

SUPREME COURT
OF THE STATE OF WASHINGTON

DAVID LADENBURG, in his capacity as
a Tacoma Municipal Court Judge,

Petitioner,

v.

DREW HENKE, in her capacity as the
Presiding Judge of the Tacoma Municipal
Court,

Respondent.

No. 98319-4

PETITION AGAINST
STATE OFFICER
PURSUANT TO
RAP 16.2(b)

The petitioner alleges as follows:

A. IDENTITY OF PARTIES

1. The petitioner is a duly elected judge of the Tacoma Municipal Department of the Pierce County District Court.

2. The respondent is the presiding judge of that Court.

B. FACTUAL BACKGROUND TO THE PARTIES' DISPUTE

3. The parties to this action have had an ongoing dispute regarding a municipal court presiding judge's authority under GR 29. That dispute resulted in Judge Henke depriving Judge Ladenburg of his authority to enter a sanction in the case of *City of Tacoma v. Nester* (Tacoma Muni. Ct. No. D00049091) by granting a motion to consolidate that case without Judge Ladenburg's knowledge or consent, even though

Judge Ladenburg had conducted an extensive fact-finding hearing and had entered findings of fact and conclusions of law. There was no basis for Judge Henke to exercise such authority under GR 29, particularly where there was no basis in RCW 3.50.125 for such a transfer of the case within the Municipal Department.

4. *Nester* was initially assigned to Judge Ladenburg in May 2017. The case was continued without a finding on August 16, 2017 requiring Mr. Nester to meet various conditions. Failing compliance with those conditions, he would be subject to adjudication and sentencing. Mr. Nester breached those conditions. Mr. Nester was set to come before Judge Ladenburg on a revocation of his conditional status on September 27, 2019, but that revocation proceeding was then re-set 5 times. A December 20, 2019 hearing ultimately set his revocation hearing for January 15, 2020. On January 13, 2020, Mr. Nester moved to consolidate his case with others, without notice to Judge Ladenburg.

5. Judge Ladenburg conducted a hearing on revocation and heard extensive testimony from witnesses on January 15, 2020. He entered findings of fact and conclusions of law, revoking Mr. Nester's probation, on that date. A sentencing hearing for Mr. Nester was scheduled for January 29, 2020 in Judge Ladenburg's court. On January

23, however, Judge Henke granted the motion to consolidate.

6. On January 29, 2020, Judge Henke sent the following email to Judge Ladenburg:

Judge Ladenburg –

I have granted the defense's motion to consolidate all the pending Nester cases into Department 3. You will need to either continue your hearing on the case that was originally set in your courtroom until after February 24, 2020, which is the next scheduled court hearing regarding the consolidation of the cases, or vacate the finding you made in the case last week and transfer the case to Department #3. The case is not properly before you and you should not proceed with a sanctions hearing.

Judge Henke

7. Judge Ladenburg responded the same day:

Judge Henke:

I reviewed your email during our morning recess prior to the Nester sentencing hearing. I've not been provided any pleadings or information regarding this request to consolidate the Nester cases. On the matter in my court we held a revocation hearing on January 15th. We heard from witnesses and considered argument of counsel. I revoked his CWOFF on a finding of violation and set sentencing over to monitor the outcome of the matters pending in the other two departments. Today Mr. Chou of the city indicated he was ready to proceed. Mr. Varo with DAC brought up a copy of an order from your courtroom setting a motion to consolidate for 2-13-2020. Your email indicated you had already granted such a motion. Your email also said the case was not properly before my court and I should vacate the guilty finding. I have no basis nor has there been any motion to vacate the judgement. How this is not properly

before my court is a mystery to me. I am not aware of any authority that would give you authority to remove a matter from my court, upon which I have exercised jurisdiction for several years, and act sua sponte to vacate my findings. I believe you would need my consent to take this action as to the matter pending in my court. If you have authority to the contrary please provide it to me. I did disclose your email to counsel in explanation of my decision to reset Mr. Nester's sentencing.

