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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

MICHAEL J. REEDER,

Respondent.

AMICUS BRIEF OF THE STATE OF WASHINGTON

Filed
Washington State Supreme Court

JAN 26 2015

Ronald R. Carpenter
Clerk

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 ORIGINAL

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I. INTRODUCTION

“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7. This important state constitutional provision protecting the privacy of Washington citizens has, since the time of its drafting and adoption, co-existed with the grand jury process of issuing subpoenas and subpoenas duces tecum for the purpose of investigating crimes, based on no more than suspicion or even rumor. The subpoena duces tecum issued in this case by a special inquiry judge is similarly consistent with article I, section 7; the subpoena was issued with “authority of law” because it was authorized by statute and because the subpoena was approved by a neutral and detached magistrate. Like a grand jury subpoena, the special inquiry judge subpoena need not be supported by probable cause, and Mr. Reeder’s arguments to the contrary should be rejected.

Even if this Court determines that a subpoena duces tecum issued for the purpose of a criminal investigation must satisfy the requirements of a search warrant, it should limit its holding to criminal investigations. Numerous other statutes authorize subpoenas to be issued in other circumstances, such as an agency’s regulation of businesses or enforcement of regulations. Those statutes rely on the particular justifications for administrative subpoenas and such subpoenas are ill-

suited to the traditional warrant requirements. Accordingly, even if the Court agrees with Mr. Reeder that in his case the subpoena duces tecum should have been issued only upon a showing of probable cause to believe a crime had been committed, it should explicitly acknowledge that a different analysis would apply to subpoenas issued in other contexts.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The State of Washington has a substantial interest in this case for at least three reasons. First, the State has an interest in upholding the constitutionality of the special inquiry judge statutes, and in the development of state constitutional law. Second, as was intended by the Judicial Council when proposing the legislation, the special inquiry judge process is a valuable investigative tool relied upon by the State to prevent and prosecute crime. As shown by the facts of this case, prosecutors use special inquiry judges to investigate complex crimes, often in cooperation with state agencies such as the Department of Financial Institutions. Removing or restricting this process will hamper the State's ability to properly investigate crime and corruption. Third, even if the Court determines that "authority of law" for purposes of article I, section 7 requires a showing of probable cause in order to investigate criminal activity, the State has an interest in avoiding an overly broad holding of the Court regarding the requirements of "authority of law" in other

contexts, such as administrative subpoenas issued for civil regulatory purposes or legislative subpoenas. Such subpoenas, which are not in furtherance of investigating criminal activity, require a different analysis and should not be addressed in this case.

III. ISSUES ADDRESSED BY AMICUS

Is a subpoena duces tecum issued under “authority of law” for purposes of article I, section 7 of the Washington Constitution where the subpoena is issued by a neutral and detached magistrate upon a showing of reason to believe a crime has been committed?

IV. STATEMENT OF THE CASE

The State adopts the statement of facts as set forth in the Court of Appeals opinion, *State v. Reeder*, 181 Wn. App. 897, 330 P.3d 786 (2014).

V. ARGUMENT

A. A Subpoena Issued By A Neutral And Detached Magistrate Pursuant To Statute Is Issued Under “Authority Of Law”

The subpoena duces tecum used to obtain documents in this case satisfies the requirements of the Washington Constitution because it was issued under authority of a statute that called for independent review by a neutral and detached magistrate. *See State v. Neslund*, 103 Wn.2d 79, 88, 690 P.2d 1153 (1984) (special inquiry judge is a neutral and detached magistrate because not actively involved in investigation). The court-

approved subpoena¹ is consistent with longstanding and analogous grand jury subpoenas and consistent with this Court's jurisprudence interpreting article I, section 7. Thus, the evidence gathered pursuant to the subpoena should not be suppressed, and Mr. Reeder's conviction should be affirmed.

Washington's constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. This Court applies a two-step analysis to questions involving article I, section 7. First, the Court determines whether a "private affair" has been disturbed. *State v. Miles*, 160 Wn.2d 236, 244, 156 P.3d 864 (2007). If a "private affair" has been disturbed, the Court determines whether "authority of law" justifies the disturbance. *Id.* In *Miles*, the Court determined that "private affairs" include private banking records such as those that were subject to the subpoena here. *Id.* Thus, this case turns on whether a subpoena reviewed and approved by a neutral and detached magistrate, pursuant to a statute, satisfies the "authority of law" requirement.

¹ The State refers to the "subpoena" rather than "subpoena duces tecum" throughout this brief for ease of reference. In any event, a subpoena duces tecum is simply a form of subpoena that commands the witness to testify and to bring documents. *See Black's Law Dictionary* 1467 (8th ed. 1999).

“Authority of law” generally includes authority granted by “a valid, (*i.e.*, constitutional) statute, the common law or a rule of [the Supreme Court].” *State v. Gunwall*, 106 Wn.2d 54, 68-69, 720 P.2d 808 (1986). The purpose of allowing disturbance of private affairs pursuant to statute has been described as the framers’ intent to “entrust[] both the courts and legislature to provide the ‘law’ authorizing disturbances of residents’ private affairs” pursuant to long-standing precedent and to allow each branch of government to serve as a check on the other. Charles W. Johnson & Scott P. Beetham, *The Origin of Article I, Section 7 of the Washington State Constitution*, 31 Seattle U. L. Rev. 431, 449 (Spring 2008).

