

NO. 84452-6

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

RICHARD CHARLES TRACER, Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

Juelanne B. Dalzell
Prosecuting Attorney

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

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

10 OCT 14 PM 3:40

BY RONALD R. CARPENTER

CLERK
bph

ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

 A. A Court’s Appointment of a Special Prosecutor Pursuant to RCW 36.27.030 Requires a Formal Hearing, With Notice to the Elected Prosecuting Attorney and an Opportunity for the Elected Prosecuting Attorney to Be Heard 2

 B. The State’s Appeal From the Judgment and Sentence Was Proper 9

 C. The Well Established Doctrine of Mislea Authorizes the Setting Aside of Tracer’s Guilty Plea to DUI 11

 D. United States Supreme Court Precedent Precludes the Defendant from Turning the Double Jeopardy Clause into a Sword 16

 E. The De Facto Public Official Doctrine Does Not Apply When the Public is Objecting to the Pretender 18

III. CONCLUSION 20

TABLE OF AUTHORITIES

TABLE OF CASES

Arizona v. Washington, 434 U.S. 497, 98 S. Ct. 824,
54 L. Ed. 2d 717 (1978) 12

Board of County Comm'rs v. Johnston, 192 Okla. 203, 134 P.2d 335
(1942) 7

Brunty v. State, 22 Va. App. 191, 468 S.E.2d 161 (1996) 20

Cummings v. Koppell, 212 A.D.2d 11, 627 N.Y.S.2d 480
(N.Y. App. Div.), *lv denied*, 86 N.Y.2d 702, 655 N.E.2d 703,
631 N.Y.S.2d 606 (1995) 13

Genesee Prosecutor v. Genesee Circuit Judge, 391 Mich. 115,
215 N.W.2d 145 (1974) 13

Hampton v. Municipal Court, 242 Cal. App. 2d 689,
51 Cal. Rptr. 760 (1966) 15

Herron v. McClanahan, 28 Wn. App. 552, 625 P.2d 707,
review denied, 95 Wn.2d 1029 (1981) 8

Howerton v. State, 640 P.2d 566 (Okla. Crim. App. 1982) 8

In re Disqualification of Cirigliano, 105 Ohio St. 3d 1223,
826 N.E.2d 287 (2004) 5, 6

In re Guerra, 235 S.W.3d 392 (Tex. App. 2007) 5, 6

Lane v. Second Judicial Dist. Court, 104 Nev. 427,
760 P.2d 1245 (1988) 6

Lattimore v. Vernor, 142 Okla. 105, 288 P. 463 (1930) 5

McCall v. Devine, 334 Ill. App. 3d 192, 777 N.E.2d 405 (2004) 4, 7

<i>Moore v. State</i> , 71 Ala. 307 (1882)	15
<i>Nat'l Bank of Wash. v. McCrillis</i> , 15 Wn.2d 345, 130 P.2d 901 (1940)	19
<i>Ohio v. Johnson</i> , 467 U.S. 493, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984)	16, 17
<i>People v. Anderson</i> , 140 A.D.2d 528, 528 N.Y.S.2d 614 (1988)	13
<i>People v. Brancoccio</i> , 189 A.D.2d 525, 596 N.Y.S.2d 856 (1993)	13
<i>People v. Hartfield</i> , 11 Cal. App. 3d 1073, 90 Cal. Rptr. 274 (1970) ..	15
<i>People v. Herrick</i> , 216 Mich. App. 594, 550 N.W.2d 541 (1996)	7
<i>People v. Stackpoole</i> , 144 Mich. App. 291, 375 N.W.2d 419 (1985) 15, 17	
<i>People v. Woods</i> , 84 Cal. 441, 23 P. 1119 (1890)	15
<i>Smith v. State</i> , 42 Okla. Crim. 308, 275 P. 1071 (1929)	19
<i>State ex rel. Brown v. Merrifield</i> , 182 W. Va. 519, 389 S.E.2d 484 (1990)	6
<i>State ex rel. Ilvedson v. District Court</i> , 70 N.D. 17, 291 N.W. 620 (1940)	5
<i>State ex rel. Matko v. Ziegler</i> , 154 W. Va. 872, 179 S.E.2d 735 (1971) ..	6
<i>State ex rel. Preissler v. Dostert</i> , 260 S.E.2d 279 (W.Va. 1979)	6
<i>State v. Blake</i> , 71 Wn.2d 356, 428 P.2d 555 (1967)	4
<i>State v. Bogart</i> , 57 Wn. App. 353, 788 P.2d 14 (1990)	14
<i>State v. Bowerman</i> , 115 Wn.2d 794, 802 P.2 116 (1990)	15, 17
<i>State v. Brown</i> , 709 N.W.2d 313 (Minn. App. 2006)	14, 16, 18