In response to your email I have reset Mr. Nester's sentencing date to February 26th.

8. Nester filed a motion to vacate Judge Ladenburg's findings on February 10, 2020 before Judge Henke, admitting at page 2 of the motion that there is no case law construing GR 29(f)(1) or (2). That motion was not presented to Judge Ladenburg.

9. On February 17, Judge Henke sent the following email to Judge Ladenburg:

Judge Ladenburg,

On February 13, 2020, I heard the defense motion to vacate findings from the case in your department and to consolidate all three cases into Department 3. I had the opportunity to review portions of the transcript of the hearing you held regarding the motion to revoke the SOC in the case assigned to your caseload. The transcript clearly indicates the defense was not ready to proceed on that date and asked for a continuance of the motion hearing four separate times during the hearing. The defense stated they needed more time to gather additional evidence to present at the hearing. You denied each of their requests.

As you recall, when we discussed whether you should proceed with the hearing moments before you started the

hearing, I specifically told you to proceed with the hearing ONLY if the parties were ready to proceed. You stated that they were ready to proceed. That obviously was not the case.

On Thursday, I decided that I did not have authority to vacate the findings made by another municipal court judge and denied that motion. I also decided that I do have the authority as presiding judge to transfer all three cases to Department 3 in order to resolve the disputes in these cases fairly and expeditiously. I granted the motion to consolidate all three cases in Department 3. I did so because Judge Christopher has already heard all the evidence during the trial and can make a determination based on all the evidence, some of which you have not yet heard. All three cases are scheduled for a hearing on February 24 in Department 3. Judge Christopher will decide how he wants to proceed with the cases at that time.

Please let me know if you have any questions regarding my rulings.

Judge Henke

Judge Henke signed an order consolidating the cases and denying the motion to vacate on February 21.

10. Judge Ladenburg responded to Judge Henke's email on February 21:

Judge Henke:

With regard to the Nester cases, I first want to make clear that a motion to consolidate all of the cases was never noted or heard in my department.

I believe you were correct in ruling that you had no authority to vacate my finding in the Nester case D00049091, which has been in my court for more than two years and in which I exercised my jurisdiction in making many rulings during the course of his probation.

Your review of the transcripts from the revocation hearing in my court and the criticisms of my decision denying a further continuance of the hearing seems to be an appeal function. Never-the-less, I would point out that the revocation hearing had been reset five (5) times, from the original setting of November 1, 2019. The basis of the revocation hearings was noted in each instant as TMC cause number D00050796.

At the revocation hearing the city was ready to proceed and both the city and defense had witnesses present. I differ with your recollection instructing me to proceed "ONLY" if the parties were ready to proceed. The morning of the scheduled revocation hearing I received your email stating that you "have granted the defense motion to consolidate all the pending Nester cases into Department 3" and that I should continue the revocation hearing to allow time for the consolidation motion but as noted no such motion had or has ever been set in my court. Your email was read into the record that morning and a copy filed.

Now you have ruled that you cannot vacate my judgement for the matter in my court but none-the-less ruled you may transfer the case to Department 3 without my approval. You apparently have relied in part on the briefing submitted by Ms. Medcalf of the Department of Assigned Counsel urging you to act pursuant to your authority under GR 29. In her motion she clearly states: "There is no case law as to these aspects of GR 29. It is clear that there is nothing in the rule that precludes reassignment of post disposition cases." She goes on to point to the transition of dockets following the retirement of Judge Verhey. This is in opposite - I have not retired, died or otherwise become disabled from my position on the court. I conducted a revocation hearing, admitted evidence, and heard from both the city and defense witnesses. I set over sentencing to monitor the proceedings involving the Nester cases in the two other departments. You would now have Judge Christopher either sentence Mr. Nester on the matter I heard or otherwise exercise jurisdiction on a matter that has