Here, the special inquiry judge process that resulted in the subpoena was specifically authorized by statute, and the subpoena was thus “authorized by law” unless the statute is unconstitutional. Because the special inquiry judge process is akin to the grand jury process, which is undeniably constitutional, Mr. Reeder cannot meet his burden to show that the statute authorizing the subpoena is unconstitutional, and this Court should affirm.

1. Grand Jury Investigations Are Constitutional

Washington, like the rest of the United States, has a long tradition and history of the use of grand juries to conduct investigations. Territorial

statutes, statutes enacted shortly after the state constitution was adopted, and the state constitution itself all contemplate use of grand juries. *E.g.*, Const. art. I, § 26; Laws of 1869, p. 236-39; Laws of 1891, ch. 28, §§ 10-17, 69. And grand juries have always performed as one of their essential functions the investigation of potential criminal activity. *E.g.*, John Spain, *The Grand Jury, Past and Present: A Survey*, 2 Am. Crim. L. Q. 119, 119-20, 123-24 (1963-64); Wayne R. LaFave, et al., 3 *Criminal Procedure* §§ 8.1(a), 8.2(c) (3d ed. WL) (noting that the broad investigative authority of grand juries dates at least to 1612 in England). In performing this investigative function, grand juries have also traditionally had the power to subpoena persons and documents. *E.g.*, Laws of 1891, ch. 28, § 69 (authorizing issuance of grand jury subpoenas); Spain, 2 Am. Crim. L. Q. at 124; LaFave, 3 *Criminal Procedure* §§ 8.1(c), 8.2(c), 8.3(c).

Not only have grand juries traditionally had the power to issue subpoenas, but in performing their broad investigative role, as contrasted with their role in issuing indictments, probable cause has not been required. Rather, “the grand jury can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.” *United States v. R. Enters., Inc.*, 498 U.S. 292, 297, 111 S. Ct. 722, 112 L. Ed. 2d 795 (1991) (internal quotations marks omitted) (quoting

United States v. Morton Salt Co., 338 U.S. 632, 642-43, 70 S. Ct. 357, 94 L. Ed. 401 (1950)).

Thus, the United States Supreme Court has upheld the issuance of a grand jury subpoena duces tecum on less than probable cause because “the very purpose of requesting the information is to ascertain whether probable cause exists.” *R. Enters., Inc.*, 498 U.S. at 297, 302;² *In re Grand Jury Investigation of M.H.*, 648 F.3d 1067, 1071 (9th Cir. 2011) (requiring only a “reasonable possibility that the subpoena will serve the grand jury’s legitimate investigative purpose” in enforcing subpoena duces tecum (internal quotation marks omitted)). Among the rationales justifying a subpoena duces tecum where a warrant could not issue is that the subpoena is far less intrusive than a physical search or seizure. See *United States v. Dionisio*, 410 U.S. 1, 10, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973) (noting that unlike physical search or seizure, subpoena duces tecum is served like other legal process, involves no stigma, and is not abrupt nor forceful).

² As the United States Supreme Court recognized, grand jury investigations are not unlimited: for example, they are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or an intent to harass. *R. Enters., Inc.*, 498 U.S. at 300. Similarly, grand jury subpoenas may not require a person to self-incriminate or be overly broad or oppressive. *E.g.*, *United States v. Dionisio*, 410 U.S. 1, 11, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973).

Given the historical pedigree of the grand jury's investigative function, the United States Supreme Court's approval of that function, the grand jury's prevalence and inclusion in statutes both before and after Washington adopted its constitution, and the state constitution's explicit reference to grand juries, the constitutionality of grand jury subpoenas cannot reasonably be questioned.

2. Precedent Regarding Grand Jury Subpoenas Is Applicable To Special Inquiry Judges By Analogy

As the Court of Appeals understood, precedent regarding grand jury subpoenas is applicable to special inquiry judge subpoenas because the two processes are so closely related. *Reeder*, 181 Wn. App. at 916. The legislation enacting the special inquiry judge process in 1971 was the result of a study of the grand jury process in Washington conducted by the Washington State Judicial Council.³ *State v. Manning*, 86 Wn.2d 272, 273, 543 P.2d 632 (1975). The Judicial Council, led by then Supreme Court Chief Justice Robert Hunter, recommended the authorization for a special

³ The Judicial Council was created by the 1925 Legislature, was designed to have membership representative of all segments of the Judicial Branch, and also included legislators and other members. *See Twenty-Second Biennial Report of the Judicial Council of the State of Washington (1969 and 1970)*, at iii-iv, 1 (Jan. 1, 1971) (excerpts attached as Appendix to this brief); former RCW 2.52. Among other duties, the Judicial Council was charged with reporting to the governor and legislature on suggested improvements to the judicial system. *See* former RCW 2.52.050. The statutes creating the Judicial Council were repealed in 1995. Laws of 1995, ch. 269, § 201.

inquiry judge as supplementary to a regular grand jury, and noted that the special inquiry judge enabled prosecutors to obtain information under oath, like at a grand jury, but unlike a grand jury, the special inquiry judge was not actively involved in the investigation. *Twenty-Second Biennial Report of the Judicial Council of the State of Washington (1969 and 1970)*, at 18 (Jan 1, 1971) (excerpts attached as Appendix to this brief). Rather, the evidence uncovered through use of the special inquiry judge could be turned over to subsequent grand juries. *Id.*