<i>State v. Brown</i> , 853 P.2d 851 (Utah 1992)	8
<i>State v. Budge</i> , 125 Wn. App. 341, 104 P.3d 714 (2005)	14
<i>State v. Campbell</i> , 103 Wn.2d 1, 691 P.2d 929 (1984), <i>cert. denied</i> , 471 U.S. 1094 (1985)	2
<i>State v. Eckelkamp</i> , 133 S.W.3d 72 (Mo. App. 2004)	7
<i>State v. Finch</i> , 137 Wn.2d 792, 975 P.2d 967, <i>cert. denied</i> , 528 U.S. 922 (1999)	7
<i>State v. Gonzales</i> , 138 N.M. 271, 119 P.3d 151 (2005)	9
<i>State v. Heaton</i> , 21 Wash. 59, 56 P. 843 (1899)	3, 7, 19
<i>State v. Horrocks</i> , 2001 UT App. 4, 17 P.3d 1145 (2001)	12, 14, 15
<i>State v. Iowa District Court for Johnson County</i> , 568 N.W.2d 505 (Iowa Sup. 1997)	7
<i>State v. Jones</i> , 97 Wn.2d 159, 641 P.2d 708 (1982)	12
<i>State v. Moss</i> , 921 P.2d 1021 (Utah Ct. App. 1996)	14
<i>State v. Netling</i> , 46 Wn. App. 461, 731 P.2d 11, <i>review denied</i> , 108 Wn.2d 1011 (1987)	17
<i>State v. Perez</i> , 77 Wn. App. 372, 891 P.2d 42, <i>review denied</i> , 127 Wn.2d 1014 (1995)	7
<i>State v. Sanchez</i> , 146 Wn.2d 339, 46 P.3d 774 (2002)	17
<i>State v. Singleton</i> , 340 Ark. 710, 13 S.W.3d 584 (2000)	13
<i>State v. Tracer</i> , 155 Wn. App. 171, 229 P.3d 847, <i>review granted</i> , 169 Wn.2d 1010 (2010)	4, 11
<i>State v. Trainer</i> , 762 N.W.2d 155 (Iowa App. 2008)	17
<i>State v. Wheeler</i> , 95 Wn.2d 799, 631 P.2d 376 (1981)	15

<i>State v. White</i> , 114 S.W.3d 469 (Tenn. 2003)	8
<i>United States v. Bolden</i> , 353 F.3d 870 (10th Cir. 2003)	6, 9
<i>Venhaus v. Pulaski County</i> , 186 Ark. 229, 691 S.W.2d 141 (1985)	7

CONSTITUTIONS

Const. art. I, § 1	5
Const. art. I, § 32	5
Const. art. I, § 9	12
Const. art. I, § 9	17
Const. art. XI, § 5	1, 2
Const. art. XI, §§ 4	1, 2
Double Jeopardy Clause of the Fifth Amendment	12
Fifth Amendment	12

STATUTES

Bal. Code, § 466 3

Bal. Code, § 471 3

Bal. Code, § 4755 3

Chapter 36.27 RCW 4

Laws of 1893, ch. 52, § 1 3

RCW 2.44.020 19

RCW 36.16.030 1

RCW 36.16.110 1

RCW 36.16.115 1

RCW 36.27.020(4) 3

RCW 36.27.030 2-5, 8, 20

RCW 36.27.040 1, 8, 19

RCW 9.94A.421 10

COURT RULES

CrR 1.4 4

CrRLJ 1.4(c) 4

ER 410 14

IRLJ 1.2(k) 4

J Crim R 2.02 4

J Crim. R 2.01	4
J3(4)	4
RAP 2.2(b)(1)	1, 9, 11
RAP 3.1	10, 11

OTHER AUTHORITIES

A.B.A. Comm. on Professional Ethics and Grievances, Formal Op. 142 (1935)	8
A.B.A. Defense Function Standard 4-3.5(g)	8
A.B.A. Prosecution Function Standard 3.13(b)	8
J. Burkoff, <i>Criminal Defense Ethics 2d: Law and Liability</i> § 6:11 (2005 ed.)	8
J. Hall, <i>Professional Responsibility in Criminal Defense Practice</i> § 13.8 at 536 (3rd ed. 2005)	8
James Madison, <i>The Federalist</i> no 47, at 2:92-93 (1788)	3
Montesquieu, <i>The Spirit of the Laws</i> , 38 Great Books of the Western World 70 (Hutchins ed. 1952)	3
Utah State Bar Ethics Advisory Opinion Committee: Opinion No. 1998-04 (1998)	8
Wisconsin State Bar Standing Committee on Professional Ethics, Formal Opinion E-81-5, 54 Wis. Bar Bull. No. 8, at 68 (Aug. 1981) .	8
WSBA Informal Opinions 1766 (1997)	8

I. INTRODUCTION

This supplemental brief expands upon arguments contained in the brief of appellant, the State's reply brief, and the State's response to petition for review. The State's decision not to address certain issues in this supplemental brief should not be considered as a concession, but should be interpreted as the State's determination that the unaddressed issues are adequately discussed in its other briefs.

II. STATEMENT OF ISSUES

1. The office of prosecuting attorney is created by the state constitution.¹ Office holders are either directly elected by the people or, in the case of a vacancy, appointed by the duly elected legislative branch.² The office holder is authorized to represent the public personally, or through deputy prosecuting attorneys and special deputy prosecuting attorneys.³ May a court disenfranchise the public by replacing the popularly chosen prosecuting attorney without notice and an opportunity to be heard?

