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COURT OF APPEALS, DIVISION III  
THE STATE OF WASHINGTON

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CITY OF SPOKANE,  
*Plaintiff/Respondent,*  
v.

LAWRENCE J. ROTHWELL  
HENRY E. SMITH  
*Defendants/Petitioners.*

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DEFENDANTS' ANSWER TO PETITION FOR REVIEW

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## **A. INTRODUCTION**

Prior to 2008, the Washington Legislature had designated only two methods for the adjudication of criminal municipal codes- the establishment of an independent municipal court under chapter 3.50 RCW or the establishment of a municipal department in the district court under chapter 3.46 RCW. Under chapter 3.46, the municipal department district court judges must first be so designated on the ballot and then elected only by city electors. The City of Spokane never purported to establish an independent chapter 3.50 court and never designated the department or held a city-wide election as required by a chapter 3.46 municipal department. Division III ruled that Spokane never established a competent municipal court and therefore never legally convicted either Mr. Smith or Mr. Rothwell. The City has since changed its court system and the legislature has changed the election requirements. Because the Division III decision conforms to prior case law and is limited in scope to cases pending prior to the publication of the decision, this Court should not accept review.

## **B. STATEMENT OF THE CASE**

Mr. Rothwell and Mr. Smith (hereinafter “Defendants”) are satisfied with the City’s statement of the case as set forth in pages four

through the first paragraph of page eight of its Petition for Review and add the following:<sup>1</sup>

#### Procedural History

On November 8, 2007, the Court of Appeals reversed the lower court and held that Judge Walker did not have jurisdiction to preside over municipal cases.<sup>2</sup> The City filed a motion for reconsideration on November 27, 2007 in which the City requested reconsideration of the jurisdictional ruling and clarification of the decision as it might be applied retroactively. (App. F, City's Mot. for Recons. at 2, November 27, 2007.)<sup>3</sup> In its motion, the City argued evidence not in the record. (App. F, Pet'rs' Answer City's Mot. Recons. and Pet'rs' Mot. to Strike at 16-19.) In response, the defendants asked the court to strike the City's Affidavit, its exhibits, and the additional facts on pages 8-10 in the City's motion. *Id.* The court denied the City's motion but granted the defendants' motion to strike references outside the record. (App. F, Order Den. Mot. for Recons., Feb. 19, 2008.)

On February 28, 2008, the City filed its Petition for Review in which it once again argues evidence either not in the record or stricken by the Court of Appeals. (Pet. for Rev. at 2, 11, 12.)

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<sup>1</sup> RAP 10.3(b).

<sup>2</sup> *City of Spokane v. Rothwell*, 141 Wn. App. 680, 170 P.3d 1205 (2008).

<sup>3</sup> The City's Motion for Reconsideration, the Defendants' response thereto and Motion to Strike, and Division III's order thereto are attached to this answer as Appendix F.

### Operational Facts

Prior to Petitioners' 2005 trials, the most recent District Court elections were in 2002. The 2002 election ballot did not disclose to the candidates or voters that Department Four, the department that Judge Walker was elected to, would be serving as a municipal department. (*Smith* AR Mot. to Dismiss for Lack of Jurisdiction, Decl. Paul Brandt at 2.) In fact, the ballot did not inform voters that any of the District Court positions would be serving as a Municipal Court in either a full or part-time capacity. *Id.* Furthermore, the citizens of the City of Spokane were not the only people who voted for the full-time Municipal Court judges. *Id.* Qualified voters from the entire County of Spokane were allowed to vote for Judge Walker and all other Municipal Court judges. *Id.*

At the time of Defendants' convictions, there were two District Court departments and judges serving in full-time municipal capacities: Department Four held by Judge Walker and Department One held by the Judge Vance Peterson. (*Smith* AR Aff. Knox Ex. C at 1, Ex. D at 1.) The other 1.7 Municipal Court positions were filled by two other District Court judges, Judge Derr in Department Two and Judge Wilson in Department Seven, both of whom presided over two domestic violence dockets shared by the County and the City. *Id.* As of November, 2006, the City continued

to operate its municipal court as a department of the District Court pursuant to chapter 3.46 RCW.<sup>4</sup>

### C. ISSUES PRESENTED FOR REVIEW

- 1) Whether chapter 3.46 Revised Code of Washington expressly requires that full-time municipal court judges must be elected by city voters only;
- 2) Whether the City of Spokane was required to strictly comply with the statutes regarding the creation and maintenance of municipal courts;
- 3) Whether there was a valid municipal department where the City of Spokane failed to comply with the statutes regarding the creation and maintenance of municipal courts, and
- 4) Whether Judge Walker had de facto authority to hear the defendants' cases where there was no municipal department created in compliance with chapter 3.46 RCW.

### D. ARGUMENT

The Court of Appeals correctly decided that Judge Walker did not have jurisdiction to hear municipal court cases. Because the City failed to strictly comply with the legislative mandate requiring specific designation of municipal departments and election of full-time municipal judges by city voters only, the City failed to create a municipal department in compliance with chapter 3.46 RCW at the time of the defendants' convictions. Without a valid municipal department, Judge Walker did not

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<sup>4</sup> *City of Spokane v. County of Spokane*, 158 Wn. 2d 661, 146 P.3d 893 (2006).

have *de facto* authority as a municipal court judge and hence her actions in these cases are void.

Division III also correctly found the statutory scheme clearly and unambiguously requires election of full-time judges by city voters only and correctly applied precedent that a judicial officer does not act under color of law where the judicial office itself is invalid.

Finally, the court's decision does not raise issues of substantial public interest because its reach is limited to cases pending upon the date of publication, including that of the defendants. The Legislature has since changed the electoral requirements and the City purports to have changed its court system.<sup>5</sup> (Pet. for Rev. at 9.) Not only is there no evidence in the record that would allow this Court to decide the merits of future collateral attacks, there is no justiciable controversy ripe for appellate review. As such, any opinion rendered by this Court on retroactivity would be advisory only and not binding on parties unrelated to this litigation.

1. **The Court should not grant review because the *Rothwell* holding conforms to prior case law.**
  - a. Prior Washington Supreme Court cases clearly hold that a judge lacks jurisdiction when the department in which that judge sits was invalidly created.

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<sup>5</sup> See Appendix A, H.B. 2557, 60<sup>th</sup> Leg., 2008 Sess. (Wa. 2008) (effective July 1, 2008.)

Strict compliance with statutes governing the establishment of municipal courts is required in order to ensure that judicial officers are directly accountable to the voters of that jurisdiction.<sup>6</sup> Thus, when statutes provide particular procedures for creating a judicial office, there must be strict compliance with those procedures.<sup>7</sup>

Chapters 3.38 (District Court Districts) and 3.46 (Municipal Court Districts) of the Revised Code of Washington govern the establishment and administration of judicial departments. As set forth by the legislature, a valid district court municipal department is created as follows:<sup>8</sup>

1. A municipal ordinance petitioning for the establishment of a specific department(s) at RCW 3.46.040;
2. The designation of a specific municipal department(s) in a district court plan at RCW 3.38.020(6); 3.46.040;
3. The designation of specific municipal department(s) on the ballot at RCW 3.46.070, and
4. The election of a candidate for each designated municipal department in a city-wide only election at RCW 3.46.063, .070.

The City of Spokane failed to follow these legislative mandates.

First, the Spokane Municipal Code provides that the “Spokane municipal

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<sup>6</sup> *State v. Moore*, 73 Wn. App. 805, 813-14, 871 P.2d 1086 (1994). See also *Delaney v. Board of Spokane County Commissioners*, 161 Wn.2d 249, 255, 164 P.3d 1290 (2007) (judicial department was not created in the absence of strict adherence to legislative procedures).

<sup>7</sup> *Id.* (citing *In re Eng*, 113 Wn. 2d 178, 189-91, 776 P.2d 1336 (1989)).

<sup>8</sup> The legislature has the exclusive constitutional power to prescribe the jurisdiction of district and municipal courts. *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 671, 146 P.3d 893 (2006).

court shall operate as a department of the Spokane County court under chapter 3.46, 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.”<sup>9</sup> Although the ordinance was in place as of the date of the defendant’s convictions, there was no effective implementing agreement between the County and the City.

Second, the current Spokane County Districting Plan fails to comply with the above requirements.<sup>10</sup> Rather than designating the actual department or departments serving as municipal departments, the plan designates all nine of the District Court judges as a “municipal department” and declares that they shall function as municipal judges.<sup>11</sup> All District Court judges are thus deemed to be full-time Municipal Court judges, but all nine do not function as municipal departments.<sup>12</sup> As such, the Districting Plan fails to designate which of the District Court departments actually serves as a Municipal Court.

Third, the ballot did not designate specific municipal departments and thus there were no elections for municipal court judges. By statute, all

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<sup>9</sup> Spokane Municipal Code (SMC) 5.01.030.

<sup>10</sup> The current Districting Plan is set forth in Chapter 1.16 of the Spokane County Code (SCC).

<sup>11</sup> SCC 1.16.050.

<sup>12</sup> Prior to 2002, the Districting Plan provided that all nine justices of the district court functioned as part-time municipal court judges. *See* Spokane County Resolution 2-0301, App. B at 64.

full-time equivalent municipal court judicial positions must be filled by election.<sup>13</sup> In order to do that, they must be designated as such on the ballot and elected by city voters only.<sup>14</sup> As the Washington State Attorney General's Office notes, "It is clearly now necessary for the ballot to disclose that one or more positions on the district court will serve the municipal department, whether full-time or part-time."<sup>15</sup>

This did not happen. The ballot did not inform the voters that they were actually voting for municipal court judges as well as district court judges. Instead, elections were held for district court judges and then municipal court judges were chosen administratively by the District Court itself. This is not only contrary to law, but it limits the accountability of the Municipal Court to the people under its jurisdiction because city voters lack notice of the positions being voted on and outsiders are allowed to dilute the vote.

For these reasons, Division III correctly held that there "was no municipal department created in compliance with chapter 3.46 RCW," at

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<sup>13</sup> RCW 3.46.063. This applies even if more than one judge is employed to fill the position. It also provides that cities with one or more full-time equivalent judicial positions, an additional position that is or are in combination more than one-half of a full-time equivalent position must be filled by election as well.

<sup>14</sup> RCW 3.46.070.

<sup>15</sup> AGO 1995 No. 9 at 8, 9.

the time of the defendants' convictions and that Judge Walker had no authority to preside over their trials.<sup>16</sup>

The City argues that its failure to follow the legislative mandates for the creation of municipal departments is a mere technicality and that Judge Walker acted under color of law despite the invalidity of her office. The City first argues that Division III misapplied *Nollette*<sup>17</sup> to this case. Although *Nollette* does not involve the question of *de facto* authority, it is on all fours with *Rothwell*. There, District Court Judge Nollette sought reappointment as a municipal court judge after his election to a second term as district court judge. The applicable code at that time expressly stated that district court judges were to serve as part-time municipal judges. Despite the fact that the applicable code also required the mayor to appoint part-time municipal court judges,<sup>18</sup> Nollette argued that the former provision accorded municipal court jurisdiction on all eight district court judges. This Court disagreed.

In its ruling, this Court rejected "...Nollette's argument that all Spokane County District Court judges have *de facto* jurisdiction to act in the capacity of Spokane Municipal Court judges. Such a declaration would be facially at odds with the statutory provision providing for the

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<sup>16</sup> *City of Spokane v. Rothwell v. Smith*, 141 Wn. App. 680, 687, 170 P.3d 1205 (2008).

<sup>17</sup> *Nollette v. Christianson*, 115 Wn. 2d 594, 800 P.2d 359 (1990).

<sup>18</sup> *Id.* at 605.

appointment of part-time municipal judges and at odds with the city code provision providing for appointment of municipal judges.”<sup>19</sup> Instead, this Court held that Spokane County Code (SCC) § 1.16.050 merely established the pool of judges eligible to act as municipal court judges. Without mayoral appointment, however, the members of this pool had no authority or right to act as municipal court judges.

The statutory amendments since *Nollette* do not alter its holding - legislative procedures for the creation of a municipal department and the selection of its judges must strictly comply with the statutory procedure in place at the time. Just as in *Nollette*, Judge Walker was merely a member of the pool of judges eligible to serve as a municipal court judge. Without designation of her department on the ballot and election by city voters only, she had no authority to act as a municipal court judge.

The City’s reliance on *Edmonds* is similarly misplaced.<sup>20</sup> In *Edmonds*, criminal defendants alleged the municipal court did not have jurisdiction to hear their cases. Edmonds is in Snohomish County which adopted the justice court act in 1965. In 1971, Edmonds reorganized under the optional municipal code pursuant to chapter 35A RCW, and in 1975 created its own “police” or municipal court. The question on appeal

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<sup>19</sup> *Id.*

<sup>20</sup> *State ex rel. Farmer v. Edmonds Mun. Ct.*, 27 Wn. App. 762, 621 P.2d 171 (1980) review denied 95 Wn. 2d 1016 (1981).

was whether optional municipal code cities under chapter 35A RCW, which were situated in counties subject to the 1961 justice court act, could forgo the provisions of that act regarding municipal courts, and set up municipal courts under chapter 35A. Based in part on legislative intent, the court found in the negative and held that Edmonds was precluded from creating a municipal court under chapter 35A RCW. As a result, the court found that the municipal court lacked jurisdiction to hear the appellants' cases and granted the requested relief.

The Court went on in dicta to caution other parties from initiating new collateral attacks of prior rulings. The Court reasoned that because the legislative authority followed the proper steps in creating the court, it was created under color of law and the judges were *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.”<sup>21</sup>

Explaining its decision, the court recognized the general rule that in the absence of a validly created office, there can be no *de facto* officer. “Generally, there must be a de jure office before there can be a de facto

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<sup>21</sup> *Edmonds*, 27 Wn. App. at 767-68 (citations omitted).

officer.”<sup>22</sup> “Where the office is created by legislative act or municipal ordinance, however, the general rule yields and the office is regarded as a de facto office until the act or ordinance is declared invalid.”<sup>23</sup> Because “[t]he Edmonds Municipal Court was created with apparent regularity pursuant to established law,” its previous final judgments and sentences were not subject to collateral attack.<sup>24</sup>

By contrast, in *Rothwell*, the municipal court office was not created with “apparent regularity pursuant to established law.” There, the municipal court was not established pursuant to laws later invalidated. Rather, the City simply didn’t follow existing law.

Both *Britton* and *Franks* fall within this line of cases as well.<sup>25</sup> In *Britton*, a criminal defendant challenged the judge’s authority to hear his case on the grounds that the judge’s appointment was invalid under Article IV, § 8 of the State Constitution which provides, “Any judicial officer who shall absent himself from the state for more than sixty consecutive days shall be deemed to have forfeited his office: Provided, that in cases of extreme necessity the governor may extend the leave of absence such time

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<sup>22</sup> *Id.* at 768.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 769.

<sup>25</sup> *State v. Britton*, 27 Wn. 2d 336, 178 P.2d 341 (1947); *State v. Franks*, 7 Wn. App. 594, 501 P.2d 662 (1972).

as the necessity therefore shall exist.”<sup>26</sup> Judge Hill had been appointed to fill the position temporarily for Judge Douglas who was on military leave.<sup>27</sup> Because the Governor had the right by law to extend the leave of absence due to such emergencies, this Court held that the appointment was valid pursuant to established law.<sup>28</sup>

In *Franks*, a criminal defendant challenged a judge *pro tempore*'s authority to issue a search warrant on the grounds that the judge was not a registered voter of the judicial district upon his appointment as was required by law.<sup>29</sup> Because the judge *pro tempore* registered to vote in that district the day after his appointment and over a year before signing the search warrant in question, the court found he had the authority to issue the search warrant.<sup>30</sup> By contrast in *Rothwell*, at the time of the defendants' cases, the City had taken no steps to conform to established law.

The ruling in *Rothwell* is also in conformity with this Court's decisions in *State v. Canady* and *In re Eng* and Division II's decision in *State v. Moore*, all of which held that local legislative actions that do not strictly adhere to the legislative guidelines for the establishment of district

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<sup>26</sup> *Britton*, 27 Wn. 2d at 343.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Franks*, 7 Wn. App. 594.

<sup>30</sup> *Id.* at 596.

and municipal judicial departments are void and do not carry *de facto* authority.<sup>31</sup>

b. Quo warranto proceedings are inapplicable to criminal defendants challenging a court's jurisdiction.

The City also argues that *Rothwell* is contrary to prior state cases which hold that *quo warranto* proceedings are the “proper and exclusive” method for challenging a judge’s authority. (Pet. for Rev. at 17.)

In general, a *quo warranto* proceeding is the proper method for determining a person’s *right* to a public office.<sup>32</sup> As such, *quo warranto* proceedings may be used by judicial officers who were removed from office, by people who lost judicial elections, or by those questioning the constitution or qualifications of the membership of a public body.<sup>33</sup>

Such proceedings are not generally used to challenge the jurisdiction of a court over criminal trials. Indeed, the City itself cites to several cases brought by criminal defendants challenging a court’s jurisdiction, none of which were filed as *quo warranto* petitions.<sup>34</sup>

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<sup>31</sup> *State v. Moore*, 73 Wn. App. 805, 813-814, 871 P.2d 1086 (1994) (citing *In re Eng*, 113 Wn. 2d 178 (1989) and *State v. Canady*, 116 Wn. 2d 853, 809 P.2d 203 (1991)).

