SUPREME COURT OF
THE STATE OF WASHINGTON

No. 84362-7

MATHEW McCLEARY, *ET AL.*,

Respondents, Plaintiffs,

vs.

THE STATE OF WASHINGTON,

Appellant, Defendant.

SUPPLEMENTAL BRIEF OF AMICUS CURIAE STEPHEN K. EUGSTER

Stephen K. Eugster, WSBA # 2003
Pro per

2418 West Pacific Avenue
Spokane, WA 99201-6422
(509) 624-5566 / Fax (866) 565-2341
eugster@eugsterlaw.com

I. ABSTRACT OF THIS BRIEF

At its next hearing in McCleary, the Court might decide the State has not done enough to absolve itself of its contempt of the Court. The Court might use judicial power to enforce its decision and might consider certain tools, which might be used as suggested by the Plaintiffs. See the Court's most-recent order filed June 8, 2015 in *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012).

If the Court uses "inherent" broad contempt and sanction powers, no doubt, there will be debate and questioning as to whether the Court has such powers – as to whether the Court is acting in violation of the separation of powers doctrine.

These concerns will be avoided if the Court utilizes its authority to issue remedial sanctions as provided in RCW Ch. 7.21, Contempt of Court.

II. DISCUSSION

In *McCleary*, the Court made a decision about the positive right K-12 children of the state have to a properly funded education. The decision was not a breach of the separation of powers doctrine. It is what the court must do when dealing with a positive right contained within the constitution of the state.

The time may come when the court must enforce its decision. This

will not be an easy task. As former Supreme Court Justice, Phil Talmadge said in a memo to the Washington Policy Center:

> The issue that is more profoundly troublesome, and presently impactful, is the nature of the remedy the Court can order. In the specific context of K-12 organization and funding, the remedy, chosen in McCleary and the subsequent orders of the Court, represents uncharted waters, particularly in light of the remedy employed by the Court in Seattle School District.[1]

A. Inherent Power of the Supreme Court.

It may be said that the Court has all the power it needs to enforce its decision. Maybe so, but such bold statements do not deal with this unique situation. There will always be doubt about the Court's decision about school funding. The separation of powers' doctrine will always be discussed.

Doubt about the Court's power to enforce its decision in McCleary should be avoided.

Just how broad is the Court's power to enforce its decision?

Former Justice Talmadge contends

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[1] Washington Policy Center, Judge Phil Talmadge, *Policy Brief, Legal analysis: Constitutional implications of Washington Supreme Court's remedy in McCleary vs. State*, April 2014. https://www.washingtonpolicy.org/publications/brief/legal-analysis-constitutional-implications-washington-supreme-courts-remedy-mccle.

> The Court has significant enforcement powers. There is little doubt that the Court has the power to enforce its orders through its inherent, and broad, contempt powers. *Moreman v. Butcher*, 126 Wn.2d 36, 42-43, 891 P.2d 725 (1995) ("Washington policy has long been that courts have the authority to coerce compliance with lawful court decisions and process by imposition of appropriate sanctions.").

That the Court has such broad powers is not true. Nowhere in Washington law can a case be found detailing in any way the power of the Supreme Court to enforce its decisions.

The case Mr. Talmadge cites and quotes would leave one to think the Court has inherent, and broad, contempt powers. However, the case he cites did not confront the issue of the power of the Supreme Court. It was a statement about courts in general. Further, it was a statement which included a reference to statutory authority, but the reference was not included.

This is what the Court, in *Moreman v. Butcher* said:

> 'Washington policy has long been that courts have the authority to coerce compliance with lawful court decisions and process by imposition of appropriate sanctions. E.g., RCW 7.21.010, .030.[fn7]'[2] [Emphasis added.]

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[2] The footnote is not relevant. Nevertheless it provides:

> [fn7] RCW 7.21.010(1)(b), which gives one definition of contempt as "[d]isobedience of any lawful judgment, decree, order, or process of the court", contains exactly

Thus it can be concluded the case, and the statute cited do not stand for the proposition that the Supreme Court has broad and inherent power.

Instead of asserting that Court has inherent contempt power, the Court should use specially provided power, power which avoids being questioned. If the Court determines to proceed with contempt sanctions at next hearing in the case, it is submitted that the Court use the Contempt of Court procedures found in RCW Ch. 7.21. See the discussion infra at 6.

B. Original Jurisdiction: Mandamus Against State Officers.

One way of avoiding any dispute about the Court's power to enforce its decisions, is to use the Court's original jurisdiction over mandamus actions concerning state officers.

Wash. Const Art. IV, §1.

> The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide.

Wash. Const Art. IV, § 4 provides:

> The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money

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> the same wording, except for the word "the", as the definition of contempt the territorial Legislature enacted in 1869. Laws of 1869, ch. LIX, § 667, p. 167.

> or personal property when the original amount in controversy, or the value of the property does not exceed the sum of two hundred dollars ($200) unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before any superior court of the state or any judge thereof. [Emphasis added.]

The constitution is clear. The court has the original jurisdiction to deal with mandamus cases against state officers. With this in mind, it is certainly right to say the Supreme Court can deal with mandamus cases against state legislators.

The court might be able to act on its own in this regard. In any case, the court must have personal jurisdiction over every single legislator up to a number necessary to pass appropriations. This might work just fine to enforce the decision of the court. However, it is not flexible enough and may depend on someone outside of the court starting the case as a petitioner for a writ of mandamus against a sufficient number of legislators.

