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Supreme Court No. 90577-1 *h/h*
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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL REEDER,

Petitioner.

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

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUES PRESENTED FOR REVIEW

1. Bank records are “private affairs” in Washington into which the government may not intrude without “authority of law” i.e., a proper warrant or the functional equivalent. Where there was no warrant and the State used a special inquiry judge’s subpoenas duces tecum without satisfying the prerequisites of a valid warrant, does the intrusion violate Article I, § 7 of the Washington Constitution, requiring suppression of the evidence and reversal of Mr. Reeder’s convictions?

2. The double jeopardy prohibition of the state and federal constitutions prohibits multiple punishments for a single offense. Where the prosecutor alleged an ongoing scheme to obtain money from a specific investor by a series of fraudulent or deceptive representations, the jury found the acts were part of a continuing criminal impulse, and the legislature established a singular unit of prosecution for such offenses, does the imposition of separate sentences for these multiple counts of securities fraud and theft violate the state and federal constitutions, requiring reversal of Mr. Reeder’s sentence?

B. FACTS

Michael Reeder and William McAllister created a corporation for the purposes of developing Bellevue and Snohomish properties. RP 270-80. They agreed McAllister would loan the necessary capital and Reeder would acquire the properties. RP 282; Exhibit 10. In furtherance of his obligation, McAllister wrote 14 checks totaling \$1.7 million between March 2006 and June 2007. RP 287-89. Neither the Bellevue nor the Snohomish deals were ever completed and Reeder did not return the money. RP 297-302.

The King County Prosecutor charged Mr. Reeder with 14 counts of securities fraud and 14 counts of first-degree theft by deception based on the 14 checks that McAllister wrote in support of their endeavors. CP 1-38. The State's case against Reeder was built on personal bank and credit card records obtained by subpoenas duces tecum issued by a special inquiry judge.¹ RP 443-58. Reeder moved to

¹ RCW 10.27.170 provides:

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

suppress the evidence obtained through the warrantless searches of his accounts based on the failure to establish the propriety of the search and seizure of his records. CP 41, 53-55, 62; 7/2/12RP 42-43. The motion was denied and he was subsequently convicted as charged.

C. ARGUMENT

1. Special inquiry judges do not provide the “authority of law” required by Article 1, § 7 of the Washington Constitution to invade “private affairs” without satisfying the substantive and procedural requirements of a search warrant.

a. Washington’s heightened protection of privacy interests extends to bank records.

Article 1, § 7 of the Washington Constitution directs that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” This Court has determined “[l]ittle doubt exists that banking records, because of the type of information contained, are within a person’s private affairs” protected by Article 1, § 7. State v. Miles, 160 Wn.2d 236, 247, 156 P.3d 864 (2007).

The intrusiveness of the invasion into Mr. Reeder’s private affairs was substantial. Department of Financial Affairs personnel spent more than 600 hours poring over boxes upon boxes of Mr.

answer such questions concerning the suspected crime or corruption as the special inquiry judge may approve, or provide evidence as directed by the special inquiry judge.

Reeder's personal financial records. RP 443-52.² These were exactly the form of protected bank records identified in Miles because they

disclose what the citizen buys, how often, and from whom. They can disclose what political, recreational, and religious organizations a citizen supports. They potentially disclose where the citizen travels, their affiliations, reading materials, television viewing habits, financial condition and more.

Miles, 160 Wn.2d at 246-47.

Where there is a state intrusion into "private affairs" it is the government's burden to establish the invasion was supported by a warrant, or an exception to the warrant requirement, by clear and convincing evidence. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009); State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). This Court has already recognized that a search warrant or subpoena directed to "private affairs" such as personal bank records must be issued by a neutral magistrate to satisfy the "authority of law" requirement. See Miles, 160 Wn.2d at 247.³

² Ms. McGreer testified she reviewed "Bank of America accounts, Washington Mutual/Chase, which is what Washington Mutual is now, accounts, Pacific Northwest Credit Union and the Woodby [sic] Island bank." RP 450. "They all came by subpoena to your office, to Tyler, to me." RP 450-51.