<sup>32</sup> *State ex. rel. Quic-Ruben v. Verharen*, 136 Wn. 2d 888, 894, 969 P.2d 64 (1998).

<sup>33</sup> See *Mun. Ct. of Seattle ex rel. Tulberg v. Beighle*, 28 Wn. App. 141, 622 P.2d 405 (1981) (*quo warranto* action by magistrate challenging his summary removal from office); *Green Mtn. Sch. Dist. No. 103 v. Durkee*, 56 Wn. 2d 154, 157, 351 P.2d 525 (1960).

<sup>34</sup> *Canady*, 116 Wn. 2d 853 (judge *pro tempore* lacked *de jure* or *de facto* authority to issue search warrant where the department was invalidly created); *In re Eng*, 113 Wn. 2d 178 (criminal defendants challenged authority of municipal court judges where municipal courts were not validly created by city); *State v. Amodio*, 110 Wn. App. 359, 40 P.3d

Moreover, at least two of the cases cited to by the City concern challenges to officers found to have been acting under color of law.<sup>35</sup> As stated in *Edmonds*, “a judge serving under such circumstances has authority until displaced by a direct proceeding for that purpose,”<sup>36</sup> presumably, a *quo warranto* action. This is not such a case. Judge Walker was not a *de facto* officer and hence a *quo warranto* proceeding is unnecessary to unseat her.

Finally, extending the *quo warranto* doctrine to jurisdictional challenges by criminal defendants subjected to the jurisdiction of an illegal court or invalid judge would effectively destroy any meaningful right of redress for such defendants.

**2. This case does not raise wide-spread and significant issues of public interest regarding retroactivity because the holding is limited to cases pending prior to publication of the decision.**

- a. There is nothing in the record supporting a ruling on retroactivity.

In its motion asking Division III to clarify its holding as it related to retroactive application, the City admitted that the “issue was not raised,

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1182 (2002) (Criminal defendant challenges authority of commissioner to issue search warrant); *Moore*, 73 Wn. App. 805 (search warrants issued by county court commissioner invalid where county failed to create the office of district court commissioner); *Edmonds*, 27 Wn. App. 762 (criminal defendants challenged jurisdiction of invalidly created municipal court).

<sup>35</sup> *Barrett-Smith v. Barrett-Smith*, 110 Wn. App. 87, 38 P.3d 1030 (2002) (Judge *pro tempore* found to be a *de facto* officer); *Franks*, 7 Wn. App. 594 (judge *pro tempore* found to be a *de facto* officer).

<sup>36</sup> *Edmonds*, 27 Wn. App. at 767-68 (citations omitted).

briefed, or supported by the Record as it currently exists.” (App. F, City’s Mot. For Recons. at 8). Division III rightly refused to reach this issue and struck facts presented in support of the City’s request. (App. F, Order Denying Mot. for Recons.) The City renews its request here and attempts to introduce facts previously struck by the Court of Appeals or otherwise not in the record. (Pet. for Rev. at 11, 12.)<sup>37</sup>

Pursuant to RAP 13.7(a), the record in the Court of Appeals is the record on review in the Supreme Court. Consequently, this Court’s review is “generally limited to questions that have been presented to and addressed by the Court of Appeals....”<sup>38</sup> However, it “may consider an issue included in the record and discussed in the briefs which is necessary to decide the case on the merits, even though review was not granted with respect to that issue.”<sup>39</sup> This is not such a case. Not only was this issue not briefed, it does not go to the merits.

The City essentially asks this Court to determine the rights and liabilities of future litigants seeking to collaterally attack previous convictions based on the *Rothwell* decision. There is nothing in the

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<sup>37</sup> Facts outside the record on appeal are irrelevant and unauthorized. We would ask this Court to disregard the following facts and argument not in the record below: information regarding the City’s termination of its contract with the County and information regarding alleged potential state-wide impacts of the *Rothwell* decision. (Pet. for Rev. at 8, 9, 11, 12.)

<sup>38</sup> *State v. L.J.M.* 129 Wn. 2d 386, 397, 918 P.2d 898 (Wn. 1996) (quoting *State v. Cunningham*, 93 Wn. 2d 823, 837-38, 613 P.2d 1139 (1980).

<sup>39</sup> *Id.* (quoting *State ex rel. Nugent v. Lewis*, 93 Wn. 2d 80, 83, 605 P.2d 1265 (1980).

appellate record or the briefing to date that would allow this Court to decide the merits of any potential future collateral attacks on a municipal court conviction.

Although there may be attempted collateral attacks on Spokane Municipal Court jurisdiction for prior cases, the record and argument necessary to resolve those attacks should be developed in the trial courts. Such attacks will necessarily be based on different factors and procedures than those applicable to the parties before this Court and those individuals with current pending cases.<sup>40</sup>

b. There is no justiciable controversy.

Further, the City's request for adjudication of future collateral attacks by different parties does not meet the test of a justiciable controversy.<sup>41</sup> A justiciable controversy is one which presents 1) an actual, present or existing dispute, or the mature seeds of one, 2) between parties having genuine and opposing interests, 3) which involves interests that must be direct and substantial, and not potential, theoretical, abstract or academic, and 4) requires a final and conclusive judicial

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<sup>40</sup> See *In re the Personal Restraint Petition of Gunter*, 102 Wn. 2d 769, 771-72, 689 P.2d 1074 (1984) which sets forth the test for retroactive application of new constitutional rule. See also *Stovall v. Denno*, 338 U.S. 293, 297, 87 S.Ct. 1967, 18 L.Ed. 2d 1199 (1967).

<sup>41</sup> See *To-Ro Trade Shows v. Collins*, 144 Wn. 2d 403, 411 (2001).

determination.<sup>42</sup> “Inherent in these four requirements are the traditional limiting doctrines of standing, mootness, and ripeness, as well as the federal case-or-controversy.”<sup>43</sup>

Even if the record below were sufficient for such review, the defendants do not have a genuine and opposing interest with the City regarding collateral attacks in this litigation because they are already entitled to full relief in their pending action. Most importantly, any advisory opinion by this Court would not be binding on parties<sup>44</sup> who are unrelated to this litigation and these potential future controversies are not ripe for appellate review. Although the legitimacy of municipal courts is clearly of great public interest, the answer to the City’s question about the rights of other litigants will be determined in the trial court in the near future and then be ripe for appellate review on the unique facts and arguments necessary to resolve a collateral attack on a conviction.<sup>45</sup>

**3. This case does not raise issues of public interest because the statutory scheme is clear and does not require interpretation by this Court.**

The City maintains the statutory scheme in chapter 3.46 RCW is unclear as it relates to part-time municipal court judges and not in

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<sup>42</sup> *Id.* at 411.

<sup>43</sup> *Id.* (citations omitted).

<sup>44</sup> The Commissioner’s Ruling of November 14, 2007 confirmed that other defendants did not have standing to be heard in this case.

<sup>45</sup> Although the *Edmonds* court did reach this issue, it is unclear from the decision to what extent the issue was properly before the court. *Edmonds*, 27 Wn. App. at 767-68.

harmony with General Rule 29. Once more, the City attempts to raise an issue not raised or briefed below. This case involved the election of full-time equivalent municipal court judges under chapter 3.46 RCW. At no point did the City ask any court to interpret chapter 3.46 as it applies to part-time judges.<sup>46</sup> Moreover, the Legislature recently repealed most of chapter 3.46 and the City no longer uses this form of municipal court.

The chapter unambiguously states that full-time equivalent municipal court judges must be designated on the ballot.<sup>47</sup> And, as Division III found, “RCW 3.46.070 is clear and unambiguous. *Only* city voters shall vote for municipal judges designated as such by the county auditor.”<sup>48</sup> There is nothing unclear about the word “only.”<sup>49</sup> Moreover, as found by the Attorney General’s office in 1995, this chapter clearly restricts voting for full-time judges to citizens of the City. It is hard to imagine that cities in this state need direction from this Court in designating such judicial positions on ballots prior to elections.

Nor does the city need guidance from this Court in harmonizing GR 29 with this requirement. General Rule 29 requires a presiding judge

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<sup>46</sup> Moreover, as noted above, the Legislature repealed Chapter 3.46 and the City has apparently adopted a different form of municipal court.

<sup>47</sup> RCW 3.46.063; 3.46.070.

<sup>48</sup> *Rothwell*, 141 Wn. App. at 685 (emphasis added).

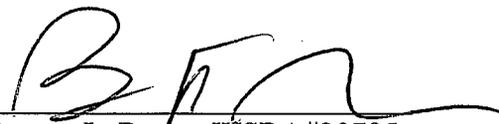
<sup>49</sup> See *In re Lehman*, 93 Wn. 2d 25, 604 P.2d 948 (1980) (If words of common meaning are used, that meaning must be applied to the statutory language unless the result is absurd or incongruous.)

to equitably distribute caseload among the judges and to assign judges to hear cases pursuant to statute or rule.<sup>50</sup> Municipal court judges have exclusive jurisdiction of matters arising from city ordinances.<sup>51</sup> There is simply nothing in GR 29 granting a presiding judge the authority to override RCW 3.46.070 and confer jurisdiction over municipal court cases to district court judges. Only the voters of Spokane can do that.

#### E. CONCLUSION

At all times relevant to this case, the City did not follow these legislative directives, without which there was no validly created municipal court department. Without a validly created municipal court department, there can be no valid judges. There is no precedential value in revisiting the Division III opinion given its limited application and the fact that both the City and the Legislature have superseded its issues.

DATED this 17<sup>th</sup> day of March, 2008.

  
Breean L. Beggs, WSBA#20795

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<sup>50</sup> GR 29(f).

<sup>51</sup> RCW 3.46.030.

### CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **Defendants' Answer to Petition for Review** by the following indicated method or methods:

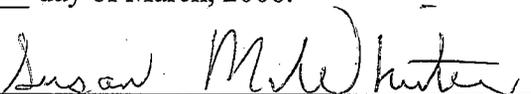
by **mailing** full, true, and correct copies thereof in sealed, first-class postage-prepaid envelopes, addressed to the persons as shown below, the last-known address(es) of the persons, and deposited with the United States Postal Service at Spokane, Washington on the date set forth below.

Michelle Szambelan  
Acting Spokane City Prosecutor  
909 W. Mallon  
Spokane, WA 99201

by sending full, true and correct copy via Fed Ex Priority Overnight (airbill 859914406081) addressed to the Clerk of Court, Temple of Justice, 415 12<sup>th</sup> Avenue SW, Olympia, WA 98504 :

by Attorney Breean Beggs personally delivering a full, true and correct copy to the Clerk of Court, Temple of Justice, 415 12<sup>th</sup> Avenue SW, Olympia, WA 98504 on March 18, 2008.

DATED this 18<sup>th</sup> day of March, 2008.

  
\_\_\_\_\_  
Sue McWhirter, Paralegal

# **APPENDIX A**

Bill Information > HB 2557 - 2007-08

<p><b>Inside the Legislature</b></p> <ul style="list-style-type: none"> <li>* <a href="#">Find Your Legislator</a></li> <li>* <a href="#">Visiting the Legislature</a></li> <li>* <a href="#">Agendas, Schedules and Calendars</a></li> <li>* <a href="#">Bill Information</a></li> <li>* <a href="#">Laws and Agency Rules</a></li> <li>* <a href="#">Legislative Committees</a></li> <li>* <a href="#">Legislative Agencies</a></li> <li>* <a href="#">Legislative Information Center</a></li> <li>* <a href="#">E-mail Notifications (Listserv)</a></li> <li>* <a href="#">Students' Page</a></li> <li>* <a href="#">History of the State Legislature</a></li> </ul>
<p><b>Outside the Legislature</b></p> <ul style="list-style-type: none"> <li>* <a href="#">Congress - the Other Washington</a></li> <li>* <a href="#">TV Washington</a></li> <li>* <a href="#">Washington Courts</a></li> <li>* <a href="#">OFM Fiscal Note Website</a></li> </ul>

<p><b>Search by Bill Number</b></p> <input type="text" value="2557"/> <input type="button" value="Search"/>
<p><b>Search Brief Description by Keyword</b></p> <input type="text"/> <input type="button" value="Search"/>

**HB 2557 - 2007-08** [\(What is this?\)](#)

**Improving the operation of the trial courts.**

[Go to documents...](#)

**History of Bill**

as of Wednesday, March 12, 2008 1:53 PM

**Sponsors:** [Representatives Goodman, Barlow, Warnick](#)

**2008 REGULAR SESSION**

- Jan 8 Prefiled for introduction.
- Jan 14 First reading, referred to Judiciary. ([View Original Bill](#))
- Jan 16 Public hearing in the House Committee on Judiciary at 1:30 PM.
- Jan 22 Executive action taken in the House Committee on Judiciary at 10:00 AM.  
 JUDI - Executive action taken by committee:  
**JUDI - Majority; 1st substitute bill be substituted, do pass.** ([View 1st Substitute](#))
- Jan 24 Referred to Appropriations Subcommittee on General Government & Audit Rev
- Feb 5 Public hearing in the House Committee on Appropriations Subcommittee on Ge Government & Audit Review at 8:00 AM.
- Feb 7 Executive action taken in the House Committee on Appropriations Subcommitt General Government & Audit Review at 8:00 AM.  
 APPG - Executive action taken by committee.  
**APPG - Majority; 2nd substitute bill be substituted, do pass.** ([View 2nd Substi](#))
- Feb 11 Passed to Rules Committee for second reading.
- Feb 14 Placed on second reading suspension calendar by Rules Committee.
- Feb 15 **Committee recommendations adopted and the 2nd substitute bill substituted.** ([View 2nd Substitute](#))  
 Placed on third reading.  
 Third reading, passed; yeas, 94; nays, 0; absent, 0; excused, 4. ([View Roll Calls](#))

**IN THE SENATE**

- Feb 19 First reading, referred to Judiciary.
- Feb 22 Public hearing in the Senate Committee on Judiciary at 1:30 PM.
- Feb 29 Executive action taken in the Senate Committee on Judiciary at 9:00 AM.  
 JUD - Majority; do pass with amendment(s).  
 Passed to Rules Committee for second reading.
- Mar 3 Placed on second reading by Rules Committee.
- Mar 5 Committee amendment not adopted.  
 Floor amendment(s) adopted.  
 Rules suspended. Placed on Third Reading.



Third reading, passed; yeas, 46; nays, 1; absent, 0; excused, 2. ([View Roll Calls](#))

**IN THE HOUSE**

Mar 8 House concurred in Senate amendments.

Passed final passage; yeas, 93; nays, 0; absent, 0; excused, 5. ([View Roll Calls](#))

Mar 11 Speaker signed.

**IN THE SENATE**

President signed.

**OTHER THAN LEGISLATIVE ACTION**

Mar 12 Delivered to Governor. ([View Bill as Passed Legislature](#))

[Go to history...](#)

**Available Documents**

Bill Documents	Bill Digests	Bill Reports
<a href="#">Original Bill</a>	<a href="#">Bill Digest</a>	<a href="#">House Bill Analysis</a>
<a href="#">Substitute Bill</a>	<a href="#">Substitute Bill Digest</a>	<a href="#">House Bill Report</a>
<a href="#">Second Substitute</a>	<a href="#">Second Substitute Bill Digest</a>	<a href="#">Second Substitute House Bill Report</a>
<a href="#">Bill as Passed Legislature</a>		<a href="#">Second Substitute Senate Bill Report</a>

**Amendments**

Amendment Name	Num	Sponsor	Type	Description	Action
<a href="#">2557-S2 AMS JUD S5943.1</a>		JUD	Crnte	Striker	NOT ADOPTED 03/05/2008
<a href="#">2557-S2 AMS KLIN S5990.3</a>	195	Kline	Floor	Pg 8 Ln 3	PULLED 03/05/2008
<a href="#">2557-S2 AMS KLIN S6032.1</a>	205	Kline	Floor	Striker	ADOPTED 03/05/2008

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CERTIFICATION OF ENROLLMENT  
SECOND SUBSTITUTE HOUSE BILL 2557

60th Legislature  
2008 Regular Session

Passed by the House March 8, 2008  
Yeas 93 Nays 0

---

Speaker of the House of Representatives

Passed by the Senate March 5, 2008  
Yeas 46 Nays 1

---

President of the Senate

Approved

---

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is SECOND SUBSTITUTE HOUSE BILL 2557 as passed by the House of Representatives and the Senate on the dates hereon set forth.

---

Chief Clerk

FILED

Secretary of State  
State of Washington



1 (2) Actions for damages for injuries to the person, or for taking  
2 or detaining personal property, or for injuring personal property, or  
3 for an injury to real property when no issue raised by the answer  
4 involves the plaintiff's title to or possession of the same and actions  
5 to recover the possession of personal property;

6 (3) Actions for a penalty;

7 (4) Actions upon a bond conditioned for the payment of money, when  
8 the amount claimed does not exceed fifty thousand dollars, though the  
9 penalty of the bond exceeds that sum, the judgment to be given for the  
10 sum actually due, not exceeding the amount claimed in the complaint;

11 (5) Actions on an undertaking or surety bond taken by the court;

12 (6) Actions for damages for fraud in the sale, purchase, or  
13 exchange of personal property;

14 (7) Proceedings to take and enter judgment on confession of a  
15 defendant;

16 (8) Proceedings to issue writs of attachment, garnishment and  
17 replevin upon goods, chattels, moneys, and effects;

18 (9) Actions arising under the provisions of chapter 19.190 RCW;

19 (10) Proceedings to civilly enforce any money judgment entered in  
20 any municipal court or municipal department of a district court  
21 organized under the laws of this state; and

22 (11) All other actions and proceedings of which jurisdiction is  
23 specially conferred by statute, when the title to, or right of  
24 possession of, real property is not involved.

