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DIVISION III
STATE OF WASHINGTON

NO. 253163-III

(Consolidated with No. 253171)

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CLERK OF SUPREME COURT
STATE OF WASHINGTON

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CITY OF SPOKANE,

Respondent,

v.

LAWRENCE J. ROTHWELL

And

HENRY E. SMITH,

Petitioners.

PETITION FOR REVIEW

JAMES S. CRAVEN 01056

Spokane City Attorney

HOWARD F. DELANEY 13805

Spokane City Prosecutor

MICHELLE D. SZAMBELAN

WSBA No. 22206

Assistant City Prosecutor

Attorneys for Respondent

909 W. Mallon
Spokane, WA 99201
(509) 835.5988

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H. ARGUMENT

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1. The majority's decision that the duly elected district court judge serving the municipal department did not have de facto authority conflicts with this Court's decision in *Nollette*, as well as numerous other appellate court decisions.
2. This Court should clarify the statutory scheme set forth in RCW 3.46 with regard to whether limiting an election to municipal voters is required when the elected district court judges serve the municipal department for only part of their terms.

I. CONCLUSION

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A. IDENTITY OF PETITIONER

The City of Spokane asks this Court to accept review of the published Court of Appeals decision terminating review designated in Part B of this petition.

B. DECISION BELOW

The City seeks review of the majority opinion issued by Division Three of the Court of Appeals in *City of Spokane v. Lawrence J. Rothwell and Henry E. Smith*,¹ which was filed on November 8, 2007. A copy of the decision is in the Appendix at pages A-1 through A-10. The decision is published at 141 Wn. App. 680, 170 P.3d 1205 (2007). The City timely moved for reconsideration, which was denied by an order issued on January 17, 2008. A copy of the order denying petitioner's motion for reconsideration is in the Appendix at pages C-1 through C-2.

The majority opinion in *Rothwell* held that the Spokane Municipal judge presiding over these cases was not properly elected because the County auditor did not designate district court municipal positions and limit voting for those municipal positions to city voters.² Concluding that municipal judge did not hold color of right to the office of municipal judge, a majority of the panel also held that de facto jurisdiction did not exist and there was no authority to preside over the municipal

proceedings.³ Although Judge Brown agreed that the manner for electing Spokane municipal judges was flawed, he would have held that the judges acted with de facto authority.⁴

C. ISSUES PRESENTED FOR REVIEW

1. Whether RCW ch. 3.46 mandates that duly elected district court judges who serve the municipal department for only part of their terms must be elected only by city voters?
2. Whether RCW 3.46.170 renders a judicial election by a majority of municipal voters a nullity because the County Auditor did not limit the election to only city voters, or specifically identify the positions as serving the municipal department when the law already did?
3. Whether a duly elected district court judge, who by ordinance also serves its municipal department and received the majority of municipal votes, has de facto jurisdiction despite the County ballot not specifically identifying the position as serving the municipal department or limiting the election to city voters?

D. SUMMARY OF ARGUMENT

The *Rothwell* decision is contrary to Washington case law, and involves an issue of substantial public interest that this Court should resolve. This is a case of first impression. As it currently exists, this decision stands to invalidate more than a decade of municipal convictions, as well as millions of dollars in fines paid to municipalities operating a

¹ [No. 25316-3-III – consolidated with Mr. Smith’s case No. 25317-1-III (“*Rothwell*”)],

² 141 Wn. App. 680, at ¶¶ 11-12 (citing RCW 3.46.070).

³ 141 Wn. App. 360 at ¶ 17.

⁴ *Id.* at ¶ 18 (J. Brown, *dissenting*).

RCW 3.46 municipal department, including funds transferred to the state from those fines, as well as statutory penalties and assessments. Although this published decision directly affects the second largest municipality in the state,⁵ the collateral effects impact all of Washington, including of Department of Licensing records and municipal court convictions that are predicate offenses for felonies and set mandatory minimum sentences across the state.

An elected judiciary from the constituents they serve is critical. Here, the City voters *were* a part of the process. Irrespective of how the ballot was labeled, all of the judges serve the municipal department. Moreover, the municipal precincts reflected the same results for the sole contested position: City voters elected Judge Walker to a position of which the public had notice as serving the municipal court. A county-wide election did not thwart the will of the municipal voters by participating in the election of judges who also serve on the municipal bench.

Instead, the *Rothwell* court decided a case of first impression that effectively disenfranchised city voters, and wrecked statewide havoc by concluding that the municipal judges in Spokane had not been properly

⁵ http://www.census.gov/Press-Release/www/2001/tables/wa_tab_6.PDF. See ER 201(b)(2)[A court may take judicial notice of a fact not subject to reasonable dispute that

elected, and did not have authority to act. Relying on this Court's decision in *Nollette v. Christianson*⁶, the majority incorrectly concluded that de facto jurisdiction did not exist – something that has profound statewide impact. This Court should grant review to determine and clarify this important issue of substantial public interest.

E. STATEMENT OF THE CASE

1) Procedural History

a) *Original Prosecutions*

The City of Spokane separately charged Lawrence Rothwell and Henry Smith with gross misdemeanor violations of its municipal code in April, 2005.⁷ [*Smith* AR Am. Compl. at 1 (DUI); *Rothwell* AR Am. Compl. at 1(physical control).] The cases were assigned to the Hon. Patti Walker of Department Four in the Spokane County District Court. [*Smith* AR Mot. to Dismiss for Lack of Jurisdiction.] Both defendants filed functionally identical pretrial motions to dismiss for lack of jurisdiction, challenging the creation of that department and the individual judge. *Id.* Judge Walker denied both motions by memorandum decision on July 27,

is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.]

⁶ 115 Wn.2d 594, 800 P.2d 359 (1990).

⁷ N.B., The Administrative Record (AR) consists of Spokane Municipal Court records for Henry E. Smith (Muni. Ct. No. B 42847) and Lawrence J. Rothwell (Muni. Ct. No. B 40445). Many of the records are duplicative; to avoid unnecessary repetition when the records are the same, only Mr. Smith's will be cited.

2005. [*Smith*, AR Mem. Op. Denying Def's Mot. to Dismiss).] Judge Walker presided over Mr. Smith's trial where he was convicted of two misdemeanors. [*Smith*, CP 3-8.] Similarly, Mr. Rothwell was convicted of gross misdemeanor after a trial with a judicially appointed District Court Commissioner, Brad Chinn. [*Rothwell*, AR Judgment].

b) *RALJ Appeals*

Mr. Smith and Mr. Rothwell both separately appealed their municipal convictions to Spokane Superior Court. [*Smith*, AR Notice of Appeal; *Rothwell*, AR Notice of Appeal.] Visiting Stevens County Superior Court Judge Rebecca Baker presided over their appeals from the court of limited jurisdiction. [*Smith*, CP 3.]

