

FILED
Court of Appeals
Division II
State of Washington
12/19/2017 8:00 AM

Washington State Court of Appeals
Division II

Docket No. 50285-2-II

Consolidating

Lewis Cy. Sup. Ct. Cause No. 16-1-00773-7 (Ware)

**IN RE THE PETITION TO CONVENE A GRAND JURY,
BARNES MICHAEL WARE,**

Petitioner-Appellant.

with

Lewis Cy. Sup. Ct. Cause No. 17-2-00013-21 (Johnson)

**IN RE THE APPLICATION FOR A CITIZEN COMPLAINT,
ERIKA JOHNSON, PETITIONER**

Petitioner-Appellant.

APPELLANTS' REPLY BRIEF

ANIMAL LAW OFFICES OF
ADAM P. KARP, JD, MS
Attorney for Petitioners-Appellants
114 W. Magnolia St., Ste. 400-104
Bellingham, WA 98225
(888) 430-0001
WSBA No. 28622

TABLE OF CONTENTS

I.	WAIVER.....	1
II.	COUNTERSTATEMENT OF FACTS	1
III.	ARGUMENT	9
	A. Standing	1
	B. <i>State v. Yakey</i>	7
	C. Constitutional Challenge to CrRLJ 2.1(c).....	9
	D. Constitutional Challenge to RCW 10.27.030.....	15

TABLE OF AUTHORITIES

CASES

<i>Branson v. Port of Seattle</i> , 152 Wn.2d 862 (2004).....	5
<i>City of Tacoma v. O’Brien</i> , 85 Wn.2d 266 (1975)	5
<i>Farris v. Munro</i> , 99 Wn.2d 326 (1983)	3
<i>Hovoet v. State</i> , 689 N.E.2d 469 (Ind.App.1997).....	16
<i>In re Grand Jury Appearance Request by Loigman</i> , 870 A.2d 249 (2005).....	16
<i>In re Murchison</i> , 349 U.S. 133 (1955).....	14
<i>Inmates of Attica Correctional Facility v. Rockefeller</i> , 477 F.2d 375 (2 nd Cir.1973)	14
<i>Kightlinger v. PUD No. 1</i> , 119 Wash.App. 501 (20030).....	5
<i>Ladenburg v. Campbell</i> , 56 Wash.App. 701 (1990).....	12
<i>Lybarger v. State</i> , 2 Wash. 552 (1891)	18
<i>People v. Benoit</i> , 152 Misc.2d 115 (1991).....	12
<i>People v. Herrick</i> , 550 N.W.2d 541 (Mich.App.1996).....	14
<i>People v. Municipal Court for Ventura Jud. Dist.</i> , 103 Cal.Rptr. 645 (1972).....	10, 11, 12
<i>People v. Smith</i> , 53 Cal.App.3d 655 (1975)	14
<i>Protect the Peninsula’s Future v. City of Port Angeles</i> , 175 Wash.App. 201 (2013)	10
<i>Robinson v. City of Seattle</i> , 102 Wash.App. 795 (2000)	5
<i>State ex rel. Boyles v. Whatcom Cy. Sup. Ct.</i> , 103 Wn2d 610 (1985)	5
<i>State ex rel. Murphy v. Taylor</i> , 101 Wash. 148 (1918).....	11
<i>State ex rel. Schultz v. Harper</i> , 573 S.W.2d 427 (Mo.App.1978)	15
<i>State v. Haddock</i> , 141 Wn.2d 103 (2000).....	4
<i>State v. Howard</i> , 106 Wn.2d 39 (1985)	12
<i>State v. Iowa District Court for Johnson Cy.</i> , 568 N.W.2d 505 (1997)	15

<i>State v. Klinker</i> , 85 Wn.2d 509 (1975)	9
<i>State v. Korum</i> , 157 Wn.2d 614 (2006)	13
<i>State v. Tracer</i> , 155 Wash.App. 171 (2010)	13
<i>State v. Walsh</i> , 143 Wn.2d 1 (2001)	13
<i>State v. Watson</i> , 155 Wn.2d 574 (2005)	3
<i>State v. Yakey</i> , 43 Wash. 15 (1906)	7, 8, 9, 11
<i>U.S. v. Williams</i> , 504 U.S. 36 (1992)	15
<i>Walker v. Munro</i> , 124 Wn.2d 402 (1994)	5
<i>Wash. Pub. Trust Advocates ex rel. City of Spokane v. City of Spokane</i> , 117 Wash.App. 178 (2003)	5

STATUTES/RULES

Code of 1881 § 984	17
RCW 10.27.030	3, 16, 17
Wash.Const. Art. IV, § 27	11
RALJ 2.1	6
CrRLJ 2.1	13
RAP 3.1	6
RCW 10.28.070	17
RCW 10.28.140	18
Wash.Const. Art. I, § 25	18, 19

TREATISES

Edward Hartnett, <i>The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine is Looking for Answers in all the Wrong Places</i> , 97 Mich.L.Rev. 2239 (1999).....	5
Philip A. Talmadge, <i>Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems</i> , 22 Seattle U.L.Rev. 695 (1999).....	4
Varu Chilakamarri, <i>Taxpayer Standing: A Step Toward Animal-Centric Litigation</i> , 10 Animal L. 251 (2004).....	5

I. WAIVER

Respondent has waived its *Counter-Statement of the Issues* Nos. 1 and 2, pertaining to standing, due to failure to ever file a *Notice of Cross-Appeal* to those parts of the challenged orders expressly or tacitly overruling that exception.

