Preliminary Response 12/11/2014 John Allan Russell

It seems the biggest issue with this case is some misconceptions, misunderstandings and some downright lies!

There is no evidence whatsoever that I ever promised 6% per month interest as sugjested by the DA in this case, it never happened.
He told me did not want any interest.
Also no check was ever deposited into my business account! It is a lie!! (Mistake?)

The promissory note / notes that I gave to my godfather and close friend Dexter were not sold to him!

I never sold anyone a promissory note!
There was a period of about 10 months when he loaned me the money on just a handshake,
It was not an investment!
We never talked about it being an investment! And no real evidence exists that there was ever an investment.
It can't exist because it did not happen; there never was any discussion of investment.
It didn't happen, there was never a conversation no verbal agreement or agreement or in writing. No evidence exists to say otherwise! Fact, it was only a personal loan to be spent as I saw fit for any and all of my expenses! This was understood and agreed on by me and Dexter!
PERSONAL LOAN BETWEEN FRIENDS!!!!

Furthermore Dexter wrote in his impact statement that what he wanted was
"His money back that he loaned me" the truth!

He offered to help me initially because I was short on money to pay my mortgages.
A personal loan!

As for the 38 checks they were in series of threes he would typically would write me three or four checks at a time he did this because he did not want the money reporting to the IRS, this is what he told me so if you look at the dates on the checks it's easy to see this is true.
It was approximately 10 instances many of which he initiated.

As far as the promissory notes he just wanted something in writing to show that I owed him the money. That's all.
Thinking it was the right thing to do, I bought a generic promissory note form from office max.
I didn't ever go to him with a promissory note and say Dexter give me money and I'll give you a promissory note!
That never happened!
The promissory notes we're done as an afterthought only because he wanted something in writing to say that I owed him money.

I've never sold anybody a promissory note!
As for the series 65 that came long after I had borrowed money from him.
Secondly he was never an advisory client we did not do any stock market mutual fund or any kind of marketable investments. No Securities! No Advisory Fees! Nothing with Brookstone Capital Management was done with him.
I did do some insurance related products with him in 2003 and wrote a life policy for his wife.

Per securities definition not all promissory notes are securities!
Personal promissory notes generally are not securities.
Per test these notes are not securities! (see below explanation)

As for our relationship, the prosecutor tried to make it appear like I met Dexter Craig in 2006 and immediately started borrowing money from him. Not True!! We met in 1995 / 1996

The truth is we met in 1995 at our church, later in 2004 the church priest assigned him to be my godfather shortly before I was baptized into the Orthodox Church in March of 2004.
I have the baptismal certificate as proof!
We grew to be close friends; we prayed together, studied scripture and spent time together quite often.
He often would come to our house with his wife for dinner sometimes lunch or just to visit me and my wife.
I know Dexter started suffering from dementia / was diagnosed in about mid 2008 and he simply forgot what had transpired between us.
I love Dexter and always wanted the best for him.
What was done to me just made things much worse.
I have and have always had every intention to repay my personal loan to him and god willing I will get it done.

The best way to make that happen is to get this horrible injustice overturned so I can get back to work at something where I can make a decent wage and pay my debt.
I don't know that I will ever work in the securities industry again.
But it's not right to shame me again for something I really did not do. (I did not break the law!)
More importantly I want the truth to be known and my name cleared.
I am not and have never been a bad evil person! I always did my best to do the right things in life.

I know that I shouldn't have borrowed so much money from him and I am sure he was filled with doubt by others. But I always had the best of intentions

I am confident if this case had not been filed I would have long ago repaid Dexter and things would be much better for all involved by now. I am not and have never been a criminal. Never even thought of it!

As for my plea, I was coerced into the plea and was under the influence of narcotic drugs at the time of the plea.
I was at the time suffering from intense knee pain and was being given 675mg of vicodin and 100mg of tramadol per day.
Clearly I was in no condition to make any judgment call or to accept any plea.
(I have requested the medical records from the Denver Detention Center that will clearly prove this.)

I attempted to withdraw my plea three times after that. The first the very next working day and the last at sentencing. All were wrongfully rejected.
Additionally I am planning to do a rule 35c ASAP as that my public defender fell short of defending me on many levels. He promised to get bank records and to have an expert witness. At the last minute he effectively told me the prosecutor did not want him to get the records and his

boss wasn't going to let him get an expert witness to testify. There are several other things he fell short on and defiantly was not adequately defending me!!

Lastly and quite important is the prosecution's contention that this supposed crime occurred in Denver. That is completely false.
Firstly there was no crime committed and secondly Dexter and I met at his house and at my house both in Douglas County.

The following is an anylisis of the case edited and corrected by me and several months of research. (I am not a lawyer as you can likely tell.

Subject: Definition of "Security" for Securities Fraud

Question Presented

For the purposes of a securities fraud conviction under C.R.S.A. §11-51-501(1)(b), are the promissory notes I John A. Russell gave to Dexter H. Craig (Michael) "securities" as defined in C.R.S.A. §11-51-201(17) when:

1) Russell and Craig had a personal relationship, met in 1996, became good close friends from approximately 2001 on.

2) Craig gave numerous checks over a ten month period before any promissory notes were issued, no discussion of it being anything other than a loan ever occurred.

3) It was alleged Craig indicated he would stop issuing checks but then continued once the promissory notes were issued, the truth is that never happened! There is no evidence to support such a statement.

4) the checks and promissory notes were made out to the individuals involved (John Allan Russell) rather than a business?

