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State of Washington

No. 315193

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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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D. ANGUS LEE, Grant County Prosecuting Attorney, by and through the  
Office of the Grant County Prosecuting Attorney,

*Respondent/Cross-Appellant,*

vs.

JERRY JASMAN, a single person,

*Appellant/Cross-Respondent,*

and

CRAIG MORRISON,

*Appellant/Cross-Respondent.*

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REPLY BRIEF OF APPELLANTS/CROSS-RESPONDENTS

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The Grant County Coroner, Craig Morrison, and the sole employee in his office, Jerry Jasman, Appellants herein, submit the following reply to the brief filed on behalf of Respondent D. Angus Lee, the Grant County Prosecutor:

### **I. REPLY**

**A. Prosecutor Lee Has Abandoned His Cross-Appeal Of The Superior Court's Orders Disqualifying Him As Counsel, And They Now Constitute The Law Of The Case, Including The Court's Determination That Coroner Morrison Is The Real Party In Interest In These Proceedings.**

As noted in the opening brief, Coroner Morrison submitted a request to the Grant County Commissioners for funds to defend and indemnify Mr. Jasman in this quo warranto action because he was acting pursuant to Coroner Morrison's instructions, within the scope of his employment and in good faith, when he signed death certificates. CP 158 (¶ 18) & 163 (Ex. D-4). Coroner Morrison also requested funds for "legal counsel needed by my office associated with this particular matter." CP 163. The commissioners originally approved the request, but subsequently reversed their decision "[b]ased on legal advice from the Prosecuting Attorney's office[.]" CP 164 (Ex. D-5, brackets added).

Prosecutor Lee's simultaneous prosecution of the quo warranto action and his advice to the county commissioners regarding the defense of the action resulted in an unethical conflict of interest, leading the

superior court to disqualify Prosecutor Lee as counsel, even though he remains as the nominal plaintiff. CP 348-50. The court based its ruling in part on the fact that Coroner Morrison is the real party in interest in this quo warranto proceeding. Specifically, the court stated:

***The Court believes that the Coroner is the real party in interest.*** It is clear that the Coroner can hire any individual the elected Coroner chooses, as long as the position and funding have been created by the County Commission. Neither the County Commission nor the Prosecutor has any input as to who the elected Coroner hires to fill the position. *Osborne v. Grant County*, 130 Wn.2d 615 (1996). This is not to say that the Coroner can authorize the employee to engage in illegal activities. That will be decided later. Further, as indicated in *Osborne, supra*, the Grant County Prosecutor does have an obligation to advise the County Coroner and the County Commission. RCW 36.27.020(2). In this instance, the County Coroner went to the County Commission and requested that the Commission provide legal counsel and funds for the Coroner's employee. Although the County Commission approved the request of a County elected official, the Prosecutor then advised the County Commission not to do so. This appears to the Court to be a conflict for the Prosecutor, who has an obligation to advise the County Coroner, to choose instead to advise the County Commission.

CP 349-50 (Decision on Conflict of Interest, at 2:12-3:3, emphasis added).

In denying Prosecutor Lee's motion for reconsideration of this decision, the court further explained:

***The Coroner is not a necessary party, but the Coroner is, indeed, the real party in interest.*** It is the Coroner that is directing his employee what to do and what not to do. Should this Court determine that the *quo warranto*

proceeding is appropriate, and should the Court order that the Defendant cease and desist from doing certain activities required by the elected Coroner, then the Coroner's Office will be required to change in some fashion. This Court believes it is pretty clear in this situation that the Coroner is no less the real party in interest than the State was in the case of *In re Lewis*, 51 Wn.2d 193 (1957), and as the County was in *Westerman v. Cary*, 125 Wn.2d 277 (1994) and *Osborne v. Grant County*, 130 Wn.2d 615 (1996). The Plaintiff surely does not suggest that the elected County Coroner has no interest in this litigation. As an employee, the Defendant does what the elected County Coroner tells him to do. When the County Prosecutor prohibits that employee, whether justified or not, from doing what the elected official tells the employee to do, this Court believes that the elected official has a significant interest in the outcome. If the County Coroner did not have a significant interest in the outcome of this litigation, the Court suspects we would not be here.

