

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

BRIEF OF RESPONDENT

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I. COUNTER-STATEMENT OF THE ISSUES

1. Whether a private person who requests that a court of limited jurisdiction issue a citizen complaint pursuant to CrRLJ 2.1(c) has standing to appeal the denial of her request.
2. Whether a private person who requests that a superior court summon a grand jury pursuant to RCW 10.27.030 has standing to appeal the denial of his request.
3. Whether a court rule that authorizes a private citizen to institute a criminal action violates article IV, section 27 and article XI, section 5 of the Washington State Constitution.
4. Whether the separation of powers doctrine is violated when a court second guesses a prosecutor's decision not to prosecute an offense.
5. Whether a grand jury may be summoned on the request of a private attorney or private person.

II. STATEMENT OF THE CASE

On April 28, 2016, a pet cat named "Jay" was killed in a cruel manner. CP 60. "Jay's" horrific death was the culmination of a series of events that were initiated by 11-year-old E.M.¹ and concluded with acts

¹The State is utilizing initials rather than the child's full names as an 11-year-old is presumed incapable of committing a crime. RCW 9A.04.050. While E.M. was charged in juvenile court with a gross misdemeanor arising out of the incident, the matter was diverted as required by RCW 13.40.070(6). The record indicates that E.M. is in full compliance with the diversion agreement. See CP 84, 90. E.M. is entitled to have the juvenile court record of this matter sealed pursuant to RCW 13.50.250(3).

performed by two adult men, who have been identified as Richard Joshua Allshouse and Kyle Bobby Burke. *See generally* CP 16-25. E.M.'s mother, Tina M. Miller, was on a balcony during the incident. Ms. Miller's only contact with "Jay" was her dropping him when E.M. tried to transfer the injured animal to her mother for help. CP 16-17, 25.

Centralia police officers responded to a call from "Jay's" owner. CP 29. Although the investigating officer left "Jay's" body at the scene, he took photographs, collected photographs taken by bystanders, and subsequently took into evidence a rock that a bystander believed had been used during the incident. CP 29-34. The responding officers arrested Mr. Burke. CP 30. On April 29, 2016, Deputy Prosecuting Attorney (DPA) Kevin T. Nelson declined to charge Mr. Burke with a crime. DPA Nelson explained the reason for his decision in a two page letter. CP 62-63.

"Jay's" owner was unhappy with the adequacy of the police investigation and DPA Nelson's charging decision. She ultimately accepted the assistance of retired Thurston County Sheriff's Deputy Barnes M. Ware and former animal control officer and Thurston County Deputy Sheriff Erika Johnson, who volunteered to conduct a private investigation. CP 2, 9.² Based upon the private investigation, Ms. Johnson, Mr. Ware and others

²The record contains no declaration from Mr. Ware. The citations are to representations made in pleadings prepared by opposing counsel. The State assumes that opposing counsel has complied with RPC 3.3(a)(1), and that his representations are accurate.

requested that criminal charges be filed against E.M., E.M.'s mother, Mr. Burke and Mr. Allshouse.³ See CP 1, 64.

Lewis County Chief Criminal Deputy Prosecuting Attorney J. Bradley Meagher met with Ms. Johnson and others to discuss the fruits of the private investigation and their request that the targets be charged with a variety of crimes. See CP 49-50. DPA Meagher declined to file charges, finding that the evidence, in light of the available statutory defenses, would be insufficient to convince a jury of guilt beyond a reasonable doubt. CP 86-87, 90.

Lewis County Prosecuting Attorney Jonathan Meyer reviewed DPA Meagher's and DPA Nelson's charging decisions at the request of the Animal Legal Defense Fund. CP 64. Prosecutor Meyer exercised his discretion and determined that none of the adult targets would be charged with a crime. Prosecutor Meyer explained his decision in a letter dated December 6, 2016. CP 70.

Unhappy with Prosecutor Meyer's decision, Ms. Johnson filed a CrRLJ 2.1(c) petition for issuance of a citizen complaint. CP 144. "Jay" was not Ms. Johnson's cat, CP 176 ¶¶ 1-2, and Ms. Johnson's interest in the matter is solely that of a private person, CP 166, with an interest in seeing "that the State's animal cruelty laws are enforced." CP 319.

Ms. Johnson's petition, which requested that charges be filed against

³These four people will be collectively referred to in this brief as the "targets" or the "potential defendants."

all four targets, was served on the Lewis County Prosecuting Attorney and the City of Centralia Prosecuting Attorney. CP 163, 234. The record contains no evidence that the targets were served with the petition for issuance of a citizen complaint. *See* CP 143-279. The record contains no summons issued to the targets by Ms. Johnson or the district court.⁴ *Id.*

The State opposed Ms. Johnson's petition for a citizen complaint on a number of grounds, including: (1) the district court's lack of jurisdiction over 11-year-old E.M., CP 235-36, 239; (2) insufficient evidence to prove Mr. Burke's or Mr. Allshouse's guilt beyond a reasonable doubt, CP 236-38; and (3) lack of legal authority in Washington for holding a parent criminally responsible for her child's actions, CP 238-39.

After a hearing in which none of the targets appeared or participated, Judge Buzzard declined to issue a citizen complaint, finding that "there is no willful disregard on behalf of the state of their oath or their duties," and that prosecution was not in the best interest of the public. CP 142.

Ms. Johnson filed a timely RALJ appeal from the denial of her request for a citizen complaint. CP 265. The notice of RALJ appeal only identifies the Lewis County Prosecuting Attorney's Office as the respondent. CP 266. The State defended the trial court's denial of the citizen complaint

⁴In a criminal case, the district court clerk, at the direction of the court, is responsible for issuing a summons commanding a defendant to appear before the court at a specified time and place. *See* CrRLJ 2.2(b). In a civil matter, the party initiating the action must issue a summons on the defendant that directs the defendant to defend the action. CRLJ 4.

on a number of procedural issues and on the grounds that CrRLJ 2.1(c) is unconstitutional. *See* CP 288-316. Lewis County Superior Court Judge J. Andrew Toynebee denied Ms. Johnson's RALJ appeal on the grounds that CrRLJ 2.1(c) violated the separation of powers doctrine. *See* CP 320.

Immediately after Judge Buzzard denied Ms. Johnson's petition for a citizen complaint,⁵ Mr. Ware filed an RCW 10.27.030 petition to summon a grand jury in the superior court. CP 1. Mr. Ware desired the grand jury to consider potential charges against Mr. Burke. CP 1. Mr. Ware's petition was supported by the exact same investigation as Ms. Johnson's petition for a citizen complaint and by similar rhetoric. *Compare* CP 1-82 with CP 144-234.

Mr. Ware served a copy of his petition upon the Lewis County Prosecuting Attorney.⁶ CP 15. Although the petition identifies Mr. Burke as the "defendant," the record contains no evidence that Mr. Ware served a copy of the petition and a summons upon Mr. Burke.⁷ Mr. Burke did not participate in the action in the Lewis County superior court.

⁵Judge Buzzard verbally denied the petition for a citizen complaint at 3:00:19 p.m. on December 27, 2016. *See* CP 141-42, 340. The petition to summons a grand jury was filed with the Lewis County superior court clerk at 3:42 p.m. on December 27, 2016. *See* CP 1.

⁶Although Mr. Ware served the prosecutor with his petition, he eventually argued that the State is not a party to the petition and has no right to file any responsive pleadings to his petition. CP 115.

⁷A civil action is commenced by the service of a copy of a summons together with a copy of the complaint or petition. *See generally* CR 3.

The State opposed Mr. Ware's petition to convene a grand jury on numerous grounds, including lack of standing and insufficient evidence to support a finding of probable cause to charge Mr. Burke with a crime. CP 83-100, 112-14. In his reply to the State's pleading, Mr. Ware sought to increase the scope of the convened grand jury to include the possibility of charging E.M. with a felony. CP 101-04.

Mr. Ware's petition was denied in an order signed by all three of Lewis County's superior court judges. CP 128. The *en banc* court's order recognized that calling a grand jury after the prosecuting attorney declined to file charges "would invade the Prosecuting Attorney's Office's discretion, vested by the Washington State Constitution." CP 130.

Ms. Johnson and Mr. Ware both timely sought review of the adverse superior court decisions. CP 132; CP 326. Their appeals have been consolidated in this court.

III. ARGUMENT

Ms. Johnson and Mr. Ware (hereinafter "the appellants") present a brief that contains a smorgasbord of cases from around the country. With stops in New York, New Jersey, and Virginia to collect cases approving of private prosecutors and side trips to Pennsylvania and Wisconsin for cases allowing private citizen complaints, the appellants urge this court to overrule the thoughtful, constitutionally based, opinions of the Lewis County Superior

Court.

The appellants' legal potluck, however, underscores the lack of Washington precedent that supports their position. Their 50-page brief contains no Washington case or statute that authorizes private prosecutors. This court may properly assume that their diligent search produced none. *See State v. Arredondo*, 188 Wn.2d 244, 262, 394 P.3d 348 (2017).

The appellants fare slightly better with respect to citizen complaints, citing to two cases from 1906 and 1918. *See* Appellants' Appeal Brief, at 39. Neither case, however, addressed the constitutionality of citizen complaints. *See State ex rel. Murphy v. Taylor*, 101 Wash. 148, 172 P. 217 (1918) (authority of court to issue a writ of prohibition to the superior court); *State ex rel. Romano v. Yakey*, 43 Wash. 15, 85 P. 990 (1906) (power of court to order a judge to leave his duties in Kitsap County and to repair to another county, for the sole purpose of hearing an application for a warrant of arrest in the other county).

