subsequently representing another party and is that bar imputed to the other attorneys in his firm?

2. Statutes of limitation bar the prosecution of criminal conduct occurring outside those limits. Where there are conflicting provisions regarding the limitations period and the evidence indicates discreet offenses rather than a continuing criminal enterprise as defined by Washington Courts, did the trial court err in failing to dismiss some or all of the charges against Mr. Reeder?

3. Bank records are private affairs in Washington into which the state may not intrude without a proper warrant or the functional equivalent. Where no warrant was obtained and the State used the secretive procedures of the special inquiry judge to obtain subpoenas duces tecum, did the record fail to establish the authority of law for this invasion of private affairs or any justification for maintaining the secrecy of the proceedings, as required by the state constitution and federal constitutions?

4. The double jeopardy bar of the state and federal constitutions prohibit multiple punishments for a single offense. Where the prosecution alleged a grand and ongoing scheme to obtain money from a specific investor by a series of fraudulent or deceptive practices, and the legislature established a singular unit of prosecution for such offenses, and the jury was not directed to find separate and distinct act unanimously, did the trial court err by imposing separate sentences for these multiple counts of securities fraud and theft?

D. STATEMENT OF THE CASE.

Mr. Reeder was charged by multi-count information, filed in King County Superior Court on April 8, 2011, with securities fraud and first degree theft by color and aid of deception based on a failed real estate development partnership undertaken with William McAllister.[1] CP 1-21. The information was subsequently amended to charge 29 counts, 28 of which were based on 14 checks written by Mr. McAllister to Mr. Reeder between March 7, 2006, and June 20, 2007. CP 22-38. The information charged one count of securities

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[1] RCW 21.20.010, defining the offense of "securities fraud," provides:

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

RCW 9A.56.030(1), currently defines "theft in the first degree," provides in pertinent part, that "A person is guilty of theft in the first degree if he or she commits theft of: (a) Property or services which exceed(s) five thousand dollars in value other than a firearm...." Laws 2009, ch. 431, § 7, increased the monetary amount from $1,500 to $5,000.

RCW 9A.56.020(1)(b) defines "theft" to include taking "by color or aid of deception to obtain control over the property or services of another or the value thereof, with the intent to deprive him or her of such property or services...."

fraud and one count of theft by deception for each of the 14 checks.[2] Id.

At trial William McAllister testified he was in the business of providing capital for real estate development projects in the form of short term loans and bridge funding before banks would become involved. RP 266-68. In that capacity he was introduced to Mr. Reeder by a business associate and made two loans of $50,000 and $35,000 which were subsequently repaid. RP 269.

Mr. Reeder had lived as a boy near Meydenbauer Bay in Bellevue and returned in 2005. 7/10/12RP 158-60, 212-13. He befriended George and Alice Buck, longtime residents of the area and former neighbors, and began helping around the Bucks' house. RP 161-64, 214. In addition to work on the porch and garage, Mr. Reeder brought gifts for the Bucks including a stove and washing machine. RP 166-67, 215. Mr. Reeder subsequently proposed a real estate deal involving the Bucks' property; but after signing a

[2] The twenty-ninth count charged theft, but severed for trial and dismissed with prejudice on the prosecutor's motion at the end of the trial. CP 38, 139.

purchase and sale agreement, the Bucks consulted counsel and decided to unwind the deal. RP 168-95, 201-11, 216-27.

Mr. Reeder nevertheless approached William McAllister, with whom he had worked before, about the development of the Bellevue property. RP 270-79. They also began discussing the development of properties in Snohomish County. RP 280. They created a corporation and agreed McAllister would provide the capital in the form of loans to the corporation and that they would split the profits following sale of the subdivided properties. RP 282; Exhibit 10. McAllister eventually wrote 14 checks to Mr. Reeder as part of this real estate development project totaling $1.7 million between March 2006 and June 2007. RP 287-89. Mr. Reeder eventually acknowledged the Meydenbauer deal had fallen through and reported the other party had backed out of the Snohomish County deal, but never returned the money McAllister had provided. RP 297-302.

E. ARGUMENT.

1. The trial court erred by failing to appoint new counsel where appellant's trial attorney was burdened with a conflict of interest.

a. Mr. Reeder sought new counsel based on his appointed attorney's conflict of interest and failure to prepare a defense.

Mr. Reeder was found indigent and counsel from Society of Counsel Representing Accused Persons (SCRAP) was assigned to represent him. 7/6/11RP 3; 4/18/12RP 2-9. It subsequently came to light, however, that another attorney at the firm, David Roberson, had previously provided legal advice to Mr. Reeder's sister, Ms. Cuzak, who was implicated in a similar mortgage fraud case against Mr. Reeder. 4/18/12RP 3. Mr. Reeder was represented by the same SCRAP attorney, Matthew Pang, in both this current prosecution as well as this mortgage fraud prosecution. Id.

Mr. Roberson explained that he had been working for another firm, Northwest Defender Agency, when he was contacted by Ms. Cuzak. He advised current counsel at SCRAP of the conflict when he became aware of the problem. 4/18/12RP 4. Mr. Roberson

explained "she contacted me for legal advice, I gave it to her. If she's a witness we have a conflict." Id. at 5.[3]

> Mr. Roberson reiterated the scope of his involvement by noting:
>
> > Prior to there being any criminal matters involved there was a civil suit instigated by several people, and that's when Ms. Cuzak called me. I gave her advice at Northwest – when I was at Northwest Defender's regarding the civil suit, so it's not simply whether or not she should talk to Mr. Seaver. There was contact made years ago regarding a civil matter where I think the subject matter was either the same or very similar.

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[3] According to the trial prosecutor,

> Ms. Cuzak just called him for advice on whether she should talk to Mr. Seaver [the prosecutor on the mortgage fraud case] and then went ahead and talked to Mr. Seaver. When Mr. Seaver asked her – found out about his conversation, her conversation, with Mr. Roberson, Mr. Seaver from my office said, "If you're represented by counsel, I'm not allowed to talk to you.' And she said, "I'm not represented by Mr. Roberson. He doesn't represent me. I just asked him if I should talk to you because my son knows him." That was the extent of that.

4/18/12RP 5.

4/18/12RP 7. Mr. Roberson reiterated that, "she called for legal advice, we talked and I gave her the legal advice," although he did not create a file. Id. at 8.

Judge Kessler failed to see the conflict of interest.