CP 354 (Decision on Motion for Reconsideration, at 4:7-23, emphasis added).

Prosecutor Lee originally cross-appealed both of the foregoing decisions.<sup>1</sup> However, in his response brief before this Court he does not mention the cross-appeal, let alone assign error or provide any argument. *See* RAP 10.3(a)(4) (requiring assignments of error); RAP 10.3(a)(6) (requiring argument). The cross-appeal is therefore deemed to be abandoned. *See Borish v. Russell*, 155 Wn.App. 892, 899 n.4, 230 P.3d 646 (2010) (deeming cross-appeal abandoned in the absence of briefing), *rev. denied*, 170 Wn.2d 1024 (2012); *Frank Coluccio Constr. Co. v. King*

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<sup>1</sup> The notice of cross-appeal is being transmitted to the Court pursuant to a second supplemental designation of Clerk's Papers.

*County*, 136 Wn.App. 751, 761 n.3, 150 P.3d 1147 (2007) (deeming cross-appeal abandoned in the absence of assignments of error). The Court should affirm the superior court's disqualification orders on this basis.

In addition, given that the cross-appeal has been abandoned, the superior court's orders are now the law of the case. *See State v. Sponburgh*, 84 Wn.2d 203, 207-08, 525 P.2d 238 (1974) (holding unappealed trial court order is law of the case); *Tornetta v. Allstate Ins. Co.*, 94 Wn.App. 803, 809, 973 P.2d 8 (relying on *Sponburgh*), *rev. denied*, 138 Wn.2d 1012 (1999). While the orders do not resolve the merits of the quo warranto action, they have a direct bearing on the question of whether a special prosecutor should be appointed to defend the action.<sup>2</sup>

**B. Prosecutor Lee Fails To Address The Statements In *Westerman v. Cary* And The Holding Of *In Re Lewis* That A Special Prosecutor Should Be Appointed To Represent County Officers Who Are Real Parties In Interest In Litigation, When The County Prosecutor Cannot Provide Representation.**

The parties agree regarding the standard for appointment of a special prosecutor under RCW 36.27.030; namely, the prosecutor must have a duty to provide representation, which he or she is prevented from fulfilling because of a conflict of interest or other disability. *See Resp. Br.*, at 17 (quoting two-part test from *Osborn v. Grant County*, 130 Wn.2d 615,

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<sup>2</sup> The Court's determination that Coroner Morrison is the real party in interest is consistent with, and bolstered by, the order granting his motion to intervene and aligning him as a defendant with Mr. Jasman. *See* CP 290-91. Coroner Morrison's intervention has not been appealed and is also the law of the case.

624-25, 926 P.2d 911 (1996)). Prosecutor Lee does not contest the fact that he suffers from a conflict of interest that would prevent him from representing Coroner Morrison or Mr. Jasman in this matter, a point that seems to be confirmed by the abandonment of his cross-appeal. *See* Resp. Br., at 15-21. The focus of the dispute appears to be whether Prosecutor Lee had a duty to provide representation in this case. *See id.*

In making his argument regarding the duty to provide representation, Prosecutor Lee all but ignores the principal case on which Coroner Morrison and Mr. Jasman rely, *Westerman v. Cary*, 125 Wn.2d 277, 892 P.2d 1067 (1994). *See* App. Br., at 31-32. The only acknowledgement of *Westerman* appears in a footnote to Prosecutor Lee's brief, where he cites the case for the uncontroversial proposition that a conflict of interest prevents a prosecutor from fulfilling his or her duty of representation. *See* Resp. Br., at 16 n.16.

However, as noted in the Coroner Morrison's and Mr. Jasman's opening brief, *Westerman* recognized that a county prosecutor may have a duty to defend county officers—district court judges in that case—who are real parties in interest in litigation:

Pursuant to this statute<sup>[3]</sup> the prosecutor has a duty to advise county officers. *In re Lewis*, 51 Wash.2d 193, 201, 316

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<sup>3</sup> The referenced statute is RCW 36.27.020, which provides that the prosecuting attorney is legal adviser to all county officers (subsection 2) and required to appear for and represent the county in litigation (subsection 3).

