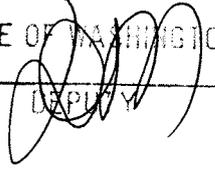


FILED  
COURT OF APPEALS  
DIVISION II

NOS. 37812-4-II  
37892-2-II  
37939-2-II

08 DEC 10 PM 12:39

STATE OF WASHINGTON  
BY  DEPUTY

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, Appellant,

v.

RICHARD CHARLES TRACER, Respondent.

---

STATE OF WASHINGTON, Appellant,

v.

RICHARD CHARLES TRACER, Respondent,

NOAH HARRISON, Real Party in Interest

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR JEFFERSON COUNTY

---

REPLY BRIEF

---

Juelanne B. Dalzell  
Prosecuting Attorney

PAMELA B. LOGINSKY  
Special Deputy Prosecuting Attorney  
206 10th Ave. SE  
Olympia, WA 98501  
(360) 753-2175

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## I. INTRODUCTION

The State of Washington will not repeat the arguments it previously set forth in the Brief of Appellant in this reply brief. This Reply Brief will only deal with gaps in Richard Tracer's arguments or with specific matters in his brief which seem in most urgent need of correction. The State's decision not to address certain arguments made by Tracer in his brief should not be considered as an acknowledgment of the validity of Tracer's analysis.

## II. ARGUMENT

### A. The State's Notices of Appeal Were All Properly Filed

Tracer contends that the State's appeals are not properly before this Court. In this, he errs.

The first notice of appeal was filed on June 2, 2008. CP 127. This notice of appeal challenges the judgement and sentence entered by the court on May 9, 2008. RAP 2.2(b)(1) authorizes the State to appeal as a matter of right "[a] decision that . . . determines the case other than a judgment or verdict of not guilty." A judgment of "guilty" clearly falls within this description.

The second notice of appeal was filed on June 13, 2008. CP 180. This notice of appeal challenges the denial of the State's motion to vacate judgment that was entered on June 13, 2008. CP 178. This notice of appeal was "a belt and suspenders" notice, since the State's motion for

reconsideration was timely filed and RAP 2.4(f) automatically brings the superior court's ruling on this motion to the appellate court by virtue of the timely notice of appeal from the judgment and sentence.

The third notice of appeal was filed on June 27, 2008. CP 185. This notice of appeal challenged the attorney's fees awarded to Noah Harrison in an order dated June 27, 2008. CP 184. This notice of appeal was also "a belt and suspenders" notice, since the appeal from the merits of the judgment and sentence of guilt brings up for review an award of attorney fees entered after the appellate court accepts review of the decision on the merits. *See* RAP 2.4(g). Furthermore, the appeal from the award of attorneys fee is civil, rather than criminal. As such, the notice of appeal was authorized by RAP 2.2(a)(13).

Finally, all three of the above notices of appeal were timely filed. *See* RAP 5.2(a) and (b). If the State incorrectly designated the notices as "notices of appeal", RAP 5.1(c) provides that the notices shall be given the same effect as a notice for discretionary review. As the brief of appellant clearly establishes, discretionary review of this matter would be appropriate pursuant to RAP 2.3(b)(3), as Judge Verser's appointment of an unqualified attorney to represent the State of Washington, without prior notice to the elected prosecuting attorney and when the elected prosecuting attorney was not barred from representing the State of Washington is a departure from the

usual and accepted course of judicial proceedings as to call for review by this Court. Review is also appropriate pursuant to RAP 2.3(b)(2) as Judge Verser's control over the prosecution through the appointment of a special prosecutor substantially altered the status quo and substantially limits the ability of the State of Washington to act. The Court, therefore, should reach the merits of the important issues raised in this appeal

**B. Double Jeopardy Does Not Bar The Relief the State is Seeking**

Tracer contends that the State is barred from appealing in this case because any appeal will place him in double jeopardy. *Brief of Respondent*, at 10. Tracer's argument fails, however, to acknowledge the doctrine of "misplea."

Where a trial ends with the discharge of a jury before verdict because of some compelling circumstance, double jeopardy does not bar a retrial under both the Fifth Amendment and Const. art. I, § 9. Retrial is only necessary under this standard where, taking all of the circumstances into consideration, there is a high degree of manifest necessity to avoid defeating the ends of public justice. *Arizona v. Washington*, 434 U.S. 497, 506, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978); *State v. Jones*, 97 Wn.2d 159, 641 P.2d 708 (1982).