Brief Answer

The promissory notes Russell issued to Craig are not likely to be defined as securities. To determine if a note is a security, Colorado courts will probably use the 1990 *Reves* "family

resemblance" test; however, they could utilize the 1946 *Howey* test, which was adopted by the Supreme Court of Colorado at last impression, which was before *Reves.* The test in *Reves* involves comparing the note in question with a judge-made list of notes that are not securities and utilizing four factors in that comparison. The most relevant factors are:

1) Intentions of parties

2) "Plan of distribution" for notes, and

3) public perception of notes. The weight of the evidence shows:

1) Craig making personal loans to Russell with no intention of profits, and

2) Russell writing promissory notes to formalize the debts he owed Craig. Russell demonstrated no intention to distribute or advertise the type of promissory notes he was offering Craig. (It was only to give him something in writing for his family to show the debt exists)

The public would not view these notes as a typical security, but rather a personal promissory note formalizing Russell's debts and repayment plan. The *Howey* test looks at if a person invests money in a common enterprise from which profits are derived by another person. The weight of the evidence shows Craig did not intend to make an investment for profit in a common enterprise, but rather to loan money to Russell, who had a cash flow issue.

Facts

A. Neutral Version of Events

John A. Russell and Dexter H. Craig met at church in 1995 / 96. Craig became Russell's godfather in March of 2004, under the church tradition where a current church member spiritually mentors a new member. In February of 2005, Russell prepared for Craigs wife a life insurance policy to pay out to him and her children upon his death. He also prepared some annuities for Craig in approximately 2003.

Craig was the sole trustee of a trust set up by his deceased first wife Mary Craig. This trust was the source of the money involved in this case. Craig wrote 38 checks from the Mary W. Craig

Family Trust account made out to "John A. Russell" from August 27th, 2006 to March 31St, 2008. These checks amounted to $297,500. According to the Criminal Investigator for the DA' s office, each of these checks was cashed except for one check, which was deposited into Russell's Wealth Preservations Strategies, LLC (WPS) account. WPS was Russell's own business. Russell wrote eight promissory notes from June 8th, 2007 to April 30th, 2009. Each of these promissory notes obligated Russell, not WPS, to repay Craig. (No checks were ever deposited into the WPS account, that statement is not true!)

On November 2, 2009, Russell changed his own life insurance policy to name Craig along with Russell's wife, Yelena N. Russell as beneficiaries. The "Beneficiary Change Form"

named Craig a 48% beneficiary and as Russell's "God Father." On a one million dollar policy. Craig was also listed on Russells previous insurance policy since approximately 2007

B. Craig's Version of Events

Craig claims that Russell sought out Craig to become his godfather. Craig reluctantly agreed.

(the truth according to Russell is the priest Boris Henderson, recommended Craig to be Russell's Godfather.Russell asked John Eliott to be his godfather but he was already assigned by the priest to Tracy Fiefer)

Russell also showed up with an insurance agent when Craig sought a new insurance policy. Craig was surprised that Russell was involved, but accepted it.

(Russell states that he set up the appointment with Craig, Russell was at the time working with American Republic Insurance and came to Craig's house with his manager to propose health insurance for Mrs. Craig)

Craig claims that Russell asked for money for his business WPS, which was in need of capital. Craig knew next to nothing about Russell's business. Russell asked for a $7,000 loan for over a month at which point Craig began issuing Russell checks. Craig claims that had he known of Russell's previous Chapter 7 bankruptcy he would only have loaned him a "small, finite amount" because he would not have wanted to see Russell and his family starving. During one interview, Craig says that he had deduced that Russell would use the money exclusively for his business, but that Russell never said specifically that he would do so. During a different interview, Craig said that he knew a couple of the checks were used by Russell to take his family on a trip. Russell brought Craig to an office to see his "partners."

Russell also showed Craig how the money would be used, but Craig does not remember details. During this time, Russell and Craig continued in the church godfather / godson relationship and spoke on the phone once to several times a week. Craig claims that they did not have a personal relationship or at most it repayments. At that point, Russell tallied up the amount due and set up a repayment plan of $5,000 per month.

(Russell says he never introduced Craig to any partners because he never had any with WPS. Russell says he thinks someone coached Craig to come up with such incredible answers. The first loan was only for mortgages. No money was ever loaned to the business. Russell says Craig knew everything about Russell's life including his bankruptcy, financial issues, as well as his personal life! No secrets whatsoever!)

Craig is currently in his late eighties and suffering from dementia and Alzheimer's. He has taken medication for dementia for approximately six years. Craig says his Alzheimer's only worsened after an unrelated accident, which occurred after he stopped issuing checks.

C. Russell's Version of Events Russell first met Craig in 1995 or 1996 in church. They would often eat together as part of a group after church services. Often go to breakfast and have lunch together, visit each other in each their respective homes. Russell began working for American Republic Insurance in 2002 and joined an agent on his rounds as part of his training. It was a coincidence that Craig had called into AR and Russell set the appointment to see Craig and his family.

A year or so later, Russell sold Craig's wife life insurance and later sold Dexter annuities. It was at this time that Russell and Craig began to develop a close friendship.

Russell claims that the priest chose Craig as Russell's mentor. After that, Craig and Russell grew even closer. Russell says that he shared everything about his life story and helped Craig on numerous occasions by fixing his computer, organizing his files, repairing things around the house and other tasks. When Russell told Craig of his financial circumstances he had no expectation that Craig would offer to help him, Russell accepted his help with the knowledge that he, Russell, was making pretty good money and believed that he would be making much more in the near future.