P.2d 907 (1957). A superior court judge is both a state and a county officer. *State ex rel. Edelstein v. Foley*, 6 Wash.2d 444, 448, 107 P.2d 901 (1940). Under this statute, the prosecutor also has a “duty to appear for and represent the state and county in all proceedings in which they may be parties”. *In re Lewis*, 51 Wash.2d at 201, 316 P.2d 907. It is not clear from RCW 36.27.020 whether this duty extends to officials who are sued in their official capacity. It cannot be denied that the District Court and its judges are an arm of the County and that the County, while not named, is the real party in interest because it is the organ ultimately impacted by detention decisions. *See In re Lewis*, at 201, 316 P.2d 907. However, we need not decide this issue today.

125 Wn.2d at 299 (brackets added).

Similarly, in the principal case relied upon by *Westerman*, *In re Lewis*, 51 Wn.2d 193, 201, 316 P.2d 907 (1957), the Supreme Court held that a county prosecutor has a duty to represent county officers who are the real party in interest in litigation—in that case a probation officer who was the petitioner in a juvenile delinquency proceeding, acting on behalf of the state. The Court explained:

It is next contended that the court exceeded its authority when it appointed counsel to represent the petitioner, a probation officer. Probation officers are county officers (*State ex rel. Richardson v. Clark County*, 186 Wash. 79, 56 P.2d 1023), and it is the duty of the prosecutor to advise such officers. It is also his duty to appear for and represent the state and county in all proceedings in which they may be parties. RCW 36.27.020. It cannot be denied that the state, while it is not named as a party, is the real party in interest in a juvenile court proceeding, for if a child is found to be dependent or delinquent, it is made a ward of the state ....

When in a juvenile court proceeding (which is not intended by the legislature to be adversary in nature) errors of law are urged and the jurisdiction of the court assailed, the probation officer, untrained in and unacquainted with such technical questions, cannot be expected to aid the court in their solution. Nevertheless the court must dispose of these questions. If the relators are correct in their contention that the court is not to be assisted by the prosecuting attorney and has no inherent power to appoint an attorney in such circumstances, it must resolve them without the assistance of counsel since the juvenile court act makes no provision for the employment of legal counsel for the court. The effective and orderly conduct of juvenile hearings is a matter with which the state and county are both deeply concerned. The letter and spirit of the statute prescribing the duties of the prosecuting attorney are broad enough to include the duty to assist the court in a juvenile court proceeding when his services are needed.

When the prosecutor declined to appear, the court was authorized to appoint a special prosecutor, under RCW 36.27.030, which provides for the appointment of such a prosecutor when the prosecutor fails, from sickness or other cause, to attend court. The relators insist that this appointment increased their burden. Of course, where only one party is represented by counsel, the burden upon that party is lighter than it is where all parties are represented. However desirable the right to be free of opposing counsel may be, the law does not espouse such a right, for obvious reasons.

51 Wn.2d at 201-02 (ellipses added); *accord Osborn*, 130 Wn.2d at 625 (citing *Lewis* with approval for the proposition that “courts have required prosecutors to represent county officers when the county or State, though unnamed in the action, was a real party in interest”).

In this way, *Westerman* expressly contemplates and *Lewis* seems to require the appointment of a special prosecutor to represent county officers who are real parties in interest in litigation. Because Coroner Morrison is the real party in interest in this quo warranto action, as explained in the superior court's orders disqualifying Prosecutor Lee and denying reconsideration, counsel should be appointed as a special prosecutor. *See* CP 354 (Decision on Motion for Reconsideration, at 4:13-14, stating "it is pretty clear in this situation that the Coroner is no less the real party in interest than the State was in the case of *In re Lewis* ... and as the County was in *Westerman*").

