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

STATE OF WASHINGTON,

Appellant,

v.

MICHAEL MILES,

Respondent.

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

The Honorable Sharon Armstrong, Judge

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BRIEF OF RESPONDENT

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A. SUMMARY OF ARGUMENT

The Washington Supreme Court held the State illegally seized and searched Michael Miles' bank records without a warrant. On remand, the State obtained a warrant, re-seized the same records, and invoked the independent source exception to the exclusionary rule as the basis for their admission into evidence. The trial court suppressed the evidence. The State's theorizes the independent source exception justifies admission because the Supreme Court's decision prompted the State to belatedly seek a warrant to exonerate the earlier illegal seizure.

The State's argument flies in the face of established precedent that unconstitutionally seized evidence must be excluded.

Furthermore, this is really an inevitable discovery case, not an independent source case, because the State initially seized the bank records without a warrant. The inevitable discovery exception does not justify admission as a matter of law under article I, section 7.

Even if the independent source doctrine is properly at issue, the doctrine is not applicable because evidence re-seized via the later warrant remains "fruit of the poisonous tree." There is no source for the evidence that is independent of the initial illegality.

Moreover, the State cannot manufacture an exception to the exclusionary rule by waiting until a court suppresses the evidence as the

reason why the evidence should be admitted. The independent source exception under article I, section 7 does not and should not allow for the admission of evidence under these circumstances because it would undermine the purposes behind Washington's exclusionary rule. Application of the exception would entangle the courts in an unconstitutional exercise of power, provide incentive not to obtain a warrant during police investigation, and fail to adequately protect the privacy rights of this state's citizens.

B. ISSUE ON REVIEW

Should this Court affirm suppression because the State's independent source theory finds no sanctuary under article I, section 7 of the Washington Constitution?

C. STATEMENT OF THE CASE

In 2001, the Washington State Securities Division of the Department of Financial Institutions (Division) issued an administrative subpoena to Washington Mutual Bank, requesting the bank records of Michael Miles. State v. Miles, 160 Wn.2d 236, 241, 156 P.3d 864 (2007). In a letter accompanying the subpoena, the Division asked Washington Mutual not to tell Miles about the subpoena and urged the bank to act quickly because of the statute of limitations for prosecuting theft. Id. The records provided by the bank supported the filing of criminal charges. Id.;

CP 297-321.¹ Based on the Division's illegal investigation, the State charged Miles with securities fraud, intimidating a witness, tampering with a witness, forgery, and theft. CP 1-25, 26-33, 34-42, 297-321.

The Honorable Sharon Armstrong denied Miles' motion to suppress evidence of bank records seized pursuant to the administrative subpoena. Miles, 160 Wn.2d at 240. On appeal, the Supreme Court reversed, holding the search conducted pursuant to the subpoena violated Miles' right to privacy under article I, section 7 of the Washington Constitution. Id. at 240, 252.

After the mandate issued but before the case came before Judge Armstrong, the State, again represented by prosecutor Ivan Orton, sought a search warrant for the same bank records the Supreme Court had determined were unlawfully seized. CP 273-82, 295-96. On August 20, 2007, the prosecutor sent an email to Judge Armstrong, stating his intent to seek a search warrant for the bank records from a different judge, but asked Judge Armstrong if she wanted him to present the search warrant request to her instead. CP 295-96. The bailiff informed the prosecutor that Judge Armstrong was on leave until August 31, and could not confirm Judge Armstrong would be able to respond to the prosecutor's inquiry until

¹ Attached as Appendix A.

September 4. CP 295. Defense counsel maintained any search warrant request should await Judge Armstrong's return. CP 295.

On August 27, the State returned the records suppressed by the Supreme Court to the bank. CP 269. The next day, the prosecutor applied for a search warrant from the Honorable Richard Eadie. CP 270, 273-96. In support, the prosecutor attached his own affidavit citing case law in support of his argument that the independent source exception to the exclusionary rule allowed the State to re-seize the records. CP 273-75. Judge Eadie issued the warrant, which was served on the bank the same day. CP 270, 293-94.

Upon Judge Armstrong's return on September 4, Miles moved to suppress the bank record evidence in light of the Supreme Court's decision. CP 73-181. The prosecutor argued he could lawfully re-seize the records under the independent source exception by virtue of the fact that he had since obtained a warrant for the records and served it on the bank. CP 184-98. Judge Armstrong ruled the independent source exception was inapplicable, ordered suppression of the bank records, and then issued an amended order to the same effect. CP 223-25, 258-60.

The judge determined "[t]he independent source doctrine 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." CP 259 (FF 2). The judge concluded "Consequently, the bank records re-acquired pursuant to the judicially issued warrant . . . were also gained by unconstitutional means." CP 259 (FF 3).

Judge Armstrong also found the following:

The Deputy Prosecuting Attorney sought a warrant from a judge other than the assigned judge, because the assigned judge was expected to be away from the court for four more business days. This conduct is troublesome because there was no emergent need for issuance of this second process, and counsel has failed to explain adequately his reasons for seeking the ruling from another judge, especially in light of defendant's objection.

CP 259 (FF 4).

The prosecutor filed a motion for reconsideration of the suppression order, which the court denied. CP 226-38, 257. The prosecutor later moved for a dismissal order terminating the case under RAP 2.2(b)(2). CP 261-264. In support, the prosecutor stated in a "certification" as follows:

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

Amended Order on Suppression and Dismissal is to terminate the entire case and request this court to explicitly so find.

CP 262.

Judge Armstrong granted the State's motion to dismiss all counts, but struck the following language from the order: "under RAP 2.2(b)(2) this court explicitly finds that the practical effect of the Court's Amended Order on Suppression and Dismissal is to terminate the case in its entirety." CP 262. Judge Armstrong had earlier denied Miles' motion to dismiss the charges, reasoning the Supreme Court observed there may be sufficient additional evidence to support a charge and the State "should be given an opportunity to prove charges against the defendant without bank records or the fruits of its two unlawful searches." CP 260.

A Court of Appeals commissioner granted the State's motion for discretionary review of the trial court order granting Miles' motion to suppress evidence, but denied review of the trial court order failing to find the practical effect of the suppression order was to terminate the case on all counts. Commissioner's Ruling Granting Discretionary Review at 9.

D. ARGUMENT

1. THE STATE CANNOT USE UNCONSTITUTIONALLY OBTAINED EVIDENCE TO PROSECUTE MILES UNDER THE INDEPENDENT SOURCE EXCEPTION TO WASHINGTON'S NEARLY CATEGORICAL EXCLUSIONARY RULE.

The State acknowledges the Supreme Court in Miles suppressed the bank records obtained via the unlawful subpoena but nonetheless seeks to use those same records to convict Miles. BOA at 1, 15. The State's attempt failed at the trial level and must fail here because the circumstances of this case do not permit any exception to the exclusionary rule.

First, when evidence is seized and searched as a direct result of unconstitutional government conduct, Washington's constitutionally mandated exclusionary rule requires suppression of the evidence.

Second, the State misunderstands the exception at issue. This is an inevitable discovery case because the State initially seized Miles' bank records without a warrant in violation of article I, section 7. The independent source exception potentially applies under article I, section 7 only if government agents refrain from seizing evidence during an initial illegal search.

Third, even if the independent source doctrine is at issue, it cannot be applied here because there is no source of evidence that is wholly

independent of the initial illegality. The means by which the State ultimately re-seized the bank records is tainted fruit of the poisonous tree. The independent source doctrine does not apply because it would undermine the purposes behind the exclusionary rule under article I, section 7.

Fourth, the State failed to prove it would have sought a warrant absent its illegal search and seizure. Intent to obtain a warrant absent the illegality is necessary to invoke the independent source exception. Moreover, the trial court properly rejected the prosecutor's claim he was not motivated by the illegal search and seizure to obtain a warrant after the Supreme Court issued its decision in Miles.

a. Washington's Constitutionally Mandated Exclusionary Rule Requires Suppression.

It is established that article I, section 7 provides greater protection of privacy rights than the Fourth Amendment. State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226, 1231 (2009). The Washington Supreme Court held the State violated Miles' right to privacy under article I, section 7 when it searched Miles' bank records without a warrant. Miles, 160 Wn.2d at 240, 252.

Article 1, section 7 gives rise to three purposes for exclusion of unconstitutionally obtained evidence: "first, and most important, to protect

privacy interests of individuals against unreasonable governmental intrusions; second, to deter the police from acting unlawfully in obtaining evidence; and third, to preserve the dignity of the judiciary by refusing to consider evidence which has been obtained through illegal means." State v. Bonds, 98 Wn.2d 1, 12, 653 P.2d 1024 (1982).

The Court has declared "the language of our state constitutional provision constitutes a mandate that the right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy." State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). The central place of the right to privacy in article I section 7 requires "whenever the right is unreasonably violated, the remedy must follow." Id.

The Court, in recently rejecting the inevitable discovery exception to the exclusionary rule, once again reaffirmed this established proposition. Winterstein, 220 P.3d at 1231. Evidence obtained as a result of an unconstitutional search or seizure must be suppressed. Bonds, 98 Wn.2d at 10-11; State v. Boland, 115 Wn.2d 571, 582, 800 P.2d 1112 (1990). "The constitutionally mandated exclusionary rule provides a remedy for individuals whose rights have been violated and protects the integrity of the judicial system by not tainting the proceedings with

illegally obtained evidence." Winterstein, 220 P.3d at 1231 (citing State v. Ladson, 138 Wn.2d 343, 359-60, 979 P.2d 833 (1999)).

Here, the State indisputably violated Miles' privacy rights under article I, section 7 when it initially seized and searched his bank records without a warrant. Miles, 160 Wn.2d at 240, 252. The remedy of exclusion must follow. Bonds, 98 Wn.2d at 10-11; White, 97 Wn.2d at 110. The fact that the State later obtained the ill-gotten evidence again is of no moment where the asserted impetus for seeking that warrant was the Supreme Court's decision holding the State violated Miles' right to have his private affairs protected under article I, section 7. It was too late. The damage to Miles' privacy interests was done. "[O]ur constitutionally mandated exclusionary rule 'saves article 1, section 7 from becoming a meaningless promise.'" Ladson, 138 Wn.2d at 359 (quoting Sanford E. Pitler, The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy, 61 Wash. L. Rev. 459, 508 (1986)).

This Court should follow established precedent and affirm the suppression ruling. This is the only way to protect Miles' privacy rights, which is the paramount purpose behind Washington's exclusionary rule.

b. Overview Of The Inevitable Discovery and Independent Source Exceptions To The Exclusionary Rule.

The State's appeal is premised on the notion that Judge Armstrong wrongly applied the inevitable discovery test rather than the independent source test. BOA at 15, 34.

The federal inevitable discovery exception to the exclusionary rule allows admission of illegally obtained evidence if the State can "establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." Nix v. Williams, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984).

The Washington Supreme Court recently rejected the inevitable discovery exception as "incompatible with the nearly categorical exclusionary rule under article I, section 7." Winterstein, 220 P.3d at 1233.

The Gaines court held the independent source exception complies with article I, section 7. State v. Gaines, 154 Wn.2d 711, 712, 116 P.3d 993 (2005). According to Gaines, "evidence tainted by unlawful governmental action is not subject to suppression under the exclusionary rule, provided that it ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action." Id. at 718.

According to Winterstein, "[t]he independent source doctrine is much different from the inevitable discovery doctrine." Winterstein, 220 P.3d at 1232. "The independent source doctrine recognizes that probable cause may exist based on legally obtained evidence; the tainted evidence, however, is suppressed." Id. In Gaines, exclusion of the illegally obtained information from the probable cause determination was "sufficient to respect both the privacy interests of the individual and the State's interest in prosecuting criminal activity." Id. (citing Gaines, 154 Wn.2d at 720). "Under the independent source doctrine, the State is in no better or worse position as a result of the illegal search." Winterstein, 220 P.3d at 1232. "[T]he balancing of interests under the independent source doctrine becomes relevant only after the tainted evidence is disregarded." Id. In contrast, "the inevitable discovery doctrine is necessarily speculative and does not disregard illegally obtained evidence." Id.