There is little difference between the investigative function of the grand jury and that of the special inquiry judge, and what little difference there is shows that special inquiry judges provide greater protection against over-reaching or otherwise improper subpoenas through the requirement of judicial review. Both the grand jury and the special inquiry judge process perform investigatory functions. Both authorize the issuance of subpoenas. RCW 10.27.140. Both are intended to assist investigation of crime and corruption and are available upon a showing of “sufficient evidence of criminal activity” for grand juries or “reason to suspect” crime or corruption for special inquiry judge proceedings. RCW 10.27.030, .170; *see also* RCW 10.27.100 (grand jury inquires into all indictable offenses

in county, and if a grand juror “has reason to believe” that an indictable offense has been committed he or she shall inform other grand jurors). Both apply the same standard with respect to whom it may call as a witness. RCW 10.27.140(3). Both allow a public attorney to call witnesses without approval of the grand jurors. RCW 10.27.140(2). Both produce evidence available to prosecutors for use in criminal prosecutions. RCW 10.27.090(4).

Mr. Reeder nevertheless argues that grand jury subpoenas are not analogous to special inquiry judge subpoenas because of alleged differences in purpose and that grand juries have traditionally been a bulwark against corruption and government misconduct. Pet’r’s Suppl. Br. at 11. But this argument fails to recognize the multiple functions of a grand jury, and that grand juries have always served an investigative function that is indistinguishable from investigations through the special inquiry judge process. *E.g.*, LaFave, 3 *Criminal Procedure* § 8.1(a) (describing dual function of grand juries: (1) protecting the individual from the government and (2) “examining situations that are still at the inquiry stage” to uncover evidence for prosecutors). There is simply no reasoned distinction between the two procedures in the context of investigating potential crime.

B. The Court Of Appeals Opinion Is Consistent With *Miles* And *Garcia-Salgado*

Mr. Reeder also mistakenly argues that upholding the statutory procedures set forth in RCW 10.27 is contradicted by this Court's prior opinions in *State v. Miles*, 160 Wn.2d 236, 244, 156 P.3d 864 (2007), and *State v. Garcia-Salgado*, 170 Wn.2d 176, 240 P.3d 153 (2010). See Pet'r's Suppl. Br. at 5-8. To the contrary, the statute's requirement of prior review and approval of a subpoena by a neutral and detached magistrate makes the use of a special inquiry judge here perfectly consistent with the *Miles* opinion and, as the Court of Appeals recognized, the *Garcia-Salgado* opinion has no application here. See *Reeder*, 181 Wn. App. at 918.

In *Miles*, this Court held that an administratively issued subpoena duces tecum for personal banking records, which had not been subject to judicial review, did not satisfy the "authority of law" requirement from article I, section 7 of the Washington Constitution. *Miles*, 160 Wn.2d at 252. In doing so, the Court repeatedly referenced the importance of judicial review of such subpoenas. *Id.* at 247 (generally "warrant or subpoena must be issued by a neutral magistrate"); 249 (referring to protections of "judicially issued warrant or subpoena"); 251-52 ("Obtaining a judicially issued warrant or subpoena risks neither detection nor delay."). Similarly, the Court repeatedly referenced judicially issued

warrants *or* subpoenas, demonstrating that the Court did not view the two as identical, as Mr. Reeder apparently does. *See Miles*, 160 Wn.2d at 251-52.

The *Miles* Court never addressed the question of what level of justification would be necessary to obtain a judicially issued subpoena, as opposed to a warrant. But rather than supporting Mr. Reeder's apparent view that probable cause must always be shown before a judge issues a subpoena affecting "private affairs," the language in the opinion suggests otherwise. First, as noted above, the Court repeatedly expressed its holding in terms of requiring a judicially issued warrant *or* subpoena, suggesting that the requirements of a warrant were not necessarily the same as that required to issue a subpoena. Second, in responding to the State's argument that requiring judicial approval might alert potential violators to the investigation, the Court cited with apparent approval several non-Washington statutes allowing for non-disclosure of judicially approved subpoenas. *Miles*, 160 Wn.2d at 252 n.9 (citing Cal. Gov't Code § 7476(b)(1)(C); Conn. Gen. Stat. Ann. § 36a-43(a); Or. Rev. Stat. § 192.565 (recodified at Or. Rev. Stat. § 192.596)). Each of these statutes allow the issuance of subpoenas *duces tecum* on less than probable

cause. Cal. Gov't Code § 7476(b)(1), (b)(1)(C) (“reasonable inference that a crime . . . has been committed and that the financial records sought are reasonably necessary to the [grand] jury’s investigation of that crime”); customer not provided notice if court determines that would “impede the investigation”); Conn. Gen. Stat. Ann. § 36a-43(a) (financial institution shall disclose financial records pursuant to lawful subpoena, service on customer of subpoena waived upon showing “good cause”); Or. Rev. Stat. § 192.596(6) (allowing court to issue subpoena duces tecum for financial records without disclosure to customer upon showing “reasonable cause to believe that a law subject to the jurisdiction of the petitioning agency has been or is about to be violated”). Thus, to the extent that *Miles* has any bearing on the question of whether a judicially issued subpoena must be justified by probable cause, it suggests that probable cause is not constitutionally required.

