FILED

JUL 12 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

90827-3

NO. 31519-3-III

COURT OF APPEALS, DIVISION THREE
OF THE STATE OF WASHINGTON

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

Respondent,

v.

JERRY JASMAN, a single person,

Appellant,

and

CRAIG MORRISON, Intervener,

Appellant.

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

BRIEF OF RESPONDENT

D. ANGUS LEE
Prosecuting Attorney
PO Box 37
Ephrata, WA 9882309937

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

IONE S. GEORGE
Special Deputy Prosecuting
Attorney
614 Division St, MS 35A
Port Orchard, WA 98366
(360) 337-4992

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ISSUES BEFORE THE COURT 2

III. STATEMENT OF THE CASE 2

V. ARGUMENT 6

A. AN INDIVIDUAL WHO IS BARRED FROM OFFICE PURSUANT TO RCW 9.92.120 MAY NOT PERFORM THE DUTIES OF A COUNTY OFFICIAL 6

B. A SPECIAL PROSECUTOR CANNOT BE APPOINTED TO REPRESENT EITHER JASMAN OR INTERVENER CORONER MORRISON AS PROSECUTOR LEE HAD NO DUTY TO REPRESENT EITHER OF THEM IN THIS ACTION 15

VI. CONCLUSION 21

TABLE OF AUTHORITY

Cases

Bates v. School Dist., 45 Wash. 498, 88 P. 944 (1907) 17

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194,
10 L. Ed. 2d 215 (1963) 13

City of Seattle v. McKenna, 172 Wn.2d 551,
259 P.3d 1087 (2011) 18

Colby v. Yakima County, 133 Wn. App. 386,
136 P.3d 131 (2006) 20

Duncan v. United States, 68 F.2d 136 (9th Cir. 1933),
cert. denied,292 U.S. 646 (1934) 13

Fisher v. Clem, 25 Wn. App. 303, 607 P.2d 326 (1980) 17

Goldmark v. McKenna, 172 Wn.2d 568, 259 P.3d 1095 (2011) 18

Hoppe v. King County, 95 Wn.2d 340, 622 P.2d 845 (1980) . . . 16, 17, 19

Hubbard v. Spokane County, 146 Wn.2d 699,
50 P.3d 602 (2002). 12

Huff v. Roach, 125 Wn. App. 724, 106 P.3d 268,
review denied, 155 Wn.2d 1023 (2005) 20

In re Cramer, 168 Wn.2d 220, 225 P.3d 881 (2010) 12

Nelson v. Troy, 11 Wash. 435, 39 P. 974 (1895) 10, 11

Nichols v. Snohomish County, 109 Wn.2d 613,
746 P.2d 1208 (1987) 16

Osborn v. Grant County, 130 Wn.2d 615,
926 P.2d 911 (1996) 17

People ex rel. Hershey v. McNichols, 91 Colo. 141,
13 P.2d 266 (1932) 14

Smith v. Board of Walla Walla County Commissioners,
48 Wn. App. 303, 738 P.2d 1076 (1987) 7

Spokane County v. State, 136 Wn.2d 644,
966 P.2d 305 (1998) 7

State ex rel. Attorney General v. Seattle Gas & Electric,
28 Wash. 488, 68 P. 946 (1902) 18

State ex rel. Brown v. Warnock, 12 Wn.2d 478,
122 P.2d 472 (1942) 1, 18

State ex rel. Day v. King County, 50 Wn.2d 427,
312 P.2d 637 (1957) 8

State ex rel. Hamilton v. Whatcom County Superior Court,
3 Wn.2d 633, 101 P.2d 588 (1940) 18

State ex rel. Zempel v. Twitchell, 59 Wn.2d 419,
367 P.2d 985 (1962) 10

State v. Bradfield, 29 Wn. App. 679, 630 P.2d 494,
review denied, 96 Wn.2d 1018 (1981) 6

State v. Greco, 57 Wn. App. 196, 787 P.2d 940,
review denied, 114 Wn.2d 1027 (1990) 18

State v. Heaton, 21 Wash. 59, 56 P. 843 (1899) 16

State v. Korba, 66 Wn. App. 666, 832 P.2d 1346 (1992) 15

State v. Stenger, 111 Wn.2d 516, 760 P.2d 357 (1988) 16

State v. Tolias, 84 Wn. App. 696, 929 P.2d 1178 (1997),
rev'd on other grounds, 135 Wn.2d 133, 954 P.2d 907 (1998) 16

State v. Walker, 101 Wn. App. 1, 999 P.2d 1296,
review denied, 142 Wn.2d 1013 (2000) 10