The rationale for appointing a special prosecutor stated in *Lewis* is equally applicable here. The Court explained that counsel for the probation officer was warranted in juvenile court proceedings because he was "untrained in and unacquainted with" technical legal questions, and could not "be expected to aid the court in their solution." *See* 51 Wn.2d at 201. In the same way, technical legal questions regarding the meaning of constitutional and statutory provisions relating to county office and officers make it difficult, if not impossible, for non-lawyers to represent themselves in this case.

Rather than dealing with *Westerman* and *Lewis*, Prosecutor Lee cites three other cases for the proposition that "[a] prosecuting attorney is

not required to appear for or represent a county officer in a legal action.” See Resp. Br., at 17-18 (citing *Hoppe v. King County*, 95 Wn.2d 332, 340, 622 P.2d 845 (1980); *Fisher v. Clem*, 25 Wn.App. 303, 307, 607 P.2d 326 (1980); and *Bates v. School Dist.*, 45 Wash. 498, 502-03, 88 Pac. 944 (1907)). All three cases are distinguishable.

*Hoppe* is distinguishable because a county officer (assessor) who lacked standing wanted to initiate litigation against the county, seeking the appointment of a special prosecutor after the prosecutor refused his demand to file suit. See 95 Wn.2d at 339-340. Because the officer lacked standing, the Court determined that the prosecutor had no duty to provide representation, and the appointment of a special prosecutor was unwarranted. See *id.* *Westerman* distinguished *Hoppe* on this basis. See *Westerman*, 125 Wn.2d at 300 (stating “the official in *Hoppe* requested that the prosecutor’s office commence an action which the assessor had neither the authority nor the duty to pursue”).

*Clem* is distinguishable on similar grounds. A county officer (district court judge) wanted to initiate litigation against the board of county commissioners, seeking a writ of mandamus directing the prosecutor to file suit, or in the alternative for the appointment of a special prosecutor to do so. See 25 Wn. App. at 304-05. The court affirmed denial of both the writ of mandamus and the appointment of a special prosecutor

on grounds that a prosecutor has discretion whether to initiate litigation on behalf of county officer. *See id.* at 307.

Unlike *Hoppe* and *Clem*, Coroner Morrison and Mr. Jasman are seeking appointment of a special prosecutor to *defend* rather than initiate litigation. In so doing, they are seeking to uphold the prerogatives of the elected county coroner to manage his own independent department of county government rather interfering with the prosecutor's discretion to initiate litigation or the operation of any other county department. As recognized by the superior court, this quo warranto action infringes on the elected coroner's freedom and responsibility to hire employees and delegate tasks to them, and, as explained by Coroner Morrison, "it is contrary to the interests of the coroner's office and the people of Grant County who [he and Mr. Jasman] are obligated to serve." *See* CP 205 (¶¶ 5-8, brackets added).

*Bates*, the remaining case cited by Prosecutor Lee, is distinguishable because it does not involve a county officer. As a defense to a lawsuit by a prosecutor seeking payment of fees, a school district argued that the prosecutor was legally obligated to provide representation without any compensation other than what was paid to him by the county. *See* 45 Wash. at 501-03. The Court held that, while a school district is a legal subdivision of the county, it is a separate and distinct municipal

corporation. *See id.* at 502. As a result, in the absence of a statutory duty to defend litigation against the school district, the prosecutor was entitled to payment of fees. *See id.* In contrast to *Bates*, Coroner Morrison is a county officer, and Prosecutor Lee has a statutory duty to provide a defense under RCW 36.27.020(3) and the authority of *Westerman* and *Lewis*. Because a conflict of interest prevents him from providing this defense, a special prosecutor should be appointed.<sup>4</sup>

**C. Prosecutor Lee’s Attempt To Limit *Nelson v. Troy* Is Based On A Misreading Of The Case, And Creates An Incongruity Between The Constitutional And Statutory Provisions Creating County Offices And Officers, On One Hand, And The Constitutional And Statutory Provisions Regarding The Removal Of Such Officers From Office, On The Other.**

Prosecutor Lee recognizes the holding of *Nelson v. Troy*, 11 Wash. 435, 39 Pac. 974 (1895), that a deputy is not a county officer, but attempts to limit the case to “a narrow interpretation of a state constitutional

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<sup>4</sup> *Bates* indicates that a statutory duty to provide representation may not be necessary to find a duty of representation:

In this state the prosecuting attorney is also the county attorney, and the relations of that officer to the county may be such as possibly require him to appear in behalf of the county in some instances, even if the specific duty may not be particularly and expressly prescribed by statute. If so, the duty arises out of the obligations he has assumed as an officer of the county to discharge the general functions of an attorney in its behalf.

