

DIVISION ONE

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**CRIMINAL DIVISION**

**KING COUNTY PROSECUTOR'S OFFICE**

No. 72043-1

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

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TED J. GRIMES

*Plaintiff/Appellant*

v.

STATE OF WASHINGTON

*Defendant/Respondent*

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**REFILED BRIEF OF APPELLANT  
TED J. GRIMES**

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## I. INTRODUCTION

Ted Grimes appeals the ORDER ON FAILURE TO PAY HEARING—SETTING MONTHLY PAYMENT SCHEDULE entered in King County Superior Court on May 8, 2014, asserting that the payment schedule includes monies exempted from attachment by the Federal and Washington State Governments which places the new court required monthly restitution payment grossly in excess of the amount prescribed by Appellant's judgment and sentence and State and Federal statute.

Grimes further appeals the MONTHLY FINANCIAL REPORT OF TED GRIMES, in the above referenced ORDER where Grimes is required to provide address, city, and state of each instance where he is away from his residence for more than a 24 hour period, which is a violation of his Fourth Amendment rights under the U.S. Constitution.

Grimes also appeals the use by the Court of the entire Monthly Financial Report as coercion to force Appellant Grimes to divulge information, under penalty of law, that could be self-incriminating.

## **II. ASSIGNMENTS OF ERROR**

The Court erred in calculating the amount of monthly restitution Grimes is required to pay by including income from sources which are exempt from any attachment under State and Federal statute.

The Court erred in requiring Grimes to report his daily whereabouts to the Court for essentially every day for a year, where even a non-change of address entry indicates he is staying at his current address, even though Appellant Grimes has fully completed his sentence and is under no court-ordered custody program of any kind. Only the restitution phase remains.

The Court erred in the preparation of the financial reporting form which requires Grimes to provide information in violation of his Fourth and Fifth Amendment rights under the U.S. Constitution.

## **III. STATEMENT OF THE CASE**

Ted Grimes owned and operated three businesses simultaneously in one location in Federal Way, WA. 1) Pacific Coast Escrow, Inc. (PCE) was an escrow business closely regulated by State statute (RCW18.44). 2) Pacific Coast Data Services, Inc., (PCDS) a separate corporation, leased computer equipment to Pacific Coast Escrow and also performed Intermediary services for IRC Section 1031 Tax-Deferred Exchanges which were governed by Federal Internal Revenue Service (IRS)

requirements and not specifically governed by the State. 3) Pacific Coast Financial Services, Inc. (PCFS), a separate corporation from both PCE and PCDS, loaned money to area businesses for commercial purposes only and its' activities were not governed by specific State regulatory statute.

PCDS would occasionally loan exchange funds under its care, custody and control to PCFS if the particular loan parameters met with the priorities of PCDS cash flow needs. PCFS also used several private party lenders for funding the business loans. PCE would handle the escrow portion of those business loans as all the loans were secured by real estate equity.

Grimes was originally charged with "Unauthorized control over the funds of another" for his business activities at PCDS (not PCE) in conducting property transactions as an Intermediary under Internal Revenue Code, Section 1031, Tax Deferred Exchanges which the State Department of Financial Institutions (DFI) determined were escrow transactions subject to RCW18.44. The charges were later modified to "theft" when it was discovered there was no underlying statute for the Unauthorized Control charges.

The State Department of Financial Institutions determined that the Section 1031 Exchange activities of PCDS were in violation of the Escrow Agent Registration Act, RCW 18.44, due to an ambiguity in the definition of escrow pertaining to exchanges (instituted in 1964). Major changes to

the Federal tax laws regarding tax-deferred exchanges had occurred after the statute definition had been written but the definition had never been updated. (Starker v. US, 1967)

After charging but prior to Grimes' trial, the State Legislature clarified the definition of "escrow" specifically exempting from the definition "the acts of a qualified intermediary in facilitating an exchange under section 1031 of the internal revenue code," (Chapter 30, Laws of Washington, 1999) which was exactly the business conducted by PCDS.

At trial the prosecutor incorrectly argued that the escrow definition clarification did not pertain to Grimes' activities as his activities occurred prior to the definition change. Case law shows that a definition clarification is to be retroactive in such instances as it goes to clarify the original intent of the legislation. Such retroactivity would have eliminated the States' action against Grimes.