Under federal law, the independent source exception to the exclusionary rule "allows admission of evidence that has been discovered by means wholly independent of any constitutional violation." Nix, 467 U.S. at 443. For a warrant to qualify as an "independent source," the government must satisfy a two-part test. First, information obtained from the initial illegal search must not affect the judge's decision to issue the warrant. Murray v. United States, 487 U.S. 533, 542, 108 S. Ct. 2529, 101

L. Ed. 2d 472 (1988). Second, the trial court must find officers would have sought a valid search warrant had they not conducted an illegal search. Murray, 487 U.S. at 542 n.3, 543. "To determine whether the warrant was independent of the illegal entry, one must ask whether it would have been sought even if what actually happened had not occurred." Id. at 542 n.3. This much is "needed to assure that what comes before the court is not the product of illegality." Id.

The "ultimate question" is "whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue." Murray, 487 U.S. at 542. A search later carried out pursuant to a warrant is not an "independent" source if the government agents' decision to seek the warrant was prompted by what they had learned from the unlawful search. Id. The independent source doctrine can apply only if the later seizure was "not the result" of the earlier, illegal search. Id. at 541. "[W]hat counts is whether the actual illegal search had *any effect* in producing the warrant." Id. at 543 (emphasis added).

c. This Is An Inevitable Discovery Case Because The State Unconstitutionally Seized Evidence Without A Warrant.

The trial court suppressed the bank record evidence following remand from the Supreme Court's decision in Miles, ruling it could not be admitted under the independent source exception. CP 223-25, 258-60.

This Court, however, can affirm the trial court's resolution of a matter on any basis supported by the record. State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). This Court should affirm suppression because the inevitable discovery doctrine, not the independent source doctrine, is really at issue here. The inevitable discovery doctrine cannot justify admission of unconstitutionally obtained evidence under article I, section 7 as a matter of law. Winterstein, 220 P.3d at 1233.

The United States Supreme Court, in construing the Fourth Amendment and the purpose behind the federal exclusionary rule, has stated the independent source exception can apply to evidence first seized unlawfully and then re-seized pursuant to a warrant. Murray, 487 U.S. at 542.

The Washington Supreme Court, in construing the independent source doctrine under article I, section 7, has signaled a different understanding of the significance of an initial illegal seizure. As set forth below, the inevitable discovery doctrine, not the independent source doctrine, is invoked under article I, section 7 if the State first illegally seizes evidence without a warrant and then later seeks to re-seize the evidence based on a warrant.

In Gaines, police searched a locked car trunk without a warrant, but did not seize a weapon and ammunition from the trunk at the time.

Gaines, 154 Wn.2d at 714. Instead, police later sought and obtained a search warrant for the trunk, at which point this incriminating evidence was seized. Id. at 714-15. The supporting affidavit referenced the officer's observation of the evidence in the trunk, as well as other evidence to establish probable cause. Id. at 714-15.

At trial, the defendants moved to suppress evidence from the trunk, arguing the officer's initial search of the locked trunk was unlawful and exclusion was mandatory. Id. at 715. The trial court admitted the evidence under the inevitable discovery exception, reasoning police would have obtained the items in the trunk "through the course of predictable police procedures." Id.

The Supreme Court originally granted review on the issue of whether the inevitable discovery exception complies with article I, section 7. Id. at 716 n.5. The Court ultimately determined "the facts of this case do not require us to decide that issue, thus we do not address it further," citing State v. Coates, 107 Wn.2d 882, 887, 735 P.2d 64 (1987) for the proposition that the "inevitable discovery doctrine is applicable only if evidence has been seized illegally." Id.

Gaines shows evidence seized in the first instance without a warrant is potentially subject to the inevitable discovery exception, not the independent source exception. The Court in Gaines implicitly recognized

the actual seizure and resulting search of evidence without a warrant is a greater intrusion into a citizen's private affairs than unlawful actions that do not amount to seizure, such as a "glance" inside an automobile trunk. Gaines, 154 Wn.2d at 721. In Miles' case, the State seized and then mined every detail of Miles' bank records to craft criminal charges against him. CP 297-321. The duration and intensity of the intrusion is far greater than the simple "glance" in Gaines.

Gaines also recognizes once evidence is unconstitutionally seized, the hands of time cannot be turned back to undo the illegal seizure and resulting search. When an illegal seizure first occurs without a warrant, then the inevitable discovery exception comes into play, not the independent source exception. This is why Gaines drew a distinction between: (1) evidence seized immediately pursuant to an unlawful search and (2) evidence that was not immediately seized but later acquired through a warrant. Gaines, 154 Wn.2d at 716 n.5, 717, 720. The former invokes the inevitable discovery exception. The latter invokes the independent source exception.

In Miles' case, the State initially seized and searched the bank records without a warrant. This search and seizure was indisputably unconstitutional. Miles, 160 Wn.2d at 240, 252. Only later, after losing in the Supreme Court, did the State seek to reacquire the same bank records

through a warrant. According to Gaines, the inevitable discovery doctrine is at issue.

The State may claim a full Gunwall² analysis is necessary to distinguish the independent source exception under article I, section 7 from its federal counterpart. That claim should be rejected. Gaines has already addressed the issue. Moreover, "[a] strict rule that courts will not consider state constitutional claims without a complete Gunwall analysis could return briefing into an antiquated writ system where parties may lose their constitutional rights by failing to incant correctly." City of Woodinville v. Northshore United Church of Christ, 166 Wn.2d 633, 641, 211 P.3d 406 (2009). Argument on state constitutional provisions and citation to authority is all that is required, especially where the Washington Supreme Court has previously recognized special protections under our state constitution. Id. at 641-42.

"Under the Washington Constitution, it is well established that article I, section 7 qualitatively differs from the Fourth Amendment and in some areas provides greater protections than does the federal constitution." State v. Surge, 160 Wn.2d 65, 70, 156 P.3d 208 (2007). Accordingly, a formal Gunwall analysis is unnecessary to establish this

² State v. Gunwall, 106 Wn.2d 54, 67, 720 P.2d 808 (1986) (setting forth factors for evaluating whether an issue merits independent state constitutional interpretation).

Court should undertake an independent state constitutional analysis when reviewing search and seizure issues: "The only relevant question is whether article I, section 7 affords enhanced protection in the particular context." Id. at 71.

Following Gaines, this Court should affirm the suppression ruling because this is an inevitable discovery case, not an independent source case. The inevitable discovery exception cannot apply as a matter of law to save the illegally acquired evidence in this case because that exception is incompatible with article I, section 7. Winterstein, 220 P.3d at 1232-33.

d. The Independent Source Exception Does Not Apply As A Matter Of Law.

The State's argument also fails under an independent source analysis. The prosecutor claims the independent source exception applies because he was motivated to seek a warrant for the evidence based solely on the Supreme Court's decision in Miles. BOA at 30, 39. The premise of the State's argument is that the "independent source" of the evidence is the warrant obtained by the prosecutor after the Supreme Court held the State violated Miles' private affairs by illegally searching his bank records without a warrant.

Assuming the prosecutor was only prompted to seek the warrant based on the Supreme Court's decision in Miles, the argument fails for two reasons.

First, evidence obtained via the warrant is not truly independent of the earlier illegal search and seizure under a standard "fruit of the poisonous tree" analysis. The warrant cannot qualify as an "independent source" because it was obtained through exploitation of the initial illegality or, at the very least, obtained by means insufficiently distinguishable to be purged of the primary taint.

Second, the independent source exception does not apply to situations that undermine the purposes behind the state exclusionary rule under article I, section 7. If the State can rely on a court opinion that suppresses evidence to subsequently invoke the independent source exception, the result would gut the purposes of the exclusionary rule under article I, section 7.

The independent source exception allows admission of evidence that has been discovered by means "wholly independent of any constitutional violation." Nix, 467 U.S. at 443. The "ultimate question" is whether the search pursuant to warrant was a "genuinely independent" source of the evidence. Murray, 487 U.S. at 542. That is, the evidence cannot be the result or the "product of illegality." Id. at 541, 542 n.3.

Evidence that is the product of illegality is fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). "When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." Ladson, 138 Wn.2d at 359. The exclusionary rule does not apply when the government "learn[s] of the [challenged] evidence from an 'independent source.'" Wong Sun, 371 U.S. at 487 (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S. Ct. 182, 183, 64 L. Ed. 319 (1920) (first stating the independent source doctrine)). A "but for" causation relationship is not itself sufficient to justify suppression. Wong Sun, 371 U.S. at 488. But under the fruit of the poisonous tree doctrine, evidence obtained directly or indirectly from illegal police conduct "will be excluded unless it was not obtained by exploitation of the initial illegality or by means sufficiently distinguishable to be purged of the primary taint." State v. Le, 103 Wn. App. 354, 361, 12 P.3d 653 (2000) (citing Wong Sun, 371 U.S. at 484-85).

The independent source doctrine thus applies to "evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities *untainted* by the initial illegality." Murray, 487 U.S. at 537 (emphasis added). The independent source doctrine is not an exception to the fruit of the poisonous tree doctrine.

Rather, as Murray recognized, evidence obtained from a wholly independent source is admissible precisely because that source is untainted by earlier illegality.

In evaluating whether evidence should be admitted under the independent source exception, courts must keep in mind the underlying question of whether the evidence is fruit of the poisonous tree. United States v. Leake, 95 F.3d 409, 412 (6th Cir. 1996). To prove evidence was not obtained by exploitation of the initial illegality or by means sufficiently distinguishable to be purged of the primary taint, the State must show "the evidence was discovered through a source independent from the illegality." Le, 103 Wn. App. at 361.

The State cannot meet this standard here. The State argues it obtained a warrant due to the Supreme Court's decision in Miles, which held the State unlawfully searched Miles' bank records in violation of article I, section 7. The source of the Court's decision in Miles is the State's illegal search of the bank records. The State exploits the initial illegality by attempting to exploit the Supreme Court's decision holding the State unlawfully seized the evidence. The Supreme Court's decision recognizing the initial illegality does not somehow cleanse the re-seizure of its taint. The decision itself cannot be used as the springboard for admission of the very evidence the Court held was illegally obtained.

The means of re-seizing the bank records via warrant stems directly or indirectly from the unlawful search and seizure. The warrant is the product of that unconstitutional action. Under these circumstances, evidence obtained via the warrant is the result or "product of illegality" and therefore must be excluded. Murray, 487 U.S. at 541, 542 n.3.

The fruit of the poisonous tree doctrine "ensures that the government cannot achieve indirectly what it is forbidden to accomplish directly." Leake, 95 F.3d at 411. This case is a good example of the government trying to achieve admission of tainted evidence by indirect means after failing to achieve admission by direct means.

The federal cases relied on by the State are flawed because they completely fail to acknowledge the ramifications of the fruit of the poisonous tree doctrine. BOA at 19-20, 30-33 (citing United States v. Hanhardt, 155 F. Supp. 2d 840 (N.D. Ill. 2001); United States v. Mulder, 889 F.2d 239 (9th Cir. 1989); United States v. Johnson, 994 F.2d 980 (2d Cir. 1993)).³

Furthermore, those cases rely on the federal exclusionary rule, whereas this case is controlled by Washington's exclusionary rule. Exclusion under article I, section 7 provides a remedy for the citizen in

³ Johnson is factually unrelated because it did not involve reliance on a court decision suppressing evidence as the basis for invoking the independent source exception. Johnson, 994 F.2d at 986-88.

question and "saves the integrity of the judiciary by not tainting our proceedings by illegally obtained evidence." Ladson, 138 Wn.2d at 359-60; see also State v. Day, 161 Wn.2d 889, 894, 168 P.3d 1265 (2007) ("If the evidence was seized without authority of law, it is not admissible in court. We suppress such evidence not to punish the police, who may easily have erred innocently. We suppress unlawfully seized evidence because we do not want to become knowingly complicit in an unconstitutional exercise of power.").

The independent source exception, as articulated in Gaines, is not broad, but rather should be limited to those circumstances where the exclusionary rule would serve no purpose under article I, section 7. Winterstein, 220 P.3d at 1231, 1232 ("We do not read Coates and Gaines expansively."). The State's argument, however, represents an unprecedented and unjustified expansion of the independent source exception under Washington law.

The State is attempting to hijack the Supreme Court's decision in Miles as the vehicle by which to admit evidence initially seized and searched without authority of law. The evidence remains tainted despite being re-seized through a warrant and should not be allowed to pollute court proceedings or undermine Miles' privacy rights. The State's theory

of admission impermissibly entangles the courts in its earlier unconstitutional exercise of power.