³ The Court has also found "private affairs" similarly subject to the warrant requirement in State v. Gunwall, 106 Wn.2d 54, 67, 720 P.2d 808 (1986) (pen registers); State v. Boland, 115 Wn.2d 571, 581, 800 P.2d 1112 (1990) (garbage); State v. Jackson, 150 Wn.2d 251, 263, 76 P.3d 217 (2003) (GPS); State v. Hinton, 179 Wn.2d 862, 319 P.3d 9 (2014) (cell phone/text messages).

As a matter of constitutional law and sound public policy, this Court should hold that special inquiry judges may only issue such third party subpoenas for personal banking records based upon a determination of probable cause and in a manner consistent with the traditional requirements of a search warrant. See State v. Garcia-Salgado, 170 Wn.2d 176, 186, 240 P.3d 153 (2010) (“A court order may function as a warrant as long as it meets constitutional requirements.”).

b. The probable cause and related warrant requirements are dictated by Article 1 § 7, Miles and Garcia Salgado.

Because warrantless searches are invalid per se with few exceptions, those exceptions are “narrowly drawn, and ‘[t]he State bears a heavy burden in showing that the search falls within one of the exceptions.’” State v. Eisfeldt, 163 Wn.2d 628, 634, 185 P.3d 580

As to the Fourth Amendment, in Riley v. California, ___ U.S. ___, 134 S.Ct. 2473, 2482 (2014) (search of cell phone of arrestee requires warrant), the U.S. Supreme Court noted:

Our cases have determined that “[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, ... reasonableness generally requires the obtaining of a judicial warrant.” Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 653, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). Such a warrant ensures that the inferences to support a search are “drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.” Johnson v. United States, 333 U.S. 10, 14, 68 S.Ct. 367, 92 L.Ed. 436 (1948). In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement. See Kentucky v. King, 563 U.S. ___, ___, 131 S.Ct. 1849, 1856–57, 179 L.Ed.2d 865 (2011).

(2008) (quoting State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002)).

Even where probable cause to search exists, a warrant must be obtained unless excused under one of the narrow set of exceptions to the warrant requirement. ... We have recognized exceptions for consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and Terry investigation stops. ... The State bears the burden to show an exception applies.

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

Special inquiry proceedings are not among the exceptions to the warrant requirement, nor are they consistent with the ones that have been identified as there is no exigency, arrest or inventory. Instead, this was a nonconsensual intrusion of the most extreme sort, unlike any simple Terry investigation.

In “special inquiry” proceedings, special inquiry judges assist police and prosecutors in gathering evidence by issuing subpoenas and subpoenas duces tecum. RCW 10.27.170; State v. Manning, 86 Wn.2d 272, 275, 543 P.2d 632 (1975). These subpoenas are court orders authorizing searches and seizures of “private affairs,” and as such must satisfy the requirements of a warrant.⁴

⁴ See BLACK’S LAW DICTIONARY 712 (9th ed. 2009) (order 2. written direction or command delivered by a court or judge. The word generally embraces final decrees as well as interlocutory directions or commands.).

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

Garcia-Salgado, 170 Wn.2d at 186 (emphasis added).

The “probable cause” requirement is crucial where there is an intrusion into “private affairs” because it requires the police to establish, under oath, circumstances that extend beyond mere suspicion, personal belief, or speculation. State v. Seagull, 95 Wn.2d 898, 907, 632 P.2d 44 (1981).⁵ Probable cause exists only if

the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched.

State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

Accordingly, “probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.” Id. at 140; State v. Perrone, 119 Wn.2d 538, 551, 834 P.2d 611 (1992). Each aspect of the warrant requirement is critical because it ensures that a thoughtful

⁵ “The concept of probable cause requires the existence of reasonable grounds for suspicion supported by circumstances sufficiently strong to warrant a man of ordinary caution to believe the accused is guilty of the indicated crime.” Seagull, 95 Wn.2d at 906, citing State v. Henker, 50 Wn.2d 809, 811, 314 P.2d 645 (1957).

determination has been made based on verified representations that support the scope of invasion. State v. Jackson, 150 Wn.2d 251, 263, 76 P.3d 217 (2003).

c. Special inquiry judges are not an exception to the warrant requirement.