45 Wash. at 501-02; *accord Lewis*, 51 Wn.2d at 201-02 (quoting this passage from *Bates* with approval); *Fuqua v. Fuqua*, 88 Wn. 2d 100, 102, 558 P.2d 801 (1977) (quoting *Bates* and *Lewis* with approval, to support the statement that “[t]he authority of the prosecuting attorney to appear in actions which present issues concerning county officials and their operation of county departments has been broadly construed in this state”).

provision” that “provides no guidance” in this case. *See* Resp. Br., at 10-11. He is wrong on both counts. The Court in *Nelson* was not employing a “narrow interpretation” of county offices and officers, but rather the “common, ordinary, and accepted meaning” of these terms. *See* 11 Wash. at 441-42. This is the correct way to interpret undefined constitutional and statutory language. *See, e.g., League of Educ. Voters v. State*, 176 Wn.2d 808, 821, 295 P.3d 743 (2013).

Furthermore, Prosecutor Lee’s briefing seems to suggest that the constitutional provision at issue in *Nelson* relates solely to the compensation of county officers. *See* Resp. Br., at 11. In actuality, the provision creates certain county offices and provides for the creation of other county offices by the legislature in all relevant particulars, including election, duties, terms of offices, and accountability, in addition to compensation. *See* Wash. Const. Art. XI, § 5. Outside of this constitutional provision, no other county offices exist or can be created.<sup>5</sup> The legislature’s authorization for the appointment of deputies and employees in RCW 36.16.070 is constitutional only because such deputies and employees are not county officers, as the Court held in *Nelson*. It is difficult to imagine how the Court can decide whether a deputy or

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<sup>5</sup> *See* App. Br., at 16-17 (citing *State ex rel. Egbert v. Blumberg*, 46 Wash. 270, 89 Pac. 708 (1907); *State ex rel. Hamilton v. Troy*, 190 Wash. 483, 68 P.2d 413 (1937); *State ex rel. Johnson v. Melton*, 192 Wash. 379, 73 P.2d 1334 (1937)).

employee holds county office or can be considered a county officer without taking its guidance from the constitutional and statutory provisions creating county offices and officers in the first place. Prosecutor Lee can maintain that Mr. Jasman is a county officer only by ignoring these provisions.

In advocating for a different meaning of county offices and officers than the one adopted in *Nelson*, Prosecutor Lee creates an incongruity between the constitutional and statutory provisions creating county offices and officers, *see* Wash. Const. Art. XI, § 5; Ch. 36.16. RCW; and the provisions regarding the removal of such officers from office, *see* Wash. Const. Art. V, § 2; RCW 9.92.120. If Prosecutor Lee's interpretation were correct, deputies and employees would *not* be considered officers under Wash. Const. Art. XI, § 5 and Ch. 36.16 RCW, but they *would* be considered officers under Wash. Const. Art. V, § 2 and RCW 9.92.120. This interpretation is contrary to the normal rule that constitutional and statutory provisions in *pari materia* should be construed in harmony with each other. *See, e.g., State ex rel. O'Connell v. Kramer*, 73 Wn. 2d 85, 88, 436 P.2d 786 (1968); *State ex rel. Pennock v. Coe*, 42 Wn.2d 569, 577, 257 P.2d 190 (1953). Prosecutor Lee's attempt to distinguish and/or limit *Nelson* should therefore be rejected.