IV. Analysis

Mr. Russell was charged with securities fraud under C.R.S.A. §11-51-501(1)(b).[1] To convict under that statute, the prosecution must show that Mr. Russell was involved in:

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

B. To make any untrue statement of a material fact or to omit to state a material fact transaction involving a "security." The definition of "security" is found in C.R.S.A. §11-51- 201(17).[2] When a "security" is involved in fraud, the prosecution obtains several benefits not available in common law fraud. First, securities fraud is easier to prove than common law fraud. Joseph Long, *Blue Sky Law,* 12 at § 1:21. Under securities fraud, no evidence of scienter or intent to defraud is needed. *See* Long, *supra; People v. Destro,* 215 P.3d 1147, 1151 (Colo. Ct. App. 2008); *People v. Rivera,* 56 P.3d 1155, 1163 (Colo. Ct. App. 2002). Securities fraud also covers gray areas of omissions and half-truths that, under common law, are unavailable or hard to prove. Long, *supra.* Second, liability is extended to all parties involved rather than limited to parties involved in the actual transactions. *Id.* Third, greater recovery is available under securities fraud. *See Andrews v. Blue,* 489 F.2d 367, 377 (10th Cir. 1973) (under the Colorado Securities Act, remedy of attorney's fees and rescission, including interest, is permissible); Long, *supra.* For all of these reasons, defining "security" appropriately is vital to reaching the will of the legislature and courts in extending these special benefits.

The legislature created a broad definition to capture the many different types of securities. *People v. Milne,* 690 P.2d 829, 833 (Colo. 1984) ("a legislative intent to provide the necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; ..." Colorado Revised Statutes Annotated § 11-51-501 (West)

[2] "Security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate of subscription; transferable share; investment contract; viatical settlement investment; voting-trust certificate; certificate of deposit for a security; certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease; or, in general, any interest or instrument commonly known as a "security" or any certificate of interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing. "Security" does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay a sum of money either in a lump sum or periodically for life or some other specified period. For purposes of this article, an "investment contract" need not involve more than one investor nor be limited to those circumstances wherein there are multiple investors who are joint participants in the same enterprise." Colo. Rev. Stat. Ann. § 11-51-201 (West) [underlines added]

flexibility needed to regulate the various schemes devised by those who seek to use the money of others with the lure of profits") *(quoting Lowery v. Ford Hill Inv. Co.,* 192 Colo. 556 P.2d 1201, 1205 (1976)). The Supreme Court of the United States, however, has interpreted congressional intent to mean that securities fraud law does not apply to all fraud. *Reyes v. Ernst & Young,* 494 U.S. 56, 61, 110 S. Ct. 945, 949, 108 L. Ed. 2d 47 (1990) ([Congress] enacted a definition of "security" sufficiently broad to encompass virtually any instrument that might be sold as an investment ... Congress did not, however, 'intend to provide a broad federal remedy for all fraud.'")(quoting Marine Bank v. Weaver, 455 U.S. 551, 556, 102 S.Ct. 1220, 1223, 71 L.Ed.2d 409 (1982)).

A. Conflicting Interpretations of the Definition of "Security"

The following types of securities are relevant to Russell's case: "notes," "investment contracts," and "evidence of indebtedness." C.R.S.A. §11-51-201(17). "Evidence of

indebtedness" is a general term, which is not needed when analyzing under the tests for "notes" or "investment contracts." Joseph Long, *Blue Sky Law,* 12 at § 2:20 (discussing promissory notes, "there is no need to resort to the general term 'evidence of indebtedness' to bring these items within the coverage of the Act").

The *en banc* Supreme Court of Colorado cases *Milne* and *Lowery* are the authorities in Colorado law regarding securities fraud law and defining securities. *See Toothman v. Freeborn & Peters,* 80 P.3d 804, 811 (Colo. Ct. App. 2002); *In re Submission of Interrogatories on House Bill 99-1325,* 979 P.2d 549, 558 (Colo. 1999); *Broadview Fin., Inc. v. Entech Mgmt. Servs. Corp.,* 859 F. Supp. 444, 453 (D. Colo. 1994); *Griffin v. Jackson,* 759 P.2d 839, 842 (Colo. Ct. App. 1988); *see also* Kenneth L. MacRitchie, *Is A Note A "Security"? Current Tests Under State*

Law, 46 S.D. L. Rev. 369, 388 (2001). After those decisions in the 1970s and 1980s, the Supreme Court of the United States clarified the scope of the *Howey* test by limiting it to "investment contracts," and not extending it to "notes." *Reves v. Ernst & Young,* 494 U.S. 56, 110 S. Ct. 945, 951 L. Ed. 2d 47 (1990). To date, this new "family resemblance" test could not been utilized by Colorado courts because the issue of whether promissory notes are a security has not arisen in Colorado since *Reves.*

Precedent from Colorado courts suggests which test courts should apply. To interpret C.R.S.A. §11-51-201(17), Colorado courts are under no constitutional obligation to use federal methods of interpretation; however, the Colorado Supreme Court finds interpretation of federal statutes that are virtually identical to Colorado statutes as significantly persuasive. *Milne* at 833, *Lowery* at 1204. Further, the Colorado Supreme Court has recently held that the "language of the CSA [Colorado Securities Act] shows the legislature's intent that Colorado securities law be coordinated with federal securities law." *Cagle v. Mathers Family Trust,* 2013 CO 7, 295 P.3d

460, 467. Further, *Reves* was briefly cited, along with *Milne,* by the Supreme Court of Colorado in reference to the topic of notes defined as securities. *In re House Bill 99-1325* at 558. Specifically, the Supreme Court of Colorado acknowledged the presumption that notes are a security, as is held in *Reves. Id.* Therefore, the applicable rule would likely be the "family resemblance" test from *Reves;* however, counsel should conduct an analysis under both tests since the Supreme Court of Colorado has not decided on the issue.

