

To be argued by
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Washington Supreme Court



Supreme Court Docket No. 81295-1

Ct. of Appeals Div. I Docket No. 264122

Spokane Cy. Sup. Ct. Cause No. 07-1-01318-1

Spokane Cy. Dist. Ct. Cause Nos. CC1 & CC2

CITY OF SPOKANE VALLEY *ex rel* CHRIS ANDERLIK,

Petitioner-Appellant

v.

BALLARD BATES & DUANE SIMMONS,

Respondents

PETITIONER'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. Where the district court found probable cause that Spokane County Sheriff's Deputies Ballard Bates and Damon Simmons committed second-degree animal cruelty and found compliance with all CrRLJ 2.1(c) factors, but nonetheless refused to allow Ms. Anderlik's citizen criminal complaint to be filed on grounds that CrRLJ 2.1(c) was unconstitutional, did the superior court err in dismissing Ms. Anderlik's RALJ appeal from the district court's erroneous ruling?

2. Did the district court err in finding CrRLJ 2.1(c) unconstitutional for violating separation of powers doctrine?

3. Do these assignments of error qualify for review under any mootness exceptions?

II. STATEMENT OF THE CASE

In the morning of April 12, 2006, a black angus male calf traveled from a farm in Greenacres (owned by the Wards) across a freeway overpass, into a commercial district, and made his way to a grassy area behind the Oxford Suites and near the Spokane River & Centennial Trail. Without any urgency or necessity, Officers Melton, Bates, and Simmons conspired to corral and restrain this calf using two Tasers until they could tie his legs with rope. As a result, the calf endured 451 seconds of current

(cumulatively, over 7.5 minutes).¹ At the time of being dual-Tasered for a period of nearly eight minutes, he was exhausted, standing still, posing no imminent threat to any other person or property, and was non-aggressive. He vocalized when struck with the first Taser, a sign of significant pain. Shortly after disengaging the Tasers, the calf died. He was a fair distance (roughly 0.5 to 0.75 miles) from any busy streets or the freeway and below the hotel parking lot adjacent to a vacant trail. There is no doubt that the calf experienced what would be tantamount to torture. Further details, analysis, photographs, audio clips, video, and declarations from eyewitness Arabella Akossy and experts (some of international renown) Dr. Temple Grandin, Dr. Bernard Rollin, Dr. Holly Cheever, and Michael Ashby may be found in DCF: Pet., Exhs. 1-16, pp. 3-11 (chronology, non-expert evidence, manuals); pp. 12-15 (experts).

Prior to filing her petition for a citizen criminal complaint on December 4, 2006, Ms. Anderlik contacted the city and county

¹ Deputy Bates deployed his M26 TASER through 42 continuous discharge cycles, for a total of three minutes and eighteen seconds (198 seconds). DCF: Pet., Exh. 11, pp. 15-16. Deputy Simmons deployed his X26 TASER for one continuous discharge cycle of two hundred fifty three (253) seconds. *Id.*, Exh. 11, p. 17. The acronym "DCF" refers to District Court File (a.k.a., original Appeal Record). As the superior court clerk did not index the DCF, per RAP 9.7(c), Ms. Anderlik references the documents by name and page. "DCF: Pet." refers to the Petition for the Citizen Criminal Complaint. "DCF: PMAS" refers to the Petitioner's Motion to Appoint a Special Prosecutor and Disqualify the Spokane County Prosecuting Attorney's Office, dated February 16, 2007. "DCF: PMR" refers to Petitioner's Motion for Reconsideration, dated March 19, 2007. "DCF: MD" refers to the Court's memorandum decision dated March 12, 2007. "DCF: PRSMR" refers to Petitioner's Response to State's Motion for Reconsideration.

prosecuting attorney's offices to initiate prosecution, and the Sheriff's Office to conduct an internal affairs investigation. In support of the allegations of torture, Ms. Anderlik presented several declarations, including those of the aforementioned experts. No action was taken, so she utilized CrRLJ 2.1(c) to initiate a criminal prosecution.

At the hearing on her petition on January 22, 2007, over the prosecutor's objection, District Court Judge Sara Derr found probable cause to charge Damon Simmons and Ballard Bates with second-degree animal cruelty and additionally found that all considerations (1) through (7) identified in CrRLJ 2.1(c) were satisfied. Specifically, the court held:

So here's my ruling. As far as the animal cruelty, and I have fairly well-defined where I see the potential for that charge, I believe that probable cause does exist. I've satisfied the additional factors that need to be considered. I just went through one to seven. The complaining witness indicates that she is aware of the gravity of this complaint, the necessity of court appearances for herself as well as any witnesses, and several have been identified to set this up. And possible liability for any kind of false arrest.

RP 1/22/07: 33:19—34:3. The court instructed Ms. Anderlik to prepare a criminal complaint for review and signature by her and Deputy Prosecuting Attorney Brian O'Brien. *Id.*, at 34:22—35:4.

In the *Spokesman-Review*, Sheriff Ozzie Knezovich "defended his deputies" and told reporters that the officers were "completely justified."

DCF: PMAS, Exh. 1. And the Prosecuting Attorney openly “refused to file charges,” publicly arguing “against the filing of the citizen’s petition.” *Id.* On January 25, 2007, the Spokane County Prosecuting Attorney’s Office filed a motion for reconsideration challenging the entire citizen criminal complaint process as unconstitutional. On January 27, 2007, the Sheriff again said that “killing the animal was necessary for public safety reasons.” DCF: PMAS, Exh. 2. Excerpts from the prosecuting attorney’s motion were disseminated publicly in the local newspaper, voicing continued opposition to filing of charges. *Id.*

On March 1, 2007, Ms. Anderlik submitted a proposed criminal complaint to the court and Mr. O’Brien, with her reply on the motion to appoint a special prosecutor and disqualify the Spokane County Prosecuting Attorney’s Office. The criminal complaint was signed and appended to Ms. Anderlik’s reconsideration motion. DCF: PMR, Exh. A.