The third purpose behind the exclusionary rule under article I, section 7 is to "to deter the police from acting unlawfully in obtaining evidence." Bonds, 98 Wn.2d at 12. In Le, the police illegally arrested the defendant. Le, 103 Wn. App. at 356. This Court held the officer's post-arrest identification should have been suppressed as the fruit of an illegal arrest. Id. It refused to apply the independent source doctrine to excuse the illegal arrest because such application would "permit the police to ignore the requirement for an arrest warrant, secure in the knowledge that the victim's postarrest identification of the defendant will still be admissible." Id. at 363.

The same rationale applies here. The State's conduct should be similarly deterred. If accepted, the State's argument creates perverse incentives and exposes the private affairs of Washington citizens to unacceptable intrusion. It removes motivation to apply for a warrant during the course of police investigation. Whenever a court at any level ruled a warrantless search and seizure was illegal, the State would be free to apply for a warrant and re-seize evidence under the independent source doctrine, claiming the court's suppression decision prompted it to seek a warrant rather than evidence uncovered by illegal search.

Mechanical application of the independent source doctrine in this context will encourage constitutional shortcuts. Where, as here, the State seeks to maneuver around the exclusionary rule after a court held the State unlawfully seized evidence, the deterrent effect of the exclusionary rule retains force and militates against application of the independent source exception.

Before the Supreme Court issued its decision in Miles, the State did not make any argument related to the derivative use of the bank record evidence or whether it had any alternative means of legally obtaining that evidence. CP 184. Applying the exclusionary rule would effectively deter prosecutors from lying in the weeds, waiting to see how a court ultimately rules, and then rely on that ruling to invoke the independent source exception in the event it is unfavorable.

Hanhardt, the federal district court case upon which the State relies, cited Murray for its assertion that the independent source exception honored the deterrence purpose of the federal exclusionary rule. Hanhardt, 155 F. Supp. 2d at 847 (citing Murray, 487 U.S. at 537). In a 4-3 decision, the United States Supreme Court in Murray claimed the deterrence policy of the exclusionary rule remains in effect because government agents relying on the independent source doctrine risk suppression of evidence by increasing their burden from one of probable

cause to "the much more onerous burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it." Murray, 487 U.S. at 540.

This reasoning has been questioned. 6 Wayne R. LaFave, Search & Seizure § 11.4 at 339-40 (4th ed. 2004). The "onerous burden" described by the majority in Murray is not onerous in practice. 20 years later, cases where a trial judge disbelieved an officer's representation that he or she was not prompted by anything discovered from an illegal search to apply for a warrant are nearly non-existent.⁴ Subsequent history sides with the dissenters:

[O]fficers committing the illegal search have both knowledge and control of the factors central to the trial court's determination . . . It normally will be difficult for the trial court to verify, or the defendant to rebut, an assertion by officers that they always intended to obtain a warrant, regardless of the results of the illegal search. The testimony of the officers conducting the illegal search is the only direct evidence of intent, and the defendant will be relegated simply to arguing that the officers should not be believed. Under these circumstances, the litigation risk described by the Court seems hardly a risk at all; it does not significantly dampen the incentive to conduct the initial illegal search.

⁴ Undersigned counsel found one case where the trial judge made an adverse credibility finding against an officer, and that ruling was reversed because the finding was made on improper grounds. State v. Krukowski, 62 P.3d 452, 455-56 (Utah App. 2002), rev., 100 P.3d 1222, 1225 (Utah 2004).

Murray, 487 U.S. at 547-48 (Marshall, J., dissenting).

The Court in Gaines did not comment on the deterrence rationale offered by the majority or dissent in Murray. In any event, the deterrence purpose behind the exclusionary rule applies with greater force to the circumstances of this case, where a prosecutor rather than a police officer is the moving force behind the warrant application. CP 273-75, 280, 295-96. The prosecutor, as a trained legal professional, is in a position to deliberately craft ways around the exclusionary rule. The prosecutor in this case has attempted to manipulate Washington's constitutionally mandated exclusionary rule to serve his own ends. Such gamesmanship should not be tolerated.

Moreover, in comparison with a police officer's professed motivation, judges are even less inclined to question a prosecutor's stated motivation due the authority of his public office. Judge Armstrong is the rare judge who did.

Furthermore, allowing a prosecutor to essentially testify on his own behalf regarding why he sought a warrant potentially violates the rules of professional conduct, which generally prohibit a lawyer from serving as both advocate and witness. RPC 3.7; cf. State v. Bland, 90 Wn. App. 677, 680, 953 P.2d 126 (1998) (factors to consider include whether

the testifying prosecutor can be an objective witness, whether the dual positions artificially bolster the witness's credibility, and whether the dual role raises an appearance of unfairness).

The State attempts to justify application of the independent source exception by balancing the costs and benefits of admitting the evidence. BOA at 22-23, 29. But that balancing of interests should not be carried out when evidence is actually obtained in violation of a person's constitutional rights. Winterstein, 220 P.3d at 1231. "When evidence is obtained in violation of the defendant's constitutional immunity from unreasonable searches and seizures, there is no need to balance the particular circumstances and interests involved." Bonds, 98 Wn.2d at 10-11. Only "where evidence is obtained through an illegality which falls short of a violation of the defendant's constitutional immunity, and where no violation of this state's laws has occurred, we hold that balancing of the costs and benefits of exclusion is appropriate." Id. at 11.

- e. Even If The Independent Source Exception Could Potentially Apply, Suppression Is Still Required Because The Trial Court's Findings And Conclusions Are Sound.

Appellate review is limited to whether the factual findings are supported by substantial evidence and whether the findings support the conclusions of law. State v. Macon, 128 Wn.2d 784, 799, 911 P.2d 1004

(1996). Conclusions of law are reviewed de novo. Gaines, 154 Wn.2d at 716. Substantial evidence is a quantum of evidence sufficient to persuade a rational, fair-minded person that the declared premise is true. In re Detention of Kistenmacher, 134 Wn. App. 72, 75, 138 P.3d 648 (2006). If the standard is satisfied, this Court will not substitute its judgment for the trial court's judgment even though it may have resolved a factual dispute differently. Id.

In order for a later search pursuant to a warrant to be deemed "genuinely independent" of a prior illegal one, the government must demonstrate "police would still have sought a warrant in the absence of the illegal search." United States v. Runyan, 275 F.3d 449, 467 (5th Cir.2001) (citing Murray, 487 U.S. at 542), on appeal after remand, 290 F.3d 223 (5th Cir. 2002), cert. denied, 537 U.S. 888, 123 S. Ct. 137, 154 L. Ed. 2d 149 (2002). In United States v. Hill, for example, the defendant argued the warrant was tainted by a prior illegal search of his house. United States v. Hill, 55 F.3d 479, 481 (9th Cir. 1995). To be untainted by a prior search, the trial court must "explicitly find that the agents would have sought a warrant if they had not earlier entered [defendant's house]." Id. (citing Murray, 487 U.S. at 543). The Ninth Circuit reversed denial of the suppression order because the trial court did not make such a finding. Hill, 55 F.3d at 481.

The State focuses on the trial court's determination that "[t]he independent source doctrine 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." CP 259 (FF 2). The "flawed investigation" refers to the Division's illegal search and seizure of Miles' bank records. The judge concluded "Consequently, the bank records re-acquired pursuant to the judicially issued warrant . . . were also gained by unconstitutional means." CP 259 (FF 3).

There was no evidence the State would have obtained the evidence through a warrant in the absence of the Division's illegal search and seizure. The State admits this. BOA at 26-27. The State only made efforts to secure a warrant after the Supreme Court held the initial search and seizure was unconstitutional.

Whether the government has shown officers would have sought a warrant in the absence of unlawfully obtained evidence under the independent source doctrine is a question of fact. State v. Spring, 128 Wn. App. 398, 405, 406, 115 P.3d 1052 (2005), review denied, 156 Wn.2d 1032, 134 P.3d 232 (2006). The lack of explicit finding by the trial court in Miles' case that the State would have sought a warrant absent the illegal

search of Miles' bank records is fatal to the State's argument. State v. Perez, 147 Wn. App. 141, 193 P.3d 1131, 1132 (2008) (trial court erred in denying suppression where officers had no intent to seek warrant before they conducted illegal "inventory" search).

The State asserts the test of whether government agents would have sought a warrant in the absence of an illegal search is not the correct test for the independent source doctrine. BOA at 15-16, 23-24, 34-36. The State claims the real test is whether state agents were prompted by the illegal search to obtain a warrant at a later time, and that whether they would have sought a warrant is but one means of showing they were not motivated to seek a warrant based on a prior illegal search. BOA at 27-28, 46.

The State misreads Murray. A search later carried out pursuant to a warrant is not an "independent" source if the government agents' decision to seek the warrant was prompted by what they had learned from the unlawful search. Murray, 487 U.S. at 542. But in determining whether a source is truly independent, "what counts is whether the actual illegal search had *any effect* in producing the warrant." Murray, 487 U.S. at 543 (emphasis added). The actual unlawful search could have an effect in producing the warrant even though government agents were not prompted by what they had learned from the unlawful search. This case

illustrates the proposition. The State obtained the warrant only by virtue of its reliance on the Supreme Court's decision in Miles, where the Court held the State actually violated Miles' privacy rights. In this manner, the State's initial unlawful action affected its ability to obtain a warrant at a later time.

The Gaines court did not frame the test as the State would have it. In Gaines, the State needed to prove police would have sought the warrant for the trunk absent the illegal search to satisfy the second prong of the independent source test. Gaines, 154 Wn.2d at 721-22. The trial court found police would have obtained the items in the trunk "through the course of predictable police procedures." Id. at 721. The Court determined "[t]his finding strongly, and we believe adequately, supports the conclusion that the police would have sought a search warrant for Norman's trunk based on facts gathered independently from the improper glance inside the trunk." Id. The evidence ultimately seized pursuant to a lawful warrant was admissible because the trial court found "the police would have sought a warrant for the trunk even absent the initial, illegal search." Id. at 722.

Unlike the trial court in Gaines, Judge Armstrong found the State failed to prove this fact here. But her findings followed the Gaines test and support her conclusion that the independent source doctrine does not

apply. The State concedes it had no intent to seek a warrant in the absence of the illegal search. Such intent is a necessary foundation, at least where the State relies on a warrant as the alleged independent source. Perez, 193 P.3d at 1132 (citing Gaines, 154 Wn.2d at 721; Spring, 128 Wn. App. at 403; Murray, 487 U.S. at 542-43).

Intent to obtain a warrant absent an illegal search is necessary based on the underlying rationale of the independent source doctrine. The rationale is that "the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred." Murray, 487 U.S. at 537 (quoting Nix, 467 U.S. at 443). Where, as here, government agents would not have obtained a warrant in the absence of the illegal conduct, then application of the exclusionary rule puts the State in no worse position than it would have been absent the illegality. The trial court did not err in rejecting the State's independent source claim.

The Court in Gaines stated the remedy of striking tainted information from the search warrant affidavit "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." Gaines, 154 Wn.2d at 720. That fine balance exists where the government would have obtained a warrant absent the initial illegality, as was the case in Gaines. That is not the case here.

The State maintains the issue boils down to whether the contents of the tainted bank records motivated the prosecutor's application for the warrant from Judge Eadie. BOA at 29, 35. Assuming the State is correct that the ultimate test is whether state agents were motivated by the earlier illegal search to obtain a warrant, its argument still fails. The trial court simply disbelieved the prosecutor's assurance he was not motivated to seek the warrant based on anything discovered from the illegal search.

The prosecutor applied for the warrant. CP 270, 273-75, 280, 295-96. His motivation is at issue. The prosecutor claims "the reason it sought a warrant was the Supreme Court's decision on the earlier suppression litigation." BOA at 30. According to the prosecutor, his explanation is "plausible" and supported by the factual record. BOA at 30.

At the suppression hearing, the prosecutor assured the trial court he was not motivated to seek the warrant by anything revealed from the illegal search of the bank records. RP 7. The trial court did not believe him and suppressed the evidence. CP 259 (FF 2). The court refused to find the prosecutor had an independent motivation to seek the warrant.

When there is an absence of a finding on a factual issue, it is presumed that the party with the burden of proof failed to sustain its burden on this issue. State v. Cass, 62 Wn. App. 793, 795, 816 P.2d 57 (1991); State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

"[I]t is not the function of an appellate court to substitute its judgment for that of the trial court or to weigh the evidence or the credibility of witnesses." Davis v. Dep't of Labor and Indus., 94 Wn.2d 119, 124, 615 P.2d 1279 (1980). "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335 (1987). The trial court did not find the prosecutor's claim that he was unmotivated by the fruits of the prior illegal search to be worthy of belief.