never been before his court. As you cannot vacate my finding, Judge Christopher cannot assume the sentencing function by your ruling. I do not believe you can operate pursuant to GR 29 to divest me of matters assigned to my court for which I have exercised my jurisdiction. A facial reading of GR 29 only authorizes you to assign case calendars to the various courts and conduct the general administrative functions and duties of the court with regard to budget and personnel. This is more analogous to the priority of action rule which states that “the court which first gains jurisdiction of a cause retains the exclusive authority to deal with the action until the controversy is resolved” See *State of Washington v. Stevens County District Court Judge*, Washington State Supreme Court Slip opinion No. 97071-8, issued 12-12 2019 citing *Sherwin*, 96 Wn.2d at 80.

I have a duty, as an elected Judge to protect my independence and authority to act on those matters assigned to me. Decisions I make can be appealed in the proper forum. Please let this be informal notice to you and Judge Christopher that I will be filing a motion for discretionary review of your ruling regarding GR 29 with the Court of Appeals. Because the City of Tacoma either did not oppose or joined in the motion for consolidation they cannot represent Department 1 in the appeal process. I have contacted City Attorney Bill Fosbre about retaining outside appellate counsel to litigate this matter in the Court of Appeals. I will be speaking further with Mr. Fosbre either later today or on Monday. I am hoping to file the motion requesting discretionary review early next week. I would ask that we agree to stay any actions on the Nester cases until this question is resolved in the appeal process. If we do not reach agreement on staying the actions, Mr. Nester is scheduled for sentencing in my court on February 26th.

David B. Ladenburg
Tacoma Municipal Court
Dept. 1

11. The *Nester* matters were set over by Judge Christopher on February 24, as he related in an email to Judge Ladenburg:

Judge Ladenburg,

The *Nester* matters are scheduled in my court for Monday, February 24th at 1:30. Per your request, I will be setting the matters over at the hearing on Monday.

Judge Dwayne L. Christopher
Tacoma Municipal Court
930 Tacoma Avenue South, Room 841
Tacoma, WA 98402-2181

Judge Christopher set over the hearing until March 23.

12. On March 4, 2020, *Nester* filed a motion asking Judge Henke to strike the sentencing hearing. No action has yet been taken on that motion.

13. Judge Ladenburg has recounted the facts here at length to provide this Court appropriate context for its decision on original jurisdiction. The current conduct of Judge Henke, as presiding judge, is capable of repetition not only in the Tacoma Municipal Department, but in courts of limited jurisdiction throughout Washington.

C. BASIS FOR ORIGINAL JURISDICTION AND REQUESTED RELIEF

14. Article IV, § 4 of the Constitution confers original jurisdiction on this Court to address actions in the nature writs of

prohibition; mandamus, or quo warranto directed to State officers. This petition is filed in accordance with RAP 16.2, or, alternatively, within the provisions of the statutory writs of mandamus and prohibition. RCW 7.16.160 (prohibition); RCW 7.16.290-300 (prohibition). This Court will exercise its original jurisdiction to address important issues of public rights including the constitutionality of statutes. *State ex rel. Garber v. Savidge*, 132 Wash. 631, 633, 233 P. 946 (1925); *O'Connor v. Matzdorff*, 76 Wn.2d 589, 592, 458 P.2d 154 (1969) (“We all said that we will assume original jurisdiction when the application involves the ‘interest of the state at large, or of the public, or when it is necessary in order to afford an adequate remedy.’”).

15. As this Court recently discussed in the *Judges of Benton-Franklin Counties v. Killian*, ___ Wn.2d ___, ___ P.3d ___, 2020 WL ___ (2020), a writ will not issue if there is a remedy available to the petitioner at law. But there is no plain, speedy, or adequate remedy available at law to the petitioner here, given the respondent’s actions. Judge Ladenburg lacks standing to raise the issues at stake here as a party in *Nester*.