On March 2, 2007, the court heard oral argument on the prosecutor’s motion for reconsideration and Ms. Anderlik’s appointment and disqualification motion. On March 12, 2007, the court issued a memorandum opinion where she concluded that the officers’ actions “went well beyond reasonable prudence and crossed over to negligent cruelty,” and that “[t]hese actions directly resulted in the death of the calf by the impact of the Tasers.” DCF: MD, at 8. The court upheld its findings

of January 22, 2007 that Ms. Anderlik had satisfied the elements of CrRLJ 2.1(c); that probable cause existed to charge Simmons and Bates with second-degree animal cruelty; that Simmons and Bates were not immune under RCW 16.52.210; and that the court would otherwise have permitted Ms. Anderlik to file a criminal complaint as provided by CrRLJ 2.1(c) but for the additional conclusions of law that the court had no authority to appoint a special prosecutor and that to compel the prosecutor to handle this criminal matter would violate separation of powers doctrine as applied. *Id.*, at 17-18.² In the final reckoning, however, the court adds:

Under these specific circumstances, the Rule is futile for any citizen who chooses to proceed under it (should the Court reach the determination that a criminal complaint should be filed).

Id., at 17. Further, the court remarks:

Without the County Prosecutor's willingness to proceed with prosecution of this case, the Complainant's exercise of her claim under the Rule is meaningless.

Id., at 18 ¶ 4.

On March 19, 2007, Ms. Anderlik filed her own motion for reconsideration and/or relief from this March 12, 2007 memorandum opinion. Argued on March 26, 2007, Ms. Anderlik's motion to finalize

² The same memorandum acknowledged that the January 22, 2007 oral ruling resulted in "The Court order[ing] a criminal complaint to be prepared." *Id.*, at 2. Furthermore, the court reiterated that it did "previously exercise[] its discretion to order a criminal

and certify the court's previous rulings for appeal under the RALJ and for direct review to the Supreme Court resulted in Judge Derr orally ruling that her order of March 12, 2007 was appealable as a matter of right under the RALJ.

The court confirmed that the complaint was ordered on January 22, 2007, but was not filed due to the motion for reconsideration:

The reason that the complaint didn't get filed was because the motion for reconsideration was filed in the interim, and then another motion by the complainant here to – regarding the special prosecutor and responding to the other motion. So, based upon that, I never did order or I never did sign any kind of complaint that was put into play; however, the record is clear that I ordered it.

RP 3/26/07, at 21:22—22:4. Indeed, the court intimated that the complaint was constructively filed, adding that Ms. Anderlik was:

well within the strictures of the rules that will allow [her] to go forward with any appeal on this without filing that complaint. It is part of the record. Certainly, it's been part of the record several times, and my ruling that ordered it is also part of the record. I don't think technically I need to go back and say this is the complaint that would be filed for purposes of [her] appeal.

Id., 24:22—25:4.

The trial court also noted that its oral rulings were binding, final decisions, and no written orders were customarily produced or required. Brian O'Brien concurred. *Id.*, at 28:22—29:21. As to being RALJ-

complaint be filed." *Id.*, at 17 (¶ 2).

appealable, the court consistently held that her decisions satisfied RALJ 2.2(a) and RALJ 2.2(c), adding:

I believe that by allowing the Petitioner to stand in the shoes of the prosecutor until such time as – as a complaint is filed, because the rule, by its – on its face, says, once the complaint’s filed, in essence, it’s turned over to the prosecutor to proceed. But, until that time, the Petitioner is acting in the capacity of a prosecutor.

Id., at 22:11—23:7; 23:15-20. Although Judge Derr declined to certify her order on reconsideration for direct review by the Supreme Court, she again confirmed that her decision was a final appealable order under the RALJ. *Id.*, at 25:5-8. The court acknowledged the statewide importance of this issue, noting that “every District Court who has ever had to deal with this issue is watching this case with avid interest, let’s just put it that way.” *Id.*, 25:12-20; 27:5—28:13. Judge Derr agreed that the question of the rule’s constitutionality was a fundamental issue in need of clarification. *Id.*, at 25:12-20.

On April 5, 2007, Ms. Anderlik filed a *Notice of RALJ Appeal* to Spokane County Superior Court before the statute of limitations ran on prosecuting the deputies. CP 1-3. Prior to hearing argument on the merits of the RALJ Appeal, the Honorable Kathleen O’Connor dismissed same on August 1, 2007 pursuant to the Respondent’s motion to dismiss,

reasoning that Judge Derr's decisions were not RALJ-appealable. CP 6-60 (Appeal Brief); CP 61-65 (Motion); CP 112-113 (Order).

On August 30, 2007, Ms. Anderlik filed an *Amended Notice of Appeal* of Judge O'Connor's order. CP 118-119. The Commissioner's Office requested that both the issue of finality and discretionary review be argued. On November 20, 2007, Commissioner McCown ruled that this decision was not a final appealable order. She also declined discretionary review on grounds of mootness. The Court of Appeals denied the motion to modify. Ms. Anderlik contested the February 4, 2008 Court of Appeals's denial by filing a joint Petition for Review and Motion for Discretionary Review before the Supreme Court. On June 4, 2008, the Supreme Court granted the motion for discretionary review.

III. ARGUMENT

A. The District Court's Ruling Denying Ms. Anderlik's Petition with Prejudice is a Final RALJ-Appealable Decision.

Judge O'Connor's order lays it out plainly:

Appellate Review: the RALJ's do not provide a path for review of this type of decision. ... The Rules on Appeal (RALJ) do not provide for an appeal from CrRLJ 2.1. The Court does not know whether the lack of a rule allowing the appeal of this type of petition was intended, or was unintentional, but this Court cannot create a path for appellate review for accommodation.

CP 112. The court never reached the merits of the decisions from which Ms. Anderlik appealed. Instead of affirming or reversing Judge Derr's rulings, Judge O'Connor abstained on grounds of no appellate subject-matter jurisdiction.

Rule interpretation was showcased recently in *State v. Chhom*, 162 Wn.2d 451 (2007), where the Supreme Court addressed CrRLJ 3.3(g)(5)'s exclusion provision to the speedy trial rule. The court first considered the rule's plain language, stating that it must be read as a whole in order to harmonize its provisions. However, it concluded that "common sense and the intent underlying the rules" compelled it to reject a literal interpretation where it "did not comport with a logical reading of the rule or with the rule's intent," and resulted in unlikely or strained consequences. *Id.*, at 459. *Chhom* held that the Court of Appeals erred "in focusing so narrowly" and "ignor[ing] ... parallel phrases" within the same rule. *Id.* In other words, one should not scrutinize certain words in isolation while ignoring other phrases in the same rule.

