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No. 84452-6

SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

vs.

RICHARD TRACER

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SUPREME COURT  
STATE OF WASHINGTON  
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REPLY TO ANSWER TO  
PETITION FOR REVIEW

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Thomas E. Weaver  
WSBA #22488  
Attorney for Appellant

The Law Office of Thomas E. Weaver  
P.O. Box 1056  
Bremerton WA 98337  
(360) 792-9345

ORIGINAL

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#### A. Counterstatement of Issues on Review

Does the authority of the trial court to appoint “any prosecutor” upon disability of the prosecutor include the authority to appoint a special deputy prosecutor?

#### B. Argument in Reply

Mr. Tracer filed a timely petition for review raising three “novel” issues that should be decided by this Court. The State has filed an answer. Although the State disagrees with the defendant on the merits of the three issues, the State appears to agree that further review by this Court is merited.

The State has also filed a counter-petition for review raising a fourth issue. This fourth issue, which pertains to the legality of a trial court to appoint a special prosecutor, was fully briefed and decided by the Court of Appeals. While Mr. Tracer agrees with the Court of Appeals on the merits of this fourth issue, he has no objection to this Court granting review of all four issues presented. Granting review of all four issues makes sense because it will allow this Court to consider all the relevant information in order to reach the correct conclusions about this case.

Since the earliest days of Washington Territory, Washington has recognized the authority of the Superior Court to appoint a special prosecutor. The first such statutory enactment was in 1858 and, with minor changes in wording, such a statute has existed unabated since. See

State v. Wallace, 119 Wn. 457, 206 P. 27 (1922) (tracing history of the statute).

In Wallace, the trial court dismissed an indictment obtained by a special prosecutor after the Whatcom County Prosecutor recused himself. The State appealed and this Court reversed. This Court said, “[W]e are of the opinion that there is ample authority vested in the superior court to appoint a special prosecutor in all proper cases. . . [and] the superior court will be presumed to have acted within its authority until the contrary is made to appear.” Wallace at 463-64.

The current statute is found at RCW 36.27.030, which reads:

When from illness or other cause the prosecuting attorney is temporarily unable to perform his duties, the court or judge may appoint some qualified person to discharge the duties of such officer in court until the disability is removed.

When any prosecuting attorney fails, from sickness or other cause, to attend a session of the superior court of his county, or is unable to perform his duties at such session, the court or judge may appoint some qualified person to discharge the duties of such session, and the appointee shall receive a compensation to be fixed by the court, to be deducted from the stated salary of the prosecuting attorney, not exceeding, however, one-fourth of the quarterly salary of the prosecuting attorney: PROVIDED, That in counties wherein there is no person qualified for the position of prosecuting attorney, or wherein no qualified person will consent to perform the duties of that office, the judge of the superior court shall appoint some suitable person, a duly admitted and practicing attorney-at-law and resident of the state to perform the duties of prosecuting attorney for such county, and he shall receive such reasonable compensation for his services as shall be fixed and ordered by the court, to be paid by the county for which the services are performed.

This statute explicitly gives the trial court authority to appoint a special prosecutor when the regular prosecutor becomes unable to perform his or her duties, whether from illness or any other cause.

The court can appoint a special prosecutor to represent a party only when two conditions are met. First, the prosecutor must have the authority and the duty to represent that party in the given matter. Second, some disability must prevent the prosecutor from fulfilling that duty. Osborn v. Grant County, 130 Wn.2d 615, 926 P.2d 911 (1996).

A conflict of interest necessitating the appointment of a special prosecutor can arise when the trial court observes actions that are inconsistent with the prosecutor's duties. Westerman v. Cary, 125 Wn.2d 277, 892 P.2d 1067 (1994). A trial court has the responsibility to ensure the orderly administration of justice and when a prosecutor, by act or omission, fails to act accordingly, the trial court does not error by appointing a special prosecutor. See Westerman at 301. The authority to determine who may or may not appeal as legal counsel in the courts of this state is vested exclusively in the judicial branch of state government, the courts have the inherent power to make decisions accordingly. State v. Cook, 84 Wn.2d 342, 525 P.2d 761 (1974).

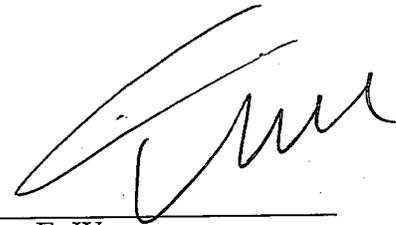
The Court of Appeals concluded that the authority to appoint "any [special] prosecutor" includes the authority to appoint, not just "any" special prosecuting attorney, but also "any" special deputy prosecutor. Although the State makes much of this distinction, Mr. Tracer does not

perceive that this is a legally significant difference. If the prosecuting attorney has recused herself along with her entire office, then it doesn't matter if the special prosecutor is acting as a prosecuting attorney or a deputy prosecutor. Ultimately, the special prosecutor's authority stems from the trial judge's inherent authority to administer the courts and its statutory authority to appoint "any prosecutor" upon a finding of disability. The Court of Appeals was correct in reaching this conclusion.

### C. Conclusion

This Court should grant review of all four issues raised by the parties.

Dated this 4th day of May, 2010.



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Thomas E. Weaver  
WSBA #22488  
Attorney for Appellant