Westerman v. Carey, 125 Wn.2d 277, 892 P.2d 1067 (1994) 16

Constitutions and Treaties

Const. art. I, § 1 1

Const. art. XI, § 4 15

Const. art. XI, § 5 . . . . . 6, 15

Statutes

Bal. Code, § 468 (P.C. § 4190) 17

Chapter 36.24 RCW 6

Ethics in Public Service Act, RCW 42.23.070 12

Laws of 1866, p. 28, § 2 9

Laws of 1909, ch. 249, § 37 9

Laws of 1909, ch. 249, § 51 14

Laws of 1975, 1st Ex. Sess., ch. 260, § 9A.04.110(13) 14

RCW 11.12.265 6

RCW 29A.08.510 6

RCW 36.16.030 6

RCW 36.16.060 3

RCW 36.16.060 8

RCW 36.16.070 . . . . . 7, 8

RCW 36.24.010 13

RCW 36.27.020 . . . . . 15, 16, 18, 19

RCW 36.27.020(2)-(4) 15

RCW 36.27.020(3) 17

RCW 36.27.030 . . . . . 5, 16

RCW 36.27.040 16

RCW 36.28.025 19

RCW 4.96.041 20

RCW 4.96.041(1) 20

RCW 42.12.010 11

RCW 42.12.010(4) 19

RCW 42.12.010(5) 19

RCW 42.23.020(2) 12

RCW 43.101.021 13

RCW 43.12.075 18

RCW 68.50.010 6

RCW 7.56.010 . . . . . 1, 4

RCW 7.56.010(1) 18

RCW 7.56.010(2) 19

RCW 7.56.020 . . . . . 1, 4, 18

RCW 7.56.040 20

RCW 7.56.100 1

RCW 7.56.130 19

RCW 70.58.170 . . . . . 6, 8

RCW 70.58.180 . . . . . 6, 8

RCW 82.45.197 6

RCW 9.92.120 . . . . . 1, 2, 8, 9, 11, 12, 15, 19

RCW 9A.04.060 15

RCW 9A.04.110(13) 14

Court Rules and Regulations

RAP 18.2 2

Other Authorities

17 Eugene McQuillin, *The Law of Municipal Corporations*
§ 50.15, at 680 (3rd ed. 2004) 18

3 Eugene McQuillin, *Law of Municipal Corporations*
§12.33 at 234 (3d ed. 2001) 7

I. INTRODUCTION

Public officials derive their powers from the consent of the governed. Const. art. I, § 1. The governed, acting through the legislature, determined that a public official, who violates the public trust through the commission of a felony or malfeasance in office, shall forever be barred from exercising political power in Washington. *See* RCW 9.92.120.

The prosecuting attorney has a duty to file a *quo warranto* action when someone is unlawfully exercising political power in Washington.[1] The very gravamen of such an action is an allegation that the individual is performing someone else's duties, rather than his or her official duties.[2] The remedy sought is ouster.[3]

In this case, the former Grant County coroner, Jerry Jasman, was forced from office after being convicted of a crime he committed while in office. Subsequently hired by a successor Grant County coroner, Jasman repeatedly exercised the political power entrusted by the governed to the current Grant County coroner.

When a *quo warranto* action was filed to preclude Jasman from exercising the political power granted to a coroner, Jasman sought to have the

---

[1]*See generally State ex rel. Brown v. Warnock*, 12 Wn.2d 478, 484, 122 P.2d 472 (1942); RCW 7.56.020.

[2]RCW 7.56.010.

[3]RCW 7.56.100.

governed fund his efforts to exercise the political power that he was stripped of by virtue of his conviction. Ultimately, the trial court rejected this use of public funds and enjoined Jasman from signing death certificates issued in Grant County. *See* CP 292. Jasman appeals from these decisions.

II. ISSUES BEFORE THE COURT[4]

1. Whether public policy, as embodied in RCW 9.92.120, disqualifies an individual who was convicted of malfeasance in office, from ever after performing the duties of a public officer?

2. Whether a county employee is entitled to representation at public expense in a *quo warranto* civil action to enjoin him from unlawfully exercising a public office?

3. Whether a county official, who voluntarily inserts himself into a lawsuit, is entitled to representation by the prosecuting attorney?

III. STATEMENT OF THE CASE

Jerry Jasman served as the Grant County Coroner for a number of years. *See* CP 141, ¶ 2. During that service, Jasman was charged with Unlawful Imprisonment in Grant County Superior Court Cause No. 09-1-00329-0. CP 64. The offense was committed while Jasman was driving the Grant County Coroner's Office's truck. CP 63.

---

[4]Prosecutor Lee filed a timely notice of cross-appeal. Prosecutor Lee withdraws this notice pursuant to RAP 18.2, as the issue is now moot as substitute counsel have represented Prosecutor Lee in both the superior court and this court.

Jasman eventually resolved this matter by pleading guilty to the crime of disorderly conduct. CP 141, ¶ 3. As part of the plea, Jasman acknowledged the conviction would result in a forfeiture of his ability to hold public office. CP 141, ¶ 4. The judgment and sentence that was entered in Grant County Superior Court Cause No. 09-1-00329-0, included a statement that "Defendant acknowledges the forfeiture of his right to hold public office, as provided in RCW 9.92.120." CP 68, at page 6. Consistent with this understanding, Jasman resigned as the Grant County Coroner. CP 141, ¶ 6.

Following Jasman's resignation as coroner, the public elected Craig Morrison as the Grant County Coroner. CP 155, at ¶ 1-2. Coroner Morrison assumed office on November 22, 2010. *Id.* Shortly after assuming office, Coroner Morrison hired Jasman as the Coroner Chief Investigator and/or Chief Deputy Coroner.[5] CP 155, at ¶ 3.