Although the RALJ do not specify that the act of granting, rejecting, or dismissing a citizen criminal complaint under CrRLJ 2.1(c) is appealable, they also do not specifically bar such matters from appeal. Therefore, final decisions concerning such complaints must be appealable

as of right. A structural analysis of the RALJ and its related provisions, in accordance with the approach taken by the *Chhom* court, reveals this:

1. RALJ 1.1(a) establishes the procedure for review by the superior court of a final decision of a court of limited jurisdiction “subject to the restrictions defined in [the] rule.” RALJ 1.1(b) limits application of the rules only for certain types of de novo review, neither of which applies to Judge Derr’s final decision. While RALJ 1.1(c) notes that statutory writs are retained and not superseded by the RALJ, it does not provide that they are the exclusive procedural path for seeking appellate review, especially since writs apply in the context of interlocutory (not final) orders. See *Alwood v. Aukeen Dist. Court*, 94 Wash.App. 396, 400-401 (I, 1999)(defining “interlocutory” as an order that does not finally determine a cause of action but requires further steps to be taken to enable full adjudication on the merits).

As much was acknowledged in *Commanda v. Cary*, 143 Wn.2d 651, 656, 23 P.3d 1086 (2001), in denying the writ of review for an interlocutory decision and stating:

The fact that an appeal will not lie directly from an interlocutory order is not a sufficient basis for a writ of review if there is an adequate remedy by appeal from the final judgment. ... Under the RALJ [Rules for Appeal of Decisions of the Courts of Limited Jurisdiction], an interlocutory order is reviewable on appeal from the ultimate judgment.

In disposing of Ms. Anderlik's petition with finality, interlocutory review was inapposite. Indeed, Judge Derr clearly stated that her decisions were final orders. RP 3/26/07, at 22:11—23:7; 23:15-20, 25:5-8.

2. RALJ 2.2(a)(1) permits a party to appeal:

from a final decision of a court of limited jurisdiction to which these rules apply under rule 1.1(a), except a decision in a mitigation hearing under RCW 46.63.100 and IRLJ 2.6(b), or a mitigation decision on written statement under IRLJ 2.6(c).

Neither of those decisions was at issue here.

3. RALJ 2.2(c)(1)(emphasis added), referencing the “final decision” language of RALJ 2.2(a), permits the state or a local government to appeal a “final decision, except not guilty.” RALJ 2.2(c)(1) also prohibits appeal where the defendant is placed in “double jeopardy.” Ms. Anderlik's criminal complaint invited several final decisions, none of which involved a judgment or verdict of not guilty, or placing defendants in double jeopardy.

4. There is no reason that a decision quashing or dismissing a citizen complaint is not appealable based on the plain text of the rules, when quashing or dismissing an identical complaint initiated by the prosecutor is appealable. CrRLJ 2.1 does not itself prefer one method (i.e., prosecutor-initiated complaints under CrRLJ 2.1(a)) over another (i.e.,

citizen-initiated complaints under CrRLJ 2.1(c)), but grants a remedy to citizens by outlining an explicit procedural avenue by which to apply for it. The petitioner, in being denied this remedy, becomes an aggrieved party on par with the prosecutor whose complaint is dismissed, and for whom a right of appeal exists under RALJ 2.2(a), as well as under RALJ 2.2(c)(1), given the petitioner's position as relator of the state or local government.

By granting, in part, the prosecutor's motion for reconsideration, which, in turn, was premised on denying Ms. Anderlik's motion to appoint a special prosecutor or to disqualify the prosecuting attorney's office, the trial court entered a final appealable order under RALJ 2.2(a)(2), a decision which, "in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing a complaint or citation and notice to appear." RAP 2.2(c)(1). There is no dispute that but for the court's reconsideration on the question of separation of powers raised at the behest of the prosecutor, the complaint would have been filed as originally ordered on January 22, 2007. Ms. Anderlik also appealed Judge Derr's March 26, 2007 order denying, in part, her motion for reconsideration with respect to seeking relief from judgment. The

cumulative effect of these three orders triggered both RALJ 2.2(a)(2) and RALJ 2.2(c)(1).

The Respondent may argue that there is no mechanism for direct appeal found expressly within CrRLJ 2.1(c). Of course, neither CrRLJ 2.1(a) nor several other criminal rules of procedure contained in the CrRLJ internally describe an appeal process (e.g., CrRLJ 8.3 (dismissal), CrRLJ 3.5 and 3.6 hearings). This is because the relevant body of rules for appeals from courts of limited jurisdiction are contained in the RALJ, not the CRLJ or CrRLJ. The RALJ applies to all civil and criminal proceedings. RALJ 1.1(d); RALJ 1.1(a). It supersedes all statutes and rules governing the procedure to review decisions of courts of limited jurisdiction. RALJ 1.1(e).

CrRLJ 9.1, however, does speak to the mechanism for perfecting an appeal with respect to proceedings “not subject to appellate review” under the RALJ, as defined by RALJ 1.1. Such “de novo appeal” matters involve “the de novo review of a decision of a judge who is not admitted to the practice of law in Washington” or “the de novo review on the record of a decision of a small claims court operating under RCW 12.40.” RALJ 1.1(b). If the court were to construe CrRLJ 9.1 as the operative rule for appealing Judge Derr’s orders, then Ms. Anderlik complied by timely filing the notice of appeal. CrRLJ 9.1(c). Accordingly, the Respondent’s

argument requiring an appeal procedure expressly within CrRLJ 2.1(c) would not be well-taken.

However, even if the court were to accept the superior court's rationale that there is no specific path in the RALJ for appeal of a citizen complaint, "common sense and the intent underlying the rules" dictate that anything not specifically excluded from the appeal path is included. Otherwise, the intent of CrRLJ 2.1(c) would be strained and lead to unintended results, resulting in Judge Derr's acknowledgement that citizens would undertake "futile" efforts to enforce a "meaningless rule" that expressly allows a citizen to step into the shoes of the state or local government for the purpose of initiating a criminal complaint but denies her the same remedy enjoyed by the state or local government if the complaint is dismissed.

Fundamentally, the court must answer the question of whether judicial review should ever exist for discretionary decisions made under CrRLJ 2.1(c). Appellate review of judicial decisions such as those made by Judge Derr should not fall into review-less lacunae or appellate "blind spots." The citizen criminal complaint process is "a necessary check and balance of the prosecutor's decision and protects against the possibility of error." *See Comm. v. Brown*, 447 Pa.Super. 454 (1995), *aff'd o.g.*, 550 Pa. 580 (1998)(citing *Comm. v. Pritchard*, 408 Pa.Super. 221, 233 (1991)

with respect to a Pennsylvania rule allowing citizens to initiate criminal complaints).

