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IN THE 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

ANSWER TO AMICUS CURIAE BRIEF OF
STATE OF WASHINGTON

DAVID L. DONNAN
Attorneys for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711



ORIGINAL

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I. IDENTITY OF ANSWERING PARTY

Petitioner, Michael Reeder, provides the following answer to the amicus brief of the State of Washington submitted by the Attorney General.

II. ARGUMENT

A. Subpoenas compelling intrusions into private affairs must be supported by probable cause based on oath or affirmation, not simply issued by magistrates.

Amicus argues that because Article 1, section 7 of the Washington Constitution has “co-existed with the grand jury process of issuing subpoenas and subpoenas duces tecum,” that the statutorily created “special inquiry” subpoenas here were issued with necessary “authority of law.” The comparisons to grand jury investigations are of limited application to these third party subpoenas for protected personal papers. Those authorities fail to address whether such subpoenas are proper where issued to third parties for protected “private affairs.” Moreover, this Court’s decision in Miles, and the U.S. Supreme Court’s decision in Riley, illustrate the modern recognition of this right to privacy in such documents and information held by third parties. State v. Miles, 160 Wn.2d 236, 156 P.3d 864 (2007) (banking records still

private when held by third party financial institution); Riley v. California, ___ U.S. ___, 134 S.Ct. 2473 (2014) (cell phone data still protected although available to phone company). In Washington, this recognition goes back at least as far as 1986. See State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) (rejecting the third party doctrine of Smith v. Maryland, 442 U.S. 735, 99 S.Ct. 2577 (1979)).

What was authorized here was the modern equivalent of sending a third party, housekeepers for example, into private homes where they work to take or copy the personal papers of the owners for delivery to police and prosecutors. There is no support for such conduct in the long and storied history of the grand jury in the state or elsewhere. In fact, U.S. Supreme Court and related jurisprudence upon which the State relies has been directed at the target of a particular investigation's business and financial records. See e.g. United States v. R. Enterprises, 498 U.S. 292, 111 S.Ct. 722 (1991), citing United States v. Morton Salt, 338 U.S. 632, 70 S.Ct. 357 (1950) and Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370 (1906). This is particularly important in light of the development of law in this area which first recognized the demand to produce documentary evidence as implicating both the Fourth

Amendment and the Fifth Amendment. Boyd v. United States, 116

U.S. 616, 6 S.Ct. 524 (1886).¹ Since then:

...the Court's de-regulation of subpoenas came in cases [like Hale] involving government attempts to regulate businesses; not a single one of them involved searches of personal papers.

Slobogin, Subpoenas and Privacy, 54 DePaul L.Rev. 805, 808 (2005)

(emphasis added); LaFave, Crim. Proc., sec 8.7(a) at 155.² Since then,

however, the viability of this "de-regulation" has come into question.

That is because, in contrast to nineteenth century culture, so much more of our personal information is now in records and held by third parties. When third parties are ordered to produce information via a subpoena, they cannot, under any plausible interpretation, be said to be incriminating themselves.

Slobogin, at 808. Moreover, as this Court recognized in Miles, these

third parties have no interest in asserting the individual's rights "and

¹ Although largely overruled, Boyd represents the analytical starting point from which our understanding of the exact scope and basis for these constitutional protections have ebbed and flowed. LaFave, Israel, King & Kerr, 3 Crim. Proc., sec 8.7(a) at 152 (3d ed. 2007). For example, Boyd's "convergence theory" provides the basis for Washington's "nearly categorical" exclusionary rule. See Sanford Pitler, "The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy, 61 Wash. L. Rev. 459, 468-69 (1986).

² Slobogin goes on to explain that the questions presented by Mr. Reeder's case were not addressed by the U.S. Supreme Court "[b]ecause, as far as the Court was concerned, personal records held by the person himself or herself-i.e., most personal records-remained protected by the Fifth Amendment's prohibition on compelling person to give testimony, the virtual elimination of Fourth

would not challenge the subpoena on the basis of Miles' privacy rights even if the bank could assert those rights." 160 Wn.2d at 251. For that reason, the warrant requirements are interposed.