Nor does this Court’s opinion in *State v. Garcia-Salgado*, 170 Wn.2d 176, 240 P.3d 153 (2010), support Mr. Reeder. In *Garcia-Salgado*, the Court held that a court order to obtain DNA samples from an already-charged criminal defendant must satisfy the traditional requirements of a warrant—that probable cause be established through sworn testimony. *Id.* at 186. The Court first concluded that a warrant was required because taking a DNA sample was a “search” under the Fourth Amendment of the

United States Constitution and article I, section 7 of the Washington Constitution. *Garcia-Salgado*, 170 Wn.2d at 185. The Court then reasoned that in order to operate as the equivalent of a warrant, a court order must satisfy the traditional warrant requirements. *Id.* at 186. *Garcia-Salgado* did not address judicially authorized subpoenas nor special inquiry judges, and thus has no application here. In relying on *Garcia-Salgado*, Mr. Reeder simply assumes that the subpoena duces tecum here is—like the court order in *Garcia-Salgado*—a search warrant by another name. But the subpoena here is not the functional equivalent of a warrant; rather it is the functional equivalent of a grand jury subpoena. Thus, as the Court of Appeals recognized, *Garcia-Salgado* does not inform the Court’s analysis.

C. Mr. Reeder’s Policy Arguments Should Be Rejected

This Court should reject Mr. Reeder’s argument that “sound public policy” requires that subpoenas issued by special inquiry judges must be justified by sworn testimony establishing probable cause. Pet’r’s Suppl. Br. at 5, 13. The State disagrees that sound public policy includes the dismantling of an important investigative tool used to prevent crime. As the Court of Appeals noted, “[t]he general public has a substantial interest in the effective enforcement of criminal statutes.” *Reeder*, 181 Wn. App. at 917. More importantly, the determination of sound public policy lies squarely with the legislature, which adopted the special inquiry judge

process after careful consideration and at the express urging of members of the Judiciary. *See Twenty-Second Biennial Report* at iii-iv, 17-18 (see Appendix) (urging adoption of act including special inquiry judges and detailing membership in judicial council including Supreme Court justices). This Court's review is limited to determining whether Mr. Reeder has shown beyond a reasonable doubt that use of the special inquiry judge process specifically authorized by statute is unconstitutional. *E.g., Island County v. State*, 135 Wn.2d 141, 955 P.2d 377 (1998) (statutes are presumed constitutional and burden is on party challenging statute to prove unconstitutionality beyond a reasonable doubt). Mr. Reeder's view of what is "sound public policy" is irrelevant to this question.

Moreover, Mr. Reeder's suggestions of potential abuse of the special inquiry judge process by prosecutors, or that judges will not faithfully perform their duties in reviewing subpoena requests, are not supported by the record here, nor by Washington's experience with special inquiry judges. *See* Pet'r's Suppl. Br. at 13 n.14, 14. In fact, recommended practices for Washington prosecutors show that special inquiry judge statutes are likely to be used only when a prosecutor has reason to suspect crime or corruption, that witnesses may be able to provide evidence or documents concerning the crime or corruption, that the evidence does not pertain to crimes already charged, and that

traditional investigative techniques will not be effective. *See WAPA Model Policy for Using Special Inquiry Judge Proceedings*, at 3, available at www.waprosecutors.org/docs/2012%20SIJ%20Model%20Policy_1.pdf. Similarly, Mr. Reeder shows no facts or history suggesting that special inquiry judges will not engage in meaningful review of subpoena requests.

D. The Court Should Limit Its Analysis To The Circumstances Of This Case

Even if the Court determines that the subpoena in this case was constitutionally required to be supported by sworn testimony establishing probable cause, it should limit its holding to criminal investigations. Numerous statutes authorize subpoenas in other contexts in which a requirement of probable cause would be inapposite. For example, legislative committees are authorized to issue subpoenas to compel testimony and to produce papers. RCW 44.16.010-.070. Originally enacted in 1895 shortly after the constitution was adopted, this statute has been held up as an example of exactly what was meant by the framers of the constitution when using the term “authority of law.” Charles W. Johnson & Scott P. Beetham, *The Origin of Article I, Section 7 of the Washington State Constitution*, 31 Seattle U. L. Rev. 431, 455, 455 n.149 (Spring 2008) (quoting Laws of 1895, ch. 6, §§ 1-17). Requiring probable cause to justify such subpoenas would make no sense because the purpose

of the subpoena is not to investigate crime but to allow “the legislative branch to fulfill its constitutional functions.” Johnson & Beetham, 31 Seattle U. L. Rev. at 455.

Similarly, numerous statutes authorize subpoenas for administrative and regulatory purposes. *E.g.*, RCW 50.12.130 (authorizing employment security department to seek court order approving subpoena); RCW 51.04.040 (authorizing department of labor and industries to seek court order approving subpoena).⁴ Again, a requirement of probable cause would make little sense in this context, in which subpoenas are sought not for criminal investigation, but for administrative regulation. Instead, these statutes mirror the federal constitutional requirements for administrative subpoenas. *Compare, e.g.*, RCW 50.12.130 (requiring request for subpoena to adequately specify the records or testimony sought, declare that the investigation is for a lawfully authorized purpose related to an investigation within the department’s authority, and that the subpoenaed