The Court of Appeals opined that RCW 10.27 relieves the State of its obligations to satisfy the warrant requirements before conducting these secret forays into the private affairs of Washingtonians. Slip op at 15-16 (citing United States v. R. Enterprises, Inc., 498 U.S. 292, 297, 111 S.Ct. 722, 112 L.Ed.2d 795 (1991); In re Grand Jury Investigation of M.H., 648 F.3d 1067 (9th Cir, 2011)).⁶ Such an expansive reading of R. Enterprises cannot justify a similar result under the Washington Constitution because the Court of Appeals opinion (1) mistakenly equates statutorily created special inquiry judges with federal grand juries, (2) relies on inapposite federal jurisprudence where the Washington Constitution compels a different result, (3) fails to

⁶ Procedurally, R. Enterprises presented the narrow question of whether the Court of Appeals had inappropriately shifted the burden to the Government, in response to a motion to quash, to establish relevancy, admissibility and specificity before enforcing a grand jury subpoena as would have been required for a trial subpoena. 498 U.S. at 298-99. The concerns identified by the Supreme Court were that this would frustrate the work of grand juries by “invit[ing] procedural delays and detours while courts evaluate the relevancy and admissibility of documents sought by a particular subpoena.” 498 U.S. at 298. No such concerns are presented by application of the warrant requirement to special inquiry proceedings. Miles, supra.

recognize the need for appropriate protections to the private interests recognized in bank records and (4) fails to appreciate the crucial part the warrant requirement plays in protecting those interests.

First, grand juries are a unique historical device dating back to the Assize of Clarendon in 1166 when King Henry II established a system using twelve men drawn from the local community to inform him who was suspected of "murder, robbery, larceny, or harbouring criminals."⁷ By the 14th Century, the developing criminal common law included two procedural devices: both an indicting grand jury and an adjudicating petit jury.⁸ Later, reacting to monarchical abuse, the grand juries began to shift their focus away from mere accusation to considerations of fairness for the individual accused.⁹

⁷ Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 6 (1996).

⁸ *Id.* at 7-8.

⁹ Two important cases became the defining point for the rights and powers of English grand juries. Pro-Protestant grand juries in London refused to indict Catholic King Charles II's enemies, Lord Shaftesbury and Stephen Colledge. Thereafter, the grand jury became an institution "c apable of being a real safeguard for the liberties of the subject." *Id.* at 9.

In the early American experience, grand juries became an integral part of local government,¹⁰ yet had sufficient independence to announce dissatisfaction with government.¹¹ Any citizen could bring a matter before a grand jury directly and the grand jury served to screen out unwarranted or malicious prosecutions.

In comparison to the ancient and storied historical traditions of the grand jury, the special inquiry judge “is of relatively recent origin in this state.” Manning, 86 Wn.2d at 273, citing Laws of 1971, 1st Ex. Sess., ch. 67. Unlike grand juries, special inquiry judges are not empowered to issue, or to reject indictments, but are simply available to prosecutors as “an added investigatory tool.” Manning, 86 Wn.2d at 274. As a “tool” of the prosecutor, special inquiry judges appear to provide a form of carte blanche to prosecutors to intrude without limitation into the private affairs of Washington citizens and without

¹⁰ In colonial Massachusetts, town officials were presented to the grand jury for neglecting to repair the stocks and highways. In Virginia, grand juries became part of the county court system and met to levy taxes, oversee spending, supervise public works, appoint local officials, and consider criminal accusations. By the middle of the 1700s, Connecticut grand juries were levying taxes and conducting other local government work while a public prosecutor took primary responsibility for investigating crime. The pattern was similar throughout the colonies. Id. at 9-10.

¹¹ Paralleling the English experience, the colonial grand jury took on a role in resisting the monarchy. In particular were three successive grand juries which refused to indict John Peter Zenger, whose newspaper criticized the withdrawal of jury trials and the royal control of New York. While the King was withdrawing the right to trial by jury and attempting to initiate prosecutions by information, colonial grand juries responded by making “stinging denunciations of Great Britain and stirring defenses of their rights as Englishmen.” Id. at 11.

having to establish a crime has likely been committed or evidence is likely to be found in the place searched.¹²

The special inquiry proceeding is not a grand jury, with its historic place as a bulwark against corruption and governmental misconduct. Their different purposes, where grand juries are organized to determine whether sufficient evidence exists while special inquiry judges are organized as an expedient to collect evidence, illustrate that the cases upon which the Court of Appeals relied have little application here. As we have seen, the powers of a jury of the people cannot be passed off to single judge. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). They certainly provide no reason for eroding the special privacy protections recognized in this state for personal bank records.

