

MURPHY J. PAINTER

* NUMBER: 604,308 DIV.: "D"

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* 19th JUDICIAL DISTRICT COURT

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* PARISH OF EAST BATON ROUGE

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* STATE OF LOUISIANA

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VERSUS

STATE OF LOUISIANA, ET AL.

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MOTION TO DECLARE LA. R.S. 49:220.24(J) UNCONSTITUTIONAL

Murphy J. Painter, through undersigned counsel, moves this Honorable Court to declare La. R.S. 49:220.24(J), which *inter alia* designates the Louisiana Office of Inspector General a law enforcement agency, unconstitutional as applied by the OIG, Stephen Street, and its employees, particularly as applied to Mr. Painter under the circumstances of his case. Alternatively, if La. R.S. 49:220.24(J) was applied as written and the statute is clear and unambiguous when harmonized and reconciled with other provisions of the La. R.S. 49:220.21 - 49:220.25, the statute is unconstitutional on its face.

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1.

In 1988, the Office of Inspector General was created by Governor Buddy Roemer. The office became statutory in the First Extraordinary Legislative Session of 2008, when the Legislature enacted La. R.S. 49:220.21 – 49:220.25, relevant to the operations of the Office of Inspector General.

2.

La. R.S. 49:220.21 provides that the purpose of the OIG is to prevent and detect waste, inefficiencies, mismanagement, misconduct, abuse, fraud, and corruption in all departments, offices, agencies, boards, commissions, task forces, authorities, and divisions of the executive branch of state government. La. R.S. 49:220.24 addresses the authority, duties, powers, standards, and functions of the Louisiana Office of Inspector General. Section 49:220.24(B) provides that “[t]he inspector general is authorized to examine and investigate the management and affairs of the covered agencies concerning waste, inefficiencies, mismanagement, misconduct, abuse, fraud, and corruption.”

3.

La. R.S. 49:220.24(B)(4) provides that “[t]he inspector general *shall* report complaints of fraud, abuse, or corruption to such federal, state, or local agencies *when there is evidence of what may be criminal activity* and when otherwise appropriate and shall otherwise cooperate with such agencies in any further action.” La. R.S. 49:220.24(K) provides “[u]pon credible information of corruption or fraud, the office of the state inspector general *shall notify the appropriate law enforcement agencies*. Subsequent to notifying the appropriate law enforcement agency, the inspector general *may assist* the law enforcement agency in conducting the investigation.”

4.

In the 2008 Regular Session, the Legislature passed Act 831, which enacted La. R.S. 49:220.24(J), providing:

The office of the state inspector general is hereby designated as a law enforcement agency and conferred all investigative powers and privileges appurtenant to a law enforcement agency under state law as necessary and in furtherance of the authority, duties, powers, and functions set forth in this Part. These powers and privileges *shall not include arrest powers* but shall include access to computer systems, information maintained for the use of law enforcement personnel, and any information contained in the criminal history record and identification file of the Louisiana Bureau of Criminal Identification and Information.

5.

La. R.S. 49:220.25 was also enacted in Act 831. It makes any records or information obtained by the OIG in connection with its investigation confidential. The OIG has accurately described this confidentiality as “unqualified.” The only exception to this confidentiality requirement is the final reports of investigations as provided in R.S. 49:220.24(C)(6). La. R.S. 49:220.25(C)(6) requires the OIG to submit an annual report to the governor and the Joint Legislative Committee on the Budget at the end of each fiscal year that describes the accomplishments and contributions made by the office toward achieving the mission of helping to prevent and detect waste, fraud, and abuse in Louisiana government. This unqualified confidentiality requirement was enacted in the same Act that the OIG, Street, and Evans, claims gave the OIG the authority to apply for search warrants, which are public records, using confidential information and details of the investigation.

6.

Although the annual report required by La. R.S. 49:220.24(C)(6) is the only exception from the confidentiality requirement of La. R.S. 49:220.25, the OIG states in these annual reports that “[a]lthough from time to time we issue a public report in conjunction with a criminal prosecution, more often than not, public reports are not issued. . .” The OIG issued a detailed report regarding its criminal investigation of Mr. Painter, in which it branded Mr. Painter a criminal.