2. The State may appeal, as a matter of right, from "[a] decision that in effect . . . determines the case other than by a judgment or verdict of not guilty." RAP 2.2(b)(1). Was the State permitted to appeal, under RAP 2.2(b)(1), a trial court's erroneous appointment of an ersatz prosecutor who

¹Const. art. XI, §§ 4, 5.

²See generally RCW 36.16.030, RCW 36.16.110 and RCW 36.16.115.

³See generally RCW 36.27.040.

then terminated the case without authority and in violation of restitution statutes?

3. The defendant in this case misled the trial judge into believing that a plea proposal was a binding plea agreement, and that there was an immediate need to execute the guilty plea. These misrepresentations induced the trial judge into orally appointing an unqualified individual to serve as a special prosecuting attorney. May the defendant, whose acts contributed to such an unlawful appointment, convert the constitutional right to be free from double jeopardy from a shield, into a sword?

II. ARGUMENT

A. **A Court's Appointment of a Special Prosecutor Pursuant to RCW 36.27.030 Requires a Formal Hearing, With Notice to the Elected Prosecuting Attorney and an Opportunity for the Elected Prosecuting Attorney to Be Heard**

The Washington Constitution vests the criminal prosecution function in the constitutionally created locally-elected executive branch office of prosecuting attorney. Const. art. XI, §§ 4, 5; *State v. Campbell*, 103 Wn.2d 1, 25-26, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985). This same constitution assigns the Legislature the task of determining the duties of the prosecuting attorney. *See* Const. art. XI, § 5 (Legislature to prescribe the duties of the prosecuting attorney). Among the duties assigned to the prosecuting attorney is the obligation to “[p]rosecute all criminal and civil

actions in which the state or the county may be a party.” RCW 36.27.020(4).

In conformity with the 1889 constitution’s designation of the prosecuting attorney as an independently elected officer, the legislature took affirmative action to limit the ability of the courts to remove the people’s chosen lawyer. *See generally* Bal. Code, §§ 466, 471, 4755; Laws of 1893, ch. 52, § 1. The limitations placed upon court action by the legislature have remained virtually unchanged to this day. *Compare* Laws of 1893, ch. 52, § 1 *with* RCW 36.27.030.

This Court acknowledged, shortly after statehood, that the statutory criteria are the sole basis for replacing the people’s chosen lawyer. *See State v. Heaton*, 21 Wash. 59, 61-62, 56 P. 843 (1899). This holding is consistent with bedrock notions of separation of powers. *See, e.g.*, James Madison, *The Federalist* no 47, at 2:92-93 (1788) (“The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.”); Montesquieu, *The Spirit of the Laws*, 38 Great Books of the Western World 70 (Hutchins ed. 1952) (“Again there is no liberty if the judiciary power be not separated from the legislative and executive. . . . Were it joined to the executive power, the judge might behave with violence and oppression.”). This holding also recognizes that the “removal of a duly elected public official is a drastic measure for it disenfranchises the very electorate who, through its votes, has spoken.”

McCall v. Devine, 334 Ill. App. 3d 192, 777 N.E.2d 405, 416-17 (2004)
(quoting a trial court judge).

This Court's respect for the doctrine of separation of powers and for the electorate were ignored by the trial judge, who summarily⁴ replaced the duly elected prosecuting attorney in order to immediately dispose of a case. This Court's restraint is undermined by the Court of Appeals' reliance upon dicta⁵ to authorize the diminishment of the duly elected prosecuting

⁴Judge Verser's entire on-the-record analysis regarding the appointment of a special prosecuting attorney is as follows:

[Judge] Verser: All right, get a hold of her and see if she can do it. If not then maybe we can appoint a special prosecutor, Mr. Harrison.

(laughter outside of camera's view)

Harrison: It's a conflict.

DeBray: (jokingly turning around to face Harrison at defense attorneys' table and shrugging his shoulders) It's already been worked out. It couldn't be easier.

[Judge] Verser: Well, yeah, I said that to Mr. Harrison sort of factiously, but I don't know why we couldn't do that tell you the truth if it's all worked out.

CP 90.

⁵The Court of Appeals, relied upon a single parenthetical comment in *State v. Blake*, 71 Wn.2d 356, 428 P.2d 555 (1967), to authorize the appointment of a prosecuting attorney pursuant to RCW 36.27.030, whenever a deputy prosecuting attorney fails to appear in court. See *State v. Tracer*, 155 Wn. App. 171, 185, 229 P.3d 847, review granted, 169 Wn.2d 1010 (2010). This was in error, the dicta in *Blake* was based upon court rules that, for purposes of the court rules, stretches the phrase "prosecuting attorney" to include "deputy prosecuting attorneys." See *Blake*, 71 Wn.2d at 359, citing to J Crim. R 2.01; J Crim R 2.02. See also J3(4); CrR 1.4; CrRLJ 1.4(c); IRLJ 1.2(k).