Second, while the U.S. Supreme Court might find that for federal grand juries, using a reasonable suspicion standard does not violate the Fourth Amendment, this does not resolve our state

¹² Little information is available about Washington special inquiry practice, but see anecdotally G. Johnson, *Obscure law used by prosecutors is 'sneak-and-peek stuff'*, The Seattle Times, May 25, 2012 (http://seattletimes.com/html/localnews/2018290663_specialinquiries26m.html, Last accessed December 19, 2014) (describing disparate practices in the use of special inquiry proceedings around the state to obtain cellphone, email, mortgage and banking records, as well as witness testimony); G. Johnson, *Questions bring review of prosecutors' use of 'special inquiry'*, The Olympian, October 31, 2012 (http://www.theolympian.com/2012/10/31/2303370_questions-bring-review-of-prosecutors.html?rh=1, Last accessed December 19, 2014) (discussing overuse of special inquiry proceedings).

constitutional analysis. “Although they protect similar interests, ‘the protections guaranteed by article I, § 7 of the state constitution are qualitatively different from those provided by the Fourth Amendment to the United States Constitution.’” State v. Eisfeldt, 163 Wn.2d at 634 (holding the private search doctrine is contrary to Art. 1, § 7), quoting State v. McKinney, 148 Wn.2d 20, 26, 60 P.3d 46 (2002). Unlike the Fourth Amendment, article I, § 7 protects citizens against all warrantless searches, regardless of whether they are reasonable. Id. at 634-35.

This distinction is crucial in understanding the inapplicability of R. Enterprises which turns on a discussion of reasonableness in subpoenaing corporate books and records from the object of the investigation, not personal banking records sought from a third party. Cf R. Enterprises, 498 U.S. at 294-95 and Miles, 160 Wn.2d at 250-51. The result ultimately turned on the intermediate appellate court’s misapplication of the law regarding trial subpoenas and does not speak to the prosecutor’s obligations or limitations in these circumstances particularly under state law. Id. at 298-99.

Third, the decision in R. Enterprises was driven by concerns about mini-trials on the relevance of subpoenaed material. Id. That is not a concern here where the special inquiry judge must simply require

the request for personal bank records to be made under oath, that the facts and circumstances make it likely that a crime has been committed, and evidence is likely to be found in the place searched. Thein, supra. This is neither unreasonable, nor is there any reason to believe it would be burdensome.

Finally, the probable cause standard is consistent with sound public policy. Requiring probable cause for special inquiry subpoenas of private bank records is consistent with our state's recognition of heightened privacy protections and "jealously and carefully drawn" warrant requirement exceptions.¹³

This is also consistent with Fourth Amendment interests as Justice Stevens noted in his concurrence.

A more burdensome subpoena should be justified by a somewhat higher degree of probable relevance than a subpoena that imposes a minimal or nonexistent burden.

R. Enterprises, 498 U.S. at 304 (Stevens, J., concurring). A subpoena to a third party for personal and confidential banking records such as these is an enormous burden on our "private affairs" that compels the application of the warrant requirements.¹⁴

¹³ Garcia-Salgado, 170 Wn.2d at 184 (quoting State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009)).

¹⁴ Unlike the cases the Court of Appeals relies on, where an individual is subpoenaed and he or she may move to quash, with a subpoena duces tecum to a

“[T]he warrant requirement ensures that some determination has been made which supports the scope of the invasion,” but that does not happen under a scheme where the prosecutor is only required to assert there might be evidence of “any crime.” Cf Miles, 160 Wn.2d at 247 (citations omitted) and Slip Op at 15. With a warrant, “[t]he scope of the invasion is, in turn, limited to that authorized by the authority of law” but no similar limit exist in the special inquiry proceedings. Id.

The Court of Appeals’ interpretation of the statute erodes crucial aspects of our privacy protections and writes the warrant requirement out of existence wherever prosecutors wish to avoid the inconvenience of, or their inability to, establish that it is even likely a crime has been committed. The statutory ability to then avoid public accountability for such decisions should be ample reason to reject the State’s view.

third party for personal bank records, the bank has no motive to challenge demands as irrelevant or overreaching. Cf Miles, 160 Wn.2d at 250-51 with R. Enterprises, 498 U.S. at 294-97; In re Grand Jury Investigation M.H., 648 F.3d 1067 (9th Cir., 2011) (subpoena for mandatory reporting forms from the object of the investigation). The distinction is critical because this Court recognized that “the opportunity to subject a subpoena to judicial review” was essential to reducing mistaken intrusions. Miles, at 247. A judge signing subpoenas does not provide the judicial review required because there are no meaningful standards nor requirements of proof provided.