Although Washington has not addressed this issue yet, a number of other jurisdictions recognize that a similar finding of manifest necessity authorizes a court to set aside a guilty plea.<sup>1</sup> *See, e.g., State v. Horrocks*, 2001 UT App. 4, 17 P.3d 1145 (2001). Just as certain grounds for a mistrial have been held to be insufficient to allow for a retrial, certain claimed irregularities have been found insufficient to justify a misplea. *See generally State v. Bernert*, 2004 UT App. 321, 100 P.3d 221 (2004) (court changes its mind on the basis of information in the presentence report that did not reveal a fraud on the court); *State v. Casey*, 2002 UT 29, 44 P.3d 756 (2002) (violation of a crime victim's statutory and constitutional right to address the court). These cases are consistent with Washington case law that prohibits the vacation of a guilty plea over the defendant's objection based upon public pressure and publicity, victim dismay, or a belief that the standard sentencing range is inadequate. *State v. Tourtellotte*, 88 Wn.2d 579, 564 P.2d 799 (1977); *State v. Rhode*, 56 Wn. App. 69, 782 P.2d 567 (1989).

Our courts have not yet determined what grounds for vacating a guilty plea are sufficiently compelling to overcome double jeopardy. *See Tourtellotte*, 88 Wn.2d at 582 (finding it unnecessary to resolve the double jeopardy claim). Other courts that have considered whether there are any

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<sup>1</sup>Jeopardy attaches in a guilty plea proceeding when the court accepts the plea. *State v. Higley*, 78 Wn. App. 172, 179, 902 P.2d 659, *review denied*, 128 Wn.2d 1003 (1995) (citing *State v. Crisler*, 73 Wn. App. 219, 223, 868 P.2d 204 (1994), *affirmed sub nom. State v. Gocken*, 127 Wn.2d 95, 896 P.2d 1267 (1995)).

sufficiently compelling grounds for vacating a guilty plea have answered the question in the affirmative in two circumstances.

First, a declaration of a misplea is appropriate and the vacation of a guilty plea is authorized when the court that accepted the defendant's guilty plea lacked the authority to do so. *See, e.g., State v. Singleton*, 340 Ark. 710, 13 S.W.3d 584 (2000) (double jeopardy did not bar trial as the court that accepted the defendant's guilty plea did not have the authority to do so as the State did not consent to a waiver of a jury as required by state law); *Genesee Prosecutor v. Genesee Circuit Judge*, 391 Mich. 115, 215 N.W.2d 145 (1974) (double jeopardy does not bar prosecution as the judge did not have the authority to accept a guilty plea, over the prosecutor's objection, to a lesser included offense); *Cummings v. Koppell*, 212 A.D.2d 11, 627 N.Y.S.2d 480 (N.Y. App. Div.), *lv denied*, 86 N.Y.2d 702, 655 N.E.2d 703, 631 N.Y.S.2d 606 (1995) (double jeopardy did not bar trial on felony as local criminal court did not have subject matter jurisdiction to accept guilty pleas and dismiss charges after actions of a grand jury or superior court); *People v. Brancoccio*, 189 A.D.2d 525, 596 N.Y.S.2d 856 (1993) (double jeopardy did not bar prosecution of defendant as the court that accepted the guilty plea to the misdemeanor was divested of jurisdiction when the court was advised that the prosecutor intended to present charges to the grand jury; people's "acquiescence" or "concurrence" in the plea does not mandate a different

conclusion); *People v. Anderson*, 140 A.D.2d 528, 528 N.Y.S.2d 614 (1988) (double jeopardy did not bar prosecution for multiple felonies as the court that accepted a guilty plea to a misdemeanor in satisfaction of the felonies in the complaint had been divested of jurisdiction to accept the plea); *see also State v. Brown*, 709 N.W.2d 313 (Minn. App. 2006) (granting the State's appeal and remanding for trial where the trial court accepted a guilty plea to a lesser included offense over the State's objection).