16. As an elected judge of the Municipal Department of the Pierce County District Court, Judge Ladenburg’s case responsibility is mandatory, intrinsic to his function as a judge. Under the Code of Judicial

Conduct, he is obliged to act diligently (Rule 2.5(A)) and to hear and decide matters assigned to him (Rule 2.7). The responsibility of each superior court judge in a multi-judge county superior court is identical. *State ex rel. Campbell v. Superior Court for King County*, 34 Wn.2d 771, 775, 210 P.2d 123 (1949) (there is only one superior court in each county, and where “there are two or more judges of the superior court in any county, their authority is identical. . .”), as are the duties of municipal court judges in a multi-judge municipal department of a district court. Judge Henke lacked discretion to deny Judge Ladenburg the ability to hear and decide a case assigned to him.

17. This Court has authority to issue a writ in an original action to prohibit a state officer from exercising a mandatory duty. *State ex rel. O’Connell v. Yelle*, 51 Wn.2d 620, 320 P.2d 1086 (1958) (writ of mandamus to prevent State Auditor from issuing warrants to House Speaker); *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 243 P.3d 919 (2010) (newspaper publishers seeking PRA disclosure of sealed court files); *Freeman v. Gregoire*, 171 Wn.2d 316, 323, 256 P.3d 264 (2011) (writ of mandamus sought to prevent expenditure of transportation funds); *Wash. State Labor Council v. Reed*, 149 Wn.2d 48, 55-56, 65 P.3d 1203 (2003) (prohibiting Secretary of State from canvassing the vote and certifying the

results on a referendum). Here, the writ of mandamus is directed at prohibiting Judge Henke from intruding upon Judge Ladenburg's mandatory case responsibilities as an elected judge.

18. This Court has addressed writs of mandamus directed to trial courts pursuant to original jurisdiction under article IV, § 4 on numerous occasions. *See, e.g., State ex rel. Taylor v. Lawler*, 2 Wn.2d 488, 98 P.2d 658 (1940) (appointment of court reporter); *Whitney v. Buckner*, 107 Wn.2d 861, 734 P.2d 485 (1987) (directing judges/commissioners to permit inmates to proceed *in forma pauperis* and *pro se* in domestic relations actions). This Court may do so here as well, given its plenary responsibility for the court of Washington.

19. A constitutional writ of prohibition will also issue against a state officer for acts that are judicial or quasi-judicial in nature, *State ex rel. New York Casualty Co. v. Superior Court for King County*, 31 Wn.2d 834, 199 P.2d 581 (1948) (prevent issuance of voluntary nonsuit), and in excess of the officer's authority. *Citizens Counsel Against Crime v. Bjork*, 84 Wn.2d 891, 529 P.2d 1072 (1975); *State ex rel. Ernst v. Superior Court for Thurston County*, 198 Wash. 133, 137, 87 P.2d 294 (1939); *Brower v. Charles*, 82 Wn. App. 53, 914 P.2d 1202, *review denied*, 130 Wn.2d 1028 (1996) (writ of prohibition may be invoked to prohibit judicial, legislative,

executive, or administrative acts if official or body to whom it is directed is acting in excess of its power).

20. The judges here are State officers. The Tacoma Municipal Department was created by authority of Wash. Const. article IV, § 12. Under that constitutional provision, the Legislature has plenary authority to prescribe municipal court powers and jurisdiction. *City of Medina v. Primm*, 160 Wn.2d 268, 274 n.3, 157 P.3d 379 (2007). The Legislature specifically authorized the creation of the Department in ch. 3.46 RCW. RCW 3.46.015. Both judges are subject to the Code of Judicial Conduct promulgated by this Court, ARLJ 4, and the disciplinary authority of the Commission on Judicial Conduct and this Court. CJCRP 1. The salaries of both judges are set by the State Salary Commission, and they are both part of the state's pension system. RCW 3.74.010. Specifically, this Court promulgated GR 29, the rule upon Judge Henke relies for her extraordinary exercise of authority to deprive Judge Ladenburg of his case responsibilities in *Nester*. GR 29(c) mandates that the Chief Justice of this Court be notified of the selection of a presiding judge.