The appellants' final bromide is that statutes or court rules have authorized citizen complaints in Washington for over 120 years and that the supreme court has the power to enact court rules. Appellants' Appeal Brief, at 39-42. Court rules, however, cannot contravene the constitution. *Auburn v. Brooke*, 119 Wn.2d 623, 632-33, 836 P.2d 212 (1992). The length of time a statute or court rule has been "on the books," moreover, does not immunize

the statute or court rule from a constitutional challenge. Many practices sanctioned by numerous statutes have been declared unconstitutional decades after the statutes' enactment. *See, e.g., Louisiana v. United States*, 380 U.S. 145, 85 S. Ct. 817, 13 L. Ed. 2d 709 (1965) (state constitutional and statutory provisions requiring voters to satisfy registrars of their ability to understand and interpret any section of the federal or state constitutions struck down decades after their adoption); *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 2d 873 (1954) (statutes providing for segregated education struck down as facially unconstitutional more than 50 years of their adoption). *Accord Rutan v. Republican Party*, 497 U.S. 62, 82, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990) (Stevens, J., concurring) (the age of an illegal practice is not a sufficient reason for its continued acceptance). Careful consideration of the Washington State Constitution requires affirming the superior court's determination that CrRLJ 2.1(c) is unconstitutional.

A. A PRIVATE PERSON LACKS STANDING TO APPEAL THE DENIAL OF HIS OR HER REQUEST TO HAVE ANOTHER PERSON CHARGED WITH A CRIME.

In Washington, only an aggrieved party may seek review. *See* RAP 3.1; RALJ 2.1(b). To be aggrieved, a person's proprietary, pecuniary, or personal rights must be substantially affected. *Aguirre v. AT&T Wireless Servs.*, 109 Wn. App. 80, 85, 33 P.3d 1110 (2001).

The mere fact that one may be hurt in his feelings, or be disappointed over a certain result, or feels that he has been imposed upon, or may feel that ulterior motives have prompted those who instituted proceedings that may have brought about the order of the court of which he complains, does not entitle him to appeal. He must be 'aggrieved' in a legal sense. *Elterich v. Arndt*, 175 Wash. 562, 27 P. (2d) 1102; *Terrill v. Tacoma*, 195 Wash. 275, 80 P. (2d) 858.

State ex rel. Simeon v. Superior Court, 20 Wn.2d 88, 90, 145 P.2d 1017 (1944).⁸

1. A person whose citizen complaint is denied is not aggrieved in the legal sense.

The State does not doubt that Ms. Johnson is disappointed that the district court judge ultimately denied her request for a citizen complaint. Her disappointment, however, is insufficient to confer standing. CrRLJ 2.1(c) gave Ms. Johnson the right to appear before a judge to request the filing of charges. The rule, however, allows the judge to deny the application even in cases in which probable cause exists. *See* CrRLJ 2.1(c) (“If the judge is

⁸When an issue of public importance is asserted by a non-aggrieved person, this court has the option of issuing an opinion on the merits under a doctrine similar to the public interest exception to the mootness doctrine. *See, e.g., State v. Watson*, 155 Wn.2d 574, 577-79, 122 P.3d 903 (2005); *Farris v. Munro*, 99 Wn.2d 326, 330, 662 P.2d 821 (1983).

Whether private citizens may initiate criminal charges by citizen complaint is an issue of public interest as demonstrated by the District and Municipal Court Judges' Association's "serious concerns" regarding the constitutionality of the rule, *See* GR 9 Cover Sheet for Proposed Changes to CrRLJ 2.1 (available at http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=388 (last visited Sep. 29, 2017)), and the Washington Association of Criminal Defense Lawyers support for the rule, *see* Comment re Proposed Changes to CrRLJ 2.1 (available at http://www.courts.wa.gov/court_Rules/proposed/2014Nov/CrRLJ2.1/Louis%20Frantz%20and%20Kent%20Underwood%20of%20WACDL.pdf (last visited Sep. 29, 2017)). While the State urges this court to apply this doctrine to resolve both appeals on the merits, the State also requests a decision on this procedural bar.

satisfied that probable cause exists, and factors (1) through (7) justify filing charges . . . the judge *may* authorize the citizen to sign and file a complaint in the form prescribed in CrRLJ 2.1(a).” (emphasis added)). In other words, the court rule does not give Ms. Johnson a personal “right” to any particular outcome. This appeal must, therefore, be dismissed.

Massachusetts, which has a citizen complaint statute, Mass G.L. c.218, § 35A, that allows a judge to exercise similar discretion, has “uniformly held that the denial of [an application for] a citizen complain creates no judicially cognizable wrong.” *Victory Distributors, Inc. v. Ayer Division of the District Court Department*, 755 N.E.2d 273, 278 (Mass. 2001) (quoting *Bradford v Knights*, 695 N.E.2d 1068, 1070 (Mass. 1998)). This lack of standing extends to cases where an application is denied on the basis of an erroneous interpretation of the law. *Victory Distributors*, 755 N.E.2d at 279. The Supreme Judicial Court of Massachusetts explains that this result is consistent with the notion that the right to pursue a criminal prosecution belongs not to a private party but to the government. *Id. Accord* Const. art. IV, § 27 (“The style of all process shall be, ‘The State of Washington,’ and all prosecutions shall be conducted in its name and by its authority.”).

The Pennsylvania Supreme Court has also determined that traditional notions of standing apply to an appeal from the denial of a citizen complaint.⁹ *See In re Hickson*, 821 A.2d 1238 (Pa. 2003). After reviewing the history of criminal prosecutions in Pennsylvania, the *Hickson* court held that only a person who was directly impacted by the crime could seek judicial review of the disapproval of a private criminal complaint. *Id.*, at 1245. In most instances, the people who can meet this test will be the victim or the victim's family. *Id.* Under this test, Ms. Johnson's acknowledgment that "Jay" did not belong to her prevents her from having standing.

2. A private person whose request to convene a grand jury is denied is not aggrieved in the legal sense.

Mr. Ware is undoubtedly disappointed by the denial of his motion to convene a grand jury. He, like Ms. Johnson, is not directly impacted by the crime because "Jay" was not his cat. Mr. Ware simply lacks a judicially cognizable interest in the prosecution of any of the targets. *See, e.g., Kelly v. Dearington*, 583 A.2d 937 (Conn. App. 1990) (surveying cases that hold a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another); *Hamilton Appeal*, 180 A.2d 782 (Pa. 1962) (a person whose request to convene a grand jury is denied is not an aggrieved

⁹Pennsylvania also extends the traditional notions of standing to the petition for a private criminal complaint. *See In re Private Crim. Complaint of Wilson*, 2005 Pa. Super 211, 879 A.2d 199, 208 (2005). A person like Ms. Johnson, who merely seeks to redress the harm done to society as a whole by the commission of the alleged crime, has no standing to seek a citizen complaint under Pa. R. Crim. Pro. 506. *In re Hickson*, 821 A.2d 1238 (Pa. 2003).

party and s/he lacks standing to prosecute an appeal from the denial). *See also Leeke v. Timmerman*, 454 U.S. 83, 86-87, 102 S. Ct. 69, 70 L. Ed. 2d 65 (1981) (a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973) (same); *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 213-14, 304 P.3d 914 (2013) (same). This principle even extends to the victim of the crime. *See generally State v. A.W.* 181 Wn. App. 400, 326 P.3d 737 (2014) (crime victims have no right to intervene in a criminal prosecution or to seek compliance with a probation condition); *Yahey*, 43 Wash. at 18 (individual seeking perjury charges against witnesses whose testimony contributed to his murder conviction has no special interest in the perjury prosecution).¹⁰

¹⁰The *Yahey* court elected to follow a number of other jurisdiction to hold 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.” *Yahey*, 43 Wash. at 19. Later decisions of the Washington Supreme Court retreated from this position, prohibiting a person who suffers an injury in common with the public generally, from maintaining a suit to redress a public wrong or neglect or breach of duty. *See, e.g., State ex rel. Gebhardt v. Superior Court for King County*, 15 Wn.2d 673, 680, 131 P.2d 943 (1942).

The instant matter is not a mandamus action. A mandamus action would not provide the relief the appellants are seeking. *See, e.g. State ex rel. Murphy v. Chapman*, 179 Wash. 237, 37 P.2d 216 (1934) (mandamus may be used to require a superior court judge to set a trial date, but not to compel the judge to call the case for trial on a specific date); *State ex rel. Beardslee v. Landes*, 149 Wash. 570, 271 Pac. 829 (1928) (mandamus will not lie to compel the enforcement of vehicle parking ordinances); *State ex rel. Hawes v. Brewer*, 39 Wash. 65, 80 Pac. 1001 (1905) (mandamus will not lie to compel the prosecution of all persons violating laws relating to liquor, prostitution and gambling).

Mr. Ware is also not legally aggrieved as neither the common law nor any Washington statute authorizes a private citizen to access the grand jury or to petition to convene a grand jury. *See infra* at section III. C. A petition to convene a grand jury is a civil matter and the right to appeal in a civil case¹¹ is limited to that granted by the legislature. *City of Bremerton v. Spears*, 134 Wn.2d 141, 148, 949 P.2d 347 (1998). Chapter 10.27 RCW contains no provision authorizing a citizen, whose petition to convene a grand jury was denied, to appeal that decision. The absence of such a statute is fatal to Mr. Ware's current appeal. *See generally In re Call a Grand Jury Filed by Reardon*, 2011 Kan. App. Unpub. Lexis 832, 260 P.3d 1249 (2011).¹²

B. CITIZEN INITIATED PRIVATE PROSECUTIONS AND PRIVATE PROSECUTORS ARE BARRED BY THE WASHINGTON STATE CONSTITUTION.

In Washington, the power to prosecute criminal acts is vested in public prosecutors. *A.W.*, 181 Wn. App. at 410. Publicly prosecutors are unique among lawyers. A public prosecutor

¹¹*Cf. Protect the Peninsula's Future*, 175 Wn. App. at 208 (citizen's motion for issuance of a search warrant is correctly characterized as a civil action).