II. COUNTERSTATEMENT OF FACTS

Respondent asserts, without evidentiary support, that Ms. Miller’s “only contact” with Jay was to drop him when her daughter “tried to transfer the injured animal to her mother for help.” *RB*, at 2. The record evidence implies no such rehabilitative bent but, rather, a reckless desire to aid and abet her daughter’s theft. Further, Erika Johnson is a *current* animal control officer. *CP* 2, 9.

The CrRLJ 2.1(c) and RCW 10.27.030 proceedings require no summons under CRLJ 4 or CR 4 (as this action commences under the rules of *criminal* procedure), but are issued *ex parte*. Neither CrRLJ 2.1(c) nor RCW 10.27.030 requires that the petition be served on the accused.¹ Further, contrary to Respondent’s assertion, Ms. Miller and E.M. did appear at the December 27, 2016 hearing before Lewis Cy. Dist. Ct. Judge R.W. Buzzard. Indeed, prosecutor Meagher spoke to them before the hearing.²

III. ARGUMENT

A. Standing.

¹ CrRLJ 2.1(c) gives the court the power to grant leave of the county prosecuting attorney or deputy, potential defendant or attorney of record, law enforcement, or other potential witnesses to testify. The *Affidavit of Complaining Witness* also anticipates that the complainant not have even consulted the prosecuting authority before filing.

² Mr. Karp witnessed this and does not anticipate the fact to be disputed.

If neither Johnson nor Ware had standing, as Respondent asserts, then neither Judge Toynee's order deeming CrRLJ 2.1(c) unconstitutional on its face, nor the Lewis County Superior Court's order declaring RCW 10.27.030 unconstitutional as applied to private petitioners have any precedential effect and offer but an advisory opinion. Yet, Respondent has nonetheless urged that the matter be considered on the merits, so further analysis of this legal question appears moot. The argument that a private citizen complainant may not seek appellate review of a judicial declination of her petition is also mooted by this court's ruling of August 1, 2017, wherein Commissioner Schmidt held, in part:

The order appealed from in cause number 52085-0-II, "Order Denying Petition to Summon a Grand Jury," is a final order that is appealable as a matter of right. And while the order appealed from in cause number 50877-0-II would normally be reviewed on a motion for discretionary review from a RALJ appeal, under RAP 2.3(d), because the case has been consolidated with one with an order appealable as a matter of right, it will be considered as an appeal as a matter of right. The Clerk will issue a perfection schedule for an appeal as a matter of right

If Respondent believed that Johnson could not seek any appellate review, it had twenty days to file a motion for reconsideration (RAP 12.4) or thirty days to file a motion to modify (RAP 17.7). It did neither and, thus, waived the foregoing argument that this court lacks jurisdiction to hear either of the consolidated matters, on any ground.

But even if this court *sua sponte* determines that neither Johnson nor Ware have a right to appellate review of an adverse judicial determination on their respective petitions, the fact that the superior court judges have gone a step

beyond merely declining same by also declaring that CrRLJ 2.1(c) and RCW 10.27.030 are unconstitutional, confers necessary jurisdiction to adjudicate the soundness of those orders, one of which affects the entire State (i.e., declaring CrRLJ 2.1(c) unconstitutional on its face), and the other which impairs all actions brought in Lewis County (i.e., declaring RCW 10.27.030 unconstitutional as applied to private petitioners). *State v. Watson*, 155 Wn.2d 574, 577-79 (2005) (holding that court may disregard RAPs, and particularly RAP 3.1, if interests of justice require and where “even traditional standing to bring a lawsuit is not an absolute bar to a court’s review where an important issue is at stake”) and *Farris v. Munro*, 99 Wn.2d 326, 330 (1983) (accord) allow this Court to hear matters of public importance on the merits even where standing proves shaky.

Notwithstanding the foregoing, a few comments are warranted. A highly esteemed law enforcement officer, Ware stepped in when Centralia Police Department (“CPD”) failed Jay. In accordance with his training, he collected, secured, and marked Jay’s body, delivered custody to Joint Animal Services Animal Control Officer Erika Johnson, who then solicited the expertise of Dr. Victoria Smith to perform a necropsy. He did what CPD and LCPAO should have done. Much like CrRLJ 2.1(c), which does not require any contact with the public prosecutor as an administrative exhaustion requirement, RCW 10.27.030 was enacted to ferret out prosecutorial inertia, ignorance, and dereliction.

The use of the phrase “public interest” in RCW 10.27.030 contemplates that any member of the general public may petition the court. Jay’s story captured

the attention of the entire County, and spread throughout the United States. Ware more than adequately represents the public's grave concern over the incident and the County's heretofore insufficient handling of the matter. That the code does not use the word victim or owner bolsters this interpretation, with similar effect in the case of CrRLJ 2.1(c). Indeed, allowing only the "owner" of Jay to file this petition would ignore what Washington Supreme Court Justice Madsen confirmed in her concurrence in *State v. Haddock*, 141 Wn.2d 103, 118 (2000), holding that the victim of a property crime is not the owner of the stolen property, but society as a whole. The entire community having been victimized by the actions of Mr. Burke, Ware has the right to present this petition as a relator, bringing the concerns of the people to the superior court for redress of a grim prosecutorial grievance.