While employed as a coroner investigator, Jasman engaged in conduct that, by law, may only be performed by the coroner or the coroner's deputies.[6] Specifically, Jasman signed a number of death certificates that purported to determine the manner and mode by which the deceased came to his or her

---

[5]The duties of a coroner investigator differ from the duties of a deputy coroner. *Compare* CP 77 *with* CP 80. *See also* CP 105-06.

[6]No oath of office as a deputy coroner was on file with the Grant County Auditor's Office when these death certificates were signed. CP 40. Jasman's oath of office was apparently maintained by Coroner Morrison, contrary to RCW 36.16.060, which requires all oaths of deputies to be filed with the county auditor. *See* CP 142, at ¶ 11, CP 147, CP 156, at ¶ 4.

death. *See* CP 84-86.

The Grant County Prosecutor's Office advised Coroner Morrison that Jasman could not sign death certificates as his conviction prevented Jasman from serving as a deputy coroner. CP 41, 91. In light of this advice, Coroner Morrison filed an affidavit of correction with respect to one of the death certificates signed by Jasman. *See* CP 88. Jasman, however, continued to sign death certificates. *See* CP 91-94.[7]

Unable to obtain Jasman's voluntary compliance with the law, D. Angus Lee, the Grant County Prosecuting Attorney, filed a *quo warranto* action pursuant to RCW 7.56.010 and 7.56.020. CP 3. In this action, Prosecutor Lee sought entry of an order ousting, prohibiting and excluding Jasman from exercising the public office of Grant County Coroner or deputy coroner. CP 7. Prosecutor Lee also sought a permanent injunction enjoining Jasman from performing the duties of the Grant County Coroner or of a deputy coroner, including the completion and/or signing of death certificates. *Id.*

Jasman counterclaimed seeking declaratory judgment that a deputy coroner does not hold "public office". CP 115, at ¶¶ 14.1- 14.3. Jasman also requested that the court appoint a specific attorney, George Ahrend, as a

---

[7]Coroner Morrison disagreed with the legal opinion of the Grant County Prosecuting Attorney as to Jasman's ability to serve as a deputy coroner. Coroner Morrison solicited legal opinions from a variety of other sources. *See, e.g.*, CP 90, CP 156, at ¶¶ 10-13.

"special prosecutor" to defend Jasman in the *quo warranto* action. CP 115, at ¶ 15.1 C. Jasman also contended that Coroner Morrison was the real party in interest in the *quo warranto* action. *See* CP 113, ¶¶ 7.1 and 8.1.

Prior to filing his answer, Coroner Morrison e-mailed a letter to the Board of County Commissioners in which Coroner Morrison requested "funds to cover independent legal counsel to defend and indemnify my deputy and Chief Investigator Jerry Jasman to the extent that he was acting within the scope of his employment and in good faith, along with any other legal counsel needed by my office associated with this particular matter." CP 121. The Board of County Commissioners rejected the request for counsel after obtaining legal advice. CP 122 and CP 235-241, 246.

Coroner Morrison filed a motion to intervene in the *quo warranto* case. He also requested the appointment of Jasman's attorney as a special prosecutor pursuant to RCW 36.27.030. CP 196. Coroner Morrison made the request for a special prosecutor because he opposed the filing of the *quo warranto* action. CP 205, at ¶ 5. Morrison's motion to intervene was granted and he was aligned as a defendant in the matter. CP 290. His motion for appointment of counsel, however, was denied. CP 292.

Both Prosecutor Lee and Jasman/intervener Coroner Morrison filed motions for summary judgment. *See* CP 249 and 262. The trial court granted Prosecutor Lee's motion and denied Jasman/intervener Coroner Morrison's motion. CP 292. The trial court order prohibits and enjoins Jasman from

signing death certificates in Grant County. *Id.* No damages were awarded to Prosecutor Lee and Coroner Morrison retains the ability to employ Jasman. *Id.*

V. ARGUMENT

A. AN INDIVIDUAL WHO IS BARRED FROM OFFICE PURSUANT TO RCW 9.92.120 MAY NOT PERFORM THE DUTIES OF A COUNTY OFFICIAL.

A coroner is an elected officer, whose duties are established by the legislature. *See generally* Const. art. XI, § 5; RCW 36.16.030. Those duties are scattered throughout the Revised Code of Washington. *See, e.g.,* Chapter 36.24 RCW (county coroner); RCW 68.50.010 (coroner's jurisdiction over remains).

An important duty performed by the coroner is the completion of death certificates when the deceased died without medical attendance. *See* RCW 70.58.170 and 70.58.180. The death certificate serves important functions related to probate, suffrage, and taxes. *See, e.g.,* RCW 11.12.265 (court clerk will unseal a will upon presentation of a death certificate); RCW 29A.08.510 (voter's registration will be canceled based upon a death certificate); RCW 82.45.197(death certificate required to receive excise tax exemption). A death certificate that is signed by someone who is not authorized by law to complete the document is inadmissible in court. *See State v. Bradfield*, 29 Wn. App. 679, 685-86, 630 P.2d 494, *review denied*, 96 Wn.2d 1018 (1981).