Second, a declaration of a misplea is allowed when some fraud, deception, or misconduct by one party leads to the acceptance of the plea agreement by the other party or the court. *Moore v. State*, 71 Ala. 307, 311 (1882); *Horrocks*, 17 P.3d at 1151. The touchstone of this exception is an attempt by the defendant to plead to a relatively minor offense to shield himself from a prosecution duly conducted by the people. Older cases generally applied this exception when a defendant walks into court, accuses himself of a fairly minor offense or arranges for someone else to accuse him of a fairly minor offense, and then pleads guilty to this minor offense with the expectation of claiming double jeopardy when felony charges are lodged.<sup>2</sup> *Drake v. State*, 68 Ala. 510 (1881) (defendant appeared before the notary, without complaint having been made, or process issued against himself, and

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<sup>2</sup>A defendant's misrepresentation to a judge regarding the outcome of an appeal that resulted in the entry of a guilty plea to a misdemeanor was also sufficient to overcome double jeopardy concerns. *See People v. Woods*, 84 Cal. 441, 23 P. 1119 (1890).

pled guilty to violations that he confessed to committing); *DeBord v. People*, 27 Colo. 377, 61 P. 599 (1900) (defendant voluntarily went before the justice of the peace to confess guilt of assault); *Shideler v. State*, 129 Ind. 523, 28 N.E. 537 (1891) (defendant bribed prosecutor); *Watkins v. State*, 68 Ind. 427 (1879) (son arranged for father to charge him before the justice of the peace); *State v. Smith*, 57 Kan. 673, 47 P. 541 (1897) (defendant requested the filing of a charge before the justice of the peace); *State v. Little*, 1 N.H. 257 (1818) (defendant procured conviction of minor offense); *Richards v. State*, 109 Tex. Crim. 403, 5 S.W.2d 141 (1928) (defendant arranged to be charged with drunkenness by the attorney who subsequently represented him on the more severe offense). Such “puppet-show” prosecutions are declared a nullity because the state is not a party in fact.<sup>3</sup> *Warriner v. State*, 3 Tex. Ct. App. 104, 106 (1877).

Modern cases have applied this exception when defendants mislead courts into believing that other charges are not offing, manipulated cases simultaneously pending in multiple jurisdictions, or when the defendant misled the officer into issuing a citation for an incorrect offense. *See, e.g., People v. Hartfield*, 11 Cal. App. 3d 1073, 90 Cal. Rptr. 274, 278-79 (1970) (defendant accelerated hearing on misdemeanor charge in order to plead

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<sup>3</sup>This rule is consistent with the modern “sham” exception to double jeopardy following an acquittal at trial by a bribed judge. *See, e.g., Aleman v. Judges of the Circuit Court*, 138 F.3d 302 (7th Cir.), *cert. denied*, 525 U.S. 868 (1998).

guilty so as to avoid prosecution on pending felony charge); *Hampton v. Municipal Court*, 242 Cal. App. 2d 689, 51 Cal. Rptr. 760, 763 (1966) (defendant lied to arresting officer, then pled guilty to charge filed by officer during the gap between the State filing appropriate charges and the defendant's arraignment on the proper charge); *Horrocks*, 17 P.3d at 1152 (defendant gave court a copy of his misdemeanor citation and misled the court into thinking that those were all of the charges).

Both of the accepted grounds for declaring a misplea are present in the instant case. Tracer affirmatively requested that the State be represented by Mr. Harrison, an unauthorized representative, in order to avoid a possible trial on the charge filed by the State or a less advantageous plea agreement. *See* CP 91 ("Mr. Tracer is willing to have Mr. Harrison step in as a special. . ."). Tracer's counsel misrepresented the plea proposal as a completed plea agreement. *See* CP 90-91.

Judge Verser also lacked the authority to accept a guilty plea to the lesser included offense of DUI as no one with authority to act on behalf of the State of Washington consented to the reduction of charges. *See generally State v. Bowerman*, 115 Wn.2d 794, 801, 802 P.2d 116 (1990) (a defendant may not plead guilty to only a portion of a count); *People v. Stackpoole*, 144 Mich. App. 291, 375 N.W.2d 419 (1985) (when an unauthorized person attempts to act on behalf of the state, the district court is without authority to

pass on the matters raised by the unofficial person; the dismissal of the criminal charge and its replacement with an infraction are invalid and not binding upon the State); *State v. Brown*, 709 N.W.2d 313 (Minn. App. 2006) (trial court did not have the authority to accept a guilty plea to lesser charge when the prosecuting attorney declined to move to amend the charge to the lesser offense).