Grimes was convicted of eight counts of theft in 1999 and given an exceptional sentence of 60 months of confinement. He was released after serving 30 months under a half-time for first time non-violent offenders program. Grimes was also ordered to pay restitution in the amount of \$616,402, plus interest in a monthly amount based on a sliding scale increasing with the amount of his income. The current balance owing is approximately \$1,600,000 due to interest charges on the outstanding balance.



At trial, no evidence was ever provided indicating Grimes had ever converted funds from another to his own personal accounts and/or usage. Grimes did loan out customers' 1031 Exchange monies in his care, custody and control to area businesses on short term Notes secured by the equity in real estate. All exchanges handled by Grimes and his companies were fully funded at the appropriate time. No customer had lost any money until the DFI issued its' Cease and Desist Order against Grimes.

Prior to the curative legislative action, the Department of Financial Institutions (DFI) issued said Cease and Desist order to all three Grimes owned businesses (PCE, PCDS and PCFS) freezing all the assets which effectively closed them down wherein customers escrows and exchange transactions then failed, forcing the companies into bankruptcy.

DFI hired two independent Certified Public Accountants to review the escrow activities of PCE and PCDS (excluding the assets of PCFS, as PCFS was not under investigation for escrow activities). Both CPA's indicated losses of around \$300,000 of "escrow" funds – not counting any offset of loan funds from PCFS which were in excess of \$600,000. DFI then conducted its' own audit and somehow placed the shortage at about \$600,000.

Grimes surrendered the short term Promissory Notes of PCFS to the Bankruptcy Court which collected over \$730,000 in cash from those Notes. All Notes were paid in full, plus accrued interest. There were no

defaults on any of PCFS' notes. In addition, DFI assisted the Bankruptcy Court in collecting \$500,000 from the PCE fidelity bond placing over \$1,100,000 in cash in the hands of the Court appointed Trustee to pay the \$300,000 to \$600,000 escrow shortage at PCE and PCDS. The Trustee collected significantly more money than required to cover the liabilities of the bankruptcy.

Grimes obtained bankruptcy court records of the money spent by the Trustee and found a large amount of bogus claims filed and paid under the bankruptcy resulting in a shortage (!!!) of the \$616,402.00 Appellant has been tasked to repay as restitution.

With statutory interest on restitution at 10% per annum on the unpaid balance, which in this case amounted to over \$60,000 per year initially, and rising every year thereafter, with Grimes paying the maximum 25% of disposable income, Grimes would need to earn over \$240,000 per year just to cover the annual interest charges. Grimes is 68 years old, and is in failing health to the point where he could only work a sit-down job part time. Finding such a job is hampered by Grimes' felony theft convictions. There is then a very, very small probability that the restitution will ever be paid in full. Recognizing that, the issue then becomes, based on statute, what is Grimes legally responsible to pay each month in restitution.

While released on bond prior to confinement Grimes paid restitution

in the amount of \$633 per month based on his income. After release from confinement in 2005 Grimes was ordered to pay restitution of \$100 per month even though Grimes notified the Clerk several times in writing that the amount was incorrect and less than specified in his J&S. The payment amount was never corrected and Grimes continued to pay the amount as ordered. In mid 2007 Grimes received a monthly restitution statement raising his payment to \$4,500 per month which exceeded Grimes' total monthly gross income and obviously then greater than the 25% of his disposable earnings. Grimes continued to pay the \$100 per month after a telephone conversation with the Clerk was unproductive in setting a realistic and proper payment amount.

A January 2008 restitution payment hearing resulted in the Court issuing a subpoena for all of Grimes financial data for the past several years. The judge also admonished the Court Clerk to provide a more reasonable payment amount based on the financial records received. *cp1*.

Upon leaving the courtroom the Clerk informed Grimes he could stop making payments until the Clerk determined a new payment amount. Grimes was uncomfortable with not making any monthly payments and began making token payments of \$25 per month while awaiting the new payment amount. A new payment amount never came so Grimes continued to pay the token amount each and every month. In 2012 Grimes provided another complete financial package (over 250 pages of data)

to the Clerk in response to an updated request. Again, no revised restitution payment was issued as directed by the Court in 2008.

Grimes had been trying since 2007 to reach an agreement with the Court Clerk where he could sell his partial interest in his house with the Clerk providing a partial satisfaction of judgment to escrow in exchange for a large cash payment exceeding \$100,000 for restitution to the Clerk. All his attempts were futile as the Clerk demanded the entire sale proceeds and would not negotiate anything less, even though Grimes had a \$125,000 homestead exemption as provided by statute and was only one of four owners listed on the deed to the property.