¹²GR 14.1(b) allows a party to cite as an authority an opinion designated as unpublished by a non-Washington court, if the issuing jurisdiction allows for citation to unpublished opinions. Kan. Sup. Ct. Rule 7.04(g) allows for citation of unpublished opinions. A copy of this unpublished opinion may be found in appendix A as required by both Kan. Sup. Ct. Rule 7.04(g)(2)(C) and GR 14.1(d).

is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). Defendants are among the people the prosecutor represents and the prosecutor owes a duty to defendants to ensure that their constitutional and statutory rights are not violated. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011) (citations omitted).

A private citizen and the attorney retained by the private citizen do not owe the same duty to a criminal defendant. *In re Grand Jury Appearance Request by Loigman*, 870 A.2d 249, 256 (N.J. 2004) (the constraints that apply to public prosecutors “do not apply to and could not easily be imposed upon private citizens”). A private citizen will generally have little comprehension of the highly technical procedures that are in place to guarantee a defendant’s statutory and constitutional rights. *Id.*¹³

A private citizen may be driven by a sense of vengeance or personal interest, rather than a fidelity to the ideal of doing justice. Roger A. Fairfax

¹³This concern is amply demonstrated in the instant case. Ms. Johnson sought charges in the district court against an 11-year-old child. *See* CP 144. The district court lacked subject matter jurisdiction over the child, RCW 13.04.030(1)(e), and the child was presumed incapable of committing a crime. RCW 9A.04.050.

Jr., *Outsourcing Criminal Prosecution?: The Limits of Criminal Justice Privatization*, 2010 U. Chi. Legal F. 265, 296-97 (2010) (hereinafter Fairfax, *Outsourcing Criminal Prosecution?*). A private prosecutor retained by a private citizen is not accountable to the community in whose name he enforces the criminal laws and he does not face the democratic check that applies to elected public prosecutors. Fairfax, *Outsourcing Criminal Prosecution?*, at 283-84; Roger A. Fairfax Jr., *Delegation of the Criminal Prosecution Functions to Private Actors*, 43 U.C. Davis L. Rev. 411, 441-445 (2009) (hereinafter Fairfax, *Delegation of the Criminal Prosecution*). The involvement of a private prosecutor in a criminal prosecution raises significant due process concerns. Fairfax, *Delegation of the Criminal Prosecution*, supra note 7, at 424 (“[P]rivate prosecution arrangements, however, have come under serious criticism on constitutional due process grounds.”); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 Ark. L. Rev. 511, 550-53 (1994) (discussing due process concerns with private victim-retained prosecutors).

The Supreme Court acknowledges these concerns, stating in an opinion that reversed criminal contempt convictions obtained by a private prosecutor that

Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is

ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.

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).

1. Criminal prosecutions must be conducted under the authority of the State of Washington for a public purpose.

The people of the State of Washington are protected from private prosecutions by article IV, section 27 of the Washington State Constitution and from private prosecutors by article XI, section 5. The first of these provisions provides that “The style of all process shall be, “The State of Washington,” and all prosecutions shall be conducted in its name and by its authority.” Const. art. IV, § 27. The latter provision vests the criminal prosecution power in the locally elected prosecuting attorney.

The limited number of Washington cases that reference article IV, section 27 recognize that the provision supports public prosecutions by public prosecutors. *See, e.g., Protect the Peninsula’s Future*, 175 Wn. App. at 213-14. No Washington case has considered whether citizen initiated criminal prosecutions violate this provision. Other jurisdictions, however, have done so.

Article IV, section 27 is identical to article VI, section 20 of the California Constitution (1879). Beverly Rosenow, *The Journal of the Washington State Constitutional Convention 1889*, at 629 n. 59 (1962). California cases interpreting its identical provision are persuasive authority in Washington. See, e.g., *Wash. Water Jet v. Yarbrough*, 151 Wn.2d 470, 493, 90 P.3d 42 (2004) (California cases “are particularly instructive because they interpret constitutional language that served as a basis for, or is nearly identical to, our own”).

In *People v. Municipal Court for Ventura Judicial Dist. (Pellegrino)*, 103 Cal. Rptr. 645 (Cal. App. 1972), the court considered whether a citizen could initiate a criminal prosecution without the consent of the district attorney. The court found that private citizen initiated criminal prosecutions were prohibited by article VI, section 20 of the California Constitution which requires all criminal prosecutions to be conducted by the State’s authority and by statutes which make the public prosecutor the State’s attorney in criminal matters. *Pellegrino*, 103 Cal. Rptr. at 650-51. Allowing citizen initiated prosecutions is contrary to the principle that crimes are offenses against the public politic for which the punishment is fine or imprisonment. *Id.*, at 651. Experience demonstrates that district attorney oversight is necessary to protect the citizenry from the spiteful actions of private individuals. *Id.*, at 652. The problem is only exacerbated by the court’s inability to appoint a

special prosecutor to present a case that the district attorney has determined is without merit. *Id.*, at 652.¹⁴

New York expressed similar sentiments in *People v. Benoit*, 152 Misc. 2d 115, 575 N.Y.S.2d 750 (1991). In *Benoit*, a defendant whose prosecution was initiated by a private person after the district attorney's office declined to prosecute, challenged the constitutionality of the statute that authorized citizen complaints. The court, after noting the existence of numerous decisions that addressed procedures under the statute, recognized that no published decision had ever examined the statute itself. *Id.*, at 118. The court ultimately struck down the statute that authorized citizen initiated complaints in those counties with full-time district attorneys, stating that

The phrase "the People of the State of New York" embodies the concept that it is the State, through its public officials, which seeks to do justice on behalf of all of its citizens – both the victims and accused. Therefore, a prosecution for a crime by a private citizen pursuant to New York City Criminal Court Act § 50 after the People's representative – the local District Attorney, has declined to prosecute, makes a mockery of the criminal justice system by attempting to utilize the court for private ends.

Id., at 126.

CrRLJ 2.1(c) is indistinguishable from the statutes at issue in the California and New York cases. CrRLJ 2.1(c) is as incompatible with the

¹⁴District court judges in Washington, like their California counterparts, are unable to appoint a special prosecutor to forward a citizen initiated criminal complaint. See *Ladenburg v. Campbell*, 56 Wn. App. 701, 784 P.2d 1306 (1990).

Washington State Constitution as the California and New York statutes are to those states' constitutions. The Lewis County Superior Court's opinion declaring the court rule to be unconstitutional must be affirmed.

2. The prosecuting attorney's charging discretion may not be transferred to a private individual or to another elected official.

Every county in Washington has a full time prosecuting attorney. These prosecuting attorneys, like the district attorneys in California, are responsible for criminal prosecutions. See RCW 36.27.020(4) ("The prosecuting attorney shall: . . .(4) Prosecute all criminal and civil actions in which the state or the county may be a party).

Prosecuting attorneys in Washington occupy a constitutional office established in article XI, section 5 of the Washington State Constitution. Const. art. XI, sec. 5 ("The legislature, by general and uniform laws, shall provide for the election in the several counties of . . . prosecuting attorneys"). The duties vested in this constitutional office are those that were assigned to the prosecuting attorney in the years leading up to the adoption of the constitution. See *State ex rel. Johnston v. Melton*, 192 Wash. 379, 388, 73 P.2d 1334 (1937) ("In naming the county officers in § 5, Article 11 of the constitution, the people intended that those officers should exercise the powers and perform the duties then recognized as appertaining to the respective offices which they were to hold."). In the pre-statehood years, the

prosecuting attorney was the person responsible to prosecute all criminal actions in which the territory or any county within his district was a party. See Laws of 1855, pg. 417, § 4; Laws of 1860, pg. 335, § 3; Laws of 1863, pg. 408, § 4; Laws of 1877, pg. 246, § 6; Laws of 1879, pg. 93, § 6; Laws of 1883, pg. 73, § 10; Laws of 1885, pg. 61, § 5.

No entity may interfere with a prosecuting attorney's performance of his or her core functions, which includes "the exercise of broad charging discretion on behalf of the local community." *State v. Rice*, 174 Wn.2d 884, 905, 279 P.3d 869 (2012). While the legislature may recommend charging standards to prosecuting attorneys, the recommendations cannot be mandatory. *Rice*, 174 Wn.2d at 906-07. The legislative recommendations, moreover, do not "create a right or benefit, substantive or procedural, enforceable at law by a party in litigation with the state." RCW 9.94A.401.¹⁵

Absent a constitutional amendment,¹⁶ the core prosecution charging function may not be transferred to another elected official or to a private

¹⁵The appellants ignore this provision, contending instead that RCW 9.94A.411(2)(a) "mandated," Appellants' Appeal Brief, at 46 (emphasis in the original), filing charges against the targets. The legislative charging standards contained in RCW 9.94A.411 "are intended solely for the guidance of prosecutors in the state of Washington." RCW 9.94A.401. They provide no basis for judicial review of a prosecutor's charging decision. See, e.g. *State v. Lee*, 69 Wn. App. 31, 33-35, 847 P.2d 25 (1993).

¹⁶Changes to the core duties of the prosecuting attorney require a constitutional amendment. See AGLO 1973, No. 115; AGLO 1974 No. 15 at n 1. Cf. *State ex rel. Hamilton v. Troy*, 190 Wash. 483, 486 P.2d 413, 110 A.L.R. 1211 (1937) (changing the name of "prosecuting attorney" to "district attorney" requires a constitutional amendment). A constitutional amendment requires a two-thirds vote of both branches of the legislature, followed and confirmed by a vote of the people. See Wash. Const. art. XXIII, sec. 1.

individual without the prosecuting attorney's permission. *See generally State ex rel Banks v. Drummond*, 187 Wn.2d 157, 385 P.3d 769 (2016) (private attorneys may not be hired to perform a core function of the prosecuting attorney without the prosecuting attorney's permission). *See also State ex rel. Johnston v. Melton, supra* (sheriff's duties could not be lawfully performed by an investigator hired by the prosecuting attorney); *New Improvement Co. v. McNeil*, 100 Wash. 22, 170 P. 338 (1918) (private individual may not be hired to perform the duties of the elected assessor).