B. Under the "Family Resemblance" Test Set Out in *Reves*

If the "family resemblance" test is utilized for Mr. Russell's case, this test will be of first impression in a Colorado court. The "family resemblance" test begins with the rebuttable presumption that a note is a security. *Reyes* at 65. The burden is on the party trying to prove a note is not a security. *Id.* To show that a note is not a security, the note should show a "family resemblance" to a judge-enumerated, non-exhaustive list of notes that are not securities. *Reyes* at 65; *See e.g. Exchange Nat'l Bank of Chicago v. Touche Ross & Co.,* 544 F.2d 1126, 1138 (2d Cir. 1976).[3] If that fails, the *Reyes* Court lays out four factors to provide "more guidance" in finding a "family resemblance" to the list.[4] *Reyes* at 65; *See e.g. Holloway v. Peat, Marwick, Mitchell & Co.,* 900 F.2d 1485, 1487 (10th Cir. 1990).

The first step is to compare Russell's promissory notes with the list of notes not considered securities. *Reyes* at 65. If Russell's promissory notes are viewed to have been used for his business, WPS, these notes closely resemble a commercial loan, which is included on the list. *See* id; *See also McNabb v. S.E.C.,* 298 F.3d 1126, 1131 (9th Cir. 2002). A commercial loan is a loan obtained in order to "to operate a business smoothly during a period when cash inflows and outflows do not match up." *McNabb* at 1131 (quoting *Stoiber v. S.E. C.,* 161 F.3d 745, 750 (D.C. Cir. 1998)). The following evidence supports a finding of a commercial loan: Craig says he issued the checks because Russell needed the money

for cash-flow issues in his business. If "One can readily think of many cases where it does the note delivered in consumer financing, the note secured by a mortgage on a home, the short-term note secured by a lien on a small business or some of its assets, the note evidencing a "character" loan to a bank customer, short-term notes secured by an assignment of accounts receivable, or a note which simply formalizes an open-account debt incurred in the ordinary course of business (particularly if as in the case of the customer of a broker, it is collateralized). When a note does not bear a strong family resemblance to these examples and has a maturity exceeding nine months, s 10(b) of the 1934 Act should generally be held to apply." *Exch. Nat. Bank of Chicago v. Touche Ross & Co.,* 544 F.2d 1126, 1138 (2d Cir. 1976)(modified sub nom. Chem. Bank v. Arthur Andersen & Co., 726 F.2d 930 (2d Cir. 1984))

[4] A summary of the four *Reyes* factors: "(1) an examination of the transaction to assess the motivations which would prompt a reasonable seller and buyer to enter into it; (2) the plan of distribution of the instrument; (3) the reasonable expectations of the investing public; and (4) whether some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, thereby rendering the protection of federal securities laws unnecessary." Holloway v. Peat, Marwick, Mitchell & Co., 900 F.2d 1485, 1487 (10th Cir. 1990).

Russell's notes are viewed to be personal loans or for other purposes, then the analysis continues with the four factors.

The first factor is the motivation of the parties involved in the transaction. *Reyes* at 66. The seller must have the purpose to "raise money for the general use of a business enterprise or to finance substantial investments" for the note to likely categorize as a security. *Id.* Further, the buyer must have the purpose to primarily gain a profit to indicate that the note will likely be a security. *Id.* On the other hand, if the seller "exchanged to facilitate the purchase and sale of a minor asset or consumer good, to correct for the seller's cash-flow difficulties, or to advance some other commercial or consumer purpose" then the note is likely not a security. *Id.*

Craig has not indicated that his primary goal was to make a profit. In fact, the evidence suggests that Craig had no goal in making a profit. **Craig issued checks from August 27th, 2006 to June 8th, 2007 without any written agreement.**

Russell only began issuing promissory notes on June 8th, 2007. Craig and Russell indicated that the loans were designed to assuage Russell's cash-flow difficulties. Personal motivations for the transaction can provide evidence for factor one. *See Stoiber* at 745 (discussion on difference between personal relationship and trust in defendant to obtain a high rate of interest). Russell has presented significant evidence of Craig and his personal relationship including: listing Craig as a beneficiary in Russell's will, the godfather/godson relationship, and assisting Craig in filing and fixing Craig's computer. A counterargument is that the promissory notes could be interpreted as "inducements" by Russell to encourage Craig to keep writing checks; however, the promissory notes did not offer any terms with regards to investment. *See C.M. Joiner Leasing* at 353-54. Rather, they summarized the checks Craig had already written and offered repayment at a fixed rate. In all, the promissory notes are likely not a security under the first factor.

The second factor is to determine whether the note is "an instrument in which there is `common trading for speculation or investment' by examining "the 'plan of distribution' of the instrument." *Reyes* at 66; *See e.g. SEC v. C.M. Joiner Leasing Corp.,* 320 U.S. 344, 353, 64 S.Ct. 120, 124, 88 L.Ed. 88 (1943).[5] Russell did not offer promissory notes to a "broad segment of the public" and they were not purchased for "any potential speculative or trading value," thus they likely are not securities under this factor. *See Resolution Trust Corp. v. Stone,* 998 F.2d 1534, 1539 (10th Cir. 1993). Checks and promissory notes were always made out to the individuals. Russell's business, WPS, was never listed. Russell's business was not indicated on the notes except in the term "commissions." Russell wrote that when commissions started coming in he would pay back Craig. Those comments could be read to show Russell offering to pay Craig

back when he personally was bringing in more money. It could also be read to say that when WPS became more successful, Craig could be paid back. Further the fact that Russell, arguably, solicited individuals and offered little detail could indicate common trading. *See Stoiber* at 751. The second factor does not clearly indicate whether the promissory notes were securities or not.