**D. Prosecutor Lee’s Argument Based On The Ostensible Purpose of The Constitutional And Statutory Provisions Regarding Removal Of County Officers Does Not Account For The Language Of These Provisions, From Which The Purpose Should Be Ascertained And By Which The Purpose Should Be Constrained.**

Prosecutor Lee argues “the public policy that underlies RCW 9.92.120 requires the statute to be construed as including deputies.” Resp. Br., at 11. He quotes from *State ex rel. Zempel v. Twitchell*, 59 Wn.2d 419, 430-31, 367 P.2d 985 (1962), which describes the purpose underlying the constitutional and statutory provisions regarding removal of county officers as “furtherance of the public interest in good government.” Resp. Br., at 9. In the context of the *Zempel* decision, however, this public policy is limited to elected office, and does not reach deputies and employees hired pursuant to RCW 36.16.070. *Zempel* involved an elected county officer, “the duly elected sheriff for Snohomish County.” 59 Wn.2d at 421. The passage quoted by Prosecutor Lee is specifically phrased in terms of officers who are “elected,” rather than their deputies or employees. *See* Resp. Br., at 9 (quoting *Zempel*, at 430-31). This limitation on the scope of the public policy stems from the fact that non-elected deputies and employees may be fired by the elected officers who employ them, whereas the elected officers may only be removed as provided by law. *Compare* RCW 36.16.070 (providing “[t]he officer

appointing a deputy or other employee ... may revoke each appointment at pleasure), *with* Wash. Const. Art. V, § 2 (providing for removal of officers only “in such manner as may be provided by law”). In this way, the case on which Prosecutor Lee relies to support his policy-based argument, actually undercuts the argument.

In the abstract, the policy-based argument proves too much. Taken to its logical conclusion, the ostensible policy in “furtherance of the public interest in good government” would preclude anyone convicted of a crime from serving in any government position, even a relatively low-level employee that Prosecutor Lee seems to concede would not be subject to forfeiture of his or her position. *See* Resp. Br., at 7 n.8 (making distinction between deputies and other employees).

In the context of a particular case, the policy-based argument might not be applicable, where, for example, the positive characteristics of the employee outweigh the existence of a conviction. That is the case here, where Prosecutor Lee has never disputed that Mr. Jasman’s experience, training and abilities make him the most qualified person in the area to perform the job. *See* CP 155 (¶ 3) & 205 (¶ 6).

Ultimately, the policy-based argument does not resolve the meaning of the words “officer” and “office,” as used in RCW 9.92.120. As

the Supreme Court did in *Nelson*, this Court should give these words their common, ordinary and accepted meaning.<sup>6</sup>

**E. The Alternate Definitions Of Office And Officer Proposed By Prosecutor Lee, Based Upon An Out-Of-Date Treatise And A Repealed Statute, Should Be Rejected As Inapplicable To RCW 9.92.120 And Contrary To the Common, Ordinary And Accepted Meaning Of The Words.**

Prosecutor Lee cites an out-of-date treatise for the proposition that, “being legally authorized to act for an in place of the principal, the deputy is a public officer.” Resp. Br., at 7 (citing 3 Eugene McQuillin, *The Law of Municipal Corporations* § 12.33, at 234 (3d ed. 2001)). Section 12:33 of the current version of the treatise relates to polling places for municipal elections. *See* 3 Eugene McQuillin, *The Law of Municipal Corporations* § 12:33 (3d ed., updated 2013). A different section of the current version contains a proposition similar to the one cited by Prosecutor Lee, albeit based on four cases from Indiana, Kentucky, Oklahoma and Texas. *See id.* § 12:62 & n.14. The treatise acknowledges that the words “officer” and

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<sup>6</sup> Prosecutor Lee claims “[t]he Washington Supreme Court has also determined that the strong public policy that underlies RCW 9.92.120 requires the statute to be construed as including deputies.” Resp. Br., at 12. The Court has held no such thing. In support of his claim, Prosecutor Lee cites *Hubbard v. Spokane County*, 146 Wn.2d 699, 702, 50 P.3d 602 (2002), which held that RCW 42.23.070(1), a section of the Code of Ethics for Municipal Officers prohibiting municipal officers from using their position to secure special privileges, provided part of the necessary public policy to support a claim for wrongful discharge in violation of public policy brought by director of a county planning department against the county. *Hubbard* did not cite RCW 9.92.120 or otherwise address the policy underlying the statute. In their opening brief, Coroner Morrison and Mr. Jasman have already explained how the definition of “officer” in the Code of Ethics for Municipal Officers, RCW 42.23.020(1), departs from the ordinary meaning of the term and is inapplicable to RCW 9.92.120. *See* App. Br., at 26-27. Prosecutor Lee has not addressed these points.

