

NO. 812713

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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CITY OF SPOKANE,

Petitioner,

v.

LAWRENCE J. ROTHWELL and HENRY E. SMITH,

Respondents.

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**SUPPLEMENTAL BRIEF OF PETITIONER**

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Howard F. Delaney  
Spokane City Attorney

Michelle D. Szambelan  
Assistant City Prosecutor  
CITY OF SPOKANE

909 W. Mallon  
Spokane, WA 99201  
(509) 835-5988  
Assistant City Prosecutor

WIGGINS & MASTERS, P.L.L.C.  
Charles K. Wiggins  
WSBA 6948  
241 Madison Ave. North  
Bainbridge Island, WA 98110  
(206) 780-5033

Attorneys for Petitioner

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## INTRODUCTION

Petitioner City of Spokane submits this supplemental brief to summarize the City's positions and explain why this Court should reverse and reinstate the respondents' convictions.

The Court of Appeals held that Judge Walker was not properly elected to the position of municipal court judge because she was elected by the voters of the entire county, not just residents of the City of Spokane. *City of Spokane v. Rothwell*, 141 Wn. App. 680, 685 at ¶¶ 10-12, 170 P.3d 1205 (2007), *rev. granted*, 164 Wn.2d 1008 (2008) (hereafter "COA at ¶ 10-12").

The appellate court misread former RCW 3.46.063<sup>1</sup>, which required that all judges serving in a municipal department of a district court be elected. Judge Walker was duly elected as a district court judge, eligible to serve as a municipal court judge in the municipal department.

The appellate court held that Judge Walker was not a de facto judge and that no Municipal Department for the City of Spokane was ever created. COA at ¶ 15, 16. These holdings

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<sup>1</sup> Most of RCW Chapter 3.46 was repealed by Laws of 2008, Ch. 277, § 12 effective July 1, 2008, and replaced with alternative statutes. RCW 3.46.015 provides that a municipality operating under RCW 3.46 may continue to act as if the statute had not been repealed.

misunderstand the nature of de facto judges and de facto courts. A judge can be a de facto judge even if there was an irregularity in the judge's selection or appointment. A court can be a de facto court if it was created by legislative act or municipal ordinance, even if the creation did not comply with the law or the ordinance.

Finally, respondents argue that municipal court judges have exclusive jurisdiction over matters arising from city ordinances and that district court judges have no jurisdiction over municipal court cases. Answer To Petition For Review at 20. Respondents' argument proves too much. District court judges have jurisdiction over violations of municipal ordinances, RCW 3.66.060(1), unless a municipal department exists. Former RCW 3.46.030. If the Spokane City Municipal department was never created, then Judge Walker, as a Spokane district judge, clearly had jurisdiction over these prosecutions and the convictions should be affirmed. See Brief of Amicus Curiae Washington State Association of Municipal Attorneys.

## SUPPLEMENTAL ARGUMENT

- A. **The Spokane District Court judges who also served as part-time Spokane Municipal judges were all properly elected as required by former RCW 3.46.063.**

The proper interpretation of former RCW 3.46.063 is a matter of law reviewed de novo by this Court. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The Court looks to the plain meaning of the language used by the Legislature, "but that meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Id.* at 11. "Context is particularly important when harmonizing two statutes where one references the other. The referred statute must be read in context of the referring statute." *Rivas v. Overlake Hosp. Med. Center*, 164 Wn.2d 261, 267, 189 P.3d 753 (2008). The Court of Appeals failed to interpret former § 063 in context and to harmonize it with other statutes relating to municipal departments and district courts. This Court should avoid this error by considering the statutory history of municipal departments and interpreting former § 063 in context.

RCW Chapter 3.46, authorizing municipal departments, was enacted by the Legislature as part of the Justice Court Act of 1961,

Laws of 1961, ch. 299, ch. 5, which required that all district court judges be elected. Laws of 1961, ch. 299, §§ 11, 14. Cities with a population over 500,000, *i.e.*, Seattle, could operate a municipal court pursuant to RCW ch. 35.20. Laws of 1961, ch. 299, § 2. Small cities and towns could establish their own municipal courts. *Id.* at § 50, 53, 54. Any city could establish a municipal department within the district court. *Id.* at ch. 5.

The Act provided, “[e]ach judge of the municipal department shall be a justice of the peace of the district in which the municipal department is situated.” *Id.* at § 36 (Codified as former RCW 3.46.020.) The Act authorized a city to select full time municipal judges by election or appointment, and the appointment of part time municipal judges. These sections were codified at former RCW 3.46.050 and .060, and until July 1, 2008, read:

RCW 3.46.050: “Each city may select its full time municipal judge or judges by election, or by appointment in such manner as the city legislative body determines . . . .”