25 **Sec. 2.** RCW 12.40.010 and 2001 c 154 s 1 are each amended to read  
26 as follows:

27 In every district court there shall be created and organized by the  
28 court a department to be known as the "small claims department of the  
29 district court." The small claims department shall have jurisdiction,  
30 but not exclusive, in cases for the recovery of money only if the  
31 amount claimed does not exceed (~~four~~) five thousand dollars.

#### 32 **MUNICIPAL COURT CONTRACTING**

33 **Sec. 3.** RCW 3.50.003 and 1984 c 258 s 125 are each amended to read  
34 as follows:

1       The definitions in this section apply throughout this chapter  
2 unless the context clearly requires otherwise.

3       (1) "City" means an incorporated city or town.

4       (2) "Contracting city" means any city that contracts with a hosting  
5 jurisdiction for the delivery of judicial services.

6       (3) "Hosting jurisdiction" means a county or city designated in an  
7 interlocal agreement as receiving compensation for providing judicial  
8 services to a contracting city.

9       (4) "Mayor((7))" ((as used in this chapter,)) means the mayor, city

10 manager, or other chief administrative officer of the city.

11       NEW SECTION. Sec. 4. A new section is added to chapter 3.50 RCW  
12 to read as follows:

13       A city may meet the requirements of RCW 39.34.180 by entering into  
14 an interlocal agreement with the county in which the city is located or  
15 with one or more cities.

16       Sec. 5. RCW 3.50.020 and 2005 c 282 s 14 are each amended to read  
17 as follows:

18       The municipal court shall have exclusive original jurisdiction over  
19 traffic infractions arising under city ordinances and exclusive  
20 original criminal jurisdiction of all violations of city ordinances  
21 duly adopted by the city (~~in which the municipal court is located~~)  
22 and shall have original jurisdiction of all other actions brought to  
23 enforce or recover license penalties or forfeitures declared or given  
24 by such ordinances or by state statutes. A hosting jurisdiction shall  
25 have exclusive original criminal and other jurisdiction as described in  
26 this section for all matters filed by a contracting city. The  
27 municipal court shall also have the jurisdiction as conferred by  
28 statute. The municipal court is empowered to forfeit cash bail or bail  
29 bonds and issue execution thereon; and in general to hear and determine  
30 all causes, civil or criminal, including traffic infractions, arising  
31 under such ordinances and to pronounce judgment in accordance  
32 therewith. A municipal court participating in the program established  
33 by the administrative office of the courts pursuant to RCW 2.56.160  
34 shall have jurisdiction to take recognizance, approve bail, and arraign  
35 defendants held within its jurisdiction on warrants issued by any court  
36 of limited jurisdiction participating in the program.

1 COURT COMMISSIONERS

2 Sec. 6. RCW 3.42.020 and 1984 c 258 s 31 are each amended to read  
3 as follows:

4 Each district court commissioner shall have such power, authority,  
5 and jurisdiction in criminal and civil matters as the appointing judges  
6 possess and shall prescribe, except that when serving as a  
7 commissioner, the commissioner does not have authority to preside over  
8 trials in criminal matters, or jury trials in civil matters unless  
9 agreed to on the record by all parties.

10 Sec. 7. RCW 3.34.110 and 1984 c 258 s 17 are each amended to read  
11 as follows:

12 (1) A district ~~((judge))~~ court judicial officer shall not ~~((act as~~  
13 ~~judge))~~ preside in any of the following cases:

14 ~~((1))~~ (a) In an action to which the ~~((judge))~~ judicial officer is  
15 a party, or in which the ~~((judge))~~ judicial officer is directly  
16 interested, or in which the ~~((judge))~~ judicial officer has been an  
17 attorney for a party.

18 ~~((2))~~ (b) When the ~~((judge))~~ judicial officer or one of the  
19 parties believes that the parties cannot have an impartial trial or  
20 hearing before the ((judge)) judicial officer. The judicial officer  
21 shall disqualify himself or herself under the provisions of this  
22 section if, before any discretionary ruling has been made, a party  
23 files an affidavit that the party cannot have a fair and impartial  
24 trial or hearing by reason of the interest or prejudice of the judicial  
25 officer. The following are not considered discretionary rulings: (i)  
26 The arrangement of the calendar; (ii) the setting of an action, motion,  
27 or proceeding for hearing or trial; (iii) the arraignment of the  
28 accused; or (iv) the fixing of bail and initially setting conditions of  
29 release. Only one change of ((judges shall be)) judicial officer is  
30 allowed each party ((under this subsection)) in an action or  
31 proceeding.

32 (2) When a ~~((judge))~~ judicial officer is disqualified under this  
33 section, the case shall be heard before another ~~((judge or judge pro~~  
34 ~~tempore))~~ judicial officer of the same county.

35 (3) For the purposes of this section, "judicial officer" means a  
36 judge, judge pro tempore, or court commissioner.

1           **Sec. 8.** RCW 3.50.075 and 1994 c 10 s 1 are each amended to read as  
2 follows:

3           (1) One or more court commissioners may be appointed by a judge of  
4 the municipal court.

5           (2) Each commissioner holds office at the pleasure of the  
6 appointing judge.

7           (3) A commissioner authorized to hear or dispose of cases must be  
8 a lawyer who is admitted to practice law in the state of Washington or  
9 a nonlawyer who has passed, by January 1, 2003, the qualifying  
10 examination for lay judges for courts of limited jurisdiction under RCW  
11 3.34.060.

12           (4) On or after July 1, 2010, when serving as a commissioner, the  
13 commissioner does not have authority to preside over trials in criminal  
14 matters, or jury trials in civil matters unless agreed to on the record  
15 by all parties.

16           (5) A commissioner need not be a resident of the city or of the  
17 county in which the municipal court is created. When a court  
18 commissioner has not been appointed and the municipal court is presided  
19 over by a part-time appointed judge, the judge need not be a resident  
20 of the city or of the county in which the municipal court is created.

21           NEW SECTION. **Sec. 9.** A new section is added to chapter 3.50 RCW  
22 to read as follows:

23           (1) A municipal court judicial officer shall not preside in any of  
24 the following cases:

25           (a) In an action to which the judicial officer is a party, or in  
26 which the judicial officer is directly interested, or in which the  
27 judicial officer has been an attorney for a party.

28           (b) When the judicial officer or one of the parties believes that  
29 the parties cannot have an impartial trial or hearing before the  
30 judicial officer. The judicial officer shall disqualify himself or  
31 herself under the provisions of this section if, before any  
32 discretionary ruling has been made, a party files an affidavit that the  
33 party cannot have a fair and impartial trial or hearing by reason of  
34 the interest or prejudice of the judicial officer. The following are  
35 not considered discretionary rulings: (i) The arrangement of the  
36 calendar; (ii) the setting of an action, motion, or proceeding for  
37 hearing or trial; (iii) the arraignment of the accused; or (iv) the

1 fixing of bail and initially setting conditions of release. Only one  
2 change of judicial officer is allowed each party in an action or  
3 proceeding.

4 (2) When a judicial officer is disqualified under this section, the  
5 case shall be heard before another judicial officer of the  
6 municipality.

7 (3) For the purposes of this section, "judicial officer" means a  
8 judge, judge pro tempore, or court commissioner.

9 NEW SECTION. **Sec. 10.** A new section is added to chapter 35.20 RCW  
10 to read as follows:

11 (1) A municipal court judicial officer shall not preside in any of  
12 the following cases:

13 (a) In an action to which the judicial officer is a party, or in  
14 which the judicial officer is directly interested, or in which the  
15 judicial officer has been an attorney for a party.

16 (b) When the judicial officer or one of the parties believes that  
17 the parties cannot have an impartial trial or hearing before the  
18 judicial officer. The judicial officer shall disqualify himself or  
19 herself under the provisions of this section if, before any  
20 discretionary ruling has been made, a party files an affidavit that the  
21 party cannot have a fair and impartial trial or hearing by reason of  
22 the interest or prejudice of the judicial officer. The following are  
23 not considered discretionary rulings: (i) The arrangement of the  
24 calendar; (ii) the setting of an action, motion, or proceeding for  
25 hearing or trial; (iii) the arraignment of the accused; or (iv) the  
26 fixing of bail and initially setting conditions of release. Only one  
27 change of judicial officer is allowed each party in an action or  
28 proceeding.

29 (2) When a judicial officer is disqualified under this section, the  
30 case shall be heard before another judicial officer of the  
31 municipality.

32 (3) For the purposes of this section, "judicial officer" means a  
33 judge, judge pro tempore, or court commissioner.

34 **MUNICIPAL DEPARTMENTS**

1        NEW SECTION.    **Sec. 11.**    A new section is added to chapter 3.46 RCW  
2 to read as follows:

3        A municipality operating a municipal department under this chapter  
4 prior to July 1, 2008, may continue to operate as if this act was not  
5 adopted.    Such municipal departments shall remain subject to the  
6 provisions of this chapter as this chapter was written prior to the  
7 adoption of this act.

8        NEW SECTION.    **Sec. 12.**    The following acts or parts of acts are  
9 each repealed:

10        (1) RCW 3.46.010 (Municipal department authorized) and 1984 c 258  
11 s 72 & 1961 c 299 s 35;

12        (2) RCW 3.46.020 (Judges) and 1987 c 3 s 1, 1984 c 258 s 73, & 1961  
13 c 299 s 36;

14        (3) RCW 3.46.030 (Jurisdiction) and 2005 c 282 s 13, 2000 c 111 s  
15 5, 1985 c 303 s 13, & 1961 c 299 s 37;

16        (4) RCW 3.46.040 (Petition) and 1984 c 258 s 74 & 1961 c 299 s 38;

17        (5) RCW 3.46.050 (Selection of full time judges) and 1975 c 33 s 2  
18 & 1961 c 299 s 39;

19        (6) RCW 3.46.060 (Selection of part time judges) and 1984 c 258 s  
20 75 & 1961 c 299 s 40;

21        (7) RCW 3.46.063 (Judicial positions--Filling--Circumstances  
22 permitted) and 1993 c 317 s 3;

23        (8) RCW 3.46.067 (Judges--Residency requirement) and 1993 c 317 s  
24 5;

25        (9) RCW 3.46.070 (Election) and 1984 c 258 s 76 & 1961 c 299 s 41;

26        (10) RCW 3.46.080 (Term and removal) and 1984 c 258 s 77 & 1961 c  
27 299 s 42;

28        (11) RCW 3.46.090 (Salary--City cost) and 1984 c 258 s 78, 1969  
29 ex.s. c 66 s 5, & 1961 c 299 s 43;

30        (12) RCW 3.46.100 (Vacancy) and 1984 c 258 s 79 & 1961 c 299 s 44;

31        (13) RCW 3.46.110 (Night sessions) and 1961 c 299 s 45;

32        (14) RCW 3.46.120 (Revenue--Disposition--Interest) and 2004 c 15 s  
33 7, 1995 c 291 s 2, 1988 c 169 s 1, 1985 c 389 s 3, 1984 c 258 s 303,  
34 1975 1st ex.s. c 241 s 4, & 1961 c 299 s 46;

35        (15) RCW 3.46.130 (Facilities) and 1961 c 299 s 47;

36        (16) RCW 3.46.140 (Personnel) and 1961 c 299 s 48;

37        (17) RCW 3.46.145 (Court commissioners) and 1969 ex.s. c 66 s 6;

1 (18) RCW 3.46.150 (Termination of municipal department--Transfer  
2 agreement--Notice) and 2005 c 433 s 33, 2001 c 68 s 2, 1984 c 258 s  
3 210, & 1961 c 299 s 49;

4 (19) RCW 3.46.160 (City trial court improvement account--  
5 Contributions to account by city--Use of funds) and 2005 c 457 s 2;

6 (20) RCW 3.42.030 (Transfer of cases to district judge) and 2000 c  
7 164 s 1, 1984 c 258 s 32, & 1961 c 299 s 33; and

8 (21) RCW 3.50.007 (Cities and towns of four hundred thousand or  
9 less to operate municipal court under this chapter or chapter 3.46  
10 RCW--Municipal judges in office on July 1, 1984--Terms) and 1984 c 258  
11 s 102.

12 **MISCELLANEOUS PROVISIONS**

13 NEW SECTION. **Sec. 13.** This act takes effect July 1, 2008.

14 NEW SECTION. **Sec. 14.** Subheadings used in this act are not any  
15 part of the law.

--- END ---

## **APPENDIX B**

C

West's Revised Code of Washington Annotated Currentness  
 Constitution of the State of Washington (Refs & Annos)  
 ▣ Article 4. The Judiciary (Refs & Annos)

→ § 8. Absence of Judicial Officer

Any judicial officer who shall absent himself from the state for more than sixty consecutive days shall be deemed to have forfeited his office: *Provided*, That in cases of extreme necessity the governor may extend the leave of absence such time as the necessity therefor shall exist.

CREDIT(S)

Adopted 1889.

LIBRARY REFERENCES

1988 Main Volume

Courts ↪ 55 et seq.

Judges ↪ 10.

C.J.S. Courts §§ 140, 143.

C.J.S. Judges §§ 26, 29.

NOTES OF DECISIONS

**Military service I**

1. Military service

Governor has right to extend military leave of absence granted to superior court judge for full term of emergency under this provision and Laws 1941 ch. 201 p. 592. *State v. Britton* (1947) 27 Wash.2d 336, 178 P.2d 341.

West's RCWA Const. Art. 4, § 8, WA CONST Art. 4, § 8

Current through amendments approved 11-6-2007

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END OF DOCUMENT

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## **APPENDIX C**

**RCW 3.38.020****Districting committee — Duties — Districting plan.**

The district court districting committee shall meet at the call of the prosecuting attorney to prepare or amend the plan for the districting of the county into one or more district court districts in accordance with the provisions of chapters 3.30 through 3.74 RCW. The plan shall include the following:

- (1) The boundaries of each district proposed to be established;
- (2) The number of judges to be elected in each district or electoral district, if any. In determining the number of judges to be elected, the districting committee shall consider the results of an objective workload analysis conducted by the administrator for the courts;
- (3) The location of the central office, courtrooms and records of each court;
- (4) The other places in the district, if any, where the court shall sit;
- (5) The number and location of district court commissioners to be authorized, if any;
- (6) The departments, if any, into which each district court shall be initially organized, including municipal departments provided for in chapter 3.46 RCW;
- (7) The name of each district; and
- (8) The allocation of the time and allocation of salary of each judge who will serve part time in a municipal department.

[2003 c 97 § 4; 1984 c 258 § 23; 1965 ex.s. c 110 § 1; 1961 c 299 § 26.]

**Notes:**

**Effective date -- 2003 c 97:** See note following RCW 3.34.010.

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

**RCW 3.46.030**  
**Jurisdiction.**

A municipal department shall have exclusive jurisdiction of matters arising from ordinances of the city, and no jurisdiction of other matters except as conferred by statute. A municipal department participating in the program established by the administrative office of the courts pursuant to RCW 2.56.160 shall have jurisdiction to take recognizance, approve bail, and arraign defendants held within its jurisdiction on warrants issued by any court of limited jurisdiction participating in the program.

[2005 c 282 § 13; 2000 c 111 § 5; 1985 c 303 § 13; 1961 c 299 § 37.]

**RCW 3.46.040  
Petition.**

Establishment of a municipal department shall be initiated by a petition from the legislative body of the city to the county legislative authority. Such petition shall be filed not less than thirty days prior to February 1, 1962, or any subsequent year, and shall set forth: (1) The number of full time and part time judges required for the municipal department; (2) the amount of time for which a part time judge will be required for the municipal department; and (3) whether the full time judge or judges will be elected or appointed. In a petition filed subsequent to 1962 provision shall be made for temporary appointment of a municipal judge to fill each elective position until the next election for district judges. The petition shall be forthwith transmitted to the districting committee. The organization of the municipal department shall be incorporated into the districting plan. The districting committee in its plan shall designate the proportion of the salary of each judge serving as a part time municipal judge to be paid by the city, which shall be proportionate to the time of such judge allotted to the municipal department by the districting plan. A city may withdraw its petition any time prior to adoption of the districting plan by the county legislative authority, and thereupon the municipal department pursuant to this chapter shall not be established.

[1984 c 258 § 74; 1961 c 299 § 38.]

**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.

**RCW 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.

[1984 c 258 § 76; 1961 c 299 § 41.]

**Notes:**

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

**RCW 3.46.150****Termination of municipal department — Transfer agreement — Notice.**

(1) Any city, having established a municipal department as provided in this chapter may, by written notice to the county legislative authority not less than one year prior to February 1st of the year in which all district court judges are subject to election, require the termination of the municipal department created pursuant to this chapter. A city may terminate a municipal department only at the end of a four-year judicial term. However, the city may not give the written notice required by this section unless the city has reached an agreement with the county under chapter 39.34 RCW under which the county is to be paid a reasonable amount for costs associated with prosecution, adjudication, and sentencing in criminal cases filed in district court as a result of the termination. The agreement shall provide for periodic review and renewal of the terms of the agreement. If the municipality and the county are unable to agree on the terms for renewal of the agreement, they shall be deemed to have entered into an agreement to submit the issue to arbitration under chapter 7.04A RCW. Pending conclusion of the arbitration proceeding, the terms of the agreement shall remain in effect. The municipality and the county have the same rights and are subject to the same duties as other parties who have agreed to submit to arbitration under chapter 7.04A RCW.

