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Nos. 50285-2-II and 50877-0-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

In re the Petition to Convene a Grand Jury,

Barnes Michael Ware,
Petitioner

and

In re the Application for a Citizen Complaint,

Erika Johnson,
Petitioner.

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

STATE'S RESPONSE TO BRIEF OF *AMICUS CURIAE*
ANIMAL DEFENSE FUND

JONATHAN L. MEYER
Prosecuting Attorney

PAMELA B. LOGINSKY
WSBA NO. 18096
Lewis County Special Deputy Prosecuting Attorney
206 10th Avenue SE
Olympia, WA 98501
Phone: (360) 753-2175
E-Mail: pamloginsky@waprosecutors.org
Office Appellate E-mail address:
appeals@lewiscountywa.gov

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ISSUES ADDRESSED IN RESPONSE 1

III. ARGUMENT 2

 A. It Is Improper to Initiate a Criminal Prosecution in Order to
 Influence Voters 2

 B. Separation of Powers Requires that Courts Not Interfere
 with the Executive Branch’s Charging Decision 4

IV. CONCLUSION 6

TABLE OF AUTHORITIES

Cases

State v. Rice, 174 Wn.2d 884, 279 P.3d 849 (2012) 2

State v. Sonneland, 80 Wn.2d 343, 494 P.2d 469 (1972) 5, 6

United States v. Hastings, 126 F.3d 310
(4th Cir. 1997) 3

Young v. United States ex rel. Vuitton Et Fils S. A.,
481 U.S. 787, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987) 4

Constitutions

Washington Constitution article IV, section 27 1

Washington Constitution article XI, section 5 1

Statutes

Former RCW 10.46.090 5

Court Rules and Regulations

CrRLJ 8.3(a)	5
APR 8	4
CrR 2.1(d)	5
CrR 2.4(f)	5
CrR 8.3(a)	5
CrRLJ 2.1(c)	1, 2
CrRLJ 8.3(a)	5

Other Authorities

ABA Standards for Criminal Justice 3-1.6(a) (4th ed. 2015)	4
ABA Standards for Criminal Justice 3-4.4(b)(i) (4th ed. 2015)	4
Bennett L. Gershman, <i>A Moral Standard for the Prosecutor's Exercise of the Charging Discretion</i> , 20 FORDHAM URB. L.J. 513 (1993)	4
National District Attorneys Association, <i>National Prosecution Standards</i> , Std. 4-1.4 (3d ed. 2009)	4

I. INTRODUCTION

Amicus curiae, Animal Legal Defense Fund (ALDF), offers numerous policy arguments in support of citizen complaints and/or citizen petitions to convene grand juries in animal cruelty matters. ALDF claims that the citizen complaint court rule, “CrRLJ 2.1(c) is a constitutionally-complaint mechanism that leaves untouched the ultimate discretionary authority of prosecuting attorneys, and supports the system of checks, balances, and democratic accountability upon which Washington’s justice system is founded.”¹ Their claim would be more convincing if the ALDF brief mentioned article IV, section 27 and article XI, section 5 of the Washington State Constitution and made any attempt to refute the State’s analysis establishing that CrRLJ 2.1(c) violates both these provisions.

The following is a brief response to selected points in ALDF’s *amicus* brief. Points not addressed in this response are not conceded; rather they are not addressed because the State believes them to be adequately addressed in the Brief of Respondent.

II. ISSUES ADDRESSED IN RESPONSE

1. Should courts sanction a practice that violates the Washington constitution solely because it provides a prosecutor’s political opponents with ammunition?

¹Brief of *Amicus Curiae* Animal Legal Defense Fund in Support of Petitioners (hereinafter “*Amicus* Brief”), at 2.

2. Is separation of powers violated when a court has discretion to deny a motion to dismiss or amend criminal charges initiated by the court at the request of a private citizen?