“office” have been defined in various ways. *See id.* § 12.58. It does not cite any Washington authority that would undermine the holding of *Nelson*, 11 Wash. at 442, that “[a] deputy clerk is not a county officer,” which has subsequently been cited with approval by the Supreme Court in *State ex rel. McIntosh v. Hutchinson*, 187 Wash. 61, 63, 59 P.2d 1117 (1936), for the proposition that “[a]n employee or a deputy is not an officer,” and by the Court of Appeals in *State v. Korba*, 66 Wn. App. 666, 669, 832 P.2d 1346 (1992), for the proposition that “neither a deputy nor an employee is a public officer.”<sup>7</sup>

Next, Prosecutor Lee argues that a repealed statutory definition of “public officer” should “prevail” over the common, ordinary and accepted meaning of the phrase. *See Resp. Br.*, at 14-15 (Laws of 1909, ch. 249,

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<sup>7</sup> In equating a deputy with an officer, Prosecutor Lee also cites *Smith v. Board of Walla Walla County Comm’rs*, 48 Wn. App. 303, 309, 738 P.2d 1076 (1987). *See Resp. Br.*, at 7 n.8. *Smith* is unhelpful because the case did not decide whether a deputy is an officer. The court merely held that a “budget director” for county commissioners was neither an officer nor a deputy under former RCW 36.22.110, which prohibits auditors or deputy auditors from holding any other county officer or deputy position. *See Smith*, 48 Wn. App. at 308-09.

To further support the claim that a deputy is an officer, Prosecutor Lee suggests that deputy coroners must take an oath of office, citing RCW 36.16.060. *See Resp. Br.*, at 3 n.6 & 8. The cited statute does not support this suggestion. It merely describes the location where an oath must be filed, if and when one is required. *See RCW 36.16.060*. Deputies and employees are not generally required to take an oath of office. RCW 36.16.040 limits the oath requirement to “[e]very person elected to county office.” RCW 36.16.070, which provides for the appointment of deputies and employees, does not mention an oath. Although a county officer presumably has the authority to require an oath of office from deputies and employees, the only statutorily required oaths are for deputy or assistant county assessors. *See RCW 36.21.011*. The fact that oaths are specifically required by statute for deputy or assistant assessors is indicative that they are not generally required for other deputies or employees.

§ 51(24), *repealed by* Laws of 1975, 1st Ex. Sess., ch. 260, § 9A.92.010(1)). As pointed out in Coroner Morrison's and Mr. Jasman's opening brief, the effect on cases arising after repeal of a statute is the same as if the statute had never existed, and, in this regard, it is immaterial whether the repeal was intentional or inadvertent. *See* App. Br., at 22 n.12 (citing *Palermo at Lakeland, LLC v. City of Bonney Lake*, 147 Wn.App. 64, 85, 93 P.2d 168 (2008), *rev. denied*, 166 Wn.2d 1003 (2009); *State ex rel. Hagen v. Chinook Hotel, Inc.*, 65 Wn.2d 573, 576-78, 399 P.2d 8 (1965)). Prosecutor Lee does not address this point.

Instead, he argues that the repealed statutory definition should apply to RCW 9.92.120 because it deals with crime and punishment, based on the authority of *Korba*, 66 Wn. App. at 670. *See* Resp. Br., at 15. In making this argument, he mischaracterizes RCW 9.92.120 as dealing with crime and punishment. Earlier in his own brief, Prosecutor Lee quotes a passage from *Zempel*, 59 Wn.2d at 430, which states that “[v]acancy in, or removal from, office as a result of a conviction of a public officer is not a punishment.” *See* Resp. Br., at 9. He does not try to reconcile the quotation from *Zempel* with his argument. Per *Zempel*, forfeiture of office is not a punishment. Furthermore, a quo warranto action is a civil, not criminal, proceeding. *See State ex rel. Hamilton v. Standard Oil Co.*, 190 Wash. 496, 501, 68 P.2d 1031 (1937).