The similarly oblique federal Foreign Intelligence Surveillance Court (FISC), which was created in 1979 to oversee Department of Justice requests for surveillance warrants against foreign agents suspected of espionage or terrorism in the United States, has also been in the news recently. The FISC has declined just *11 of the more than 33,900* surveillance requests made by the government in 33 years. E. Perez, Secret Court’s Oversight Gets Scrutiny, Wall Street Journal, June 9, 2013. A rate of .03 percent raises serious questions about just how much judicial review is actually being provided by such systems.

Requiring a higher burden of proof before issuing a subpoena for personal banking records in Washington would result in none of the delay or threats to the secrecy of the process that were critical to the U.S. Supreme Court's R. Enterprises decision. See Miles, 160 Wn.2d at 251-52 ("Obtaining a judicially issued warrant or subpoena risks neither detection nor delay.")

Ironically, it appears the Michigan statute upon which our special inquiry proceedings were modeled specifically required "probable cause to suspect that any crime...has been committed" before the single judge could issue the subpoena.¹⁵ So while the Washington statute may refer simply to having "reason to suspect crime or corruption, within the jurisdiction," the Washington Constitution does not permit the Legislature to undercut these

¹⁵ The Michigan statute provides:

Whenever by reason of the filing of any complaint, which may be upon information and belief, or upon the application of the prosecuting attorney or attorney general, any judge of a court of law and of record **shall have probable cause to suspect that any crime**, offense or misdemeanor has been committed within his jurisdiction, and that any persons may be able to give any material evidence respecting such suspected crime, offense or misdemeanor, such judge in his discretion may make an order directing that an inquiry be made into the matters relating to such complaint, which order, or any amendment thereof, shall be specific to common intent of the scope of the inquiry to be conducted, and thereupon conduct such inquiry.

M.C.L.A. ss 767.3 as cited in State v. Manning, 86 Wn.2d 272, 273, 543 P.2d 632 (1975) (Appendix A).

The Connecticut statute that was also cited as a model for the Washington law was repealed in 1985. C.G.S.A. s 54-47 (Appendix B).

constitutional requirements which limit intrusions in private affairs, by simply passing a statute. Garcia-Salgado, 170 Wn.2d at 186-88.

The requirement of sworn testimony is also crucial and was dispositive in Garcia-Salgado, 170 Wn.2d at 187-88. The Court of Appeals concluded there was no constitutional requirement of sworn testimony, but to the extent there was, it was satisfied by the trial deputy's declaration that he had seen documents submitted by another prosecutor in support of the special inquiry subpoenas. Slip op at 17 n.48; see CP 102-07. This form of post hoc justification is clearly contrary to established law and practice which requires the propriety of a search warrant be gauged by the sworn testimony within the four corners of the affidavit. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) ("the trial court acts in an appellate-like capacity; its review, like ours is limited to the four corners of the probable cause affidavit."); see also CrR 2.3.¹⁶

¹⁶ Even if the special inquiry procedure satisfied the "authority of law" requirement, where the special inquiry judge acts outside the statutory dictates, the evidence gathered is subject to suppression. Manning, 86 Wn.2d at 275. Nothing in the record established that at the time the subpoenas were sought, a grand jury had been impaneled in King County. RCW 10.27.020(2) ("the term 'public attorney' shall mean the prosecuting attorney of the county in which a grand jury or special grand jury is impaneled...."). There is no record whoever might have signed the subpoenas was designated in the manner prescribed. RCW 10.27.020(7). Finally, the blanket assertions of confidentiality are fundamentally inconsistent with Article 1, § 10 of the Washington Constitution which provides: "Justice in all cases shall be administered openly...." State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

d. Suppression of the improperly obtained bank records was required

Where the special inquiry judge acts outside constitutional or statutory dictates, the evidence gathered thereby is still subject to suppression. Manning, 86 Wn.2d at 275. Miles and Garcia-Salgado dictate the remedy of reversal where convictions were based on the tainted records. Garcia-Salgado, 170 Wn.2d at 188-89; Miles, 160 Wn.2d at 252.