In 2013 Grimes filed a MOTION TO COMPEL PERFORMANCE in King County Superior Court in an effort to get the Clerk to negotiate a settlement amount to permit the sale of Grimes' family home. This motion led to a series of hearings in which the ORDER ON FAILURE TO PAY was issued and is now under appeal by Grimes.

In that order Grimes was ordered by the Court to pay restitution in the amount of \$700 per month. Grimes' income consists of his monthly Social Security retirement of \$1,402, his monthly military retirement of \$978, his Boeing Company retirement of \$338, and his half portion of a Tacoma house sale contract of \$175 for a total of \$2,893 per month. INCLUDING the exempted sources of income, the amount payable per

month for restitution per Grimes' Judgment & Sentence would be the \$2,893 times 15% to restitution equaling \$434 per month – not the \$700. The difference stems from Grimes' 2013 income tax return which shows a line item marked “seller financed interest” income of \$11,561. That figure is phantom money. It does not exist in real life. It is money received by Grimes and his wife as monthly payments on a real estate contract where Grimes and his wife sold a previous residence with an underlying mortgage payment still due their original mortgage lender and which they continue to make monthly payments. Shown on a different page of that same 2013 income tax return is the outgoing underlying loan payments to Grimes' mortgage company. The actual disposable income to Grimes from the real estate contract was \$175 per month.

#### IV. ARGUMENT

##### **4.1 The calculation of monthly restitution payments is governed by statute.**

A court interpreting a statute must discern and implement the legislature's intent. *State v. J.P.*, 149 Wn2d 444,450.

Where the plain language of a statute is unambiguous and legislative intent is apparent, we [the Court] will not construe the statute otherwise.

Id.

It is the policy of the state of Washington to ensure the well-being of its citizens by protecting retirement income to which they are or may become entitled. RCW 6.15.020 (1).

Unless otherwise provided by *federal law*, (emphasis added) any money received by any citizen of the state of Washington as a pension from the government of the United States, whether the same be in the actual possession of such person or be deposited or loaned, shall be exempt from execution, attachment, garnishment, or seizure by or under any legal process whatever, and when a debtor dies, or absconds, and leaves his or her family any money exempted by this subsection, the same shall be exempt to the family as provided in this subsection. RCW 6.15.020 (2). Exemption statutes should be liberally construed to give effect to their intent and purpose. *In re Elliott*, 74 Wn2d 600,620.

An antigarnishment provision reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task. *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 376-77, 110 S.Ct. 680.

**4.2 Social Security income is exempt from consideration in determining restitution payments.**

Grimes' Social Security income is exempt from consideration in determining restitution payments. "[T]he right of any person to any future payment under this title shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under

this title shall be subject to execution, levy, attachment, garnishment, or other legal process, . . .” 42 U.S.C 407, Sec 207 (a).

In the federal courts, the language in the Social Security Act prohibiting garnishment of “the moneys paid or payable” to a beneficiary has been held protected even after deposit. *Philpott v. Essex County Welfare Board*. 409 U.S. 413, 415-17, 93 S.Ct. 590 (1973) (social security funds on deposit retain protection as “moneys paid” (quoting Social Security Act of 1935, ch. 531, section 208, 49 Stat. 620, 625 (1935))).

**4.3 Military retirement benefits are exempt from consideration in determining restitution payments.**

Similarly Grimes’ military retirement benefits are exempt from consideration in determining restitution payments. “Payments of [military] benefits due or to become due under any law administered by the Secretary [of Defense] shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. . . “ 38 U.S.C. Section 5301(a)(1).

Language in the World War Veterans Act of 1924 (now Veterans Benefits Act) that funds were exempt “either before or after receipt by the beneficiary” has been held to protect funds postdistribution. *Porter v. Aetna*

Cas. & Sur. Co., 370 U.S. 159, 160-62. 82 S.Ct. 1231.(1962). (veterans' benefits paid into savings and loan account were readily withdrawable and therefore retained protection (quoting World War Veterans' Act of 1924, ch. 510, sec. 3 (1935))). Anthis v. Copland, 173 Wn2d 578. (2012).