As to Mr. Smith, Judge Baker reversed and dismissed his conviction for failing to sign acknowledgement of the infraction based on insufficiency of the evidence. [*Smith*, CP 4.] However, the judge denied his argument as to the jurisdictional issue, and affirmed his DUI conviction. *Id.*

Likewise, as to Mr. Rothwell, Judge Baker denied his argument of the jurisdictional issue, and affirmed his conviction for being in physical control of a motor vehicle while under the influence of alcohol or drugs. [*Rothwell*, CP 4.] He and Mr. Smith timely filed notices for discretionary

review to Division Three of the Court of Appeals. [*Smith*, CP 22; *Rothwell*, CP 22.]

c) *Division III of the Court of Appeals*

Division Three granted discretionary review for both cases on September 20, 2006. The cases were formally consolidated for review on October 31, 2006. On November 8, 2007, a majority of Division Three's panel reversed the superior court's RALJ decisions on the basis that the judicial officer of the municipal department was not properly elected. App. A-1 to A-10. Already facing over a hundred motions on the basis of the published opinion, the City filed an emergency motion to stay the *Rothwell* decision, which the Court of Appeals granted on November 14, 2007. App. B-1 to B-2. The stay extends to complete appellate review and receipt of the mandate. *Id.*

The City filed a motion for reconsideration on November 27, 2007. On December 6, 2007, Division Three requested an answer to the motion, On January 17, 2008, the panel issued an order denying reconsideration, as well as denying Mr. Smith and Mr. Rothwell's motion to lift the stay of execution of the court's opinion. App. C-1 to C-2. This petition timely followed.

2) Operational Facts: Evolution of Municipal Court

At the time relevant to these matters, the City of Spokane's Municipal Court operated as a department of the Spokane County District Court, organized pursuant to RCW ch. 3.46.⁸ This Court has set out the historical development of Spokane's Municipal Court in *Nollette v. Christianson*,⁹ which provides background for these cases.

The Spokane Municipal Court was created pursuant to the Justice Court Act in 1961.¹⁰ The City petitioned Spokane County to create a municipal department within its district court. *Id.* In response, the County adopted a Justice Court Districting Plan in 1962. [*Smith* AR, Mot. To Dismiss for Lack of Jurisdiction, Aff. of Knox, Ex. A (Resolution No. 62-169).] It created and designated a municipal department. *Id.* The judicial officer serving that department was designated as a part-time municipal judge.¹¹ Over time, the Districting Plan was amended. For instance, the County amended the Districting Plan in 1982, agreeing to provide judicial services equivalent to two full-time judges on a year-round basis for an agreed amount of compensation by the City.¹² It set forth how those positions "shall be provided for the two Spokane Municipal Divisions on a

⁸ Spokane Municipal Code (SMC) 05.01.010, 05.01.030. *See also, City of Spokane v. County of Spokane*, 158 Wn.2d 661, 666, 146 P.3d 893 (2006).

⁹ 115 Wn.2d 594, 800 P.2d 359 (1990).

¹⁰ 115 Wn.2d at 601.

¹¹ *Nollette*, 115 Wn.2d at 602.

rotating basis from” judges of the district court as assigned by the Presiding Judge.¹³

The Districting Plan in effect when Mr. Smith and Mr. Rothwell were convicted reflects that there are ten full-time elected judges in the District Court – nine of which were funded and filled. [*Smith* AR, Knox Aff., Ex. B, p. 3.]. All nine are designated as the “municipal department.”¹⁴ Since 2002, all of the elected District Court judges have been specifically designated as full-time Municipal Court judges. [*Smith*, AR, Knox Aff., Ex. A, p. 32.]

The City and County entered into interlocal agreements setting forth the amount of judicial services needed. [*Smith*, AR, Mot. to Dismiss for Lack of Jurisdiction, Dec. Terri Pfister (Pfister Dec., p. 6).] The 2004 agreement contracted for the services of 3.7 full-time judges. *Id.* at p. 2. No local agreement was found for 2005. *Id.* at p. 2. There is a reason.

As this Court noted in its November 16, 2006 decision, the City notified the County in November, 2004 that it sought to terminate its municipal department.¹⁵ In order for the City’s termination notice to be effective, the statute required an agreement with Spokane County to

¹² *Nollette*, 115 Wn.2d at 603.

¹³ *Id.*

¹⁴ Spokane County Code (SCC) 1.16.050.

¹⁵ *City of Spokane v. County of Spokane*, 158 Wn.2d at ¶ 3.

provide for any costs resulting from the termination.¹⁶ When disagreement arose as to issues relating to the termination and the validity of the agreement without the District Court's approval, the City filed a declaratory action against Spokane County and its District Court.¹⁷ After receiving an adverse ruling on summary judgment, the City obtained direct discretionary from this Court, which noted:

The practical result of the trial court's ruling was that the City missed its window for giving valid notice of its intent to create its own independent municipal court.¹⁸

Ultimately, this Court reversed, approving the statutory notice to terminate the City's municipal department. *Id.* at ¶ 32. However, the November 16, 2007 decision occurred after Mr. Smith and Mr. Rothwell's appeals, as well as the last quadrennial judicial election.

Mr. Smith and Mr. Rothwell's judge was elected to the District Court in the 2002 quadrennial election. [*Smith* AR, Mot. to Dismiss for Lack of Jurisdiction, Dec. of Paul Brandt (Brandt Dec. I) at p. 2.] Although the Districting Plan said that all District Court judges serve the municipal department, the ballot did not specifically identify that the candidates were running for District Court departments that would serve the municipal department. [Brandt Dec. I at p. 2.] The County election

¹⁶ *Id.* at ¶2; RCW 3.46.150(1).

¹⁷ 158 Wn.2d at 669-70.

¹⁸ 158 Wn.2d at ¶ 11.

allowed qualified voters throughout the County to vote for Judge Walker and the other judges who served the Municipal Department. *Id.*

The Record reflects that Judge Walker's position was contested, but that other Departments (Positions, 1, 2, and 7) were uncontested. [*Smith* AR, 6/14/05 Dec. of Paul Brandt (Brandt Dec. II) in Supp. of Memo. Opp. Dismissal.] In the contested election, Judge Walker received 58.98% of the vote in municipal precincts, while her challenger received 40.79%. [Brandt Dec. II at p. 2, ¶ 6.] The County-wide results reflected that Judge Walker received 59.95% of the vote, while her challenger received 39.81% of the vote. *Id.* at ¶ 7. The City concedes that the ballot language prepared by the County did not designate the positions as serving the Municipal Department or limit voting to only City voters.¹⁹

F. REASONS WHY REVIEW SHOULD BE GRANTED

When a Court of Appeals decision is in conflict with another division of the Court or a decision by this Court, the Supreme Court will accept review. RAP 13.4(b)(1). Similarly, when the decision from which a party seeks review involves an issue of substantial public interest that should be decided by the Supreme Court, this Court will accept review. RAP 13.4(b)(4).