And for good reason. A trial court may infer motivation from the totality of facts and circumstances. Murray, 487 U.S. at 540 n.2; United States v. Restrepo, 966 F.2d 964, 972 (5th Cir. 1992). A key consideration in determining motivation is the "relative probative import" of the information secured during the illegal search compared with all other information known to the government. Williams v. State, 327 Ark. 213, 221, 939 S.W.2d 264 (Ark. 1997) (quoting Restrepo, 966 F.2d at 972).

The bank records unlawfully seized by the Division contained a wealth of incriminating information and a search of those records led to further evidence of criminal wrongdoing. CP 297-321. The prosecutor self-servingly claims he was not prompted to obtain a warrant by evidence uncovered by the unlawful subpoena. RP 7; BOA at 15. Yet he also "concluded that the likelihood of success at trial without the bank records and the evidence derived from those records is so limited as to make trial a futile act." CP 262. Although the prosecutor may claim he was not motivated to obtain the warrant based on what he already knew from the unlawful search, the trial court had discretion to find that claim implausible. Murray, 487 U.S. at 540 n.2.

The State relies on Hanhardt on appeal. BOA at 19-20, 45. In Hanhardt, the defendant Basinski moved to suppress evidence obtained from a search of his briefcase. Hanhardt, 155 F. Supp. 2d at 843. This evidence was previously suppressed in a different case involving different charges because the Government searched the briefcase without a warrant. Id. at 843-44. Before the previous case was dismissed, the government charged Basinski with different crimes in a different case. Id. at 844. After the previous case was dismissed, the government obtained a warrant to again search Basinski's briefcase to use against him in the new case. Id. at 844.

The government asserted its motive for obtaining the warrant was the appellate court's decision affirming suppression of the evidence. Id. at 848. The trial court found the government did not have an improper motive in seeking the warrant, and concluded the independent source doctrine allowed briefcase evidence to be admitted. Id. at 849. Basinski argued it "blinks reality" to believe the government's decision to seek the warrant was not prompted by evidence obtained from the illegal search, but the trial court found the stated reason "plausible" and supported by the record. Id. at 850-51.

Hanhardt is distinguishable from Miles' case. The government in Hanhardt obtained a warrant to support new charges in a different case. The government in Miles' case obtained a warrant to continue pursuit of the same charges in the same case. The evidence obtained in Miles' case is more closely tied to the primary taint of the illegal seizure than the evidence at issue in Hanhardt. Furthermore, this Court should not follow Hanhardt because it is inconsistent with Washington's exclusionary rule and improperly disregards the fruit of the poisonous tree doctrine.⁵

Assuming the validity of its legal analysis, Hanhardt does not demonstrate Judge Armstrong was wrong. In Hanhardt, a trial judge found government agents were not improperly motivated to seek a

⁵ See D. 1. a., d. and e., supra.

warrant. Judge Armstrong made a different finding based on a different factual record. No trial court is bound by after-the-fact government assurances regarding motivation for seeking a warrant. Murray, 487 U.S. at 540 n.2. But stripped to its core, the prosecutor asks this Court to require the trial court to give his representations dispositive effect. That is not the law. The trial court was free to reject the prosecutor's self-serving assurance and it did.

It has been stated the requirement of proper motive in Murray is meant to guard against the "confirmatory search." Restrepo, 966 F.2d at 972-73 (citing Wayne R. LaFave, Search and Seizure § 11.4(f) at 70 (1992 Supp.)). In the traditional case of a confirmatory search, exploitation of illegal conduct "may be found in the fact that the police have used the search to assure themselves that there is cause to obtain a warrant." People v. Burr, 70 N.Y.2d 354, 362, 520 N.Y.S.2d 739, 514 N.E.2d 1363 (N.Y. 1987).

The State claims there is "no evidence" that a confirmatory search occurred in Miles' case. BOA at 29. The State seems to suggest the second prong of the independent source test — whether the State would have sought a search warrant or was prompted to seek the warrant based on its earlier unlawful action — is automatically satisfied if the State did not engage in a "confirmatory" search.

Rejection of the State's independent source argument does not turn on whether the State engaged in a confirmatory search. No court has ever held the independent source exception applies unless the government conducted a confirmatory search. There was nothing to suggest officers in Murray engaged in a confirmatory search, but the Court still remanded the case for a finding on whether officer would have sought a warrant. Murray, 487 U.S. at 540 n.2, 543.

The independent source doctrine applies only if the later seizure was "not the result" of the earlier, illegal search. Murray, 487 U.S. at 541. "[W]hat counts is whether the actual illegal search had any effect in producing the warrant." Id. at 543. If the government is motivated to seek a warrant based on something it learned from the earlier unlawful search, then the second prong of the independent source exception remains unsatisfied, regardless of whether the earlier unlawful was "confirmatory" in nature.

Furthermore, if the subsequent search and seizure of Miles' bank records is the direct or indirect fruit of an initial illegal seizure, then the evidence is not "independent" of that original unlawful action, regardless of whether a confirmatory search occurred. The independent source exception does not apply because the State did not ultimately obtain the

evidence from an "independent" source under the fruit of the poisonous tree doctrine. See D. 1. d., supra.

That being said, there is evidence of a confirmatory search in this case. At the suppression hearing, Judge Armstrong suggested the Division engaged in a confirmatory search because nothing in the record showed it would have referred Miles' case to the prosecutor in the absence of the documents it seized via the invalid administrative subpoena. RP 12-13. The prosecutor argued the Division could not be said to engage in a confirmatory search of Miles' bank records because it never obtained a warrant after recovering evidence via the administrative subpoena. RP 9-10. In fact, after reviewing evidence obtained via the administrative subpoena, the State in 2003 obtained a warrant to search for evidence of securities fraud, witness tampering, and witness intimidation at Miles' former residence, where he still had personal belongings. CP 217-222. This effort fits into the traditional confirmatory search parameters. It is probative evidence regarding the character of the Division's illegal search by means of administrative subpoena.

The Division routinely issued subpoenas to a bank "to identify potential investment transactions, investors, and instances where it appears that may have been misuse or misappropriation of investors' money." CP 166. According to Division Chief Cordell, "the issuance of a subpoena

for bank records is almost always the first or among the first investigative steps undertaken in a securities investigation. That is because the bank records will reveal several crucial things: is the fraud ongoing, are there other victims, and what happened to the money." CP 143. The Division referred only a small number of cases for criminal investigation, and it did not make a referral decision until after investigation. CP 139, 159, 167. As of December 2004, the Division received about 400 complaints during the previous year. CP 166. The Division investigated about 100 of those complaints and referred only six of them to the prosecutor. CP 166.

Administrative subpoena searches were used, at least in part, to weed out cases deserving of criminal prosecution from those that did not. One function of the administrative subpoena was to confirm the existence of criminal activity. In Miles' case, the Division urged the bank to act quickly on the subpoena because of the statute of limitations for prosecuting theft. Miles, 160 Wn.2d at 241. This evidence shows the Division's search of Miles' bank records was a confirmatory search.

f. The State's Remaining Claims Do Not Merit Consideration.

The State complains the trial court erred in not holding an evidentiary hearing before denying its motion to reconsider the suppression order. BOA at 3. The State does not support this assignment

of error on this point with any authority or developed argument. This Court should therefore refuse to consider the claimed error. State v. Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) (passing treatment of an issue without citation to authority is insufficient to merit judicial consideration). Argument presented for the first time in a reply brief will not be considered. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Regardless, the State's claim fails. "[I]t is within the discretion of the trial court to allow oral testimony, in addition to affidavits, when hearing a motion to suppress evidence." State v. McLaughlin, 74 Wn.2d 301, 303, 444 P.2d 699 (1968). A trial court abuses its discretion only when it takes a view that no reasonable person would take. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

The court considered the State's proffered affidavit from Cordell, which was attached to the motion for reconsideration. CP 257. The State did not inform the trial court what Cordell's oral testimony would have added beyond what was contained in the affidavit. The State made no offer of proof. The State's motion for reconsideration only stated "If the court is not persuaded by this declaration the State requests an evidentiary hearing where we will call the Securities Division witness in court to

answer questions." CP 234. In the absence of an offer of proof, the court acted well within its discretion in declining to hold an evidentiary hearing.

The State also assigns error to Judge Armstrong's refusal to issue a subpoena duces tecum for the same bank records covered by the search warrant authorized by Judge Eadie.⁶ BOA at 2. The State's position below was that it could issue the subpoena without Judge Armstrong's permission, so it is unclear why her failure to give permission matters to the State. CP 270. The subpoena would have encompassed the same evidence obtained from the search warrant. The State's subpoena request was redundant and gratuitous. Moreover, the State does not support its assignment of error on this point with any authority or argument, particularly in regards to why the lack of a subpoena has any impact on the issues in this case. This Court should therefore refuse to consider the claimed error. Thomas, 150 Wn.2d at 868-69.

The State also assigns error to the trial court's refusal to find the practical effect of the suppression order was to terminate the case. BOA at 3-5. This claimed error is not properly before this Court. The Court of Appeals commissioner declined to grant discretionary review of the trial

⁶ The clerk's minutes show the judge denied the State's motion for issuance of a subpoena on September 4, 2007. Supp CP __ (sub no. 110, Clerk's Minutes, 9/4/07).

court order that failed to find the practical effect of the suppression order was to terminate the case on all counts.⁷

The State did not file a motion to modify the commissioner's ruling. A party aggrieved by a commissioner's ruling may obtain relief solely by a motion to modify. RAP 17.7. Because the State did not move to modify, the ruling of the commissioner became the final decision of this Court. In re Detention of Broer, 93 Wn. App. 852, 857, 957 P.2d 281 (1998). This Court should therefore refuse to consider the assignment of errors related to the practical effect of the suppression order.

In a footnote, the State challenges the trial court's findings on the prosecutor's troubling conduct in this case. BOA at 2 n.4. Argument presented in a footnote will not be addressed. State v. N.E., 70 Wn. App. 602, 607 n.3, 854 P.2d 672 (1993).

⁷ Commissioner's Ruling Granting Discretionary Review at 9.

E. CONCLUSION

For the reasons stated, Mr. Miles requests that this Court affirm the trial court's suppression order.

DATED this 17th day of February 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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WSBA No. 37301
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Attorneys for Respondent

APPENDIX A

FILED

2003 NOV -7 PM 3: 21

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)
)
Plaintiff,)
)
v.)
)
MICHAEL M. MILES,)
)
Defendant.)
_____)

No. 03-1-09574-1 SEA
INFORMATION

WARRANT ISSUED
CHARGE COUNTY \$110.00

COUNT I

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse MICHAEL M. MILES of the crime of **Securities Fraud**, a crime of the same or similar character as another crime charged herein, committed as follows:

That the defendant MICHAEL M. MILES in King County, Washington, during a period of time intervening between June 30, 1997 and November 20, 1999, through a series of acts which were part of a continuing criminal impulse and a continuing course of conduct, in connection with the offer and sale and purchase of a security, to-wit: investment contracts, did willfully, directly and indirectly: (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 Sandra Farwell;

Contrary to RCW 21.20.010 and 21.20.400 and against the peace and dignity of the State of Washington.

COUNT II

And I, Norm Maleng, Prosecuting Attorney aforesaid, further do accuse **MICHAEL M. MILES** of the crime of **Securities Fraud**, a crime of the same or similar character as another crime charged herein, committed as follows:

That the defendant **MICHAEL M. MILES** in King County, Washington, during a period of time intervening between October 23, 1999 and December 7, 1999, through a series of acts which were part of a continuing course of conduct, in connection with the offer and sale and purchase of a security, to-wit: investment contracts, did willfully, directly and indirectly: (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 Julie Gillett;

Contrary to RCW 21.20.010 and 21.20.400 and against the peace and dignity of the State of Washington.

COUNT III

And I, Norm Maleng, Prosecuting Attorney aforesaid, further do accuse **MICHAEL M. MILES** of the crime of **Securities Fraud**, a crime of the same or similar character as another crime charged herein, committed as follows:

~~That the defendant **MICHAEL M. MILES** in King County, Washington, during a period of time intervening between August 20, 2000 and November 14, 2000, through a series of acts which were part of a continuing course of conduct, in connection with the offer and sale and purchase of a security, to-wit: investment contracts, did willfully, directly and indirectly: (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 Susan Berndt;~~

Contrary to RCW 21.20.010 and 21.20.400 and against the peace and dignity of the State of Washington.