Chapter 36.27 RCW contains no comparable expansive definition for the phrase "prosecuting attorney." Instead, Chapter 36.27 RCW utilizes the phrase "prosecuting attorney" to refer to the holder of the constitutionally created office, and the phrases "deputy prosecuting attorney" and "special prosecuting attorney" to refer to the individuals that the

attorney's office, whenever one of her deputies fails to appear for a hearing. The Washington Constitutions' exhortation for the return to fundamental principles that guarantee a free government⁶ require this Court to establish procedures for the replacement of the duly elected prosecuting attorney with a special prosecuting attorney that respects the governed's choice of an advocate⁷ and the prosecuting attorney's property interest in both her office and her salary.⁸

In establishing a procedure, the Court should look to the process adopted in many of the states that have statutes similar to RCW 36.27.030. These sister states uniformly require that the incumbent prosecuting attorney be provided with notice of a motion to appoint a special prosecuting attorney, and with an opportunity to present argument and evidence regarding the propriety of appointing a special prosecutor. *See generally State ex rel. Ilvedson v. District Court*, 70 N.D. 17, 291 N.W. 620, 627-28 (1940); *In re Disqualification of Cirigliano*, 105 Ohio St. 3d 1223, 826 N.E.2d 287 (2004); *Lattimore v. Vernor*, 142 Okla. 105, 288 P. 463 (1930); *In re Guerra*, 235

prosecuting attorney appoints as her agents.

⁶Const. art. I, § 32.

⁷See Const. art. I, § 1 (recognizing that the political power belongs to the people and that the government must exercise its powers in a manner that is consistent with this principle).

⁸See generally *Verhaus v. Pulaski County*, 286 Ark. 229, 691 S.W.2d 141, 143 (1985) (recognizing that “[incumbent prosecuting attorneys, like all Constitutional officers, have the right and the duty to perform the functions of their office until they are legally removed from office or legally disqualified to act.”); RCW 36.27.030 (identifies the salary of the prosecuting attorney as the source of payment for any special prosecuting attorney).

S.W.3d 392, 420-24 (Tex. App. 2007); *Lane v. Second Judicial Dist. Court*, 104 Nev. 427, 760 P.2d 1245 (1988); *State ex rel. Preissler v. Dostert*, 260 S.E.2d 279, 284-87 (W.Va. 1979).⁹ These sister states also hold that any order appointing a special prosecutor that is entered without such notice is void. *See, e.g., Cirigliano*, 826 N.E.2d at 291; *Preissler*, 260 S.E.2d at 284; *State ex rel. Brown v. Merrifield*, 182 W. Va. 519, 389 S.E.2d 484, 487 (1990).

When the proponent for the appointment of a special prosecutor is a judge, that judge should arrange for another judge to decide whether such an appointment is proper. *State ex rel. Lambert v. King*, 208 W. Va. 87, 538 S.E.2d 385, 389 (2000) (Canon 3 E of the Code of Judicial Conduct precludes a judge from deciding whether the prosecutor should be disqualified upon the judge's own motion). Because, "the public has a right to know why the attorney they have selected to represent them and whose salary they pay with their taxes, is unfit to prosecute a given case",¹⁰ the judge who presides over a hearing to appoint a special prosecutor should enter findings of fact and conclusions of law in support of the decision. *United States v. Bolden*, 353 F.3d 870, 880 (10th Cir. 2003) ("in light of the serious

⁹Some jurisdictions hold that notice may be dispensed with when the prosecuting attorney is, himself, being investigated by the grand jury for possible criminal wrongdoing or has been indicted for a felony charge. *See Priessler*, 260 S.E.2d at 286-87 (discussing *State ex rel. Matko v. Ziegler*, 154 W. Va. 872, 179 S.E.2d 735 (1971)); *In re Guerra, supra*.

¹⁰*Priessler*, 260 S.E.2d at 287.

ethical allegations and constitutional issues involved in such cases, we stress that the district court must make attorney-specific factual findings and legal conclusions before disqualifying attorneys from the USA's office"). *Accord Board of County Comm'rs v. Johnston*, 192 Okla. 203, 134 P.2d 335 (1942) (requiring the order appointing a special prosecutor to identify the proof that supported the conclusion that one or more of the statutory requirements for appointing a special prosecutor had been established).

When the evidence clearly establishes a conflict of interest¹¹ on the

¹¹A defendant's relationship to a sheriff's department's employee does not create a conflict of interest that mandates the recusal of the prosecuting attorney's office. *See State v. Finch*, 137 Wn.2d 792, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999) (defendant's motion in a capital murder case to force the recusal of the Snohomish County Prosecuting Attorney's Office due to their friendship with the murdered Snohomish County deputy sheriff relationship was properly denied as the appearance of fairness doctrine does not apply to a prosecutor's office); *State v. Perez*, 77 Wn. App. 372, 377, 891 P.2d 42, *review denied*, 127 Wn.2d 1014 (1995) (deputy prosecutor was also not disqualified by her friendship for the victim's cousin, who was a police officer; court noted that "[i]t is not unusual for prosecuting attorneys and law enforcement officers to be friends."). *Accord McCall v. Devine*, 334 Ill. App. 3d 192, 777 N.E.2d 405 (2002) (a close professional relationship between a prosecutor's office and a police agency does not create a conflict of interest that justifies replacing the prosecutor with a special prosecutor).