In the face of this potentially boundless intrusion into our citizens' most private affairs, the State argues that grand jury subpoenas on less than probable cause are permissible because they are somehow less burdensome and intrusive than searches based on probable cause. See e.g. United States v. Dionisio, 410 U.S. 1, 93 S.Ct. 764 (1973) (noting grand jury subpoenas to give voice exemplars are less intrusive than the search of the home). This balance does not hold up in the context of these broad ranging subpoenas to third parties for personal banking records which can detail the

...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. While a subpoena to provide a voice exemplar may not be particularly intrusive, that does not compare at all in form or scope to the intrusion involved here with "boxes" of personal banking records from a multitude of different institutions. Id.

Amendment protection against subpoenas [in Hale and related cases] had no

Moreover, the critical safeguards and limitations present with subpoenas, i.e. they could not be finally enforced except after challenge, is not present in the case of bank records held by the institution. But these are privileges not held by the financial institutions, nor interests they are inclined to assert. See Miles, *supra*. Leading federal cases such as Dionisio and United States v. Mara, 410 U.S. 19, 93 S.Ct. 774 (1973), in which individuals are subpoenaed to appear before the grand jury, do not involve the intrusions and instead include important protections that do not exist in the third party subpoenas duces tecum. It is the opportunity for prior judicial challenge that justified setting the requisite showing for the “seizure” by subpoena duces tecum on less than probable cause and that is not present in this case. LaFave, *Crim Pro* at 156 n 15, citing LaFave, *Search and Seizure*, sec 4.14(e) (4th ed. 2004) and In re Addonizio, 53 N.J. 107, 248 A.2d 531 (1968). As with a search warrant then, because the opportunity to challenge the subpoena does not exist, the higher standard of probable cause and the associated warrant requirements is necessary and appropriate.

impact in this area.” Slobogin, at 808.

This Court should hold that dated jurisprudence does not justify issuance of subpoenas duces tecum to third party banks and financial institutions to produce private records absent satisfaction of the warrant requirements of Article 1, section 7 and the Fourth Amendment. It is well settled that appeals to tradition must fail in the face of unconstitutional practices. See e.g. Windsor v. United States, ___ U.S. ___, 133 S.Ct. 2675 (2013).

B. Special inquiry proceedings have no meaningful relationship to the traditional grand jury so any analogy is not apt and cannot support the practice.

The attorney general acknowledges that Mr. Reeder's private banking and financial records are "private affairs" pursuant to Article 1, section. 7. Amicus at 4. The question then is, if grand juries have the power to subpoena third party banking records without meeting the warrant requirements, has that authority been properly delegated to the special inquiry judge? The answer is no.

Whatever historical support exists for the broad grant of authority to grand juries to investigate "crime or corruption" based on "suspicion or rumor," nothing here justifies extending those extraordinary powers to prosecutors and special inquiry judges now

operating outside the grand jury system.³ The codification of this authority in the same chapter as the grand jury procedures does not accomplish the extension either. See Miles, 160 Wn.2d at 246-47.⁴

The essence of the grand jury historically was its duty to serve as the citizen's voice in the enforcement of criminal laws. Utter & Spitzer, *The Washington State Constitution: A Reference Guide*, 40-41 (2002). By the time of statehood, however, these commentators noted that:

the delegates decided that the grand jury was antiquated and unnecessary aspect of law enforcement. Hill argued that grand juries had lost the historical basis for their existence (protection against the Crown), but served to prevent corruption of public officials, namely party-affiliated prosecutors.

Id. What was left was a limited grant of authority providing that “No grand jury shall be drawn or summoned in any county, except the superior judge thereof shall so order.” Const. Art. 1, sec. 26. The more

³ The breadth of this investigative authority is particularly disturbing when one considers prosecutors are acting on “suspicion and rumor” to find not only “crime” but also “corruption” which includes not only dishonest or illegal behavior by government officials, but also:

- the act of corrupting someone or something
- something that has been changed from its original form

Mirriam-Webster Dictionary (<http://www.merriam-webster.com/dictionary/corruption>).