RCW 3.46.060: “In district court districts having more than one judge, appointment of part time municipal judges shall be made from the judges of the district by the mayor in such manner as the city legislative body shall determine.”

The Justice Court Act provided that where municipal court judges were to be elected, “[o]nly voters of the city shall vote for municipal judges.” (Codified at former RCW 3.46.070).

In 1993, a bill was introduced into the legislature to prevent cities from establishing any new municipal courts or municipal departments of district courts. HB 1545, 1993 Sess. The substitute version of the bill removed this prohibition on new municipal courts, but required that all “judicial positions” in municipal courts and municipal departments be filled by election, unless the court had less than one half-time equivalent judge. SHB 1545, §§ 3, 4. Section 3, governing “judicial positions” in municipal departments, was codified as former RCW 3.46.063:

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.

The evident legislative intent was that the “judicial position” be filled by election. The statute does not say that a full-time equivalent municipal position must be filled by election as a municipal judge. It simply says that the “judicial position shall be filled by election.” In fact, all judicial positions on the Spokane

District Court were “filled by election” – election as district court judges.

The appellate court decision would require that all nine Spokane District Court judges appear on the ballot twice, once as district court judges and a second time as municipal department judges. As provided in the 1961 Act, all district court judges must be elected in a district-wide vote. RCW 3.34.050. All nine Spokane District Court judges have been appointed as Spokane Municipal judges<sup>2</sup>. Spokane County Code § 1.16.050 (copy at Smith AR 65). Over a four year period, different district court judges serve as municipal court judges. Smith AR 5. The Court should not interpret a statute in a way that renders part of the statute meaningless or nonsensical, but that is the effect of the appellate court interpretation. The simple and sensible resolution of this problem lies in the language of the statute: each “judicial position” shall be filled by election. Only one election is necessary. Once the district

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<sup>2</sup> The ordinance originally expressly designated the nine district court judges as “part-time” municipal judges, but the reference to “part-time” was stricken from the ordinance in 2002. Smith AR 65. It is obvious that designating nine judges to fill the equivalent of 3.7 judicial positions makes all of the judges part-time, regardless of whether the ordinance calls them “part-time.”

court judges are elected, they all qualify as elected municipal department judges as well.

Defendants assert that Judge Walker and Judge Peterson were full-time municipal judges. Ans. to Pet. 3, 18-19. However, Spokane County Code § 1.16.050 designates all the nine district court judges as the municipal department and all of the judges as “municipal or police judges.” (Copy at Smith AR 65). Moreover, as defendant Smith admitted in his motion to dismiss, “the current practice of district court judges is to rotate the different departments within Spokane County District Court in and out of the municipal department on a yearly basis.” Smith AR 5. Thus, all of the Spokane County District Court judges serve the municipal department only part of the time. In short, Judge Walker met the legislative requirement imposed in former RCW 3.46.063. Judge Walker’s position was “filled by election.”

**B. Even if the statutory scheme had required that the Spokane Municipal judges be elected by City voters only, the Municipal Department was created by municipal ordinance and the District Court judges elected by County-wide vote were de facto Municipal judges.**

**1. Judge Walker was a de facto judge.**

Judge Walker was at least a de facto municipal court judge serving in a de facto municipal court. The Court of Appeals erred in

concluding that Judge Walker was not a de facto judge and that the municipal department was never created. COA at ¶¶ 15-16.

A person occupying and exercising judicial office may be a de facto judge even if there is a defect in the person's appointment or election:

A judge de facto is one acting with color of right and who is regarded as, and has the reputation of, exercising the judicial function he assumes; . . .

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.

**State v. Britton**, 27 Wn.2d 336, 344, 178 P.2d 341 (1947) (quoting 48 C. J. S. 949, § 2 (2)). In **Britton**, the defendant argued that the statute under which the judge was appointed was invalid and unconstitutional.

Relying on **Britton**, the Court of Appeals similarly held that a judge pro tem whose appointment was defective was a de facto judge nonetheless:

To hold, as defendant argues, that an irregular appointment of a judge pro tempore renders his subsequent official actions null and void, would unduly disrupt the orderly function of the judicial process. Necessity and public policy compel us to hold otherwise.