One must also consider Washington's refusal to restrict standing to Article III standards,³ and Washington's liberal, minority position for taxpayer standing, which independently commends Ware's standing here. The Washington Supreme Court has repeatedly recognized that a taxpayer has standing to challenge illegal governmental acts on behalf of all taxpayers without the need to allege a direct,

³ Former Supreme Court Justice Talmadge noted that Washington State superior courts are courts of general jurisdiction and are not constrained by subject matter jurisdiction under Article III, Section 2. *Philip A. Talmadge, Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 Seattle U.L. Rev. 695, 708-11 (1999) (noting that no "case or controversy" requirement appears in the text of the constitutional grant of jurisdiction and Washington courts have never implied any).

special, or pecuniary interest in the outcome.⁴ Few other than Ware would fall within the “zone of interest” of Washington’s animal cruelty laws.

Further, traditional notions of standing do not apply in criminal cases. *See* Edward Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine is Looking for Answers in all the Wrong Places*, 97 Mich.L.Rev. 2239, 2248-49 (1999) (to reason and conclude from the current status of the Court’s Article III standing doctrine that “the vast majority of federal criminal prosecutions are not ‘cases’ or ‘controversies’ and the United States lacks standing to initiate them [would,] ... [o]f course, [amount to] an absurd result.”).

In short, if—as all concede—the United States can prosecute crimes in the federal courts, then a “case” within the meaning of Article III must include litigation that is based on nothing more than the “harm to the common concern for obedience to law,” and the “abstract ... injury to the interest in seeing that the law is obeyed.”

Id. Of course, whether civil or criminal in nature, the law is in flux as to whether standing is even jurisdictional. *See* Chambers, J., concurring in *Branson v. Port of Seattle*, 152 Wn.2d 862, 879-80 & n. 10 (2004)(noting that a case may be heard even if a party lacks standing, as long as the issue is one of great public interest and well briefed).

⁴ *State ex rel. Boyles v. Whatcom County Superior Court*, 103 Wn.2d 610, 614, 694 P.2d 27 (1985); *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 269, 534 P.2d 114 (1975); *Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994). Washington’s Courts of Appeal concur. *Robinson v. City of Seattle*, 102 Wn.App. 795, 805, 10 P.3d 452 (I, 2000); *Kightlinger v. Pub. Util. Dist. No. 1*, 119 Wn.App. 501, 506-07, 81 P.3d 876 (II, 2003); *Wash. Pub. Trust Advocates ex rel. City of Spokane v. City of Spokane*, 117 Wn.App. 178, 182, 69 P.3d 351 (III, 2003). *See* Varu Chilakamarri, *Taxpayer Standing: A Step Toward Animal-Centric Litigation*, 10 Animal L. 251 (2004) (recognizing that Washington is uniquely liberal among other states). Mr. Ware routinely pays sales tax within Lewis County by shopping within its jurisdiction, for he lives nearby.

As to Johnson, RALJ 2.1(a) provides that only “aggrieved” parties may appeal. The term is undefined. While RAP 3.1 case law suggests that those whose proprietary, pecuniary, or personal rights are substantially affected meet the threshold for appeal, such disputes typically concern private litigants. Here, the Washington Supreme Court expressly and broadly permitted “any person wishing to institute a criminal action alleging a misdemeanor or gross misdemeanor” to lodge a CrRLJ 2.1(c) petition for criminal complaint. Prior to the creation of the rule, the Legislature enacted a similar statute. Nothing in CrRLJ 2.1(c) limits complainants to property owners or crime victims. Had the Supreme Court intended to narrow the scope, it certainly knew how to do so. The wording “any person” eliminates any prudential standing requirement.

Johnson is certainly a natural person desirous of criminal prosecution, but she is more than that. As explained in her declaration of complaining witness and declaration in support of appellate review, has devoted her career to enforcing the State’s anticruelty laws and has a commission to do so. Moreover, she personally investigated the torturous slaying of Baby Jay and conveyed his body for forensic necropsy. She interviewed witnesses and collected photographic evidence at the scene. Furthermore, she had a direct relationship with one of the defendants, Mr. Burke, who was convicted of second-degree animal cruelty thanks to her diligence. That he was under probation from Thurston County when he stabbed Baby Jay, and that he returned to Thurston County bespeaks substantial interest in protecting not only the animals and people

of the State of Washington from further acts of abuse and neglect, but those in her jurisdiction.

Clearly, she has a justiciable interest (based on her commission, education, training, experience, and nationally recognized credentials), as well an abiding aesthetic interest in observing animals treated humanely. Like a private attorney general, she seeks to ensure that the animal cruelty laws of the State are enforced uniformly, especially against those who extend their nefarious reach beyond more than one County.

B. *State v. Yakey.*

State v. Yakey, 43 Wash. 15 (1906), concerned Matteo Romano, a man convicted of assault with intent to murder and imprisoned for fourteen years based on the testimony of Sebastian Ucci and Conchetta Rosetta, whom Romano claimed perjured themselves. Romano's private criminal complaint was rejected by several judges, including King County Superior Court Judge John B. Yakey, who reasoned "that he was at one time a prosecuting attorney himself, and that he believed it was the duty of the prosecuting attorney to make such investigations, and that he, sitting as a committing magistrate, would not interfere with the duties or doings of that officer." *Id.*, at 18. Romano thereafter sought a writ of mandamus to compel Yakey to file the criminal complaint of perjury.