⁴ Statements in Miles that a subpoena subject to judicial review could satisfy the authority of law requirement appear to presume the interested party

limited use of grand juries in Washington contrasts starkly to the federal model where the right to indictment by grand jury is expressly found in the Bill of Rights. In the face of this limited vision of the grand jury in Washington, the State argues for almost limitless power to intrude into our private affairs. The Legislature should not, and Mr. Reeder contends cannot, simply pass these extraordinary powers historically granted the grand jury to a prosecutor and judge acting in secret.

As the Supreme Court noted in Boyd:

[I]llegitimate and unconstitutional practices get their first footing ... by silent approaches and slight deviations from legal modes of procedure.

144 U.S. at 635. While the legislature certainly has the power to develop systems which provide the “authority of law,” they must be consistent with the bedrock constitutional standards including an actual jury where the State seeks to invoke its authority, and probable cause based on oath or affirmation where they seek to intrude in the quintessentially private affairs of Washington citizens. See State v. Garcia Salgado, 170 Wn.2d 176, 240 P.3d 153 (2010).

would be part of that review process.

The special inquiry judge was created as a “supplementary” “investigative tool” because grand juries were viewed by some as obsolete and cumbersome. See Twenty-Second Biennial Report of the Judicial Council of the State of Washington (1969 and 1970), at 17-18 (Jan. 1, 1971).⁵ The people represented in the grand jury continued to serve as a crucial component and important check in the process. That element is lost in the special inquiry proceeding where the prosecutor and judge, operating in secret, no longer have the check or balance held by the people since the Magna Carta. In that way the petit and grand jury stand on similar footings which may not be written away for the sake of convenience.

Identifying trial by jury as “the grand bulwark” of English liberties, Blackstone contended that other liberties would remain secure only “so long as

⁵ See also Seattle Times, “Obscure Law Used By Prosecutors Is ‘Sneak-and-Peek Stuff,’” explaining the impetus behind recommendation:

The special inquiry law was a response to a corruption scandal in the 1960s involving the Seattle police, the former chief and the former King County prosecutor.

When Chris Bayley was elected prosecutor, he organized a grand jury to investigate.

Dave Boerner, a semiretired Seattle University criminal-law professor, was a deputy King County prosecutor then. He recalled that the grand jury was cumbersome, slow and expensive, and he joined his boss in urging lawmakers to adopt a new type of proceeding.

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this *palladium* remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*), yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters.”

Jones v. United States, 526 U.S. 227, 247, 119 S.Ct. 1215 (1999), quoting 4 W. Blackstone, Commentaries on the Laws of England 342-344 (1769). These efforts have been rebuffed as to the petit jury and should be similarly constrained in the case of the grand jury. See e.g. Jones, supra; Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004).

Unfortunately, what was described as “supplementary to a regular grand jury” has grown into its own independent and unregulated extra-constitutional beast. See G. Johnson, “Questions Bring Review of Prosecutors’ Use of ‘Special Inquiry,’” *The Olympian*, October 31, 2012;⁶ Brief Amici Curiae Washington Association of Criminal

⁶ Following reporting in 2012 regarding the use of special inquiry subpoenas Tom McBride, executive secretary of the Washington Association of Prosecuting Attorneys, said Tuesday that investigators have

Defense Lawyers.at 5-6.⁷ It is particularly noteworthy that the Judicial Council described very narrowly what was envisioned in the special inquiry proceedings: “[t]his added investigative tool enables the prosecutor to require a person’s testimony, under oath, before a judicial office.” Judicial Council Report, at 18. Furthermore, the statute limits the county prosecutor’s use of the special inquiry proceedings to times in which a grand jury has been empaneled, although it appears there has not been a grand jury empaneled in King County since the statute was enacted. 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....” (emphasis added)).

drifted toward becoming too reliant on the “special inquiry judge proceedings,” and should use them only when traditional investigative techniques won’t suffice.

The Olympian, “Questions bring review of prosecutors’ use of ‘special inquiry” (October 31, 2012) (available at http://www.theolympian.com/2012/10/31/2303370_questions-bring-review-of-prosecutors.html?rh=1#storylink=cpy Last accessed February 12, 2015).