¹⁹ RCW 3.46.070.

In this case, Division Three's published decision in *Rothwell* involves three considerations governing this Court's acceptance of review. As discussed below, the decision conflicts with case authority issued by other divisions and this Court as it relates to de facto jurisdiction. See RAP 13.4(b)(1),(2).

Additionally, the City's petition involves an issue of substantial public interest that this Court should resolve. RAP 13.4(b)(4). The statutory scheme is not a model of clarity. The manner in which judges must be elected in a municipal department is an issue of first impression. Guidance from the Supreme Court on this issue will assist municipalities and County auditors across Washington. Most importantly, this is not just a "Spokane problem," or an issue limited to the two defendants convicted in Spokane Municipal Court. The *Rothwell* majority opinion noted how the argument that Judge Walker was without authority to act applies to "necessarily all other Spokane county municipal judges."²⁰ The effect of this decision presents profound, statewide impact that may well date back to 1995.²¹

Municipal convictions affect offender scores,²² and constitute predicate offenses for felony stalking,²³ domestic violence,²⁴ and felony

²⁰ 141 Wn. App. at ¶ 7.

²¹ The effective date of RCW 3.46.070, and the amendments to RCW 3.46.063.

²² RCW 9.94A.030(40)(b).

DUI.²⁵ Municipal conviction data is required to be sent to Department of Licensing,²⁶ which could affect not only its voluminous records over the years, but also impacts livelihoods.²⁷ Fines and penalties collected as a result of municipal convictions over the years could be in the millions of dollars. Given that a significant portion of monies paid are directed to various statutory assessments, such as the Public Safety Education and Assessment (PSEA),²⁸ Criminal Conviction Fees,²⁹ Criminal Justice Funding (CJF)³⁰, and Alcohol Violators Fee,³¹ the decision could dramatically impact the entire state if there was no valid conviction. This Court should accept discretionary review of the *Rothwell* decision.

G. ARGUMENT

Challenges to jurisdiction are question of law, which this Court reviews de novo.³² In reviewing statutory provisions, courts give effect to

²³ SMC 10.11.060(E)(3).

²⁴ RCW 26.50.110(5).

²⁵ RCW 46.61.5055(4).

²⁶ RCW 46.20.270 (conviction for offense requiring withholding driving privileges), and RCW 46.65.010 (Habitual Traffic Offender).

²⁷ RCW 46.25.090 (disqualification for Commercial Driver's License).

²⁸ RCW 3.62.090.

²⁹ RCW 3.62.085.

³⁰ RCW 46.64.055.

³¹ RCW 46.61.5054.

³² *City of Medina v. Primm*, 160 Wn.2d 268, at ¶ 8, 157 P.3d 379 (2007)(citation omitted).

the legislature's intent, which involves discerning plain meaning by examining related statutes and provisions within the same act.³³

1. **The *Rothwell* majority's holding as to de facto jurisdiction conflicts decisions of this Court and other divisions of the Court of Appeal.**

The *Rothwell* majority concluded that Judge Walker had no color of right because she was neither appointed, nor elected exclusively by City voters and thus, no de facto jurisdiction existed.³⁴ This conclusion is premised on this Court's decision in *Nollette v. Christianson*,³⁵ but overlooks a fundamental difference in Judge Nollette's situation. There, the judge had been specifically rejected from the pool of those eligible to be a municipal court judge, and sought a writ of mandamus to compel his ability to preside over municipal cases.³⁶ In short, he sought to usurp the office – a situation where de facto authority does not exist.

This Court explained how SCC 1.16.050 establishes the relevant pool of judges who are eligible to serve as municipal court judges.³⁷ It then noted how RCW 3.46.060 [appointment process for part-time judges] and the Spokane Municipal Code provided for the appointment of part-

³³ *Id.* at ¶ 10 (citation omitted).

³⁴ *Rothwell*, 141 Wn. App. at ¶ 15.

³⁵ *Id.* (citing 115 Wn.2d 594, 605, 800 P.3d 359 (1990)).

³⁶ 115 Wn.2d at 597.

³⁷ 115 Wn.2d at 605.

time municipal court judges.³⁸ This appointment process was the mechanism to select judges from the eligible pool. *Id.* Accordingly, the Court concluded that a declaration that all judges in the eligibility pool had de facto authority would be facially at odds with the statutory and city code provisions that dictated the selection mechanism (*i.e.*, appointment).

Since this Court decided *Nollette* in 1990, key amendments have occurred. Spokane County amended SCC 1.16.050 to remove the part-time limitation:

All of the judges in the Spokane County District are designated by this plan as a municipal department, and the judges shall function as municipal or police judges. . . .

The state legislature also amended the selection mechanism to be election, not appointment.³⁹ Here, Judge Walker was elected to the Spokane County District Court. She was a part of the eligible pool and the selection mechanism was election.

The defect present in this case involves an irregularity in her election to the municipal office when the County did not follow RCW 3.46.070 by designating the position as serving the municipal department on the ballot, or limiting the election to only City-voters. However, Judge Walker did not seek to usurp an office for which she had not been selected:

³⁸ *Nollette*, 115 Wn.2d at 605.

[A]n officer de facto has the possession, and performs the duties under the color of right, without being actually qualified in law so to act, both being distinguished from a mere usurper, who has neither lawful title nor color of right.⁴⁰

Judge Walker was selected, but because of an irregularity in the selection process, she only held the position as a de facto municipal judge. As this Court long ago explained:

‘A judge who actively assumes the duties of his office after he has been appointed by the governor of the state, or has been elected by the people, is at least a de facto judge even though facts aliunde might disclose irregularities in the appointment or the election.’⁴¹

After the district court election, Judge Walker held color of right title to the de facto office. As a duly elected district court judge, she served its municipal department. Even if her occupation of that office was a nullity because the County did not strictly comply with RCW 3.46.070, it does not mean that her actions are null and void.⁴²

The irregularity with regard to the County’s ballot should not render subsequent judicial actions null and void. As the *Franks* court aptly noted, such a holding “would unduly disrupt the orderly function of

³⁹ RCW 3.46.063.

⁴⁰ *State v. Britton*, 27 Wn.2d 336, 345, 178 P.2d 341 (1947)(affirmed first-degree murder conviction in trial presided over by an appointee to a judicial vacancy created by a leave of absence to serve in the military).

⁴¹ *Britton*, 27 Wn.2d at 344 (quoting 48 C.J.S., Judges, § 2(2), p. 949)(emphasis supplied).

⁴² See *Barrett-Smith v. Barrett-Smith*, 110 Wn. App. 87, 90-91, 38 P.3d 1030 (2002).

the judicial process. Necessity and public policy compel us to hold otherwise.”⁴³ The majority decision in *Rothwell* wrecks chaos in that judicial process.