III. ARGUMENT

A. It Is Improper to Initiate a Criminal Prosecution in Order to Influence Voters.

ALDF's brief sweeps away all separation of power concerns by contending that a citizen initiated criminal prosecution "does not result in compulsion to prosecute,"² because "the ability of prosecutors to decisively halt the progress of criminal cases"³ is preserved. In ALDF's framework, "Prosecuting attorney powers remain undisturbed by citizen-initiated complaints; the prosecuting attorney retains full and unilateral authority to forgo or maintain prosecution."⁴ If, as ALDF contends, the prosecuting attorney has unlimited authority to dismiss charges initiated by citizen complaint, the citizen's actions are futile.

The process envisioned by ALDF is largely meaningless. Under ALDF's framework a citizen, who is disappointed with the prosecuting attorney's charging decision, may file a CrRLJ 2.1(c) motion for citizen

²*Id.*, at 10.

³*Id.*, at 11.

⁴*Id.*, at 12. Omitted footnote, citing to *State v. Rice*, 174 Wn.2d 884, 902, 279 P.3d 849 (2012), explains, in part, that "The determinative factor is not, therefore, the formal initiation of a criminal complaint, but rather the functional ability of prosecuting attorneys to control – or end – prosecution."

complaint. If the district court judge denies the request, the citizen may seek review in the superior court, with possible future review in the court of appeals or the supreme court. The final result is either (1) the courts refuse to file charges, or (2) the courts file charges, and the prosecuting attorney, who refused to file the charges in the first place, and opposed their filing thereafter, dismisses the charges.

ALDF claims that this lengthy, costly and unproductive procedure is beneficial as it provides voters with useful data.⁵ ALDF urges this court to approve a constitutionally infirm process, not to ensure that legal rights are enforced, but to provide ammunition to a prosecuting attorney's political opponents. ALDF contends that this théâtre de l'absurde "shores up the accountability of prosecuting attorneys to their communities," and "is a mechanism that serves to make notions of democratic accountability and limited state power vis-à-vis prosecution meaningful."⁶

Partisan prosecutions are reprehensible.⁷ Public prosecutors consider charges with an eye toward whether "the ends of justice would be served by criminal prosecution, and [public prosecutors strive to ensure] that neither personal, political, discriminatory, nor retaliatory motives have influenced the

⁵*Amicus* Brief, at 17.

⁶*Id.*, at 18.

⁷Prosecutors have long been barred from bringing prosecutions motivated by disagreement with a defendant's political activity. *See, e.g., United States v. Hastings*, 126 F.3d 310, 313 (4th Cir. 1997) (defendant's political activity cannot be motivation for criminal prosecution).

charging decision.”⁸ Hauling a person into criminal court, even when charges are dismissed shortly after arraignment, disrupts that person’s life.⁹ If ALDF is unhappy with a prosecutor’s actions in the handling of a particular case, it is free to publicize its dissatisfaction and to seek election of an official whose judgment it approves. ALDF, however, is not free to enlist the courts as agents in its political campaign.

B. Separation of Powers Requires that Courts Not Interfere with the Executive Branch’s Charging Decision.

ALDF claims that citizen initiation of charges does not violate the separation of powers doctrine because “it remains prosecutors who ultimately determine whether to proceed with initiated charges.”¹⁰ Washington law, however, prohibits a prosecutor from unilaterally dismissing charges or reducing charges.¹¹

⁸Bennett L. Gershman, *A Moral Standard for the Prosecutor’s Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 514 n. 6 (1993). Accord National District Attorneys Association, *National Prosecution Standards*, Std. 4-1.4, at 51 (3d ed. 2009) (“Factors that should not be considered in the screening decision includes .. Political advantages or disadvantages that a prosecution might bring to the prosecutor”); ABA Standards for Criminal Justice 3-1.6(a) (4th ed. 2015) (“A prosecutor should not use other improper considerations, such as partisan or political or personal considerations, in exercising prosecutorial discretion”); ABA Standards for Criminal Justice 3-4.4(b)(i) (4th ed. 2015) (“In exercising discretion to file and maintain charges, the prosecutor should not consider (I) partisan or other improper political or personal considerations”).