Courts have recognized that when a misplea is granted, the defendant's statement in support of his guilty plea is inadmissible at any subsequent trial. *Horrocks*, 17 P.3d at 1152. *Accord* ER 410. Merely returning a defendant to his or her pre-plea position does not constitute the type of undue prejudice that bars the granting of a misplea. *Horrocks*, 17 P.3d at 1152. A defendant can only avoid a misplea if he "has taken some affirmative action which would materially and substantially affect the outcome of a subsequent trial." *State v. Moss*, 921 P.2d 1021, 1026-27 (Utah Ct. App. 1996). *Cf. State v. Budge*, 125 Wn. App. 341, 347-48, 104 P.3d 714 (2005) (a defendant is only entitled to enforce a plea proposal when he can demonstrate that he detrimentally relied upon the proposal to the prejudice of his defense); *State v. Bogart*, 57 Wn. App. 353, 357, 788 P.2d 14 (1990) (the defendant must establish he relied on the bargain in such a way that a fair trial is no longer possible).

Here, Tracer can demonstrate no more than psychological angst at being returned to his pre-plea status. This is insufficient under Washington law to compel enforcement of a plea proposal, and is insufficient to avert a misplea. *Cf. State v. Wheeler*, 95 Wn.2d 799, 805, 631 P.2d 376 (1981) (only the defendant's plea, or some other detrimental reliance upon the arrangement, renders a plea proposal irrevocable).

**C. Due Process Does Not Provide a Basis for Enforcing the Nascent Plea Proposal Tendered by Ms. Vingo**

Tracer contends that he has a due process right to the benefit of his plea agreement. Brief of Respondent, at 12. Tracer, however, never entered into an enforceable plea agreement with a duly appointed representative of the State of Washington.

Tracer had a plea proposal from Special Deputy Prosecuting Attorney Andrea Vingo. This plea proposal lacked agreement on many material issues, including restitution, length of incarceration, and imposition of relevant court costs. *See* CP 134-35, 140-42, 145. Even if complete, Tracer lacked the ability to convert the plea proposal into a binding agreement on May 9, 2008. *See State v. Yates*, 161 Wn.2d 714, 741, 168 P.3d 359 (2007), *cert. denied*, 128 S. Ct. 2964 (2008) (a defendant does not have a right to enforce a plea proposal); *State v. Wheeler*, 95 Wn.2d 799, 631 P.2d 376 (1981) (only the defendant's plea, or some other detrimental reliance upon the arrangement, renders a plea proposal irrevocable).

Tracer's plea agreement with Noah Harrison was not binding upon the State of Washington as Mr. Harrison was not authorized to speak for the State of Washington. *See* RCW 2.44.020 (when an attorney purports to appear for a party without that party's permission, the party may be relieved of the consequences of that attorney's actions); *State v. Sanchez*, 146 Wn.2d 339, 348, 46 P.3d 774 (2002) (a prosecutor is not bound by a plea agreement entered between the defendant and any other person); *Stackpoole*, 375 N.W.2d at 424 (unauthorized attorney's actions, which included allowing the defendant to admit responsibility to an infraction and the nol-pros of the criminal charge, are not binding on the Oakland County Prosecutor's Office).

**D. The Jefferson County Prosecuting Attorney's Office was Not Disqualified from Appearing in this Case**

In an attempt to rewrite history, Tracer contends that Judge Verser's appointment of a special prosecutor was appropriate because Ms. Dalzell had a conflict of interest. *See* Brief of Respondent, at 16-17. The law of conflicts did not require Ms. Dalzell's recusal, and the record establishes that she was never disqualified from acting in this case.

A defendant's relationship to a sheriff's department's employee does not create a conflict of interest that mandates the recusal of the prosecuting attorney's office. *See State v. Finch*, 137 Wn.2d 792, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999) (defendant's motion in a capital murder case to force the recusal of the Snohomish County Prosecuting

Attorney's Office due to their friendship with the murdered Snohomish County deputy sheriff relationship was properly denied as the appearance of fairness doctrine does not apply to a prosecutor's office); *State v. Perez*, 77 Wn. App. 372, 377, 891 P.2d 42, *review denied*, 127 Wn.2d 1014 (1995) (deputy prosecutor was also not disqualified by her friendship for the victim's cousin, who was a police officer; court noted that "[i]t is not unusual for prosecuting attorneys and law enforcement officers to be friends."). *Accord McCall v. Devine*, 334 Ill. App. 3d 192, 777 N.E.2d 405 (2002) (a close professional relationship between a prosecutor's office and a police agency does not create a conflict of interest that justifies replacing the prosecutor with a special prosecutor).