> I just don't see a conflict of interest here. Even if there is one, the Court will deem it resolvable by a Chinese wall, and Mr. Roberson is now ordered not to discuss this with anyone at all. Mr. Pang is ordered not to discuss with Roberson, Mr. Pang is ordered to advise all – any investigators that they are not to discuss it with Mr. Roberson. There's not file to warn off so that doesn't make any difference.
>
> On [the mortgage fraud] case No. 11-106175-9 there's an arguable conflict of interest. I still think it's resolvable by the same Chinese wall, so I'm going to deny the motions to withdraw and it's time now to set this matter for trial.

4/18/12RP 8-9.

The conflict of interest, Mr. Reeder contends, was real and legally cognizable. It was not resolvable by a so-called Chinese wall and it burdened his representation throughout, requiring relief from this Court.[4]

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[4] Ms. Buck testified that Mr. Reeder visited them once with his sister. RP 165.

b. The Rules of Professional Conduct and constitutional standards of effective assistance of counsel and due process affirm the presence of a conflict of interest below. [5]

Attorneys owe their clients a duty of loyalty that requires they avoid conflicts of interest. The Rules of Professional Conduct specifically prohibit representation of a client if "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person…." RPC 1.7(a). This duty is a continuing one. RPC 1.9.[6] Critically here, the rules

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[5] See RPC 1.7(b) (conflict of interest with attorney's own interests); 1.8(b) (lawyer shall not use information learned in representing client to disadvantage of client without prior consent); 1.15(b)(6) (lawyer may withdraw for good cause); 3.8(b) (prosecutor will take reasonable steps to give defendant opportunity to obtain counsel).

[6] RPC 1.9 provides:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client ….

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
(1) whose interests are materially adverse to that person; and

impute the conflict requirements to all the members of a firm. RPC 1.10(a).[7]

These rules are crucial to ensuring the constitutional right to effective assistance of counsel which is guaranteed by the Sixth Amendment and Article 1, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). Effective assistance includes "a duty of

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(2) about whom the lawyer had acquired information protected by Rules 1. 6 and 1.9(c) that is material to the matter; ....

[7] RPC 1.10 provides in pertinent part:

(a) Except as provided in paragraph (e), while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

loyalty, [and] a duty to avoid conflicts of interest." Strickland, 466 U.S. at 688. Under the Sixth Amendment, a criminal defendant has a constitutional right to conflict-free representation. State v. Dhaliwal, 150 Wn.2d 559, 566, 79 P.3d 432 (2003).

As this Court has noted,

> We cannot over-emphasize the primary importance of the right to counsel: '[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.'

State v. McDonald, 96 Wn.App. 311, 316, 979 P.2d 857 (1999), affirmed by State v. McDonald, 143 Wn.2d 506, 22 P.3d 791 (2000), quoting Schaefer, Federalism and state Criminal Procedure, 70 Harv. L.Rev. 1, 8 (1956).

An actual conflict of interest exists "when a defense attorney owes duties to a party whose interests are adverse to those of the defendant." McDonald, 96 Wn.App. at 317. Mr. Roberson continues to owe a duty of loyalty to Ms. Cuzak. He brought that duty with him to SCRAP and it is now imputed to the attorneys

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(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

there, including Mr. Pang. The prosecution has alleged she is a witness, perhaps even an accomplice.

Appellate courts review de novo whether the circumstances demonstrate a conflict under the ethical rules. Regan, 143 Wn.App. at 428. The trial court erred in finding there was no conflict of interest.

c. Mr. Reeder was prejudiced by the conflict of interest throughout the proceedings.

The conflict of interest Mr. Reeder endured was real and clearly impacted the attorney client relationship throughout the proceedings. Mr. Pang continued to represent Mr. Reeder after the motion for new counsel was denied, the parties returned to court in June, at which time Mr. Reeder expressed his continuing concerns regarding his representation. 6/20/12RP 20. Mr. Pang was still representing him on both matters. 6/20/12RP 20. Mr. Reeder reported:

> … I met with Mr. Pang, Your Honor, and he, quote, said, "I think you've been wrong, Mr. Reeder. I cannot represent you efficiently or effectively. I haven't had the time since your case has been given to me. I'm not qualified to try this case,….

Id. at 21.

Mr. Pang admitted "that is while I did say that I – I'm not prepared, the (inaudible) issue is just a matter of time to be prepared. It's not – it's not an issue of that I can't do a fraud case." Id. at 21-22. He also acknowledged, however, that "the discussions that Mr. Reeder and I have had subsequent to that, we've had several disagreements over what had been happened in the prior meeting." Id. at 22. This presented the very risk contemplated by the Rules of Professional Conduct, but Judge Kessler again denied Mr. Reeder's requests for conflict free counsel. Id.

Mr. Reeder renewed his request on July 2, 2012, and the trial court again denied his prayer for relief. 7/2/12RP 26, 32. Forced to trial with counsel burdened by the imputed conflict of interest and with whom he had plainly lost confidence, he presented no defense case and the result was not surprising. Mr. Reeder used his opportunity for allocution at sentencing to reiterate that the representation he received in trial was ineffective. 8/17/12RP 674.

The trial prosecutor took the position that providing legal advice without fully and formally undertaking representation was insufficient to create a conflict of interest, that Ms. Cuzak was not a

witness in this specific case and that the conflict could be resolved if "we just order them not to talk to talk to each other…." 4/18/13RP 6.

RPC 1.18 extends the duties of confidentiality to "prospective clients" where the initial consultations do not lead to a formal attorney-client relationship as well.[8] The relationship here, even

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[8] RPC 1.18 outlines the duties owed to "prospective client"

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client or except as provided in paragraph (e).
(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraphs (d) or (e). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
  (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
  (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

though brief, was still subject to the duties of confidentiality and loyalty.

Furthermore, the trial court's retreat behind a "Chinese Wall" was ineffectual in resolving the conflict. Although this form of sequestration has been recognized in case law and in the rules of professional conduct, the efforts here were incomplete and insufficient to resolve the conflict. See State v. Stenger, 111 Wn.2d 516, 522-23, 760 P.2d 357 (1988); RPC 1.10(b)[9] and (e)[10] also

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(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
(ii) written notice is promptly given to the prospective client.

[9] RPC 1.10(b), regarding imputed conflicts describes the limits on representation of a firm after a lawyer has left.