7.

The statutes establishing the purpose, scope, authority, duties, powers, standards, and functions of the OIG remained unchanged by Act 831. The Legislature explained in the digest to Act 831 that the change in the law “designates the office of the inspector general as a law enforcement agency and confers on the office all investigative powers and privileges appurtenant to a law enforcement agency under state law as necessary and in furtherance of the authority, duties, powers, and functions of the office as set forth in *existing* law. . .” The emphasis on “existing” is the Legislature’s, not Mr. Painter’s.

8.

Despite there being no change in the OIG’s purpose, scope, authority, duties, powers, standards, and functions, upon enactment of La. R.S. 29:220.24(J), the OIG in its own words “completely shifted its focus” away from its original scope and purpose of conducting civil audits and investigations to conducting *criminal* investigations.

9.

Despite there being no change in the law that requires the OIG to refer matters to the appropriate federal, state, or local law enforcement agency when there is evidence of what may be criminal activity, the OIG in its own words “completely shifted its focus” away from its original scope and purpose to conducting criminal investigations on its own. Although according the OIG, Inspector General Street, and Shane Evans, they believed within days of beginning their investigation that Mr. Painter had been involved in criminal activity, they did not refer the matter to the appropriate federal, state, or local law enforcement agency. Instead, the OIG, Street, and Evans proceeded with their own “criminal investigation.”

10.

Despite their being no change in the law requiring “unqualified” confidentiality of reports and information concerning OIG investigations other than the exception created for the annual report, in Mr. Painter’s case Evans completed an affidavit to obtain a search warrant containing such information. Evans filed the search warrant application, and subsequently obtained a search warrant, making confidential information regarding the “investigation” into Mr. Painter public, contrary to the provisions of La. R.S. 49:220.25. In this warrant application, Evans, Street, and the OIG branded Mr. Painter a criminal.

11.

The OIG, Street, and Evans, continued the investigation without referring the matter to the appropriate federal, state, or local law enforcement agency, as required in La. R.S. 49:220.24, to determine whether a criminal investigation was warranted and, if so, for that agency to conduct the criminal investigation.

12.

At the completion of the OIG investigation, Street issued a report to the Governor as required by La. R.S. 49:220.24(5), which was immediately made public. That report branded Mr. Painter a criminal, stating *inter alia* that he “illegally” accessed information, and that his actions appeared to violate several criminal laws.

13.

In its annual report issued for the fiscal year ending June 30, 2011, the OIG again branded Mr. Painter a criminal, reporting that its investigation revealed that Mr. Painter engaged in “widespread illegal use of confidential law enforcement databases.” According the report, OIG did not refer the matter to any other appropriate law enforcement agency when it determined that there may be criminal activity or at any other time, instead conducting and completing a criminal investigation itself and then referring its investigation to the United States District Attorney and the East Baton Rouge District Attorney.

14.

Regarding its investigations, the OIG has no authority to make any binding adjudication and is limited to reporting its findings and conclusions regarding individuals and making

may be criminal activity and that relegate any role the OIG has to a support role in cooperation with the appropriate agency. Further, the OIG's interpretation that it may apply for and obtain criminal search warrants is inconsistent with the unconditional confidentiality requirements of the law.

18.

The statutory requirement that the OIG issue a report of its findings also means that under the OIG's interpretation that it is now a criminal law enforcement agency, the OIG can brand someone a criminal in its report. The OIG did so to Mr. Painter.

19.

Thus, the OIG's, Street's, and Evans's application of Street's interpretation of La. R.S. 49:220.24(J) that the OIG is now a criminal law enforcement agency engaged primarily in conducting and reporting on criminal investigations, and its application of the law consistent with that interpretation, is unconstitutional as applied to Mr. Painter, pursuant to the United States Supreme Court's decision in *Jenkins v. McKeithen*, 395 U.S. 411, 89 S.Ct 1843 (1969). This includes, *inter alia*, the OIG's interpretation that it can make application for criminal search warrants in derogation of the confidentiality requirements of the law, and issuing reports including conclusions that Mr. Painter engaged in criminal activity.