⁴ A non-exhaustive list of similar statutes includes RCW 7.68.030(3) (Labor & Industries–Victims of Crimes); RCW 18.44.425 (Escrow Agents); RCW 19.86.110 (Consumer Protection); RCW 19.100.243 (Franchise Investment Protection); RCW 19.110.143 (Business Opportunity Fraud Act); RCW 19.146.233 (Mortgage Broker Practices Act); RCW 19.230.133 (Uniform Money Services Act); RCW 19.290.210 (Metal Property); RCW 21.20.377 (Securities Act of Washington); RCW 21.30.107 (Commodities Transactions); RCW 30A.04.017 (Washington Commercial Bank Act – Unauthorized Banking); RCW 30B.10.120 (Washington Trust Institutions Act); RCW 31.04.143 (Consumer Loan Act); RCW 31.45.103 (Check Cashers and Sellers); RCW 43.09.166 (State Auditor); RCW 43.20A.605 (Department of Social and Health Services); RCW 82.32.117 (Department of Revenue).

documents or testimony are reasonably related to an investigation within the department's authority) *with Steele v. State*, 85 Wn.2d 585, 593-94, 537 P.2d 782 (1975) (applying United States Supreme Court test for administrative subpoenas of (1) the inquiry is within the authority of the agency; (2) the demand is not too indefinite; and (3) the information is reasonably relevant (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 70 S. Ct. 357, 94 L. Ed. 401 (1950); *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 66 S. Ct. 494, 90 L. Ed. 614 (1946))). Given the important distinctions between subpoenas issued for criminal investigations and those for other purposes, and the uncertainty and confusion that an overly broad or imprecise ruling can cause, the State respectfully requests that the Court explicitly acknowledge the limitations of its holding in this case, whatever it may be.

VI. CONCLUSION

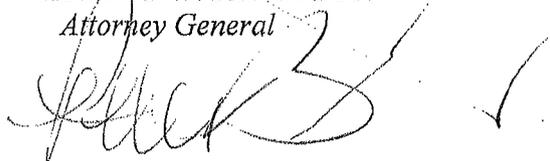
The Court should uphold RCW 10.27.170-.190, Washington's statutes authorizing special inquiry judges to review and issue appropriate subpoenas on a showing of a reason to believe criminal activity is occurring within a particular jurisdiction. The statutes provide the "authority of law" required by article I, section 7 of the Washington Constitution to disturb a person's "private affairs," and its requirement of review by a neutral and detached magistrate, and the more limited

intrusion of a subpoena as compared to a physical search, ensure that the statute is otherwise constitutional.

In the alternative, the Court should make clear that its holding is limited to requests for a subpoena duces tecum in support of a criminal investigation, as a different analysis applies to other subpoenas.

RESPECTFULLY SUBMITTED this 9th day of January 2015.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read 'Peter B. Gonick', is written over the printed name and title of the Deputy Solicitor General. The signature is fluid and cursive.

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APPENDIX

THE
TWENTY-SECOND BIENNIAL REPORT
of the
JUDICIAL COUNCIL
of
THE STATE OF WASHINGTON



Submitted to the
Governor of Washington
In Accordance With RCW 2.52.050

January 1, 1971

for
1969 and 1970

CHAIRMAN
ROBERT T. HUNTER
CHIEF JUSTICE, SUPREME COURT
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State of Washington
JUDICIAL COUNCIL

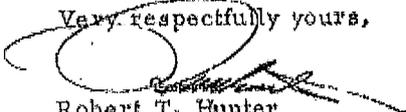
January 1, 1971

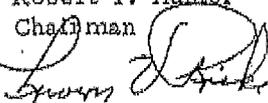
The Honorable Daniel J. Evans
Governor of the State of Washington
Olympia, Washington 98501

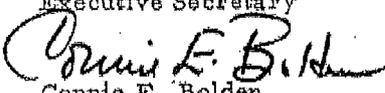
Sir:

We have the honor to submit to you and to the
Legislature the TWENTY-SECOND BIENNIAL REPORT
OF THE WASHINGTON JUDICIAL COUNCIL in
accordance with RCW 2.52.050.

Very respectfully yours,


Robert T. Hunter
Chairman


Luvern V. Rieke
Executive Secretary


Connie E. Bolden
Recording Secretary

RTH:LVR:CEB:at:ak

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Supreme Court Justice, Olympia

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Prosecuting Attorney, Pierce County, Tacoma

* Succeeded Senator Gordon L. Walgren

** Succeeded Senator Wesley C. Uhlman

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Attorney, Seattle

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Attorney, Seattle

Arlene M. Timms
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* Represents Attorney General Slade Gorton

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Philip R. Meade

* Succeeded Lyle H. Truax as President of the Washington State Magistrates' Association

I.

INTRODUCTION: THE WASHINGTON JUDICIAL COUNCIL
AND ITS OPERATION

A. STATUTE CREATING THE COUNCIL

The Washington Judicial Council was created by the 1925 Legislature, chapter 25 of the Laws of 1925, ex. sess., RCW chapter 2.52.

The Council is designed to have membership representative of all segments of the judicial branch of government. As a result, a broad range of view is embodied in the membership of the Council.

B. MEMBERSHIP AND OFFICERS OF THE
COUNCIL

Twice in recent years, -1961 and again in 1967 - the Legislature has seen fit to enlarge the Council membership. In 1961, the Council gained five new members by an amendment to RCW 2.52.010, which added to the membership two legislators, - one from each house, the dean of each recognized school of law in the state, and the attorney general. The 1967 session again increased the legislative representation of each house by one, making a total of three legislators representing the Senate and three representing the House of Representatives. That session also added a judge of a court of limited jurisdiction who represents the Washington State Magistrates' Association.