In keeping with this legal precedent, neither Ms. Dalzell nor Judge Verser disqualified Ms. Dalzell from acting in *State v. Tracer*. *See* CP 134 ("No conflict required the disqualification of Ms. Dalzell or her office. The special deputy appointment was made to avoid possible friction arising between Ms. Dalzell's office and the Jefferson County Sheriff's Office. . ."); RP (June 13, 2008) 15 ("The first is the idea that I somehow removed the Prosecutor. I did not. And, nowhere in the transcript of the proceedings do I say I remove the Prosecuting Attorney. I didn't do that.").

Tracer did not file a challenge to Judge Verser's refusal to disqualify the Jefferson County Prosecuting Attorney's Office. Tracer, moreover, did not object to the Jefferson County Prosecuting Attorney's Office representation of the State with respect to the motion to vacate the judgment. It is too late for Tracer to now object.

Tracer tenders an alternative basis for Judge Verser's appointment of Mr. Harrison – his frustration with Ms. Vingo. *Brief of Respondent*, at 17. RCW 36.27.030, however, does not authorize a trial court to deprive the public of its chosen attorney due to frustration. The unlawful appointment of Mr. Harrison must, therefore, be vacated and all acts undertaken by Mr. Harrison must be nullified.

**E. The De Facto Public Official Doctrine Does Not Apply When the Public is Objecting to the Pretender**

Tracer, relying upon inapposite cases, argues that Mr. Harrison's actions cannot be collaterally attacked by the State. To reach this conclusion, Tracer cites to the de facto official doctrine, and its application by courts to challenges brought by criminal defendants. These cases are irrelevant to a State of Washington challenge to the authority of the person who purported to be the prosecutor.

Courts have explained the purpose of the de facto public official doctrine as follows:

The *de facto* doctrine will, validate, on grounds of public policy and prevention of a failure or public justice, the acts of officials who function under color of law. *People v. Townsend*, 214 Mich 267, 270; 183 NW 177 (1921), *People v. Matthews*, 289 Mich 440, 447-48; 286 NW 675 (1939).

In 46 CJ, Officers, § 366, p. 1053, it states as follows:

“A person will be held to be a de facto officer when, and only when, he is in possession, and is exercising the duties, of an office; his incumbency is illegal in some respect; he has at least a fair color of right or title to the office, or has acted as an officer for such a length of time, and under such circumstances of reputation or acquiescence by the public and authorities, as to afford a presumption of appointment or election, and induce people, without inquiry, and relying on the supposition that he is the officer he assumes to be, to submit to or invoke his action; and, in some, although not all, jurisdictions, only when the office has a de jure existence.” (Footnotes omitted).

*People v. Davis*, 86 Mich. App. 514, 272 N.W.2d 707, 710 (1978).

These factors are generally satisfied when the elected prosecuting attorney or the attorney general appointed the deputy prosecuting attorney whose authority is being challenged by the defendant. *See, e.g., State v. Breeze*, 873 P.2d 627 (Alas. App. 1994) (defendant brought a challenge to a special prosecutor appointed by the state attorney general); *Anderson v. State*, 699 N.E.2d 257 (Ind. 1998) (defendant brought challenge to inactive attorney from other state who was admitted pro hoc vice to participate in the prosecution team that was led by the elected prosecuting attorney); *State v. Cook*, 84 Wn.2d 342, 525 P.2d 761 (1974) (defendant brought challenge to legal interns appointed by the county prosecuting attorney).

These factors are also satisfied when the elected prosecuting attorney or the state attorney general petitions the court for the appointment of the special prosecuting attorney whose authority is being challenged by the defendant. requests the appointment of , or when a court appointed a special deputy prosecuting attorney at the request of the elected prosecuting attorney. *See, e.g., State v. Bell*, 84 Idaho 153, 370 P.2d 508, 511 (1962) (defendant brought challenge to a special prosecutor who was appointed by the district court in response to a petition filed by the prosecuting attorney); *State v. Waldon*, 481 N.E.2d 1331 (Ind. App. 1985) (defendant brought challenge to special prosecutor who was appointed to the position upon the request of the newly elected prosecuting attorney); *People v. Davis, supra* (defendant brought challenge to special prosecutor appointed pursuant to a petition for a special prosecutor filed with the court by the county prosecutor).