The only exception to the permission requirement is when the prosecuting attorney is disqualified pursuant to RCW 36.27.030. *See Drummond*, 187 Wn.2d at 177. RCW 36.27.030 requires that the prosecuting attorney is truly unavailable or unable to perform the duties of his office. *Drummond*, 187 Wn.2d at 177; *State v. Heaton*, 21 Wash. 59, 56 P.3d 843 (1899) (court may only replace a prosecuting attorney with a special prosecuting attorney in strict compliance with RCW 36.27.030). RCW 36.27.030 does not permit the replacement of a prosecuting attorney solely because a citizen or the court disagrees with the prosecuting attorney's charging decision. *See Heaton*, 21 Wash. at 62 ("The fact that the prosecuting attorney may deem it inadvisable to further prosecute, or that the facts charged do not constitute a crime, does not in any sense disqualify him from the further discharge of his duties in the matter."). *See also In re Recall*

of Lindquist, 172 Wn.2d 120, 133-34, 258 P.3d 9 (2011) (a prosecutor may not be recalled for exercising his wide discretion not to prosecute).

In the instant case, the Lewis County Prosecuting Attorney did not refuse to perform his duties. Jonathan Meyer personally reviewed the referral related to “Jay’s” death to determine whether charges would be filed. Two of Mr. Meyer’s deputies also reviewed the police reports and Ms. Johnson’s investigation. Having discharged his duty by reviewing the reports, Mr. Meyer and his deputies exercised the discretion they possessed as to whether charges should be filed. This is all the constitution and the statutes require of them.

CrRLJ 2.1(c) violates all of these precepts. The rule purports to authorize a private citizen and/or the district court judge to perform a core function of the prosecuting attorney—deciding whether to file criminal charges. Judge Toynbee’s Order Denying RALJ Appeal, CP 320, must be affirmed.

CrRLJ 2.1(c) also violates the rule that a separately elected official’s decision how to allocate the resources of his office may not be controlled by another. Thus the case law is clear that the county commissioners, who set the budgets for a prosecuting attorney’s office, may not substitute its judgment as to how the resources allocated in the budget should be prioritized. *See State ex rel. Banks v. Drummond, supra* (commissioners

could not retain a private attorney to perform duties that the commissioners believed the prosecuting attorney was not devoting sufficient time to performing); *In re Recall of Sandhaus*, 134 Wn.2d 662, 669-70, 953 P.2d 82 (1998) (Board of Commissioners' instituted recall petition dismissed as a prosecuting attorney who never refused to perform those civil legal tasks requested by the Board of Commissioners, is not subject to recall on the grounds that he placed priority on criminal matters). *See also Osborn v. Grant County*, 130 Wn.2d 615, 622, 926 P.2d 911 (1996) (county commissioners may not determine who a separately elected county official hires to fill a deputy position). Surely judicial branch meddling in the prosecuting attorney's judgment as to how best to deploy his office's resources would be equally improper. Yet, this is exactly what CrRLJ 2.1(c) purports to authorize.

In a case that raised the issue of "Will mandamus lie to compel a district attorney to prosecute every charge of crime that may be made by individuals desiring the prosecution of third person," the California Court of Appeals stated that:

A negative answer is indicated for the following reasons: As concerns the enforcement of the criminal law the office of district attorney is charged with grave responsibilities to the public. These responsibilities demand integrity, zeal and conscientious effort in the administration of justice under the criminal law. However, both as to investigation and prosecution that effort is subject to the budgetary control of boards of supervisors or other legislative bodies controlling

the number of deputies, investigators and other employees. Nothing could be more demoralizing to that effort or to efficient administration of the criminal law in our system of justice than requiring a district attorney's office to dissipate its effort on personal grievance, fanciful charges and idle prosecution.

Taliaferro v. Locke, 6 Cal. Rptr. 813, 815-16 (Cal. App. 1960).

A prosecuting attorney must consider all available resources for criminal prosecution within a jurisdiction and must deploy personnel in a manner that provides the greatest protection for the citizenry. *See generally* RCW 9.94A.411(1)(f) (cost of prosecution vis-a-vis to importance is a valid basis for declining to file charges); National District Attorneys Association, *National Prosecution Standards*, Std. 4-2.4, at 52 (3d ed. 2009) (cost of prosecution vis-a-vis benefit to the community appropriate factor to be considered in determining whether charges are consistent with the interests of justice); ABA Standards for Criminal Justice 3-4.4(a)(xiv) (4th ed. 2015) (“Among the factors which the prosecutor may properly consider in exercising discretion to initiate, decline, or dismiss a criminal charge, even though it meets the requirements of Standard 3-4.3, are: ... (xiv) the fair and efficient distribution of limited prosecutorial resources.”)

The Washington Supreme Court recognizes that the cost of prosecution must be considered in making the charging decision. In *State v. Howard*, 106 Wn.2d 39, 722 P.2d 783 (1985), a dispute arose between the State of Washington and Yakima County regarding the funding of the

extraordinary expenses arising from a murder prosecution that was initiated by the attorney general. In deciding that the expenses were the responsibility of the entity that brought the prosecution, the Court stated that

the Attorney General's decision to file a criminal charge should be subject to the same constraints as limit local prosecutors. The expenses of providing for an indigent's defense are a necessary expense of charging a crime, and the ability to shift responsibility for these expenses to another level of government camouflages the true costs of the decision. Resources are limited, and by placing responsibility for all direct costs of a criminal case with the official making the charging decision, we encourage wise and efficient allocation of these limited resources.

Howard, 106 Wn.2d at 44. CrRLJ 2.1(c) allows a citizen to initiate prosecution with the approval of a district court judge without taking any responsibility for the direct costs of the prosecution. This is another basis for affirming Judge Toynbee's thoughtful Order Denying RALJ Appeal.

3. The decision to file charges is solely vested in the executive branch.

Court authorization of citizen initiated criminal prosecutions is also barred by the separation of powers doctrine. The separation of powers doctrine is not specifically enunciated in either the Washington State or Federal Constitutions, but is universally recognized as deriving from the tripartite system of government established in both Constitutions. *State v. Blilie*, 132 Wn.2d 484, 489, 939 P.2d 691 (1997); *Carrick v. Locke*, 125

Wn.2d 129, 134-35, 882 P.2d 173 (1994).¹⁷

Under Washington's constitution, governmental authority is divided into three branches—legislative, executive, and judicial—and “[e]ach branch of government wields only the power it is given.” *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002); see Const. arts. II (creating the “Legislative Department” to wield “legislative authority”), III (creating “The Executive” to wield “executive power”), IV (creating “The Judiciary” to wield “judicial power”). The branches are not hermetically sealed, but the fundamental functions of each branch remain inviolate. *Rice*, 174 Wn.2d at 900; *Carrick*, 125 Wn.2d at 135 n.1.

This constitutional division of government is for the protection of individuals against centralized authority and abuses of power. *Rice*, 172 Wn.2d at 901-02. “The division of governmental authority into separate branches is especially important within the criminal justice system, given the substantial liberty interests at stake and the need for numerous checks against corruption, abuses of power, and other injustices.” *Rice*, 174 Wn.2d at 901.

In Washington, the decision to file charges is an executive function, not a judicial function. See, e.g., *Rice*, 174 Wn.2d at 900-903 (the state

¹⁷When a separation of powers challenge is raised involving different branches of state government, only the state constitution is implicated. *Carrick*, 125 Wn.2d at 135 n.1. However, federal principles regarding the separation of powers doctrine are relied upon in interpreting and applying the state's separation of powers doctrine. *State v. Wadsworth*, 139 Wn.2d 724, 735, 991 P.2d 80 (2000); *Blilie*, 132 Wn.2d at 489.

constitution vests the decision to file charges in the prosecuting attorney, a locally elected executive officer); *State v. Korum*, 157 Wn.2d 614, 655, 141 P.3d 13 (2006) (Johnson, J., concurring) (the discretionary charging decision is exclusively that of the executive branch); *State v. Walsh*, 143 Wn.2d 1, 10, 17 P.3d 591 (2001) (Alexander, C.J., concurring) (“Under principles of separation of powers, the charging decision is for the prosecuting attorney.”); *State v. Tracer*, 155 Wn. App. 171, 182, 229 P.3d 847 (2010), *overruled in part on other grounds*, 173 Wn.2d 708, 272 P.3d (2012) (“Under separation of powers principles, the decision to determine and file appropriate charges is vested in the prosecuting attorney as a member of the executive branch. . . . trial courts do not have the authority to substitute their judgment for that of the prosecutor’s” (citations omitted.)).

Other courts also recognize that the executive branch as the exclusive authority over whether to file charges and what charges to file. *See, e.g., Greenlaw v. United States*, 554 U.S. 237, 246, 128 S. Ct. 2559, 171 L. Ed. 2d 399 (2008) (“This Court has recognized that ‘the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.’”); *Pellegrino*, 103 Cal. Rptr. at 653-54 (doctrine of separation of powers vests the decision of whether to forego prosecution in the executive branch).

“Numerous courts have recognized that ‘[t]he interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief.’” *Tracer*, 155 Wn. App. at 186 (quoting *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 516, 10 L. Ed. 559 (1840)). Our founding fathers and other great thinkers caution that the judiciary’s encroachment on the executive branch’s prosecutorial authority can result in tyranny. *See, e.g.*, James Madison, *The Federalist*, No. 47, at 2:92-93 (1788) (“The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.”); Montesquieu, *The Spirit of the Laws*, 38 *Great Books of the Western World* 70 (Hutchins ed. 1952) (“Again there is no liberty if the judiciary power be not separated from the legislative and executive. . . . Were it joined to the executive power, the judge might behave with violence and oppression.”). The California Court of Appeals, consistent with these sentiments, has stated that the spectacle of a judge, who attempted to assume the rule of both judge and prosecutor in order to move a prosecution forward, “should be repugnant to anyone dedicated to our system of jurisprudence.” *Pellegrino*, 103 Cal. Rptr. at 652.