The Council is presently led by Chief Justice Robert T. Hunter, of the Washington Supreme Court, who acts as Chairman. University of Washington School of Law Professor Luvern V. Rieke has served the Council as Executive Secretary, and C. E. Bolden, State Law Librarian, by virtue of RCW 2.52.030, has served as Recording Secretary.

Judge Orris L. Hamilton represents the Supreme Court on the Council. Dan Reaugh, Seattle, and R. Max Etter, Sr., Spokane, are private attorneys who serve on the Council. Representing the Washington State Senate are Senator William Gissberg, Chairman of the Senate Judiciary Committee; Senator Fred H. Dore; and Senator Francis E. Holman. Representing the House are Representative George Clarke, Chairman of the House Judiciary Committee; Representative Newman H. Clark; and Representative Lorraine Wojahn. Attorney General Slade Gorton is represented on the Council by Deputy Attorney General Edward Mackie. Superior Court judges J. Guthrie Langsdorf and F. A. Walterskirchen represent the Washington Superior Court Judges' Association. Judge Waldo F. Stone, of the Pierce County District Justice Court, represents the Washington State Magistrates' Association. Prosecuting Attorneys on the Council are Ronald L. Hendry, Prosecuting Attorney for Pierce County, and Robert E. Schillberg, Prosecuting Attorney for Snohomish County. Acting Dean Luvern V. Rieke, University of Washington School of Law, and Dean Lewis H. Orland, Gonzaga University School of Law, represent the state's law schools. Dean Rieke has been replaced by Dean Richard S. L. Roddis.

C. ORGANIZATION AND PROCEDURES

Matters to be considered by the Judicial Council may be suggested by anyone. Much of the Council's business originates from referrals by practicing lawyers, by judges or other persons in the judicial system. However, an appreciable number of the topics studied are first suggested by citizens. The legislature has upon occasion referred problems to the Council for study. The members of the Council initiate many items themselves.

The large range of vital topics needing Council attention has dictated a division of the Council into three standing committees. Topics selected for Council study are assigned as the responsibility of a particular committee. After it has thoroughly studied the assigned topic, the committee makes specific recommendations to the full Council membership. These committee recommendations form the basis for full Council discussion of the topic and ultimate Council action. The recommendations contained in this report were developed by such committee work and Council deliberations.

D. STAFF OF THE COUNCIL

The Council is served by an ever growing staff necessitated by the Council's expanding workload. Presently two attorneys are in the employ of the Council, Mr. Philip R. Meade and Mr. Phillip B. Winberry. Mr. Winberry serves as a full-time staff attorney, while Mr. Meade devotes a substantial portion of his practice time to Judicial Council business. The Council has received additional research help from several University of Washington law students, as well as Mr. Albert C. Bise, the Administrator for the Courts, and Mr. William M. Lowry, Clerk of the Supreme Court. Mrs. Arlene Timms serves as secretary to the Council.

II.

NATURE OF THE COUNCIL WORK

The legislation which created the Council assigned certain continuing tasks for it to perform. This statutorily defined responsibility is the following:

2.52.050 Duties. It shall be the duty of the Council:

- (1) Continuously to survey and study the operation of the judicial department of the state, the volume and condition of business in the courts, whether of record or not, the methods of procedure therein, the work accomplished, and the character of the results;
- (2) To receive and consider suggestions from judges, public officers, members of the bar, and citizens as to remedies for faults in the administration of justice;
- (3) To devise ways of simplifying judicial procedure, expediting the transaction of judicial business, and correcting faults in the administration of justice;

(4) To submit from time to time to the courts or the judges such suggestions as it may deem advisable for changes in rules, procedure, or methods of administration;

(5) To report biennially to the governor and the legislature on the condition of business in the courts, with the Council's recommendations as to needed changes in the organization of the judicial department or the courts or in judicial procedure; and

(6) To assist the judges in giving effect to Art. 4 § 25 of the state Constitution. [1925 ex. sess. c 45 § 5; RRS § 10959-5.]

The work accomplished by the Council in pursuance of the statutory requirements may be summarized under the following three classifications:

(A) The continuous survey of the judicial business of the Superior Court and the Supreme Court;

(B) The examination of that part of the case and statute law of the state bearing upon the administration of justice in order to make recommendations to the Governor and to the Legislature where the need for change is believed to exist; and

(C) The continuous examination of the operation of the statutes and rules covering pleading, practice, procedure and evidence in order to formulate and recommend such changes as may be required to improve the administration of justice in this state.

It is the purpose of this report to outline briefly the work of the Council in each of these classifications during the years 1969 and 1970. Some of the recommendations of the Council may be controversial. With this in mind, the Council presents with its recommendations for legislation and court rules brief statements of the reasons for the proposals as set forth.

B. PROPOSED LEGISLATION

Many topics that come before the Council require an examination of the statutes of the state of Washington insofar as they bear upon the administration of justice, in order to make recommendations to the legislature for improvements in that regard.

The Washington Judicial Council will submit proposals to the 1971 session of the Washington State Legislature in the following areas:

1. Tolling Statute of Limitations
2. Court Administrator's Act
3. Extension of the 1961 Justice Court Act
4. Indication of Incumbency on Ballot
5. Schedule of Attorneys' Fees
6. Attorneys' Fees in Divorce Cases
7. Criminal Investigation Act
8. Judicial Council--Increase in Membership
9. Uniform Rendition of Accused Persons Act
10. Annual Conference of Judges
11. Amendment to Wrongful Death Statute--RCW 4.24.010
12. Temporary Prison Leaves (Furlough Legislation)
13. County Law Libraries--Proposed Amendment to RCW 27.24.070
14. Presentence Reports
15. Costs Arising out of Criminal Matters
16. Six-Man Jury
17. Fiscal Accountability of Justice Court Judges
18. Electronic Courtroom Recording Devices

1. TOLLING STATUTE OF LIMITATIONS

The Judicial Council recommends that RCW 4.16.170, entitled Tolling Statute--Actions Deemed Commenced, be amended to state that for the purpose of tolling any statute of limitations, an action shall be deemed commenced when the complaint is filed or the summons is served, whichever occurs first.