(2) A county that wishes to terminate a municipal department of the district court must provide written notice to the city legislative authority at least one year prior to the date of the intended termination.

[2005 c 433 § 33; 2001 c 68 § 2; 1984 c 258 § 210; 1961 c 299 § 49.]

**Notes:**

**Application -- Captions not law -- Savings -- Effective date -- 2005 c 433:** See RCW 7.04A.290 through 7.04A.310 and 7.04A.900.

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

Rules Of Appellate Procedure, RAP 13.7

West's Revised Code of Washington Annotated Currentness

Part III Rules on Appeal

Rules of Appellate Procedure (Rap)

Title 13: Review by the Supreme Court of Court of Appeals Decision

**RULE 13.7 PROCEEDINGS AFTER ACCEPTANCE OF REVIEW**

**(a) Procedure.** The procedure in the Supreme Court, after acceptance of review of a decision of the Court of Appeals, is the same as the procedure in the Supreme Court after acceptance of review of a trial court decision, except that (1) the record in the Court of Appeals is the record on review in the Supreme Court, and (2) only the briefs filed in the Court of Appeals and the documents submitted in connection with the motion for discretionary review or petition for review will be considered by the Supreme Court, unless additional briefs are submitted by the parties in accordance with sections (d) and (e) of this rule or are requested by the Supreme Court.

**(b) Scope of Review.** If the Supreme Court accepts review of a Court of Appeals decision, the Supreme Court will review only the questions raised in the motion for discretionary review, if review is sought of an interlocutory decision, or the petition for review and the answer, unless the Supreme Court orders otherwise upon the granting of the motion or petition. The Supreme Court may limit the issues to one or more of those raised by the parties. If the Supreme Court reverses a decision of the Court of Appeals that did not consider all of the issues raised which might support that decision, the Supreme Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues.

**(c) Other Limitations on Scope of Review.** The scope of review may be further affected by the circumstances set forth in rule 2.5.

**(d) Supplemental Briefs, Authorized.** Within 30 days after the Supreme Court grants a petition for review or a motion for discretionary review, any party may file and serve a supplemental brief in accordance with these rules. No response to a supplemental brief may be filed or served except by leave of the Supreme Court.

**(e) Supplemental Briefs, Special Requirements.**

(1) *Form.* Except as to length, a supplemental brief should conform to rules 10.3 and 10.4 and should be captioned "supplemental brief of (petitioner/respondent--name of party)."

(2) *Length.* A supplemental brief should not exceed 20 double spaced pages. The title sheet, appendices, table of contents and table of authorities are not included in this page limitation. For compelling reasons the court may grant a motion to file an over-length brief.

(3) *Filing and Service.* A supplemental brief should be filed in the Supreme Court and served in accordance with rule 10.2.

CREDIT(S)

[Amended effective June 7, 1979; September 1, 1990; September 1, 1994; September 1, 1998; September 1, 2006.]

Rules Of Appellate Procedure, RAP 13.7

West's Revised Code of Washington Annotated Currentness

Part III Rules on Appeal

Rules of Appellate Procedure (Rap)

Title 13. Review by the Supreme Court of Court of Appeals Decision

**RULE 13.7 PROCEEDINGS AFTER ACCEPTANCE OF REVIEW**

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**(b) Scope of Review.** If the Supreme Court accepts review of a Court of Appeals decision, the Supreme Court will review only the questions raised in the motion for discretionary review, if review is sought of an interlocutory decision, or the petition for review and the answer, unless the Supreme Court orders otherwise upon the granting of the motion or petition. The Supreme Court may limit the issues to one or more of those raised by the parties. If the Supreme Court reverses a decision of the Court of Appeals that did not consider all of the issues raised which might support that decision, the Supreme Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues.

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General Rules, GR 29

West's Revised Code of Washington Annotated Currentness

Part I Rules of General Application

General Rules (Gr)

**➔RULE 29. PRESIDING JUDGE IN SUPERIOR COURT DISTRICT AND LIMITED JURISDICTION COURT DISTRICT**

**(a) Election, Term, Vacancies, Removal and Selection Criteria--Multiple Judge Courts.**

(1) *Election.* Each superior court district and each limited jurisdiction court district (including municipalities operating municipal courts) having more than one judge shall establish a procedure, by local court rule, for election, by the judges of the district, of a Presiding Judge, who shall supervise the judicial business of the district. In the same manner, the judges shall elect an Assistant Presiding Judge of the district who shall serve as Acting Presiding Judge during the absence or upon the request of the Presiding Judge and who shall perform such further duties as the Presiding Judge, the Executive Committee, if any, or the majority of the judges shall direct. If the judges of a district fail or refuse to elect a Presiding Judge, the Supreme Court shall appoint the Presiding Judge and Assistant Presiding Judge.

(2) *Term.* The Presiding Judge shall be elected for a term of not less than two years, subject to reelection. The term of the Presiding Judge shall commence on January 1 of the year in which the Presiding Judge's term begins.

(3) *Vacancies.* Interim vacancies of the office of Presiding Judge or Acting Presiding Judge shall be filled as provided in the local court rule in (a)(1).

(4) *Removal.* The Presiding Judge may be removed by a majority vote of the judges of the district unless otherwise provided by local court rule.

(5) *Selection Criteria.* Selection of a Presiding Judge should be based on the judge's 1) management and administrative ability, 2) interest in serving in the position, 3) experience and familiarity with a variety of trial court assignments, and 4) ability to motivate and educate other judicial officers and court personnel. A Presiding Judge must have at least four years of experience as a judge, unless this requirement is waived by a majority vote of the judges of the court.

COMMENTARY

2008 Electronic Update

It is the view of the committee that the selection and duties of a presiding judge should be enumerated in a court rule rather than in a statute. It is also our view that one rule should apply to all levels of court and include single judge courts. Therefore, the rule should be a GR (General Rule). The proposed rule addresses the process of selection/removal of a presiding judge and an executive committee. It was the intent of the committee to provide some flexibility to local courts wherein they could establish, by local rule, a removal process.

Additionally, by delineating the selection criteria for the presiding judge, the committee intends that a rotational system of selecting a presiding judge is not advisable.

**(b) Selection and Term--Single Judge Courts.** In court districts or municipalities having only one judge, that judge shall serve as the Presiding Judge for the judge's term of office.

**(c) Notification of Chief Justice.** The Presiding Judge so elected shall send notice of the election of the Presiding Judge and Assistant Presiding Judge to the Chief Justice of the Supreme Court within 30 days of election.

**(d) Caseload Adjustment.** To the extent possible, the judicial caseload should be adjusted to provide the Presiding Judge with sufficient time and resources to devote to the management and administrative duties of the office.

#### COMMENTARY

##### 2008 Electronic Update

Whether caseload adjustments need to be made depends on the size and workload of the court. A recognition of the additional duties of the Presiding Judge by some workload adjustment should be made by larger courts. For example, the Presiding Judge could be assigned a smaller share of civil cases or a block of time every week could be set aside with no cases scheduled so the Presiding Judge could attend to administrative matters.

**(e) General Responsibilities.** The Presiding Judge is responsible for leading the management and administration of the court's business, recommending policies and procedures that improve the court's effectiveness, and allocating resources in a way that maximizes the court's ability to resolve disputes fairly and expeditiously.

**(f) Duties and Authority.** The judicial and administrative duties set forth in this rule cannot be delegated to persons in either the legislative or executive branches of government. A Presiding Judge may delegate the performance of ministerial duties to court employees; however, it is still the Presiding Judge's responsibility to ensure they are performed in accordance with this rule. In addition to exercising general administrative supervision over the court, except those duties assigned to clerks of the superior court pursuant to law, the Presiding Judge shall:

(1) Supervise the business of the judicial district and judicial officers in such manner as to ensure the expeditious and efficient processing of all cases and equitable distribution of the workload among judicial officers;

(2) Assign judicial officers to hear cases pursuant to statute or rule. The court may establish general policies governing the assignment of judges.;

(3) Coordinate judicial officers' vacations, attendance at education programs, and similar matters;

(4) Develop and coordinate statistical and management information;

(5) Supervise the daily operation of the court including:

(a) All personnel assigned to perform court functions; and

(b) All personnel employed under the judicial branch of government including but not limited to working conditions, hiring, discipline, and termination decisions except wages, or benefits directly related to wages; and

(c) The court administrator, or equivalent employee, who shall report directly to the Presiding Judge.

## COMMENTARY

### 2008 Electronic Update

The trial courts must maintain control of the working conditions for their employees. For some courts this includes control over some wage-related benefits such as vacation time. While the executive branch maintains control of wage issues, the courts must assert their control in all other areas of employee relations.

With respect to the function of the court clerk, generally the courts of limited jurisdiction have direct responsibility for the administration of their clerk's office as well as the supervision of the court clerks who work in the courtroom. In the superior courts, the clerk's office may be under the direction of a separate elected official or someone appointed by the local judges or local legislative or executive authority. In those cases where the superior court is not responsible for the management of the clerk's office the presiding judge should communicate to the county clerk any concerns regarding the performance of statutory court duties by county clerk personnel.

A model job description, including qualification and experience criteria, for the court administrator position shall be established by the Board for Judicial Administration. A model job description that generally describes the knowledge, skills, and abilities of a court administrator would provide guidance to Presiding Judges in modifying current job duties/responsibilities or for courts initially hiring a court administrator or replacing a court administrator.

(6) Supervise the court's accounts and auditing the procurement and disbursement of appropriations and preparation of the judicial district's annual budget request;

(7) Appoint standing and special committees of judicial officers necessary for the proper performance of the duties of the judicial district;

(8) Promulgate local rules as a majority of the judges may approve or as the Supreme Court shall direct;

(9) Supervise the preparation and filing of reports required by statute and court rule;

(10) Act as the official spokesperson for the court in all matters with the executive or legislative branches of state and local government and the community unless the Presiding Judge shall designate another judge to serve in this capacity;

## COMMENTARY

### 2008 Electronic Update

This provision recognizes the Presiding Judge as the official spokesperson for the court. It is not the intent of this provision to preclude other judges from speaking to community groups or executive or legislative branches of state or local government.

(11) Preside at meetings of the judicial officers of the district;

(12) Determine the qualifications of and establish a training program for pro tem judges and pro tem court commissioners; and

(13) Perform other duties as may be assigned by statute or court rule.

## COMMENTARY

### 2008 Electronic Update

The proposed rule also addresses the duties and general responsibilities of the presiding judge. The language in subsection (d), (e), (f) and (g) was intended to be broad in order that the presiding judge may carry out his/her responsibilities. There has been some comment that individual courts should have the ability to change the "duties and general responsibilities" subsections by local rule. While our committee has not had an opportunity to discuss this fully, this approach has a number of difficulties:

- It would create many "Presiding Judge Rules" all of which are different
- It could subject some municipal and district court judges to pressure from their executive and/or legislative authority to relinquish authority over areas such as budget and personnel
- It would impede the ability of the BJA through AOC to offer consistent training to incoming presiding judges

The Unified Family Court subgroup of the Domestic Relations Committee suggested the presiding judge is given specific authority to appoint judges to the family court for long periods of time. Again the committee has not addressed the proposal; however, subsections (e) and (f) do give the presiding judge broad powers to manage the judicial resources of the court, including the assignment of judges to various departments.

**(g) Executive Committee.** The judges of a court may elect an executive committee consisting of other judicial officers in the court to advise the Presiding Judge. By local rule, the judges may provide that any or all of the responsibilities of the Presiding Judge be shared with the Executive Committee and may establish additional functions and responsibilities of the Executive Committee.

## COMMENTARY

### 2008 Electronic Update

Subsection (g) provides an option for an executive committee if the presiding judge and/or other members of the bench want an executive committee.

**(h) Oversight of judicial officers.** It shall be the duty of the Presiding Judge to supervise judicial officers to the extent necessary to ensure the timely and efficient processing of cases. The Presiding Judge shall have the authority to address a judicial officer's failure to perform judicial duties and to propose remedial action. If remedial action is not successful, the Presiding Judge shall notify the Commission on Judicial Conduct of a judge's substantial failure to perform judicial duties, which includes habitual neglect of duty or persistent refusal to carry out assignments or directives made by the Presiding Judge, as authorized by this rule.

**(i) Multiple Court Districts.** In counties that have multiple court districts, the judges may, by majority vote of each court, elect to conduct the judicial business collectively

under the provisions of this rule.

**(j) Multiple Court Level Agreement.** The judges of the superior, district, and municipal courts or any combination thereof in a superior court judicial district may, by majority vote of each court, elect to conduct the judicial business collectively under the provisions of this rule.

**(k) Judicial Services Contracts.** A judicial officer may contract with a municipal or county authority to serve as a judicial officer. The personal service contract shall not contain provisions which conflict with this rule, the Code of Judicial Conduct or statutory judicial authority, or which would create an impropriety or the appearance of impropriety concerning the judge's activities. The employment contract should acknowledge the court is a part of an independent branch of government and that the judicial officer or court employees are bound to act in accordance with the provisions of the Code of Judicial Conduct and this rule.

#### COMMENTARY

##### 2008 Electronic Update

The Board for Judicial Administration should establish a model judicial services contract.

#### CREDIT(S)

[Adopted effective April 30, 2002.]

## **APPENDIX D**

Title 1 ADMINISTRATION AND PERSONNEL

Chapter 1.16 DISTRICT COURT DISTRICTS

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**1.16.010 Established.**

There shall be one district court district within Spokane County known as the Spokane County District, which boundaries shall be the same as that of Spokane County. (See RCW 3.30.015). (Res. 02-0403 (part), 2002: Res. 90-1199 Attachment A (part), 1990: Res. 78-405 Attachment A (part), 1978: Res. 70-234 § 1, 1970: Res. 62-169 § 1, 1962)

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Title 1 ADMINISTRATION AND PERSONNEL

Chapter 1.16 DISTRICT COURT DISTRICTS

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**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)

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Title 1 ADMINISTRATION AND PERSONNELChapter 1.16 DISTRICT COURT DISTRICTS

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**1.16.030 Location of court facilities.**

The location of the central office, courtrooms and records of the Spokane County District shall be in the Spokane County Courthouse Complex. The judges of the Spokane County District shall, however, sit in facilities located within the city limits of Cheney, the city limits of Deer Park, and any other places, including, but not limited to, any other incorporated cities within Spokane County, as the board of county commissioners, in their sole discretion, may from time to time deem conducive to the best interests and welfare of the county as a whole: (Res. 02-0403 (part), 2002: Res. 90-1199 Attachment A (part), 1990: Res. 78-405 Attachment A (part), 1978: Res. 70-234 § 3, 1970: Res. 62-169 § 3, 1962)

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Title 1 ADMINISTRATION AND PERSONNELChapter 1.16 DISTRICT COURT DISTRICTS

---

**1.16.040 Number and location of court commissioners.**

There shall be up to five Spokane County District court commissioners having those powers enumerated in RCW Section 3.42.020. The actual number of Spokane County District court commissioners, up to five, shall be determined on a yearly basis upon the board of county commissioners adoption of the Spokane County District Court budget. Spokane County District court commissioners' court rooms shall be in the Spokane County Courthouse Complex or in court facilities located within the city limits of Cheney or city limits of Deer Park or other places, including, but not limited to, any other incorporated cities within Spokane County, as the board of county commissioners, in their sole discretion, may from time to time deem conducive to the best interest and welfare of the county as a whole. (Res. 02-0403 (part), 2002: Res. 01-0023, 2001: Res. 00-0793, 2000: Res. 90-1199 Attachment A (part), 1990: Res. 78-405 Attachment A (part), 1978: Res. 70-234 § 4, 1970: Res. 62-169 § 4, 1962)

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Title 1 ADMINISTRATION AND PERSONNELChapter 1.16 DISTRICT COURT DISTRICTS

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**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)

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Title 1 ADMINISTRATION AND PERSONNEL

Chapter 1.16 DISTRICT COURT DISTRICTS

---

**1.16.060 Salary of judges.**

(a) The annual salary for full-time judges in the Spokane County District shall be established by the Washington Citizens' Commission on Salaries for Elected Officials or as otherwise provided by state law.

(b) The annual salary for the part-time judges in the Spokane County District shall be established by the Washington Citizens' Commission on Salaries for Elected Officials or as otherwise provided by state law. (Res. 02-0403 (part), 2002: Res. 90-1199 Attachment A (part), 1990: Res. 78-1023, 1978; Res. 78-405 Attachment A (part), 1978: Res. 62-290, 1962: Res. 62-248, 1962)

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Title 1 ADMINISTRATION AND PERSONNEL

Chapter 1.16 DISTRICT COURT DISTRICTS

---

**1.16.070 Compensation for jurors.**

Pursuant to the provisions of RCW 2.36.150, the board of county commissioners does formally approve of a ten-dollar per day fee as that fee which each juror shall receive for each day's attendance. (Res. 90-1199 Attachment A (part), 1990; Res. 80-1323, 1980)

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# **APPENDIX E**

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)

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## **APPENDIX F**

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NO. 253163-III  
(Consolidated with No. 253171)

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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CITY OF SPOKANE,

Respondent,

v.