CrRLJ 2.1(c) requires the judiciary to wear two hats at the same time – that of prosecutor and of neutral and detached magistrate. The separation

of powers doctrine prohibits such a feat. *Mistretta v. United States*, 488 U.S. 361, 404, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989). CrRLJ 2.1(c) requires the judge to both determine the existence of probable cause *and* to evaluate the wisdom of filing charges in light of the complainant's motives, prosecutorial resources, and other myriad factors. *See* CrRLJ 2.1(c)(7) (incorporating RCW 9.94A.411). This combining of the accusatory process with that of the neutral and detached magistrate could constitute a violation of the defendant's due process rights. *See In re Murchison*, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955) (improper for judge who served as part of the accusatory process that led to a contempt charge to later preside at the contempt hearing).

Judge Toynbee's determination that CrRLJ 2.1(c) unconstitutionally violates the separation of powers doctrine is supported by numerous other courts. *See, e.g., Harrington v. Almy*, 977 F.2d 37, 41 (1st Cir. 1992) ("In the federal system, the separation of powers proscribes a judicial direction that a prosecutor commence a particular prosecution."); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379-380 (2nd Cir. 1973); *People v. Smith*, 53 Cal. App. 3d 655, 126 Cal. Rptr. 195 (1975); *People v. Municipal Court for Ventura Judicial Dist. (Pellegrino)*, *supra*; *State v. Iowa District Court for Johnson County*, 568 N.W.2d 505, 508 (Iowa Sup. 1997); *People v. Herrick*, 550 N.W.2d 541 (Mich. App. 1996) (separation of powers

prohibits the judiciary from overruling a prosecutor's exercise of executive discretion not to file charges, even in cases in which the a complainant acquires a citizen's warrant).

Judge Toynee's well considered opinion is also consistent with Washington cases that address the court's power to compel another officer to act. Numerous Washington mandamus cases recognize that while a court can compel an officer to exercise his or her discretion, the court cannot direct how the officer should exercise his discretion. *See, e.g. In re Pers. Restraint of Dyer*, 143 Wn.2d 384, 398, 20 P.3d 907 (2001) (the act of mandamus compels performance of a duty, but cannot lie to control discretion); *Peterson v. Dep't of Ecology*, 92 Wn.2d 306, 314, 596 P.2d 285 (1979) (mandamus can direct an officer to exercise a mandatory discretionary duty, but not the manner of exercising that discretion). Our state's appellate decisions are consistent with decisions from other jurisdictions. *See, e.g., State ex rel. Schultz v. Harper*, 573 S.W.2d 427 (Mo. App. 1978) (a court cannot compel a prosecutor to file charges based upon a citizen complaint where the prosecutor, after investigation, has exercised his discretion not to file charges).

The undisputed record in this case is that the Lewis County Prosecuting Attorney and his deputies, while acting as attorneys for the State of Washington, reviewed the circumstances surrounding "Jay's" death on

three separate occasions. The undisputed record is that counsel for the State exercised their discretion to not file charges. To the extent that CrRLJ 2.1(c) allows the district court, at the request of a private citizen, to compel the State to change how it exercises its discretion, the rule unconstitutionally violates the separation of power doctrine.

Such judicial overstepping is not necessary in Washington, moreover, as an aggrieved person has recourse to another executive branch entity. The governor has the duty to direct the attorney general to aid any prosecuting attorney in the discharge of the prosecutor's duties. RCW 43.06.010. An attorney general, who is so directed, possesses the absolute power to initiate and conduct prosecutions. *See* RCW 43.10.232. Although rarely invoked, a petition to the governor did result in murder charges being filed in Yakima County after the prosecuting attorney declined to prosecute the suspected perpetrator. *See State v. Howard, supra.*

C. PRIVATE PERSONS ARE NOT AUTHORIZED TO REQUEST THE CONVENING OF A GRAND JURY OR TO DIRECTLY ACCESS A GRAND JURY.

The Lewis County Superior Court's en banc decision denying Mr. Ware's petition to convene a grand jury must be affirmed for all of the reasons identified in section III. B. of this brief. Allowing grand jury access to a private citizen after a prosecutor has thoroughly reviewed his claims would be just as troublesome as private prosecutions, requiring "an

intolerable level of intrusion by the judiciary into an executive function – the exercise of prosecutorial discretion in deciding *not* to pursue an investigation or press a charge.” *In re Grand Jury Appearance Request by Loigman*, 870 A.2d 249, 257 (N.J. 2005). “Such an erosion of the prosecutor’s screening authority would be disruptive of the orderly and fair disposition of cases and increase the likelihood that wrongful indictments will be returned.” *Id.*

The decision to deny Mr. Ware’s petition to convene a grand jury may also be sustained on non-constitutional grounds. Where an issue may be resolved on statutory grounds, an appellate court will generally avoid deciding the issue on constitutional grounds. *See, e.g., Tunstall v. Bergeson*, 141 Wn.2d 201, 210, 5 P.3d 691 (2000).

The Washington State Constitution contains one provision that expressly refers to grand juries.¹⁸ Article I, section 26 of the Washington State Constitution states that: “No grand jury shall be drawn or summoned in any county, except the superior judge thereof shall so order.” This provision is silent on how many members comprise a grand jury, the method of drawing or summoning a grand jury, who may attend a grand jury, and a myriad of

¹⁸Another provision of the Washington State Constitution refers to indictments, which are the fruits of a grand jury proceeding. *See* Const. art. I, sec. 25 (“Offenses heretofore required to be prosecuted by indictment may be prosecuted by information, or by indictment, as shall be prescribed by law.”). Similar provisions in other state constitutions do “not confer an unbridled right of access, allowing any person to make an accusation or to present evidence to the grand jury.” *In re Grand Jury Appearance Request by Loigman*, 870 A.2d 249 (N.J. 2005).

other issues. It therefore fell to the legislature to address all of those issues by statute. *See generally* Const. art. II, sec. 1 (legislature has the power to adopt general laws); Const. art. I, sec. 25 (legislature to prescribe by law how offenses are to be prosecuted). *Accord Paul W. De Laney & Assocs. v. Superior Court for King County*, 69 Wn.2d 519, 525, 418 P.2d 747 (1966) (Hunter, J., dissenting) (“the grand jury in this state is a creature of the legislature”); *State v. McGilvery*, 20 Wash. 240, 247, 55 Pac. 115 (1898) (the question of procedure, whether by indictment or information, is left to the legislature). To the extent the legislature’s grand jury laws are inconsistent with any common law right a private person had to request the summoning of a grand jury and/or to appear before a grand jury, the statutes control. *Probst v. Dep't of Ret. Sys.*, 167 Wn. App. 180, 189, 271 P.3d 966, 971 (2012) (“if a statute is inconsistent with the common law, it is deemed to abrogate the common law”); RCW 4.04.010; RCW 9A.04.060.¹⁹

In territorial days, the legislature adopted comprehensive procedures for our state grand juries. *See Paul W. De Laney & Assocs.*, 69 Wn.2d at 525 (detailing the legislative history of grand jury statutes from territorial days

¹⁹Citing to non-Washington cases, Mr. Ware contends that the common law allowed for a grand jury to prefer indictments at the request of private person. *See* Appellants’ Appeal Brief, at 32. Other jurisdictions have held that there is no common law or constitutional right of access to a grand jury by a private citizen. *See Loigman*, 870 A.2d at 253 and 258 n. 6 (collecting cases). A significant number of jurisdictions that allow private persons to directly access the grand jury, confer this right of access by statute. *Id.* at 253 n. 4 (collecting statutes).

until 1966). These early statutes, with minimal changes, were codified in Chapter 10.28 RCW.

The Criminal Investigatory Act of 1971²⁰ which modernized and recodified the provisions relating to grand juries, is a continuation of Chapter 10.28 RCW. *State v. Carroll*, 81 Wn.2d 95, 98-99, 500 P.2d 115 (1972). A significant difference between the pre-statehood grand jury statutes which remained in effect until 1971, and the current grand jury statutes is that the pre-1971 grand jury statutes allowed private persons to seek indictments through a private prosecutor. *See generally* Code of 1881 § 996, repealed by Laws of 1971, ch. 67, § 20(22).²¹ The modern grand jury limits who may

²⁰The Criminal Investigatory Act, RCW 10.27.010, is largely codified in Chapter 10.27 RCW.

²¹The majority of the grand jury statutes were enacted in 1881, *see generally* Code of 1881, §§ 997-1001, eight years before statehood. *See* 26 Stat. Proclamations at 10 (Nov. 11, 1889) (admitting Washington into the Union as a state). The Washington Supreme Court never had an occasion to consider whether the private prosecutor provision was compatible with the Washington State Constitution.

Code of 1881, § 996, provided that:

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.

The only case that cites to this repealed provision is *In re Permstick*, 3 Wash. 672, 29 Pac. 350 (1892). The sole issue in *Permstick* was whether Code of 1881, § 2103 allowed a jury to order the complaining witness to pay the costs of trial following the acquittal of the defendant.

request that a court summon a grand jury to public attorneys²² and corporation counsel²³ or city attorneys. RCW 10.27.030.²⁴ Whether this change was prudent or wise is not a question for the courts. *See McGilvery*, 20 Wash. at 247 (“Under [article I, section 25 of the Washington State Constitution], the question of procedure is left to the legislature; and, if it can be ascertained that the procedure which was adopted in this case has legislative sanction, it is idle for the courts to concern themselves with the question of policy involved in the legislation.”).