Chief Justice Barbara Madsen, in her concurring-dissenting opinion, in McCleary, supra, 173 Wn. 2d 477 at 550, said the way to enforce the

Court's decision is provided by the Courts "original jurisdiction" over petitions for writs of mandamus against State Officials. Wash. Const. Art. IV, Section 4 ("The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers.")

Using this original jurisdiction, the McCleary parents, or any other parents or K-12 children, with a proper interest could file a mandamus action in the Supreme Court against State Officers, the individual state legislators and the governor.

The court could then, after proper procedures and hearing, issue writs of mandamus ordering the State Officers, individually, to provide full funding of ESHB 2261. If the officers did not fulfill the writs of mandamus, they would be punished, possibly with continuing fines, until the mandamus was fulfilled.

B. Power of the Supreme Court under Special Proceedings for Contempt of Court, RCW, Ch. 7.21.

There is an unquestionable way for the Court to use sanctions to remedy the State's contempt of Court. The Court can use the proceedings for Contempt of Court set out in RCW Ch. 7.21.

Under, and pursuant to, RCW Ch. 7.21, the Washington Supreme Court judges have ample authority, unquestioned authority, to act to

enforce the Court's orders. The act says, "[a] judge or commissioner of the supreme court, . . . may impose a sanction for contempt of court under this chapter." RCW 7.21.020 (emphasis added).

Plaintiffs, at the time of the hearing in the spring of 2014, identified six possible tools, which could be used to deal with the contempt of the State in not doing what the Court said the state should do. Today, Plaintiffs have added two more possible actions the court might undertake.

It is not necessary to go into each possibility. The reason for not doing so is that the judges, in dealing with contempt must do so in the statutory framework. A review of what the Court has the authority to do under RCW 7.21 is sufficient to effect the contempt sanctions necessary to cause the State to fulfill the Court's positive constitutional right decision in *McCleary*.

The Court has the power to impose remedial sanctions. A "remedial sanction" is as a"sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform." RCW 7.21.010 (3).

" The court may initiate a proceeding to impose a remedial sanction on its own motion or on the motion of a person aggrieved by a contempt of court in the proceeding to which the contempt is related. Except as provided

in RCW 7.21.050, the court, after notice and hearing, may impose a remedial sanction authorized by this chapter." RCW 7.21.030 (1)

"If the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court and impose one or more of the following remedial sanctions" RCW 7.21.030 (2).

The remedial sanctions the Court may impose are as follows:

> (a) Imprisonment if the contempt of court is of a type defined in RCW 7.21.010(1) (b) through (d). The imprisonment may extend only so long as it serves a coercive purpose.
>
> (b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.
>
> (c) An order designed to ensure compliance with a prior order of the court.
>
> (d) Any other remedial sanction other than the sanctions specified in (a) through (c) of this subsection if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.
>
> . . . .

RCW 7.21.030 (2).

Punitive sanctions are not applicable.[3]

C. Contempt of Court, Statutory Provisions, and the Tools.

[3] 7.21.040.

Plaintiffs have brought several "tools" to the attention of the Court which it "can employ to coerce compliance of the Court's decision." Plaintiff/Respondents' 2015 Post-Budget Filing at 46 and following pages (Filed July 27, 2015).

In this part, there will be a brief statement or two as to whether Plaintiffs "tool" may be used by the Court to enforce its order under RCW 7.21. Each tool is numbered and in bold type. Comment(s) follow in brackets.

1. "Impose monetary or other contempt sanctions against the governmental body or elected officials;"

[Permitted.]

[A daily monetary sanction, which would build every day, as an item owing to the Court could be imposed. The Court every year, would turn this money over to the Department of Public Instruction as revenue to be used to meet the obligation of the State for adequate funding of education.]

2. "Prohibit expenditures on certain other matters until the Court's constitutional ruling is complied with;"

[Doesn't hurt the state or legislature, but sure would hurt parties which have nothing to do with creation of the problem of lack of adequate funding.]

3. "Order the legislature to pass legislation to fund specific amounts

or remedies;"

[Would be all right under the contempt statutes.]

4. "Order the sale of State property if the Court's constitutional ruling is not complied with;"

[This is nonsense.]

5. "Invalidate education funding cuts;" and

[Not permitted.]

6. "Prohibit any funding of an unconstitutional education system."

[Not permitted. Put bluntly this means to shut down the State's unconstitutionally underfunded school system until the State's constitutional violation is stopped. This would not hurt the state or the legislature, but it would hurt parents, K-12 children, teachers, etc.]

"Two additional tools "identified by others" have been added."

Plaintiff/Respondents' 2015 Post-Budget Filing at 47.

7. "Order the legislature to comply with the court orders in this case before attending to any other legislation; and"

[This would fit under the Contempt statutes. But, should there be exemptions – such as an emergency, e.g., Mount Rainier erupts.]

8. "Invalidate existing State tax exemptions until the State complies with the court orders in this case."

[This was tried by HJR 1, a House Joint Resolution presented to the

electorate in November 1972. HJR 1 called for an amendment to the state constitution which would invalidate a tax exemption if the legislature did not act to renew it every 10 years. It did not pass.]

[This would be very unwise. The structure of taxation includes a multitude of "tax exemptions." The exemptions are part and parcel, in many instances, of the fabric of the tax in question. The exemptions are a part of the structure of the tax. And, why would one damage those dependent upon the tax exemption? They did not do anything wrong. Why hold such people hostage?]

III. CONCLUSION

The Court has the power, indisputable power, to impose remedial sanctions on the State under Special Proceeding – Contempt of Court (RCW Ch. 7.21).

August 3, 2015.

Respectfully submitted,

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Stephen K. Eugster, WSBA # 2003, Pro Per
WSBA #2003

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