The State acknowledges there was no warrant and they failed to produce evidence that sworn testimony was provided to support the 15 subpoenas obtained. 7/9/12RP 140-41. This is a direct violation of the privacy protections of the Washington Constitution which place the burden to justify such intrusions on the State. Tibbles, 169 Wn.2d at 368-69; Winterstein, 167 Wn.2d at 633-35.

The special inquiry statute cannot be read so broadly as to permit police and prosecutors to sidestep the bedrock constitutional protections of our private affairs through secret invasions of a citizen's personal financial records when prosecutors cannot, or do not want to, attest under oath to facts sufficient to infer a crime has likely been committed and evidence of that crime is likely to be found in the place to be searched.

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

The double jeopardy bar prohibits “multiple punishments for the same offense,” absent contrary “clearly expressed legislative intent.” Missouri v. Hunter, 459 U.S. 359, 368, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).¹⁹ In charging multiple violations of the same statute, where the prosecutor attempts to distinguish the charges by dividing the evidence into various segments, the proper inquiry is what “unit of prosecution” has the Legislature intended as the punishable act. Bell v. United States, 349 U.S. 81, 82-83, 75 S.Ct. 620, 99 L.Ed. 905 (1955); State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). When the Legislature defines the scope of a criminal act, i.e. the unit of prosecution, double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime.²⁰ If the Legislature failed to specify the unit of prosecution in a criminal

¹⁹ The federal double jeopardy clause provides, “No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb...” U.S. Const. amend V; Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). The state double jeopardy clause provides, “No person shall ... be twice put in jeopardy for the same offense.” WA Const. art. 1, § 9.

²⁰ See e.g. In re Snow, 120 U.S. 274, 7 S.Ct. 556, 30 L.Ed. 658 (1887) (double jeopardy violated when defendant convicted on multiple counts of plural cohabitation when the cohabitation was continuous and ongoing).

statute, the ambiguity should be construed in favor of lenity. Bell, 349 U.S. at 84.²¹

The securities fraud statute, RCW 21.20.010, states:

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

- (1) To employ any device, scheme, or artifice to defraud;
- (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
- (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Here the prosecutor alleged Mr. Reeder was engaged in an ongoing criminal enterprise, a fraudulent real estate development scheme, in which McAllister provided the funding and Reeder sought out and acquired the properties. RP 585-86. The plain language of the statute defines the unit of prosecution in terms of the wrongful sale of the security. Here, the security was “a common enterprise,” represented by a single “REEMC agreement.” RP 583-84. In conjunction with that one security, Mr. Reeder may have made a multitude of misrepresentations and Mr. McAllister may have made a

²¹ See also United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22, 73 S.Ct. 227, 97 L.Ed. 260 (1952); Brown v. Ohio, 432 U.S. 161, 169, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).

number of separate payments, but the unit of prosecution defined by the statute is the security and that did not change.²²

The Court of Appeals concluded that because “the State based each count upon a separate transaction; the charged acts did not “inhere in the same transaction.”²³ Washington law is clear, however, that:

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

State v. Dash, 163 Wn.App. 63, 68, 259 P.3d 319 (2011)

(emphasis added) (quoting State v. Vining, 2 Wn.App. 802, 808-09, 472 P.2d 564 (1970)); State v. Carrier, 36 Wn.App. 755, 757, 677 P.2d 768 (1984).

The prosecution alleged that each and every one of the securities fraud offenses it charged were all part of a “continuing criminal impulse.” CP 153-66; RP 583-84. The court instructed the jury that to prove the defendant’s multiple offenses were “committed under a

²² RCW 21.20.010 defines a single offense. State v. Mahmood, 45 Wn.App. 200, 206, 724 P.2d 1021 (1986) (making an untrue statement and omitting to make a material statement were not separate offenses). See also United States v. Lilly, 983 F.2d 300, 303–04 (1st Cir. 1992) (multiple misstatements that are part of a single execution of a scheme should be prosecuted in a single count in a prosecution under 18 U.S.C. § 1344 because the statute punishes “a scheme or artifice ... to defraud”).