A prosecutor's decision to not file charges, to not reduce the filed charges, or to not engage in plea negotiations in a particular case does not create a conflict of interest that triggers RCW 36.27.030. *See generally Venhaus v. Pulaski County*, 186 Ark. 229, 691 S.W.2d 141 (1985) (a prosecutor's refusal to file charges against a person the prosecutor believed to be innocent not grounds for the prosecutor's replacement); *State v. Iowa District Court for Johnson County*, 568 N.W.2d 505, 509 (Iowa Sup. 1997) (a prosecutor's controversial professional judgment about the appropriateness of pressing charges does not constitute a conflict of interest disqualifying him); *People v. Herrick*, 216 Mich. App. 594, 550 N.W.2d 541, 542 (1996) (a court commits an error of law in ruling that a prosecutor's decision not to prosecute constitutes a conflict of interest authorizing the appointment of a special prosecutor); *State v. Eckelkamp*, 133 S.W.3d 72 (Mo. App. 2004) (trial court lacked the authority to appoint a special prosecutor to enter into plea agreement discussions with the assistant public defender); *State v. Heaton*, *supra*.

part of the prosecuting attorney¹² or the satisfaction of the other grounds contained in RCW 36.27.030 for the appointment of a special prosecutor, the judge must select someone who is "qualified" to serve. To be "qualified", the person must be an attorney who is admitted to practice law in Washington and must have no disqualifying conflicts of interest.¹³ Ideally, such a person

¹²As a general rule, the actions of a deputy prosecuting attorney or a conflict that is unique to a deputy prosecuting attorney is insufficient to remove the prosecuting attorney from a case. Deputy prosecutors, whether regular or special, are the prosecutor's agents. See RCW 36.27.040. If one of these agents fails to perform his or her duties, corrective measures should be taken by the elected prosecutor. It is only if the prosecutor herself fails to perform her duties that there is any need for an outsider (the judiciary) to act. See *Herron v. McClanahan*, 28 Wn. App. 552, 625 P.2d 707, review denied, 95 Wn.2d 1029 (1981) (an appointment pursuant to RCW 36.27.030 is improper if the prosecuting attorney has already appointed a suitable person to act).

¹³Clearly, an individual who is representing criminal defendants in the same jurisdiction is not "qualified" to serve as a special prosecuting attorney. See generally *State v. White*, 114 S.W.3d 469 (Tenn. 2003) (it is an actual conflict of interest for an attorney to serve as a prosecutor and as a defense attorney in the same county); *State v. Brown*, 853 P.2d 851,856-59 (Utah 1992) (loyalty is compromised when an attorney represents criminal defendants at the same time that he has prosecutorial responsibilities); *Howerton v. State*, 640 P.2d 566, 567 (Okla. Crim. App. 1982) ("A public prosecutor has as his client the state. It is obvious, therefore, that he cannot appear for any defendant in cases in which the state is an adverse party. . .") (citing A.B.A. Comm. on Professional Ethics and Grievances, Formal Op. 142 (1935)); Utah State Bar Ethics Advisory Opinion Committee: Opinion No. 1998-04 (1998) (a private practitioner who has been appointed as special deputy county attorney to investigate and prosecute a single matter may not represent criminal defendants in any jurisdiction in Utah while he is also acting as a special prosecutor for a county); ; WSBA Informal Opinions 1766 (1997); Wisconsin State Bar Standing Committee on Professional Ethics, Formal Opinion E-81-5, 54 Wis. Bar Bull. No. 8, at 68 (Aug. 1981) (a person appointed by the court as a district attorney pro tempore may not act as defense counsel in criminal matters in the same county); A.B.A. Defense Function Standard 4-3.5(g) ("Defense counsel should not represent a criminal defendant in a jurisdiction in which he or she is also a prosecutor."); A.B.A. Prosecution Function Standard 3.13(b) ("A prosecutor should not represent a defendant in criminal proceedings in a jurisdiction where he or she is also employed as a prosecutor."); J. Burkoff, *Criminal Defense Ethics 2d: Law and Liability* § 6:11, at 304-307 (2005 ed.) (surveying cases related to serving simultaneously as a criminal defense lawyer and a prosecutor); J. Hall, *Professional Responsibility in Criminal Defense Practice* § 13.8 at 536 (3rd ed. 2005) ("Part-time prosecutors should not be defending criminal cases even in other counties or the same county in the same state. Part-time prosecutors still have the state as a regular client in one county. The rule should seem obvious, but obviousness does not prevent violations.").

should also have experience prosecuting criminal cases in Washington. To minimize the possibility of a disqualifying conflict of interest, courts should first consider the appointment of a currently serving government attorney, such as the prosecuting attorney from a neighboring county, a currently serving deputy prosecuting attorney, or an assistant attorney general. Other appropriate candidates would be a retired prosecuting attorney or deputy prosecuting attorney.