> When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
> (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
> (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

[9] RPC 1.10(e) provides:

> When the prohibition on representation under paragraph (a) is based on Rule 1.9(a) or (b), and arises out of the disqualified lawyer's association with a prior firm, no other lawyer in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified unless:

describe this practice. While RPC 1.10 may allow for a screening mechanism, there is no basis in this record to believe they notice provisions were satisfied. Judge Kessler's directions were limited to Mr. Roberson not discussing the matter, but never touched on the

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> (1) the personally disqualified lawyer is screened by effective means from participation in the matter and is apportioned no part of the fee therefrom;
> (2) the former client of the personally disqualified lawyer receives notice of the conflict and the screening mechanism used to prohibit dissemination of information relating to the former representation;
> (3) the firm is able to demonstrate by convincing evidence that no material information relating to the former representation was transmitted by the personally disqualified lawyer before implementation of the screening mechanism and notice to the former client.

RPC 1.10 concludes by noting, however, that:

> Any **presumption that information protected by Rules 1.6 and 1.9(c) has been or will be transmitted** may be rebutted if the personally disqualified lawyer serves on his or her former law firm and former client an affidavit attesting that the personally disqualified lawyer will not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of his or her current law firm, and attesting that during the period of the lawyer's personal disqualification those lawyers or employees who do participate in the matter will be apprised that the personally disqualified lawyer is screened from participating in or discussing the matter. Such affidavit shall describe the procedures being used effectively to screen the personally disqualified lawyer. Upon request of the former client, such affidavit shall be updated periodically to show actual compliance with the screening procedures....

(Emphasis added.)

notice requirements and consent elements which are essential to the rule.

d. The error is structural in form and prejudicial in its effect, requiring reversal of the conviction and sentence.

The "assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'" Holloway v. Arkansas, 435 U.S. 475, 488-89, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), quoting Chapman v. California, 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (Stewart, J. concurring)). The prejudice that attaches to forcing a person to continue with counsel with who he has an irreconcilable conflict cannot be readily quantified. Gonzalez-Lopez, 548 U.S. 140, 126 S.Ct 2557, 2565 (2006).

> [I]n a case of joint representation of conflicting interests the evil-it bears repeating-is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the [trial] available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics,

> and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.

Holloway, 435 U.S. at 490-91; see also In re Personal Restraint of Benn, 134 Wn.2d 868, 890, 952 P.2d 116 (1998).

Where counsel represents conflicting interests, Washington courts look to the conflict of interest rules to determine whether the right to effective assistance of counsel was violated. State v. McDonald, 143 Wn.2d 506, 513, 22 P.3d 791 (2001); State v. Regan, 143 Wn.App. 419, 427, 177 P.3d 783, review denied, 165 Wn.2d 1012 (2008). Having established a conflict under the rules, "reversal is always necessary where a defendant shows an actual conflict of interest adversely affecting counsel's performance." McDonald, 143 Wn.2d at 513. When the Mr. Reeder enters a guilty plea in one case where the conflict is acute and no defense case is presented in this substantially similar and related matter, he has demonstrated the form of compromised defense the rules are intended to avoid. The State cannot establish that the conflict was harmless.

Mr. Reeder need only demonstrate "that some plausible alternative defense strategy or tactic might have been pursued but

was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." Regan, 143 Wn.App. at 428 (internal quotations omitted). Mr. Reeder did this before, during and after sentencing where defense counsel failed to understand the nature of the case, the relevant evidentiary standards and ultimately presented no defense.

2. The trial court erred in permitting the prosecution of conduct that was alleged to have occurred beyond the statute of limitations.

a. Statutes of limitation constrain the jurisdiction of the criminal courts.

The statute of limitations in a criminal case is a jurisdictional bar to prosecution. State v. Dash, 163 Wn.App. 63, 67, 259 P.3d 319 (2011); State v. Eppens, 30 Wn.App. 119, 124, 633 P.2d 92 (1981). Because a criminal statute of limitations is jurisdictional, unlike the statute of limitations in a civil action, it cannot be waived and may even be raised for the first time on appeal. State v. Phelps, 113 Wn.App. 347, 357, 57 P.3d 624 (2002) (defendant could not agree to extend criminal statute of limitations period); State v. Novotny, 76 Wn.App. 343, 345 n.1, 884 P.2d 1336 (1994); State v. Glover, 25 Wn.App. 58, 61-62, 604 P.2d 1015 (1979).

When a statute of limitations challenge is raised in a criminal prosecution, the State bears the burden of establishing that sufficient time is tolled to permit the matter to proceed. State v. Walker, 153 Wn.App. 701, 706-07, 224 P.3d 814 (2009); RCW 10.37.050(5) (An information must establish, "That the crime was committed at some time previous to the finding of the indictment or filing of the information, and within the time limited by law for the commencement of an action therefor…").

b. Various statutes of limitation are implicated in the prosecution.

Mr. Reeder moved to dismiss the securities fraud allegations based on the expiration of the statute of limitations prior to the filing of the information. CP 40, 47-50. The information was filed April 8, 2011. CP 1.

1. Securities Fraud.

aa. 3 years. RCW 9A.04.080 provides that criminal prosecutions may not begin after the applicable time period has expired and further provides that for crimes not otherwise specified, "No other felony may be prosecuted more than three years after its commission…." RCW 9A.04.080(1)(h). If this statute

applies, all of the alleged conduct would fall outside the statute of limitations.

bb. 5 years. RCW 21.20.400(3) states that an information for crimes under that chapter must be returned within five years of the violation, or within three years of discovery. If the five year statute applies then the information charging conduct occurring prior to April 8, 2006, however, including Count I (March 6, 2006) and Count III (March 9, 2006), would be beyond the statute. Under "discovery rule," statute of limitations for claims of fraud began only when investor discovered, or should have discovered by due diligence, fact of fraud and sustained some actual damage as result. RCW 21.20.010; RCW 21.20.430(4)(b). There was no assertion that the discovery rule justified tolling or extending the statute.

2. First Degree Theft.

aa. 3 years. The statute of limitations for first degree theft is generally three years. RCW 9A.04.080.

bb. 6 years. The statute was amended in 2009 to provide in RCW 9A.04.080(1)(d)(iv) a six-year statute of

limitations when first degree theft is accomplished by color or aid of deception.

c. The rule of lenity requires use of the more restrictive statutes.

The laws of Washington provide for two potentially applicable statutes limiting the state's prosecution of securities fraud. Because they conflict, and cannot be read together, the rule of lenity is implicated. Applying the rule of lenity, the shorter period of limitation must be applied to the prosecution of securities fraud.