Further, the situation presented in this case is analogous to that in *State ex rel. Farmer v. Edmonds Mun. Ct.*⁴⁴ when the city of Edmonds attempted to create its own municipal court -- ostensibly pursuant to RCW 35A.20.⁴⁵ Division I concluded that Edmonds could not forego the provisions of the 1961 justice court act, and was precluded from establishing a court under RCW 35A.20.⁴⁶ Notably, however, Division I clarified:

Our holding that the present Edmonds Municipal Court lacks jurisdiction over municipal offenses should not be taken to imply that final judgments and sentences previously rendered in that court are now subject to collateral attack. When those judgments were rendered and those sentences imposed, the judge or judges functioned as de facto officers. An officer de facto is a person in actual possession of an office, exercising its functions and discharging its duties under color of title. A judge serving under such circumstances has authority until displaced by a direct proceeding for that purpose.⁴⁷

Despite the flawed process, the office is still regarded as a de facto office until the legislative act or municipal ordinance creating it is declared

⁴³ 7 Wn. App. at 596.

⁴⁴ 27 Wn. App. 762, 621 P.2d 171 (1980), *rev. denied*, 95 Wn.2d 1016 (1981).

⁴⁵ *Id.* at p. 766.

⁴⁶ *Id.* at 767.

⁴⁷ 27 Wn. App. at 767-68 (citations omitted)(emphasis supplied).

invalid.⁴⁸ Moreover, neither Mr. Smith nor Mr. Rothwell sought a writ of quo warranto to challenge Judge Walker's entitlement to the office of municipal judge, which is the proper and exclusive method for challenging her authority.⁴⁹

Just as in *Edmonds*, the official acts of the Spokane Municipal Judges should be valid and enforceable against the public and third parties; the final judgments and sentences should not be disturbed.⁵⁰ The majority's decision in *Rothwell* conflicts with existing case law. This Court should accept review to give clarity to lower courts and litigants across the state.

2. **This Court should clarify the statutory scheme set forth in RCW 3.46 with regard to whether limiting an election to City voters is required when the district court judges serve the municipal department for only a part of their term.**

Until January 1, 2007,⁵¹ the City of Spokane prosecuted its cases in a municipal department of the Spokane County District Court. In order

⁴⁸ *Rothwell*, 141 Wn. App. at ¶ 19 (quoting *State v. Canady*, 116 Wn.2d 853, 857, 809 P.2d 203 (1991)).

⁴⁹ See, e.g., *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 893, 969 P.2d 64 (1998)(judicial election); see also, *Franks*, 7 Wn. App. at 596; *Barrett-Smith*, 110 Wn. App. at 91. [N.B., *Quo warranto* proceedings are not limited to conflicting claims to a public office. *Green Mtn. Sch. Dist. No. 103 v. Durkee*, 56 Wn.2d 154, 159, 351 P.2d 525 (1960)(citing cases).]

⁵⁰ 27 Wn. App. 768.

⁵¹ *City of Spokane v. County of Spokane*, 158 Wn.2d at 666 (City's declaratory action to enforce transfer agreement required by RCW 3.46.150 to terminate municipal department.)

to be a municipal judge in a municipal department organized pursuant to RCW ch. 3.46, one must be elected to the district court. RCW 3.46.020. It is undisputed that the judge was properly elected to the district court. The public had notice that Spokane's Districting Plan designates that all district court judges comprise the municipal department.⁵² As this Court and past interlocal agreements⁵³ recognized, GR 29 vests the Presiding Judge with the responsibility of managing the cases, and allocating resources to maximize the court's ability to adjudicate cases.⁵⁴ Allowing the Presiding Judge to allocate resources by assigning the elected judges – all of whom comprised the municipal department – is consistent with this concept, and did not eviscerate the will of the municipal electorate.

It does, however, raise an argument caused by lack of clarity in the statutory scheme and dearth of precedent. When the Legislature enacted the 1993 amendments to RCW 3.46,⁵⁵ it required election of judges performing more than 35 hours of services per week to the municipal department -- irrespective of how many judges provided those services. RCW 3.46.063. However, it expressly retained the statutory provisions

⁵² SCC 1.16.050; *see also*, *State v. Amodio*, 110 Wn. App. 359, 365, 40 P.3d 1182, *rev. denied*, 147 Wn.2d 1011 (2002).

⁵³ 1982 amendment provided that the judicial services for two full-time judges would be assigned by the Presiding Judge on a rotating basis from the judges of the District Court. *Nollette*, 115 Wn.2d at 602-03.

⁵⁴ 158 Wn.2d at ¶ 24 (quoting CR 29(e)).

⁵⁵ Laws of 1993, ch. 317 (effective January 1, 1995).

for the appointment of judges, stating how: “Notwithstanding⁵⁶ RCW 3.46.050 and 3.46.060,” full-time equivalent municipal judges must be elected. The referenced statutes allow for the appointment of full-time municipal judges to be either by election or appointment as the city legislative body determines. RCW 3.46.050. Likewise, the mayor may appoint part-time judges. RCW 3.46.060.

Prior to *Rothwell*, the only guidance to courts, counties, and municipalities is a 1995 Attorney General Opinion. Harmonizing the statutory scheme in 3.46, it concludes that “mixed-use” or district court judges who serve the municipal department only part of the time do not need be elected subject to the provisions of RCW 3.46.170. *See, e.g.*, 1995 AGO No. 9 at pp. 9-10. The original trial court decision relied, in part, on this rationale.⁵⁷ [*Smith*, AR Memo. Op. Denying Def’s Mot. to Dismiss, at p. 6.]

Guidance from this Court is needed to harmonize GR 29’s delegation for judicial assignments, as well as the seemingly conflicted statutory scheme in RCW 3.46, and to resolve whether elected district court judges who serve the municipal department on rotating basis for

⁵⁶ The term “notwithstanding” means “in spite of.” BLACK’S LAW DICT. (8th ed. 2004).

⁵⁷ In addition to the lack of deference to Division III’s majority decision, this Court may affirm on any grounds supported by the record. *State v. Bryant*, 97 Wn. App. 479, 490-91, 983 P.2d 1181 (1999), *rev. denied*, 140 Wn.2d 1026, *cert. denied* 531 U.S. 1016 (2000).

only part of their terms must also comply with RCW 3.46.170 requirements that they be elected solely by the voters of that municipality. This Court should grant review.