Ms. Anderlik attempted to initiate a criminal prosecution in a similar manner to that of the public prosecutor. If the court were to dismiss the prosecutor's complaint due to lack of probable cause, suppressed evidence, failure to state a charge, or other grounds, a RALJ appeal would be permitted under RALJ 2.2(a)(1) and RALJ 2.2(c)(1). Simply because Ms. Anderlik's complaint was dismissed on constitutional grounds does not deprive her of the same remedy to appeal as granted to the prosecutor. The CrRLJ 2.1(c) proceeding is not one that must be identified with particularity in the RALJ in order to afford a right of appeal, and the Respondent will not be able to provide authority to this effect. A probable cause hearing (which is what the CrRLJ 2.1(c) hearing amounted to in large part) is not a special proceeding that must be specifically mentioned for purposes of the RALJ. Judges decide probable cause with respect to arrest and search warrants every day. While the mechanism for introducing the probable cause issue before Judge Derr was different than the ordinary course, the determination made by the district court was routine. Furthermore, the RALJ expressly states that the rules shall be "liberally interpreted to promote justice and facilitate the

decision of cases on the merits.” RALJ 1.2(a). With such a liberal construction, RALJ-appealability should a foregone conclusion.

B. The District Court Erred in Holding CrRLJ 2.1(c) Unconstitutional, Effectively Nullifying a Supreme Court Rule

Presumably, if the Supreme Court had no right, under the Constitution, to enact CrRLJ 2.1(c), then it had no right to permit RALJ appeals from decisions on CrRLJ 2.1(c) petitions. In other words, the court cannot begin to examine the RALJ-appealability question without resolving the separation of powers debate, for the Respondent has argued that the Washington Constitution exclusively vests prosecutorial decisionmaking power in the Executive Branch and not the courts, notwithstanding the fact that the legislature expressly granted to the Supreme Court the right to make rules that affect criminal and civil procedure.

On January 22, 2007, and again on March 12, 2007, the court found that probable cause existed to charge Simmons and Bates with second-degree animal cruelty, that all elements of CrRLJ 2.1(c) were satisfied, and that but for the perceived inability to appoint a special prosecutor and alleged separation of powers violation, the court would have permitted Ms. Anderlik to file her criminal complaint. As applied, the court held that CrRLJ 2.1(c) was unconstitutional. But where a citizen

complainant has qualified under a rule promulgated by the Washington State Supreme Court, does not the district court's "as applied" decision in essence render the rule a nullity in every circumstance? In other words, by ruling that CrRLJ 2.1(c) is *de jure* unconstitutional as applied, has the district court not also declared CrRLJ 2.1(c) *de facto* unconstitutional on its face? See DCF: MD, at 17 (acknowledging ruling courts futility).

Traditionally, "a facial challenge must be rejected unless there exists no set of circumstances in which the statute can constitutionally be applied." *City of Richmond v. Moore*, 151 Wn.2d 664, 669 (2004). Furthermore, the party asserting unconstitutionality must prove so beyond a reasonable doubt. *State v. Clinkenbeard*, 130 Wash.App. 552, 560-561 (III, 2005). This burden cannot be sustained by the Respondent.

The Respondent and district court asserted that the Supreme Court, in enacting CrRLJ 2.1(c), improperly encroached upon the executive branch's power to make discretionary prosecutorial decisions. In evaluating the separation of powers challenge:

The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.

Carrick v. Locke, 125 Wn.2d 129, 135 (1994) (citing *Zylstra v. Piva*, 85 Wn.2d 743, 750 (1975)).

In adjudging the potential damage to one branch of government by the alleged incursion of another, it is helpful to examine both the history of the practice challenged as well as that branch's tolerance of analogous practice.

Id., at 136 (citing *Minstretta v. U.S.*, 448 U.S. 361, 398-401 (1989)).

“Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.” *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952)(Frankfurter, J., concurring)). The *Carrick* court expressly rejected a rigid categorical view of governmental functions for purposes of separation of powers analysis. *Id.*, at 137 (citing *Morrison v. Olson*, 487 U.S. 654, 689-91 (1988)). In evaluating investigation of crimes, the *Carrick* court recognized the high degree of collaboration between the judicial and executive branches and rejected respondents' urging to abandon Washington's tradition of bilateral investigation. *Id.*, at 137.

The court further examined the role of the grand jury as having been described as “an institution [that] has one foot in the judicial branch and the other in the executive.” *Id.*, at fn. 3 (quoting *In re Request for Access to Grand Jury Materials*, 833 F.2d 1438, 1444 (11th Cir.1987)). In finding that “[t]he unique function of the grand jury necessitates a high degree of cooperation between the judicial and executive branches,” the

court concluded that “[t]he constitutionality of this arrangement under both the federal constitution and Washington's constitution is unquestionable.” *Id.* Indeed, the judicially led investigation by Chief Justice Earl Warren of the United States Supreme Court into the assassination of President Kennedy bespeaks this point. *Id.*, at fn. 4.

Note that CrRLJ 2.1(c) does not delegate prosecutorial discretion to a private citizen, but uses the municipal or district court judge as the gatekeeper, who will, as an attorney, be guided by the RPCs and statutory charging guidelines, as well as consider the right for a defendant, if acquitted, to recover attorney’s fees. Indeed, CrRLJ 2.1(c) expressly requires such consideration be given, and Judge Derr did this on the record. DCF: MD, at 2; RP 1/22/07 at 32:24—33:6. The court correctly dismissed concerns of liability exposure for a malicious prosecution claim. *See Brin v. Stutzman*, 89 Wash.App. 809, 818-819 (I, 1998) (proof of probable cause is an absolute defense to a malicious prosecution claim (citing *Hanson v. City of Snohomish*, 121 Wn.2d 552, 558 (1993))). No fees were at issue here as self-defense would not apply to the crime of second-degree animal cruelty on these facts. RCW 9A.16.110.