²³ Slip. Op. 29.

continuing criminal impulse the State must prove that the defendant's criminal impulse or intent continued unabated throughout the acts." CP 179. The jury returned verdicts finding this proposition was established beyond a reasonable doubt as to each of the securities fraud counts. CP 201-02.

"If the impulse continues, the crime is not complete until the continuing impulse has been terminated." State v. Mermis, 105 Wn.App. 738, 745, 20 P.3d 1044 (2001) (noting the doctrine originates at common law, citing State v. Ray, 62 Wash. 582, 114 P. 439 (1911) and State v. Dix, 33 Wash. 405, 74 P. 570 (1903)). The resulting convictions represent a "single larceny" and the double jeopardy bar limits the punishment which can be imposed. State v. Turner, 102 Wn.App. 202, 209, 6 P.3d 1226 (2000).

Mr. Reeder's actions with regard to the security were repetitive but otherwise virtually indistinguishable from a legal perspective. McAllister made every payment pursuant to his initial agreement with Mr. Reeder. All payments were in furtherance of the single goal alleged, the property development scheme, and the jury was required to find "the acts were part of an ongoing criminal enterprise with a single objective." To find a "continuing criminal impulse" the jury was required to find "the defendant's criminal impulse or intent continued

unabated throughout the acts.” CP 178-79 (emphasis added); RP 585-86. The jury so found.²⁴

The Court of Appeals concluded the legislature’s prohibiting of false or misleading acts in connection with “any” security and “every” sale indicated its intent of separate crimes. Slip op at 28. As noted already however, there was only one security and Mr. McAllister’s interest in that security did not change. The agreement remained that he would be repaid his contributions and the profits would be split. The charging in this case attempts to divide this single offense into separate and arbitrary units. Adel, 136 Wn.2d at 340 (“a court should guard against the State’s attempting to segment a singular criminal act to form the basis for multiple convictions.”)

Washington's first degree theft statute does not expressly define the unit of prosecution either and is ambiguous as to whether multiple acts of theft as part of an ongoing scheme or plan over the same period of time and against the same victim may be punished separately. Thus, the rule of lenity dictated this ambiguity be construed in favor of the accused.

²⁴ Even if the acts can be distinguished, as with an assault that may involve multiple punches over an extended period of time, they further the single criminal enterprise. See e.g. State v. Villanueva-Gonzalez, 180 Wn.2d 975, 329 P.3d 78 (2014). Any ambiguity regarding the scope of the transactions must be resolved by finding a single transaction. Id.

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

Turner, 102 Wn.App. at 209-10; compare State v. Tili, 139 Wn.2d 107, 113-14, 985 P.3d 365 (1999).

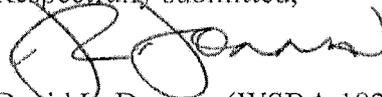
Finally, as the Mermis Court explained, “[i]f the impulse continues, the crime is not complete until the continuing impulse has been terminated.” 105 Wn.App. at 745. The jury found such a continuing impulse here and the resulting convictions, therefore, represent a “single larceny.” The double jeopardy bar limits the punishment which can be imposed for the separate acts committed in support of the single ongoing theft. Turner, 102 Wn.App. at 209.

D. CONCLUSION

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

DATED this 19th day of December, 2014.

Respectfully submitted,



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

C

Effective:[See Text Amendments]

Michigan Compiled Laws Annotated Currentness

Chapters 760 to 777 Code of Criminal Procedure (Refs & Annos)

☒ Chapter 767. Code of Criminal Procedure--Grand Juries, Indictments, Informations and Proceedings Before Trial (Refs & Annos)

☒ Chapter VII. Grand Juries, Indictments, Informations and Proceedings Before Trial (Refs & Annos)

→→ 767.3. Proceedings before trial; inquiry, order, conducting; summoning witnesses, proceedings, fees, subpoena, appearance; notification to judge; taking testimony; legal counsel; revelation by attorney, penalty; testimony in presence of judge; disqualification of judge, etc.