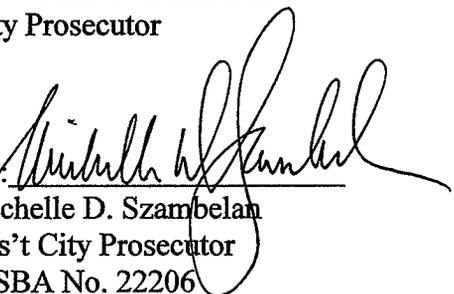
H. CONCLUSION

The City asks this Court to accept review of Division III's majority decision in *City of Spokane v. Rothwell*. This case of first impression has profound and far-reaching impacts, not only in Spokane but across the entire state. It presents issues of substantial public interest that this Court should decide. The majority decision conflicts with not only this Court's decision in *Nollette*, but also with other decisions from the Court of Appeals. Review should be granted.

Respectfully submitted this 19th day of February, 2008.

CITY OF SPOKANE

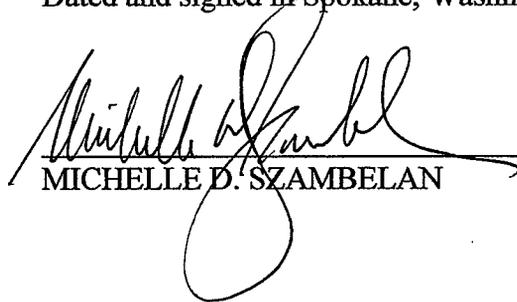
JAMES S. CRAVEN
City Attorney
HOWARD F. DELANEY
City Prosecutor

By: 
Michelle D. Szambelan
Ass't City Prosecutor
WSBA No. 22206
Attorneys for Petitioner

DECLARATION OF SERVICE

I, MICHELLE D. SZAMBELAN, declare under penalty of perjury under the laws of the State of Washington that I served a copy of the foregoing document on Respondent's counsel by leaving a copy with the receptionist at the Center for Justice, 35 W. Main St., Ste. 300, Spokane, WA 99201 on the 19th day of February, 2008; and that I served Mr. Smith and Mr. Rothwell by leaving a copy of the same in an envelope addressed to them at their counsel's address of record on the same date.

Dated and signed in Spokane, Washington this 19th day of February, 2008.

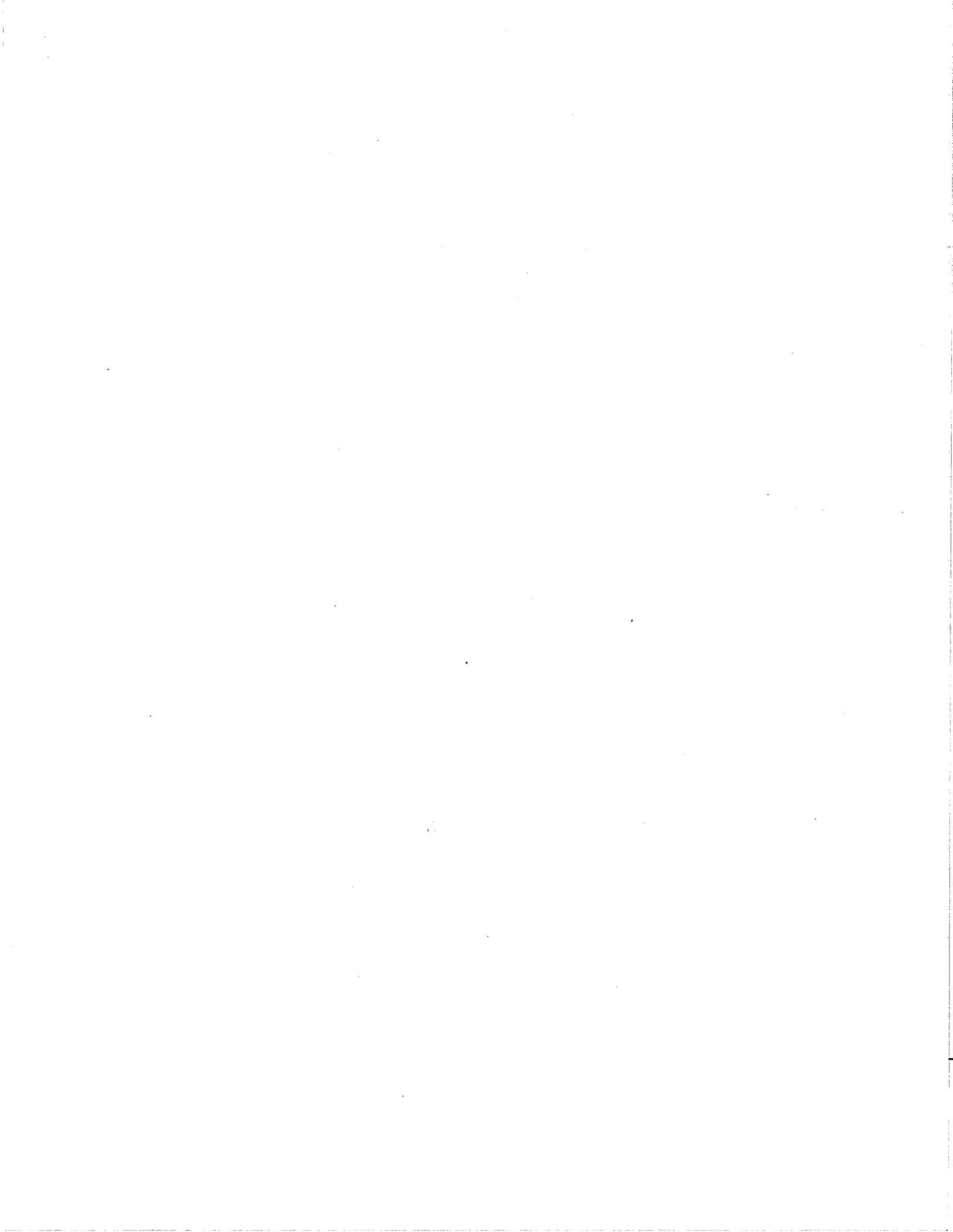


MICHELLE D. SZAMBELAN

"A"

INDEX TO APPENDICES

- A. Slip opinion (11/8/07) of Division III's decision in *City of Spokane v. Rothwell*, published at 141 Wn. App. 680, 170 P.3d 1205 (2007).
- B. Division III's (11/14/07) Order Granting Emergency Stay
- C. Division III's Order (1/17/08) Denying Reconsideration, etc.
- D. Cited sections from RCW 3.46
- E. Cited sections from Spokane County Code
- F. Cited sections from Spokane Municipal Code



FILED

NOV 08 2007

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF SPOKANE,	)	No. 25316-3-III
	)	(consolidated with
Respondent,	)	No. 25317-1-III)
)	
v.)	
)	
LAWRENCE J. ROTHWELL,)	
)	
Petitioner.)	
-----	)	Division Three
)	
CITY OF SPOKANE,)	
)	
Respondent,)	
)	
v.)	
)	
HENRY E. SMITH,	)	PUBLISHED OPINION
)	
Petitioner.)	