If the duties of coroner are greater than can be performed by the person elected to fill it, the coroner may employ deputies with the consent of the board of county commissioners. RCW 36.16.070. A deputy coroner may perform any act which the elected coroner may perform, with the elected coroner responsible for the actions of the deputy. *Id.* "And being legally authorized to act for and in place of the principal, the deputy is a public officer." 3 Eugene McQuillin, *The Law of Municipal Corporations* §12.33 at 234 (3d ed. 2001).[8]

A deputy coroner is appointed for a definite term of office that coincides with the term of the officer granting the authority, subject to the officer's ability to shorten the term at will. *Spokane County v. State*, 136 Wn.2d 644, 655, 966 P.2d 305 (1998) ("Unless a deputy's appointment is revoked, the term of office for a deputy prosecutor ends when the term of the

---

[8]This Court recognized the difference between a deputy and an employee in *Smith v. Board of Walla Walla County Commissioners*, 48 Wn. App. 303, 309, 738 P.2d 1076 (1987):

> Black's Law Dictionary defines deputy as: "A substitute; a person duly authorized by an officer to exercise some or all of the functions pertaining to the office, in the place and stead of the latter". Black's Law Dictionary 529 (4th rev. ed. 1968). *Webster's Third New International Dictionary* 607 (1976) defines deputy as: "a person appointed, nominated, or elected as the substitute of another and empowered to act for him, in his name, or in his behalf ... a second in command or an assistant who usually takes charge when his superior is absent". *See* RCW 36.16.070 ("A deputy may perform any act which his principal is authorized to perform"). *See also Wilbur v. City Clerk of Los Angeles*, 143 Cal.App.2d 636, 300 P.2d 84, 89 (1956); *Commonwealth ex rel. Brothers v. McDowell*, 59 A.2d 169, 170, 359 Pa. 304 (1948).

elected prosecutor ends."); *State ex rel. Day v. King County*, 50 Wn.2d 427, 428 n. 1, 312 P.2d 637 (1957) ("[t]he term of a deputy sheriff expires with the term of the sheriff who appointed him"); RCW 36.16.070. A deputy coroner's oath is to be treated the same as the oath of the coroner. Both are to be filed with the county auditor. RCW 36.16.060.

In the instant matter, Jasman's December 15, 2009, conviction disqualified him from ever after holding any public office in Washington. *See* CP 68 and RCW 9.92.120. Jasman, however, ignored the ban and signed death certificates on April 21, 2011, June 24, 2011, February 15, 2012, and February 23, 2012. CP 84, 86, 92, 94. In response, the trial court granted the writ of *quo warranto* and barred Jasman from unlawfully holding the office of deputy coroner[9] and/or unlawfully exercising the office of coroner by signing death certificates. CP 292.

Jasman and intervener Coroner Morrison ask this Court to overturn the *quo warranto* order on a number of grounds. First, intervener Coroner Morrison complains that the order affects his ability to hire deputies and employees and to delegate tasks to them. *See* Brief of Appellants at 2 and 7. The important public policy grounds that support RCW 9.92.120 trump this

---

[9]Jasman signed at least one of these death certificates while serving as the "Chief Investigator", rather than as a deputy coroner. *See* CP 90 (Coroner Morrison stating in a letter that due to Jasman's conviction and forfeiture of the right to hold public office, he "employed Jerry as my Chief Investigator, an at-will employee, rather than deputizing him as an appointed official."). The statutes governing the completion of death certificates do not authorize a chief investigator to sign the document. *See* RCW 70.58.170 and 70.58.180.

concern.

RCW 9.92.120 was first enacted in 1909. *See* Laws of 1909, ch. 249, § 37. A companion statute, RCW 42.12.010, provided that an elective office shall be deemed vacant upon conviction or violation of oath, was enacted in 1866. Laws of 1866, p. 28, § 2. In discussing these two statutes, the Washington Supreme Court stated:

> Vacancy in, or removal from, office as a result of a conviction of a public officer is not a punishment. Removal from office is simply a consequence of a reasonable and sound public policy, and a condition imposed upon a public official in furtherance of the public interest in good government. "Officers are elected not for the benefit of the individuals, but for the benefit of the community ...." Public officials can and should be removed, irrespective of detriment to the individuals involved if the interests of the community so require. That is precisely the legislative policy and purpose of RCW 42.12.010, and the reason the statute was enacted and has been continued on the books. Thus, the statute is an expression of public policy by the legislature, clearly within the ambit of the constitutional prerogative of that branch of state government, pursuant to Art. 5, § 3, 3 of the state constitution. The public policy as expressed by the legislature has stood unaltered for ninety-five years -- in fact, since territorial days. Basically, the statute is a legislative statement of qualifications for holding public office. One such qualification is that a public official convicted of "any offense involving a violation of his official oath" shall not hold a position of public trust. This court should not lightly brush aside determinations as to public policy duly and officially made by the legislative branch of government. Certainly, in the instant case we should not alter and revise qualifications established by the legislature for public officers -- qualifications which are so well recognized and of such long standing.
>
> An examination of the cases reveals that this court has recognized the wisdom of the legislative policy expressed in

> RCW 42.12.010 and RCW 9.92.120, certain arguments as to the unconstitutionality to the contrary not withstanding.