The third factor is to determine if the public would reasonably expect the instruments to be securities, even if the economic analysis of the particular transaction might suggest otherwise. *Reyes* at 66. This factor is a "one-way ratchet" to allow a note to become a security rather than the other way around. *Reyes* at 66. *See also Stoiber* at 751. Russell did not advertise these promissory notes in any way. There is no evidence that he told Craig or anyone else that they were investments. *See Resolution Trust Corp.* at 1539, *Stoiber* at 751. Russell wrote the notes to indicate that he would pay back his friend, Craig, who loaned him a significant amount of money. Russell wrote the promissory notes to clarify what he owed and when he would pay that debt back. Therefore, the public would likely view these notes as personal promissory notes not as securities. The "one-way ratchet" element of this factor makes this conclusion a non-starter.

[5] "In applying acts of this general purpose, the courts have not been guided by the nature of the assets back of a particular document or offering. The test rather is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect. In the enforcement of an act such as this it is not inappropriate that promoters' offerings be judged as being what they were represented to be." *Sec. & Exch. Comm'n v. C. M Joiner Leasing Corp.,* 320 U.S. 344, 52-53, 64 S. Ct. 120, 124, 88 L. Ed. 88 (1943) judgment entered sub nom. Sec. & Exch. Comm'n v. C M Joiner Leasing Corp, 53 F. Supp. 714 (N.D. Tex. 1944)

The fourth factor is whether another regulatory scheme might serve the function of reducing risk of fraud, thus nullifying the need for the Colorado Securities Act for this instrument. *See Reyes* at 66. No evidence in the terms of the promissory note indicates that is

was collateralized or insured, or otherwise subjected to federal or state regulation. *See Resolution Trust Corp.* at 1539. The fourth factor does not give support that this instrument will be regulated elsewhere.

Balancing all of the factors, the promissory notes are not a "security." These three factors indicate that the promissory notes Russell gave to Craig did not

1) fit public notions of a security,

2) indicate an intention from Craig to make a profit, and

3) fit a plan of distribution where Russell is trying to secure investors to buy his promissory notes. Therefore, the promissory notes are not a security.

C. Under the *Howey* Test

An investment contract is a security when it is:

(1) a contract, transaction, or scheme whereby a person invests his or her money

(2) in a common enterprise and (3) is led to expect profits derived from the entrepreneurial or managerial efforts of others." *Toothman v. Freeborn & Peters,* 80 P.3d 804, 811 (Colo. Ct. App. 2002) (referencing *Milne); see also S.E.C. v. W.J. Howey Co.,* 328 U.S. 293, 301, 66 S. Ct. 1100, 1104, 90 L. Ed. 1244 (1946) ("whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others."); *Straub* at 1323, *Lowery* at 1205.

During the analysis, two overarching concepts should be considered. First, the concept of an investment contract as a security "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who

seek the use of the money of others on the promise of profits." *Toothman* at 811 (quoting *Howey* at 299, 1250). Second, courts must "consider whether, under all the circumstances, the scheme was being promoted primarily as an investment or as a means whereby participants could pool their own activities, their money and the promoter's contribution." *Toothman* at 811 (quoting *SEC v. Aqua—Sonic Prods. Corp.*, 687 F.2d 577, 582 (2d Cir.1982)). These overarching concepts raise the core issues that will be analyzed in the following factors. Evidence indicates that Craig began writing checks to help out his friend with no interest in making profits. Craig did not give money to Russell to make a sound investment leading to profits, but rather to help a struggling friend.

On the other hand, Craig claims that he refused to give Russell more money, which triggered Russell to start writing the promissory notes. An argument could be made that Craig was induced to give more money by the possibility of profits from the interest rate on the promissory notes. Considering the interviews with Craig and Russell, the promissory notes more likely served to formalize Russell's intentions to pay Craig back more than as an inducement for Craig to make a profit by offering Russell more money.

In analyzing the first factor in the *Howey* test, the court determines if the promissory notes and the checks in Russell and Craig's transaction involved an "investment of money." The principal purpose of the transaction for the buyer must be for profit. *See discussion in Lowery* at 1205; *see also Howey* (security because investor was induced by potential profits alone); *United Hous. Found., Inc. v. Forman,* 421 U.S. 837, 858, 95 S. Ct. 2051, 2063, 44 L. Ed. 2d 621 (1975) ("[w]hat distinguishes a security transaction ... is an investment where one parts with his money in the hope of receiving profits from the efforts of others"). To support a finding that this transaction was an investment, the best

evidence is the language about "commissions" in the promissory notes. That evidence could indicate that Craig was induced to loan additional money to Russell in the belief that when commissions came in and WPS began to succeed, that Craig would profit.

To support a finding that this transaction was not an investment, the best evidence is the history of checks before the promissory notes and the testimony from Craig and Russell indicating their personal relationship.

The second factor in the *Howey* test determines whether Russell and Craig entered into a "common enterprise." Colorado courts have held that a common enterprise exists when "fortunes of the investors are interwoven with and dependent upon the efforts and success of those seeking the investment of third parties." *Griffin v. Jackson,* 759 P.2d 839, 842 (Colo. Ct. App. 1988); see also *S.E.C. v. Koscot Interplanetary, Inc.,* 497 F.2d 473 (5th Cir.1974). Further, Colorado courts have identified securities when "the investor must commit his assets to an enterprise or venture in such a manner as to subject himself to financial loss." *Griffin* at 842; *see also Woolridge Homes, Inc. v. Bronze Tree, Inc.,* 558 F.Supp. 1085 (D.Colo.1983). Both Craig and Russell's statements indicate that Craig believed his money would be paid back to him; no mention was made as to the potential losses if C.xig's business, WPS, failed. In fact, Ggeli$_g$;_s_e<, business was not listed in the promissory notes or the checks. If Czaig,succeeded in another business or in some other personal endeavor, it is likely Craig would have assumed he would be paid back due to their relationship and the nature of the loan, which leans toward a personal loan.