The factors that support the de facto officer doctrine do not apply when a court, acting on its own and without statutory authority, appoints an individual to serve as a special prosecutor. A person appointed under these circumstances does not have a fair color of right to the office. Nor, has such an individual occupied the office for a sufficient period of time that no one would reasonably assume that the individual has the authority he claims. Finally, an individual appointed under these circumstances cannot demonstrate acquiescence by officials, as most challenges to their authority

are mounted by the lawfully elected legal representative of the people— the prosecuting attorney.

The earliest Washington opinion that dealt with a judge’s sua sponte appointment of a special prosecutor when such an appointment was not authorized by statute, held that the actions taken by such an individual must be set aside when challenged. *See State v. Heaton*, 21 Wash. 59, 56 P. 843 (1899) (affirming the dismissal of an indictment obtained by an unlawfully court appointed special prosecutor). This holding is consistent with cases from other jurisdictions. *See, e.g., Smith v. State*, 42 Okla. Crim. 308, 275 P. 1071, 1073 (1929) (ordering a new trial where the judge sua sponte appointed a special prosecutor because “[t]he appointment of James W. Smith as special prosecutor being without authority of law, all his acts are void.”); *Brunty v. State*, 22 Va. App. 191, 468 S.E.2d 161, 164 (1996) (holding that a final order that was signed by a person that the court illegally appointed as a “special prosecutor” must be vacated as it “was entered improperly, without endorsement of counsel of record”).

Here, Noah Harrison was not appointed special prosecutor at the request of the Jefferson County Prosecuting Attorney’s Office. Instead, his appointment was made at Tracer’s request. *See* CP 91 (“Mr. Tracer is willing to have Mr. Harrison step in as a special. . .”). This case, therefore, is governed by the rule established in *State v. Heaton, supra*, rather than by the

de facto officer rule utilized in *State v. Cook, supra*. All of the actions taken by Mr. Harrison are void, and must be vacated.

**F. The Crime Victim Fund Assessment is Mandatory**

RCW 7.68.035(1)(a) and (2) provide as follows:

(1)(a) When any person is found guilty in any superior court of having committed a crime, except as provided in subsection (2) of this section, there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

....

(2) The assessment imposed by subsection (1) of this section shall not apply to motor vehicle crimes defined in Title 46 RCW except those defined in the following sections: RCW 46.61.520, 46.61.522, 46.61.024, 46.52.090, 46.70.140, 46.61.502, 46.61.504, . . . .

This statute indicates that superior courts “shall” impose the crime victim assessment whenever a person is convicted of one of the listed offenses. The use of the word “shall” creates an imperative obligation, requires the imposition of the crime victim assessment, even in cases of indigency. *State v. Curry*, 118 Wn.2d 911, 917-18, 829 P.2d 166 (1992); *State v. Q.D.*, 102 Wn.2d 19, 29, 685 P.2d 557 (1984).

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### III. CONCLUSION

Judge Verser's unlawful appointment of a conflicted attorney as special prosecutor was void, and all actions taken by the special prosecutor must be set aside. This matter should be remanded for further proceedings before a different jurist.

Dated this 9th day of December, 2008.

Respectfully Submitted,

Juelanne B. Dalzell  
Prosecuting Attorney

A handwritten signature in black ink that reads "Pamela Beth Loginsky". The signature is written in a cursive, flowing style.

Pamela B. Loginsky, WSBA 18096  
Special Deputy Prosecuting Attorney

PROOF OF SERVICE

I, Amber Haslett, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On the 9th day of December, 2008, I deposited in the mails of the United States of America, postage prepaid, the original document to which this proof of service is attached in an envelope addressed to:

David C. Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEFENDANT

On the 9th day of December, 2008, I deposited in the mails of the United States of America, postage prepaid, a copy of the document to which this proof of service is attached in an envelope addressed to:

Noah Harrison  
Harrison Law, Inc., P.S.  
210 Polk St Suite 4A  
Port Townsend, WA 98368

On the 9th day of December, 2008, I deposited in the mails of the United States of America, postage prepaid, two copies (one for Mr. Tracer and one for his counsel of record) of the document to which this proof of service is attached in an envelope addressed to:

Thomas E. Weaver, Jr.  
Attorney at Law  
PO Box 1056  
Bremerton, WA 98337-0221

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Signed this 9th day of December, 2008, at Olympia, Washington.

  
Amber Haslett