State ex rel. Zempel v. Twitchell, 59 Wn.2d 419, 430-31, 367 P.2d 985 (1962).

Intervener Coroner Morrison's desire to set the parameters of his employee's duties and/or administrative convenience are insufficient to set aside the order enjoining Jasman from signing death certificates. It is correct that Coroner Morrison has the authority to hire employees - but only to a point. Coroner Morrison is still bound by the law and cannot authorize an employee to take an action, the employee is not qualified to legally take. Indeed, a lawyer may have an assistant who is very educated in the law, but that does not allow the lawyer to authorize her assistant to practice law. A judge may have a clerk who is wise and judicious, but that does not allow the judge to have the clerk preside over cases for him. *See State v. Walker*, 101 Wn. App. 1, 999 P.2d 1296, *review denied*, 142 Wn.2d 1013 (2000) (an arrest warrant issued by a court clerk without judicial involvement and in the absence of a statute or court rule that specifically authorizes the judge to delegate this authority to the clerk, is void).

Second, Jasman and intervener Coroner Morrison claim that the *quo warranto* order should be vacated because a deputy coroner is not an "officer". *See* Brief of Appellants, at 12. In making this argument, Jasman and intervener Coroner Morrison rely upon the case of *Nelson v. Troy*, 11 Wash. 435, 39 P. 974 (1895).

Nelson, however, dealt with a narrow interpretation of a state

constitutional provision and provides no guidance in the instant matter. In *Nelson*, a challenge was made to state legislation authorizing the employment of deputies to assist public officials, claiming that it violated Section 5, article 11 of the state constitution, which states that the legislature fixes the compensation of county officers. The *Nelson* decision was expressly limited to the interpretation of the issue at hand, *i.e.*, whether the legislation conflicted with the constitutional provision. *Nelson*, 11 Wash. at 441. The *Nelson* court specifically acknowledged that there may be other circumstances where the term "officer" would include a deputy:

> It seems to us that the determination of this question lies *within a very narrow compass*. The question is, what is meant by the term "officer," *as used in the section of the constitution under consideration*? . . . The view which the learned majority of the California court has taken of the subject in the case of *Dougherty v. Austin* seems to deny the existence of any distinction between the "officer" and the deputy, and the term "officer" seems to have been rendered so as to include deputies and all needful assistants. *Doubtless many instances might arise requiring such construction. . . .*

Nelson, 11 Wash. at 440-41 (emphasis added).

Here, the public policy that underlies RCW 9.92.120 requires the statute to be construed as including deputies. To allow Jasman to return to essentially the same position with the same duties, albeit unelected, greatly undermines the important public policies underlying RCW 9.92.120 and RCW 42.12.010. The trial court recognized this and correctly extended the statute to Jasman, in whichever role he was acting when signing death

certificates.[10] The Washington Supreme Court has also determined that the strong public policy that underlies RCW 9.92.120 requires the statute to be construed as including deputies.

In *Hubbard v. Spokane County*, 146 Wn.2d 699, 50 P.3d 602 (2002), the Court dealt with an employment issue of a planning director. In its opinion, the *Hubbard* court stressed the public policy regarding public officials contained in the Ethics in Public Service Act, RCW 42.23.070. The strong public policy for honesty and integrity of public officers extends to their deputies and to "'all persons exercising or undertaking to exercise any of the powers or functions of a municipal officer.'" *Hubbard*, 146 Wn.2d at 713 n. 21 (quoting RCW 42.23.020(2)[11]). In extending this public policy to the planning director, the Court focused on the important public role that the planning director occupies, based upon his authority to oversee and enforce building and zoning codes. *Id.* The Court noted that their holding places a significant burden on public officials, but determined that it was appropriate to hold public officials to such a high standard. *Hubbard*, 146 Wn.2d at 713.

---

[10]Intervener Coroner Morrison cannot circumvent RCW 9.92.120 by changing Jasman's job title from "chief investigator" to "deputy coroner", or from "deputy coroner" to "chief investigator." *See In re Cramer*, 168 Wn.2d 220, 225 P.3d 881 (2010) (attorney, who dissolved law business when faced with license revocation and reformed under a new name, was disbarred based upon illegal and dishonest circumvention of the law).

[11]RCW 42.23.020(2) provides:

> "Municipal officer" and "officer" shall each include all elected and appointed officers of a municipality, together with all deputies and assistants of such an officer, and all persons exercising or undertaking to exercise any of the powers or functions of a municipal officer;

A coroner's role is equally, if not more, important to the public than that of a planning director. The coroner is charged with vital and serious responsibilities of determining and certifying causes of death. The role of the coroner is extremely important to not only immediate family, but to the public at large. A homicide prosecution could be seriously undermined if the person making the cause of death determination had previously been determined as unfit for public office. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *see also* RCW 43.101.121.[12] There would be evidentiary issues with any and all death certificates signed by Jasman, as well as with the death investigations themselves. *Duncan v. United States*, 68 F.2d 136, 141-42 (9th Cir. 1933), *cert. denied*, 292 U.S. 646 (1934) ("It is essential therefore in order that the record introduced in evidence shall have any probative value that it shall be kept in compliance with and conformity to the law of the nation, state, or district in which it is kept.").