Yakey holds that a person making a complaint to a magistrate that a crime has been committed has sufficient interest to entitle him to institute mandamus proceedings against the magistrate who refuses to interfere with the prosecuting

attorney's refusal to prosecute, under Washington's then-extant private prosecution statute, Ballinger's Ann. Codes § 6695. This statute:

permits any person to make complaint that a criminal offense has been committed, and, if the magistrate to whom the complaint is made wrongfully refuses to act in the matter, we think the party applying for the warrant has a sufficient interest in the performance of the public duty to compel action by mandamus. This is especially true where it is made to appear that the prosecuting attorney is resisting the application.

Id., at 19.

Faced with the Respondent's similar argument here—that Johnson and Ware are not “part[ies] beneficially interested” and have no standing to initiate prosecution by way of private criminal complaint or grand jury empanelment—the Supreme Court, upon evaluating the split of national authority, held:

the better and more reasonable rule is established by the decisions of the courts of New York, Ohio, Indiana, Illinois, and Iowa, which hold the opposite doctrine, and maintain that when the question is one of public right, and the object of the mandamus to procure the enforcement of a public duty, the relator is not required to show that he has any legal or special interest in the result; it being sufficient if he shows that he is interested, as a citizen, in having the laws executed and the right enforced.

Id., at 19. Ware has standing to seek such execution and right enforcement under RCW 10.27.030, as does Johnson via CrRLJ 2.1(c). Accordingly, though not a mandamus proceeding *per se*, having spawned from the statutory analog of CrRLJ 2.1(c), *Yakey* governs.

Indeed, the Washington Supreme Court of 1906 recognized the importance of preserving the private criminal complaint procedure in light of the

disappearance of grand juries,⁵ which gave even more reason to confer greater access by private citizens:

In this state, where grand juries are the exception and not the rule, it is of the highest importance that every charge of violation of the criminal laws of the state should be carefully, conscientiously, and fearlessly investigated by the officers charged with that duty, and **the theory that the prosecuting attorneys of the several counties must determine first and finally who shall be prosecuted, and who shall not, finds no support in the law.**

Id., at 20 (emphasis added). *Yahey* thus bespeaks the Supreme Court rejection of the separation of powers objection 111 years ago. *See also State v. Klinker*, 85 Wn.2d 509, 524 (1975) (“And the citizen-complaint provisions of JCrR 2.01(c) and 2.02(a) provide a model of **constitutionally proper** warrant practice which should be followed in future filiation cases.”) (emphasis added).

C. Constitutional Challenge to CrRLJ 2.1(c).

Respondent takes a condescending view that public prosecutors know best how to balance precious constitutional and statutory rights, are not motivated by vengeance or personal interest, and only have fidelity to the ideal of doing justice. Yet, a plain review of the evidence shows that such fealty has been tarnished by a persistent refusal to address the facts and law applicable to Baby Jay, creating a public clamor for justice. No rational explanation having been offered, the victim’s interest, to wit, Baby Jay, have been abysmally disserved. CrRLJ 2.1 furnishes the necessary check and balance on the public prosecutor, who has largely supplanted the role of the grand jury since 1889, and, as *Yahey* noted over

⁵ This resulted from the 1889 Washington Constitution providing for information in lieu of indictment.

a century ago, justified greater (albeit limited) private citizen access via the citizen criminal complaint procedure.

In *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wash.App. 201, 213 (2013), the Court of Appeals refused to imply a private right of action from RCW 69.41.060 to obtain a search warrant due to failure to meet the *Bennett* factors. Here, Johnson need not seek any implied remedy. It is explicitly bestowed upon her by the Supreme Court.

While *People v. Municipal Court for Ventura Jud. Dist. (Pellegrino)*, 103 Cal.Rptr. 645 (1972) required that any citizen criminal complaint must be approved by the district attorney before criminal proceedings are instituted, the statutory language of Cal. Penal Code §§ 740, 806, which requires that a complaint for a misdemeanor or infraction be prosecuted “by written complaint under oath subscribed by the complainant,” and which “may be verified on information and belief,” does not include the Washington Supreme Court safeguards against private prosecutions based on personal grievance and fanciful charges as set forth in the rigorous prerequisites of CrRLJ 2.1(c) and also in the vesting of discretion in the trial judge to make such determinations, including that of probable cause. CrRLJ 2.1(c)’s directives to the court hearing the petition resolve the due process concerns of the California Court of Appeals.

Another distinction must be noted, viz., that no similar separation of powers concern arises given that Johnson does not seek to privately *prosecute* but, instead, to privately *initiate* prosecution. She does not seek appointment of her

attorney as a special prosecutor, either. Further, Pennsylvania and Wisconsin have expressly rejected the separation of powers argument made to challenge their citizen criminal complaint statutes.

As for the assertion that this court should defer to California due to the similarity between the Constitutions, a contextualized reading of Wash.Const. Art. IV § 27, reveals that a prosecution initiated by a private citizen is done by the authority of the State of Washington (“by its authority”) care of the Washington Supreme Court, in which “judicial power of the state shall be vested ... as the legislature may provide,” which it did in RCW 2.04.190. Notably, Art. IV, § 27 may be found in Article pertaining to the Judiciary, not the Executive, branch. Additionally, two private criminal complaint matters brought before the Washington Supreme Court were captioned at the trial level as required by Art. IV § 27 (*State ex rel. Murphy v. Taylor*, 101 Wash. 148 (1918) and *State ex rel. Romano v. Yahey*, 43 Wash. 15 (1906)).