The Respondent may argue that civil recompense is the preferred method to resolve misdemeanor matters, citing to Ch. 10.22 RCW (Compromise of Misdemeanors), and noting that a citizen without

standing can use the political process to affect prosecutor budgets and elections or even sit on an advisory board. These avenues, however, do not justify eliminating a procedure that preexisted Washington's statehood. They should instead be acknowledged as nonexclusive, alternative remedies. For crimes involving un-owned property, natural resources, wildlife, victimless acts or omissions, and those with a generalized impact on an entire community, as opposed to those affecting specific human victims whose persons or property have been damaged, CrRLJ 2.1(c) serves an important remedial and deterring purpose, particularly when budgetary triage and political expediency clouds a prosecutor's judgment.

CrRLJ 2.1(c) also provides a vital recourse for nonhuman animals who currently lack legal personhood. As such, they have no right to sue, urge for humane treatment, or seek retribution for cruel conduct. For this class of victims, the only individuals typically capable of protecting their fundamental interests to be free of torture will be their owners (since animals are property). Where, as here, the owners are too afraid or unconcerned for the animal's welfare to pursue such remedies, where the victimized animal is unowned (e.g., a stray shot repeatedly and indiscriminately, causing extreme suffering), or where the animal is owned by an abuser, only "a person with an interest in the welfare of the

animal”³ or organization committed to protecting animal interests (e.g., societies for prevention of cruelty to animals, humane societies), can vindicate the protections afforded them under RCW 16.52.207 and corresponding local anticruelty law. Only citizens like Ms. Anderlik, who would otherwise have no standing to sue civilly for the animal’s injury or death, will be able to see that state cruelty laws are enforced, using the only tool at her disposal – the citizen criminal complaint.

1. Historical Antecedents to CrRLJ 2.1(c)

Historical antecedents to CrRLJ 2.1(c) predate enactment of Washington’s Constitution, much like the statutes authorizing inquests.⁴ The citizen criminal complaint rule has been Washington law (in various forms) from the early days of Washington’s statehood and even before, when it was made a territory in 1853. In 1854, thirty-five years before the Washington Constitution was approved, Washington law permitted any person to approach a superior court judge or any justice of the peace asking that a warrant be issued for misdemeanors and felonies. Ballinger Code § 6695 (1897); Remington Revised Code § 1949 (1932); Pierce Code § 3114 (1905) (DCF: PRSMR, Exh. 1). Indeed, early cases before

³ RCW 11.118.050 expressly permits such an individual (i.e., someone other than the trustee, custodian, or court appointee) to petition for an order appointing or removing a person designated or appointed to enforce the animal trust.

⁴ The *Carrick* court found no separation of powers violation by the inquest statute. *Carrick*, at 137-138.

this court address when private citizens appeared in court to prefer a criminal charge against a third party. See *State ex rel. Murphy v. Taylor*, 101 Wash. 148 (1918); *State ex rel. Romano v. Yakey*, 43 Wash. 15 (1906). Eventually, the private criminal complaint became a court rule. JCrR 2.01 allowed citizen criminal complaints for felonies and misdemeanors. JCrR 2.01(d)(1963); JCrR 2.01(c) (1969). DCF: PRSMR, Exh. 2. The JCrRs were replaced with the CrRLJs, providing the most current version of CrRLJ 2.1(c)(last amended in 1999).

The Supreme Court's power to enact JCrR 2.01 and CrRLJ 2.1(c) derives from both the constitution and statute, vesting in it "coextensive authority" to make rules with the legislature. *Sackett v. Santilli*, 146 Wn.2d 498, 506 (2002). "It is a well-established principle that the Supreme Court has implied authority to dictate its own rules, 'even if they contradict rules established by the Legislature.'" *Id.*, at 504 (quoting *Marine Power & Equip. Co. v. Dep't of Transp.*, 102 Wn.2d 457, 461 (1984)). "[I]n most jurisdictions court rulemaking power has been shared, *de jure* or *de facto*, between courts and legislatures." *Id.* (quoting Hugh Spitzer, *Court Rulemaking in Washington State*, 6 U. Puget Sound L.Rev. 31, 59 (1982) (citation omitted)). The *Sackett* court cites to RCW 2.04.190

as statutory reinforcement of this coextensive authority. RCW 2.04.190 provides that:

The supreme court shall have the power ... generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, **practice and procedure to be used in all suits**, actions, appeals and proceedings of whatever nature by the supreme court, superior courts, and district courts of the state.

RCW 2.04.190(1987)(emphasis added); *see also State ex rel. Foster-Wyman Lumber Co. v. Superior Court*, 148 Wash. 1 (1928)(upholding constitutionality of RCW 2.04.190). See also RCW 2.04.020(1890)(vesting plenary authority in supreme court to determine all matters according to its rules). The legislature, therefore, acknowledges the role of court rulemaking and common law in civil procedure. Although there is no express constitutional provision for rulemaking by the Supreme Court, the power was intended by the Framers. *State v. Superior Court for King Cy.*, 148 Wash. 1, 12 (1928). The Constitution does not prohibit the Supreme Court from making rules for the inferior courts. *Id.* While a court rule may contradict and trump a statute, it cannot contradict the state constitution. *Sackett*, at 504.

The Constitution does not expressly state that prosecutorial decisionmaking is expressly vested in only the Executive Branch. Article III, Section 1 merely notes that the executive department consists of

several officials including an “attorney general.” The Respondent may reference Article XI, Section 5, to support the argument that the legislature established the powers of the county prosecutor by statute, at Ch. 36.27 RCW. While this constitutional reference provides that the legislature “shall prescribe their duties,” it by no means requires that the legislature completely delegate the enforcement power to the county prosecuting attorney alone. Indeed, the argument appears to support the notion that the powers of the county prosecutor are completely delineated by the legislative branch, and that the county-level executive branch possesses no inherent constitutional power outside the scope delegated to it by the legislature. The constitution neither demands nor prevents the legislature from similarly empowering the judiciary.

Rather, as described above, the legislature expressly granted to the Supreme Court the right to make rules that affect criminal and civil procedure. This occurred through enactment of JCrR 2.01 and CrRLJ 2.1. While the Respondent may assert that the content of this rule allows the judiciary to serve in the capacity of an executive officer, the language of the rule only permits a judge to evaluate probable cause (as she does in every criminal case), weigh the petition against prosecutorial guidelines recommended by the legislature under RCW 9.94A.440, and entertain other equitable considerations including motivation of the complainant. If,

and only if, all factors pass muster, may the court exercise its own discretionary authority to permit the filing of the criminal charge. Once filed, the judicial branch no longer controls the course of the prosecution but surrenders its fate to the executive branch.