COUNT IV

And I, Norm Maleng, Prosecuting Attorney aforesaid, further do accuse **MICHAEL M. MILES** of the crime of **Securities Fraud**, a crime of the same or similar character as another crime charged herein, committed as follows:

That the defendant **MICHAEL M. MILES** in King County, Washington, during a period of time intervening between September 27, 2000 and April 23, 2001, through a series of acts which were part of a continuing course of conduct, in connection with the offer and sale and purchase of a security, to-wit: investment contracts, did willfully, directly and indirectly: (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 Susan Bowman;

Contrary to RCW 21.20.010 and 21.20.400 and against the peace and dignity of the State of Washington.

COUNT V

And I, Norm Maleng, Prosecuting Attorney aforesaid, further do accuse **MICHAEL M. MILES** of the crime of **Securities Fraud**, a crime of the same or similar character as another crime charged herein, committed as follows:

That the defendant **MICHAEL M. MILES** in King County, Washington, on or about May 3, 2001, in connection with the offer and sale and purchase of a security, to-wit: investment contracts, did willfully, directly and indirectly: (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 Michelle Bahr;

Contrary to RCW 21.20.010 and 21.20.400 and against the peace and dignity of the State of Washington.

COUNT VI

And I, Norm Maleng, Prosecuting Attorney aforesaid, further do accuse **MICHAEL M. MILES** of the crime of **Securities Fraud**, a crime of the same or similar character as another crime charged herein, committed as follows:

That the defendant MICHAEL M. MILES in King County, Washington, during a period of time intervening between April 1, 2002 and April 30, 2002, through a series of acts which were part of a continuing course of conduct, in connection with the offer and sale and purchase of a security, to-wit: investment contracts, did willfully, directly and indirectly: (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 Kristina Ragde;

Contrary to RCW 21.20.010 and 21.20.400 and against the peace and dignity of the State of Washington.

COUNT VII

And I, Norm Maleng, Prosecuting Attorney aforesaid, further do accuse MICHAEL M. MILES of the crime of **Securities Fraud**, a crime of the same or similar character as another crime charged herein, committed as follows:

That the defendant MICHAEL M. MILES in King County, Washington, during a period of time intervening between January 29, 2002 and March 19, 2002, through a series of acts which were part of a continuing course of conduct, in connection with the offer and sale and purchase of a security, to-wit: investment contracts, did willfully, directly and indirectly: (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 Carey Schroyer;

Contrary to RCW 21.20.010 and 21.20.400 and against the peace and dignity of the State of Washington.

COUNT VIII

And I, Norm Maleng, Prosecuting Attorney aforesaid, further do accuse MICHAEL M. MILES of the crime of **Intimidating a Witness**, a crime based on a series of acts connected together with another crime charged herein, committed as follows:

That the defendant MICHAEL M. MILES in King County, Washington, on or about December 20, 2002, by use of a threat directed to Susan Berndt, a person

whom he had reason to believe may have information relevant to a criminal investigation did attempt to influence the testimony of Susan Berndt;

Contrary to RCW 9A.72.110(1), and against the peace and dignity of the state of Washington.

COUNT IX

And I, Norm Maleng, Prosecuting Attorney aforesaid, further do accuse MICHAEL M. MILES of the crime of **Intimidating a Witness**, a crime based on a series of acts connected together with another crime charged herein, committed as follows:

That the defendant MICHAEL M. MILES in King County, Washington, on or about December 20, 2002, by use of a threat directed to Susan Bowman, a person whom he had reason to believe may have information relevant to a criminal investigation did attempt to influence the testimony of Susan Bowman;

Contrary to RCW 9A.72.110(1), and against the peace and dignity of the state of Washington.

COUNT X

And I, Norm Maleng, Prosecuting Attorney aforesaid, further do accuse MICHAEL M. MILES of the crime of **Intimidating a Witness**, a crime based on a series of acts connected together with another crime charged herein, committed as follows:

That the defendant MICHAEL M. MILES in King County, Washington, on or about December 20, 2002, by use of a threat directed to Michelle Bahr, a person whom he had reason to believe may have information relevant to a criminal investigation did attempt to influence the testimony of Michelle Bahr;

Contrary to RCW 9A.72.110(1), and against the peace and dignity of the state of Washington.

COUNT XI

And I, Norm Maleng, Prosecuting Attorney aforesaid, further do accuse MICHAEL M. MILES of the crime of **Tampering with a Witness**, a crime based on a series of acts connected together with another crime charged herein, committed as follows:

That the defendant MICHAEL M. MILES in King County, Washington, on or about December 20, 2002, attempted to induce Susan Berndt, a person whom he had reason to believe may have information relevant to a criminal investigation, to withhold from a law enforcement agency information which she has relevant to a criminal investigation;

Contrary to RCW 9A.72.120(1)(c), and against the peace and dignity of the state of Washington.

COUNT XII

And I, Norm Maleng, Prosecuting Attorney aforesaid, further do accuse MICHAEL M. MILES of the crime of **Tampering with a Witness**, a crime based on a series of acts connected together with another crime charged herein, committed as follows:

That the defendant MICHAEL M. MILES in King County, Washington, on or about December 20, 2002, attempted to induce Susan Bowman, a person whom he had reason to believe may have information relevant to a criminal investigation, to withhold from a law enforcement agency information which she has relevant to a criminal investigation;

Contrary to RCW 9A.72.120(1)(c), and against the peace and dignity of the state of Washington.

COUNT XIII

And I, Norm Maleng, Prosecuting Attorney aforesaid, further do accuse MICHAEL M. MILES of the crime of **Tampering with a Witness**, a crime based on a series of acts connected together with another crime charged herein, committed as follows:

That the defendant MICHAEL M. MILES in King County, Washington, on or about December 20, 2002, attempted to induce Michelle Bahr, a person whom he had reason to believe may have information relevant to a criminal investigation, to withhold from a law enforcement agency information which she has relevant to a criminal investigation;

Contrary to RCW 9A.72.120(1)(c), and against the peace and dignity of the state of Washington.

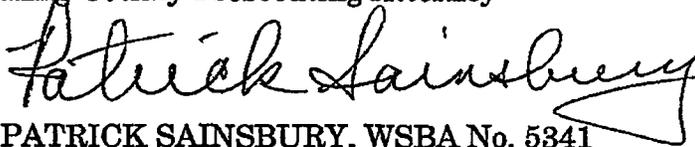
COUNT XIV

And I, Norm Maleng, Prosecuting Attorney aforesaid, further do accuse MICHAEL M. MILES of the crime of **Tampering with a Witness**, a crime based on a series of acts connected together with another crime charged herein, committed as follows:

That the defendant MICHAEL M. MILES in King County, Washington, on or about March 20, 2002, attempted to induce Susan Berndt, a person whom he had reason to believe may have information relevant to a criminal investigation, to withhold from a law enforcement agency information which she has relevant to a criminal investigation;

Contrary to RCW 9A.72.120(1)(c), and against the peace and dignity of the state of Washington.

NORM MALENG
King County Prosecuting Attorney



By PATRICK SAINSBURY, WSBA No. 5341
Chief Deputy Prosecuting Attorney
Fraud Division

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NO. 03-1-09574-1 SEA

CERTIFICATION OF PROBABLE CAUSE

I, Tyler R. Letey, am a Staff Attorney with the Securities Division of the Department of Financial Institution of the State of Washington. I have been employed as an attorney with the Securities Division for 2½ years.

I was responsible for the investigation of Michael M. Miles discussed below, which was conducted by the Enforcement Staff of the Securities Division. I prepared the Criminal Reference Report reflecting the results of the Securities Division's investigation of Michael M. Miles. Based on the information I learned in the course of the investigation, I have concluded that there is probable cause to believe that Michael M. Miles has committed the crimes of Securities Fraud, Theft, Intimidating a Witness and Tampering with a Witness. The results of the Securities Division's investigation are discussed below.

SYNOPSIS OF THE INVESTIGATION

From at least July 1997 though April 2002 Michael Miles, presenting himself as a successful securities salesperson and investor, defrauded at least eight women of nearly \$400,000. Miles, then an insurance salesperson for Primerica Financial Services, told these women that he could double or even triple their investment in 3 to 18 months. Miles also told the investors that he personally guaranteed the principal of their investments. Miles told the investors that he would invest their money in options and commodities and that his success at making such trades enabled him to promise such high returns and offer his personal guarantee. Although Miles led the investors to believe that he was a securities salesperson, Miles has never held a license to sell securities or commodities.

Miles did trade commodities using his own funds for a short period of time in 1997. These trades were made prior to the first investor's investment. These trades resulted in a loss of over \$2,500 on a \$6,500 investment. Miles also made a \$6,000 mutual fund purchase in 1995 that he later sold for a small profit. This investment was also completed prior to the first investor's investment. I have investigated thoroughly and carefully and have not been able to

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1 find any investments made by Miles from the first sale to an investor in July 1997 to the present.

2
3 Although the Securities Division was unable to find evidence that Miles invested any of
4 the investor's funds, based upon the nature of option and commodity investing, had Miles
5 actually invested the investor funds, it was misleading for Miles to guarantee an investment in
6 options or commodities. Option and commodity investing involves a high degree of speculation
7 and is not considered a prudent investment for the average investor. Additionally it was
8 misleading for Miles to guarantee the investor's principal because he had limited financial
9 resources to back up his guarantee.

10
11 Miles used the funds that he received from the investors for his own benefit and to help
12 perpetuate his fraud. By using the funds to maintain his standard of living he was able to give the
13 appearance of being financially successful. In most of the cases, the women that Miles solicited
14 were either going through divorce or had some other event in their personal life that left them
15 vulnerable.

16 BACKGROUND OF MICHAEL M. MILES

17
18 Michael Malone Miles was employed as an insurance salesperson with Primerica
19 Financial Services from 1998 to February 2002. Prior to working for Primerica Miles attended
20 Seattle University. In his position at Primerica he was able to sell insurance products, personal
21 loans, home loans and prepaid legal services but he was never registered as a securities broker-
22 dealer, salesperson or investment adviser. In February 2002 Primerica terminated Miles for not
cooperating with the Securities Division investigation and for receiving what Primerica believed
to be personal loans from individuals that he recruited to work under him at Primerica. In the
Primerica business structure, sales representatives are encouraged to recruit other individuals to
work for Primerica. The recruiter then acts as a supervisor to those that they recruit and are
rewarded financially for the success of those recruits. According to Dan Brecht, manager of the
Primerica office where Miles worked, in the last year that Miles worked for Primerica, Miles'
compensation was around \$3,300 for the entire year. Brecht said that during the time he was
employed at Primerica Miles lived a lifestyle that was beyond that of the compensation he
received from Primerica.

23 VICTIM SANDRA FARWELL

24
25 Sandra Farwell met Miles at Seattle University around 1995. Farwell and Miles lived in
26 the same dormitory. Farwell had known Miles for about 2½ years before he offered to make an
27 investment in commodities for her. Miles had told Farwell that he was experienced at investing
28 in commodities. Miles showed Farwell charts of certain commodities and he pointed out where
29 he had traded in that commodity, thus enabling him to make large profits in a short period of
30 time. Miles did make commodities trades using his own money from January 1997 to June 1997
31 but he lost money on those investments. Miles told Farwell that he would triple her money in 3
32 months and that he guaranteed her principal investment. Based upon this and the appearance that

CERTIFICATION OF PROBABLE CAUSE - 2

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1 Miles was financially successful Farwell gave Miles \$25,000 on June 30, 1997 to invest in
2 commodities for her benefit. The following chart represents that payment:

Investor Farwell's Payment to Miles			
Date	Investor	Amount	Miscellaneous
6/30/1997	Sandra Farwell	\$25,000	Personal check payable to Michael Miles and deposited in Miles' account, "commodities" in memo line
Total		\$25,000	

6 Farwell had told Miles that she wanted to use the money for a down payment on a house
7 so the investment could not be long term. About six months after she made the investment,
8 Miles told her that the investment was worth around \$70,000. At that point Farwell asked for the
9 money back because she wanted to buy a house. Miles then told her that his account had been
10 frozen because there was problem with Primerica and the IRS. Miles told her that the he could
11 not trade in commodities and work for Primerica at the same time and that the account had been
12 frozen because of this. Miles told her that as soon as the funds were released that he would
13 return the money to her. Miles subsequently told Farwell that he would pay her back all the
14 money that was in the account at the time that the account was frozen. In a letter dated
15 November 20, 1999 Miles told Farwell that he would pay the approximately \$100,000 that was in
16 the account at the time that the account was frozen through payments and that he would give her
17 the remaining balance once the funds were released. The Securities Division has not been able to
18 locate any account other than those included in this report. Those accounts were never frozen
19 and did not contain any substantial amount of money during the time that Miles claimed his
20 account was frozen.