Putting aside that the version of Cal.Const.Art. VI, § 20 relied upon in *Pellegrino* no longer exists,⁶ instead of citing it as a basis to deem Cal. Penal Code §§ 740, 806 unconstitutional, the court recognized that:

Since all criminal proceedings must be brought in the name of the People of the State of California (Cal.Const. art. VI, s 20), such procedure, if it in fact exists, has the potential for permitting any person in the name of the People of the State of California to

⁶ A current search on Westlaw and the California Legislative Information site finds no such section in the present version of the California Constitution. While it did exist in 1879, it does not appear any more. Cf. <https://www.cpp.edu/~jlkorey/calcon1879.pdf> with <https://leginfo.legislature.ca.gov/faces/codesTOCSelected.xhtml?tocCode=CONS&tocTitle=+California+Constitution++CONS>

redress a personal grievance by way of a criminal prosecution against his adversary.

Id., at 201. Further, while the California codes are ambiguous as to whether district attorney approval must be sought, CrRLJ 2.1(c) expressly states that “any person” may initiate the prosecution, whether or not she consulted with the prosecuting attorney. Lastly, in finding a separation of powers violation, the California Court of Appeals cited to Cal.Const. Art. III, § 1,⁷ not Art. VI, § 20. *Id.*, at 204.

One the district court permits the complainant to file under CrRLJ 2.1(c), the prosecuting attorney controls the case’s destiny, whether by prosecuting it to verdict, negotiating a plea, or dismissing. *People v. Benoit*, 152 Misc.2d 115 (1991) declared a city code of criminal procedure, whereupon a private citizen sought to have her counsel appointed as a Special Prosecutor unconstitutional on grounds of due process and equal protection. Benoit’s concerns are not at issue here as Johnson merely sought leave to initiate prosecution. Nor are the special prosecutor concerns of *Ladenburg v. Campbell*, 56 Wash.App. 701 (1990).

The costs of prosecution, discussed in *State v. Howard*, 106 Wn.2d 39, 44 (1985), are not a reason to find the rule unconstitutional or to affirm given that the Supreme Court explicitly provided this avenue to citizens mindful of the effect it would have and instructed the trial court to give it express consideration prior granting a citizen criminal complaint. Judge Toynbee expressly *rejected*

⁷ This provision, too, no longer can be found for Cal.Const.Art. III, § 1, states, “The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land.” It is hard to follow how the citizen criminal complaint process violates this section.

Respondent's concern in his ruling. CP 329:12-14. From a policy standpoint, the cost of private prosecution petitions are borne within the counties where filed and incentivize responsibility of the elected prosecutors to take citizen complaints seriously before further adjudication is sought. See CrRLJ 2.1(c) ("I (*have*) (*have not*) consulted with a prosecuting authority concerning this incident.")

Chief Justice Alexander's statement that "Under principles of separation of powers, the charging decision is for the prosecuting attorney and we should resist the temptation to dispense hints that might influence that decision," was not joined by any of the other eight justices. Besides, it is immaterial to the issue at bar, for *Walsh* pertained to whether a defendant could withdraw his guilty plea, not whether the court could interfere with the ability of the State to refile dismissed charges, an issue even Justice Alexander acknowledged was "not presented to this court." The majority opinion never even discusses separation of powers. *State v. Walsh*, 143 Wn.2d 1, 10 (2001), *overruled o.g.* 173 Wn.2d 708 (2012).

Respondent cites to Justice J.M. Johnson's concurrence, not joined by any others, in *State v. Korum*, 157 Wn.2d 614, 655 (2006), wherein he generally admonishes against "judicial second-guessing of the discretionary charging decisions that courts have long recognized as exclusively executive." He does so not in the context germane here but, instead, relative to accusations of prosecutorial vindictiveness in plea negotiations where a prosecutor adds or increases charges. *State v. Tracer*, 155 Wash.App. 171, 182 (2010) concerned a

superior court judge's violation of separation of powers by appointing a special prosecutor whom it then directed, *sua sponte*, to amend the information to accept Tracer's guilty plea to a reduced charge. Here, no court *sua sponte* ordered that the county prosecute the Baby Jay case. Rather, it considered a petition expressly authorized under CrRLJ 2.1(c) and its mandatory considerations.

Any concern of impartiality of the judge who authorizes private criminal complaint later hearing the prosecution can be resolved by recusal or the disqualification process, thereby responding to the concern of *In re Murchison*, 349 U.S. 133 (1955). *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379-80 (2nd Cir.1973) spoke only to prosecution of federal crimes, confirming that only the Attorney General or a U.S. Attorney may file such charges. No Congressional Act or Federal Rule of Criminal Procedure exists in any form that approximates CrRLJ 2.1(c), so this decision has no value here.

People v. Smith, 53 Cal.App.3d 655 (1975) did not involve the question of private prosecution but, instead, a trial court's order allowing a defendant to withdraw a former plea of not guilty to assault by means of force likely to produce great bodily injury and, over the prosecutor's objection, enter a guilty plea to battery, a count never charged, nor a lesser-included offense within the charged assault. Like the other cases cited by Respondent, it proves inapposite, as is *People v. Herrick*, 550 N.W.2d 541 (Mich.App.1996), a special prosecutor case holding that a declination decision did not amount to grounds for disqualification.