21. Even if municipal court judges are not state officers, this Court has exercised its original jurisdiction under article IV, § 4 to issue writs of mandamus or prohibition in appropriate circumstances directed to

municipal court judges. *E.g.*, *City of Seattle v. Rohrer*, 69 Wn.2d 852, 420 P.2d 687 (1966); *O'Connor*, 76 Wn.2d at 591-92, where fundamental rights are at stake, as here.

22. Moreover, this Court has exercised original jurisdiction in cases involving issues pertinent to its inherent power to regulate the affairs of the judicial branch of Washington government. *See, e.g.*, *Washington St. Bar Ass'n v. State*, 125 Wn.2d 901, 890 P.2d 1047 (1995) (Court issued writ of prohibition to prohibit PERC from exercising jurisdiction over labor dispute between WSBA and its staff).

23. GR 29, the ostensible basis for Judge Henke's extraordinary decision here, does not authorize a presiding judge to deprive an elected municipal court judge of responsibilities in a case. Rather, the presiding judge has general administrative powers. GR 29(e) states:

(e) General Responsibilities. The Presiding Judge is responsible for leading the management and administration of the court's business, recommending policies and procedures that improve the court's effectiveness, and allocating resources in a way that maximizes the court's ability to resolve disputes fairly and expeditiously.

More specifically, GR 29(f) states:

In addition to exercising general administrative supervision over the court, except those duties assigned to clerks of the superior court pursuant to law, the Presiding Judge shall:

- (1) Supervise the business of the judicial district and judicial officers in such manner as to ensure the expeditious and efficient processing of all cases and equitable distribution of the workload among judicial officers;
- (2) Assign judicial officers to hear cases pursuant to statute or rule. The court may establish general policies governing the assignment of judges;
- (3) Coordinate judicial officers' vacations, attendance at education programs, and similar matters;
- (4) Develop and coordinate statistical and management information;
- (5) Supervise the daily operation of the court including:
 - (a) All personnel assigned to perform court functions; and
 - (b) All personnel employed under the judicial branch of government including but not limited to working conditions, hiring, discipline, and termination decisions except wages, or benefits directly related to wages; and
 - (c) The court administrator, or equivalent employee, who shall report directly to the Presiding Judge.
- (6) Supervise the court's accounts and auditing the procurement and disbursement of appropriations and preparation of the judicial district's annual budget request;
- (7) Appoint standing and special committees of judicial officers necessary for the proper performance of the duties of the judicial district;
- (8) Promulgate local rules as a majority of the judges may approve or as the Supreme Court shall direct;
- (9) Supervise the preparation and filing of reports required

by statute and court rule;

(10) Act as the official spokesperson for the court in all matters with the executive and legislative branches of state and local government and the community unless the Presiding Judge shall designate another judge to serve in this capacity;

(11) Preside at meetings of the judicial officers of the district;

(12) Determine the qualifications of and establish a training program for pro tem judges and pro tem court commissioners; and

(13) Perform other duties as may be assigned by statute or court rule.

See generally, Wash. State Council of County and City Employees, Council 2, AFSCME, AFL-CIO, Local 87 v. Hahn, 151 Wn.2d 163, 167-76, 66 P.3d 774 (2004) (discussing GR 29 powers of presiding judges).

24. A presiding judge has only limited authority over the conduct of court colleagues. This Court has appropriately barred the president-judge of the superior court judges' association from entering an order authorizing a retired judge to hear a case. *State ex rel. New Washington Oyster Co. v. Meakim*, 34 Wn.2d 131, 208 P.2d 628 (1949).