LAWRENCE J. ROTHWELL  
And  
HENRY E. SMITH,

Petitioners.

---

CITY'S MOTION FOR RECONSIDERATION

---

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**Attorney General Opinions**

AGO 1995 No.	3,10
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1. IDENTITY OF MOVING PARTY

The City of Spokane, through its attorneys, seeks the relief set forth in Part 2.

2. STATEMENT OF RELIEF SOUGHT

The City of Spokane respectfully requests reconsideration and clarification of this Court's opinion in *City of Spokane v. Rothwell et al.*, \_\_\_ Wn. App. \_\_\_, 2007 WL 3287766, Slip op. 25316-3-III (Nov. 8, 2007). In *Rothwell*, this Court reversed two municipal convictions, concluding that the trial court judge did not have authority to preside over municipal proceedings and impose judgment because of an election irregularity. *Id.* at ¶ 17.

The decision concluded that Judge Walker did not have authority to preside over Mr. Smith and Mr. Rothwell's trials because she was not properly elected. *Rothwell* at ¶ 12. The County auditor did not designate her position as a municipal department, nor did only city-voters elect her. *Id.* at n. 1 (quoting RCW 3.46.070). The decision did not determine that the municipal department was improperly created or maintained. *Id.* at 12.

3. GROUND FOR RELIEF

a. **Motion to reconsider reversal based on lack of de facto authority.**

RAP 12:4(c) governs motions to reconsider this Court's opinion in *Rothwell*. In the interests of clarity, the facts and points of law that the City respectfully contends were overlooked will be discussed in the same section.

b. **In alternative, motion to clarify retroactivity of decision.**

While somewhat unusual, an appellate court may subsequently clarify its holding in a reported case. In *State v. Chrisman*, the Washington Supreme Court initially held that state college police violated students' Fourth Amendment rights and ruled that contraband should have been excluded. 100 Wn.2d 814, 815, 676 P.2d 419 (1984). After the United States Supreme Court reversed, Mr. Chrisman moved the state supreme court for clarification as to Washington's constitutional prohibition against unreasonable searches and seizures. *Id.* Washington's Supreme Court clarified its holding, again suppressing the evidence but doing so solely on state constitutional grounds. *Id.* In the event this Court declines to reconsider its decision, the City also respectfully asks this

Court to clarify its holding in *Rothwell* as it relates to retroactive application.

4. FACTS & ARGUMENT RELEVANT TO MOTIONS

- a. *De facto jurisdiction did not exist in Nollette because that judge sought to usurp the position from the selection process, not because there was an irregularity in the selection; subsequent legislative amendments distinguish it from Judge Walker's situation where there was an irregularity in the selection process.*

The City respectfully submits that several facts and points of law may have been overlooked. Preliminarily, as noted by the Attorney General:

Unlike municipal courts, the municipal department<sup>1</sup> of a district court is not a stand-alone court. It is part of the larger county district court. AGO 1992 No. 13 at 2. Its judges are judges of the district court. RCW 3.46.020.

AGO 1995 No. 9 at 6. This Court concluded that because Judge Walker was neither appointed, nor elected exclusively by City voters, she had no color of right and thus, no de facto jurisdiction. *Rothwell*, ¶ 15. This conclusion is premised on *Nollette v. Christianson*, 115 Wn.2d 594, 605, 800 P.3d 359 (1990). *Id.* The City respectfully suggests that this

---

<sup>1</sup> "Department" means an administrative unit of a district court established for the orderly and efficient administration of business and may include, without being limited in scope thereby, a unit or units for determining traffic cases, violations of city ordinances, violations of state law, criminal cases, civil cases, or jury cases.

RCW 3.30.010 (emphasis supplied).

conclusion 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, but sought to compel his ability to preside over municipal cases. 115 Wn.2d at 597. In short, he sought to usurp the office. This case does not involve the same situation.

The *Nollette* court explained how SCC 1.16.050 establishes the relevant pool of judges who are eligible to serve as municipal court judges. 115 Wn.2d at 605. 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-time municipal court judges. *Nollette*, 115 Wn.2d at 605. This appointment process is 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). *Id.*

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

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 state legislature also amended the selection mechanism to be election, not appointment. RCW 3.46.063. Here, Judge Walker was elected to the Spokane County District Court.<sup>2</sup> 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 that office when the County did not follow RCW 3.46.070 by designating the position as serving the municipal department or limiting the election to only City-voters. However, Judge Walker's situation is not like Judge Nollette, who sought to usurp an office for which he had not been selected:

[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.

*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).

Judge Walker was selected, but because of an irregularity in the selection.

---

<sup>2</sup> There is no dispute that voters elected Judge Walker to the District Court. In the 2002 election, she received 58.98% of the votes compared to her opponent receiving 40.79% in municipal precincts; the overall Spokane County results were 59.95% voting in favor of Judge Walker and 39.81% in favor of her challenger. RALJ RECORD: DEC. OF PAUL BRANDT (filed June 28, 2005) at ¶¶ 6-7. Despite the deficiency or election irregularity with regard to serving the municipal department, Judge Walker was a duly elected district court judge.

process, she only held the position as a de facto judge. As our Supreme 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.'

*Id.* at 344 (quoting 48 C.J.S., Judges, § 2(2), p. 949)(emphasis supplied).

The City respectfully suggests that this Court misapprehended the application of *Nollette* to this case. Judge Nollette did not have de facto jurisdiction because he sought to usurp the position from the selection process, not because there was an irregularity in the selection process. Here, however, there was an irregularity in the selection process. Nevertheless, Judge Walker held the office of municipal judge and actively assumed those duties under color of right. Accordingly, de facto jurisdiction existed. This result is consistent with cases in which there was an irregularity or deficiency in the manner in which a judicial officer came into that office.

b. *When there is an irregularity as to the manner in which a judicial officer holds office, de facto jurisdiction exists.*

All district court judges comprise the municipal department. SCC 1.16.050. As a duly elected district court judge, Judge Walker served its municipal department. Even if her occupation of the office of municipal

judge was a nullity because her election did not follow statutory procedures, it does not mean that her judicial actions are null and void. *Barrett-Smith v. Barrett-Smith*, 110 Wn. App. 87, 90-91, 38 P.3d 1030 (2002).

In *Barrett-Smith*, superior court did not follow the statutory procedures for appointing a pro tem judge to preside over a dissolution trial. 110 Wn. App. at 90. The wife moved for a continuance, which was denied. *Id.* at 88. The husband conceded error and that a new trial was warranted. *Id.* But despite the pro tem's appointment being a nullity, the pro tem's actions were not null and void. *Id.* at 90. The pro tem was appointed by superior court order and thus occupied that position under color of authority. *Id.* at 92. Although the order appointing did not comply with the statutory requisites, the pro tem occupied the office as a de facto judge. *Id.* The same principles apply here.

Just as in *State v. Franks*, 7 Wn. App. 594, 596, 501 P.2d 622 (1972), the irregularity with regard to the County's ballot not identifying Judge Walker's position as one that served the municipal department, or limiting the election to city voters 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 the judicial process.

Necessity and public policy compel us to hold otherwise.” 7 Wn. App. at 596. This is such a case.

c. *Possible Unintended Consequences*

At oral argument on the merits, when this Court inquired as to retroactivity, Petitioners’ counsel responded that the issue was not briefed or a part of the record. The City concurs this issue was not raised, briefed, or supported by the Record as it currently exists.

As currently interpreted, the impact of this Court’s decision in *Rothwell* is potentially widespread: Mass media headlines and lead news stories have touted the ruling as having the possible effect of invalidating thousands of convictions and requiring the refund of millions of dollars in municipal fines. See App. A to Aff. of M. Szambelan, CITY’S EMERGENCY MOTION FOR STAY. In the very short time since this decision was released, defense attorneys have already sought to have convicted criminals released from jail on the premise that the *Rothwell* decision automatically voids all convictions issued by the municipal department when it operated as RCW 3.46 court. *Id.* If this interpretation is correct and was an intended consequence of the decision, it currently affects more than one hundred inmates being held, pending appeals, past fines, show cause hearings for probation violations, felony cases that have a municipal conviction as a predicate offense, and has far-reaching impacts. *Id.* It

could also affect the validity of no-contact orders issued in domestic violence cases.

If this Court had intended its decision challenging Judge Walker to retroactively apply as to the entire bench. *Cf. Rothwell* at ¶7 (Petitioners' argument applies to "necessarily all other Spokane county municipal judges"); this issue should be briefed and allow supplementation of the existing record pursuant to RAP 9.6(a). For instance, there are a multitude of scenarios that affect the extent of any retroactivity based on a defect in the improper election:

- As set forth in more detail below, the City was able to terminate its 3.46 court effective December 31, 2006 and an interlocal agreement for judicial services through the County District Court currently exists.
- Cases that had been filed in the 3.46 municipal department and were open on the date of termination are transferred to the new court pursuant to last year's Supreme Court ruling that is discussed below.
- Judicial services for municipal cases prosecuted in the regional domestic violence task force have always been provided through an interlocal agreement pursuant to a federal grant.

- Judge Walker was initially appointed to fill a mid-term vacancy. 1995 AGO 9 suggests that an appointment to a mid-term vacancy need not be subject to city-wide election.

Given that retroactivity was not an issue on appeal, the City respectfully requests that this Court clarify whether its decision is retroactive, as well as allow supplementation of the record and additional briefing if that is the case.

The situation presented in this case, however, is analogous to that in *State ex rel. Farmer v. Edmonds Mun. Ct.*, 27 Wn. App. 762, 621 P.2d 171 (1980), *rev. denied* 95 Wn.2d 1016 (1981). There, the city of Edmonds attempted to create its own municipal court, ostensibly pursuant to RCW 35A.20. *Id.* at p. 766. The Court of Appeals 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. *Id.* at 767.

Notably, however, the Court of Appeals 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.

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

As noted by Judge Brown, the general rule is that there must be a de jure office before there can be a de facto officer. *Rothwell* at ¶ 19 (J. Brown, *dissenting*). However, as both the dissent and the court in *Edmonds* recognized, there is an exception to that general rule when the office is created by a legislative act or municipal ordinance: “[T]he general rule yields and the office is regarded as a de facto office until the act or ordinance is declared invalid.” *Edmonds*, 27 Wn. App. at 768 (citations omitted); *see also*, *Rothwell*, *Rothwell* at ¶ 19 (J. Brown, *dissenting*).

Here, Spokane established its municipal court:

[B]y virtue of 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.

SMC 5.01.010. It operated as a RCW 3.46 municipal department of the Spokane County district court until terminated pursuant to RCW 3.46.150.

SMC 5.01.030. As set forth in more detail below, the municipal department was terminated effective January 1, 2007. Just as in *Edmonds*, the official acts of the Spokane Municipal Judges should be valid and enforceable against the public and third parties. 27 Wn. App. 768. The final judgments and sentences should not be disturbed. *Id.* at 769.

If retroactive invalidation is an intended consequence, this decision impacts cases beyond those filed in Spokane Municipal Department when it was organized pursuant to RCW 3.46. In addition to being predicate offenses for specified felonies, such as felony DUI, stalking (SMC 10.11.060(E)(3)) and violations of protective orders, municipal convictions may affect existing sentences based on offender scores under the Sentencing Reform Act:

Any . . . municipal conviction for an offense under the laws of this state that would be classified as a serious traffic offense under (a) of this subsection [nonfelony DUI, physical control, reckless driving, as well as hit-and-run attended].

RCW 9.94A.030(40)(b). It would also affect Department of Licensing records for administrative actions based upon convictions for criminal traffic offenses and civil infractions.

Similarly, if retroactivity was an intended consequence, it also raises the question of reimbursement of past fines paid pursuant to orders by judges in the municipal department. This affects not only the City, but also state reimbursement of the corresponding contributions to the state Public Safety Education Assessment fund (RCW 3.62.090) during the time period when the judges were mandated to be elected pursuant to the effective date of the 1993 amendments to RCW 3.46.070.

d. *Remedial efforts to cure election irregularities.*

This Court focused on how after the 2004 Interlocal Agreement expired, “there was no attempt to create a municipal department.” *Rothwell*, at ¶ 16. There is a simple explanation. As noted, the statutory structure of these mandatory provisions is beyond the sole control of municipalities: The City filed suit against the County to terminate the municipal department created pursuant to RCW 3.46.150. *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 146 P.3d 893 (2006). As the Court noted, cities may create an independent municipal court (RCW 3.50), establish a municipal department of the district court (RCW 3.46), or enter into an agreement with the district court to hear criminal cases and other matters. *Id.* at ¶ 14.

The Supreme Court recited the relevant procedural history in its decision:

Currently, the City operates its municipal court as a department of the District Court pursuant to chapter 3.46 RCW. In November 2004, the mayor of Spokane notified the commissioners of the County that the City intended to create an independent Spokane municipal court pursuant to chapter 3.50 RCW, effective January 1, 2007. The City would therefore terminate the existing municipal department of the District Court on December 31, 2006.

158 Wn.2d at 666 (underscore supplied). By way of general background, a municipality must enter into an agreement with the affected county before the municipality may give its statutory notice that it intends to terminate a department of that county's district court. RCW 3.46.150(1). The statutory scheme sets forth a detailed timeline that must be followed (e.g., "at least one year prior to February 1<sup>st</sup> of the year in which all district court judges are subject to election") with respect to notice and the City could only terminate a municipal department at the end of a four-year judicial term. 158 Wn.2d at ¶ 4.

After coming to an impasse regarding the termination, the City of Spokane filed a complaint seeking declaratory judgment against both the County and the District Court in order to allow it to terminate. 158 Wn.2d at 669-70. At summary judgment, the trial court determined the requisite transfer agreement was invalid. *Id.* at 670-71. The Supreme Court recognized how the practical result of the trial court's ruling was that the City missed its window for giving valid notice of its intent to terminate the municipal department of the district court. *Id.* at ¶ 11. The City petitioned and obtained direct discretionary review. *Id.*

Ultimately, the Supreme Court reversed the lower court on the issues of surrounding the proposed transfer to an independent municipal court, agreeing the transfer agreement met the statutory requisites (158

Wn.2d at ¶ 23), and that GR 29 did not render the Presiding Judge a necessary party to the agreement. *Id.* at ¶ 28. The Supreme Court issued its decision on November 16, 2006 -- shortly after the most recent judicial elections, but in time for the City to terminate its 3.46 municipal department on December 31, 2006 as set forth in its statutory notice.

These developments transpired after the Superior Court's decision from which Mr. Smith and Mr. Rothwell obtained discretionary review. As a result, the documents terminating the City's municipal department and instituting a 2007 interlocal agreement for judicial services from the District Court are not -- and could not have been -- in the appellate record for these cases. If this Court determines that the record is not sufficiently complete to permit a decision under these circumstances, RAP 9.10 allows for supplementation of the Record and the City would request an opportunity to do so.

Not only are these subsequent developments relevant should this Court have intended for its decision to be retroactive, they also demonstrate legislative enactments to cure the deficiencies such as in *State v. Amodio*, 110 Wn. App. 359, 40 P.3d 1182 (2002):

When a specific statutory procedure for creation of a governmental department or position is not followed, a subsequent legislative enactment incorporating the necessary elements can provide the notice and authorization necessary to cure the deficiency.

110 Wn. App. at 364-65 (citing *In re Eng*, 113 Wn.2d 178, 191, 776 P.2d 1336 (1989)). As noted by the Supreme Court, while the 2004 interlocal agreement was in effect, the City informed the County that it wanted to terminate the 3.46 municipal department and operate an independent court. The City complied with the termination procedures set forth in 3.46, but the County resisted termination until the Supreme Court's decision in the City's favor in November 2006.

The Supreme Court's decision was issued shortly after the most recent (2006) judicial elections. It is noteworthy that the County controls the election and ballot designations, not the City. If this Court were inclined to grant a supplemental designation of the Superior Court record pursuant to RAP 9.6(a), the City would designate the materials submitted in support of the District Court's October 5, 2005 motion to intervene in these RALJ appeals, which would confirm the respective positions on this issue.<sup>3</sup>

In addition, if RCW 39.34.180(3) allows for continuation of an expired interlocal agreement for disputed compensation, the disputed 2004

---

<sup>3</sup> RAP 9.6(a) encourages a party to only designate that which is needed to review the issues presented to the appellate court. Since the trial court's motion to intervene was not necessary to review the issues presented on review, the City did not file supplemental designation of those papers when it filed its response brief.

interlocal agreement arguably may also be deemed to continue until a new agreement is reached – and one was, effective January 1, 2007. These subsequent legislative enactments provide the notice and authorization necessary to cure the deficiency.

Similarly, these legislative enactments provide the office that Judge Walker occupied. As Judge Brown noted, there was an official attempt to create the office. *Rothwell* at ¶ 19. Despite the flawed process in doing so, the office is still regarded as a de facto office until the legislative act or municipal ordinance creating it is declared invalid. *Id.* (quoting *State v. Canady*, 116 Wn.2d 853, 857, 809 P.2d 203 (1991)).

After the district court election Judge Walker held color of right title to the de facto office, for which she had performed judicial functions since she was first appointed to the bench years ago and winning two subsequent judicial elections since.