An appellate court looks to whether the legislative intent can be found in the plain meaning of the statutory language using the ordinary meaning of the words and the context in which they are found. City of Spokane v. Rothwell, 166 Wn.2d 872, 876-77, 215 P.3d 162 (2009). Although statutes should be construed so that all the language is given effect and no portion is meaningless, however, when a conflict is irreconcilable, the more recent statute is assumed to take priority. Id. State v. J.P., 149 Wn.2d 444, 454, 69 P.3d 318 (2003). If there is more than one reasonable interpretation of the statute after looking at the ordinary meaning of the statute and context of the statutory scheme, the court should treat the statute as

ambiguous. State v. Knight, 134 Wn.App. 103, 108, 138 P.3d 1114 (2006).

In this case two separate statutes appear to set the limits for prosecuting securities fraud. RCW 9A.04.080 limits prosecutions subject to that provision to three years. RCW 21.20.400, however, provides that an indictment or information charging crimes under that chapter must commence within five years, or three years of discovery. Because they set very different periods of limitation, they cannot be reconciled and the shorter period should be applied and the charges dismissed.

d. The "continuing criminal impulse" doctrine may not save counts outside the statute.

To overcome the statute of limitations bar, the prosecutor alleged these charges were all part of a continuing offense which began in March 2006 and did not end until June 20, 2007. CP 22-23. This is unavailing, however, because the offense were completed prior beyond the statute.

The statute of limitations does not begin to run until the continuing criminal impulse ends. State v. Carrier, 36 Wn.App. 755, 758, 677 P.2d 768 (1984).

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

State v. Dash, 163 Wn.App. 63, 68, 259 P.3d 319 (2011) (emphasis added) quoting State v. Vining, 2 Wn.App. 802, 808-09, 472 P.2d 564 (1970); State v. Mermis, 105 Wn.App. 738, 745, 20 P.3d 1044 (2001); State v. Carrier, 36 Wn.App. at 757-58. "Because a continuing crime is not completed until the criminal impulse is terminated, the statutory limitation period does not commence until that time." Dash, 163 Wn.App. at 68.

In Mr. Reeder's case, the jurors were asked to determine whether the acts charged as securities fraud (Counts 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27), "were part of a continuing course of conduct and were committed under a continuing criminal impulse..." CP 153-67.[11] In order to find the acts were a "continuing course of conduct" the jury was instructed it must find "the acts were part of

[11] A defendant's "lulling" activities may also toll the statute of limitations. State v. Argo, 81 Wn.App. 552, 568, 915 P.2d 1103 (1996). "Under the lulling doctrine, the statute of limitations begins running when the defendant's lulling activities are completed." Argo, 81 Wn.App. at 568.

an ongoing criminal enterprise with a single objective." CP 178. Similarly, to find a "continuing criminal impulse" the jury was required to find "the defendant's criminal impulse or intent continued unabated throughout the acts." CP 179.[12]

The facts in Mr. Reeder's case are distinguishable, however, from those in a case like Mermis, one of the leading examples of the doctrine. In Mermis the Court concluded the successive takings first of a car and then the title certificate and bill of sale were the part of a continuing criminal impulse and the crime was not complete until that impulse had been terminated. 105 Wn.App. at 745-46. The evidence was insufficient in Mr. Reeder's case, however, to support such a conclusion. Whereas Mermis' acts of persuading Johnson to sign the title and bill of sale were part of his effort to steal the car by deception, the conduct of Mr. Reeder and the related criminal intent were each complete at the point he received the money from McAllister and converted it to other uses.

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[12] The jury was also required to find that the some of the theft offenses (Counts 2, 4, 6, 8, 10, 12, 14) "were part of a continuing course of conduct." CP 180-86. The jury ultimately returned guilty verdicts encompassing that finding on each of those charges. CP 201-06.

Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Here if the evidence was insufficient to support a finding of continuing criminal impulse as interpreted in Mermis then the various offenses were completed outside the applicable statutes of limitation.

Because the statute of limitations in a criminal case is a jurisdictional bar to prosecution, Mr. Reeder is entitled to relief from those offenses that were beyond the statute of limitations. Dash, 163 Wn.App. at 67; Eppens, 30 Wn.App. at 124. This Court should, therefore, reverse and remand Mr. Reeder's convictions for offenses beyond the jurisdictional reach of the state.

3. The trial court erred in failing to suppress bank records seized without a search warrant or functional equivalent based on a finding of probable cause which stated with particularity the items to be seized.

   a. Mr. Reeder moved to bar the use of his bank records obtained without a warrant by subpoena under RCW 10.27.

Prior to trial Mr. Reeder moved to suppress all the evidence obtained through the warrantless search of his banking and credit card records. CP 41, 53-55; 7/2/12RP 42-43. The bank and credit card records were obtained by the Department of Financial Institutions by subpoena reportedly endorsed by a special inquiry judge.[13] CP 62. These records were an integral part of the

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[13] RCW 10.27.170 provides:

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

prosecutor's effort to prove its allegations of fraud and theft. RP 443-58. Mr. Reeder contends that obtaining these private records without a valid search warrant, or the functional equivalent, violated the Fourth Amendment, Article 1, section 7 of the Washington Constitution, and State v. Miles, 160 Wn.2d 236, 156 P.3d 864 (2007). CP 53-55.

The prosecutor argued initially that obtaining bank records by a subpoena issued by a special inquiry judge was neither a search nor a seizure and, therefore, could not be challenged. CP 80-81; 7/2/12RP 42-47. Judge Eadie denied the motion to suppress, ruling the bank records admissible, based on the prosecutor's assertion they were properly obtained through the special inquiry procedure. CP 241; 7/9/12RP 140-47.

b. Mr. Reeder's bank records were "private affairs" subject to the enhanced protections of the Washington Constitution.

Article 1, section 7 of the Washington Constitution provides that "No person shall be disturbed in his private affairs, or his home

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See e.g. State v. Neslund, 103 Wn.2d 79, 690 P.2d 1153 (1984).

invaded, without authority of law." It is well settled that article 1, section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment to the United States Constitution.

The Washington Supreme Court has determined that an individual's bank records are well within the constitutional provision for "private affairs" protected by Article 1, section 7.[14] Miles, 160 Wn.2d at 247 ("Little doubt exists that banking records, because of the type of information contained, are within a person's private affairs.") Drawing in particular on a series of statutory provisions, the Court found the sort of historical protections recognized by the Washington Constitution as private affairs. Miles, at 244-46. The scope and intrusiveness of the invasion of Mr. Reeder's private affairs was detailed by Patricia McGreer on behalf the Department of Financial Affairs who spent more than 600 hours searching through the records. RP 443-52.

c. The record below failed to establish a valid exception to the warrant requirement.