14 A letter from Farwell to Miles dated March 10, 2000 states that Farwell was under the
15 impression that Miles owed her \$94,000. That figure was based upon five payments received
16 from Miles totaling \$27,500 and a beginning balance of \$134,000. In the letter Farwell told
17 Miles that if this was not his understanding of what he still owed her that he should contact her.
18 He did not respond to this letter. Farwell has tried to maintain contact with Miles through
19 telephone and e-mail on a monthly basis. Miles has not returned her messages in months. To
20 date Farwell has received \$27,500 from Miles. At least \$12,000 of those funds came from
21 Miles' bank account. The source of that \$12,000 was Julie Gillett's investment, discussed
22 below.

VICTIM SUSAN CAMPBELL

20 Susan Campbell, an accountant, met Miles in a bar in Seattle and soon became
21 romantically involved with him. Miles impressed Campbell as very intelligent. He told her he
22 was working for Primerica and that he was a financial planner. He told her that he invested other
people's money, claiming to be investing millions of dollars for others. Campbell does not recall
how the subject of Miles investing her money first came up. She stated that Miles gave off such

1 a sense of respectability and honesty that "he makes you believe in him -- he makes you trust
2 him."

3 Campbell had a number of investments, much of it money in the name of her deceased
4 ex-husband. She was able to collect on these investments over time and as she got the money she
5 gave it to Miles for investing. She gave Miles some of her personal money and some of her
6 children's inheritance for investment purposes. Campbell does not know how Miles planned on
7 investing the funds. "He was so trustworthy I didn't even think of it." She had no investment
8 experience herself. She did not have any expectation regarding the return on the investment
9 other than it would be greater than what she was earning at the time. Campbell was under the
10 impression that she could get her money back at any time and did receive some funds back when
11 she asked Miles for funds.

12 As indicated above, part of the funds that Miles received from Campbell came from the
13 estate of her children's father. Miles was required to sign a document that was filed with
14 Snohomish County stating that he had their funds and that the funds were not available to them
15 until they turned 18 because they were minors at the time of their father's death. On June 23,
16 1999, Miles claimed in these documents filed in court that he had \$19,005.46 in account
17 "104634" as property of Sean Campbell and \$7,021 in account "104635" as property of Ryan
18 Campbell. A copy of this document is the only documentation that Campbell has regarding the
19 investment.

20 Campbell cannot remember the total amount she had invested but, as of 2002, still hoped
21 to have the funds returned. She no longer believes this.

22 ~~From December 1997 to August 1999 Miles negotiated twelve checks from Campbell~~
~~totaling over \$120,000. A check for \$7,716 did not clear Miles' account because there were~~
~~insufficient funds in Campbell's account. The total funds from Campbell, which appear to be for~~
~~investment purposes, that were successfully negotiated by Miles is \$112,799.80. The following~~
~~chart represents those payments:~~

Investor Campbell's Payments to Miles			
Date	Investor	Amount	Miscellaneous
9/5/1997	Susan Campbell	\$20,000	Personal check payable to Michael Miles, negotiated at investor's bank.*
12/9/1997	Susan Campbell	\$17,069.38	Personal check payable to MM Miles and deposited in Miles' account
1/8/1998	Susan Campbell	\$6,500	Personal check payable to Michael Miles and deposited in Miles' account
1/8/1998	Susan Campbell	\$4,500	Personal check payable to Michael Miles and deposited in Miles' account
2/3/1998	Susan Campbell	\$10,200	Personal check payable to M Miles and deposited in Miles' account

1	3/18/1998	Susan Campbell	\$12,836	Personal check payable to M Miles Co and deposited in Miles' account
2	7/10/1998	Susan Campbell	\$15,911.28	Personal check payable to M Miles and deposited in Miles' account
3	8/24/1998	Susan Campbell	\$5,000	Personal check payable to M Miles and deposited in Miles' account
4	10/27/1998	Susan Campbell	\$7,716.72	Personal check payable to M Miles and deposited in Miles' account, check did not clear his account
5				
6	11/13/1998	Susan Campbell	\$7,732.72	Personal check payable to M Miles and deposited in Miles' account
7	5/10/1999	Susan Campbell	\$1,300	Personal check payable to M Miles and deposited in Miles' account
8	8/16/1999	Susan Campbell	\$11,750.42	Personal check payable to Michael Miles and deposited in Miles' account
9	Total Cleared Funds		\$112,799.80	
10				*Bank does not have record of how negotiated but does have record of 8 cashiers checks totaling \$25,000 being purchased (14k to Miles, 5k to ADM Investor Services, 1k to Charles Schwab, 5
11				1k to Miles) 14k and 3 1k checks deposited in Miles' account
12				
13				

14 The bank records show that in virtually every instance Miles spent the money given him
 15 by Campbell for personal living expenses. For example prior to the deposit of the first check
 16 from Campbell in September 1997, Miles' checking account balance was \$771. He deposited
 17 \$14,000 of her \$20,000 check to this account. Between the date of that deposit on September 10,
 18 1997 and the next deposit from Campbell on December 9, 1997, Miles drew the account balance
 19 down to \$3,006, with none of the expenditures identifiable as investments. On December 9,
 20 1997, Miles deposited a \$17069 check from Campbell. Over the next month, with only \$211 of
 21 other deposits to this account, Miles drew the balance down to \$4,863 with none of the
 22 expenditures identifiable as investments. This pattern continued for each of the subsequent
 deposits of Campbell's funds.

Campbell asked about her investments and asked for a statement. Miles never provided a statement. Campbell asked for information about the investments for tax purposes. Miles gave her some information about interest the investments were earning which she reported on her tax return, and paid taxes on. The IRS later contacted her, telling her they had no record of the interest she claimed and refunding the taxes she had paid on that interest.

CERTIFICATION OF PROBABLE CAUSE - 5

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1 Miles told John Chapman, Miles' former roommate, that he was investing Campbell's
2 money in commodities, that the account had a balance of over \$90,000 and doing quite well.
3 Miles also recommended to Chapman that he trade commodities. Miles offered to help Chapman
4 learn how to trade commodities as well. Although Chapman never actually saw Miles make a
5 trade or see an account statement of Miles, Miles continually told Chapman about successful
6 trades he had made. But when questioned by Chapman on the specifics of the investment he
7 would not give the details of the actual trades that he made.

8 According to investor Susan Berndt, Campbell's husband had died shortly before
9 Campbell and Miles became involved.

10 From October 1999 to December 2001 Campbell received 15 payments from Miles
11 totaling \$14,780, of which \$7,630 can be attributed to other investors funds.

12 When Miles learned of the Department of Financial Institutions investigation of him he
13 told Campbell not to talk to the Department or its investigators. He told her they were
14 investigating him because they thought he was selling securities without a license which, he
15 claimed, he was not. Regarding the DFI investigation, Miles told Campbell, "They turn
16 everything over to the King County Prosecutor but they're not going to do anything to me."

17 In the fall of 2002, after he was evicted from his West Seattle apartment, Miles moved in
18 with Campbell. He was still residing with her as of the date of this Certification. According to
19 Campbell, Miles has no income and no assets. He does not have a job. He spends all his time at
20 her residence. He is home all day using his laptop computer. (The screen on his laptop does not
21 work so he connects his laptop to Campbell's monitor.) He uses Campbell's DSL Internet
22 service for Internet access. According to Campbell he sends and receives a large volume of
email. He has sent email to victims Carey Schroyer and Susan Bowman throughout 2003 and, as
described later in this Certification, attempted to influence the testimony of victims Michelle
Bahr and Susan Bowman via email.

16 In the middle of October 2003, Miles told Campbell he had deposited \$800 into her bank
17 account and asked if he could get \$800 cash from her. After confirming that \$800 had been
18 deposited into her account Campbell gave him the money. Later, wondering where he had gotten
19 the money making up the deposit, Campbell requested a copy of the deposit item from her bank.
20 She received that copy in the mail on Saturday, November 2. She discovered that the deposit
21 was check #7790, dated October 17, 2003, on a "Parents without Partners" account, in the
22 amount of \$800. Parents without Partners is a non-profit organization for whom Campbell is the
Treasurer. Campbell maintained the checkbook for that account at her residence. The signatures
on the check (it requires two signatures - Campbell's plus one other) had been forged.

21 When she confronted Miles about this he did not deny forging the signatures to the check
22 and promised her he would put the money back in the account.

1 As a result of this incident Campbell told Miles he would have to move out of her
2 residence. She has no idea where he will go. On past occasions when she has asked him to leave
3 temporarily, because relatives were visiting, he told her he was living on the street while out of
4 her house, sleeping in the library.

5 Campbell inherited some guns from her ex-husband and keeps them in a safe in her
6 house. She does not believe Miles has access to the combination to the safe, but has not checked
7 the safe's contents in some time. About 2-3 years ago Miles asked her if he could have a couple
8 of her husband's guns as compensation for managing her kids' money, since she wasn't paying
9 him to do that. She agreed and gave him two guns. She does not know where these guns are
10 now.

11 VICTIM JULIE GILLETT

12 Julie Gillett, a schoolteacher, met Miles in 1998 at the birthday party of her friend Anne
13 Carragher. Miles was dating Carragher at the time. The first few times that Miles and Gillett
14 talked they did not discuss financial matters. It was not until after Gillett's boyfriend committed
15 suicide that Miles began to show interest in her financial situation. Gillett had money invested in
16 stocks through AG Edwards. The money was from her divorce settlement and from an
17 inheritance from her father. Gillett knew that Miles worked at Primerica and thought that he was
18 a stockbroker with the firm. Gillett was frustrated with the returns that she was receiving with
19 the investments through AG Edwards. Miles told her that he made investments for some of his
20 clients and could get her a much higher return than she was currently receiving from her
21 investments. Miles told Gillett that he could double her money in 12-18 months. Gillett told
22 Miles that she would only want the money invested for 12 months because she intended to
making a down payment on a house and pay for her children's college expenses with the money.
Miles told her that investing in commodities was his specialty, that he would guarantee the
principal and that the investment would be completed by December 2000.

Based upon her belief that Miles was a good person and because he personally guaranteed
the principal, Gillett gave Miles a total of \$124,000 in three checks payable to MM Miles from
October 1999 to December 1999. The following chart represents those payments:

Investor Gillett's Payments to Miles			
<u>Date</u>	<u>Investor</u>	<u>Amount</u>	<u>Miscellaneous</u>
10/23/1999	Julie Gillett	\$85,000	Personal check payable to MM Miles and deposited in Miles' account
11/1/1999	Julie Gillett	\$27,000	Personal check payable to MM Miles, Miles converted the check to a cashiers check at investors bank and deposited in Miles' account
12/7/1999	Julie Gillett	\$12,000	Personal check payable to MM Miles and deposited in Miles' account

CERTIFICATION OF PROBABLE CAUSE - 7

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1	Total	\$124,000
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2 These funds from Gillette were the first significant deposits to Miles' bank account
3 following the last deposit from Susan Campbell in August 1999 other than an unknown source
4 deposit of \$2,574 on August 17. The balance was \$857 prior to the deposits of Gillette's funds.
5 From October 23, 1999 to January 12, 2000, Miles made additional deposits, from unknown
6 sources, of \$9,210. Of the total deposits of \$133,210 Miles used \$14,000 to pay back previous
7 investors (Farwell and Campbell), \$43,901 was withdrawn as cash, \$21,178 was used for his
8 personal benefit, \$29,118 was withdrawn by Miles for unidentified purposes, \$6,315 was
9 attributed to business expenses, \$2,960 for restaurant expenses, \$2,572 for travel and
10 entertainment expenses, and \$12,961 as unknown or other expenses. There were no known
11 investments purchased with these funds and by January 12, 2000 the balance of the account was
12 \$1,195.