Mr. Ware does not address the legislature’s 1971 decision to repeal the provision allowing private prosecutors to access the grand jury, while limiting the ability to request a grand jury to public attorneys. He claims that

²²The term “public attorney” in this context means “the prosecuting attorney of the county in which a grand jury or special grand jury is impaneled; the attorney general of the state of Washington when acting pursuant to RCW 10.27.070(9) and, the special prosecutor appointed by the governor, pursuant to RCW 10.27.070(10), and their deputies or special deputies.” RCW 10.27.020(2).

²³In the context of the entire grand jury chapter, “corporation counsel” is limited to the attorney for a city or town. *See, e.g.*, RCW 10.27.070(12) (“Subject to the approval of the court, the corporation counsel or city attorney for any city or town in the county where any grand jury has been convened may appear as a witness before the grand jury to advise the grand jury of any criminal activity or corruption within his or her jurisdiction.”). This is consistent with the article XI, section 10 of the Washington State Constitution which recognizes that cities are towns are municipal corporations.

²⁴RCW 10.27.030 states that:

No grand jury shall be summoned to attend at the superior court of any county except upon an order signed by a majority of the judges thereof. A grand jury shall be summoned by the court, where the public interest so demands, whenever in its opinion there is sufficient evidence of criminal activity or corruption within the county or whenever so requested by a public attorney, corporation counsel or city attorney upon showing of good cause.

the superior court judges' authority to summon a grand jury without a request from a public attorney allows a private person to request the judges to exercise their power. *See* Appellants' Appeal Brief, at 30. Mr. Ware's interpretation of RCW 10.27.030, however, improperly renders the list of specific attorneys who may request the summoning of a grand jury superfluous. His construction, therefore, must be rejected. *See, e.g., State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous).

The elimination of the provision allowing private prosecutors to request and access the grand jury must be given meaning. When language contained in an earlier statute is not included in a later statute, the omission is interpreted as an intentional act. *See, e.g., State v. Veliz*, 176 Wn.2d 849, 863, 298 P.3d 75 (2013) ("The contrast between the new statute and the old statute is stark. The legislature removed all custody and visitation language from RCW 26.50.060. It did not, however, replace it with corresponding parenting plan language. This omission indicates that the legislature did not intend DVPA orders to be parenting plans."). Even when a court believes the omission was unintentional, the court may not add language it believes was omitted. *See, e.g., Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003) ("[A] court must not add words where the legislature has

chosen not to include them.”); *State v. Moses*, 145 Wn.2d 370, 374, 37 P.3d 1216 (2002) (“Where the Legislature omits language from a statute, intentionally or inadvertently, this court will not read into the statute the language that it believes was omitted.”).

Mr. Ware’s construction of RCW 10.27.030 has been rejected by other jurisdictions whose statutes authorize a judge to convene a grand jury without a request from the prosecutor. In *Hovoet v. State*, 689 N.E.2d 469 (Ind. Ct. App. 1997), parents of a daughter who was murdered were unhappy with the prosecutor’s failure to charge anyone with the crime. They filed a petition which requested that the court convene a grand jury to investigate the crime. The parents claimed that Indiana Code section 35-34-2-2²⁵ gave them the right to request that the court convene a grand jury. *Hovoet*, 689 N.E.2d at 472.

²⁵This statute provided that:

(a) A grand jury shall consist of six (6) persons, and may be impaneled by the circuit court or a superior court with criminal jurisdiction. A grand jury shall hear and examine evidence concerning crimes and shall take action with respect to this evidence as provided by law.

(b) The court shall call the grand jury into session at the request of the prosecuting attorney. The court may also convene the grand jury without a request from the prosecuting attorney. The grand jury shall be convened by the judge issuing an order requiring the jury to meet at a time specified.

Ind. Code. § 35-34-2-2 (1993).

The Indiana Court of Appeals rejected the parents claim that Indiana Code section 35-34-2-2 created a right of action for a private citizen to request that the court convene a grand jury. *Hovoet*, 689 N.E.2d at 472. Before stating its conclusion, the court recognized the well-settled principle that the decision whether to prosecute lies within the prosecutor's sole discretion and that a court cannot substitute its discretion for that of the prosecuting attorney. *Id.* The court further noted that the powers and functions of the grand jury are controlled by statute and the a private citizen does not have a right to appear before the grand jury and present evidence of a crime. *Id.* (citing Ind. Code. § 35-34-2-9²⁶). The court's bottom line was that

In light of the broad discretion of the prosecutor as to whether to bring a charge, and the legislature's intent to limit the ability of private citizens to present evidence to a grand jury, we believe that this statutory scheme was not intended to provide a remedy for a prosecutor's failure to bring criminal charges in the form of a right of action on the part of a citizen to convene a grand jury.

Holvoet, 689 N.E.2d at 472.

²⁶Section 35-24-2-9 of the Indiana Code provided:

(a) Except as provided by subsection (b) of this section, no person has a right to appear as a witness before the grand jury or to present any evidence or information to the grand jury.

(b) A target of a grand jury investigation shall be given the right to testify before the grand jury, provided he signs a waiver of immunity.

Ind. Code § 35-34-2-9 (1993).

Both of the factors that led the Indiana Court of Appeals to determine that a private citizen has no right to convene a grand jury are present in Washington. The decision to file criminal charges is vested in Washington in the prosecuting attorney. *See supra* at pages 24-27. Washington's grand jury statutes, like those of Indiana, do not confer a right to appear as a witness before the grand jury upon a private citizen.²⁷ *See* RCW 10.27.140.²⁸

²⁷Even the Code of 1881 limited access to the grand jury. Code of 1881, § 990 stated that:

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.

²⁸RCW 10.27.140 states that:

(1) Except as provided in this section, no person has the right to appear as a witness in a grand jury or special inquiry judge proceeding.

(2) A public attorney may call as a witness in a grand jury or special inquiry judge proceeding any person believed by him or her to possess information or knowledge relevant thereto and may issue legal process and subpoena to compel his or her attendance and the production of evidence.

(3) The grand jury or special inquiry judge may cause to be called as a witness any person believed by it to possess relevant information or knowledge. If the grand jury or special inquiry judge desires to hear any such witness who was not called by a public attorney, it may direct a public attorney to issue and serve a subpoena upon such witness and the public attorney must comply with such direction. At any time after service of such subpoena and before the return date thereof, however, the public attorney may apply to the court which impaneled the grand jury for an order vacating or modifying the subpoena on the grounds that such is in the public interest. Upon such application, the court may in its discretion vacate the subpoena, extend its return date, attach reasonable conditions to directions, or make such other qualification thereof as is appropriate.

(4) The proceedings to summon a person and compel him or her to testify or provide evidence shall as far as possible be the same as proceedings to summon witnesses and compel their attendance. Such

Washington's grand jury statutes, moreover, limit who the grand jury may seek or receive legal advice from to "the court and public attorneys." RCW 10.27.070(8). These statutory provisions, coupled with the repeal of the provision authorizing private prosecutors, compels the conclusion that the legislature has not authorized a private person to request the convening of a grand jury when the private person is dissatisfied with the prosecutor's decision not to bring charges. The denial of Mr. Ware's petition to convene a grand jury is, moreover, consistent with the principle that a statute court must interpret a statutory provision in light of the entire act. *See, e.g., Jametsky v. Olsen*, 179 Wn.2d 756, 317 P.3d 1003 (2014) (the plain meaning of a statute is derived from the context of the entire act as well as any related statutes which disclose legislative intent about the provision in question). The order denying Mr. Ware's request must, therefore, be affirmed.

Nothing in the preceding paragraphs prevents a citizen, such as Mr. Ware, who has information regarding crime or corruption from sharing his information with the superior court bench. Once made aware of such information, the superior court judges may take no further action, may refer the information to the prosecuting attorney or to the appropriate law enforcement agency for investigation, or may convene a grand jury. The

persons shall receive only those fees paid witnesses in superior court criminal trials.

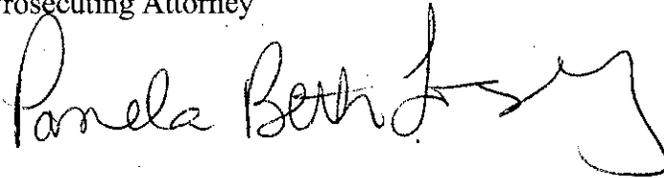
citizen, however, lacks any authority to bring an action to channel the superior court judges' course of action towards the convening of a grand jury.

IV. CONCLUSION

Ms. Johnson and Mr. Ware are clearly unhappy with the State's decision not to charge the targets with certain crimes. They have a remedy—the ballot box. *See generally Venhaus v. Pulaski County*, 691 S.W.2d 141, 144 (Ark. 1985) (“Only the people in an election have the right to remove a prosecuting attorney from office due to objections to use of discretion.”); *In re Padgett*, 678 P.2d 870, 873 (Wyo. 1984) (if private individuals “are unsatisfied [with a prosecutor’s inaction], they are free to express their feelings at the polls.”). Their desire to eschew this remedy in favor of the courts must be denied and the Lewis County Superior Court’s decisions must be affirmed.

Respectfully submitted this 11th day of October, 2017.

JONATHAN L. MEYER
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Pamela Beth Loginsky". The signature is written in a cursive style with a large, sweeping initial "P".

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

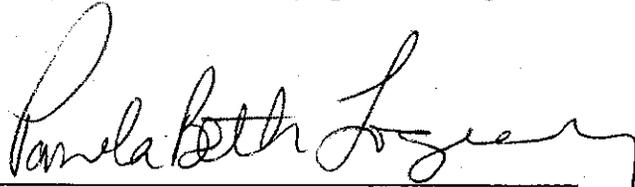
Proof of Service

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 11th day of October, 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.

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

Signed this 11th day of October, at Olympia, Washington.