**State v. Franks**, 7 Wn. App. 594, 596, 501 P.2d 622 (1972). Similarly, the appellate court held that a municipal court judge was a judge de facto despite the fact that the municipal court was improperly constituted contrary to statute. **State ex rel. Farmer v. Edmond Mun. Ct.**, 27 Wn. App. 762, 621 P.2d 171 (1980), *rev. denied*, 95 Wn.2d 1016 (1981). The appellate court has also held that a pro tem judge was a de facto judge even though he was appointed in violation of the statute governing de facto judges: "The pro tem judge thus appointed occupied his position under color of authority represented by this order. But because the order does not satisfy the requirements of RCW 2.08.180, he did so as a de facto judge." **In re Marriage of Barrett-Smith**, 110 Wn. App. 87, 92, 38 P.3d 1030 (2002).

Under all of these authorities, Judge Walker was a de facto judge. She was in fact elected by the citizens of Spokane County (and also by the citizens of the City of Spokane). Brandt Declaration at p.2, ¶ 6 (filed 6/28/05). The statutory defect identified by the Court of Appeals is that her position was not identified on the ballot as a municipal court position and the franchise was not limited to city voters. These are simply defects in Judge Walker's election, making her a de facto judge instead of a

de jure judge. Judge Walker was certainly as much a de facto judge as the judge: in *Britton*, whose appointment was unconstitutional; in *Franks*, in which the judge was appointed even though he was not a registered voter as required by statute; in *Edmonds Municipal Court*, who was a judge of an improperly constituted court; and in *Barrett-Smith*, whose appointment was illegal under the statute.

The appellate court's holding that the Spokane District Court judges are not de facto municipal judges calls into question every municipal court conviction since 1995, when the 1994 statutory change became effective. This "chaos" is precisely what the de facto officer doctrine is designed to prevent:

The de facto doctrine springs from the fear of the chaos that would result from multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question, and seeks to protect the public by insuring the orderly functioning of the government despite technical defects in title to office.

*Ryder v. United States*, 515 U.S. 177, 180-81, 115 S. Ct. 2031, 132 L. Ed. 2d 136 (1995) (quoting 63A Am. Jur. 2d, Public Officers and Employees § 578, pp. 1080-1081 (1984) (footnote omitted)). The United States Supreme Court has repeatedly relied on the de facto officer doctrine to protect the public when criminal defendants

challenge the authority of the judges who participated in their conviction or sentencing. *Ryder*, 515 U.S. at 181; see also *Britton*, *supra*.

The appellate court's holding could also subject Spokane and the District Court judges individually to civil suit. It is "well established" that judicial immunity is "of the highest importance to the proper administration of justice." *Stump v. Sparkman*, 435 U.S. 349, 355, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978). Judicial immunity is so instrumental to our justice system that it applies "however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." *Moore v. Brewster*, 96 F.3d 1240, 1244 (9th Cir. 1996), *cert. denied*, 519 U.S. 1118 (1997) (quoting *Cleavinger v. Saxner*, 474 U.S. 193, 199-200, 88 L. Ed. 2d 507, 106 S. Ct. 496 (1985)). There are only two exceptions: judicial immunity does not apply to (1) extrajudicial acts, or (2) acts taken in the "clear absence of all jurisdiction." *Stump*, 435 U.S. at 356-57; *Moore*, 96 F.3d at 1244.

The latter exception could arguably apply under the appellate court holding that Judge Walker had no "de facto jurisdiction" and that "no district court judge has jurisdiction over municipal cases." COA at ¶ 15. Without jurisdiction, the Spokane

District Court judges would arguably be subject to personal liability arising from judicial acts taken as municipal judges, not for any wrongdoing, but because of a technical flaw in the election process. Any lawsuit against Judge Walker or any other district court judge without de facto status could also implicate Spokane, contrary to the purpose of the de facto official doctrine. *Ryder, supra*.

A further potential consequence of invalidating all municipal court decisions since 1996 would be to give rise to claims made by convicted persons for refund of penalties and fines they paid upon conviction. This affects not only the City, but also the state treasury, which receives 32% of the fines pursuant to RCW 3.62.040. This is a significant amount of revenue. For example, in 2005, the year of these two convictions, the total revenue collected by the Spokane Municipal Court was \$3,890,760. ***Courts of Limited Jurisdiction 2005 Annual Caseload Report*** at 63, available at <http://www.courts.wa.gov/caseload/clj/ann/2005/annualtbls05wostaffing.pdf> (accessed 10/28/08). An even larger percentage of the \$506,508 collected for the Public Safety Education Act is remitted to the State. RCW 3.62.090. From 1999 (the oldest date available online) through 2005, the total revenue collected by the Spokane Municipal Court was \$30,261,316.

Yet another consequence of the appellate court decision is that it could potentially invalidate hundreds of criminal convictions. This could affect subsequent convictions and sentences throughout the State insofar as they were affected by or based on convictions invalidated by the logic of the appellate court. 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. RCW 9.94A.030(040)(b). It would also affect Department of Licensing records for administrative actions based upon convictions for criminal traffic offenses and civil infractions.

