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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent

v.

MICHAEL REEDER,

Petitioner.

STATE'S SUPPLEMENTAL BRIEF ON
DISCRETIONARY REVIEW

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ORIGINAL

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I. INTRODUCTION

The State offers this supplemental brief on the constitutionality of using subpoenas approved by the special inquiry judge to obtain a suspect's bank records. The State relies on its brief filed in the Court of Appeals to address the unit of prosecution issue on which this Court has also accepted discretionary review.

II. ISSUE RAISED ON DISCRETIONARY REVIEW

Did the trial court err in denying Petitioner's motion to suppress bank records the State obtained by subpoena under the special inquiry judge procedure described in RCW 10.27?

III. STATEMENT OF THE CASE

For purposes of this supplemental brief the State adopts the statement of facts contained in the brief of respondent filed with the Court of Appeals with the following additional citations to the record:

Pat McGreer, a financial examiner for the Washington State Department of Financial Institutions' Securities Division, began her financial analysis of Petitioner's bank records in February of 2010. She estimated she spent 600 hours reviewing and analyzing bank records obtained by special inquiry judge subpoenas. 7/11/12 p. 451. The collected bank records filled three "banker boxes" each containing multiple reams of paper. The records of just one of petitioner's accounts

consumed three reams of paper or approximately 1,500 pages. RP 7/12/12 p. 485-86.

Ms. McGreer's detailed analysis of the Petitioner's bank records revealed that \$1.4 million of Mr. McAllister's investment money was not deposited to Petitioner's bank account. RP 7/11/12 p. 457; RP 7/12/12 p. 488-91. Her analysis showed that Petitioner converted nearly \$3 million from three investors including Mr. McAllister into cash or cashier's checks. RP 7/12/12 p. 493-94. She testified that Petitioner was named in approximately 600 currency transaction reports (CTR's) each documenting a cash transaction of \$10,000 or greater. Charges weren't filed against Petitioner until April 8, 2011, when Ms. McGreer's analysis was complete and over a year after she began her work. CP 280.

IV. ARGUMENT

The Washington special inquiry judge procedure was created by the Criminal Investigatory Act of 1971, Laws of 1971, 1st Ex. Sess., ch. 67, to supplement the grand jury on recommendation of the Washington State Judicial Council. 22 Washington State Judicial Council Reports (1969-1970); State v. Manning, 86 Wn.2d 272, 273, 543 P.2d 632 (1975). Under the Act, the special inquiry judge is authorized to issue subpoenas for testimony or evidence when there is reason to suspect crime or corruption. RCW 10.27.170. Unlike a grand jury, the special inquiry

judge does not play an investigative role. Instead, the special inquiry judge acts as a neutral and detached magistrate. See State v. Neslund, 103 Wn.2d 79, 690 P.2d 1153 (1984). The Judicial Council report states:

This added law enforcement aid is patterned after the one man grand jury law of Michigan. . . . 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.

22 Washington State Judicial Council Reports 17-18 (1969-1970) (emphasis added). The emphasized language shows that the Judicial Council viewed both the grand jury and special inquiry judge as alternative investigative tools available to the prosecutor.

Washington is one of several states that authorize prosecutors to use subpoenas to investigate criminal offenses, some of which, like Washington, condition the authority on prior approval of the court. 3 W. LaFave & J. Israel. Criminal Procedure, § 8.1(c) (3d ed. 2007). Those states include Arkansas, Florida, Hawaii, Kansas, Louisiana, Michigan, Indiana, South Dakota, Wisconsin, and Vermont. Id., notes 24, 33.

Washington statutes have described grand jury procedures since before statehood, Statutes of the Territory of Washington, Title 5 (Goudy, 1855), and grand jury proceedings are expressly authorized by the Washington Constitution. Wash. Const. art. 1 § 26.¹ A grand jury may be empaneled in Washington “where the public interest so demands, whenever in its opinion there is sufficient evidence of criminal activity or corruption within the county or whenever so requested by a public attorney, corporation counsel or city attorney upon showing of good cause.” RCW 10.27.030.