⁷⁷ The motion to file this amicus curiae brief has been referred to Court as a motion to for permission to include materials in the appendix not contained in the trial record. Mr. Reeder believes the Court should grant the motion for the reasons persuasively stated in the briefing. In any event, breadth of the circumstances in which the special inquiry proceedings are being used is illustrated in the cases cited. State v. White, 44 Wn.App. 215, 216, 720 P.2d 873 (1986) (power consumption records); State v. Hilton, 164 Wn.App. 81, 261 P.3d 683 (2011) (library records); State v. Thorpe, 51 Wn.App. 582, 588, 754 P.2d 1050 (1988) (suspect’s wife subpoenaed to testify); In re Special Inquiry Judge

Ultimately, because the special inquiry judge does not investigate as the grand jury does, the special inquiry judge simply signs subpoenas, there is no reasoned basis for granting the liberal investigative prerogatives to the special inquiry judge, or more accurately, the prosecutor. Given that it appears the use of the grand jury has been almost, if not entirely abandoned in Washington since 1971, the State's continuing reliance on cases arising from the grand jury's subpoena of business records from investigative targets fails to address the new unique concerns presented today.⁸

1987, 52 Wn.App. 707, 763 P.2d 1232 (1988) (attorney held in contempt after refusing to answer questions about client).

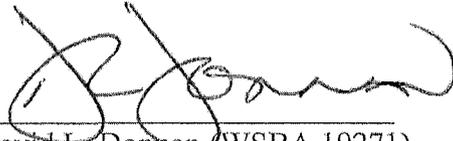
⁸ The application of federal caselaw is further limited because, as LaFave notes, "The *Hale* majority ... failed also to explain why the subpoena, though governed by the Fourth Amendment, was not subject to the usual Fourth Amendment requirement of probable cause, but only its requirement of particularity." Crim Pro, sec 8.7(a) at 155.

III. CONCLUSION

For the reasons outlined herein, Mr. Reeder requests the Court find the search and seizure of his banking records pursuant to a special inquiry judge's subpoena to third party financial institutions violated Article 1, section 7 and the Fourth Amendment.

DATED this 12th day of February 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David L. Donnan", written over a horizontal line.

David L. Donnan (WSBA 19271)
Attorney for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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)
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) NO. 90577-1
 v.)
)
 MICHAEL REEDER,)
)
 Petitioner.)

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516 THIRD AVENUE, W-554
SEATTLE, WA 98104
[paoappellateunitmail@kingcounty.gov]
[scott.peterson@kingcounty.gov]
- [X] LENELL NUSSBAUM () U.S. MAIL
ATTORNEY AT LAW () HAND DELIVERY
MARKET PLACE ONE STE 330 (X) E-MAIL
2003 WESTERN AVE
SEATTLE, WA 98121-2161
[lenell@nussbaumdefense.com]
- [X] SUZANNE ELLIOTT () U.S. MAIL
ATTORNEY AT LAW () HAND DELIVERY
HOGE BUILDING (X) E-MAIL
705 2ND AVE STE 1300
SEATTLE, WA 98104
[suzanne-elliott@msn.com]
- [X] PETER GONICK, AAG () U.S. MAIL
OFFICE OF THE ATTORNEY GENERAL () HAND DELIVERY
PO BOX 40100 (X) E-MAIL
OLYMPIA, WA 98504
[peterg@atg.wa.gov] [sgoolyef@atg.wa.gov]

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

SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF FEBRUARY, 2015.

A handwritten signature in cursive script, appearing to read "Gut", positioned above a horizontal line.

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

OFFICE RECEPTIONIST, CLERK

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Answer to Amicus Curiae Brief

David L. Donnan- WSBA #19271
Attorney for Petitioner
Phone: (206) 587-2711
E-mail: dave@washapp.org

By

Maria Arranza Riley
Staff Paralegal
Washington Appellate Project
Phone: (206) 587-2711
Fax: (206) 587-2710
E-mail: maria@washapp.org
Website: www.washapp.org

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