A prosecuting attorney, who is aggrieved by the diminishment of her office, should be entitled to challenge the appointment of a special prosecuting attorney through the filing of an interlocutory appeal in the case in which the appointment was made. *See generally Bolden*, 353 F.3d at 877-78 (orders disqualifying prosecuting attorneys are immediately reviewable); *State v. Gonzales*, 138 N.M. 271, 119 P.3d 151, 157 (2005) (surveying state cases and indicating that the general rule is that an immediate appeal from an order disqualifying a prosecutor is available). Such an appeal should be filed prior to the resolution of the underlying case when the prosecutor received proper notice of the motion to appoint a special prosecutor. When the prosecutor did not receive prior notice, a motion to vacate the appointment or an appeal from the appointment should be promptly filed.

B. The State's Appeal From the Judgment and Sentence Was Proper

RAP 2.2(b)(1) permits the State to file an appeal from any decision,

other than a judgment of “not guilty” that “in effect abates, discontinues, or determines the case.” A judgment of guilty and the accompanying sentence falls squarely within the rule’s “determines” language. Acknowledgment of this fact will not open the floodgate to State’s appeals in every case in which the defendant is convicted, because the State may only appeal when it is “aggrieved.” RAP 3.1.

Here, Judge Verser provided no notice to Juelanne Dalzell, the duly elected prosecuting attorney, of his intention to appoint a special prosecutor. Judge Verser did not set a time for Ms. Dalzell to appear in court to rebut the need for a special prosecutor. The 23 minute interval¹⁴ between Judge Verser’s facetious on-the-record statement that criminal defense attorney Noah Harrison should be appointed as a special prosecutor and the actual oral appointment of Mr. Harrison as a special prosecutor was insufficient to provide Ms. Dalzell with a meaningful opportunity to appear in court. The 2 1/2 hour interval between Mr. Harrison’s appointment and the entry of the judgment and sentence was insufficient to provide Ms. Dalzell with an opportunity to seek an appellate court stay of the appointment.¹⁵

¹⁴*Compare* CP 89-90 (setting the time of the proceeding at 9:52 a.m.) *with* CP 91 (setting the time of the proceeding at 10:15 a.m.).

¹⁵*Compare* CP 91 (setting the time of the proceeding at 10:15 a.m.) *with* CP 93 (setting time of proceeding at 12:50 p.m.).

This time period was also insufficient to allow any prosecutor to evaluate the case, contact witnesses, “ascertain any objections or comments the victim has to the plea agreement”, RCW 9.94A.421, and to make an informed decision as to the propriety of

Although the defendant, Richard Tracer, was convicted, by plea, of “a crime”, he was not convicted of “the crime” charged by the duly authorized executive branch attorney. The State was aggrieved by the summary removal of the people’s chosen attorney, by the appointment of a conflict-ridden replacement, by Judge Verser’s hijacking the plea negotiation process, by the lack of restitution, and by the absence of the mandatory crime victim assessment. Thus, the State had an appeal as a matter of right under the plain language of RAP 2.2(b)(1) and RAP 3.1.¹⁶

In addition to being “aggrieved”, the instant appeal presents one of the few in which the entry of a judgment and sentence on a lesser included offense does not prevent the State from proceeding on the greater charge. As discussed *infra*, two different exceptions to double jeopardy authorize either the remedy the State has consistently sought in this case, or a remedy that is less favorable to Tracer.

C. The Well Established Doctrine of Mislea Authorizes the Setting Aside of Tracer’s Guilty Plea to DUI

Tracer, who affirmatively misled the trial court into believing that the

converting the plea proposal into a plea agreement. *See generally* CP 123 (Certification of King County Senior Deputy Prosecuting Attorney).

¹⁶The Court of Appeals also held that discretionary review of the State’s appeal was appropriate because the State had “amply demonstrated cause to believe that the trial court so far departed from the accepted and usual course of judicial proceedings as to call for our review.” *Tracer*, 155 Wn. App. at 182. Tracer did not challenge this holding in his petition for review.

State's nascent plea proposal was a binding plea agreement¹⁷ and who affirmatively supported the appointment of an unqualified special prosecutor,¹⁸ claims that the Double Jeopardy Clause of the Fifth Amendment allows him to enjoy the fruits of his perfidy. Tracer's claim has been repeatedly rejected by courts in a large number of jurisdictions.

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

Although this Court has not addressed this issue yet, a number of other jurisdictions recognize that a similar finding of manifest necessity authorizes a court to set aside a guilty plea. *See, e.g., State v. Horrocks*, 2001

¹⁷See CP 89 (Judge Verser indicating the matter is set for "a pretrial hearing", and Tracer "corrected" him by stating "Well judge it's set for a change of plea."); CP 175 (docket listing Tracer's matter as a "3.5 & Pretrial Hearing"). *See also* CP 91 (Tracer's attorney acknowledging that all the "specifics" of the "plea agreement" had not been resolved); CP 134 (Special Deputy Prosecuting Attorney Andrea Vingo stating that the May 9, 2010, phone call concluded without a firm agreement); CP 141 and 142 (Tracer's attorney acknowledging that no agreement had been reached with the State regarding restitution, recoupment of defense expert fees, or the term of suspended jail time).