⁹*Young v. United States ex rel. Vuitton Et Fils S. A.*, 481 U.S. 787, 814, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987) (“Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life.”).

¹⁰*Amicus* Brief, at 11.

¹¹ALDF’s brief was authored by two Oregon lawyers in addition to two Washington lawyers. It does not appear that either Oregon lawyer obtained admission pursuant to APR 8 prior to submitting the brief to this court. The involvement of unadmitted foreign attorneys

Prosecutors in Washington do not have unfettered authority to dismiss a criminal case after charges have been filed. *See* CrR 8.3(a) (“The court may, in its discretion, upon written motion of the prosecuting attorney setting forth the reasons therefor, dismiss an indictment, information or complaint.”); CrRLJ 8.3(a) (same). As the rules, which are a recodification of former RCW 10.46.090,¹² clearly state, the trial court alone is authorized to dismiss criminal charges. CrR 8.3(a) and CrRLJ 8.3(a) “completely abrogate[] the prosecuting attorney’s common-law discretion to dismiss a criminal prosecution.” *State v. Sonneland*, 80 Wn.2d 343, 346, 494 P.2d 469 (1972).

Prosecutors in Washington also do not have unfettered authority to amend charges after the charges have been filed. *See* CrR 2.1(d) (“The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.”); CrR 2.4(f) (“The court may permit a complaint, a citation and notice, or a bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.”). Agreements to reduce charges in exchange for a guilty plea or to dismiss certain counts in exchange for a guilty plea to other counts are not purely

may explain the legal error.

¹²Former RCW 10.46.090 provided that “No prosecuting attorney shall hereafter discontinue or abandon a prosecution except as provided in this section.”

matters of prosecutorial discretion. *State v. Sonneland, supra.*

The separation of power objections to citizen or court initiated criminal charges are exacerbated by the prosecution's inability to unilaterally dismiss the charges once filed. These heightened separation of powers concerns, in addition to the unlawful transfer of a core prosecution function to a citizen or the court, mandates the affirmance of the Lewis County Superior Court's orders denying the RALJ appeal and the summoning of a grand jury.

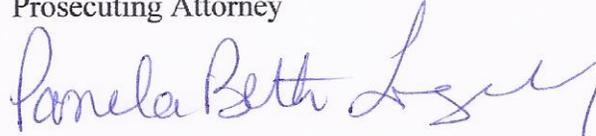
IV. CONCLUSION

It is apparent that ALDF believes that the current prohibitions upon citizen initiated criminal charges, private prosecutions and/or private prosecutors are harmful. ALDF's remedy, however, is not to ignore the Washington Constitution, its remedy is to amend the constitution.

ALDF may also educate the voters of Lewis County as to any deficiencies they perceive in the prosecutor's office. Affirming the RALJ decision affirming the denial of the citizen complaint petition and the order denying the motion to convene a grand jury does not interfere with ALDF's voter outreach efforts.

Respectfully submitted this 19 th day of December, 2017.

JONATHAN L. MEYER
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 19th day of December, 2017, pursuant to the agreement of the parties, I e-mailed a copy of the document to which this proof of service is attached to

Adam Karp at adam@animal-lawyer.com

Rob Roy Smith at rsmith@kilpatricktownsend.com

Rachel B. Saimons at rasimons@kilpatricktownsend.com

David Rosengard at drosengard@aldf.org

Kathleen Wood at kmwood@aldf.org

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

Signed this 19th day of December, 2017, at Port Orchard, Washington.



PAMELA B. LOGINSKY, WSBA NO. 18096
Special Deputy Prosecuting Attorney

WASHINGTON ASSOC OF PROSECUTING ATTY

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- rrsmith@kilpatricktownsend.com
- rsaimons@kilpatricktownsend.com
- sara.beigh@lewiscountywa.gov
- teri.bryant@lewiscountywa.gov

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Address:

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