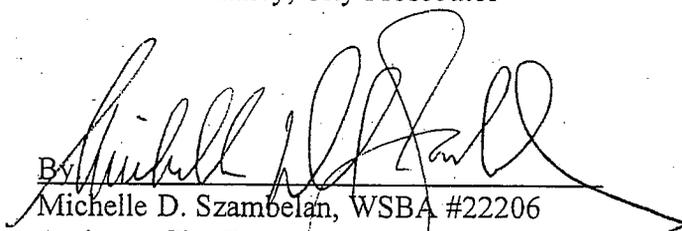
5. CONCLUSION

The City respectfully asks this Court to reconsider whether Judge Walker was a de facto judge, and affirm the convictions. Alternatively, the City asks this Court to clarify the *Rothwell* opinion as to its retroactive effect, and if so to allow the parties to prepare an adequate record and briefing on that issue.

Respectfully submitted this 27th day of November, 2007.

CITY OF SPOKANE

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- 1) City of Spokane's Motion for Emergency for a Stay
- 2) Declaration of Paul Brandt (June 28, 2005)
- 3) Spokane Municipal Code 5.01.010
- 4) Spokane Municipal Code 5.01.030



ORIGINAL

FILED

NOV 13 2007

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

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COPY

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

CITY OF SPOKANE,

Respondent,

v.

LAWRENCE J. ROTHWELL,

Petitioner.

No. 25316-3-III  
(Consolidated with  
No. 25317-1-III

CITY OF SPOKANE'S EMERGENCY  
MOTION FOR A STAY

CITY OF SPOKANE,

Respondent,

v.

HENRY E. SMITH,

Petitioner.

CITY'S EMERGENCY MOTION FOR STAY  
PAGE 1

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1. IDENTITY OF MOVING PARTY

The City of Spokane, through its attorneys, asks for the relief set forth in Part 2.

2. STATEMENT OF RELIEF SOUGHT

The City of Spokane seeks an emergency stay of enforcement of this Court's opinion in *City of Spokane v. Rothwell et al.*, \_\_\_ Wn. App. \_\_\_, 2007 WL 3287766, Slip op. 25316-3-III (Nov. 8, 2007) while it timely seeks further clarification and review.

3. FACTS RELEVANT TO MOTION

As currently interpreted, the impact of this Court's decision in *Rothwell* is potentially widespread. Mass media headlines and lead news stories have touted the ruling as having the possible effect of invalidating thousands of convictions and requiring the refund of millions of dollars in municipal fines. See App. A to Aff. of M. Szambelan. In the very short time since the decision was released, defense attorneys have already sought to have clients released from jail on the premise that the *Rothwell* decision automatically voids all convictions issued by the municipal department when it operated as RCW 3.46 court. Aff. of Szambelan. If this interpretation is correct and was an intended consequence of the decision, it currently affects more than one hundred inmates being held, pending appeals, past fines, show cause hearings for probation violations, felony cases that have a municipal conviction as a predicate offense, and has far-reaching impacts. *Id.*

While the City promptly seeks clarification and further review, it has attempted to mitigate potential problems by temporarily delaying disposition on pending matters that could incarcerate people as a result of a conviction rendered or a warrant issued by the court when it

1 operated as a municipal department pursuant to RCW 3.46. Aff. of Szambelan. Likewise, the  
2 City has identified the inmates being held solely as a result of a conviction or warrant issued by  
3 the judges when the court operated as a municipal department, including *inter alia* assault and  
4 domestic violence. *Id.* Mr. Smith and Mr. Rothwell are not in custody. *Id.*

5  
6 The City advised counsel for the Petitioners on Friday, November 9<sup>th</sup> as to its intention  
7 to seek a stay while it seeks additional review. Aff. of Szambelan. The City understands that  
8 Mr. Beggs will be out of state from Wednesday (11/14/07) for the remainder of the week. *Id.*  
9 The City has faxed, e-mailed and hand-delivered a copy of this motion to Mr. Beggs. *Id.* The  
10 chaos started with this morning's dockets – waiting ten more days to have the stay issue  
11 resolved only compounds the problem; adequate relief cannot be given if ten days' notice of the  
12 motion. *Id.*

13  
14 4. GROUNDS FOR RELIEF AND ARGUMENT

15 RAP 8.3 gives this Court authority to issue orders after acceptance of review in order to  
16 insure effective and equitable review. Specifically, it provides authority for injunctive or other  
17 relief to a party. RAP 8.3. An emergency stay of this Court's decision in *Rothwell* is necessary  
18 to insure effective and equitable review.  
19

20  
21 Appellate review is deliberative and necessarily takes time. In recognition of that, the  
22 City respectfully requests this Court to grant a temporary stay of enforcement of the *Rothwell*  
23 decision. While the parties are not bound until the case is final, the opinion is effective upon  
24 filing. There is much debate and uncertainty as to the immediate impact of the decision,  
25 including whether or not it requires the release of inmates incarcerated as a result of a conviction  
26

27 CITY'S EMERGENCY MOTION FOR STAY  
28 PAGE 3

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1 or warrant issued by a judge of the municipal court when it operated as a municipal department  
2 pursuant to RCW 3.46.

3  
4 The City will be timely filing a motion for clarification and reconsideration. At a  
5 minimum, a temporary stay of enforcement of the *Rothwell* decision will allow effective and  
6 equitable review for everyone involved in the judicial process. The panel could clarify that it  
7 did not intend for its decision to invalidate all convictions and actions undertaken by judges  
8 when acting under as a municipal department organized pursuant to RCW 3.46, as it had for  
9 more than a decade. Conversely, if the panel did intend for that to be a consequence of the  
10 decision, clarification allows all those involved to act accordingly. The impact of such a  
11 consequence is far-reaching: Equity is best served by full appellate review before mandating  
12 such drastic and sweeping consequences.  
13  
14

15 A stay simply maintains the status quo while the decision and its impact are afforded full  
16 appellate review. It does not adversely affect the petitioners. The petitioners are not in custody  
17 and the trial court stayed enforcement of their judgment and sentences pending appellate review.  
18 Denial of a stay opens the proverbial floodgates and tens of thousands of cases will be subject to  
19 an argument that the *Rothwell* decision affords them relief prior to complete appellate review of  
20 that decision.  
21

22 The City's position is not without merit and presents debatable issues. Judge Brown's  
23 dissent disagreed with the majority as it related to the judge having *de facto* authority. 2007 WL  
24 3287766 at ¶¶ 18-20. Moreover, appellate courts recognize that a stay may appropriate to  
25

26  
27 CITY'S EMERGENCY MOTION FOR STAY  
28 PAGE 4

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1 preserve the fruits of an appeal when there is no appreciable loss to the parties. *See, e.g.,*  
2 *Kennett v. Levine*, 49 Wn.2d 605, 304 P.2d 682 (1955); *Shamley v. City of Olympia*, 47 Wn.2d  
3 124, 286 P.3d 702 (1955); *Boeing v. Sierracin Corp.*, 43 Wn. App. 288, 716 P.2d 956 (1986).  
4

5 The more recent *Boeing* case acknowledged how a trial court decision granting  
6 injunctive relief that prohibited the use of a trade secret was not a decision “affecting property,”  
7 which was supersedable as of right. 43 Wn. App. At 291. Given that it was not appealable as of  
8 right, it fell within the parameters of RAP 8.3 and the appellate court’s discretionary authority.  
9  
10 *Id.* It noted that when there are debatable issues presented on appeal and the equities of the  
11 situation can support a stay as being necessary to preserve the fruits of the appeal. *Id.* In  
12 discussing the actual application of this theory, it stated how:

13  
14 [C]ourts apply a sliding scale such that the greater the inequity, the less important  
15 the inquiry into the merits of the appeal. **Indeed, if the harm is so great that**  
16 **the fruits of a successful appeal would be totally destroyed, relief should be**  
**granted, unless the appeal is totally devoid of merit.**

17 *Boeing*, 43 Wn. App. 291 (citing *Purser v. Rahm*, 104 Wn.2d 159, 702 P.2d 1196 (1985);  
18 *Kennett v. Levine*, 49 Wn.2d 605, 304 P.2d 682 (1956))(emphasis supplied).  
19

20 Likewise, this situation does not involve a decision affecting property for the purposes of  
21 the traditional supersedeas as of right. This Court should exercise its discretion pursuant to  
22 RAP 8.3 to stay enforcement of the *Rothwell* decision pending further review. Here, there is no  
23 change in the status quo to the petitioners until appellate review is complete. However, the  
24 fruits of a successful further appellate review would be destroyed without a stay. As evidenced  
25

1 by the dissent, the City's position as it relates to *de facto* jurisdiction is not devoid of merit.

2 This Court should stay enforcement of the *Rothwell* decision pending further appellate review.

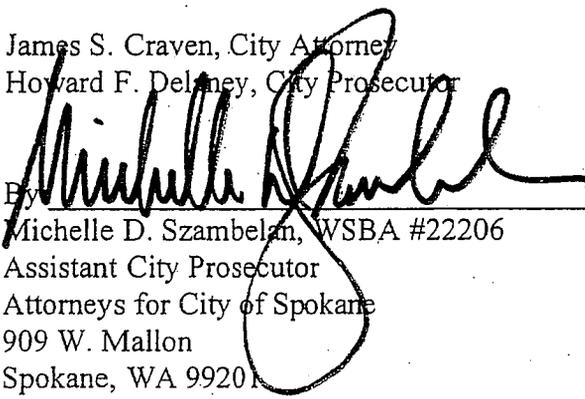
3  
4 5. CONCLUSION

5 The City respectfully asks this Court to use its inherent power to grant the equitable  
6 relief that would stay enforcement of the *Rothwell* opinion.

7 Respectfully submitted this 13<sup>th</sup> day of November, 2007.

8 CITY OF SPOKANE

9  
10 James S. Craven, City Attorney  
Howard F. Delaney, City Prosecutor

11   
12 By \_\_\_\_\_  
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14 Assistant City Prosecutor  
Attorneys for City of Spokane  
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16 509.835.5988

17 Affidavit

18  
19 STATE OF WASHINGTON :

20 County of Spokane :

:ss. AFFIDAVIT OF  
MICHELLE D. SZAMBELAN

21 Michelle D. Szambelan, being first duly sworn upon oath, says:

- 22 1. I am an Assistant City Prosecutor for the City of Spokane and  
23 attorney of record for same in this matter.  
24

1           2.       I attach as App. A true and correct copy of mass media stories  
2 reflecting current interpretation as to the widespread impact of this Court's  
3 decision in *Rothwell*. Mass media headlines and lead news stories have touted  
4 the ruling as having the possible effect of invalidating thousands of convictions  
5 and requiring the refund of millions of dollars in municipal fines.  
6

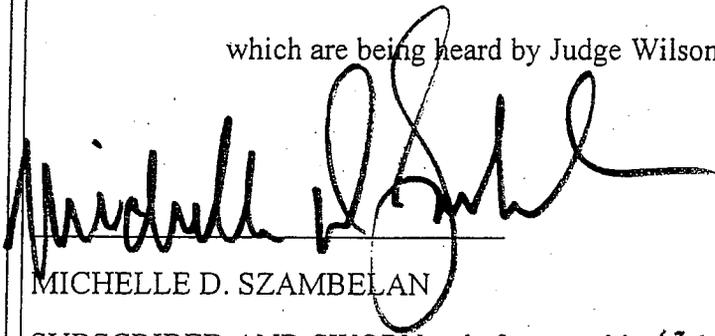
7           3.       In the two business days time since the decision was released,  
8 defense attorneys have already sought to have clients released from jail on the  
9 premise that the *Rothwell* decision automatically voids all convictions issued by  
10 the municipal department when it operated as RCW 3.46 court. If this  
11 interpretation is correct and was an intended consequence of the decision, it  
12 currently affects more than one hundred inmates being held, pending appeals,  
13 past fines, show cause hearings for probation violations, felony cases that have a  
14 municipal conviction as a predicate offense, and has far-reaching impacts.  
15

16           4.       Although the City is promptly seeking clarification and further  
17 review, it has attempted to mitigate potential problems by temporarily delaying  
18 disposition on pending matters that could incarcerate people as a result of a  
19 conviction rendered or a warrant issued by the court when it operated as a  
20 municipal department pursuant to RCW 3.46. Likewise, the City has identified  
21 the inmates being held solely as a result of a conviction or warrant issued by the  
22 judges when the court operated as a municipal department, including *inter alia*  
23 assault and domestic violence. Mr. Smith and Mr. Rothwell are not in custody.  
24  
25  
26

1 5. I advised counsel for the Petitioners, Mr. Beggs on Friday, November 9<sup>th</sup> as to  
2 the City's intention to seek a stay while it pursues additional review and  
3 clarification. I understand that Mr. Beggs will be out of state from Wednesday  
4 (11/14/07) for the remainder of the week. The City has faxed, e-mailed and  
5 hand-delivered a copy of this motion to Mr. Beggs at his address of record on this  
6 date: Mr. Breean Beggs, Esq., Center for Justice, 35 W. Main Ave., Ste. 300,  
7 Spokane, WA 99201, along with copies for Mr. Smith and Rothwell.

8  
9  
10 6. This morning's dockets, which were the first substantive criminal dockets since  
11 the decision was filed, were chaotic as a result of the *Rothwell* decision and  
12 motions are already being filed for the release of inmates being held on  
13 convictions from the municipal department – waiting ten more days to have the  
14 stay issue resolved only compounds the problem; adequate relief cannot be given  
15 if ten days' notice of the motion.

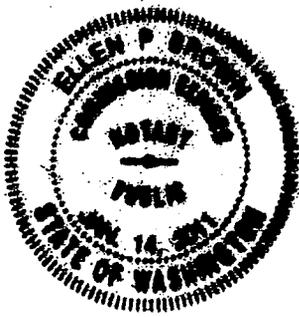
16  
17 7. As Ex. B, I attach a true and correct copy of a dispositive motion that has been  
18 served on our office today. Reportedly it is one of 116 separate motions, some of  
19 which are being heard by Judge Wilson tomorrow at 9 a.m.

20  
21  
22  
23   
24 MICHELLE D. SZAMBELAN

25 SUBSCRIBED AND SWORN to before me this 13th day of November, 2007.

26  
27 CITY'S EMERGENCY MOTION FOR STAY  
28 PAGE 8

JAMES S. CRAVEN, City Attorney  
OFFICE OF THE CITY ATTORNEY  
5<sup>th</sup> Floor Municipal Building  
Spokane, WA 99201-3326  
(509) 625-6225  
FAX (509) 625-6277



*Ellen P. Brown*

ELLEN P. BROWN, Notary Public in and for the State  
Of Washington, Residing in Spokane

My appointment expires: *January 14, 2011*

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**SPOKESMANREVIEW.COM**

Friday, November 9, 2007

SPOKANE

## In legal limbo

Thomas Clouse and Karen Dorn Steele  
Staff writers  
November 9, 2007

Thousands of petty criminals could have their convictions thrown out and millions of dollars in fines refunded because Spokane County District Court judges overstepped their authority for more than a decade by improperly handling city cases, an appeals court ruled Thursday.

The decision, which overturns two otherwise simple drunken driving convictions, has such far-reaching implications that it could trigger what's believed to be the largest legal debacle of overturned Spokane Municipal Court cases in city history.

Unless the decision is overturned by the Washington Supreme Court, the ruling would invalidate every DUI and domestic violence conviction, and all contested speeding and parking tickets issued between 1995 and Jan. 1, several legal and court officials said.

"It's potentially a huge, huge impact – and we're trying to deal with it in an orderly fashion," said Sara Derr, who serves as the District Court presiding judge.

Local attorney Breean Beggs – who brought the lawsuit that generated the ruling – questions why the city didn't do more to avert the crisis it now faces.

"It was preventable," Beggs said. "The city had the opportunity over the last two years to resolve this particular case in a way that would not have resulted in this ruling ... and there would be no jeopardy to these other cases."

The flaw came in how the judges were elected, according to the 2-1 decision by the state Court of Appeals Division III.

State law mandates that Spokane residents alone elect the judges who handle municipal cases, such as trespassing, shoplifting, speeding and DUI within city limits.

But in Spokane, an agreement was struck between the city and county to assign District Court judges – who are chosen by voters in countywide elections – to preside over the city's municipal court caseload. Beggs successfully argued it violated state law because voters outside Spokane city limits were allowed to choose city judges.

"We conclude ... that the way in which the Spokane municipal judges are elected is contrary to state law," appellate judge Dennis Sweeney wrote in Thursday's opinion. Judge John Schultheis concurred, but judge Stephen Brown dissented.

City officials, lawyers and judges scrambled for most of the day to determine how to proceed, city spokeswoman Marlene Feist said.

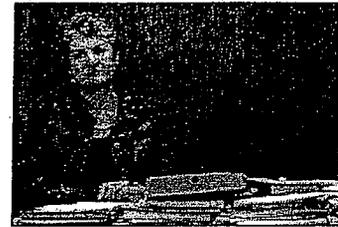
City Prosecutor Howard Delaney "plans to seek some clarification on the decision from the court of appeals," she said. "He is also trying to take some immediate steps on the most pressing issues, such as outstanding misdemeanor warrants. And he has asked jail officials how many inmates are currently being held on convictions from municipal court."

Spokane County sheriff's deputies and city police have stopped executing misdemeanor warrants involving city cases related to alleged crimes prior to Jan. 1.