At least this is what the district court assumed. CrRLJ 2.1(c) does not expressly indicate what happens after a judge has authorized the citizen complainant to file the criminal complaint. One would suspect that the complainant could either privately prosecute or collaborate with the public prosecutor. This is, incidentally, a point of clarification upon which the separation of powers objection may hinge. The WSBA agrees. *See* DCF: PRSMR, Exh. 5 (Letter, (2)).

The Supreme Court, being empowered by both the legislature and the constitution to enact CrRLJ 2.1(c), has clear coextensive authority to prepare rules of criminal procedure of this nature. Moreover, once promulgated, these rules trump and nullify all conflicting statutes. RCW 2.04.200(1925); *State v. Smith*, 84 Wn.2d 498 (1974); *Marine Power & Equip. Co. v. Indus. Indem. Co.*, 102 Wn.2d 457 (1984). In making rules, the “judiciary’s province is procedural and the legislature’s is substantive.” *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394 (2006). Substantive law “prescribes norms for societal conduct and punishments for violations thereof” and “creates, defines, and regulates primary rights,”

while “practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.” *Id.* (quoting *State v. Smith*, 84 Wn.2d 498, 501 (1974)).

The *Fircrest* court found that SHB 3055, regarding admissibility of BAC results, did not violate separation of powers in contradicting ER 401, 402, 403, and 404(b), holding that the court rule prevails where in irreconcilable conflict with a statute concerning matter related to court’s inherent power). *Id.*, at 399. This conclusion comports with the view that unless harmonized, an irreconcilable conflict between a statute and rule must be resolved in favor of the rule.

An analogous case to this matter of first impression involved the court’s inherent and statutory power to specify the circumstances of when a search warrant will issue. *State v. Fields*, 85 Wn.2d 126, 128 (1975). The *Fields* court concluded that the court rule concerning issuance of search warrants involved procedure, rather than substance, and was not an *ultra vires* act. *Id.*, at 129. The court reached this conclusion by noting that it “is well established that the issuance of a search warrant is part of the criminal process,” and that once categorized as part thereof, it follows that “it involves a matter of procedure.” *Id.* (citing *State v. Noah*, 150 Wash. 187 (1928), et al.). The court adds:

This conclusion flows from the definition of legal process. The term 'legal process' in its broadest sense is equivalent to procedure and embraces any form of order, writ, summons or notice given by authority of law for the purpose of acquiring jurisdiction of a person or bringing him into court to answer. [¶] In a larger sense, 'process' is equivalent to procedure, and may include all steps and proceedings in a cause from its commencement to its conclusion.

Id., at 129-30 (citations omitted). The criminal complaint is the indispensable first step in "acquiring jurisdiction of a person or bringing him into court to answer." The court must find probable cause at stages prior to the filing of a criminal complaint, such as in the instance of issuing search warrants. Arrest warrants may only be issued after a finding of probable cause. See CrRLJ 2.2(a)(2).

The private citizen's petition for the filing of a criminal complaint is wholly procedural in nature given that it represents a pre-step to commencing a criminal cause of action. CrRLJ 2.1(c) does not define crimes or assess punishments. It merely provides a procedural framework for the presentation of the proposed criminal matter for assessment by a judicial officer applying the same check-and-balance safeguards incumbent in maintaining legitimate criminal complaints, or issuing search and arrest warrants.

The Respondent will fail to cite to a single constitutional provision that expressly divests the judiciary of exercising its inherent discretion to

permit citizen-initiated criminal complaints, or that exclusive authority to charge and try crimes rests with the prosecuting attorney. Indeed, were this case, then the inquest and grand jury would impermissibly invade the discretion of the prosecuting attorney. *See In re Boston*, 112 Wash.App. 114, 118 (I, 2002)(inquest held constitutional).

The *In re Boston* case is noteworthy for another reason. It is one of the few appellate decisions evaluating the superior court's jurisdiction to hear direct RALJ appeals. In *Boston*, the superior court agreed that it had jurisdiction to hear a direct appeal under the RALJ from coroner inquest proceedings where the district court judge acted as the coroner. In reversing, the Court of Appeals reasoned that the trial judge conducting an inquest stands in the shoes of the county executive, assists in rendering a purely advisory decision in a nonadversarial proceeding, does not operate as a court and does not result in a "final decision" under RALJ 1.1 and 2.2. Additionally, the inquest proceeding is a statutorily authorized (per Ch. 36.24 RCW), nonbinding inquiry, not one originating by Supreme Court rule. Under a broad interpretation of the rules, and given the liberal construction of RALJ 1.2(a), one may easily distinguish the case at bar from *Boston*. There can be no doubt that the decision of a district court judge acting in a judicial capacity to resolve adversarial claims, following

a procedure outlined by the CrRLJs, and resulting in a criminal prosecution is assuredly a RALJ-appealable undertaking.

It is also worth noting that this alleged criminal act occurred in the city limits of Spokane Valley, in violation of municipal law. While RCW 36.27.020 speaks to the powers of county prosecutions, it is silent on municipal ones. Even assuming that the legislature intended to prevent private prosecutions at the county level, using the maxim *expressio unius est exclusion alterius*, one may assume that the legislature did not intend to prohibit private prosecutions in municipal criminal actions.

2. History of Private Prosecutions.

Private prosecutions are not new but were part of a common practice in England and America for crime victims for several hundred years. They continue to coexist there with public prosecutions.⁵ New Hampshire's common law allowed the practice of private prosecutors for many years, and it continues to this day.⁶ New York permitted private attorneys to prosecute petty offenses. *People ex rel. Allen v. Citadel*

⁵ Michael T. McCormack, The Need for Private Prosecutors: An Analysis of Massachusetts and New Hampshire Law, 37 Suffolk U.L.Rev. 497, 499-500 (2004); Kenneth L. Wainstein, Judicially Initiated Prosecution: A Means of Preventing Continuing Victimization in the Event of Prosecutorial Inaction, 76 Cal.L.Rev. 727, 751 (1988) ("Although public prosecution is the norm in most criminal proceedings, this country has a strong and continuing tradition of criminal prosecution by private parties. Private parties, in fact, prosecuted all criminal cases in English and American common law, before the divergence of tort and criminal law and the creation of the public prosecutor's office.")