SWEENEY, C.J.—Spokane county voters elect district court judges. But those judges also preside over Spokane city municipal cases, with the judges sitting as “municipal court judges” by designation. This is despite the fact that state statute mandates that only city voters may select municipal judges. And all of the Spokane County district court judges are designated as part-time municipal judges despite another

state statute that requires designation of municipal departments. We conclude, therefore, that the way in which the Spokane municipal judges are elected is contrary to state law. We therefore reverse these convictions.

FACTS

The city of Spokane entered into an agreement (Interlocal Agreement) in 2004 with the county of Spokane for the county to provide municipal court services for the equivalent of 3.7 full-time judges and related services. The county district court is serviced by nine judges elected county-wide. There are no elections for municipal judges per se. The "municipal department" is instead rotated among the district court judges based on a schedule. The parties suggest that the schedule is created by the district court itself, but there is no information in this record one way or the other. The agreement ended by its terms on December 31, 2004. But, apparently, the city and the county continued to operate under the terms of the agreement, although this is also not clear from either the record or the briefs on file here.

The City of Spokane charged Henry Smith with driving under the influence, and Lawrence Rothwell with physical control of a motor vehicle under the influence under the Spokane Municipal Code in April 2005. Both cases were assigned to Judge Patti Walker. Judge Walker is a district court judge; her department is department No. 4. She was elected in 2002 in a county-wide, not city-wide, election.

Mr. Rothwell and Mr. Smith moved pretrial to dismiss for lack of jurisdiction. They argued that the Spokane municipal department was created in violation of state statute and was therefore an invalid entity. And Judge Walker had not been properly elected to the position of Spokane municipal court judge. Judge Walker denied both motions and concluded the court had jurisdiction in both cases. Mr. Rothwell and Mr. Smith were convicted as charged.

Both Mr. Rothwell and Mr. Smith appealed to superior court and again challenged the district court's authority to preside over city cases. The superior court (Judge Rebecca Baker) concluded that the statutory scheme (and particularly RCW 3.46.070¹) was not violated as long as a majority of city voters voted for a particular district court candidate. Judge Baker also concluded that the statute has been complied with but for the fact that there was no designation of municipal positions on the ballot. Judge Baker stated that there is nothing of "real consequence" that is implicated by such an omission. Clerk's Papers at 12.

We accepted discretionary review.

¹ "In each district court district where an election is held for the position of municipal judge, the county auditor . . . shall designate the proper number of municipal judge positions Only voters of the city shall vote for municipal judges."

DISCUSSION

Mr. Rothwell and Mr. Smith contend that Judge Walker was not properly elected to the position of municipal court judge because she was elected in a county-wide election of a district court seat rather than by city voters to a municipal court position, contrary to RCW 3.46.063(1) and RCW 3.46.070. They also argue that the municipal department of the district court was created and maintained in violation of the scheme set out in chapter 3.46 RCW. And it is not therefore a valid department. They argue that Judge Walker (and necessarily all other Spokane county municipal judges) must be elected solely by the residents of the city of Spokane and elected to specific municipal court departments, designated as such on the ballot.

Whether the city's approach to creating a municipal department of the Spokane County District Court and electing its judges complies with the state statutory scheme is a question of law. And so our review is de novo. *Enter. Leasing, Inc. v. City of Tacoma, Fin. Dep't*, 139 Wn.2d 546, 551-52, 988 P.2d 961 (1999). The city must strictly comply with the statutes and the statutory scheme we apply here because they implicate the franchise rights of the citizens of Spokane. *State v. Moore*, 73 Wn. App. 805, 813-14, 871 P.2d 1086 (1994). The city argues that substantial compliance is sufficient but cites no relevant authority for that proposition.

ELECTION

RCW 3.46.063(1) requires that each full-time equivalent judicial position be filled by election. The words "full-time equivalent" refers to hours per week of judicial time, so more than one person could fill a position. But all must be elected. RCW 3.46.063(1). Any additional positions that equal one-half of a full-time position or more must also be filled by election. RCW 3.46.063(2). And only city voters may vote for municipal judges. RCW 3.46.070.

The designation of 3.7 full-time municipal judicial positions then triggers the requirement of RCW 3.46.063(1) that all municipal judges involved with serving that time be elected. And they must be elected by city voters only; voters who are told that they are electing municipal judges. RCW 3.46.070. That was not done here. City of Spokane voters did not elect Judge Walker or any of the other judges designated to serve a term as a municipal department. That designation was made by some other administrative process, again unclear from this record. And the city does not assert otherwise. It contends instead that it substantially complied with the statute because city voters (also citizens of the county) voted for the district court judges and did so in roughly the same proportion as the county voters. The superior court agreed.

A municipal judge is separate and distinct from a district court judge. RCW 3.46.020, .030, .063, .070. RCW 3.46.070 is clear and unambiguous. Only city voters shall vote for municipal judges designated as such by the county auditor. We must read

No. 25316-3-III, 25317-1-III
City of Spokane v. Rothwell, Smith

the statute literally. *See Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Sept. 18, 2007) (No. 07-402); *see also Bruett v. Real Prop. Known as 18328 11th Ave. N.E.*, 93 Wn. App. 290, 301, 968 P.2d 913 (1998) (court cannot amend unambiguous statute by judicial construction). The city urges substantial compliance as the standard but again cites no meaningful authority for that proposition.

Judge Walker was not, then, elected to the position of municipal court judge by the citizens of Spokane and had no authority to preside over these trials. In light of this conclusion, we need not decide in this case whether the municipal department was created and maintained in violation of chapter 3.46 RCW.

DE FACTO JURISDICTION

The city argues nonetheless that Judge Walker had de facto authority to act as a judge even assuming that she was not properly elected. Mr. Smith and Mr. Rothwell respond that Judge Walker did not have de facto authority because she was not elected by city voters.

A judge may exercise the authority of an office if he or she is a de facto officer. That requires a showing that he or she holds an office, exercises its functions, and discharges the duties under some color of right. *Foisy v. Conroy*, 101 Wn. App. 36, 41, 4 P.3d 140 (2000). A de facto judge exercises “the duties of the judicial office under color of authority pursuant to an appointment or election thereto, and for the time being

performs those duties with public acquiescence, though having no right in fact, because the judge's actual authority suffers from some procedural defect.'" *Cotton v. City of Elma*, 100 Wn. App. 685, 700, 998 P.2d 339 (2000) (quoting 46 AM. JUR. 2D, *Judges* § 242 (1994)).

Here, Judge Walker was neither elected nor appointed by the citizens of the city of Spokane; therefore, she has no color of right and no de facto jurisdiction. In *Nollette v. Christianson*,² the court rejected the notion that all Spokane County district court judges had de facto jurisdiction to act in the capacity of Spokane municipal judges. *Nollette*, 115 Wn.2d at 605. *Nollette* held that without an appointment, no district court judge could act as a municipal court judge. *Id.* The statutes now require that municipal judges in Spokane be elected, but it follows from *Nollette* that without such an election, no district court judge has jurisdiction over municipal cases. RCW 3.46.063; *Nollette*, 115 Wn.2d at 605.