**4.4 ERISA income is exempt from consideration in determining restitution payments.**

Grimes' Boeing Company Pension Plan is an Employee Retirement Income Security Act (ERISA) qualified benefit plan. ERISA requires that a pension plan provide that benefits under the plan may not be assigned. ERISA supersedes state laws insofar as such laws relate to employee benefit plans. The ERISA anti-alienation and preemption provisions combine to make state attachment and garnishment laws inapplicable to an individual's benefits under an ERISA-covered employee benefit plan. ERISA section 514(a).

. . . in the face of this direct clash between state law and the provisions and objectives of ERISA, the state law cannot stand. Conventional conflict pre-emption principles require pre-emption "where compliance with both federal and state regulations is a physical impossibility . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Gade v. National Solid Wastes Management Assn., 505 U.S. 88, 98 (1992)

The right of a person to a pension, annuity, or retirement allowance or disability allowance, or death benefits, or any optional benefit, or any other



right accrued or accruing to any citizen of the state of Washington under any employee benefit plan, and any fund created by such a plan or arrangement, shall be exempt from execution, attachment, garnishment, or seizure by or under any legal process whatever. RCW 6.15.020 (3)

4.5 **The States' Monthly Financial Report of Ted Grimes requires the Appellant to provide information regarding his daily whereabouts and financial activities that violate his Fourth Amendment rights to privacy and his Fifth Amendment rights against self-incrimination.**

The Court may consider this argument moot as the reporting period required of Appellant for the MONTHLY FINANCIAL REPORT OF TED GRIMES will have probably expired by the time of review of this appeal however the information requested by threat of coercion and possible criminal prosecution is ongoing as indicated by the statement in item 14 of the said MONTHLY FINANCIAL REPORT OF TED GRIMES which reads "I understand that this report is intended to be used in any future court proceedings and may be filed in the court file."

The Fourth Amendment reads:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

". . . If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of

the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.” 232 U.S. 383, 391-393. Elkins v. United States, 364 U.S. 206, 80 S.Ct. 1437.

[t]here is a significant difference between the use of compulsion to extort communications from a defendant and compelling a person to engage in conduct that may be incriminating. Thus, even though the act may provide incriminating evidence, a criminal suspect may be compelled to put on a shirt, to provide a blood sample or handwriting exemplar, or to make a recording of his voice. The act of exhibiting such physical characteristics is not the same as a sworn communication by a witness that relates either express or implied, assertions of fact or belief. Pennsylvania v. Muniz, 496 U.S. 582, 594-98 (1990). Similarly, the fact that incriminating evidence may be the by product of obedience to a regulatory requirement, such as filing an income tax return, maintaining required records, or reporting an accident, does not clothe such required conduct with the testimonial privilege. United States v. Hubbell, 530 U.S. 27. *Supreme Court* 2000.

petitioners argued that, under our [U.S. Supreme Court] reasoning in *Counselman*, (*Counselman v. Hitchcock*, 142 U.S. 547, 1892) nothing less than full transactional immunity from prosecution for any offense to which compelled testimony relates could suffice to supplant the privilege. In rejecting that argument, we stressed the importance of Section 6002's "explicit proscription" of the use in any criminal case of "testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)." *Kastigar v. United States*, at 453. We particularly emphasized the critical importance of protection against future prosecution "based on knowledge and sources of information obtained from compelled testimony." *Id.* at 454 (quoting *Ullmann v. United States*, 350 U.S. 422, 437 (1956)). *United States v. Hubbell*, at 39.

Grimes has completed the full scope of the incarceration and custody portion of his sentence. He is under no authority of the Department of Corrections nor any limitations on his freedom at this point of time. Any required reporting of his daily whereabouts is an unreasonable invasion of his privacy and security.

Further, the entire coerced nature of the form is a violation of Grimes' Fifth Amendment right against self-incrimination.



## V. CONCLUSION

The Superior Court erred in including exempted sources of income in the calculation of Grimes' monthly restitution payments. Grimes' social security, military retirement and ERISA monthly benefit checks must not be counted as income for restitution payment calculations.

Appellant Grimes requests this Court direct the Superior Court to reissue its' ORDER ON FAILURE TO PAY deleting the exempt sources of income from its' calculations, to adjust the phantom interest earnings to include the outgoing mortgage payment and to strike the unconstitutional invasions of Appellants' privacy from the MONTHLY FINANCIAL REPORT OF TED GRIMES form.

Further, Grimes requests a directed order to the Superior Court Clerk for the refund of the erroneous additional monies paid by Grimes during this appeal process as determined by the Superior Court Judge.