Prosecutor Lee also misapprehends the *Korba* decision. The court did not apply the repealed statutory definition of “officer” to RCW 9.92.120, but rather held that a jury instruction based on the Criminal Code definition of “officer,” RCW 9A.04.110(13), was proper in a case involving the crime of injury to and misappropriation of a public record, RCW 40.16.020. *See* 66 Wn.App. at 670. The defendant argued that the Criminal Code definition was inapplicable because it was adopted after the statute making injury to and misappropriation of a public record a crime. *See id.* The court rejected this argument because the repealed statutory definition was in effect beforehand. *See id.* There was no suggestion by the parties or the court that the Criminal Code definition was otherwise inapplicable according to its terms. *See id.* As pointed out in Coroner Morrison’s opening brief, however, the Criminal Code definition is inapplicable by its terms to RCW 9.92.120. *See* App. Br., at 25-26. The definition is limited to Title 9A and “offenses defined by this title or another statute.” RCW 9A.04.090. Because forfeiture of public office is neither part of Title 9A nor an offense, the Criminal Code definition of “officer” is inapplicable here.

**F. The Implicit Argument Based On Prosecutor Lee’s Discussion Of The Admissibility And Importance Of Death Certificates— That Death Certificates Signed By Mr. Jasman Are Inadmissible In Court Or Otherwise Invalid—Begs The Question Of Whether He Is Legally Entitled To Sign Them.**

Prosecutor Lee contends that “[a] death certificate that is signed by someone who is not authorized by law to complete the document is inadmissible in court.” Resp. Br., at 6. Elsewhere, he discusses “[t]he extremely important function of state vital statistics.” Resp. Br., at 13-14. The implicit argument, that death certificates signed by Mr. Jasman are inadmissible in court or otherwise invalid, begs the question of whether Mr. Jasman is authorized by law to sign death certificates.<sup>8</sup> Because RCW 9.92.120 poses no impediment to Mr. Jasman, there should be no concern about the admissibility or validity of death certificates that Coroner Morrison directs him to sign.

## II. CONCLUSION

The Court should reverse summary judgment granted in Prosecutor Lee’s favor, grant summary judgment in Coroner Morrison’s and Mr. Jasman’s favor, appoint their counsel as a special prosecutor, and award

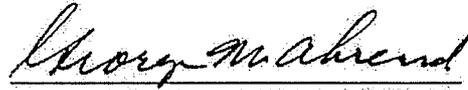
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<sup>8</sup> Prosecutor Lee cites *State v. Bradfield*, 29 Wn.App. 679, 685-86, 630 P.2d 494, *rev. denied*, 96 Wn.2d 1018 (1981), which held that a pre-signed blank death certificates later filled in by law enforcement is inadmissible, illustrates the importance of having the person who investigates a death and has personal knowledge of the facts sign the certificate. This is one of the reasons why Coroner Morrison directed Mr. Jasman to sign death certificates, because it is not always possible for Coroner Morrison to investigate each death personally in his two-person office. CP 156 (¶ 7).

attorney fees and costs incurred in the superior court an on appeal pursuant  
to RCW 36.27.030 and RAP 18.1.

Submitted this 12<sup>th</sup> day of ~~June~~  
*August*, 2013.

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Attorneys for Appellants

## CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On August 12, 2013, I served the document to which this is annexed as follows:

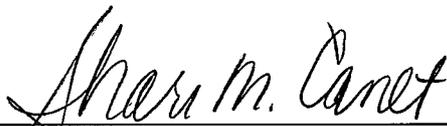
By email and First Class Mail, postage prepaid, as follows:

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Signed at Ephrata, Washington on August 12, 2013.

  
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Shari M. Canet, Paralegal