20.

The interpretation that the change in the law only changed the OIG's access to information as necessary to conduct its civil auditing, investigation, and reporting duties, and that the OIG must refer all suspected criminal activity to the appropriate federal, state, or local law enforcement agency for investigation, by contrast, is consistent with the United States Supreme Court's holding of constitutionality in the context of *civil* investigative authority in *Hannah v. Larche*, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960).

21.

To the extent La. R.S. 49:220.24(J) alters the role and makes the OIG a criminal law enforcement agency to the extent asserted by the OIG, the law is unconstitutional on its face for the same reasons listed above. Whether by application of the OIG's interpretation, or by applying the law on its face, the procedures of the OIG do not meet the minimal requirements made

recommendations. These findings and recommendations are a matter of public record. Although the statutes applicable to the OIG require the submission of an annual report describing the OIG's accomplishments and contributions toward achieving its mission of helping prevent waste, fraud and abuse in Louisiana government, nothing in the law makes any provision in criminal investigations for preparation of findings or reports for submission to the governor or the legislature *for the explicit purpose of legislative action*.

15.

The OIG's interpretation that La. R.S. 49:220.24(J) "completely shifted its focus" away from its original scope and purpose to conducting criminal investigations is not consistent with the other provisions of law applicable to the OIG. The OIG acting consistent with his interpretation renders the law unconstitutional in its application.

16.

In harmonizing and reconciling La. R.S. 49:220.24(J) with other provisions of law dealing with the OIG, the language in the statute "as necessary and in furtherance of the authority, duties, powers, and functions set forth in this Part" clearly limits the grant of law enforcement power to that necessary to carry out its existing authority, duties, powers and functions." It did not change the OIG into a criminal law enforcement agency. La. R.S. 49:220.24(J) further solidifies the limited nature of the law enforcement agency designation by providing that the OIG did not have arrest powers, but that its law enforcement power "shall include access to computer systems, information maintained for the use of law enforcement personnel, and any information contained in the criminal history record and identification file of the Louisiana Bureau of Criminal Identification and Information." As the OIG noted in the Painter report, access to certain investigative databases are restricted to law enforcement agencies, making such designation necessary to obtain access to information.

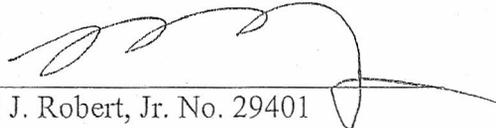
17.

The OIG's interpretation that it has broad powers that include conducting criminal investigations and obtaining criminal search warrants is inconsistent with the other statutory provisions applicable to the OIG. It requires ignoring the statutory provisions that require the OIG to turn any investigation over to the appropriate law enforcement agency when it suspects there

obligatory on the States by the Due Process Clause of the Fourteenth Amendment. In this case, as in *Jenkins*, Mr. Painter was branded a criminal by the investigation. And defendants OIG, Street, Evans, and their counsel, continue to brand him a criminal in these proceedings based on that unconstitutional process.

WHEREFORE, after due proceedings are had on this motion, Mr. Painter prays his motion to declare La. R.S. 49:220.24(J) and any other laws allowing the OIG to conduct criminal investigations under the procedures applied to Mr. Painter unconstitutional, be granted.

Respectfully submitted:



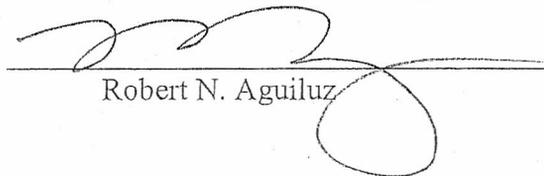
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CERTIFICATE OF SERVICE

I certify that the foregoing was served on all counsel of record via email on April 2, 2018.



Robert N. Aguiluz