Judge Derr said the ruling "essentially says that we have no authority to handle city cases until this year. We are attempting to comply with the order of the court, to the best of our ability and as quickly as possible."

The court instituted technical changes this year that brought it under compliance with state law, she said.

Although there's a legal 30-day "reconsideration period" for the ruling, court officials are not going to wait, Derr said. However, court clerks are not going to start issuing refunds for fines and fees today, Derr added.



**Presiding District Court Judge Sara Derr is leading the analysis of an appeals court ruling that overturned two Spokane DUI cases. The ruling may affect DUI, domestic violence assault, restraining order and speeding ticket cases numbering in the thousands. The Spokesman-Review. (HOLLY PICKETT/The Spokesman-Review )**

### **1995-2006 cases affected**

The ruling applies to Municipal Court actions from Jan. 1, 1995, to Dec. 31, 2006. People with questions about whether they are affected can call the district court administrator at (509) 477-4463.

Ex **A** page **1** of **3**

"Until we have information on those fees and fines, we ask everybody to be calm – we'll certainly get to everybody," Derr said.

The trigger case began in 2005 when Spokane residents Henry Smith and Lawrence Rothwell challenged their DUI convictions under the argument that District Judge Patti Connolly Walker lacked jurisdiction to decide their case because they were both arrested in Spokane city limits.

Judge Walker, who was elected in a countywide race, denied their motions. Smith and Rothwell appealed the case to Spokane Superior Court Judge Rebecca Baker. She likewise ruled that Walker had jurisdiction.

With the help of Beggs, an attorney for the public interest law firm Center for Justice, Smith and Rothwell appealed their case to the State Court of Appeals Division III.

Along with conviction reversals, the case could have "unimaginable" effects that could take years to unravel, said Superior Court Judge Sam Cozza. For instance, if a DUI conviction is reversed, court records must be changed, any subsequent convictions would be altered, and the state would have to change the offender's driving record.

Last year alone, Spokane Municipal Court handled 25,104 traffic tickets, 608 DUIs, and more than 10,000 misdemeanor crimes, including serious traffic charges, according to the state Office of the Administrator for the Courts.

"Those are all kind of thrown into a state of uncertainty," Judge Cozza said.

In addition to evaluating the local impact of the appellate court ruling, Derr's office has sent a query to the Administrative Office of the Courts in Olympia to assist with an analysis of the fiscal impact.

"As we speak, we are running queries in our system. We'll be meeting all day" today, Derr said. "We need to minimize the risk to the citizens."

Ex A page 2 of 3



Thursday, November 08, 2007 5:16 pm | Spokane, Washington & Northern Idaho



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# KXLY.com NEWS

## Thousands of convictions up in the air after Municipal Court ruled invalid

Rob Kauder / Internet Content Manager, KXLY.com  
Last updated: Thursday, November 08th, 2007 05:02:02 PM

**SPOKANE --** A State Court of Appeals has ruled that the Spokane Municipal Court has not been valid for several years and that the actions of the court, to include convictions for a variety of offenses over the last several years, are invalid.

Two of the three judges on the State Court of Appeals Division 3 said that convictions ruled on in the Spokane Municipal Court are invalid, which means that potentially thousands of convictions for everything ranging from traffic citations to parking tickets and criminal misdemeanors could all potentially be invalid.

Judges Dennis Sweeney and John Schulthels agreed that the Spokane Municipal Court was invalid while Judge Stephen Brown dissented.

The appellate court ruled in *City of Spokane vs. Lawrence Rothwell* Thursday that Spokane County voters elect district court judges who then preside over municipal cases within the city as designated "municipal court judges".

The ruling upheld that state statutes mandate that city - not county - voters can select municipal judges, and that they way Spokane is selecting municipal judges is contrary to state law.

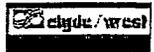
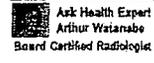
The ruling in *City of Spokane vs. Lawrence Rothwell* regarded the cases of Lawrence Rothwell and Henry Smith, who were charged with physical control of a motor vehicle under the influence and driving under the influence. Their cases were brought before Judge Patti Walker in municipal court however Judge Walker is a district court judge who was elected to her position in a county-wide election in 2002.

Both Smith and Rothwell filed pre-trial motions contending Walker had no jurisdiction, motions which she struck down. Both Rothwell and Smith were later convicted of the crimes charged.

In Thursday's ruling Judges Sweeney and Schulthels agreed with Rothwell and Smith, reversing their convictions and stating that based on state statutes 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."

The Spokane, Cheney and Deer Park Municipal Courts have been served by District Court judges in Spokane County since 1978. It's not known yet how many convictions might be impacted by the court's ruling Thursday.

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Ex A page 3 of 3

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OFFICE OF THE  
CITY PROSECUTOR

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE  
CITY OF SPOKANE

CITY OF SPOKANE,

Plaintiff,

vs.

WILLIAM AKINS,

Defendant.

Case No. B50136

NOTICE OF MOTION ON ISSUE OF  
LAW AND OF EXPEDITED HEARING

The defendant has filed a motion for release based on the November 8, 2007 decision of Division III of the Court of Appeals in City of Spokane v. Rothwell and City of Spokane v. Smith. The defendant is assigned to the City of Spokane Public Defender's Office and is held in custody in Spokane. This motion must be heard on an expedited basis to protect the defendant's interest and also to reduce the possible liability to the City.

This motion will be heard on November \_\_\_\_, 2007 at \_\_\_\_ a.m./p.m. in Judge \_\_\_\_\_'s courtroom. The motion to expedite is granted.

Presented by:

Katherine S. Knox  
KATHERINE S. KNOX

91060/11414  
BAR NUMBER

11-13-07  
DATE

NOTICE OF MOTION ON ISSUE  
OF LAW AND OF EXPEDITED HEARING

Kathy Knox  
City of Spokane Public Defender's Office  
824 N. Monroe  
Spokane, WA 99201  
(509) 835-5955

Ex. B page 1 of 6

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6 IN THE DISTRICT COURT OF THE STATE OF WASHINGTON  
7 IN AND FOR THE COUNTY OF SPOKANE  
8 CITY OF SPOKANE

9 CITY OF SPOKANE,

10 Plaintiff,

11 vs.

12 William AGNS,

13 Defendant.

No. B50136

MOTION TO RELEASE BASED  
ON LACK OF JURISDICTION  
BY THE JUDGE WHO ENTERED  
THE SENTENCE AND FOR  
EXPEDITED HEARING

14  
15 **I. MOTION FOR RELEASE**

16 COMES NOW the defendant, by and through Katherine S. Knox of the City of  
17 Spokane Public Defender's Office, as to the case number(s) herein, and the  
18 declaration of counsel filed herewith, and moves this court for an order releasing  
19 the defendant because the sentencing judge lacked jurisdiction at the time of the  
20 sentence. See City of Spokane v. Rothwell, Court of Appeals No. 25316-3-III, and  
21 City of Spokane v. Smith, Court of Appeals No. 25317-1-III

22 **II. FACTS**

23 The defendant has been charged with a crime under the Spokane Municipal  
24 Code. The defendant is currently in custody at the Spokane County Jail or Geiger

25 Motion to Release for  
Lack of Jurisdiction on  
Expedited Hearing  
Page 1 of 3

Ex B page 2 of 6

KATHY KNOX, Public Defender  
CITY OF SPOKANE  
824 North Monroe  
Spokane, Washington 99201-2110  
(509) 835-5955

1 Corrections Center and serving a sentence where the sentence has been entered  
2 by a judge who lacked jurisdiction at the time of the sentence. See City of  
3 Spokane v. Rothwell, and City of Spokane v. Smith, Court of Appeals opinion.  
4 The Court of Appeals, Division III, filed its decision on Thursday, November 8,  
5 2007. Even if the City chooses to seek review by the State Supreme Court, which  
6 it has indicated it will, these decisions are final and effective as to cases other than  
7 Mr. Smith's and Mr. Rothwell's unless and until the Supreme Court reverses them.  
8 Even if the City is granted a stay of the proceedings by an appellate court, that stay  
9 will only be effective as to Mr. Rothwell and Mr. Smith, unless the Court of Appeals  
10 extends the stay to other cases.

11 **III. ARGUMENT & AUTHORITY**

- 12 1. The defendants are not being held pursuant to valid convictions or  
13 commitment orders and must be released immediately.

14 Upon the conviction of an individual defendant, a court clerk prepares a  
15 commitment order as to what the sentence is and how it is to be served. The  
16 judge signs it, and the information is transmitted to the Spokane County Jail and  
17 Geiger Corrections Center. The Court of Appeals invalidated sentences entered  
18 prior to December 31, 2006 in its ruling in City of Spokane v. Rothwell,  
19 and City of Spokane v. Smith,

20 CrRLJ 7.8(b) sets forth the requirements for relief from judgment. The  
21 defendants here seek relief under subsections (4) and (5). CrRLJ 7.8(b)(4)  
22 provides that upon motion and such terms as are just, the court may relieve a party  
23 from a final judgment, order, or proceeding for "(4) the judgment is void; or (5) Any  
24 other reason justifying relief from the operation of the judgment." The rule further

1 provides that, as to these particular subsections, the motion shall be made within a  
2 reasonable time. When a court lacks personal or subject matter jurisdiction over a  
3 party or controversy, any judgment obtained is void. Scott v. Goldman, 82 Wn.  
4 App. 1, 6, 917 P.2d 131 (1996); Marley v. Dep't of Labor & Indus., 125 Wn.2d 533,  
5 539, 886 P.2d 189 (1994). The right to challenge jurisdiction cannot be waived  
6 and may be raised at any time. Skagit Surveyors & Eng'rs, L.L.C. v. Friends of  
7 Skagit Cy., 135 Wn.2d 542, 556, 958 P.2d 962 (1998).

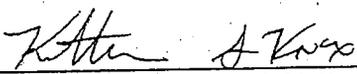
#### 8 IV. MOTION FOR EXPEDITED HEARING

9 If we are correct that the defendant is being wrongfully held on the city case  
10 at this time, each day that passes increases the City of Spokane's liability. We are  
11 filing these motions today. We understand that each individual judge wants to hear  
12 his or her own cases. We ask for a hearing today or tomorrow at the court's  
13 convenience.

#### 14 CONCLUSION

15 The defendants are being held on invalid orders and must be released  
16 immediately upon an expedited hearing.

17 RESPECTFULLY SUBMITTED this 13th day of November, 2007.

18  
19   
20 \_\_\_\_\_  
21 KATHERINE S. KNOX, WSBA #91060/11414  
22 City of Spokane Public Defender's Office  
23 Attorney for Defendant

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7 IN THE DISTRICT COURT OF THE STATE OF WASHINGTON  
8 IN AND FOR THE COUNTY OF SPOKANE  
9 CITY OF SPOKANE

10 CITY OF SPOKANE,

11 Plaintiff,

12 vs.

13 William Akins

14 Defendant.

Case No. B50136

DECLARATION OF COUNSEL  
IN SUPPORT OF MOTION TO  
RELEASE INMATE AND FOR  
EXPEDITED HEARING

15  
16 **DECLARATION**

17 Katherine S. Knox declares, under penalty of perjury of the laws of the  
18 State of Washington, that the following is true and correct:

19 I am the City Public Defender for the City of Spokane. The defendant  
20 has been assigned to the City Public Defender's Office. We reviewed the  
21 Sheriff's Roster to determine who was in custody on orders that we maintain are  
22 void, under the November 8, 2007 decision of Division III of the Court of Appeals  
23 in City of Spokane v. Rothwell and City of Spokane v. Smith. To the best of our

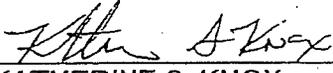
24 DECLARATION IN SUPPORT OF  
25 MOTION TO RELEASE AND FOR  
EXPEDITED HEARING

Kathy Knox  
City of Spokane Public Defender's Office  
824 N. Monroe  
Spokane, WA 99201  
(509) 835-5955

Ex. B page 5 of 6

1 ability, the defendant is assigned to the City of Spokane Public Defender's Office  
2 and is held at the Spokane County Jail or Geiger Corrections Center. This motion  
3 must be heard on an expedited basis to protect the defendant's interest and also  
4 to reduce the possible liability to the City.

5 Dated this 13th day of November, 2007 and signed at Spokane,  
6 Washington.

7   
8 KATHERINE S. KNOX,  
9 WSBA No. 91060/11414  
10 City of Spokane Public Defender's Office  
11 Attorney for Defendant

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DECLARATION IN SUPPORT OF  
MOTION TO RELEASE AND FOR  
EXPEDITED HEARING

Kathy Knox  
City of Spokane Public Defender's Office  
824 N. Monroe  
Spokane, WA 99201  
(509) 835-5955

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**FILED**  
JUN 28 2005  
SPOKANE MUNICIPAL COURT

**IN THE DISTRICT COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE  
MUNICIPAL DEPARTMENT**

CITY OF SPOKANE,

Plaintiff,

vs.

HENRY E. SMITH,

Defendant.

Case No. B 42847

**COVER SHEET TO DECLARATION OF  
PAUL BRANDT**

COVER SHEET TO DECLARATION

Michael Connelly, City Attorney  
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Spokane, Washington 99201-3326  
(509) 625-6225 Telephone  
(509) 625-6277 Facsimile

*filed  
12.17.07*

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OFFICE OF THE  
CITY PROSECUTOR

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

---

CASE NOS. 253163-3-III; 253171-1-III

---

CITY OF SPOKANE,  
Respondent,

v.

LAWRENCE JOHN ROTHWELL,  
Petitioner.

No. 253163-3-III

---

CITY OF SPOKANE,  
Respondent,

v.

HENRY E. SMITH,  
Petitioner.

No. 25317-1-III

---

PETITIONERS' ANSWER TO CITY'S MOTION FOR  
RECONSIDERATION AND PETITIONERS' MOTION TO  
STRIKE REFERENCES TO FACTS OUTSIDE THE RECORD

---

BREEAN L. BEGGS  
WSBA #20795  
Attorney for Petitioners  
Center for Justice  
35 W. Main Street, Suite 300  
Spokane, Washington 99201  
(509) 835-5211

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    C. The Court Should Strike The Portions of the City’s Brief  
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**TABLE OF AUTHORITIES**

**Cases**

*City of Spokane v. County of Spokane* 158 Wn.2d 661, 681 (2006).....11, 12, 19

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## I. IDENTITY OF RESPONDING PARTY

COME NOW the Petitioners, Lawrence J. Rothwell and Henry E. Smith, by and through their attorney, Breean L. Beggs of the Center for Justice, and submit the following answer in response to City's Motion for Reconsideration.

## II. STATEMENT OF RELIEF REQUESTED

The City identified only one issue that they contend the Court overlooked or misapprehended pursuant to RAP 12.4(c). City's Motion for Reconsideration at p. 3-4, 6. The City contends that the Court overlooked and misapprehended differences between the municipal court judge qualification process in *Nollete*<sup>1</sup> and *Rothwell*<sup>2</sup> that would lead to Judge Walker having color of right to adjudicate Mr. Smith and Mr. Rothwell in municipal court. "The City respectfully suggests that this conclusion overlooks a fundamental difference in Judge Nollete's situation. *Id.* at p. 3-4. "The City respectfully suggests that this Court misapprehended the application of *Nollette* to this case. *Id.* at p. 6. (Citation omitted).

The City did not identify with particularity any other points of law or fact that it contends the Court overlooked or misapprehended as

---

<sup>1</sup> *Nollete v. Christianson*, 115 Wn.2d 594 (1990).

<sup>2</sup> *City of Spokane v. Rothwell*, \_\_\_ Wn. App. \_\_\_, 170 P.3d 1205 (Div. III 2007).

required by RAP 12.4(c). The following conclusions reached by the Court are therefore settled by the Court's previous opinion and beyond the scope of this motion:

- 1) There are no elections in Spokane for municipal judges per se. *Rothwell* at p. 1206.
- 2) The interlocal agreement between City of Spokane and Spokane County for judicial services ended on December 31, 2004. *Id.*
- 3) Judge Walker from Department 4 was elected in 2002 in a county-wide, not a city-wide election. *Id.*
- 4) The City must strictly comply with the statutes governing the creation of municipal courts and election of municipal court judges because they implicate the franchise rights of the citizens of Spokane. *Id.* at p. 1207.
- 5) RCW 3.46.063(1) and RCW 3.46.070 required that all Spokane Municipal Court judges be elected by city voters only after being so designated on the ballot. *Id.*
- 6) "The City of Spokane voters did not elect Judge Walker or any of the other judges designated to serve a term as a municipal department." *Id.*
- 7) Instead, an administrative procedure that is unclear from the record was used to designate municipal judges. *Id.*
- 8) No municipal court department in Spokane was created in compliance with RCW 3.46. *Id.* at p. 1208.

Petitioners have also not responded anew to the City's rehashing of any previous arguments regarding de facto jurisdiction based on cases cited by the City and the Petitioners in their original briefing since the City

has not identified that as an issue that the Court overlooked or misapprehended in its opinion. Instead, Petitioners direct the Court, if interested to Petitioner's reply brief.

The City also requested relief outside RAP 12.4(c)<sup>3</sup> that the Court apply its holding in this case to other litigants not before this Court even though there is no applicable factual record to consider and no party has briefed the applicable law. City's Motion for Reconsideration at p. 2. Petitioners request relief from the City's continued practice of not properly citing to the record in its briefing and arguing facts that do not appear in the record even if properly cited. These references and related arguments should be stricken until such time as the City complies with the applicable rules.