The third *Howey* factor determines whether Craig's profits depended solely on the efforts of another. To contribute to a finding of no security, the investors would need to have "substantial power to affect the success of the enterprise." People v. Pahl, 169 P.3d 169, 181 (Colo. Ct. App. 2006) (quoting People v. Blair, 579 P.2d 1133, 1141-42 (1978).

Craig had no power over this endeavor except to provide funds. Craig stated in an interview with an investigator that he knew next to nothing about the business. The third factor would support a finding that this transaction constituted an investment contract and a security. Balancing all three factors, the promissory notes issued from Russell to Craig **do not represent an investment made for profit in a common enterprise where profits depended solely on the efforts of someone other than the investor.**

V. Conclusion

The promissory notes from Russell to Craig will not likely be found to fall under the definition of "security" in C.R.S.A. §11-51-201(17). In interpreting the definition, Colorado courts will likely find that the promissory notes are not securities under either the *Reyes* "family resemblance" test for notes or the *Howey* test for investment contracts.

Thus, it is unlikely that Russell will be found guilty of securities fraud under C.R.S.A. §11-51-501(1)(b), which requires that the transaction involve a security.

Note: I am Very grateful to those who those who helped me complete this answer as that I am not an attorney and still feel very uncomfortable acting as my own attorney.

Respectfully, John A. Russell

Please see supporting documents attached, med history from jail has been ordered, 2nd request form attached (Denver Health is the jails provider, the request was submitted in person at the jail)

DENVER HEALTH

AUTHORIZATION TO DISCLOSE HEALTH INFORMATION

Patient Name [redacted] Date of Birth [redacted] mm/dd/yy Soc. Sec. No. [redacted] MR# [redacted]

Address [redacted]

City [redacted] State [redacted] Zip Code [redacted] Telephone No. [redacted]

AUTHORIZATION TO RELEASE DENVER HEALTH MEDICAL RECORDS

☐ I request that Denver Health disclose my health information to the following:

Facility/Office/Company/Person [redacted]

Address [redacted]

City [redacted] State [redacted] Zip Code [redacted]

The information to be disclosed to the above Facility/Office/Company shall include: ☐ view or ☐ copy

Admission/Discharge Date(s) _____ *Please check appropriate box.*

☐ Discharge Summary	☐ Consultation	☐ Operative Report	☐ Pathology Report
☐ Emergency Room Report	☐ Laboratory Reports	☐ Radiology Report	☑ Entire Medical Record
☐ Billing Record	☐ Radiologic Images	☐ Denver CARES	
		☐ Other (Specify) _____	

I understand that by checking any boxes below I have given permission to give out confidential information related to drug and alcohol treatment records that are protected by federal law (42 CFR, Part 2); or HIV; or Mental Health.

If these boxes are not checked, this information will not be released.

☐ Diagnosis and/or treatment relating to drug or alcohol abuse
☐ Diagnosis and/or treatment relating to mental health conditions
☐ Diagnosis and/or treatment relating to HIV testing, infection or diagnosis and/or treatment for AIDS

I request that the Denver Health medical records be:

☑ Mailed directly to the facility/office/company/person specified above

☐ Faxed to the following number Fax Number _____

☐ Telephone me when the copies are ready for pickup _____ Telephone number _____

☑ I authorize the following person to pick up my medical records Name [redacted]

☐ I authorize _____ to give verbal information regarding my treatment to the following person/s:

_____ _____ _____.

These records will be used/disclosed for the purpose of _____

_____

REQUEST TO VIEW DENVER HEALTH MEDICAL RECORDS

☐ I do hereby request the opportunity to inspect my medical record(s). I promise not to make any entries, marks, additions or deletions to the records I may inspect. I understand that if I wish to have copies of my medical record I will complete the top portion of this form.

PATIENT OR PERSONAL REPRESENTATIVE SIGNATURE

I understand that I have a right to revoke this authorization at any time. I understand that if I revoke this authorization I must do so in writing and present my written revocation to the Health Information Management department. I understand that the revocation will not apply to information that has already been released in response to this authorization. This authorization will automatically expire 180 days from the date of my signature.

I understand that authorizing the disclosure of this health information is voluntary. I need not sign this form in order to ensure treatment. I understand that I may inspect or copy the information to be used or disclosed, as provided in CFR 164.524. I understand that any disclosure of information carries with it the potential for an unauthorized re-disclosure and the information may not be protected by federal confidentiality rules. I understand that a fee may be charged. A copy of facsimile of this authorization is to be considered as valid as the original. If I have questions about disclosure of my health information, I can contact the Health Information Management department at (303) 602-8000.

Patient/Personal Representative Signature [redacted] Date [redacted] mm/dd/yy

Personal Representative Relationship _____

456

F20-246 (3/11) Original – Chart Copy – Patient

VICTIM IMPACT STATEMENT

Date: FEBRUARY 10, 2010	Case Number: 09CR06137 -CTRM 14
Defendant: JOHN ALLAN RUSSELL	
Your Name: DEXTER CRAIG	Your Employer: RETIRED 1991
Address: [redacted]	Work Address:
City, State Zip: [redacted]	Work City, State Zip:
Home Phone: [redacted]	Work Phone:

If you wish the Court to order the Defendant to pay you for your losses, this form must be completed. This form will become part of the District Attorney's file and may be seen by the *Defendant and/or lawyer.*

How did this crime affect you emotionally?

① I GREATLY, BECAUSE JOHN AND I ARE CO-RELIGIONISTS: MEMBERS OF THE RUSSIAN ORTHODOX CHURCH, AND HE IS ALSO MY GOD-SON IN THE CHURCH. SO UNTIL RELATIVELY RECENTLY I HAVE TRUSTED HIM IMPLICITLY, EVEN TO HIS HANDLING OF A PORTION OF MY MONEY.