Warrantless searches are unreasonable per se with few exceptions. State v. Ladson, 138 Wn.2d 343, 352 n.3, 979 P.2d 833 (1999). These few exceptions to the blanket prohibition on warrantless searches are "narrowly drawn, and '[t]he State bears a heavy burden in showing that the search falls within one of the exceptions.'" Eisfeldt, 163 Wn.2d at 634 (quoting State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002)).

> We begin with the presumption that warrantless searches are per se unreasonable under our state constitution. ... Even where probable cause to search exists, a warrant must be obtained unless excused under one of the narrow set of exceptions to the warrant requirement. ... We have recognized exception for consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and Terry investigation stops. ... The State bears the burden to show an exception applies.

State v. Tibbles, 169 Wn.2d 364, 368-69, 236 P.3d 885 (2010).

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[14] "Although they protect similar interests, 'the protections guaranteed by article I, section 7 of the state constitution are qualitatively different from those provided by the Fourth Amendment to the United States Constitution.'" State v. Eisfeldt, 163 Wn.2d 628, 634, 185 P.3d 580 (2008) (quoting State v. McKinney, 148 Wn.2d 20, 26, 60 P.3d 46 (2002)). Unlike the Fourth Amendment, article I, section 7 protects citizens against all warrantless searches, regardless of whether they are reasonable. Id. at 634-35.

The warrant requirement is critical because it ensures that a thoughtful determination has been made based on verified representations which support the scope of the invasion. State v. Jackson, 150 Wn.2d 251, 263, 76 P.3d 217 (2003).

The precise requirements of a valid warrant or equivalent order include sworn testimony establishing probable cause.[15] State v. Garcia-Salgado, 170 Wn.2d 176, 240 P.3d 153 (2010).

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[15] CrR 2.3 provides in pertinent part:

> **(a) Authority to Issue Warrant.** A search warrant authorized by this rule may be issued by the court upon request of a peace officer or a prosecuting attorney.
>
> **(b) Property or Persons Which May Be Seized With a Warrant.** A warrant may be issued under this rule to search for and seize any (1) evidence of a crime; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears about to be committed; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.
>
> **(c) Issuance and Contents.** A search warrant may be issued only if the court determines there is probable cause for the issuance of a warrant. There must be an affidavit, a document as provided in RCW 9A.72.085 or any law amendatory thereto, or sworn testimony establishing the grounds for issuing the warrant. The sworn testimony may be an electronically recorded telephonic statement. The recording or a duplication of the recording shall be a part of the court record and shall be transcribed if requested by a party if there is a challenge to the validity of the warrant or if ordered by the court. The evidence in support of the finding of probable cause shall be preserved and shall be subject to constitutional limitations for such determinations and may be hearsay in whole or in part. If the court finds that probable cause for the issuance of a warrant exists, it

The prosecutor below has argued that the special inquiry judge's issuance of a subpoena duces tecum, based on less than probable cause and obtained without the crucial procedural protections of the warrant requirement, provided the "authority of law" demanded by Article 1, section 7. Contrary to the state's position, however, the "authority of law" requirement of Article 1, section 7 can only be satisfied by a court order if it meets the requirements of a warrant.

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shall issue a warrant or direct an individual whom it authorizes for such purpose to affix the court's signature to a warrant identifying the property or person and naming or describing the person, place or thing to be searched. The court shall record a summary of any additional evidence on which it relies. The warrant shall be directed to any peace officer. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person, place, or thing named for the property or person specified. It shall designate to whom it shall be returned. The warrant may be served at any time.

(d) Execution and Return With Inventory. The peace officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken. If no such person is present, the officer may post a copy of the search warrant and receipt. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person from whose possession or premises the property is taken, or in the presence of at least one person other than the officer. The court shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

> A court order may function as a warrant as long as it meets constitutional requirements. E.g., United States v. Mendez, 709 F.2d 1300, 1302 (9th Cir. 1983)....[It] must be entered by a neutral and detached magistrate; must describe the place to be searched and items to be seized; and must be supported by probable cause based on oath or affirmation ... .

State v. Garcia-Salgado, 170 Wn.2d at 186. Any reference in Miles to obtaining bank records by subpoena must be read in light Garcia-Salgado's reference to the substantive and procedural requirements equivalent to a warrant.

In Garcia-Salgado, the court ordered a DNA swab taken from a defendant, but none of the prosecutor's assertions in support of the request were provided under oath. 170 Wn.2d at 188. The Court reiterated that a subpoena is not the "authority of law" required by the constitution simply because it is authorized by statute. Garcia-Salgado, 170 Wn.2d at 188; Miles, 160 Wn.2d at 248, citing State v. Butterworth, 48 Wn.App. 152, 158, 737 P.2d 1297, rev. den., 109 Wn.2d 1004 (1987). The protections offered by authorizing a magistrate to let the government invade a person's private affairs are meaningless if they do not comply with the constitutional prerequisites.

> As a general principle, our cases have recognized that a search warrant or subpoena must be issued by a neutral magistrate to satisfy the authority of law requirement. … Warrant application and issues by a neutral magistrate limit governmental invasion into private affairs. In part, the warrant requirement ensures that some determination has been made which supports the scope of the invasion. The scope of the invasion is, in turn, limited to that authorized by the authority of law. The warrant process, or the opportunity to subject a subpoena to judicial review, also reduces mistaken intrusions.

Miles, 160 Wn.2d at 247 (citations omitted).

The purpose of the special inquiry judge is simply to investigate suspected crime or corruption. State v. Manning, 86 Wn.2d 272, 275, 543 P.2d 632 (1975). Where the special inquiry judge acts outside the constitutional or statutory dictates, the evidence gathered thereby is still subject to suppression. Id. The judicial approval of these searches and seizures offers no meaningful protection to anyone unless they also meet the constitutional requirements of probable cause based on oath or affirmation and then narrowly limit the scope of the invasion. Garcia-Salgado, 170 Wn.2d at 186-88.

"Probable cause" is crucial in particular because it requires the state to establish circumstances that extend beyond mere

suspicion or personal belief; speculation will not do. State v. Anderson, 105 Wn.App. 223, 229, 19 P.3d 1094 (2001). These standards are particularly important where the intrusion is so significant.