The extremely important public function of state vital statistics would also be in question. Such records are termed "vital" because they are a necessity in carrying out a large number of public functions, ranging from

---

[12]RCW 43.101.021 codifies an important public policy:

> It is the policy of the state of Washington that all commissioned, appointed, and elected law enforcement personnel comply with their oath of office and agency policies regarding the duty to be truthful and honest in the conduct of their official business.

This policy is relevant to coroners because RCW 36.24.010 specifies that the coroner may act as sheriff under certain circumstances.

public health to valid elections. As the Colorado Supreme Court put it in an early case:

> The matters dealt with in the act of 1907 [regarding the registrar of vital statistics], *supra*, are not of local concern only; they are of general public importance. The records required to be kept are such as will be useful in the administration of the laws concerning public health, elections, wills, descent of property, marriage, guardian and ward, adoption, apprentices, crimes, juvenile delinquency, child labor, motor vehicles, and other laws. Certified copies of the records are made prima facie evidence of facts, the proof of which may be absolutely essential to the just administration of those laws.

People ex rel. Hershey v. McNichols, 91 Colo. 141, 146, 13 P.2d 266, 268 (1932).

Finally, the fact that the *Nelson* Court's restrictive definition of "officer" does not apply in this circumstance is established by the definition of "public officer" that was adopted contemporaneously with RCW 9.92.120:

> 24. The words "officer" and "public officer" shall include all assistants, deputies, clerks and employees of any public officer and all persons exercising or assuming to exercise any of the powers or functions of a public officer.

Laws of 1909, ch. 249, § 51.[13] This statutory definition of "officer" and

---

[13]When the legislature replaced the former criminal code in 1975, it expanded upon this definition of public officer:

> (13) "Officer" and "public officer" means a person holding office under a city, county, or state government, or the federal government who performs a public function and in so doing is vested with the exercise of some sovereign power of government, and includes all assistants, deputies, clerks, and employees of any public officer and all persons lawfully exercising or assuming to exercise any of the powers or functions of a public officer;

Laws of 1975, 1st Ex. Sess., ch. 260, § 9A.04.110(13), currently codified at RCW 9A.04.110(13).

"public officer" prevails over the common law definition contained in *Nelson* when dealing with crime or punishment. *See State v. Korba*, 66 Wn. App. 666, 670, 832 P.2d 1346 (1992). *Accord* RCW 9A.04.060.[14]

Based upon the applicable definition, the trial court did not err in ruling that Jasman was attempting to serve as a "public officer", despite his lifetime ban pursuant to RCW 9.92.120, when he signed death certificates. The governed's constitutional right to decide who can exercise political power requires that the order granting Prosecutor Lee's motion for summary judgment be affirmed.

B. A SPECIAL PROSECUTOR CANNOT BE APPOINTED TO REPRESENT EITHER JASMAN OR INTERVENER CORONER MORRISON AS PROSECUTOR LEE HAD NO DUTY TO REPRESENT EITHER OF THEM IN THIS ACTION

A prosecuting attorney is an elected officer, whose duties are established by the legislature. *See generally* Const. art. XI, §§ 4, 5. In RCW 36.27.020, the duties of the prosecuting attorney are set forth. Those duties include (1) providing legal advice to all county officers; (2) "appear[ing] for and represent[ing] the . . .*county* . . . in all . . .civil proceedings in which the . . . county . . . may be a party"; and (3) "defend[ing] all suits brought against the state or the *county*." RCW 36.27.020(2)-(4) (emphasis added).

---

[14]RCW 9A.04.060 states that:

> The provisions of the common law relating to the commission of crime and the punishment thereof, insofar as not inconsistent with the Constitution and statutes of this state, shall supplement all penal statutes of this state and all persons offending against the same shall be tried in the courts of this state having jurisdiction of the offense.

A prosecuting attorney may personally perform all of the duties contained in RCW 36.27.020, or may appoint one or more deputies to exercise the prosecuting attorney's authority. RCW 36.27.040. So long as the prosecuting attorney or one of his or her deputies or special deputies is available to perform the duties specified in RCW 36.27.020,[15] a court may not appoint some other person to perform the prosecutor's duties. *See generally State v. Heaton*, 21 Wash. 59, 61-62, 56 P. 843 (1899) (the court may only appoint a special prosecutor as authorized by statute).

RCW 36.27.030 identifies the conditions that must exist before a court may appoint a special prosecuting attorney:

> When from illness or other cause[16] the prosecuting attorney is temporarily unable to perform his or her duties, the court or judge may appoint some qualified person to discharge the duties of such officer in court until the disability is removed.