To make this position even clearer, the Judicial Council recommends that RCW 26.08.090 be amended as follows:

AN ACT Relating to attorneys' fees in divorce cases; and amending section 9, chapter 215, Laws of 1949 and RCW 26.08.090.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Section 1. Section 9, chapter 215, Laws of 1949 and RCW 26.08.090 are each amended to read as follows:

Pending an action for divorce or annulment the court may make, and by attachment enforce, such orders for the disposition of the persons, property and children of the parties as the court may deem right and proper, and such orders relative to the expenses of such action, including attorneys' fees, as will insure to the wife an efficient preparation of her case and a fair and impartial trial thereof. ~~((Upon))~~ At the time of the entry of judgment in the superior court, ~~((reasonable attorneys' fees may be awarded either party))~~ the judge may issue an order directing the payment of reasonable attorneys' fees to either party, in addition to statutory costs. Upon any appeal, the supreme court may in its discretion ~~((award))~~ enter an order directing payment of reasonable attorneys' fees to either party for services on the appeal, in addition to statutory costs. Such an order to pay attorneys' fees and statutory costs shall be enforceable by contempt proceedings. An order for the payment of attorneys' fees in any domestic relations case may on application therefore be reduced to a judgment and enforced as such.

7. CRIMINAL INVESTIGATION ACT

It has long been recognized that the original purpose of grand juries, to intervene on behalf of the people against the state, no longer exist. The Bill of Rights, governmental checks and balances, and other Constitutional safeguards now fulfill this need. For these reasons, grand juries must

serve another purpose if they are to be justified. To determine whether continued use of the grand jury in Washington was justified, the 1967 Legislature, pursuant to House Concurrent Resolution 13, requested Judicial Council study of the organization and procedures relating to grand juries and for a report to the Forty-first Legislature by the Judicial Council. In 1969, the Judicial Council proposed a revised grand jury law to replace present RCW 10.28. These proposals were contained in HB 221 and SB 503. This proposal passed the House of Representatives but died in the Senate because of the time rush at the end of the legislative session. The Judicial Council resubmitted this proposal to the 1970 special session of the legislature as HB 100. No formal action was taken on this proposal.

After the 1970 special session, the Judicial Council reopened its grand jury study. The result of this additional study is the present draft which contemplates significant reorientation of the grand jury system as it relates to modern society. Most authorities agree that grand juries can and should be used to provide substantial help to law enforcement. Thus, the grand jury's role in a modern society is as an aid to law enforcement for combating crime, especially organized crime. When reviewing its 1969 proposal, the Judicial Council considered the comments expressed by members of both the judiciary and the bar, as well as those of the press and members of the legislature. Several of the views presented by those groups have been incorporated into the revised proposal.

The proposed draft does not contemplate use of grand juries as "watchdogs" for auditing or reporting on non-criminal misconduct, nonfeasance or neglect. "Watchdog" functions are better handled by the State Auditor or, if such an office existed, an Ombudsman. Frequent use of grand juries should frustrate a substantial amount of criminal activity and also eliminate much of the sensationalism that often accompanies the impaneling of a grand jury. An additional feature of the proposed statute is the provision for a special inquiry judge. This added law enforcement aid

is patterned after the one man grand jury law of Michigan. However, under the statute proposed for Washington, the special inquiry judge will only sit as a judicial officer to hear and receive evidence presented by either the prosecuting attorney, the attorney general, or a special prosecutor appointed by the governor. Special inquiry judge proceedings are viewed by the Judicial Council as supplementary to a regular grand jury which has the power to actively investigate evidence of crime and corruption, a power not granted to the special inquiry judge. The special inquiry judge does not have the power to issue indictments as does the grand jury, but can turn over any evidence produced at the proceedings before him to any subsequent grand juries called pursuant to the statute. Thus, although not actively participating in an investigative role himself, the special inquiry judge provides the prosecutor an added investigatory tool. This added tool enables the prosecutor to require a person's testimony, under oath, before a judicial officer. This will aid the prosecutor in his fight against crime by providing him information not generally otherwise available.

No reports can be issued by either the grand jury or special inquiry judge. This provision was also in the 1969 act. Public reports are not only unnecessary to the true, modern function of the grand jury, but also unfair to those not indicted but included in a report. Several alternatives to reports were considered by the Judicial Council including one which would have allowed reports by the grand jury but would have also permitted those mentioned in the report to formally answer in writing before the report was made public. Such answer would then become part of the formal report of the grand jury. Another alternative considered was to allow reports but to make those issuing reports, and the county, subject to the laws of libel without the normal public officials privilege being applicable. These alternatives underscore the problems raised by allowing a grand jury to issue a report. They were rejected by the Judicial Council because they do not sufficiently protect the rights of the individual to not be unjustly accused. The 1969 proposed grand jury law as set out in the Twenty-first Biennial Report of the Judicial Council contained a section by section analysis. In order to save space in this report, that analysis is not here repeated and reference to the 1969 report of the Judicial Council might be helpful to those wishing to review the sources of this draft.