State ex rel. Schultz v. Harper, 573 S.W.2d 427 (Mo.App.1978) is a writ of mandamus case, not a case brought under a Supreme Court rule of criminal procedure authorized by the Legislature.

D. Constitutional Challenge to RCW 10.27.030.

The grand jury is not an adjunct of either the court or the prosecutor. In fact the whole theory of [the grand jury's] function is that it belongs to no branch of the institutional government, serving as a kind of buffer or referee between the government and the people. Although the grand jury normally operates, of course, in the courthouse and under judicial auspices, its institutional relationship with the judicial branch has traditionally been, so to speak, at arm's length. Judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office.

United States v. Williams, 504 U.S. 36, 47 (1992)(cit. om.). And Ware properly initiated the constitutive process under RCW 10.27.030.

State v. Iowa District Court for Johnson Cy., 568 N.W.2d 505, 508 (Iowa Sup.1997) found error in the district court judge instructing the grand jury to investigate a shooting and also supplanting the elected prosecutor with special counsel after the former issued a press release expressing his view that the shooting officer was negligent, but committed no crime. The State did not challenge the authority of a grand jury to consider the shooting matter, even over objection of the county attorney, but did take issue with the *court* compelling it to do so. RCW 10.27.030 does not allow the court to direct the grand jury but merely to empanel it. A public attorney (attorney general or prosecuting attorney) would engage the grand jury, not Ware or his attorney. See RCW 10.27.070.

In re Grand Jury Appearance Request by Loigman, 870 A.2d 249, 257 (NJ 2005) speaks to the question of whether the private citizen himself may address an already-empaneled grand jury. This “appearance request” is not at all the same as petitioning to call a grand jury and Ware does not seek leave to instruct or question the grand jury. As no judge found probable cause did not exist to bring felony charges against Mr. Burke, no ethical conflict arises under RPC 3.8(a) (prohibiting seeking indictment in absence of probable cause). Incidentally, *Loigman* states, “Private prosecutions in municipal court are a permissible, *R. 7:8-7(b)*, but not favored, practice. *See State v. Storm*, 141 N.J. 245, 252-54, 661 A.2d 790 (1995); *State v. Ward*, 303 N.J.Super. 47, 52, 696 A.2d 48 (App.Div.1997).” *Id.*, at fn. 1.

One must distinguish the right to petition to empanel a grand jury from the right of a private prosecutor to appear before, address, and seek an indictment from same. Ware only seeks the former. Once empaneled, the attorney general or county prosecutor would access it. *Hovoet v. State*, 689 N.E.2d 469 (Ind.App.1997) uses language distinguishable from RCW 10.27.030, for it permits empanelment of the grand jury “at the request of the prosecuting attorney” or, vaguely, “without a request from the prosecuting attorney.” RCW 10.27.030 speaks to three separate instances warranting empanelment. Like Ind. Code 35-34-2-2(b), a court may call a grand jury at the instance of the public prosecutor. But RCW 10.27.030 also provides that a grand jury “shall be summoned by the court” where “the public interest so demands,” a solicitation to

individuals other than the “public attorney, corporation counsel or city attorney[.]” No similar call for public intervention under Ind. Code 35-34-2-2. And while Ware may not have a “right to appear as a witness in a grand jury,” it would be foolhardy not to be called given his personal knowledge of the case.

Respondent reads too much into the 1971 repeal of RCW 10.28.160 (i.e., Code 1881 § 996), titled “True bills at instance of private prosecutor.” The attached Code of 1881, Chapter LXXX, distinguishes initiation of a complaint by a private prosecutor from active efforts to seek an indictment from a grand jury. § 984 states that the “prosecuting officer may attend on the grand jury for the purpose of examining witnesses and giving them such advice as they may ask.” Ten years later, the Code of 1891, Ch. 28 § 14 made the prosecutor’s presence mandatory, changing Code 1881 § 984 to state that “The prosecuting attorney shall attend on the grand jury for the purpose of examining witnesses and giving them such advice as they may ask.” RCW 10.28.070. This proves that, as of 1891, the public prosecutor did not cede control of the grand jury proceeding to a private prosecutor but that the private prosecutor, if one existed, would ostensibly assist.

Regardless, neither public nor private prosecutor is the complainant, who stands in the shoes of Ware. Highlighting this distinction between the person instituting the prosecution and the prosecuting attorney (private or otherwise) who asks the grand jury to find a true bill, consider RCW 10.28.140, titled “Complainant not to take part” (codifying Code 1881 § 987, which states that the

“complainant who may institute a prosecution shall [not] be competent to be present at the deliberations of the grand jury, or vote for the finding of an indictment.”) Unlike the modern grand jury law of Ch. 10.27 RCW, the grand jury is not charged with determining if the prosecution is malicious and frivolous and whether to order the complainant, county, or private prosecutor to pay costs. Cf. RCW 10.28.160, 190 (Code 1881 §§ 988, 996). The different classifications of private prosecutor and complainant suggest distinct roles in the grand jury process. The former is appointed or otherwise authorized to attend to the grand jury, examine witnesses, and offer legal advice, while the complainant is forbidden from having any such interaction. Ware is not a private prosecutor, but a complainant, so the repeal of RCW 10.28.160 is of no moment.