### III. STATEMENT OF THE FACTS

Petitioners' statement of the facts is set forth in the Brief of Petitioners (11/07/06).

### IV. SUMMARY OF ARGUMENT

The City's Motion for Reconsideration is essentially a re-argument of its previous briefing with unsupported facts outside the record. Instead of detailing facts in the record or case law that the Court might have

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<sup>3</sup> The Rules of Appellate Procedure do not appear to contemplate a party's motion to clarify a previously published opinion absent a remand from a higher court. *State v. Chrisman*, 100 Wash.2d 814 (1984).

overlooked or misapprehended, the City has cited the same cases it used in its original brief. Despite the Court's admonitions at oral argument, the City has not provided any actual citations to the record on review and has added new evidence that is outside the record without obtaining permission under RAP 9.11. The only new component that City has advanced in its motion is that it has substituted the term "irregular selection" for the term "substantial compliance" in its earlier argument for *de facto* jurisdiction. The Court rejected that contention and the cases relied upon by the City because the City of Spokane's entire system was flawed, not Judge Walker's individual election. Finally, the City's attempt to gain a ruling over litigants not before this Court on potential future collateral attacks against convictions is not ripe, nor do Mr. Rothwell and Mr. Smith appear to have standing to engage in that argument.

## V. ARGUMENT

### A. This Court Did Not Overlook or Misapprehend Either the Facts or Opinions in the *Nollette* Decision.

This Court did not misapprehend or overlook *Nolette*<sup>4</sup> in concluding 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." There is nothing in *Nollette*

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<sup>4</sup> *Nollete v. Christianson*, 115 Wn.2d 594 (1990).

or any other case that casts doubt on the Court's conclusion that "The City of Spokane voters did not elect Judge Walker or any of the other judges designated to serve a term as a municipal department." *City of Spokane v. Rothwell*, \_\_\_ Wn. App. \_\_\_, 170 P.3d 1205, 1208 (Div. III 2007). The City's argument, that its passage of an ordinance in 1961 that authorized a municipal court established color of law for any judge purporting to be a municipal judge without strictly complying with the legislature's requirements in establishing such a court, lacks any authority.

This Court found that the legislature has since developed a unified process for creating a municipal judicial department and selecting the judge for that department, which superseded the two step process in *Nollette*. *City of Spokane v. Rothwell*, \_\_\_ Wn. App. \_\_\_, 170 P.3d 1205, 1208 (Div. III 2007). *Nollette* was decided under a prior statutory scheme that first defined the relevant pool of judges eligible for a district court municipal department as being existing district court judges, and then required that the qualified applicant be formally appointed by the city. *Nollette v. Christianson*, 115 Wn.2d 594, 605 (1990). The *Nollette* court held that absent compliance with each required step in the process, neither Judge Nollette nor his court had *de facto* authority over the enforcement of the city's criminal code. *Id.* The legislature has since reversed the process and now requires a city-wide election of a designated municipal

department judge, who in turn holds requisite office as a member of the district court. RCW 3.46.070. The rule common to *Nollette* and *Rothwell* is that the legislative procedures for the creation of a municipal department and the selection of its judges must strictly comply with the statutory procedure in place at the time. The difference in procedures two decades ago has nothing to do with the requirement to follow those in place today.

As described by statute and the *Rothwell* opinion, a municipal court department in a city the size of Spokane is created by the designation on the ballot of a specific municipal department and an election by city voters only. *Id.* at p. 1207. The successful municipal court candidate is now chosen by City of Spokane voters as a municipal judge and as a district court judge at the same time. Judge Walker was validly elected as a district court judge in 2002 but was not elected as a municipal court judge. There was no irregularity in her election; she was simply not elected to the municipal court.

The Washington Supreme Court recently held that a judicial department is not created unless all required steps are fulfilled. *Howard Delaney v. Board of Spokane County Commissioners*, 161 Wn.2d 249, 255 (2007). Mr. Delaney argued that substantial compliance with the legislative requirements was sufficient to establish the department for the

purpose of filing to be on the ballot. The legislature had designated a tenth district court position for Spokane County in RCW 3.34.010, the districting commission had amended its plan to add the tenth department and the Commissioners had approved the amended districting plan. Therefore, he had a colorable right to run for election for that judicial department even though the County Commissioners had not yet approved funding. *Id.* at p. 254-255. The Supreme Court held that tenth judicial department was not created in the absence of strict adherence to the legislative procedures, which required an ordinance funding the position. Thus, only local legislative action that strictly complies with all the statutory requirements for creating a new judicial department is sufficient to create the color of law or right to hold judicial office.

Local legislative actions that do not strictly adhere to the legislative guidelines for the establishment of district and municipal judicial departments are void and do not carry *de facto* authority. *State v. Moore*, 73 Wn. App. 805, 813-814 (1994); citing *In re Eng*, 113 Wn.2d 178 (1989), and *State v. Canady*, 116 Wn.2d 853 (1991). In all three of these cases the courts rejected the prosecuting authority's arguments that they had partially met the requirements to authorize their courts through legislative action. Instead, the *Moore* court recognized that local legislative action must strictly comply with the requirements for

specificity in establishing local courts. The City's contention that partial compliance creates jurisdiction would always enable municipalities to avoid legal requirements and evade the public control of the voters who were intended to provide accountability to judicial offices. *Moore* at p. 813.

The City of Spokane had not fulfilled all requirements for creating a valid municipal court department of the district court at the time that Mr. Smith and Mr. Rothwell were convicted in Department 4. The legislature<sup>5</sup> set out the following requirements in establishing a valid district court municipal department in Spokane:

1. An municipal ordinance petitioning for the establishment of a specific department(s) at RCW 3.46.040;
2. The designation of a specific municipal department(s) in a district court plan at RCW 3.46.040;
3. The designation of a specific municipal department(s) on the ballot at RCW 3.46.070; and,
4. The election of a candidate for each designated municipal department in a city-wide only election at RCW 3.46.063, 070.

The City of Spokane could not complete any of these requirements because it refused to specify individual municipal departments. Failure to specify the time and judge for each department may have passed muster in

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<sup>5</sup> The legislature has the exclusive constitutional power to prescribe the jurisdiction of district and municipal courts. *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 671 (2006).

1961 when the first Spokane municipal court ordinance was enacted. City's Motion for Reconsideration at p. 11. Neither it or any successor ordinances presented by the City thus far would have passed muster after the 1984 amendments to RCW 3.46.040 and 070 that imposed specific departmental designations, and the 1993 amendment that created RCW 3.46.063's requirement for elective municipal offices for city's like Spokane, that utilized more than thirty-five hours of judicial time each week. Under the plain language of these statutes and the principles enunciated in every Washington case that has ruled on validity of courts of limited jurisdiction that were not created in strict adherence to legislative requirements, Department 4 was not a valid Spokane Municipal Court Department because it was never legally created.

Judge Walker sitting as a District Court officer did not have jurisdiction to impose judgment on Mr. Smith and Mr. Rothwell because municipal departments and municipal courts have exclusive jurisdiction over matters arising under city ordinances. *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 681 (2006). Even though Judge Walker was validly elected to the District Court in 2002, she had no authority to adjudicate cases without authority as a municipal judge because, "A municipal department *shall have exclusive jurisdiction* of matters arising from ordinances of the city." RCW 3.46.030 (emphasis added). The

City's argument that Judge Walker's county-wide election to the position of District Court Judge gives her authority to adjudicate cases in the municipal department without the required city-wide election and designation on the ballot is contradicted by the jurisdictional statute and the cases that have interpreted it. This is true, independent of any analysis in *Nollette* and/or past practices that have been superseded by the legislative amendments made to RCW 3.46 in 1984 and 1993. The City of Spokane and its municipal department judges have ignored those amendments predictably resulting in its current situation. There was nothing overlooked or misapprehended by this Court in its previous analysis and it should not be reconsidered.

B. The Court Should Lift its Stay on the Use of This Opinion and Decline the City's Request to Apply it to Unrelated Parties.

The Court's rule in *Rothwell* that any Spokane Municipal Court departments that did not comply with the statutory election requirements had no color of right to enforce the Spokane Municipal Code applies to pending cases upon the date of publication. A new rule will be applied retroactively to all cases which are still on direct review or not yet final. *In the Matter of the Personal Restraint Petition of St. Pierre*, 118 Wn.2d 321, 326, 823 P.2d 492, 495 (1992); citing, *Griffin v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987). The City does not

appear to disagree with this rule and instead focuses on potential collateral attacks, which are governed by a different rule. City's Motion for Reconsideration at p. 8-10. There is no evidence in the record as to the number of Spokane Municipal Court cases that were commenced under the flawed election system and are still pending or are on review. Given the municipal court's limitation to misdemeanors and speedy trial rules, it will be far less than the number of people whose cases have been resolved and might consider a collateral attack. The City has not cited any legal basis<sup>6</sup> for denying application of the *Rothwell* rule to cases currently pending or on direct review. The Court should therefore lift its stay on publication so that the trial courts may correctly apply the new rule on pending cases.

A collateral attack to conviction based on the *Rothwell* rule would be based on different factors and procedures than those applicable to the parties before this Court and those individuals with current pending cases. A party may collaterally attack his or her conviction by filing a personal restraint petition (PRP) pursuant to Criminal Rules for Courts of Limited Jurisdiction (CrRLJ) 7.8(b) and the Revised Code of Washington (RCW) 10.73.100(5). A collateral attack is "any form of postconviction relief other than a direct appeal." RCW 10.73.090. RCW 10.73.100(5) states

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<sup>6</sup> The dicta in *Farmer v. Edmonds*, 27 Wn. App. 762, 767 (1980) was limited to collateral attacks; application to the pending cases was granted.

that a person may collaterally attack a conviction, outside the one year time limit specified in RCW 10.73.090, if “[t]he sentence imposed was in excess of the court’s jurisdiction.” CrRLJ 7.8(b)(4) allows a court to relieve a party from a final judgment if the judgment is void.

When asked to apply a new constitutional rule retroactively to a case on collateral review, the court will usually balance three factors:

- (1) The purpose to be served by the new standards;
- (2) The extent of reliance by law enforcement officials on the old standards;
- (3) The effect on the administration of justice of a retroactive application of the new standards.

*In re the Personal Restraint Petition of Gunter*, 102 Wn.2d 769, 771-72, 689 P.2d 1074, 1075 (1984); *see also*; *Stovall v. Denno*, 338 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 E.Ed.2d 1199 (1967).

The general rule on retroactivity differs where jurisdiction is questioned, because it is a prerequisite for any judicial authority and cannot be waived. *State v. Corrado*, 78 Wn. App. 612, 615-616 (1995). In *Corrado*, the defendant was convicted of attempted murder despite the fact that no valid information had been filed in the Superior Court. He raised the issue for the first time on appeal and his conviction was vacated because without the subject matter jurisdiction conferred by a valid charging document, the conviction was void. *Id.* “The law is well settled that an order entered without jurisdiction is void.” *Id.* (citations omitted).

There will likely be attempted collateral attacks on Spokane Municipal Court jurisdiction for prior cases, but the record and argument necessary to resolve those attacks under the guidance of the court decisions cited above will first be developed in the trial courts.

The City's request for adjudication of future collateral attacks by different parties does not meet the test of a justiciable controversy. *To-Go Trade Shows v. Collins*, 144 Wash.2d 403, 411 (2001).

We defined a justiciable controversy as "(1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interest, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive." Inherent in these four requirements are the traditional limiting doctrines of standing, mootness, and ripeness, as well as the federal case-or-controversy.

*Id.* (citations omitted). As the City acknowledged in its motion, there is nothing in the appellate record or the briefing to date that would allow this Court to decide the merits of any potential future collateral attack on a municipal court conviction. City's Motion for Reconsideration at p. 8. Even if the record was sufficient, Mr. Smith and Mr. Rothwell do not have a genuine and opposing interest with the City regarding collateral attacks in this litigation because they are already entitled to full relief in their pending action. Most importantly, any advisory opinion by this Court

would not be binding on parties<sup>7</sup> who are unrelated to this litigation and these potential future controversies are not ripe for appellate review. The answer to the City's question about the rights of other litigants will be determined in the trial court in the near future and then be ripe for appellate review on the unique facts and arguments necessary to resolve a collateral attack on a conviction. The City has not offered any reason why streamlined procedures cannot resolve those disputes efficiently and their request for clarification on matters unrelated to these parties should be denied.

C. The Court Should The Portions of The City's Brief That Includes Facts Not in the Appellate Record and Facts Not Properly Cited to the Record.

The record on review does not include materials outside the trial court record unless the Court of Appeals directs that additional evidence be taken. RAP 9.1(a) and 9.11. The City has offered the Affidavit of Shelly Szambelan, its exhibits and several additional facts in its briefing on pages 8-10 in the City's Motion for Reconsideration. These facts outside the record on appeal are irrelevant and unauthorized under the rules even if they might have been relevant to the procedural issues of a temporary stay. The City is required to file a separate motion under RAP 9.11 and meet the relevant six part test, including why it would be

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<sup>7</sup> The Commissioners Ruling of November 14, 2007 confirmed that other defendants did not have standing to be heard in this case.

equitable to excuse their failure to bring such a motion earlier<sup>8</sup> instead of making a strategic decision to await this Court's decision and then make an additional argument.

The City has not offered any evidence that would cure the jurisdictional infirmities of its Municipal Court even if the Court were to allow supplementation at this late date. Generally, cities that are large enough to require more than thirty-five hours of judicial time a week must utilize elected municipal court judges. RCW 3.46.063 and 3.50.055.

Cities historically assumed responsibility for criminal justice activities by enacting municipal criminal codes, employing city attorneys to prosecute the crimes created by such codes, creating municipal courts, and erecting city jails.

*Whatcom County v. City of Bellingham*, 128 Wn.2d 537 (1996). Cities are responsible for the cost and administration of this criminal justice system, even if they repeal their criminal codes. *Id.* at p. 552. The legislature has given cities and counties the authority to enter into cooperative action in all areas of government service at RCW 39.34.030, including criminal justice. However, a city can not use these agreements to relieve it of "[A]ny obligation or responsibility imposed upon it by law." *Id.* The Supreme Court has blessed interlocal judicial agreements but has never ruled that they obviate the need for elected judges for cities that would

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<sup>8</sup> According to their motion, the Supreme Court ruled on the City's requested change and they began a new system six months before oral argument was heard in this case. City's Motion for Reconsideration at p. 9.

otherwise be required to use them. *City of Spokane v. Spokane County*, 158 Wn.2d 661, 672 (2006). Unless, the City's new interlocal agreement includes a designation of judges for each municipal department and a city-wide only election, it will not be a sufficient remedial measure to confer jurisdiction on its courts. Any analysis of the recent changes to Spokane's Municipal Court should be deferred to parties that have an interest in it and should not be explored in this appeal. Instead, the City's attempt to inject new facts into the record with or without permission should be rejected.

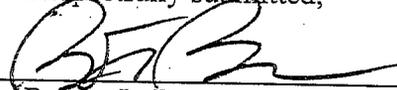
#### VI. CONCLUSION

The City has essentially rehashed its original argument that this Court previously rejected in the guise of a motion for reconsideration for overlooked or misapprehended issues. Instead of identifying or analyzing traditional grounds for reconsideration, they have cited to the same cases, made the same arguments and merely substituted the phrase "irregular selection" for "substantial compliance." The Court should also reject again the City's failure to properly cite to the record and strike the volume of new evidence the City has injected into its brief. Finally, the parties before this Court have no standing to argue the validity of collateral attacks on unrelated municipal department judgments, and both the record and briefing are incomplete. There is nothing in the Court's previous

opinion that will prevent the City from making its arguments in the trial court, nor would any revision of this opinion be binding on another party not before this Court, who seek to make an argument similar to Mr. Rothwell and Mr. Smith.

DATED this 17th day of December, 2007.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Pursuant to RAP 18.5 and CR 5(b)(1), I certify I am not a party to this action, I am competent to testify therein, and I caused to be delivered a true and correct copy of the foregoing Reply Brief of Petitioners to Michelle Szambelan, Acting Spokane City Prosecutor, 909 W. Mallon, Spokane, WA 99201, at or before the time of filing.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 17<sup>th</sup> day of December, 2007.

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FILED

JAN 17 2008

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

**COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON**

CITY OF SPOKANE,

Respondent,

v.

LAWRENCE J. ROTHWELL and  
HENRY E. SMITH,

Petitioners.

)  
) No. 25316-3-III  
) (consolidated with  
) No. 25317-1-III)  
)  
) ORDER DENYING  
) MOTION FOR RECONSIDERATION,  
) GRANTING MOTION TO STRIKE  
) REFERENCES TO FACTS OUTSIDE  
) 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.

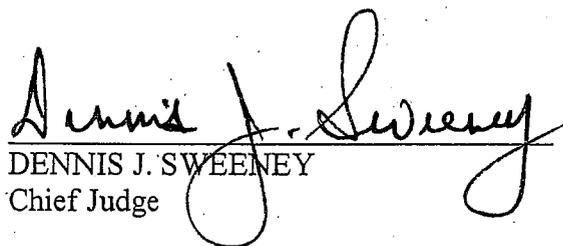
NOW, THEREFORE,

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