Mgmt. Co., 78 Misc.2d 626, 630 (Crim.Ct.1974). New Jersey has also sanctioned the practice of private prosecution.⁷ Virginia's common law allows the use of private prosecutors to assist the public prosecutor. *Cantrell v. Comm.*, 329 S.E.2d 22, 25 (Va. 1985). Other states permitting private prosecutors to participate without consent or supervision of the district attorney include Alabama, Montana, and Ohio.⁸

3. Identical Challenge in Pennsylvania.

Pennsylvania's Supreme Court enacted Pa.R.Crim.P. 106, which approves of private criminal complaints for both felonies and misdemeanors, permitting private citizens to submit complaints to the commonwealth's attorney, who is required to approve or disapprove without unreasonable delay. If the attorney disapproves the complaint, she needs to state the reasons for disapproval and return it to the complainant. The complainant can then file the complaint with a judge of a court of common pleas for judicial approval or disapproval.

⁶ *McCormack*, at 504.

⁷ *State v. Storm*, 278 N.J.Super. 287 (App.Div.1994)(private prosecution does not deny due process unless there is a conflict); *State v. Avena*, 281 N.J.Super. 327 (1995); *State v. Leonardis*, 73 N.J. 360, 388 (1977)(noting that "where a prosecutor proposes to drop such a prosecution the possibility of connivance or culpable non-feasance, contrary to the public interest, activates a strong public policy for judicial superintendence of such a decision.")(Conford, P.J.A.D., concurring).

⁸ *Hall v. State*, 411 So.2d 831, 838 (Ala.Crim.App.1981); *State v. Cockrell*, 309 P.2d 316 (Mont.1957); *State v. Ray*, 143 N.E.2d 484 (Ohio App.1956).

In *Comm. v. Brown*, 447 Pa.Super. 454 (1995), *aff'd o.g.*, 550 Pa. 580 (1998), Mr. Buckley, a private citizen, petitioned the trial court to direct the commonwealth attorney to prosecute the charges outlined in his private criminal complaint. The trial court granted his request. The commonwealth appealed, asserting that the order to prosecute over the attorney's objection violated the separation of powers doctrine and that "the courts may never evaluate prosecutorial decisions that are based on policy determinations." *Id.*, at 461. The appeals court disagreed, highlighting the importance of Rule 106 "as a necessary check and balance of the prosecutor's decision and protects against the possibility of error." *Id.*, citing *Comm. v. Pritchard*, 408 Pa.Super. 221, 233 (1991).

In examining the separation of powers doctrine, the court concluded that it does "not entirely preclude judicial review of discretionary decisions made by the executive branch." *Id.*, at 462. It added that since the Pennsylvania Constitution gave their supreme court the exclusive power to establish rules of procedure, it lacked jurisdiction to interpret Rule 106 and any attempt to do so would amount to "an unwarranted intrusion into the supreme court's authority." *Id.*, at 462-63;

Penn.Const. Art. V §10(c).⁹ Analogous matters have been raised in other jurisdictions with similar effect.¹⁰

4. Commentary from WSBA and Other Commentators

JCrR 2.01 was enacted by the Supreme Court in the 1960s. A proposal to amend JCrR 2.01 by restricting its scope to misdemeanors and gross misdemeanors and later, to repeal CrRLJ 2.1(c), elicited comment from concerned lawyers, judges, and the WSBA. DCF: PRSMR, Exhs. 3-5. After hearing all comments, the efforts to repeal CrRLJ 2.1(c) were rejected, and rule has been in effect in its current form since 1999. Ms. Anderlik incorporates by reference the well-fashioned arguments of these commentators.

5. Vocal Opposition by Prosecutor Required Special Appointment and Disqualification

⁹ In *In re Wilson*, 879 A.2d 199, 210 (Pa. Super.2005), the court found no violation of separation of powers in allowing an appellate court to review the trial court's order sustaining the commonwealth attorney's disapproval of a private criminal complaint. See also *Reilly by Reilly v. Southeastern Penn. Transp. Auth.*, 507 Pa. 204, 218-219 (1985) (enforcement of rules of judicial conduct is beyond jurisdiction of superior court and attempts to interpret canon by creating new standards of review and procedures are without effect as unwarranted intrusions upon Supreme Court's exclusive right to supervise the conduct of all courts and officers of the judicial branch).

¹⁰ See *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749 (5th Cir.(Tex.)2001)(no separation of powers violation in qui tam action); *Morrison v. Olson*, 487 U.S. 654 (1988) (no separation of powers violation in Ethics in Government Act); *State v. Ronek*, 176 N.W.2d 153 (Iowa, 1970) (no separation of powers violation in permitting adultery prosecution by injured spouse); *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S.Ct. 2124 (1987) (FRCP 42(b) does not violate separation of powers).

The citizen criminal complaint petition process is a unique device that has longstanding statutory origins. This procedure, however, is still under development at each stage of litigation, and in the absence of appellate guidance, requires this court to interpret the rule with discretion, equity, and common sense. The reason why the district court felt compelled to declare CrRLJ 2.1(c) unconstitutional was because it believed it could not appoint a special prosecutor or disqualify the prosecuting attorney's office. Resolving this issue of public prosecutor bypass is critical to assessing the underlying constitutional challenge.

a. Special Appointment.

District courts possess inherent equitable powers in light of the 1993 amendment to the Washington Constitution. A district court's core authority to exercise equitable power is not presently sourced by statute, but by constitution. Such powers include those of contempt and appointing counsel for a criminal defendant. Statutes only serve to limit a court's authority granted by the constitution, rather than create new authority, since equitable powers originate at the constitutional level.

Where the prosecuting attorney has resisted efforts to initiate prosecution, publicly argued against the presence of probable cause, and attacked the entire premise of a citizen criminal complaint process as unconstitutional, it follows that this office cannot represent the state

without violating core ethical tenets that will be the product of half-hearted, if not self-sabotaged, prosecution. The result will be a farce of justice, a high risk of a charade that the court has the power to resolve responsibly at the front end of this litigation. It is not inconceivable that the defendants could have called the prosecutors as witnesses in the defense case or to assist with their team.¹¹

More importantly, the prosecutor's position undermined the court's authority, expressly bestowed upon it by court rule, to grant the petition of a citizen to initiate a criminal prosecution and ensure that its order will not be an illusory gesture. If the court cannot use its equitable powers to guarantee that its order is followed in earnest, then its judicial pronouncement becomes little more than rhetoric. Such impudence would not be tolerated in other contexts and would be punished by the court's inherent equitable power of contempt.