Petitioner argues that this court’s decisions in State v. Miles, 160 Wn.2d 236, 156 P.3d 864 (2007), and State v. Garcia-Salgado, 170 Wn.2d 176, 240 P.3d 153 (2010), compel the conclusion that the special inquiry judge procedure is unconstitutional under article 1 section 7 of the Washington Constitution² because it does not require probable cause before the special inquiry judge may authorize subpoenas to a third party bank for a suspect’s bank account records. Petitioner argues that “authority of law” under article 1 section 7 of the Washington Constitution

¹ “No grand jury shall be drawn or summoned in any county, except the superior judge thereof shall so order.”

² “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. art. 1 § 7.

means probable cause, at least with respect to bank records obtained through the special inquiry judge procedure.

The United States Supreme Court has rejected the notion that the Fourth Amendment³ has any application in the grand jury context. Noting that a grand jury “may act on tips, rumors, evidence offered by the prosecutor, or their own knowledge,” the court recognized that grand juries have broad investigative powers including the power to issue subpoenas. United States v. Dionisio, 410 U.S. 1, 15, 93 S. Ct. 764, 772, 35 L. Ed. 2d 67 (1973).

This Court’s prior decisions interpreting article 1 section 7 also contradict Petitioner’s claim. In State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), this Court determined that although a defendant’s long distance telephone records are private affairs under article 1 section 7 of the Washington Constitution the State may obtain these records from the telephone company with a subpoena issued under a constitutional statute or court rule:

Generally speaking, the “authority of law” required by Const. art. 1 § 7 in order to obtain records includes authority granted by a valid (i.e., constitutional) statute, the common law or a rule of this court. In the case of long

³ “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.” U.S. Const., 4th Amend.

distance toll records, “authority of law” includes legal process such as a search warrant or subpoena.

Gunwall, *supra*, at 68-9.

This Court has also held that a defendant’s bank account records are private affairs protected by article 1 section 7 and that the State may obtain these records with a judicially authorized subpoena:

We find that banking records are private affairs protected by article 1 section 7 of the Washington Constitution. A search of personal banking records without a judicially issued warrant or subpoena to the subject party violates article I, section 7. Chapter 21.20 RCW is invalid to the extent it authorizes the Division to issue administrative subpoenas to third parties for otherwise private information.

Miles, *supra*, at 252.

This Court’s decisions in Gunwall and Miles authorize the State to obtain telephone records and bank records from third parties with judicially authorized subpoenas. Neither case requires a showing of probable cause before a judge can authorize a subpoena for these records because the exercise of judicial authority provides the authority of law required by article 1 section 7. The State obtained Petitioner’s bank records by a subpoena authorized by the special inquiry judge under RCW 10.27 in compliance with this Court’s decisions in Gunwall and Miles. But Petitioner argues that after this Court’s decision in State v. Garcia-Salgado, 170 Wn.2d 176, 240 P.3d 153 (2010), special inquiry

judge subpoenas for bank records, or perhaps all subpoenas for protected records including those authorized by Criminal Rules 4.7(d) and 4.8 adopted by this Court, may not issue absent probable cause. Garcia-Salgado does not support his argument.

In Garcia-Salgado the trial court ordered a defendant to submit to a cheek swab for DNA without probable cause. Garcia-Salgado appealed his subsequent conviction on the ground that the order violated both the Fourth Amendment and article 1 section 7 of the Washington Constitution. This Court agreed:

Swabbing a cheek to procure a DNA sample constitutes a search under the Fourth Amendment and article I, section 7. The United States Supreme Court has recognized “that a ‘compelled intrusio[n] into the body for blood to be analyzed for alcohol content’ ” is a search. Similarly, the Court found Breathalyzer tests to “implicate[] similar concerns about bodily integrity” and constitute searches as well. We find that the swabbing of a person’s cheek for the purposes of collecting DNA evidence is a similar intrusion into the body and constitutes a search for the purposes of the Fourth Amendment and article I, section 7.

Garcia-Salgado, at 184 (citations omitted). This Court concluded that because a cheek swab is a search under the Fourth Amendment an order compelling it must be supported by probable cause. Id. Because the Washington Constitution cannot be interpreted to provide less protection to defendants than the United States Constitution this Court could do no less.