¹⁸CP 91 ("Mr. Tracer is willing to have Mr. Harrison step in as a special ...").

UT App. 4, 17 P.3d 1145 (2001). A declaration of a misplea is appropriate and the vacation of a guilty plea is authorized when the court that accepted the defendant's guilty plea lacked the authority to do so. *See, e.g., State v. Singleton*, 340 Ark. 710, 13 S.W.3d 584 (2000) (double jeopardy did not bar trial as the court that accepted the defendant's guilty plea did not have the authority to do so as the State did not consent to a waiver of a jury as required by state law); *Genesee Prosecutor v. Genesee Circuit Judge*, 391 Mich. 115, 215 N.W.2d 145 (1974) (double jeopardy does not bar prosecution as the judge did not have the authority to accept a guilty plea, over the prosecutor's objection, to a lesser included offense); *Cummings v. Koppell*, 212 A.D.2d 11, 627 N.Y.S.2d 480 (N.Y. App. Div.), *lv denied*, 86 N.Y.2d 702, 655 N.E.2d 703, 631 N.Y.S.2d 606 (1995) (double jeopardy did not bar trial on felony as local criminal court did not have subject matter jurisdiction to accept guilty pleas and dismiss charges after actions of a grand jury or superior court); *People v. Brancoccio*, 189 A.D.2d 525, 596 N.Y.S.2d 856 (1993) (double jeopardy did not bar prosecution of defendant as the court that accepted the guilty plea to the misdemeanor was divested of jurisdiction when the court was advised that the prosecutor intended to present charges to the grand jury; people's "acquiescence" or "concurrence" in the plea does not mandate a different conclusion); *People v. Anderson*, 140 A.D.2d 528, 528 N.Y.S.2d 614 (1988) (double jeopardy did not bar prosecution for

multiple felonies as the court that accepted a guilty plea to a misdemeanor in satisfaction of the felonies in the complaint had been divested of jurisdiction to accept the plea); *see also State v. Brown*, 709 N.W.2d 313 (Minn. App. 2006) (granting the State's appeal and remanding for trial where the trial court accepted a guilty plea to a lesser included offense over the State's objection).

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

Here, consistent with the doctrine of misplea, the State has

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

A return to pre-plea status is appropriate because Washington law precluded the trial court from accepting a guilty plea to anything less than the charged offense, and Mr. Harrison's oral amendment to DUI was ineffectual as his special prosecutor appointment was void.¹⁹ *See generally State v. Bowerman*, 115 Wn.2d 794, 799-801, 802 P.2 116 (1990) (a defendant may not plead guilty to only a portion of a count); *People v. Stackpoole*, 144 Mich. App. 291, 375 N.W.2d 419 (1985) (when an unauthorized person

¹⁹This remedy is also appropriate because Tracer misrepresented to the court that he had a plea agreement, rather than the actual plea proposal. *See generally Moore v. State*, 71 Ala. 307, 311 (1882) (declaration of misplea is appropriate when some fraud, deception, or misconduct by the defendant leads to the acceptance of the plea agreement by the other party or the court); *Horrocks*, 17 P.3d at 1151 (declaration of misplea is appropriate when some fraud, deception, or misconduct by the defendant leads to the acceptance of the plea agreement by the other party or the court); *People v. Hartfield*, 11 Cal. App. 3d 1073, 90 Cal. Rptr. 274, 278-79 (1970) (defendant accelerated hearing on misdemeanor charge in order to plead guilty so as to avoid prosecution on pending felony charge); *Hampton v. Municipal Court*, 242 Cal. App. 2d 689, 51 Cal. Rptr. 760, 763 (1966) (defendant lied to arresting officer, then pled guilty to charge filed by officer during the gap between the State filing appropriate charges and the defendant's arraignment on the proper charge); *Horrocks*, 17 P.3d at 1152 (defendant gave court a copy of his misdemeanor citation and mislead the court into thinking that those were all of the charges); *People v. Woods*, 84 Cal. 441, 23 P. 1119 (1890) (defendant claimed, contrary to the record, that the appellate court had affirmed the trial judge's grant of a new trial).

attempts to act on behalf of the state, the district court is without authority to pass on the matters raised by the unofficial person; the dismissal of the criminal charge and its replacement with an infraction are invalid and not binding upon the State); *State v. Brown*, 709 N.W.2d 313 (Minn. App. 2006) (trial court did not have the authority to accept a guilty plea to lesser charge when the prosecuting attorney declined to move to amend the charge to the lesser offense).

D. United States Supreme Court Precedent Precludes the Defendant from Turning the Double Jeopardy Clause into a Sword

While application of the misplea doctrine restores Tracer to his pre-plea position, this Court may also, consistent with double jeopardy doctrines, let Tracer's DUI plea stand and return the matter for trial on the greater charge of vehicular assault. This result is consistent with the Supreme Court case of *Ohio v. Johnson*, 467 U.S. 493, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984). *Johnson* recognizes that a defendant may not convert the double jeopardy shield into a sword by pleading guilty, without the State's concurrence, to lesser included charges. 467 U.S. at 501-02. In such cases, the State's prosecution of the greater offense may go forward and the issue is dealt with at sentencing. *See Johnson*, 467 U.S. at 500. The rule announced in *Johnson* has been extended to other situations in which a defendant pleads guilty to a lesser included offense in an attempt to avoid

prosecution on the greater offense and there is no prosecutorial overreaching. *See, e.g., State v. Trainer*, 762 N.W.2d 155 (Iowa App. 2008) (surveying cases).