GR 29(h) provides for the administrative duties of presiding judges:

(h) Oversight of judicial officers. It shall be the duty of the Presiding Judge to supervise judicial officers to the extent necessary to ensure the timely and efficient processing of cases. The Presiding Judge shall have the authority to

address a judicial officer's failure to perform judicial duties and to propose remedial action. If remedial action is not successful, the Presiding Judge shall notify the Commission on Judicial Conduct of a judge's substantial failure to perform judicial duties, which includes habitual neglect of duty or persistent refusal to carry out assignments or directives made by the Presiding Judge, as authorized by this rule.

RCW 3.50.125 specifically addresses the transfer of cases within a municipal court, stating:

A transfer of a case from the municipal court to either another municipal judge of the same city or to a judge pro tempore appointed in a manner prescribed by this chapter shall be allowed in accordance with RCW 3.66.090 in all civil and criminal proceedings.

There is no evidence in this case that Judge Ladenburg's conduct in *Nester* fell within the provisions of GR 29(h) or RCW 3.50.125.

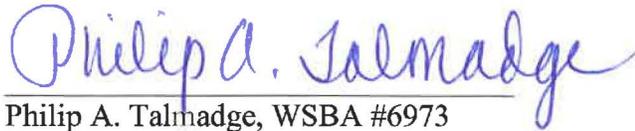
25. The unprecedented action taken by Judge Henke raises substantial questions on the authority of judges vis-à-vis presiding judges. In interpreting the scope of a presiding judge's GR 29 authority, this case has significance for the entire judiciary in the State of Washington, and public confidence in the judiciary. This Court is the ultimate authority on the power of the judiciary in this State with the plenary authority to supervise the lower courts and individual judges. No other court, except this Court, has similar power to control the actions of presiding judges.

WHEREFORE, petitioner prays as follows: Judge Henke lacked

authority to deprive Judge Ladenburg of his case responsibility in *Nester*. This Court should issue a writ of mandamus or writ of prohibition directing Judge Henke to withdraw any order purporting to override the authority of Judge Ladenburg in the *Nester* matter. Costs, including reasonable attorney fees, should be awarded to Judge Ladenburg.

Dated this ~~24th~~ day of March, 2020.

Respectfully submitted,



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DECLARATION OF SERVICE

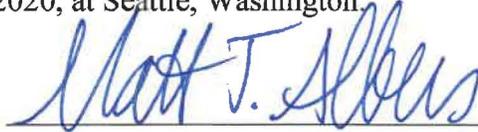
On said day below I served via ABC Legal Messengers a true and accurate copy of the *Petition Against State Officer Pursuant to RAP 16.2(b)* in Supreme Court Cause No. _____ (TBD) to the following:

Judge Drew Ann Henke
Tacoma Municipal Court
930 Tacoma Avenue South
Second Floor, Dept. 2, Room 234
Tacoma, WA 98402

Original E-filed via appellate portal with:
Supreme Court Clerk's Office

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

DATED: March 24, 2020, at Seattle, Washington



Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

March 24, 2020 - 10:57 AM

Filing Original Action Against State Officer

Transmittal Information

Filed with Court: Supreme Court

Appellate Court Case Number: Case Initiation

The following documents have been uploaded:

- OAS_Orig_Act_Against_State_Officer_20200324091126SC525302_6287.pdf

This File Contains:

Original Action Against State Officer

The Original File Name was Petition Against State Officer.pdf

A copy of the uploaded files will be sent to:

- matt@tal-fitzlaw.com
- phil@tal-fitzlaw.com
- sarah@tal-fitzlaw.com

Comments:

Petition Against State Officer Pursuant to RAP 16.2(b) [Please note that we will send out filing fee payment directly to the Court and will serve upon opposing party via courier]

Sender Name: Matt Albers - Email: matt@tal-fitzlaw.com

Filing on Behalf of: Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

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