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



Positive

As of: August 3, 2017 6:49 PM Z

In re Call a Grand Jury Filed by Reardon

Court of Appeals of Kansas

October 7, 2011, Opinion Filed

No. 103,723

Reporter

2011 Kan. App. Unpub. LEXIS 832 *; 260 P.3d 1249

IN THE MATTER OF THE PETITION TO CALL A
GRAND JURY FILED BY T.J. REARDON.

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR
CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC
REPORTER.

Subsequent History: Review denied by *In re Reardon*,
2012 Kan. LEXIS 407 (Kan., June 13, 2012)

Prior History: [*1] Appeal from Wyandotte District
Court; BARRY A. BENNINGTON, judge.

State v. Turner, 45 Kan. App. 2d 744, 250 P.3d 286,
2011 Kan. App. LEXIS 72 (2011)

Disposition: Appeal dismissed.

Core Terms

grand jury, district court, signatures, **convene**,
disallowance, **summoned**, election, statutes, **grand
jury** proceeding, statutory authority, **standing** to appeal,
days, qualified electors, right to appeal, aggrieved,
parties, signer

Counsel: T.J. Reardon, appellant, Pro se.

Daniel D. Crabtree, of Stinson Morrison Hecker LLP, of
Overland Park, and John C. Aisenbrey, of Kansas City,
Missouri, for appellee The Unified Government of
Wyandotte County/Kansas City.

Carl A. Gallagher, of McAnany Van Cleave & Phillips,
P.A., of Kansas City, for appellee Kansas City Board of
Public Utilities.

Jerome A. Gorman, district attorney, and Derek
Schmidt, attorney general, for appellee State of Kansas.

Judges: Before MALONE, P.J., MARQUARDT and
HILL, JJ.

Opinion

MEMORANDUM OPINION

Per Curiam: T.J. Reardon appeals the district court's
order disallowing his petition to convene a grand jury
pursuant to *K.S.A. 22-3001(2)*. For the reasons set forth
herein, we conclude this court lacks jurisdiction to
consider Reardon's appeal.

To understand this appeal requires some knowledge of
a previous appeal in *State v. Turner*, 45 Kan. App. 2d
744, 250 P.3d 286 (2011), *pet. for rev.* filed May 18,
2011, which stemmed from a grand jury proceeding
involving some of the same parties involved herein. On
January 9, 2008, Thomas "T.J." Reardon filed a petition
(the 2008 petition) with the District Court [*2] of
Wyandotte County, calling for a grand jury pursuant to
K.S.A. 22-3001(2) to investigate allegations of criminal
activity by the Board of Public Utilities of the Unified
Government of Wyandotte County/Kansas City, Kansas
(BPU). 45 Kan. App. 2d at 745-46. A grand jury was
convened and handed down multiple-count indictments
against two individuals. 45 Kan. App. 2d at 746. The
criminal case initiated by this grand jury proceeded
under district court case number 2008 CR 1546. The
defendants filed a joint motion to dismiss the
indictments, which the district court granted. 45 Kan.
App. 2d at 747-48. On appeal, this court reversed the
dismissal of the indictments and remanded for further
proceedings. 45 Kan. App. 2d at 765.

On October 21, 2009, while the appeal from the

Appendix A

proceedings initiated by the 2008 petition was pending in this court, Reardon filed another petition (the 2009 petition) to call a grand jury in the District Court of Wyandotte County. The 2009 petition requested a grand jury to investigate (1) alleged misconduct and criminal actions by the BPU, the Unified Government of Wyandotte County/Kansas City, Kansas (Unified Government), and Kansas City Kansas Community College; [*3] (2) alleged conspiracies by Kansas realtors in violation of the Kansas Consumer Protection Act; and (3) alleged judicial misconduct during the 2008 grand jury proceedings. This grand jury petition was assigned district court case number 2009 MR 225.

That same day, pursuant to K.S.A. 22-3001(2), the clerk of the district court delivered the signatures on the 2009 petition to the Wyandotte County Election Commissioner, Bruce Newby. Reardon's petition needed to bear the signatures of electors equal to 100 plus 2% of the total number of votes cast for governor in Wyandotte County in the last preceding election. K.S.A. 22-3001(2). A "qualified elector" is a person who is at least 18 years old and is a citizen of Kansas and the district in which he or she desires to vote. The number of votes cast for the governor in the relevant election was 32,761; therefore, Reardon needed 756 electors' signatures. Newby's staff verified that the names, addresses, and signatures on the petition were a reasonable match to those in their files but did not make any effort to determine whether the signatures were original signatures. In a letter dated October 28, 2009, Newby returned the petition to the district [*4] court and certified that 900 of the signatures were those of qualified electors.

On November 10, 2009, the Unified Government filed an objection to the petition to empanel a grand jury, alleging that at least 354 of the signatures, in the 2009 petition were photocopied from the 2008 petition. The Unified Government also argued that the petition failed to meet the requirements of K.S.A. 25-3601 et seq. The BPU joined the objection to the petition to empanel a grand jury.

On December 4, 2009, the district court held a hearing on the objections. Reardon was present at the hearing, as was the Wyandotte County district attorney, and attorneys representing the Unified Government and the BPU. The Unified Government called numerous witnesses to testify: Newby, who explained his office's signature verification process; Kathleen Collins, the Clerk of the District Court for Wyandotte County; Daniel McCarty, a forensic document examiner who testified

that numerous signatures in the 2009 petition were photocopied from the 2008 petition; witnesses whose names were on the 2009 petition but testified they had not signed it; a witness whose name was on the 2009 petition but who thought he had signed a [*5] petition to save the walnut trees at Wyandotte County Lake; and a witness who testified he signed the petition but Reardon had not presented it to him, despite Reardon's signed affirmation on the petition page.

The BPU and the State did not present any evidence. Reardon called Patricia Parker-Jambrosic, who testified that she helped Reardon obtain signatures on the 2009 petition. Jambrosic testified that Reardon was at every location at which they obtained signatures. Reardon also testified on his own behalf. He testified that the names were the same on the two petitions because he attended the same places, meetings, parades, etc., to gather signatures both years. Reardon testified that the people who were now denying they had signed the 2009 petition were coerced into doing so.

On December 8, 2009, the district court filed a memorandum decision, detailing the procedural history of the matter, the evidence presented at the hearing, findings of fact, conclusions of law, and the district court's rulings and order. The district court ruled that the petition did not contain the number of valid original signatures required by law to compel the summoning of a grand jury under K.S.A. 22-3001 et seq. [*6] The district court also ruled that the petition failed to follow the prescribed statutory form by failing to state a single issue or proposition under one distinctive title and by failing to provide the dates upon which each elector signed the petition. Accordingly, the district court disallowed the entire petition and refused to summon a grand jury based on the petition. Reardon timely filed a notice of appeal.

On appeal, Reardon claims the district court erred by disallowing the 2009 petition to convene a grand jury. Soon after the appeal was docketed, the Unified Government filed a motion with this court requesting the involuntary dismissal of the appeal. The Unified Government argued that Reardon lacked statutory authority to prosecute the appeal and that he also lacked standing to prosecute the appeal. The BPU filed a notice joining the motion to dismiss the appeal. Reardon filed a response arguing that the appeal should be retained. This court denied the motion on present showing and ordered the parties to brief the issue for the assigned hearing panel.

We will first address whether this court has jurisdiction to consider Reardon's appeal. Whether jurisdiction exists is a question [*7] of law over which an appellate court's scope of review is unlimited. Kansas Medical Mut. Ins. Co. v. Svaty, 291 Kan. 597, 609, 244 P.3d 642 (2010). In addressing appellate jurisdiction, we make two inquiries. First, does Reardon have statutory authority to appeal the disallowance of his petition to **convene** a **grand jury**? Second, does Reardon have **standing** to appeal the disallowance of his petition to **convene** a **grand jury**?

Does Reardon have statutory authority to appeal the disallowance of his petition to convene a grand jury?

In their briefs, the Unified Government and the BPU renew the arguments made in the motion for involuntary dismissal. They argue that the right to appeal is "strictly a statutory right," and where there is no statutory authority for an appeal, none exists. They assert that because the grand jury statutes, K.S.A. 22-3001 et seq., do not create a right to appeal for the person whose petition to call a grand jury is subsequently disallowed, there is no avenue for such an appeal. The State of Kansas joins in this argument.

Reardon, on the other hand, argues that because grand jury proceedings are neither civil nor criminal in nature, criminal procedure does not control [*8] and he is allowed to appeal under K.S.A. 60-2102(a)(4), which creates a right to appeal to the Court of Appeals from "[a] final decision in any action, except in an action where a direct appeal to the supreme court is required by law." Reardon also speculates that the underlying purpose of the hearing in district court was to prepare and gather evidence for a future criminal case against him for falsifying signatures on the petition. Reardon argues that he is entitled to have this court review and evaluate the evidence "produced against him" at the hearing.

The right to appeal is entirely statutory and is not a right contained in the United States or Kansas Constitutions. State v. Gill, 287 Kan. 289, 294, 196 P.3d 369 (2008). Subject to certain exceptions, Kansas appellate courts have jurisdiction to entertain an appeal only if the appeal is taken within the time limitations and in the manner prescribed by the applicable statutes. 287 Kan. at 294. As the appellees point out, there is nothing in the grand jury statutes permitting an appeal from the denial of a petition to summon a grand jury.

K.S.A. 22-3001 creates two ways in which a grand jury

may be summoned: (1) a majority of district [*9] judges in any judicial district may determine it to be in the public interest and order a grand jury to be summoned, and

"(2) A grand jury shall be summoned in any county within 60 days after a petition praying therefor is presented to the district court, bearing the signatures of a number of electors equal to 100 plus 2% of the total number of votes cast for the governor in the county in the last preceding election. The petition shall be in substantially the following form:

"The undersigned qualified electors of the county of __ and state of Kansas hereby request that the district court of __ county, Kansas, within 60 days after the filing of this petition, cause a grand jury to be summoned in the county to investigate alleged violations of law and to perform such other duties as may be authorized by law.