Washington case law is consistent with *Ohio v. Johnson*. A defendant may not obtain a dismissal of a greater offense solely by pleading guilty, without a plea agreement with the prosecutor, to a lesser offense. *See, e.g., Bowerman*, 115 Wn.2d at 801 n. 4 (noting that a guilty plea to felony murder would not have prevented trial on the aggravated murder charge); *State v. Netling*, 46 Wn. App. 461, 731 P.2d 11, *review denied*, 108 Wn.2d 1011 (1987) (Const. art. I, § 9 did not protect a defendant, who plead guilty to a possession charge without a plea agreement, from continued prosecution on the delivery charge).

Here, an unauthorized person amended the charge from vehicular assault to DUI. This action is not binding upon the State of Washington, and cannot constitute the “consent” necessary to remove Tracer’s case from the rule announced in *Ohio v. Johnson*. *See generally State v. Sanchez*, 146 Wn.2d 339, 348, 46 P.3d 774 (2002) (a prosecutor is not bound by a plea agreement entered between the defendant and any other person); *People v. Stackpoole*, 144 Mich. App. 291, 375 N.W.2d 419 (1985) (when an unauthorized person attempts to act on behalf of the state, the district court is without authority to pass on the matters raised by the unofficial person; the

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

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

Tracer, who contributed directly to the improper appointment of Noah Harrison, claims that Mr. Harrison's actions should bind the State under the de facto public official doctrine. To reach this conclusion, Tracer cites to cases involving challenges brought by criminal defendants. These cases are irrelevant to a State of Washington challenge to the authority of the person who purported to be the prosecutor.

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

prosecuting attorney.

Here, Mr. Harrison's appointment was made at the request of Tracer. *See* CP 91. The appointment was never memorialized in writing, and no record of the appointment was ever filed with the auditor. *Cf.* RCW 36.27.040 (requiring written appointments of deputy prosecuting attorneys to be filed with the county auditor). Mr. Harrison's appointment as a special prosecutor lasted approximately 2 1/2 hours, and was preceded with his appearance in court, on behalf of defendants charged with crimes. *See* CP 112-122, 149, 168, 174, 175. Finally, Mr. Harrison's appointment as a special prosecutor violated the constitutional doctrine of separation of powers and the legislature's constitutionally delegated responsibility to determine when a prosecuting attorney may be relieved of his or her office.

The "de facto" public official doctrine does prevent the vacation, on the government's timely filed motion, of the void actions of a pro tem officer. *See Nat'l Bank of Wash. v. McCrillis*, 15 Wn.2d 345, 360-64, 130 P.2d 901 (1940) (the temporary character of a pro tem appointment preclude the automatic application of the de facto doctrine); *State v. Heaton*, 21 Wash. 59, 56 P. 843 (1899) (affirming the dismissal of an indictment obtained by an unlawfully court appointed special prosecutor); RCW 2.44.020 (when an attorney purports to appear for a party without that party's permission, the party may be relieved of the consequences of that attorney's actions). This

proposition is consistent with cases from other jurisdictions. *See, e.g., Smith v. State*, 42 Okla. Crim. 308, 275 P. 1071, 1073 (1929) (ordering a new trial where the judge sua sponte appointed a special prosecutor because “[t]he appointment of James W. Smith as special prosecutor being without authority of law, all his acts are void.”); *Brunty v. State*, 22 Va. App. 191, 468 S.E.2d 161, 164 (1996) (holding that a final order that was signed by a person that the court illegally appointed as a “special prosecutor” must be vacated as it “was entered improperly, without endorsement of counsel of record”).

III. CONCLUSION

The State respectfully requests that this Court reaffirm the limitations RCW 36.27.030 place upon a court’s ability to displace the people’s chosen attorney. The State also respectfully requests that this Court affirm the vacation of the illegally appointed special prosecutor’s void actions.

Dated this 4th day of October, 2010.

Respectfully Submitted,

Juelanne B. Dalzell
Prosecuting Attorney

A handwritten signature in cursive script, appearing to read "Pamela B. Loginsky".

Pamela B. Loginsky, WSBA 18096
Special Deputy Prosecuting Attorney

PROOF OF SERVICE

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

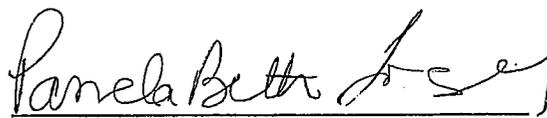
On the 4th day of October, 2010, I deposited in the mails of the United States of America, postage prepaid, a copy of the document to which this proof of service is attached in an envelope addressed to:

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

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

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

Signed this 4th day of October, 2010, at Olympia, Washington.



Pamela B. Loginsky, WSBA No. 18096