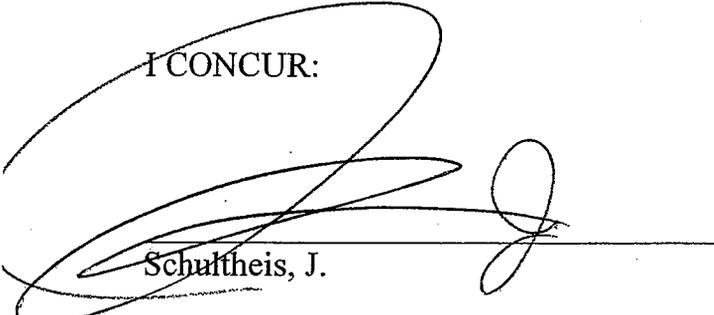
And here the first Interlocal Agreement was expired so there was no attempt to create a municipal department. And more significantly, no municipal department was created in compliance with chapter 3.46 RCW.

² *Nollette v. Christianson*, 115 Wn.2d 594, 800 P.2d 359 (1990).

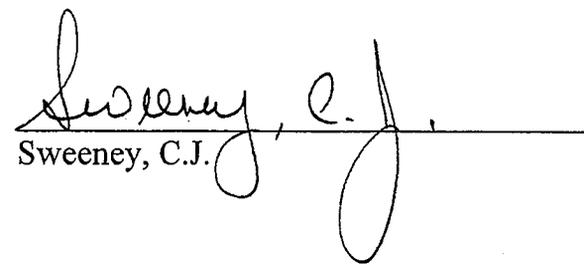
HOLDING

We conclude that Judge Walker did not hold color of right to the office of municipal court judge and was therefore without authority to preside over municipal proceedings and impose judgment. We therefore reverse the convictions.

I CONCUR:



Schultheis, J.



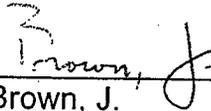
Sweeney, C.J.

No. 25316-3-III; No. 25317-1-III

BROWN, J. (concurring in part, dissenting in part) — I agree that the manner for electing Spokane municipal judges is flawed and thus, concur partly in the majority opinion. However, because I would hold the judges acted with de facto authority, I part company with the majority in reversing the convictions of Henry Smith and Lawrence Rothwell.

In *State v. Canady*, 116 Wn.2d 853, 856-57, 809 P.2d 203 (1991), the court discussed the difference between de facto offices and de facto judges. The *Canady* court noted the applicable rule is found in *Higgins v. Salewsky*, 17 Wn. App. 207, 212, 562 P.2d 655 (1977). Generally, a de jure office is a precondition for a de facto officer. But an exception exists where the office is created by a flawed legislative act or municipal ordinance “and the office is regarded as a de facto office until the act or ordinance is declared invalid.” *Canady*, 116 Wn.2d at 857 (citation omitted). Considering the 2004 Interlocal Agreement and the ordinance under the legislative scheme, an “official attempt was made to ‘create’ the ‘office’ in question by act or ordinance.” *Id.* (citation omitted). Therefore, I would apply the exception recognized in *Canady* and affirm the convictions.

Accordingly, I respectfully dissent in part.


Brown, J.

"B"

The Court of Appeals
of the
State of Washington
Division III

FILED

NOV 14 2007

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

CITY OF SPOKANE,)
)
 Respondent,)
)
 v.)
)
 LAWRENCE J. ROTHWELL,)
)
 Petitioner.)
 _____)
)
 CITY OF SPOKANE,)
)
 Respondent,)
)
 v.)
)
 HENRY E. SMITH,)
)
 Petitioner.)

COMMISSIONER'S RULING
No. 25316-3-III
CONSOLIDATED WITH
25317-1-III

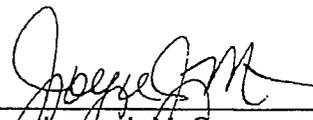
Having considered the City of Spokane's emergency motion to stay this Court's opinion filed on November 8, 2007, along with "Other Defendants[]" Motion to Intervene re City's Motion for Emergency Stay" filed by the City of Spokane Public Defender's Office, the responses thereto, the record, file, and oral argument of counsel, and being

No. 25316-3-III

of the opinion that in reading RAP 12.7(a) in conjunction with RAP 7.2, this Court has the power to change or modify its decision until a mandate is issued, (until a final decision terminating review has been entered), and the trial court has very limited authority to act in a case until this Court has completed its review and issued a mandate, a stay is appropriate until the appellate process is completed, and here the City has indicated that it will be filing with this Court a motion for reconsideration and for clarification, and possibly a petition for review to the Washington State Supreme Court; as to the motion to intervene, while appreciating the fact that this Court's opinion impacts many others who have appeared before the district court judges, the Rules of Appellate Procedure do not provide for intervention; now, therefore,

IT IS ORDERED, the motion for stay is granted and remains in effect until the appellate process is completed and a mandate issued. As agreed in open Court, Mr. Smith's driving privileges will immediately be reinstated. The motion to intervene is denied at this time.

November 14 , 2007.



Joyce J. McCown
COMMISSIONER

"C"

FILED

JAN 17 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

CITY OF SPOKANE,)	
	)	No. 25316-3-III
Respondent,	)	(consolidated with
	)	No. 25317-1-III)
v.)	
	)	ORDER DENYING
LAWRENCE J. ROTHWELL and	)	MOTION FOR RECONSIDERATION,
HENRY E. SMITH,	)	GRANTING MOTION TO STRIKE
	)	REFERENCES TO FACTS OUTSIDE
Petitioners.	)	THE RECORD, AND DENYING
	)	MOTION TO LIFT STAY

THE COURT has read and considered the following pleadings:

- (1) Respondent's Motion for Reconsideration and the Petitioners' Answer to the City's Motion for Reconsideration,
- (2) Petitioners' Motion to Strike References to Facts Outside the Record, and
- (3) Respondent's Objection to Untimely Motion to Modify Commissioner's Ruling and Petitioners' Reply Brief.

The court has also reviewed and considered the declarations filed as part of these motions, responses, and objections, and is fully informed of the positions of the parties and the reasons therefore.