13 The investment discussions prior to investing and payments received by Miles all took
14 place in the Seattle area. The only written evidence of the agreement is a one-page document
15 from Miles listing Gillett as the client with an investment amount of \$85,000 on October 23,
16 1999. The document states that the investment has a duration of 12-18 months and an initial
17 investment strategy of investing in options on stocks and commodities. The document also
18 states: "MM Miles is a private investment firm created to maximize profits for its clients by
19 using heretofore non-traditional methods with a minimum of risk. To such an end MM Miles
20 guarantees the return of principal to all who are involved with the program. While we cannot
21 guarantee actual results we do on a regular basis double our clients profits over a twelve to
22 eighteen month period."

 Gillett recorded a total of 14 voice mails left by Miles on her home voice mail system
from December 2000 through March 2001. The content of the 14 voice mail messages include
the following statements made by Miles:

- That the investment returns were to be deposited on December 15, 2000 and that the money would be available to Gillett a few days after that.
- That the check had not arrived by January 1, 2001.
- That the check had arrived but that the bank was placing a two-week hold on the check because of the dollar amount.
- That the funds did not clear but not to worry because he guaranteed the investment.
- That there were much more funds involved than just hers.
- That Gillett should not call the Primerica office in Lynnwood if she wanted to get her money back.

Gillett has received \$8,000 of her investment back. Of that, \$7,000 came from other investor funds.

VICTIM SUSAN BERNDT

Susan Berndt, a tax accountant, met Miles in May 1999 through John Chapman. Chapman was Miles' roommate at the time. For the next year Miles and Berndt periodically talked to each other but not about investing or her becoming a Primerica representative. In June 2000 Miles talked to Berndt about becoming a Primerica representative. Miles told Berndt that he was a "Regional Vice President" and made close to \$100,000 per month at Primerica and that she would be very successful under him. Miles was not a Regional Vice President for Primerica and Miles did not earn \$100,000 in the entire time that he worked for Primerica.

Soon after Berndt began showing interest in Primerica, Miles told Berndt that he did investing for a few friends and clients. Berndt was going through divorce proceedings when Miles began recruiting Berndt to work for Primerica and offering his investment services. Berndt was leaving an abusive relationship and was not in a secure financial position. Miles explained to Berndt that he knew that women are usually financially devastated after a divorce and that he could help her out by investing her money. Much like investor Gillett, Berndt was trying to save up money to buy a house and thought that investing through Miles was a good way to accomplish that goal.

During their discussions Miles gave Berndt examples of how he had doubled and tripled his clients' money in the past. Berndt told Miles that all of her investment money was in her IRA. Miles tried to convince Berndt to liquidate her IRA so that he could invest the funds. Berndt told Miles that she did not feel comfortable using the funds in her IRA. Miles convinced Berndt to take cash advances on her credit cards for investing so that she would not have to use the IRA funds. Miles promised to make the monthly credit card interest payments while the money was being invested. He promised that after the investment had matured, in 12 to 18 months, Miles would pay off the credit card debt and give her the profits.

In August 2000 Berndt gave Miles four checks totaling \$48,000. Also in August Miles sent Berndt an email message titled "Susan Berndt's Investment" outlining her investment. The email message states that the objective of Berndt's investment is to double her funds in 12 to 18 months. In another August 2000 email message Miles states that he is going to start the "investment process" and that there are some "good opportunities" available. In November 2000 Berndt gave Miles an additional \$8,000 from credit card advance checks. Also in November 2000 Miles sent Berndt an email message acknowledging that the funds were for investment purposes. In total, Berndt gave Miles \$56,000 for investing. The following chart represents those payments:

Investor Berndt's Payments to Miles			
Date	Investor	Amount	Miscellaneous
8/10/2000	Susan Berndt	\$5,000	Personal check payable to M Miles and deposited in Miles' account
8/11/2000	Susan Berndt	\$18,000	Cashiers check payable to M Miles and

			deposited in Miles' account
8/20/2000	Susan Berndt	\$24,900	Personal check payable to MM Miles and deposited in Miles' account
8/20/2000	Susan Berndt	\$100	Personal check payable to MM Miles and deposited in Miles' account
11/14/2000	Susan Berndt	\$8,000	Personal check payable to MM Miles and deposited in Miles' account
Total		\$56,000	

From August 10, 2000 to November 14, 2000, besides Berndt's \$56,000, Miles made additional deposits of \$18,000 from investor Bowman (see below) and \$942 from other sources. Prior to those deposits the account balance was \$2,731. Of the total deposits of \$74,942, Miles used \$14,581 to pay back investors (Berndt, Campbell and Gillett), \$5,713 was withdrawn as cash, \$18,409 for Miles benefit, \$2,704 for travel and entertainment expenses, \$7,931 for restaurant expenses, \$10,183 for business, bank and legal expenses, \$9,575 for automotive expenses and \$8,682 for unknown expenses. There were no known investments purchased with these funds and by January 9, 2001 the balance in the account was -\$106.

Because Berndt trusted Miles and was romantically involved with him at the time of the investment she did not insist on requiring a contract for her investment. In the months that followed Miles did make some of the monthly interest payments on Berndt's credit cards, but soon that ended. In early 2001 Miles told Berndt that he would not be able to make the monthly credit card interest payments because the checkbook for his Charles Schwab checking account had been stolen and the \$92,000 in the account had been taken. In fact, Miles' Charles Schwab account was closed in 1998. To date Berndt has received \$7,382 from Miles - \$1951 of which appears to be her own funds.

VICTIM SUSAN BOWMAN

Susan Bowman, a Primerica representative, first met Miles in early 2000 at the Zig-Zag restaurant in Seattle. The two met again, in Seattle, in July 2000 where Miles told Bowman that he was a Primerica representative making about \$100,000 a month as a securities salesperson. He also told Bowman that he planned on retiring in three years because he was so successful. Miles and Bowman met again to discuss Bowman's becoming a Primerica representative. Based upon his lifestyle (spending money on travel, wine, dinner, etc.) Bowman believed Miles when he talked about how successful he was and that she would succeed under Miles at Primerica. Bowman eventually became a Primerica representative working under Miles.

The two became romantically involved, and in September 2000 Bowman gave Miles a check for \$18,000 after Miles offered to make investments for her. This money is a portion of her divorce settlement. Bowman's understanding of the investment was that Miles would give the money to another individual who would invest the money in options. She did not know what type of options. In April 2001 Miles told Bowman that her investment was doing very well. As

1 a result of this representation Bowman gave Miles an additional \$20,000 for investment
2 purposes. This same representation that the investment was doing well led Bowman's friend
3 Michelle Bahr to invest (see below). Bowman gave Miles a total of \$38,000 for investment
4 purposes. The following chart represents those payments:

Investor Bowman's Payments to Miles			
<u>Date</u>	<u>Investor</u>	<u>Amount</u>	<u>Miscellaneous</u>
9/27/2000	Sue C Bowman	\$18,000	Cashiers check payable to Michael Miles and deposited in Miles' account
4/23/2001	Sue C Bowman	\$20,000	Cashiers check payable to MM Miles, Miles converted the check to a \$16,000 cashiers check at investors bank. Miles later converted the \$16,000 cashiers check into a \$13,000 cashiers check and \$3,000 in cash at the investor bank. The \$13,000 check was deposited into Miles' account
Total		\$38,000	

10 At the time Miles obtained the \$18,000 from Bowman his account balance was \$23,500.
11 Most of that balance was composed of money received from Berndt. By January 9, 2001 the
12 account had a negative balance, notwithstanding the deposit of an additional \$8,000 from Berndt.
13 None of the expenditures between the September 27, 2000 deposit of Bowman's money and the
14 negative balance date of January 9, 2001 represent the purchase of an investment or use of
15 Bowman's money for investment purposes. The largest expenditures during this time included:

14 \$5,000 Attorney Gregory Grahn for Legal Expenses
15 \$3,500 Cash
16 \$3,000 Susan Campbell return of investment
17 \$8,712 Four checks to Budget Rent a Car
18 \$4,825 Three checks to The Reef Apartments

17 All of the expenditures during this time period appear to be either for personal
18 expenditures or the repayment of money to other investors.

18 Miles took about \$7,000 of Bowman's \$20,000 investment as cash back and deposited
19 the remaining \$13,000 in his account. Prior to this deposit the balance in the account was
20 \$1,209. On May 3, 2001, two days after Bowman's money was invested, Michelle Bahr's
21 \$25,000 investment was deposited. (See below.) By May 11, 2001 the balance in the account
22 was \$930. There were several personal expenditures from the account during the time between
May 3, 2001 and May 11, 2001. There was also one \$28,000 withdrawal by Miles, the use of
which is unknown, although \$24,000 in unknown source deposits were made to Miles' account
two weeks later. There were no identifiable investments made with any of these funds.

CERTIFICATION OF PROBABLE CAUSE - 11

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1 At the time of the \$18,000 investment, Miles did not tell Bowman how long the
2 investment would take or whether her investment was readily available to be withdrawn. At the
3 time that Bowman invested the additional \$20,000 he told her that the investment proceeds
4 would become available in March 2002. In March 2002 Miles told Bowman that her money
5 would not be available until October 1, 2002 because other investors' money had been invested
6 under the same contract and he could not just withdraw only one individual's investment, but that
7 her \$38,000 investment was now worth \$61,000. On October 1, 2002 Bowman received a voice
8 mail message from Miles stating that the money would not be available until the end of October
9 because the contract did not end until the end of the month but that the investment was safe. On
10 the voice mail message he said that he did not know how much the proceeds of the investment
11 would be. Bowman does not have any documents regarding the investment. Because she trusted
12 him and thought that he was the most honest person that she knew, Bowman did not ever
13 question the investment.

14 In addition to the money that Bowman gave Miles for investment purposes, she also gave
15 Miles money during this time and made payments and purchases on his behalf, all as loans. She
16 did this because Miles told her that his car and Charles Schwab checkbook had been stolen and
17 he needed a short-term loan. Miles told Bowman that his checking account had a balance of
18 \$92,000 that that account was emptied when his checkbook was stolen. This information was
19 untrue. His Charles Schwab account was closed more than two years before the representation
20 was made. Bowman found out later that his car had not been stolen - Miles had crashed it.

21 Besides the loan to Miles, Bowman rented a Ford Mustang from Budget-Rent-A-Car on a
22 month-to-month basis for Miles to drive after his car was stolen. Additionally, the townhouse
23 where Miles lived until late 2002 was leased in Bowman's name until April 2002 even though
24 Bowman did not pay the rent and did not live in the townhouse. Until recently Bowman thought
25 that Miles was the most honest, ethical and trustworthy man that she knew and that he had strong
26 religious convictions. It was this foundation of trustworthiness that led Bowman to believe that it
27 was safe to invest with Miles. Bank records show that from August 2001 to November 2001
28 Bowman received several payments from Miles totaling \$7,048.88. The source of these funds
29 included Bowman's and Bahr's money as well as other deposits from unknown sources.

VICTIM MICHELLE BAHR

30 Michelle Bahr was introduced to Miles by Bowman. Bowman and Bahr are longtime
31 friends. Bahr met Miles when Bowman and Miles were in Georgia visiting friends and family.
32 While in Georgia, Miles told Bahr that he was investing Bowman's money and that he was doing
33 well. Bowman told Bahr that she thought that he was the most moral and trustworthy man that
34 she knew. Based upon her belief that Miles was successfully investing Bowman's money and
35 because of Bowman's opinion of Miles, Bahr gave Miles a check for \$25,000 in April 2001. The
36 following chart represents that payment:

Investor Bahr's Payment to Miles			
<u>Date</u>	<u>Investor</u>	<u>Amount</u>	<u>Miscellaneous</u>
5/3/2001	Michelle Bahr	\$25,000	Personal check payable to MM Miles and deposited in Miles' account, "investment" in memo line
Total		\$25,000	

At the time of the investment Miles and Bahr signed a two-page contract. The Securities Division discovered the contract when Dan Brecht, manager of Primerica in Lynnwood, invited the Securities Division to visit their offices. This contract appears to be the first two pages of an eight-page Primerica account application form. The contract has been altered to take out any references to Primerica. The contract contains little information beyond Bahr's name and address and signatures of Miles and Bahr. The only other documentation that Miles provided Bahr was a fax that he sent after the investment was made proclaiming that the investment was doing well. Bahr's understanding of the investment was that Miles was going to purchase options with the funds and that the investment would last from 6 to 12 months. Bahr did not have any expectation as to what the return on investment would be, just that Miles and Bowman had told her that Bowman's investment was doing well and Bahr assumed that her investment would do as well.