Sec. 3. Whenever by reason of the filing of any complaint, which may be upon information and belief, or upon the application of the prosecuting attorney or attorney general, any judge of a court of law and of record shall have probable cause to suspect that any crime, offense or misdemeanor has been committed within his jurisdiction, and that any persons may be able to give any material evidence respecting such suspected crime, offense or misdemeanor, such judge in his discretion may make an order directing that an inquiry be made into the matters relating to such complaint, which order, or any amendment thereof, shall be specific to common intent of the scope of the inquiry to be conducted, and thereupon conduct such inquiry. In any court having more than 1 judge such order and the designation of the judge to conduct the inquiry shall be made in accordance with the rules of such court. Thereupon such judge shall require such persons to attend before him as witnesses and answer such questions as the judge may require concerning any violation of law about which they may be questioned within the scope of the order. The proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony. The witnesses shall not receive any compensation or remuneration other than witness fees as paid witnesses in other criminal proceedings. The witness shall not be employed in any capacity by the judge or by any person connected with such inquiry, within the scope of the inquiry being conducted. Whenever a subpoena is issued by the judge conducting the inquiry, commanding the appearance of a witness before the judge forthwith upon the service of such subpoena, and, following the service thereof, the witness arrives at the time and place stated in the subpoena, the judge issuing the same shall be forthwith notified of the appearance by the officer serving the subpoena, and the judge forthwith shall appear and take the testimony of the witness. Any person called before the grand jury shall at all times be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt. The witness shall have the right to have counsel present in the room where the inquiry is held. All matters revealed to the attorney shall be subject to the requirements of secrecy in section 4, [FN1] and any revelation thereof by the attorney shall make him subject to punishment as provided in section 4. No testimony shall be taken or given by any witness except in the presence of the judge.

A-1

Any judge, prosecuting attorney or special prosecuting attorney, or the attorney general participating in any inquiry under this section which continues more than 30 calendar days shall thereafter be disqualified from appointment or election to any office other than one held at the time of the inquiry. The disqualification shall not extend more than 1 year from date of termination of the inquiry, as determined by final order of the judge entered prior to such date.

[FN1] M.C.L.A. § 767.4.

HISTORICAL AND STATUTORY NOTES

Source:

P.A.1927, No. 175, c. VII, § 3, Eff. Sept. 5.

C.L.1929, § 17217.

C.L.1948, § 767.3.

P.A.1949, No. 311, § 1, Eff. Sept. 23.

P.A.1951, No. 276, § 1, Eff. Sept. 28.

P.A.1965, No. 251, § 1, Imd. Eff. July 21.

C.L.1970, § 767.3.

As enacted, this section read:

“Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings.”

A-2



Effective:[See Text Amendments]

Connecticut General Statutes Annotated Currentness

Title 54. Criminal Procedure

Chapter 960. Information, Procedure and Bail (Refs & Annos)

→ → § 54-47. Repealed. (1985, P.A. 85-611, § 9.)

HISTORICAL AND STATUTORY NOTES

The repealed C.G.S.A. § 54-47 related to investigations into the commission of crime to be conducted before judges or state referee and was derived from:

1941, Supp. § 889f.

1949 Rev., § 8777.

1953, Supp. § 2509c.

1955, Supp. § 3324d.

1969, P.A. 631, § 2.

1971, P.A. 860.

1973, P.A. 73-116, § 2.

1973, P.A. 73-667, § 1.

1974, P.A. 74-183, § 139.

1974, P.A. 74-186, § 2.

1976, P.A. 76-436, §§ 10a, 538.

1978, P.A. 78-280, § 1.

1980, P.A. 80-313, § 5.

C. G. S. A. § 54-47, CT ST § 54-47

Current with enactments of Public Acts of the 2014 February Regular Session of the Connecticut General Assembly.

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IN THE SUPREME COURT OF STATE OF WASHINGTON

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| |) | |
| Respondent, |) | |
| |) | NO. 90577-1 |
| v. |) | |
| |) | |
| MICHAEL REEDER, |) | |
| |) | |
| Appellant. |) | |

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I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF DECEMBER, 2014, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| KING COUNTY PROSECUTOR'S OFFICE | <input type="checkbox"/> | E-MAIL BY AGREEMENT |
| APPELLATE UNIT | | VIA COA PORTAL |
| 516 THIRD AVENUE, W-554 | | |
| SEATTLE, WA 98104 | | |

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF DECEMBER, 2014.

X. 

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

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Cc: paoappellateunitmail@kingcounty.gov; David Donnan
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To the Clerk of the Court:

Please accept the attached documents for filing in the above-subject case:

**Supplemental Brief of Petitioner; and
Motion for leave to File Overlength Brief**

David L. Donnan - WSBA #19271
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