But unlike a cheek swab for DNA, bank records held by third parties are not protected by the United States Constitution. In United States v. Miller, 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976), the Court held that bank records in the possession of a third party are not protected by any privacy interest recognized under the Fourth Amendment. The same is true for telephone records. In Smith v. Maryland, 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979), the Court held that the Fourth Amendment did not prohibit the State from installing a pen register on a personal telephone line without a warrant or court order. Unlike an order compelling a defendant to submit to a cheek swab there is no requirement under the United States Constitution that the State show probable cause before obtaining bank or telephone records from a third party. This Court recognized this distinction in Gunwall and Miles when it held that the State may obtain these records under article 1 section 7 with a judicially authorized subpoena.

Petitioner equates his bank records to his DNA to argue that under Garcia-Salgado subpoenas for his records should not have issued without probable cause. Although bank records are private affairs they are not entitled to the same protection as a suspect's DNA. Bank records are kept by a citizen's bank whose employees have access to them in the ordinary course of business. Citizens voluntarily place checks, credit cards, and

debit cards into the stream of commerce where the recipient, the recipient's bank, and often a third bank acting as a clearinghouse record and process the transactions before they are recorded by the citizen's bank. In its holding in Miles that bank records are private affairs under article 1 section 7 this Court noted that they can reveal a citizen's spending habits, charitable and political donations, and travels. Miles, at 246-47. But this same information is collected, kept, and often shared by the businesses, charities, and political organizations the citizen chooses. None of this is true for a citizen's DNA. Although bank records are a citizen's private affairs they do not compel the same level of protection as a search of a citizen's body to collect DNA.

Petitioner apparently concedes that grand jury investigative subpoenas are constitutional under article 1 section 7. Instead, he attempts to draw a distinction between grand juries and the special inquiry judge to bolster his argument that the special inquiry judge procedure is unconstitutional. He points out that unlike the grand jury the special inquiry judge does not play an investigative role and does not issue indictments. However, Petitioner fails to explain how these differences in the special inquiry judge procedure provide less protection to citizens than a grand jury proceeding.

On the contrary, the special inquiry judge procedure provides greater protections to suspects than a grand jury. While RCW 10.27.170 requires a special inquiry judge authorizing a subpoena to find reason to suspect crime or corruption, a grand jury may be empaneled “whenever in its opinion there is sufficient evidence of criminal activity” or upon “good cause,” RCW 10.27.030, and “may act on tips, rumors, evidence offered by the prosecutor, or their own knowledge.” Dionisio, *supra*, at 15. A special inquiry judge authorizing a subpoena is more likely to question the necessity or scope of a subpoena than a grand juror who is not familiar with the law. To maintain neutrality a special inquiry judge plays no investigative role and is disqualified from subsequent proceedings involving the case under investigation. RCW 10.27.180. Finally, the special inquiry judge procedure may not be used to collect evidence once charges are filed. Manning, *supra*, at 275.⁴

These procedural differences provide greater protections to suspects investigated by the special inquiry judge than by the grand jury by establishing a clear standard for approving subpoenas and by circumscribing the special inquiry judge’s role to that of independent magistrate. A statute is presumed to be constitutional and the burden is on

⁴ Conversely, a grand jury may continue to investigate an indicted defendant to determine if the defendant committed other crimes even when the evidence produced can be used at the trial on the pending indictment. 3 W. LaFave & J. Israel. Criminal Procedure, § 8.8(f) (3d ed. 2007).

the party challenging the statute to prove it is unconstitutional beyond a reasonable doubt. State v. Myles, 127 Wn.2d 807, 812, 903 P.3d 979 (1995). Petitioner has failed to meet this burden.

As Justice Leach noted in his opinion below, requiring probable cause for special inquiry judge subpoenas would defeat the purpose of RCW 10.27.170 as an aid to the investigation of crime and corruption:

Because no Washington case directly addresses the level of justification required before a special inquiry judge can issue a subpoena, we look to grand jury jurisprudence for guidance. In United States v. R. Enterprises, Inc., the United States Supreme Court concluded, “[T]he Government cannot be required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause because the very purpose of requesting the information is to ascertain whether probable cause exists.”

Similar to a federal grand jury, a purpose of a special inquiry proceeding is to obtain evidence about suspected crimes for determining probable cause that a crime has been committed. The general public has a substantial interest in the effective enforcement of criminal statutes. Also, a special inquiry proceeding cannot be used to gather evidence against a charged defendant. Therefore, the appropriate level of justification for state intrusion must be something less than probable cause.