The prosecutor argued below that the statutory scheme of RCW 10.27 relieves the state of its obligations to establish "probable cause" rather than a mere suspicion of unlawful activity. CP 99, citing RCW 10.27.120. But the Constitution does not permit the Legislature to circumvent the foundational requirements by simply enacting a statute. Garcia-Salgado, 170 Wn.2d at 186-88. Ironically, rather than swearing to tell the truth, the prosecutor only swears "not to disclose either the evidence presented or the identity of participants in those proceedings." CP 99-100, citing RCW 10.27.070; .080. Nothing in the nature or purpose of these secret proceedings justifies lowering the threshold for issuing search warrants or subpoenas for private bank records. While the prosecutor speculates about the reasons he might not want to disclose his work, none justify the abandonment of fundamental constitutional protections.

This prosecutor's effort to summarize what he feels may be been relevant in the secret file is equally unavailing. He does not assert, even second hand, that the information provided to the magistrate was given under oath. CP 102-03. Based on these unsworn assertions and multiple levels of hearsay, the state consciously rejects a probable cause standard in favor of a far more nebulous one, the state then seeks defend the extraordinary sweep of the subpoenas it sought. They apparently then cast an extraordinarily wide net across 15 financial institutions in an effort to grab every scrape of the protected private documents of our day. CP 104-05.

d. Failure to establish compliance with the statutory scheme dooms the State's reliance on RCW 10.27.

As noted already, where the special inquiry judge acts outside the statutory dictates, the evidence gathered thereby is subject to suppression. Manning, 86 Wn.2d at 275. The record in this case fails to establish that the subpoenas were issued in accordance with the procedures dictated by the statute. The state's failure to establish the propriety of its invasion and seizure of Mr. Reeder's private bank

and credit card records precluded its reliance on those records at trial.

1. The record fails to establish the King County Prosecutor was authorized to serve as a "public attorney".

The county prosecutor only serves as a "public attorney" under the statute where a grand jury is impaneled. RCW 10.27.020(2) ("the term 'public attorney' shall mean the prosecuting attorney of the county in which a grand jury or special grand jury is impaneled….") Nothing in the record establishes that at the time the subpoenas were sought, that a grand jury had been impaneled in King County. As everyone involved is sworn to secrecy, the prosecutor may never be able to establish the propriety of his request.

2. The record fails to establish the subpoena was issued by a neutral magistrate selected in accordance with RCW 10.27.020(7).

The prosecutor posits that the subpoenas were issued by a neutral magistrate acting within the statutory guidelines of RCW 10.27.020. No subpoena has been produced however, nor has a neutral magistrate been identified, either by name, number or any other designation. The statute provides that a "'special inquiry

judge' is a superior court judge designated by a majority of the superior court judges of a county to hear and receive evidence of crime and corruption." RCW 10.27.020(7). There is no record, nor any independent reason to believe, whoever might have signed the subpoena was designated in the manner prescribed.

The constitutional right to be free from unreasonable governmental searches and seizures must remain a bulwark this statutory erosion. Nothing in RCW 10.27 suggests this procedure was intended to provide the government a way around the constitution. The statue carefully provides that many other constitutional protections remain in place including a witness's ability to invoke the privilege against self-incrimination and the right to counsel.[16] Nothing indicates the Legislature's intent to otherwise circumvent the constitutional protections provided by the warrant requirement, particularly in what was nothing more than a mundane fraud prosecution.

The Legislature did not, and cannot, circumvent these constitutional requirements by enacting a statute that says a court

may invade people's "private affairs" upon a mere showing of "reasonable suspicion." Neither the legislature nor the courts can override the constitutional protections of people's private affairs by permitting a subpoena based on unsworn statements of a state agent which fail to establish probable cause. [17]

e. The procedures of the special inquiry judge violate the constitutional guarantee of open administration of justice.

Article 1, section 10 of the Washington Constitution provides: "Justice in all cases shall be administered openly and without unnecessary delay." The rules for obtaining a warrant are intended not only to satisfy the protection of people's privacy against government intrusion, but also to hold the police and courts responsible to the public. See Dreiling v. Jain, 151 Wn.2d 900, 903,

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[16] RCW 10.27.130 (if ordered to testify, the witness may not be prosecuted based on the testimony). The statute also incorporates a witness's right to counsel. RCW 10.27.080.

[17] Probable cause is a crucial standard wherever the state invades a citizens private affairs because it requires a nexus between criminal activity and the item to be seized, as well as a nexus between the item to be seized and the place to be searched. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). It must be probable (i) that the described items are connected with criminal activity, and (ii) that they are to be found in the place to be searched. State v. Perrone, 119 Wn.2d 538, 551, 834 P.2d 611 (1992). The prosecution must establish circumstances that extend beyond mere suspicion or personal belief; certainly speculation will not do. State v. Anderson, 105 Wn.App. 223, 229, 19 P.3d 1094 (2001).

93 P.3d 861 (2004). These important public policy considerations are frustrated by the secrecy of the special inquiry proceedings and are inconsistent with the constitutional dictate of open courts.

The requirement of open courts extends beyond the courtrooms themselves. "Under article 1, section 10 of our state constitution documents considered by a judge to make a decision in a court proceeding are presumptively open to public review." State v. DeLauro, 163 Wn.App. 290, 291, 258 P.3d 696 (2011). Thus the DeLauro Court held this provision applies even to the very private nature of a written report evaluating a defendant's competency to stand trial when the court considered that report to determine the defendant was competent.

When a court issues a search warrant, the warrant must be returned to the court with an inventory. A copy of the warrant and inventory are also left with the person whose premises are searched. Cowles Publishing Co. v. Murphy, 96 Wn.2d 584, 590, 637 P.2d 966 (1981). Nothing in this record or the prosecutor's description of the proceedings establishes any justification for failing to comply with these provisions. State v. Bone-Club, 128 Wn.2d 254, 258-59, 906

P.2d 325 (1995). This is certainly not the sort of public corruption case which spawned the special inquiry statutes in the first place. There was no record of any compelling need for the secrecy surrounding what was ultimately a classic fishing expedition. Exactly the sort of general search that the warrant requirement is meant to address.

d. Suppression of the wrongfully obtained bank records was required.

This special inquiry statute cannot be read so broadly as to permit law enforcement to sidestep the constitutional protections of private affairs through secret invasions of a citizen's private affairs on the whim of a prosecutor whenever some law enforcement officer does not want to establish probable cause. Miles and Garcia-Salgado dictate the remedy of reversal of convictions based on the tainted records and remand for a new trial if the state chooses. Garcia-Salgado, 170 Wn.2d at 188-89; Miles, 160 Wn.2d at 252.