Further, the precise mechanism by which a grand jury was empaneled in 1881 cannot be discerned from that code, which was enacted eight years before Washington’s Statehood, a silence that speaks volumes, for grand juries furnished the default method of prosecution. A petition to empanel a grand jury would, therefore, have been anachronistic. Thus, it is inappropriate to imply a repeal of any private right to petition for empanelment when, in 1881, defendants had the right to presentment by a grand jury and prosecution by information was not permitted. *See Lybarger v. State*, 2 Wash. 552, 554-555 (1891) (addressing assertion that prosecution by information was illegal and that an indictment was necessary to jurisdiction and a valid judgment; finding that Washington Constitution of 1889, Art. I, § 25, declared that “offenses heretofore required to

be prosecuted by indictment may be prosecuted by information or by indictment, as shall be prescribed by law.”)

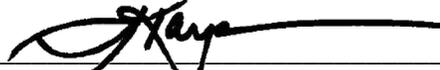
Thus, the Constitutional provisions relied upon by the Respondent were nonextant at the time the suite of 1881 laws codified by Ch. 10.28 RCW were enacted. Moreover, between 1853, when Washington was a territory, and 1881, the private citizen could prefer a criminal complaint for misdemeanor *and felonies*. Sometime after Statehood, the private prosecution legislative enactment became Supreme Court rule (and transitioned from the JCrRs to the CrRLJs with minor changes and still in effect despite several efforts by the DMJCA and WAPA to eliminate it). The Criminal Investigatory Act of 1971 modernized the Code of 1881, Chs. 80-81, codified as Ch. 10.28 RCW, and which retained through 1971 the entirety of Ch. 80 Code of 1881 (with the exception of § 983), and the entirety of Ch. 81 Code of 1881 (with the exception of § 995), including § 996 pertaining to indictments “found at the instance of” private prosecutors. Yet, Ch. 10.28 RCW still failed to codify any mechanism by which a grand jury would be empaneled.

Instead of completely eliminating citizen access to the grand jury, the legislature updated the process to account for the practical and constitutional transition from indictment to information and, hence, distant role of the grand jury. In passing RCW 10.27.030 and allowing for the summoning of a grand jury “where the public interest so demands,” the legislature effected a compromise of retiring the territorial practice of allowing private prosecutors to address the grand

jury while still retaining the right of a citizen complainant to involve himself in its affairs, even if he could not attend to the grand jury and seek an indictment on his own.

Dated this December 18, 2017

ANIMAL LAW OFFICES

A handwritten signature in black ink, appearing to read "A. Karp", written over a horizontal line.

Adam P. Karp, WSB No. 28622

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 18, 2017, after 5 p.m., I caused a true and correct copy of the foregoing to be served upon the following person(s) in the following manner:

[X] Email (stipulated)

Pamela Loginsky
Washington Association of Prosecuting Attorneys
206 10th Ave. SE
Olympia, WA 98501-1311
pamloginsky@waprosecutors.org
jonathan.meyer@lewiscounty.gov
Bradley.meagher@lewiscounty.gov



Adam P. Karp, WSBA No. 28622
Attorney for Petitioners-Appellants

CHAPTER LXXX.

OF THE GRAND JURY.

SECTION

977. Challenge to the panel.
978. Challenge to individual jurors.
979. If allowed to the panel.
980. If allowed to an individual.
981. Oath of grand juror; form.
982. Foreman, powers of
983. Charge, by the court.

SECTION

984. Prosecuting attorney must attend.
985. 6-7-8-9 What grand jury shall inquire into.
990. Not bound to hear evidence for defendant.
991. Grand juror, shall not disclose finding, when.
992. Grand juror shall not disclose vote.
993. Grand jury may be summoned again at same term.

SEC. 977. Challenges to the panel shall be allowed to any person in custody or held to answer for an offense, when the clerk has not drawn from the jury box the requisite number of ballots to constitute a grand jury, or when the drawing was not done in the presence of the proper officers; and such challenges shall be in writing and verified by affidavit, and proved to the satisfaction of the court.

SEC. 978. Challenges to individual grand jurors may be made by such person for reason of want of qualification to sit as such juror; and when, in the opinion of the court, a state of mind exists in the juror, such as would render him unable to act impartially and without prejudice.

SEC. 979. If a challenge to the panel be allowed, the panel shall be discharged, and the court may order the sheriff to summon from the bystanders and the body of the county a sufficient number of persons to act as grand jurors at such term of the court.

SEC. 980. If a challenge to an individual juror be allowed, he shall be discharged and the panel filled.

SEC. 981. The following oath shall be administered to the grand jury:
"You, as grand jurors for the body of the (district or county, as the

case may be.) do solemnly swear (or affirm) that you will diligently inquire into, and true presentment make, of all such matters and things as shall come to your knowledge, according to your charge; the counsel of the United States of America, your own counsel and that of your fellows, you shall keep secret; you shall present no person through envy, hatred or malice; neither will you leave any person unpresented through fear, favor, affection or reward, or the hope thereof; but that you will present things truly as they come to your knowledge, according to the best of your understanding, and according to the laws of this territory, so help you God."

SEC. 982. A foreman of the grand jury shall be appointed by the court, who may remove him and appoint another at any time, and such foreman shall have power to administer all oaths and affirmations to witnesses who shall appear before such grand jury, and the jury may appoint one of their number as clerk to keep a minute of their proceedings.