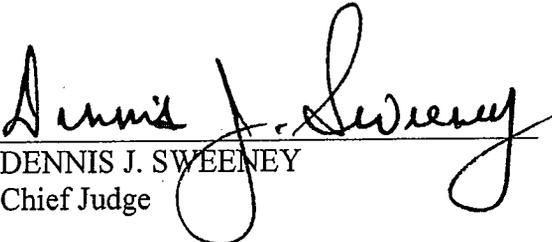
NOW, THEREFORE,

No. 25316-3-III, 25317-1-III
City of Spokane v. Rothwell & Smith

IT IS ORDERED (1) the Respondent's Motion for Reconsideration of this court's decision of November 8, 2007, is denied, (2) the Petitioners' Motion to Strike References to Facts Outside the Record is granted, and (3) the Petitioners' motion to lift the stay of execution of the court's opinion is denied.

DATED: January 17, 2008

FOR THE COURT:


DENNIS J. SWEENEY
Chief Judge

"D"

RCW 3.46.020
Judges.

Each judge of a municipal department shall be a judge of the district court in which the municipal department is situated. Such judge shall be designated as a municipal judge.

[1987 c 3 § 1; 1984 c 258 § 73; 1961 c 299 § 36.]

Notes:

Severability -- 1987 c 3: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1987 c 3 § 21.]

Court Improvement Act of 1984 -- Effective dates -- Severability -- Short title -- 1984 c 258: See notes following RCW 3.30.010.

RCW 3.46.050

Selection of full time judges.

Each city may select its full time municipal judge or judges by election, or by appointment in such manner as the city legislative body determines: PROVIDED, That in cities having a population in excess of four hundred thousand, the municipal judges shall be elected.

[1975 c 33 § 2; 1961 c 299 § 39.]

Notes:

Severability -- 1975 c 33: See note following RCW 35.21.780.

RCW 3.46.060
Selection of part time judges.

In district court districts having more than one judge, appointment of part time municipal judges shall be made from the judges of the district by the mayor in such manner as the city legislative body shall determine.

[1984 c 258 § 75; 1961 c 299 § 40.]

Notes:

Court Improvement Act of 1984 -- Effective dates -- Severability -- Short title -- 1984 c 258: See notes following RCW 3.30.010.

RCW 3.46.063

Judicial positions — Filling — Circumstances permitted.

Notwithstanding RCW 3.46.050 and 3.46.060, judicial positions may be filled only by election under the following circumstances:

(1) Each full-time equivalent judicial position shall be filled by election. This requirement applies regardless of how many judges are employed to fill the position. For purposes of this section, a full-time equivalent position is thirty-five or more hours per week of compensated time.

(2) In any city with one or more full-time equivalent judicial positions, an additional judicial position or positions that is or are in combination more than one-half of a full-time equivalent position shall be filled by election.

[1993 c 317 § 3.]

Notes:

Severability -- Effective date--1993 c 317: See notes following RCW 3.50.810.

Westlaw

Page 1

West's RCWA 3.46.070

▷

West's Revised Code of Washington Annotated Currentness
 Title 3. District Courts--Courts of Limited Jurisdiction (Refs & Annos)
 ▢ Chapter 3.46. Municipal Departments (Refs & Annos)

→ **3.46.070. Election**

In each district court district where an election is held for the position of municipal judge, the county auditor, prior to the date for filing declarations for the office of district judge, shall designate the proper number of municipal judge positions, commencing with number one, and if there is more than one municipal judge in any municipal department, one or more positions may, at the request of the legislative body of the city, be further designated as municipal traffic judge positions. Only voters of the city shall vote for municipal judges.

CREDIT(S)

[1984 c 258 § 76; 1961 c 299 § 41.]

HISTORICAL AND STATUTORY NOTES

Court Improvement Act of 1984--Effective dates--Severability--Short title--1984 c 258: See notes following RCW 3.30.010.

Laws 1984, ch. 258, § 76, substituted "district court district" for "justice court district"; and substituted "district judge" for "justice of the peace".

LIBRARY REFERENCES

2004 Main Volume

Judges ↻3.
 Westlaw Topic No. 227.
 C.J.S. Judges §§ 12 to 14.

West's RCWA 3.46.070, WA ST 3.46.070

Current through Chapter 1 of the 2008 Regular Session

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"E"

Title 1 ADMINISTRATION AND PERSONNEL

Chapter 1.16 DISTRICT COURT DISTRICTS

1.16.020 Number of judges.

There shall be ten elected full-time judges in Spokane County District. (Res. 02-0403 (part), 2002: Res. 90-1199 Attachment A (part), 1990: Res. 83-0040, 1983: Res. 78-945, 1978: Res. 78-405 Attachment A (part), 1978: Res. 70-234 § 2, 1970: Res. 62-169 § 2, 1962)

[<< previous](#) | [next >>](#)

Title 1 ADMINISTRATION AND PERSONNELChapter 1.16 DISTRICT COURT DISTRICTS

1.16.050 Municipal departments.

All of the judges in the Spokane County District are designated by this plan as a municipal department, and the judges shall function as municipal or police judges. The time and salary of each of these judges shall be allocated between municipal business and state/county business as the board of county commissioners of Spokane County and respective political subdivisions may hereinafter agree to in writing. (Res. 02-0403 (part), 2002: Res. 90-1199 Attachment A (part), 1990: Res. 78-405 Attachment A (part), 1978: Res. 70-234 § 5, 1970: Res. 62-169 § 5, 1962)

[<< previous](#) | [next >>](#)

"F"

Spokane Municipal Code

Monday, February 18, 2008 - 12:04 PM

[Print](#) | [Close Window](#)Font Size: [Increase](#) | [Decrease](#)**Title 05 Municipal Court****Chapter 05.01 Justice Court District****Section 05.01.010 Adoption of Districting Plan**

The Spokane municipal court, by virtue of the resolution of the city council of December 26, 1961, has been established as a department of the Spokane County district court established by Resolutions 62-169 and 70-234 of the board of county commissioners of Spokane County, as amended by Resolution 78-465.

Date Passed: Monday, April 16, 2007

Recodification ORD C34011 Section 1

Spokane Municipal Code

Monday, February 18, 2008 - 12:04 PM

[Print](#) | [Close Window](#)Font Size: [Increase](#) | [Decrease](#)**Title 05 Municipal Court****Chapter 05.01 Justice Court District****Section 05.01.020 Location of Court**

The Spokane municipal court, its courtrooms, chambers and administrative and clerical offices are located in the Spokane County Courthouse and Spokane County/City Public Safety Building complex, as provided by agreement between the City and the county of Spokane from time to time.

Date Passed: Monday, April 16, 2007

Recodification ORD C34011 Section 1

Spokane Municipal Code

Monday, February 18, 2008 - 12:04 PM

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Title 05 Municipal Court

Chapter 05.01 Justice Court District

Section 05.01.030 Time of Effect

The Spokane municipal court shall operate as a department of the Spokane County district court under chapter 3.46 RCW, the justice court districting plan and implementing agreements from February 1, 1962, until such time as abolished by the city council as provided in RCW 3.46.150.

Date Passed: Monday, April 16, 2007

Recodification ORD C34011 Section 1