4. The trial court erred in imposing multiple punishments for the same offense in violation of constitutional, statutory and common law protections against double jeopardy.

a. Double jeopardy bars multiple punishments.

The federal double jeopardy clause provides, "No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb...." U.S. Const. amend V. This provision bars "multiple punishments for the same offense," absent contrary "clearly expressed legislative intent," Missouri v. Hunter, 459 U.S. 359, 368, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983); Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). The state double jeopardy clause provides, "No person shall ... be twice put in jeopardy for the same offense." WA Const. art. 1, section 9. The state provision has been interpreted in the same manner as the federal provision because they "are identical in thought, substance, and purpose." State v. Schoel, 54 Wn.2d 388, 391, 341 P.2d 481 (1959). Appellate review of an alleged double jeopardy violations is de novo. State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

b. Unit of Prosecution for securities fraud is the scheme.

The Legislature has the power, limited by the Eighth Amendment, to define criminal conduct and set out the appropriate punishment for that conduct. Bell v. United States, 349 U.S. 81, 82, 75 S.Ct. 620, 99 L.Ed. 905 (1955). When a defendant is convicted for violating one statute multiple times, the question arises what act or course of conduct has the Legislature defined as the punishable. State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). In charging multiple violations of the same statute, where the prosecutor attempts to distinguish the charges by dividing the evidence into various segments, the proper inquiry is what "unit of prosecution" has the Legislature intended as the punishable act under the specific criminal statute. See Bell v. United States, 349 U.S. at 83; State v. Mason, 31 Wn.App. 680, 685-87, 644 P.2d 710 (1982).[18] When the Legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit

[18] See also Michelle A. Leslie, Note, State v. Grayson: Clouding the Already Murky Waters of Unit of Prosecution Analysis in Wisconsin, 1993 Wis.

of the crime.[19] The unit of prosecution issue is one of constitutional magnitude on double jeopardy grounds, but the issue ultimately revolves around a question of statutory interpretation and legislative intent.[20]

If the Legislature has failed to specify the unit of prosecution in a criminal statute, the ambiguity should be construed in favor of lenity. Bell, 349 U.S. at 84; see also United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22, 73 S.Ct. 227, 97 L.Ed. 260 (1952). The United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges. Brown v. Ohio, 432 U.S. 161, 169, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) ("The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of

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L.Rev. 811, 824 (making this same point to illustrate that the "identical in law and in fact" analysis is not useful in the unit of prosecution context).

[19] See e.g. Bell, 349 U.S. at 83-84 (double jeopardy violated when defendant convicted on two counts of transporting women across state lines when two women were transported at the same time); In re Snow, 120 U.S. 274, 7 S.Ct. 556, 30 L.Ed. 658 (1887) (double jeopardy violated when defendant convicted on multiple counts of plural cohabitation when the cohabitation was continuous and ongoing).

[20] See Peter Westen & Richard Drubel, Toward a General Theory of Double Jeopardy, 1978 Sup.Ct. Rev. 81, 113; Note, Twice in Jeopardy, 75 Yale L.J. 262, 313 (1965).

dividing a single crime into a series of temporal or spatial units."); Snow, 120 U.S. at 282, 7 S.Ct. 556 (if prosecutors were allowed arbitrarily to divide up ongoing criminal conduct into separate time periods to support separate charges, such division could be done ad infinitum, resulting in hundreds of charges).

Where the legislature chooses to criminalize a scheme, the unit of prosecution will be the scheme rather than the specific acts that constitute the means by which the scheme is effectuated. See, e.g., United States v. Lilly, 983 F.2d 300, 303–04 (1st Cir.1992) (multiple misstatements that are part of a single execution of a scheme should be prosecuted in a single count in a prosecution under 18 U.S.C. § 1344 because the statute punishes "a scheme or artifice ... to defraud"). In Washington, this Court has already determined that the Legislature intended RCW 21.20.010 to define a single offense. State v. Mahmood, 45 Wn.App. 200, 206, 724 P.2d 1021 (1986). In making this determination, the court looks to:

> (1) whether the title of the act indicates a legislative intent to define multiple offenses; (2) whether there is a readily perceivable connection between the acts set forth in the statute; (3) whether these acts are consistent with and not repugnant to each other; (4) whether these acts may inhere in the same transaction.

Mahmood, 45 Wn.App. at 206, citing State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976)..

Applying these factors to the securities fraud statute, RCW 21,20.010, the Court found that making an untrue statement and omitting to make a material statement were not separate offenses. Critically, the Court also found they are connected by the object of deceiving; they may inhere in the same transaction and they are consistent and not repugnant to each other. Mahmood, at 206. Similarly, the prosecutor alleged Mr. Reeder was engaged in an ongoing enterprise, real estate development in which McAllister provided the funding and Reeder sought out and acquired the properties, and the jury returned a verdict to that effect. RP 585-86 (continuing course of conduct, had the same objective intent and purpose). The unit of prosecution for such a fraud is the scheme itself and is represented by Count I which alleges these practices stretched across the charging period as part of a singular criminal impulse. CP 153. The remaining counts must be vacated and dismissed.

c. Double jeopardy required a clear instruction that multiple convictions of the same offense cannot be based on the same act.

When multiple counts allegedly occur within the same charging period, the jury instructions must make it manifestly apparent that each count is based on proof of a separate and distinct underlying act. State v. Borsheim, 140 Wn.App. 357, 367-68, 165 P.3d 417 (2007). Furthermore, the jury must be unanimous. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Here multiple counts of security fraud were alleged to have occurred within the same charging period reflected in Count I. Multiple convictions could only be sustained over the double jeopardy bar if the trial court instructed the jury "that they are to find 'separate and distinct acts' for each count. Borshiem 140 Wn.App. at 367-68 citing State v. Hayes, 81 Wn.App. 425, 431, 914 P.2d 788 (1996); State v. Noltie, 116 Wn.2d 831, 842-43, 809 P.2d 190 (1991) (jury must be unanimous as to which act or incident constitutes a particular charged count of criminal conduct).