② **How have you and your members of your family been affected by this crime?**

JOHN RUSSELL WAS FIRST KNOWN TO ME AND MY FAMILY AS AN INSURANCE SALESMAN, AND HE DREW UP AND MAINTAINED SEVERAL POLICIES FOR US. NEEDLESS TO SAY THE CRAIG FAMILY (HUSBAND AND WIFE, AND TWO MIDDLE-AGED CHILDREN (A SON MARRIED WITH 3 CHILDREN AND A DAUGHTER, SINGLE AND A CHRISTIAN MISSIONARY IN WEST AFRICA [FOR 20 YEARS]) HAVE BEEN ACTIVE IN VARIOUS WAYS (EMOTIONAL AND FINANCIAL)

③ **What do you believe is a fair outcome of this case?**

RETURN OF THE MONEY LOANED TO JOHN RUSSELL BY ME, THE AMOUNT IS DUE TO BE $297,500. 6,200 CONSIDERED TO WAIVE, OR 305,200

Please attach additional pages if necessary

Victim Impact Statement

How did this crime affect you emotionally?

Greatly, because John and I are co-religionists: members of the Russian Orthodox Church and he is also my god-son in the church. So, until relatively recently I have trusted him implicitly, even to his handling of a portion of my money.

How have you and your members of your family been affected by this crime?

John Russell was first known to me and my family as an insurance salesman and he drew up and maintained several policies for us. Needless to say, the Craig family (husband and wife, and two middle-aged children[a son married with 3 children and a daughter, single and a Christian missionary in west Africa, for 20 years) have been affected in various ways. (emotionally and financially)

What do you believe is the fair outcome of this case?

Return of the money loaned to John Russell by me. The amount said to be $297,500.00

FINANCIAL LOSS

Total FINANCIAL loss: $ 297,500

(Attach copies of receipts and/or estimates of missing or damaged items. Keep the original documents for your records.

Description of loss/damage/expense.	Was property recovered?	Cost of repair or replacement.
	NO, NOT TOTALLY	~430,000
297,500, AUG 27, 2006		-5,200,-1,800
- MAR 31, 2009		324,800 323,800

Have you received any payment? Yes ✓ No ____ Amount $ 6,200

Source of payment (insurance, victims' compensation or other) ____

Was your loss covered by insurance? Yes ____ No ✓

Have you submitted an insurance claim? Yes ____ No ✓

Has your claim been paid? Yes ____ No ✓

How much is your deductible? $ ____

Your insurance company's name and address: Adjuster's Name ____

____ Phone Number ____

____ Claim Number ____

____ ____ Policy Number ____

As a result of this crime, are you currently in therapy or counseling? Yes ____ No ✓

Have you applied for Victims' Compensation? Yes ____ No ✓

Total **MEDICAL/THERAPY** cost $ ____

Was medical/therapy loss covered by insurance? Yes ____ No ____

How much is your deductible $ ____ Amount of Co-Payments $ ____

Amount paid by insurance? $ ____

Your insurance company's name and address: Adjuster's Name ____

____ Phone Number ____

____ Claim Number ____

____ ____ Policy Number ____

____ I DO NOT WISH TO COMPLETE THIS STATEMENT

When filling out this form, be advised that Colorado Revised Statute 18-8-11(1)(c) says: A person commits false reporting to the authorities if: (c) "He makes a report or knowingly causes the transmission of a report to law enforcement authorities pretending to furnish information relating to an offense or other incident within their official concern when he knows he has no such information or knows that the information is false."

I hereby declare that the above information is true and correct to the best of my knowledge.

Your Signature Dexter H. Craig Date FEBRUARY 10, 2010

Dexter Craig - 09CR06137 -CTRM 14

[redacted]

FAX

To: ROBBIE HERRERA
From: DEXTER H. CRAIG
Fax: [redacted]
Pages: 3 (INC. COVER)
Phone:
Date: 2/10/2010
Re:
CC:

☒ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply

VICTIM IMPACT STATEMENT, AS REQUESTED.

PLEASE CONTACT ME FOR ANYTHING ELSE NEEDED, INCLUDING PAST PROMISORY NOTES.

THANK YOU,

DEXTER.

Russian Orthodox Church Outside Russia

Certificate of Holy Baptism

This is to certify that servant of God

John Russell

child of **Luther Allan Russell**
of the Roman Catholic faith,

And **Irma K. Kloph**
of the Roman Catholic faith,

who was born on the nineteenth day of January, 1964
in the city of Denver, Colorado

was baptized in the Holy Orthodox Faith
in the church of All Saints of Russia, Denver, Colorado

on the

Twenty-seventh day of March, 2004

and was named in honor of St. John the Baptist
by Priest Boris Henderson, Rector, All Saints of Russia Church.

Godparent: Michael Craig

This information is in agreement with the parish register kept in the church of
All Saints of Russia, 3274 East Iliff Avenue, Denver, CO 80210.