State v. Reeder, No. 69226-7-I, slip. op. at 15-16 (citations omitted).

In addition to allowing the State to investigate criminal allegations before there is probable cause to charge, the special inquiry judge allows the State to investigate crimes referred for prosecution from agencies other

than police departments. The King County Prosecutor receives criminal referrals from the Securities Division, the Washington State Auditor, the Washington State Bar Association, and from private citizens or their attorneys as well as other public agencies. In such cases there is often no peace officer involved to serve a search warrant for records.⁵ Moreover, police agencies are often ill-equipped to investigate complex crimes like securities fraud. Few police detectives possess the time or expertise necessary to analyze thousands of pages of financial records as was done by Ms. McGreer in this case. The State's ability to investigate crime, particularly complex economic crimes like Petitioner's offenses, would be significantly constrained if the special inquiry judge procedure is held to be unconstitutional.

This court has interpreted the term "private affairs" in article 1 section 7 to be broader than the "persons, houses, papers, and effects" protected by the Fourth Amendment based in part on differences in the texts of the two constitutions. "It suffices to observe that in 1889, our State Constitutional Convention specifically rejected a proposal to adopt language identical to that of the Fourth Amendment, before adopting Const. art. 1 § 7 in its present form." Gunwall, supra, at 65-66. The framers of the Washington Constitution also decided to adopt the phrase

⁵ Search warrants must be directed to "the sheriff of the county, or his deputy, or to any constable of the county" RCW 10.79.020.

“authority of law” instead of “probable cause” in article 1 section 7. This difference in textual language suggests the drafters also rejected probable cause as the sole test to determine the constitutionality of every government intrusion into a citizen’s private affairs.

Preexisting state law including statutory law can also bear on the decision to interpret the Washington Constitution differently than the federal constitution. Gunwall, at 61. Article 1 section 26 of the Washington Constitution authorizing grand juries suggests that the framers contemplated investigative grand juries similar to those that existed under federal law with broad authority to issue subpoenas. And the legislature’s decision in 1971 to enact RCW 10.27 intertwining the procedures for both the grand jury and the special inquiry judge shows that the legislature saw the special inquiry judge as the functional equivalent of the grand jury. Both the Washington Constitution and RCW 10.27 provide preexisting state law grounds for interpreting “authority of law” under article 1 section 7 differently than the probable cause requirement of the Fourth Amendment. This Court’s decisions in Gunwall and Miles approving judicially authorized subpoenas for bank and telephone records under article 1 section 7 is supported by the differences in the texts of the two constitutions and by preexisting state law.

V. CONCLUSION

While probable cause is clearly the test to search a suspect's home, place of business, or body under the Fourth Amendment, a judicially authorized subpoena issued under a finding that there is a reason to suspect crime or corruption is sufficient to protect a citizen's privacy interest in bank account records in the hands of third parties under article 1 section 7. Petitioner has failed to demonstrate that the special inquiry judge procedure provides any less protection than grand jury investigations which are recognized by the Washington Constitution and statutes.

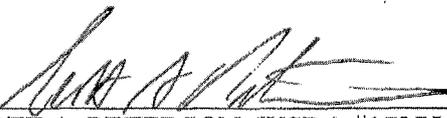
The comments of the Judicial Council, this Court's case law, and the provisions of RCW 10.27 intertwining the grand jury and special inquiry judge procedures show that the grand jury and special inquiry judge are analogous alternative means of obtaining evidence and investigating crimes. Requiring probable cause in every instance where the special inquiry judge approves a subpoena for a suspect's records held by a third party would defeat the investigatory purpose of the statute and unduly constrain the State's ability to prosecute complex crimes. Petitioner has not met his burden of showing that the special inquiry judge procedure described in RCW 10.27.170 is unconstitutional beyond a reasonable doubt.

For these reasons the decision of Division I of the Court of Appeals should be affirmed.

DATED this 19th day of December, 2014.

Respectfully submitted,

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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Donnan, the attorney for the petitioner, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the STATE'S SUPPLEMENTAL BRIEF ON DISCRETIONARY REVIEW, in STATE V. MICHAEL REEDER, Cause No. 90577-I, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Sandra Atkinson

Name Sandra Atkinson
Done in Seattle, Washington

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Please find attached State's Supplemental Brief on Discretionary Review.

State v. Michael Reeder
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