Here, Jasman and intervener Coroner Morrison sought the appointment of a special prosecutor. Both requests, however, were properly

---

[15]When another statute creates a mandatory duty in the prosecuting attorney, the failure of the prosecutor to act *can* create grounds for appointing a special prosecuting attorney. *See generally Nichols v. Snohomish County*, 109 Wn.2d 613, 619-20, 746 P.2d 1208 (1987) (attorney fees awarded pursuant to a statute, RCW 73.16.033, that required the prosecuting attorney of the county in which the employer is located to bring an action for compliance).

[16]Case law generally equates "other cause" to a conflict of interest. *See Westerman v. Carey*, 125 Wn.2d 277, 892 P.2d 1067 (1994) (prosecutor disagreed with his client's position in a case in which the client was sued); *State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988) (defendant was prosecutor's former client); *State v. Tolias*, 84 Wn. App. 696, 929 P.2d 1178 (1997), *rev'd on other grounds*, 135 Wn.2d 133, 954 P.2d 907 (1998) (prosecutor had mediated dispute that gave rise to criminal charges). A disagreement between a prosecuting attorney and a county officer over the interpretation of a statute does not establish a conflict of interest that allows the county officer to obtain a special prosecutor at public expense. *See Hoppe v. King County*, 95 Wn.2d 340, 622 P.2d 845 (1980).

denied as a

> court can appoint a special prosecutor to represent a party only when two conditions are met. First, the prosecutor must have the authority and the duty to represent that party in the given matter. Second, some disability must prevent the prosecutor from fulfilling the duty. If the prosecutor has no duty or authority to represent a party, the trial court cannot appoint special counsel.

Osborn v. Grant County, 130 Wn.2d 615, 624-25, 926 P.2d 911 (1996).

Jasman and Coroner Morrison concede in their brief that no statute explicitly requires the prosecutor to defend a county officer in a *quo warranto* action. *See* Brief of Appellant at 31. Jasman and intervener Coroner Morrison's concession that no statute expressly requires a prosecuting attorney to represent them in this action is well supported by the case law.

A prosecuting attorney is not required to appear for or represent a county officer in a legal action. *See Hoppe v. King County*, 95 Wn.2d 332, 340, 622 P.2d 845 (1980) (prosecuting attorney not required to bring a civil legal action at the request of a county officer); *Fisher v. Clem*, 25 Wn. App. 303, 307, 607 P.2d 326 (1980) (same); *Bates v. School Dist.*, 45 Wash. 498, 502-03, 88 P. 944 (1907) (the requirement to provide legal advice contained in the predecessor statute to RCW 36.27.020(3)[17] does not include a

---

[17]Bal. Code, § 468 (P.C. § 4190) provided that:

> "The prosecuting attorney in each county is hereby required to give legal advice, when required, to all county and precinct officers, and directors and superintendents of common schools, in all matters relating to their official business, and when so required, he shall draw up, in writing, all contracts, obligations, and like instruments of an official nature, for the use of said officers."

Bates, 45 Wash. at 502.

requirement to defend a civil action brought in response to actions taken upon the given advice).[18]

A prosecuting attorney, however, does have a statutory duty to bring a *quo warranto* action when an individual unlawfully exercises any public office.[19] *See State ex rel. Brown v. Warnock*, 12 Wn.2d 478, 122 P.2d 472 (1942); RCW 7.56.020. In many cases, such an action will be brought against a sitting county officer,[20] who has either been convicted of a crime or

---

[18]The legislature has the ability to write a statute that requires a government attorney to represent a government official in a lawsuit, regardless of the government attorney's legal judgment. *See Goldmark v. McKenna*, 172 Wn.2d 568, 259 P.3d 1095 (2011) (RCW 43.12.075 expressly requires the state attorney general to represent the commissioner of public lands in an appeal);RCW 43.12.075 (" It shall be the duty of the attorney general, to institute, or defend, any action or proceeding to which the state, or the commissioner or the board, is or may be a party, or in which the interests of the state are involved, in any court of this state, or any other state, or of the United States, or in any department of the United States, or before any board or tribunal, when requested so to do by the commissioner, or the board, or upon the attorney general's own initiative."). The mandatory language found in RCW 43.12.075 does not appear in RCW 36.27.020.

[19]No other official can file a *quo warranto* action. *See City of Seattle v. McKenna*, 172 Wn.2d 551, 557-58, 259 P.3d 1087 (2011)(citing *State ex rel. Attorney General v. Seattle Gas & Electric*, 28 Wash. 488, 68 P. 946 (1902); *State ex rel. Hamilton v. Whatcom County Superior Court*, 3 Wn.2d 633, 101 P.2d 588 (1940)).