Rector Priest Boris Henderson Date July 1st, 2005

Priest Boris Henderson

Seal

DISTRICT COURT, CITY AND COUNTY OF DENVER COLORADO LINDSAY FALNIGAN COURTHOUSE 520 W. COLFAX AVE. DENVER CO. 80204	
PEOPLE OF THE STATE OF COLORADO, **Plaintiff,** **v.** **John Allan Russell** **Defendant.**	**▯ COURT USE ONLY ▯**
Attorney for Defendant **John Allan Russell Pro-Se** Inmate Number: 335201 PO Box 1108 Denver, CO 80201	CASE NUMBER: 09CR06137 DIVISION: COURTROOM: 4G

MOTION TO WITHDRAW PLEA

COMES NOW, **John Allan Russell** Defendant *Pro-Se,* respectfully requests to withdraw his plea of guilt, pursuant to Crime. P. Rule 32 (d), and defendant provides the following facts to support this motion:

1. Defendant entered a plea of guilt to the following violation: Securities Fraud CRSA 11-51-501 an F3 Felony conviction, Stipulated Time Served + 5 years ECU Probation
2. Sentence has not been imposed in the above matter.
3. The Defendant John Allan Russell at the time that the plea was entered was under the influence of the prescribed narcotic pain medication Vicoden (750mg 4x a day) and Tramadol (50mg 3x a day) for severe chronic knee pain due to a complex torn meniscus in his left knee and severe cartilage loss in both knees (per Denver Health) and was not thinking clearly. It is a well known fact that anyone who is under the influence of the narcotic drugs Vicoden and Tramadol, that persons ability to make rational judgements is the first thing to go. (very similar to the effects of alcohol) e.g. "impaired judgement" This being true how can one even know that the act of making the decision is rational under these circumstances? (the decision to make a decision is obviously impaired as evidenced in Colorado state law, including C.R.S.A. 42-4-1301 / 42-4-1301.4 pertaining to decision making / operating machinery and automobiles.) Additionally exacerbating the situation the previous evening the defendant was also suffering from the stomach flu and had not slept more than two or so hours. On the day the plea was entered the defendant was very groggy and suffering from a headache, stomach pain and fatigue. (counsel was advised of all of this) When the court asked the defendant whether he was under the influence of any medication that would impair his judgement the defendant looked to his public defender and stated "you know I am taking Vicoden and Tramadol" and surprisingly counsel advised the defendant to proceed against his intuition and better judgement.

4. The Defendant's counsel did not properly advise defendant regarding his plea of guilt. The defendant was not informed of any of the details of the proposed probation, nor has the defendant been advised of the short term or long term ramifications of having an F3 felony conviction on his record, especially regarding his lack of employment opportunities, self employment limitations, barred employers and industries, limits on ones banking, savings of financial investment and entrepreneurial activities. Limitations and or possible problems in obtaining life insurance, health insurance, or any other kind of insurance. Had counsel advised the defendant of even the limited information and answers the defendant has since found on his own regarding the aforementioned facts, even if he had not been under the influence of narcotic pain medication he would not have accepted the plea. And therefore the plea was not tendered knowingly, intelligently or voluntarily.
5. As stated by *St. James V. People,* 948 P.2d 1028 (Colo.1997), "Defendant is entitled to specific performance of a plea agreement if no other remedy is appropriate to effectuate the defendant's legitimate expectation engendered by the governmental promise." Also, *People V. Elsbach,* 934 P.2d 877 (Colo. App.1997).
6. According to *Craig v. People,* 986 P.2d 951, 961 (Colo.1999), "a plea agreement is more than mere contract between the parties and must be attended by constitutional safeguards to ensure that defendant receives performance that he is due."
7. The court should also be aware that there is discoverable evidence that the defendant added Mr. Craig as a substantial beneficiary to his existing West Coast Life, $800,000.00 life insurance policy in early 2007 and additionally added him to his new Banner Life $2,000,000.00 policy in November of 2009. Counsel had long ago been informed of these facts. As a matter of due diligence this is just one of several items that should be considered.
8. The defendant John Allan Russell has previously submitted two motions to request that the current public defender Mr. Robert Halpern be dismissed and that conflict free alternative counsel be appointed. The defendant is very sorry and remorseful that things went the way they did for everyone involved, the chain of events that occurred certainly was never anything he had ever wanted, anticipated or envisioned for his Godfather Michael (Dexter H. Craig) himself or anyone else. The FACT is as the defendant John Allan Russell has vehemently stated since the beginning of this nightmare, "He Is Not Guilty" and that never in his life has he ever had any intention or plan to hurt, or deprive anyone of anything. Nor has the defendant John Allan Russell ever done or even thought of doing any such thing. Nor is his Personal Promissory Note a security. The FACT is his only plan was a plan to repay all of the money he had borrowed, pursue happiness for his family, loved ones, friends and himself, to lead a life pleasing to God and to do his best to help all people in any way possible, especially those he loved.
9. The Defendant's counsel Also did not properly advise defendant of his option to enter a plea of no contest in lieu of a plea of guilt. The defendant was not informed of this option and again therefore the plea was not tendered knowingly, intelligently or voluntarily.

WHEREFORE, The Defendant John Allan Russell, respectfully requests that the Court to grant this motion and enter an order withdrawing defendant's plea of guilt, or in the alternative a hearing be set where further evidence and testimony can be heard concerning this motion.

Dated this 14th Day of August, 2013.

Respectfully, John Allan Russell

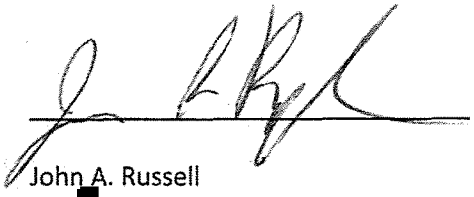
Certificate of Service

I hereby certify that a true copy of the attached preliminary answer was mailed to the following recipiants:

Also Sent Via Email 12/11/2014

Honorable Cameron Elliot
100 F Street N. E.
Mail Stop 2582
Washington D.C. 20549

Nancy K. Ferguson Esq.
Denver Regional Office
Securities and Exchange Commission
Byron G Rogers Federal Building
1961 Stout Street Suite 1700
Denver, CO. 80294-1961



John A. Russell
[redacted]