The use of Bahr's funds is explained above in the discussion of Bowman's funds.

In December 2001 Bahr contacted Miles to ask where her 1099 federal tax form was. Miles told her that she did not need a 1099 because the investment was in his name. At this point Bahr told Miles that she wanted her money back because she was nervous about an investment that did not require tax forms or was in Miles name. In March 2002 Miles told Bahr that her money would not be available until October 1, 2002. Miles said that the money was not available before that because her money was invested with other people's money and that he could not just withdraw one person's investment. To date, Bahr has received \$275 from Miles.

VICTIM CAREY SCHROYER

Carey Schroyer, a chiropractor, met Miles at the El Gaucho bar in Seattle. Miles and Schroyer went a few dates and eventually became romantically involved. Miles told Schroyer that he worked for Primerica as a financial planner but that he was closing his Primerica office to work on his own. Miles told Schroyer that he could double, triple or quadruple her money in a year to a year and a half. Miles said that he invested in options and explained puts and calls to Schroyer. Miles told Schroyer that he guaranteed her investment and that she could have her funds returned at any time. Schroyer gave Miles a personal check for \$2,000 dated January 29, 2002 made payable to MM Miles and a cashier's check for \$20,000 dated March 19, 2002 made payable to MM Miles. Miles cashed the \$2,000 check on January 30, 2002 and the \$20,000 was negotiated on March 19, 2002. Schroyer signed a document for the investment that looked to be

1 on Primerica stationary. Schroyer asked Miles for a copy of the document but never received
2 one. Schroyer would periodically ask Miles how her investment was doing and he would tell her
3 that it was going great. Schroyer asked Miles for the return of her funds but has not received any
4 money.

VICTIM KRISTINA RAGDE

5 In April 2002 Miles helped Kristina Ragde, a hair colorist, sell some gold coins she
6 owned. Miles was Ragde's friend and former boyfriend. Miles told Ragde that she should let
7 him invest her money and that if she lost money he would repay the initial investment. Ragde
8 believed that the investment would only be three months in duration. Ragde gave Miles \$1,000
9 cash from the proceeds of the sale of the gold coins. Ragde did not receive any documentation
10 regarding the investment. Ragde asked Miles where her funds were at the end of the three
11 months. Miles told her that the investment matured in two more months. Ragde asked Miles
12 about her investment about six months after the initial investment. Miles told her that he had
13 placed the funds into another investment. In March 2003 Ragde asked Miles for the return of her
14 funds. Miles stopped maintaining contact with Ragde and she has not had any of her funds
15 returned.

USE OF FARWELL, CAMPBELL, GILLETT, BERNDT, BOWMAN AND BAHR FUNDS

16 Miles received from the six investor's cashiers and personal checks totaling \$388,516.52.
17 Miles received 24 checks from the investors that the Securities Division believes to be
18 investment checks. Twenty-one of those checks were entirely or partially deposited into Miles
19 account at Washington Mutual. Of those 21, one did not clear the account because there were
20 insufficient funds in the investor's account. The three checks that were not directly deposited
21 into Miles account were negotiated at the investor's financial institution for cashiers checks. (A
22 \$20,000 check from Bowman was converted into a \$16,000 cashiers check and deposited into
Miles account. A \$27,000 check from Gillett was converted into a \$27,000 cashiers check and
deposited to Miles account. A \$20,000 check from Campbell was converted into a \$14,000
cashiers check payable to Miles, a \$5,000 cashiers check payable to ADM Investor Services and
a \$1,000 check payable to Charles Schwab. The \$14,000 check payable to Miles was deposited
to Miles account on September 10, 1997. The \$5,000 check payable to ADM Investor Services
was not deposited into the ADM/Main Street Trading account subpoenaed by the Securities
Division. The \$1,000 Charles Schwab check was not deposited into the Charles Schwab account
subpoenaed by the Securities Division. Pacific Northwest Bank was not able to determine where
the ADM and Charles Schwab checks were negotiated. Pacific Northwest Bank also has records
of five \$1,000 cashiers checks, purchased by Miles on October 20, 1997, payable to Miles. The
bank does not have a record of how those checks were purchased but 3 of those checks were
deposited into Miles account on October 31, 1997.) From June 1997 to May 2001 Miles
successfully negotiated checks from the investors totaling \$380,700.80. The following chart
represents the total amount of investment for each investor:

Total Investor Payments to Miles			
Investor	Total Investment	Time Frame of Investment	Number of Checks payable to Miles
Sandra Farwell	\$25,000	6/30/1997	1
Susan Campbell	\$112,799.80	9/5/1997-8/16/1999	12 (11 cleared Campbell's acct.)
Julie Gillett	\$124,000	10/23/1999-12/7/1999	3
Susan Berndt	\$56,000	8/10/2000-11/14/2000	5
Sue C Bowman	\$38,000	9/27/2000-4/23/2001	2
Michelle Bahr	\$25,000	5/3/2001	1
6 Investors	\$380,799.80	6/30/1997-5/3/2001	24

From July 1997 to February 2002 Miles' Washington Mutual account had total deposits of \$565,147 and total expenditures of \$565,200. \$358,032 of the deposited funds are investor funds. \$207,116.30 came from other sources. Of the total expenditures \$52,486 went to the investors, \$51,639 as business expenses, \$18,118 as travel and entertainment expenses, \$32,965 as restaurant expenses, \$39,333 as automotive expenses, \$118,228 as personal expenses, \$61,633 as unidentified withdrawals from Washington Mutual, \$95,033 as cash withdrawals and \$95,735 as unknown expenses.

Because Ragde's investment was in cash and Schroyer's investment occurred after the Securities Division had subpoenaed Miles' bank accounts, the use of their funds is not known at this time.

WITNESS INTIMIDATION AND TAMPERING

The Securities Division started contacting potential witnesses, other than the original complainant Julie Gillett, in February 2002 based upon subpoenaed bank records. These witnesses included Susan Berndt, Susan Campbell, Susan Bowman. Michelle Bahr was originally contacted in April 2002.

When Investigator Tyler Letey contacted Sue Berndt in early 2002 she immediately called Miles. Miles told her not to talk to Letey and, if asked, to say that the money she gave Miles was a loan or a gift. He told Berndt that was what the others were doing. Berndt argued with him saying it was an investment. Miles reminded her she had no paperwork. They went back and forth about what she was supposed to do; Berndt finally told him that he'd better find her some proof as to why she didn't need to cooperate. In an email dated March 2, 2002, Miles responded.

1 I talked to two securities lawyers yesterday. Here is the upshot.

2 "Forget the letter. There is no need to respond. You ARE NOT required to respond.
3 That is a bunch of bs. Scott Smith is doing what lawyers typically do when people aren't
4 cooperating, trying to bully them, particularly if they are not aware of their legal rights.
5 Primerica has no legal way to require you to say anything, especially since the
6 investigation does not pertain to you. He was a little [sic] taken aback that you would
7 even call, given that it was not a court document. He said ANY OF US voluntarily
8 talking to the State or PFS without benefit of counsel has a fool for client, no matter how
9 innocent I might be."

6 "The state has to prove that I was SELLING securities that I was not licensed to sell or
that I was presenting myself to be a broker, if I did neither then the state has no case."

7 "So in a nutshell, ignore the letter. Don't return phone calls. Scott Smith is blustering to
8 get people to cave and give up some valuable information he things they have. He will
9 lie, if he has to, investigators, like cops do that all the time. Trust me, he and the state
10 are sharing notes. No one should have ever talked to the AG's office voluntarily in the
11 first place. Your friends now would be wise just to go about their business, until and if,
12 and that is a very big IF, they are legally required to do otherwise. Which given what
13 you have already told me, is highly unlikely, although not impossible."

11 So there you have it, in a nutshell.

12 Berndt received an unsigned letter from Michael Miles in December 2002. The letter
13 starts with the following:

13 Some people seek justice and other people seek blood. It has been brought to my
14 attention by a number of people that you are seeking the latter and telling your own tall
15 tales along the way to buttress your alleged grievances.

15 Later in the letter Miles states:

16 The old saying is apropos; don't throw stones if you live in glass houses. You should
17 remember several things:

- 18 • I still have those pictures you kept asking me to destroy
- 19 • I still have your daughter's email address and your son's contact info. I wonder how
20 they might feel after reading some of the missives you sent or knowing about your
21 "dalliances" while still married or even seeing the pictures. After all, wasn't your
22 husband Jerry's story to them is that you were nothing but a drunken slut?
- I know an awful lot about you and Jerry. I just hope you still have those guns.
- There is more but that is enough for know [sic].

21 The letter concludes:

22 [Y]ou have laid down the gauntlet. So be it. I hope for your sake it is worth it.

CERTIFICATION OF PROBABLE CAUSE - 16

Norm Maleng, Prosecuting Attorney
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1 [Berndt was afraid of her ex-husband and made efforts to keep him from knowing where
2 she was for fear of physical harm. The pictures that Miles refers to are pictures that Miles took
3 of Berndt naked without her permission.]

4 Susan Berndt described this as the second time Miles had tried to silence her with letters.

5 This same letter was sent via email to Susan Bowman and Michelle Bahr on December
6 20, 2002. In the email he sent to Bowman containing a copy of the letter Miles said:

7 Below is a letter I sent to Sue Berndt. You might find it of interest.

8 Susan Bowman said that when she received this email from Miles with the letter he'd
9 sent to Susan Berndt attached she felt nervous and scared.

10 To me it was obvious that he was trying to blackmail her, and I knew that the only
11 reason he would forward it to me, and my dearest friend Michelle Bahr, was to intimidate
12 and threaten us as well. In fact I felt it was an even stronger threat to me that he sent it
13 to Michelle and made a strong point of letting me know that he had sent it to her.

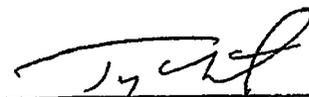
14 Bowman asked Miles about this letter to Berndt on October 10, 2003 via email. Miles
15 denied he was intimidating anybody but:

16 I am going to start responding in kind. You don't think all of that deserves a strong
17 response? I wrote Michelle to update her and to let her know that I was very aware she
18 had been talking to Tyler [Letey, State Securities] and what she told you wasn't true.

19 In the email he sent to Michelle Bahr containing a copy of the letter Miles said:

20 Below is a letter I sent to Sue Berndt (whose lawsuit you were invited to join.) You may
21 find it interesting.

22 Under penalty of Perjury under the laws of the State of Washington, I certify that the
foregoing is true and correct. Signed and dated by me this 10th day of November, 2003, at
Seattle, Washington.



Tyler R. Letey, WSBA NO. 30741
Staff Attorney
Department of Financial Institutions
Securities Division

03-1-09574-1 SEA

Supplemental Statement of Prosecuting Attorney

We are requesting that bail be set in the amount of \$400,000. There are five reasons supporting this bail amount.

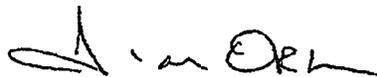
First, the defendant has no stable address. He is currently living at the residence of one of the investors, Susan Campbell but has been asked to move out as soon as possible. Ms. Campbell says she does not know where he will go once he moves out of her residence. In the past when Ms. Campbell has asked him to leave for short periods while relatives have visited her, he has told her that he lived on the street and slept in the library.

Second, he is not employed and has no known source of income.

Third, as explained in detail in the Certification and as charged in the Information, the defendant has, in the past, threatened retaliation against those investors/victims who have cooperated with authorities. The detail of their continuing cooperation is contained in the Certification and several of those investors/victims have expressed concern for their personal safety.

Fourth, at least two investors/victims have claimed that the defendant possesses firearms. One of them claims that he sleeps with gun under his pillow, has a concealed weapon permit and carries a weapon on his person.

Finally, the amount of the bail is equal to the approximate amount of the money the defendant obtained from the investors/victims over the course of the scheme described in the Certification.



IVAN ORTON, WSBA No. 7723
Sr. Deputy Prosecuting Attorney
Fraud Division
King County Prosecuting Attorney

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 61474-6-I
)	
MICHAEL MILES,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 17TH DAY OF FEBRUARY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL MILES
6910 ROOSEVELT WAY #422
SEATTLE, WA 98115

SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF FEBRUARY, 2010.

x Patrick Mayovsky

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2010 FEB 17 PM 4:10