[20]A *quo warranto* action is against a specific person, rather than the office or officer. *See* RCW 7.56.010(1) ("when the person shall usurp, intrude upon, or unlawfully hold or exercise any public office"); 17 Eugene McQuillin, *The Law of Municipal Corporations* § 50.15, at 680 (3rd ed. 2004) ("The subject matter of the controversy is the right to the office for the term in controversy and the proceeding personal to the parties claiming the office. Therefore, the writ is never directed to the officer as such, but always to the person to determine whether he or she has the legal right to perform the duties and exercise the functions of the office."). A prosecuting attorney's representation of a public official or office does not create a barrier to the prosecuting attorney bringing an action against the person. *See State v. Greco*, 57 Wn. App. 196, 200-01, 787 P.2d 940, *review denied*, 114 Wn.2d 1027 (1990) (prosecutor, who advised the county auditor and the auditor's office, did not have a conflict of interest such that the prosecutor could not bring criminal charges against the county auditor).

has failed to satisfy the conditions to remain in office. *See, e.g.,* RCW 7.56.010(2); RCW 42.12.010(5) and RCW 9.92.120 (conviction works forfeiture of office); RCW 36.28.025 (sheriff must obtain a certificate of completion of a basic law enforcement training program within twelve months of assuming office); RCW 42.12.010(4) (ceasing to be a legally registered voter of the jurisdiction). The legislature clearly did not want the defense in the ouster action to be bourne by the public in these circumstances, as evidenced by the absence of an explicit "duty to defend county officer" requirement in RCW 36.27.020 and by RCW 7.56.130 's[21] prohibition upon an award of costs when the prosecuting attorney files the *quo warranto* action.

Prosecutor Lee did have a duty to advise Coroner Morrison about Jasman's ability to sign death certificates. The record is clear that Prosecutor Lee discharged this responsibility *prior* to filing the *quo warranto* action. *See* CP 41, 91. The fact that Coroner Morrison disagreed with Prosecutor Lee's analysis does not create a basis for appointing a special prosecuting attorney so Coroner Morrison can assert his particular view of the law. *Hoppe*, 95 Wn.2d at 340. Coroner Morrison was free to second guess Prosecutor Lee's judgment, but not at taxpayers' expense. *Id.* Intervener Coroner Morrison's

---

[21]RCW 7.56.130 provides that:

> When an information is filed by the prosecuting attorney, he or she shall not be liable for the costs, but when it is filed upon the relation of a private person such person shall be liable for costs unless the same are adjudged against the defendant.

motion for appointment of a special prosecuting attorney was properly denied.

As for Jasman, the prosecuting attorney has no statutory duty to provide legal advice to a county official's employee. Such employees may receive representation pursuant to RCW 4.96.041[22] when money damages[23] are being sought for tort claims arising from the performance of their official duties. Jasman does not fall within the ambit of RCW 4.96.041 as the *quo warranto* action was not an action for money damages[24] and the gravamen of the action was that Jasman was acting in excess of his official duties. *See Colby v. Yakima County*, 133 Wn. App. 386, 136 P.3d 131 (2006) (both an action to defend the right to hold office and an action to defend a charge of official misconduct fall outside the scope of RCW 4.96.041). Jasman's

---

[22]RCW 4.96.041(1) provides that

> (1) Whenever an action or proceeding for damages is brought against any past or present officer, employee, or volunteer of a local governmental entity of this state, arising from acts or omissions while performing or in good faith purporting to perform his or her official duties, such officer, employee, or volunteer may request the local governmental entity to authorize the defense of the action or proceeding at the expense of the local governmental entity.

[23]An action for damages is one seeking monetary relief. *See, e.g., Huff v. Roach*, 125 Wn. App. 724, 729, 106 P.3d 268, *review denied*, 155 Wn.2d 1023 (2005) ("'Damages' are the monetary value of the injury or damage proximately caused by the breach of an alleged duty.").

[24]Damages may only be awarded in a *quo warranto* action when the action is filed by someone other than the prosecuting attorney. *See* RCW 7.56.040 ("and when filed by any other person he or she shall show his or her interest in the matter, and he or she may claim the damages he or she has sustained.").

motion for appointment of counsel was, therefore, properly denied.

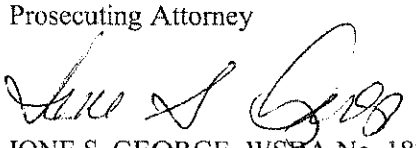
VI. CONCLUSION

Prosecutor Lee respectfully requests that this court affirm the trial court's order prohibiting Jasman from signing death certificates in Grant County. Prosecutor Lee further request that this court affirm the order denying Jasman and intervener Coroner Morrison's request for the appointment of a special prosecutor to represent them in this matter.

DATED this 10th day of July, 2013.

Respectfully submitted,

D. ANGUS LEE
Prosecuting Attorney



IONE S. GEORGE, WSBA No. 18236
Special Deputy Prosecuting Attorney

PAMELA B. LOGINSKY, WSBA NO. 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 10th day of July, 2013, 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:

George M. Ahrend
Ahrend Albrecht PLLC
16 Basin St. SW
Ephrata, WA 98823

On the 10th day of July, 2013, I e-mailed a copy of the document to which this proof of service is attached to

George M. Ahrend at gahrend@trialappeallaw.com

Ione S. George at Igeorge@co.kitsap.wa.us

D. Angus Lee at dlee@co.grant.wa.us

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

Signed this 10th day of July, 2013, at Olympia, Washington.

PAMELA B. LOGINSKY
WSBA NO. 18096