SEC. 983. The grand jury shall be charged by the court as to the nature of their duties, and may at any reasonable time ask the advice of the court as to any legal questions upon which they may desire information.

SEC. 984. The prosecuting officer may attend on the grand jury for the purpose of examining witnesses and giving them such advice as they may ask.

SEC. 985. The grand jury shall inquire into the cases of parties in custody or under bail, charged with commission of offenses against the laws of the United States or of this territory, and duly returned by a committing magistrate, justice of the peace or United States commissioner, or upon a complaint sworn to before an officer authorized to administer oaths and presented by the prosecuting attorney, or under the instructions of the court.

SEC. 986. If a member of a grand jury knows, or has reason to believe, that a public offense, triable within the county, has been committed, he must declare the same to his fellow jurors, who may thereupon investigate the same, if a majority so order.

SEC. 987. No complainant who may institute a prosecution shall be competent to be present at the deliberations of a grand jury, or vote for the finding of an indictment.

SEC. 988. Where a grand jury ignore a bill of indictment, they shall also find whether the prosecution is malicious and frivolous, and find whether the complainant or county shall pay the costs, which shall be returned with their proceedings into open court.

SEC. 989. The grand jury shall especially inquire as to the offense of any person confined in prison on a criminal charge; into the condition and mismanagement of the public prisons in the county; into the willful misconduct in office of public officers, and shall in their discretion exam-

ine the public records of the county.

SEC. 990. The grand jury are not bound to hear evidence for the defendant; but it is their duty to weigh all the evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge they should order such evidence to be produced, and for that purpose may cause process to issue for the witnesses.

SEC. 991. No grand jury shall disclose the fact that an indictment for

Secs. 992-999]

CODE OF WASHINGTON.

191

a felony has been found against any person not in custody or under recognizance, until such person has been arrested.

SEC. 992. No grand jury shall be allowed to state or to testify in any court in what manner he or any member of the jury, voted on any question before them, or what opinion was expressed by any juror in relation to such question, or what question was before them; and in charging the grand jury the court shall remind them of the provisions of this and the preceding sections.

SEC. 993. Whenever the grand jury shall have been dismissed at any term of the court for which they shall have been impaneled, before the final adjournment, they may be summoned to attend again at the same term, if necessary; and if a full jury do not attend, the number may be completed from the bystanders.

CHAPTER LXXXI.

FINDING AND PRESENTATION OF THE INDICTMENT.

SECTION

994. Cannot be found without twelve concur.

995. Witnesses names must be endorsed on.

996. When found at instance of private prosecutor, indictment must so state.

997. How presented and filed.

SECTION

998. No juror must disclose facts concerning.

999. Jury must destroy papers, when.

1000. If no bill is found, charge is dismissed.

1001. Presentment, requisites of.

SEC. 994. An indictment cannot be found without the concurrence of at least twelve grand jurors, and when so found, it must be endorsed "a true bill" and such endorsement signed by the foreman of the jury.

SEC. 995. When an indictment is found, the names of the witnesses examined before the grand jury must be inserted at the foot of the indictment, or endorsed thereon, before it is presented to the court, and the clerk of the court must, within one day after demand made, furnish the defendant or his counsel a copy thereof without charge, or permit the defendant's counsel, or the clerk of such counsel, to take a copy.

SEC. 996. When an indictment is found at the instance of a private prosecutor, the following must be added to the endorsement required by the preceding section, "found at the instance of," (here state the name of the person,) and in such case, if the prosecution fails, the court trying the cause may award costs against the private prosecutor, if satisfied, from all circumstances, that the prosecution was malicious or without probable cause.

SEC. 997. An indictment, when found by the grand jury, must be presented by their foreman, in their presence, to the court, and filed by the clerk, and remain in his office as a public record; but if the defendant has not been held to answer the charge, neither the indictment or any order or process in relation thereto, must be inspected by any person other than the judge of the court or an officer thereof in the discharge of a duty concerning the same, until after the arrest of the defendant.

SEC. 998. No grand juror or officer of the court must disclose any fact concerning such indictment while it is not subject to public inspection; and a violation of this section or the foregoing section is punishable as a contempt.

SEC. 999. When a person has been held to answer a criminal charge, and the indictment in relation thereto is not found "a true bill," it must

be endorsed "not a true bill", which endorsement must be signed by the foreman, and presented to the court and filed with the clerk, and remain a public record; but in the case of an indictment not found "a true bill," against a person not so held, the same, together with the minutes of the evidence in relation thereto, must be destroyed by the grand jury.

SEC. 1000. When an indictment, endorsed "not a true bill," has been presented in court and filed, the effect thereof is to dismiss the charge; and the same cannot be again submitted to or inquired of by the grand jury, unless the court so order.

SEC. 1001. A presentment is made to the court, by the foreman, in the presence of the grand jury, and with the concurrence of twelve of their number; but being a mere informal statement of facts, for the purpose of obtaining the advice of the court as to the law arising thereon, is not to be filed in court or preserved beyond the sitting of the grand jury.

ANIMAL LAW OFFICES OF ADAM P. KARP

December 18, 2017 - 11:25 PM

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Appellate Court Case Title: In re the Petition to Convene a Grand Jury, Barnes Michael Ware, Petitioner
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