In Mr. Reeder's case, the court's instructions to the jury (CP 140-200) never advised the jury that it was required to find "separate

and distinct acts" for each count of securities fraud.[21] The court's instruction No. 3 only told the jury, "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." CP 144. The permissive nature of the third sentence actually aggravates the constitutional uncertainty. Critically, however, the court did not inform the jury that they must unanimously agree about the act alleged, nor that they cannot rely on the conduct to support conviction on different counts. Borsheim, 140 Wn.App. at 367-68.

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[21] Mr. Reeder was convicted of 14 counts of securities fraud for a variety of unspecified acts which were all undertaken as part of an overarching scheme to separate Mr. McAllister from his money. 7/2/12RP 29 (state's theory "Reeder took all this money and gambled it away."). All 14 counts were alleged in the same statutory language, i.e., that between March 7, 2006 and June 20, 2007, he did:

> (1) employ a device, scheme and artifice to defraud; and (2) make untrue statements of material facts and omit to state material facts necessary in order to make statements made, in light of the circumstances under which they were made, not misleading; and (3) engage in acts practices, and a course of business which did and would operate as a fraud and deceit upon William McAllister.

CP 22 (Count I) (emphasis added). The to-convict instructions changed the conjunctives to disjunctives. Count III makes the same allegations for a period between March 9, 2006 and June 20, 2007. CP 23. Count V makes the same allegations with regard to one day, May 4, 2006. CP 24. Count VI on May 22, 2006. CP 26. Count IX on May 26, 2006. CP 27. Count XI, on June 16, 2006. CP 28. Count XIII on July 5, 2006. CP 29. Count XV on August 2, 2006. CP 30. Count XVII, on September 11, 2006. CP 31. Count XIX on December 14, 2006. CP 32-33. Count XXI on December 21, 2006. CP 33-34. Count XXIII on January 31, 2007. CP 35. Count XXV on June 13, 2007. CP 36. Count XXVII on June 20, 2007. CP 37.

Where the allegations include engaging in a course of business which operates a fraud, the jury could easily rely some or all of the same conduct alleged to reach a verdict on each allegation of securities fraud. CP 150. Double jeopardy bars the imposition of multiple punishments on this record.

d. "Continuing criminal impulse" counts constitute a single offense.

The prosecution alleged that each and every one of the multitude of securities fraud offenses it charged were all part of "continuing criminal impulse." CP 153-66. The court instructed the jury that to prove the defendant's multiple offenses were "committed under a continuing criminal impulse the State must prove that the defendant's criminal impulse or intent continued unabated throughout the acts." CP 179. The jury returned verdicts finding this proposition was established beyond a reasonable doubt as to each of the securities fraud counts. CP 201-02.

Washington courts have repeatedly held, however, that

> "'where the successive takings are the result of a single, continuing criminal impulse or intent and are pursuant to the execution of a general larcenous

> scheme or plan, such successive takings constitute a single larceny regardless of the time which may elapse between each taking.'"

Mermis, 105 Wn.App. at 745, quoting Carrier, 36 Wn.App. at 757, quoting Vining, 2 Wn.App. 802, 808-09, 472 P.2d 564 (1970). Although this common law doctrine grew out of the common law practice of aggregating multiple small takings from a single victim in to a single higher charge, "there is no reason to limit the doctrine to aggregation cases." Mermis, 105 Wn.App. at 745. As the Court explained, "[i]f the impulse continues, the crime is not complete until the continuing impulse has been terminated." Id.

Where the resulting convictions represent a "single larceny" the double jeopardy bar limits the punishment which can be imposed for the separate acts committed in support of the securities fraud alleged. State v. Turner, 102 Wn.App. 202, 209, 6 P.3d 1226 (2000).

e. Theft by deception should be punished based on a single unit of prosecution.

The same aspects of double jeopardy are at issue in the charging of the theft offenses and appear to result in Mr. Reeder being punished multiple times for the same offense. With regard to the theft allegations, he is charged with violating the same statutory

provision a number of times, and the multiple convictions can withstand double jeopardy challenge only if each is a separate "unit of prosecution." In making this determination, we apply the rules of statutory construction to the statute at issue. If there is any ambiguity, then "the ambiguity should be construed in favor of lenity." Adel, 136 Wn.2d at 632-35.

When this Court examined the first degree theft statute, it concluded thefts by various means from the same person did not support multiple convictions. Turner, 102 Wn.App. at 209.

> The first degree theft statute makes no mention of schemes or plans in distinguishing the seriousness of the crime from other degrees of theft. And there is no wording in the statute that indicates any other relevant distinction between multiple acts of theft committed against the same person over the same period of time.

Turner, 102 Wn.App. at 209-10; compare State v. Tili, 139 Wn.2d 107, 113-14, 985 P.3d 365 (1999) (statutory definition of sexual intercourse indicates separate units of prosecution).

This Court found that the lack of clarity in the first degree theft statute creates ambiguity as to whether multiple schemes or plans constitute separate units of prosecution under the first degree theft statute. Thus, the rule of lenity dictated that the Court construe

this ambiguity in favor of the accused. Turner, 103 Wn.App. at 210-11.

> We note that the unit of prosecution analysis is designed in part to avoid overzealous charging by the prosecution. While the record shows that the prosecutor here sought to divide the acts of theft into schemes or plans for clarity of presentation to the jury, not in a fit of prosecutorial zeal, the reason for the rule applies with equal force here. We seriously doubt that the Legislature could have intended to delegate to the prosecution the discretion to define the punishable act in this way.

Turner, 102 Wn.App. at 102; see also State v. Hoyt, 79 Wn.App. 494, 496-97, 904 P.2d 779 (1995), review denied, 129 Wn.2d 1004 (1996).

Because Washington's first degree theft statute does not expressly define the unit of prosecution, but is ambiguous as to whether multiple theft schemes or plans over the same period of time and against the same victim may be punished separately. As with the securities fraud charges, the state charges one count with an overarching period of commission and then a variety of other narrow periods thereafter. CP 180-93. Double jeopardy bars this form of multiple punishment and Mr. Reeder is entitled to relief in the form of a new sentencing hearing.

F. CONCLUSION.

For the reasons stated above, Mr. Reeder respectfully asks this Court to reverse his conviction and sentence and remand his case to the superior court for further proceedings.

DATED this 23rd day of May 2013.

Respectfully submitted,

David L. Donnan (WSBA 19271)
Washington Appellate Project
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. MICHAEL REEDER, Appellant.	)))))))))	NO. 69226-7-I

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[X] MICHAEL REEDER 958706 MONROE CORRECTIONAL COMPLEX-WSR PO BOX 777 MONROE, WA 98272	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710