"The signatures to the petition need not all be affixed to one paper, but each paper to which signatures are affixed shall have substantially the foregoing form written or printed at the top thereof. Each signer shall add to such signer's signature such signer's place of residence, giving the street and number or rural route number, if any. One of the signers of each paper shall verify [*10] upon oath that each signature appearing on the paper is the genuine signature of the person whose name it purports to be and that such signer believes that the statements in the petition are true. The petition shall be filed in the office of the clerk of the district court who shall forthwith transmit it to the county election officer, who shall determine whether the persons whose signatures are affixed to the petition are qualified electors of the county. Thereupon, the county election officer shall return the petition to the clerk of the district court, together with such election officer's certificate stating the number of qualified electors of the county whose signatures appear on the petition and the aggregate number of votes cast for all candidates for governor in the county in the last preceding election. The judge or judges of the district court of the county shall then consider the petition and, if it is found that the petition is in proper form and bears the signatures of the required number of electors, a grand jury shall be ordered to be summoned."

The remaining grand jury statutes do not provide for an appeal from grand jury proceedings, although the legislature knows how [*11] to provide procedures for

an aggrieved party to bring an action on a citizen-filed petition when it desires to do so. Compare K.S.A. 25-4317 (providing for district court review of a determination in regards to petitions to recall elected state officers); K.S.A. 25-4331 (same with regard to local officers); Baker v. Gibson, 22 Kan. App. 2d 36, 37-40, 913 P.2d 1218 (1995) (Interpreting K.S.A. 25-4331 and reviewing a district court's determination that a recall petition was legally insufficient) with K.S.A. 22-3001 et seq. (containing no right to appeal the finding that a petition to call a grand jury is insufficient).

Further, the few jurisdictions that allow a challenge to the denial of a petition to summon a grand jury have explicitly provided for such an appeal, whereas Kansas has not done so. For example, Oklahoma statutes providing for grand juries impaneled at the request of citizen petitions state that the presiding district judge shall rule on the sufficiency of such a petition within 4 business days of the initial filing, and if the petition is found deficient, the petitioners shall have 2 days to amend the petition to conform to the district court's order. Okla. Stat. tit. 38, § 102 [*12] (2001). Upon the filing of an amended petition, the district court has 2 days to rule whether the amended petition is sufficient, and "[a]ny such order quashing an amended petition shall be appealable when entered," while "[a]n order determining such petition or amended petition to be sufficient shall not be appealable." Okla. Stat. tit. 38, § 102.

Nevada also allows for a citizen-requested grand jury to investigate alleged misdeeds by public officers and, after the citizen files a proper request, "[t]he district judge shall act upon the affidavit or petition within 5 days. If he or she fails or refuses to recall or summon a grand jury, the affiant or petitioner may proceed as provided in NRS 6.140." Nev. Rev. Stat. Ann. § 6.130 (2009). The referenced Nevada statute provides:

"In any county, if the district judge for any reason fails or refuses to select a grand jury when required, any interested person resident of the county may apply to the Supreme Court for an order directing the selection of a grand jury. The application must be supported by affidavits setting forth the true facts as known to the applicant, and the certificate of the county clerk that a grand jury has not been selected [*13] within the time fixed or otherwise as the facts may be. The Supreme Court shall issue its order, if satisfied that a grand jury should be called, directing the county clerk to select and impanel a grand jury, according to the provisions of [the grand

jury statutes]." Nev. Rev. Stat. Ann. § 6.140 (2009).

Unlike the legislature in these states, the Kansas Legislature has not seen fit to include in its grand jury statutes a right to challenge or appeal the denial of a citizen petition. An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. Padron v. Lopez, 289 Kan. 1089, 1097, 220 P.3d 345 (2009). This court "cannot add something to a statute that is not readily found in the language of the statute. [Citation omitted.]" Casco v. Armour Swift-Eckrich, 283 Kan. 508, 525, 154 P.3d 494 (2007).

The grand jury statutes, K.S.A. 22-3001 et seq., are contained within the code of criminal procedure, and arguably any appeal right would be controlled by K.S.A. 22-3602 governing criminal appeals. But this statute does not help Reardon because it only provides for appeals by the defendant or by the prosecution [*14] in a criminal case. Strictly speaking, there are no parties to a grand jury proceeding, and Reardon's appeal cannot be categorized as an appeal by the defendant or by the prosecution under K.S.A. 22-3602.

As stated above, Reardon argues that because grand jury proceedings are neither civil nor criminal in nature, criminal procedure does not control and he may appeal under K.S.A. 60-2102(a)(4), which allows for an appeal from a "final decision in any action." Reardon does not explain why this court should apply the code of civil procedure to a proceeding under K.S.A. 22-3001 et seq. that is neither civil nor criminal in nature, other than stating that "[b]y elimination, only civil procedure can apply."

"In Kansas, a grand jury is a creature of statute and not of the constitution. Its function is investigatory and accusatory in contrast to a petit jury, which determines the guilt or innocence of an accused." State v. Snodgrass, 267 Kan. 185, 190, 979 P.2d 664 (1999). In Snodgrass, our Supreme Court addressed an appeal from a district court order dismissing indictments because the grand jury was not lawfully impaneled. The defendants argued that the impaneling was improper because there [*15] was no voir dire. Our Supreme Court noted the distinctive nature of grand jury proceedings and stated that, although there are statutory requirements for the voir dire and selection of jurors in civil trials and criminal trials, "[t]he simple response to the defendants' complaint is that there is no statutory requirement to conduct a traditional voir dire of the grand jurors." 267 Kan. at 190. Moreover, our

Supreme Court stated: "A grand jury is not a civil or criminal trial." 267 Kan. at 190.

Under the reasoning in Snodgrass, grand jury proceedings may follow unique paths and are not necessarily governed by either the code of criminal or civil procedure. Because a grand jury is neither a criminal nor a civil proceeding, and because there is no statutory right to appeal in the grand jury statutes, we conclude Reardon has no statutory authority to appeal from the disallowance of his petition to convene a grand jury.

Does Reardon have standing to appeal the disallowance of his petition to convene a grand jury?

The appellees also contend that Reardon does not have standing to appeal the disallowance of his petition to convene a grand jury. The appellees argue that when Reardon submitted [*16] the petition to call a grand jury, he was placed in a role equivalent to that of a complaining witness, and his involvement in the matter ceased. Just as a complaining witness has no right to appeal the dismissal of a criminal complaint or to control a criminal prosecution after its initiation, the appellees argue that Reardon has no standing to appeal the order disallowing his petition.

"Standing is a jurisdictional question whereby courts determine "whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant invocation of jurisdiction and to justify exercise of the court's remedial powers on his or her behalf." [Citation omitted.] 'Because standing implicate[s] the court's jurisdiction to hear a case, the existence of standing is a question of law over which this court's scope of review is unlimited.' [Citation omitted.]" Cochran v. Kansas Dept. of Agriculture, 291 Kan. 898, 903, 249 P.3d 434 (2011).

The State cites Tiller v. Corrigan, 286 Kan. 30, 37, 182 P.3d 719 (2008), for the idea that once the petition for a grand jury is submitted, control of the process rests with the prosecutor. In Tiller, while discussing the constitutionality [*17] of an investigatory grand jury summoned by citizen petition, our Supreme Court stated that "upon the submission of the petition, the role of the citizenry in the grand jury process ceases." 286 Kan. at 37. Because Tiller draws the line at the submission of the petition, not the approval of the petition or the summoning of the grand jury, the State argues that Reardon's part in the process ended upon his filing of

the petition with the clerk of the district court.

Although there is no Kansas caselaw directly addressing the standing of a petitioner for a grand jury to appeal the dismissal of such a petition, the Supreme Court of Pennsylvania has held that citizens who petition to convene a grand jury are not aggrieved parties and have no standing to appeal from an order dismissing the petition. Hamilton Appeal, 407 Pa. 366, 180 A.2d 782 (1962), reh. denied May 21, 1962. In Hamilton, the court stated:

"This is not an adversary proceeding. The appellants appeared before the court below to inform it of facts which, in their opinion, indicated the necessity for the investigation requested. The only function of the appellants was one of presenting facts and suggesting to the court that an investigation [*18] be ordered—nothing more. They claim and have no more than a public interest in the proceeding. The investigation they suggest would result in no direct benefit to them as individuals. Hence, no appealable interest is present. They are not 'parties aggrieved' in the legal sense." 407 Pa. at 367-68.

The same rationale applies here. Reardon's petition purported to inform the district court of facts which required investigation by a grand jury. Reardon stated at the hearing on his petition that he was "[h]ere to represent—a representative of the people." Yet in order to have standing, Reardon must have "alleged such a personal stake in the outcome of the controversy as to warrant invocation of jurisdiction and to justify exercise of the court's remedial powers on his or her behalf." [Citation omitted.] Cochran, 291 Kan. at 903. Reardon alleged harm to the general public, but he has not alleged a personal stake in the outcome of the controversy. Therefore, he is not an aggrieved party sufficient to prosecute an appeal. Further, based on Tiller, Reardon's role as citizen petitioner to call a grand jury ceased upon submission of the petition. Therefore, we conclude that Reardon does not [*19] have standing to appeal the disallowance of his petition to convene a grand jury.

In summary, Reardon has no statutory authority to appeal the disallowance of his petition to convene a grand jury. Also, Reardon lacks standing to appeal because he is not an aggrieved party sufficient to prosecute the appeal. Accordingly, we conclude this court is without jurisdiction to consider Reardon's appeal from the district court's order disallowing his petition to

convene a grand jury pursuant to K.S.A. 22-3001(2).

Appeal dismissed.

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WASHINGTON ASSOC OF PROSECUTING ATTY

October 11, 2017 - 10:40 AM

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