The appellate court decision could also arguably invalidate protective orders, subjecting innocent victims to danger.

In short, the consequences of the appellate court decision could be disastrous for the City of Spokane.

**2. The Spokane Municipal Court was a de facto court.**

The appellate court held, almost as an afterthought, that, “no municipal department was created in compliance with chapter 3.46

RCW." COA at ¶ 16. This conclusion is contrary to the law and the facts.

As Judge Brown stated in his dissent, both the Court of Appeals and this Court have recognized that there must be a de jure court before there can be a de facto judge. COA at ¶ 19 (Brown, J., dissenting), citing *State v. Canady*, 116 Wn.2d 853, 857, 809 P.2d 203 (1991); *State ex rel. Farmer v. Edmonds Mun. Ct.*, *supra*. But a court created by legislative enactment or municipal ordinance may still be a de facto court served by a de facto judge:

In *State ex rel. Farmer v. Edmonds Mun. Court*, [*supra*], an exception to the general rule that "there must be a de jure office before there can be a de facto officer" was recognized: "Where the office is created by legislative act or municipal ordinance . . . the general rule yields and the office is regarded as a de facto office until the act or ordinance is declared invalid."

*State v. Canady*, 116 Wn.2d at 857. In *State ex rel. Farmer*, the municipal court was a de facto court because it was created by municipal ordinance. 27 Wn. App. at 768. It was not a de jure court, because the ordinance was invalid under the statute; nonetheless, the municipal court was a de facto court served by a de facto judge:

The acts of the incumbent were as potent, as far as the public is concerned, as were the acts of any *de jure* officer performing a duty of a legally existing office. The public, in its organized capacity, as well as private citizens, has acquiesced in and submitted to its authority. Under those circumstances, it appears to us that to suggest that, because there cannot be a *de facto* court without a *de jure* court, all such acts are invalid is too hypercritical a refinement and one which should have no support in law or reason.

*Id.* By contrast, the night court in ***State v. Canady***, was not a *de facto* court because it was not created by any municipal ordinance, but “seems to have come into existence purely for the sake of convenience, with no basis in law at all.” 116 Wn.2d at 857. Similarly, where there was no ordinance creating the office of district court commissioner, there was no *de jure* or *de facto* authority. ***State v. Moore***, 73 Wn. App. 805, 814, 871 P.2d 1086 (1994). Like the municipal court in the ***Edmonds*** case, the Spokane Municipal Court was created as a department of the Spokane District Court by Spokane County ordinance in 1962. Smith AR 36-38. The ordinance has been amended over the years, always reaffirming the existence of the municipal department. Smith AR 42, 46, 57, 65.

Indeed, it would be strange if this Court were to conclude that the municipal department was never created, because at least two of this Court’s prior decisions have detailed the history of the

municipal department of the Spokane District Court and have analyzed its provisions. *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 665, 146 P.3d 893 (2006); *Nollette v. Christianson*, 115 Wn.2d 594, 603, 800 P.2d 359 (1990)

Here, the appellate court misunderstood this Court's decision in *Nollette v. Christianson*. COA at ¶ 15. Under the legislative scheme in place in *Nollette*, judges of the Spokane District court could sit as municipal court judges if they were appointed by the mayor. 115 Wn.2d at 604-05. District Judge Nollette was never appointed by the mayor, and was accordingly never a de facto municipal judge. *Id.* at 605. Nollette's appointment was not defective, it was nonexistent. That is why Nollette was not a de facto judge. By contrast, Judge Walker was required to be elected and she was elected. Even if her election was defective, it was de facto, and she exercised her office under color of title, unlike Judge Nollette.

The appellate court decision would eliminate the category of de facto judges. A judge is only a de facto judge if there is some defect in the judge's appointment or election. If, as the appellate court reasoned, the defect precludes a de facto judgeship, then

there can never be a de facto judge, which is an absurd interpretation of our court's consistent caselaw.

Finally, the appellate court held, "The first Interlocal Agreement was expired so there was no attempt to create a municipal department." COA at ¶ 16. The Interlocal Agreement was not renewed for the simple reason that the City was seeking to terminate the arrangement and were locked in a dispute ultimately resolved by this Court. *City of Spokane v. County of Spokane*, 158 Wn.2d at 665 ¶ 1. By the clear terms of former RCW 3.46.150(1), the Agreement "shall remain in effect" until the parties agree on the terms of the termination. It was error for the Court to conclude that the interlocal agreement had terminated.