The Judicial Council submits the following proposal for consideration by the legislature:

AN ACT Relating to grand juries and criminal investigations; repealing sections 977 through 994, 996 through 1001, and 2104, Code of 1881, sections 11 through 17, chapter 28, Laws of 1891, section 3, chapter 48, Laws of 1891, section 5, chapter 57, Laws of 1911, section 1, chapter 150, Laws of 1925 ex. sess., section 1, chapter 74, Laws of 1939, sections 1 and 2, chapter 90, Laws of 1951, section 1, chapter 130, Laws of 1967, RCW 2.36.030 through 2.36.040, and 10.28.010 through 10.28.220; and providing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Section 1. Preamble. This act shall be known as the criminal investigatory act of 1971 and is enacted on behalf of the people of the state of Washington to serve law enforcement in combating crime and corruption.

NEW SECTION. Section 2. Definitions. For the purposes of this act:

(a) The term "court" shall mean any superior court in the state of Washington.

(b) The term "public attorney" shall include the prosecuting attorney of the county in which a grand jury or special grand jury is impaneled; the attorney general of the state of Washington when acting pursuant to RCW _____ (§ 7(i)); and, the special prosecutor appointed by the governor, pursuant to RCW _____ (§ 7(j)).

(c) The term "indictment" shall mean a written accusation found by a grand jury.

(d) The term "principal" shall mean any individual whose conduct is being investigated by a grand jury or special inquiry judge.

return date thereof, however, the public attorney may apply to the court which impaneled the grand jury for an order vacating or modifying the subpoena on the grounds that such is in the public interest. Upon such application, the court may in its discretion vacate the subpoena, extend its return date, attach reasonable conditions to directions, or make such other qualification thereof as is appropriate.

(d) The proceedings to summon a person and compel him to testify or provide evidence shall as far as possible be the same as proceedings to summon witnesses and compel their attendance. Such persons shall receive only those fees paid witnesses in superior court criminal trials.

NEW SECTION. Section 15. Indictments. After hearing, examining and investigating the evidence before it, a grand jury may, in its discretion, issue an indictment against a principal. A grand jury shall find an indictment only when from all the evidence taken together a majority of the jurors are convinced that there is probable cause to believe a principal is guilty of a criminal offense. When an indictment is found by a grand jury the foreman or acting foreman shall present it to the court.

NEW SECTION. Section 16. No reports. Under no circumstances is a grand jury or special inquiry judge to issue a report on the results of its hearings, examinations, or investigations.

NEW SECTION. Section 17. When any public 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 shall petition the judge designated as a special inquiry judge pursuant to RCW _____ (§ 5) for an order directed to such persons commanding them to appear at a designated time and place in said county and to then and there answer such questions concerning the suspected crime and corruption

as the special inquiry judge may approve, or provide evidence as directed by the special inquiry judge.

NEW SECTION. Section 18. Disqualification of judge at subsequent proceedings. The judge serving as a special inquiry judge shall be disqualified from acting as a magistrate or judge in any subsequent court proceeding arising from such inquiry except alleged contempt for neglect or refusal to appear, testify or provide evidence at such inquiry in response to an order, summons or subpoena.

NEW SECTION. Section 19. Preservation of evidence in another county. Upon petition of a public attorney to the special grand jury that there is reason to suspect that there exists evidence of crime and corruption in another county, and with the concurrence of the special inquiry judge of the other county, the special inquiry judge may direct the public attorney to attend and participate in special inquiry judge proceedings in the other county held to inquire into crime and corruption. The proceedings of such special inquiry judge may be transcribed, certified and filed in the county of the public attorney's jurisdiction at the expense of that county.

8. JUDICIAL COUNCIL -- INCREASE IN MEMBERSHIP

As detailed earlier in this report, the Washington Judicial Council was created by the 1925 Legislature. In recent years, 1955, 1961, and 1967, the legislature has increased membership of the Council to its present number of 17. The Judicial Council feels that the Court of Appeals, created in 1969, should also be represented on the Judicial Council and is, therefore, requesting that two members of the Court of Appeals be statutorily made members of the Council. Additionally, to provide equal representation of all judicial levels on the Council, the Council recommends that an additional member of the Magistrates' Association be statutorily made a member of the Council so as to have a ratio of two judges representing each court level.

OFFICE RECEPTIONIST, CLERK

To: Scharber, Wendy R. (ATG)
Cc: Gonick, Peter (ATG); david@washapp.org; paoappellateunitmail@kingcounty.gov
Subject: RE: State v. Reeder - Amicus Brief

Received 1-09-2015

Supreme Court Clerk's Office

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From: Scharber, Wendy R. (ATG) [mailto:WendyO@ATG.WA.GOV]
Sent: Friday, January 09, 2015 3:00 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Gonick, Peter (ATG); david@washapp.org; paoappellateunitmail@kingcounty.gov
Subject: State v. Reeder - Amicus Brief

Sent on behalf of: Peter Gonick, Deputy Solicitor General WSBA 25616
360-753-6245 : peterg@atg.wa.gov

State of Washington Cause No. 90577-1
v.
Michael J. Reeder

Motion To File Amicus Brief Of The State Of Washington
Amicus Brief Of The State Of Washington
Certificate of Service

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