**C. If the Municipal Department of the Spokane District Court is not a de facto or de jure court, then the Spokane District Court had jurisdiction over the prosecution of the respondents and their convictions must be affirmed.**

The final holding of the Court of Appeals is, "[w]e conclude that Judge Walker did not hold color of right to the office of municipal court judge and was therefore without authority to preside over municipal proceedings and impose judgment." COA at ¶17. The Court of Appeals was wrong because if the Municipal Department was never validly created, then the district court has

jurisdiction over violations of Spokane municipal ordinances. This Court should reverse the appellate court decision and reinstate the convictions.

A municipal department of a district court has “exclusive jurisdiction of matters arising from ordinances of the city . . .” former RCW 3.46.030. But if, as the appellate court held, no municipal department was created in compliance with former Chapter 3.46 RCW, COA at ¶ 16, then the district court has jurisdiction over all violations of city ordinances. RCW 3.66.060.

The defendants’ arguments prove too much. If they have proven themselves out of a de jure or a de facto municipal court, they have proven themselves into the jurisdiction of the district court. It is undisputed that Judge Walker is a validly elected district court judge, and the defendant’s convictions must be affirmed. See Brief of Amicus Curiae Washington State Association of Municipal Attorneys.

Although Spokane did not rely below on the jurisdiction of the district court, this Court should consider the issue. In ***Bennett v. Hardy***, this Court considered a statute that had not previously been raised by any party for the following reasons:

◆ “[A] statute not addressed below but pertinent to the substantive issues which were raised below may be considered for the first time on appeal”;

◆ the Court will consider anything not raised below “when the question raised effects the right to maintain the action”;

◆ and, the Court has discretion to consider a new issue if “it is necessary to our rendering a proper decision.”

113 Wn.2d 912, 918, 784 P.2d 1258 (1990). The Court similarly considered a statute not previously raised in an action against a hospital noting, “[t]he issue of the hospital's duty for the safety of its patients was squarely before the trial court and the statutes of this state in regard thereto are therefore pertinent to our consideration.” ***Osborn v. Public Hosp. Dist. 1***, 80 Wn.2d 201, 206, 492 P.2d 1025 (1972). Finally, the Court has discretion to consider an issue first raised in an amicus brief where it is necessary to reach a proper decision. ***Harris v. Dep't of Labor & Indus.***, 120 Wn.2d 461, 467-68, 843 P.2d 1056 (1993); ***Kustura v. Dep't of Labor & Indus.***, 142 Wn. App. 655, 677 n. 35, 175 P.3d 1117 (2008).

**CONCLUSION**

The City of Spokane respectfully asks the Court to hold that the Spokane District Court judges who served in the municipal department part-time were properly elected. Alternatively, the City asks the Court to hold that the district court judges were de facto municipal judges. Finally, if the Court rejects both conclusions, the Court should hold that the Spokane District Court had jurisdiction over the prosecution of the respondents and their convictions must be affirmed.

Respectfully submitted this 3 day of November, 2008.

CITY OF SPOKANE

WIGGINS & MASTERS, P.L.L.C.

*Michelle Szambelan by*  
*Howard F. Delaney* *clw*

Howard F. Delaney  
WSBA 13805  
Spokane City Attorney

Michelle D. Szambelan  
Assistant City Prosecutor

909 W. Mallon  
WSBA 22206  
Spokane, WA 99201  
(509) 835-5988  
Assistant City Prosecutor

*Charles K. Wiggins*

Charles K. Wiggins  
WSBA 6948  
241 Madison Avenue North  
Bainbridge Island, WA 98110  
(206) 780-5033

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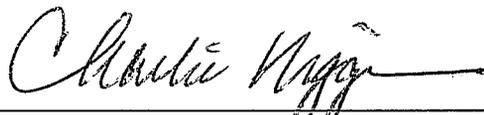
I certify that I mailed, or caused to be mailed, a copy of the foregoing **SUPPLEMENTAL BRIEF OF PETITIONER** postage prepaid, via U.S. mail on the 3 day of November, 2008, to the following counsel of record at the following addresses:

Breean Beggs  
Bonne Beavers  
CENTER FOR JUSTICE  
35 w. Main, Suite 300  
Spokane, WA 99201

Tim Donaldson  
Attorney at Law  
15 N. 3<sup>rd</sup> Avenue  
Walla Walla, WA 99362

Howard F. Delaney  
Spokane City Attorney  
Michelle D. Szambelan  
Assistant City Prosecutor  
CITY OF SPOKANE  
909 W. Mallon  
Spokane, WA 99201

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Charles K. Wiggins, WSBA 6948  
Counsel for Petitioner