The petition filed by Ms. Anderlik was not technically a criminal case, but rather an equitable type of action with the purpose of *initiating* a criminal case. *See* DCF: PRSMR, Exh. 5 (GR 9(d) Cover Sheet, (2)(b) (WSBA concurs)). It shares characteristics most akin to a mandamus

¹¹ In a worst-case scenario, what if the prosecutor were himself accused of corruption or criminal wrongdoing and a citizen criminal complainant succeeded in persuading a judge to allow her to file a criminal complaint? Who would then handle the case? The prosecuting attorney's office could not in good faith take such a cannibalistic position. Yet that is exactly what would be required were the district court to believe it lacked the

proceeding (i.e., compelling enforcement of state law, albeit in a private capacity). In essence, it is a quasi-criminal matter that does not result in issuance of a warrant, seizure of property, or arrest unless the court grants the equitable relief requested.

Given the continuous opposition between Ms. Anderlik and the prosecuting attorney's office, this matter evolved into a dispute that most closely resembled a petition for a writ of prohibition, injunction, or quo warranto. Although not representing her personally, the prosecuting attorney's office took an adverse position to her (and the state's) interests. Under such circumstances, to permit the prosecutor's office to proceed with the case would sanction ineffective (if not unethical) assistance of counsel.

Equitable relief incidental to a petition-stage criminal proceeding is appropriate due to the novel character of the action. Ambiguity in the rule required exercise of judicial authority. It was almost incumbent on the court not to allow the prosecutor to handle the case for if the jury convicted, they would undermine the prosecutor's then-current, contrary position. CrRLJ 2.1(c) does not mandate that the matter be tried by the prosecuting attorney. It merely states that, after considering probable cause and other discretionary factors, the "judge may authorize the citizen

equitable power to appoint a disinterested prosecuting attorney from another jurisdiction.

to sign and file a complaint in the form prescribed in CrRLJ 2.1(a).” CrRLJ 2.1(c). CrRLJ 2.1(a)(1) adds that “all criminal proceedings shall be initiated by a complaint,” without specifying who will prosecute. Furthermore, CrRLJ 2.1(c) contemplates that the prosecutor may have already declined to prosecute the matter. CrRLJ 2.1(c) [in proposed Affidavit, it concludes with the statement, “I (*have*) (*have not*) consulted with a prosecuting authority concerning this incident.”]

Where the prosecutor has a conflict of interest that disables him from representing the state or city, the court has no other option than to appoint a special prosecutor. *Westerman v. Cary*, 125 Wn.2d 277, 301 (1994)(where prosecutor’s ability to represent District Court was compromised even before trial began, and where he advised Sheriff to disobey a court order, appointment of special prosecutor was justified). Although *Ladenburg v. Campbell*, 56 Wash.App. 701 (II, 1990) concludes that a district court does not have this authority, that decision may be set aside in light of the Amendment No. 87. Wash. Const. Art. IV, § 6 (1993).

Washington’s courts of limited jurisdiction are created by the legislature, which has the sole authority to prescribe their subject matter jurisdiction and powers. Const. art. IV, §§ 1, 12 (noting that legislature shall prescribe by law jurisdiction and powers); *see also Smith v. Whatcom Cy. Dist. Ct.*, 147 Wn.2d 98, 104 (2002). In 1993, by constitutional

amendment, the legislature expressly vested in district courts the equivalent equitable powers granted to the superior courts of this state. Const. Art. IV, § 6. This authoritative grant was recognized in *Hough v. Stockbridge*, 150 Wn.2d 234, 235-36 (2003). The Washington Supreme Court has expressly recognized that the amended Constitution provides district court equitable powers to “fashion broad remedies to do substantial justice” that did not previously exist. *Id.*, at 235-36, and fn. 1.

The superior courts, as courts of general jurisdiction, traditionally and exclusively had full equitable powers to grant injunctive relief in the form of writs of prohibition and quo warranto, as well as other traditionally equitable devices. By constitutional amendment, the power also vested in the district courts. Courts of equity also have the power to appoint receivers. *Boothe v. Summit Coal Min. Co.*, 55 Wash. 167 (1909), and to protect the rights of infants and incompetents. *In re Hudson*, 13 Wn.2d 673, 699 (1942). The jurisdiction of a court of equity “does not depend upon precedents, but upon the great principles of natural justice which are a part of the law of the land.” *Id.*, at 698. As a matter of fundamental fairness, and as implied from the list of other expressly recognized inherent equitable powers, the district court has the authority

to appoint a special prosecutor.¹² Within the penumbra of these equitable powers is the ability to take steps to effectuate CrRLJ 2.1(c).

Now that the mantle of equitable power has extended to district court by constitution:

in the absence of any constitutional provisions to the contrary, such power may not be abrogated or restricted by the legislative department. Any legislation, therefore, the purpose or effect of which is to divest, in whole or in part, a constitutional court of its constitutional powers, is void as being an encroachment by the legislative department upon the judicial department.

Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 415 (1936). “The superior court has all the powers of the English chancery court.” *Id.*, at 415 (citing *State ex rel. Burrows v. Superior Court*, 43 Wash. 225). A writ of injunction “is the principal, and the most important, process issued by courts of equity,” and functions “to furnish preventive relief against irreparable mischief or injury.” *Id.*

¹² Inherent powers for courts of this state include the power to:

compel funding of their own functions; **punish for contempt; insure a fair criminal trial**; appoint counsel for a criminal defendant; grant bail; **review actions of public officials**; compel attendance of witnesses and the production of evidence; **regulate practice of law**; control photography in court; and correct errors in the records.

State v. Gilkinson, 57 Wash.App. 861, 865 (citing *In re Juvenile Director*, 87 Wn.2d 232, 246 (1976); 20 Am.Jur.2d *Courts* § 79 (1965)(emphasis added). “The court has inherent power to punish for contempt and the legislature may not destroy this power.” *Mead Sch. Dist. No. 354 v. MEA*, 85 Wn.2d 278, 287 (1975)(superior court). “The legislature, however, may regulate that power as long as it does not diminish it so as to render it ineffectual.” *Id.*

The relief sought by Ms. Anderlik was in the nature of an injunction, writ of prohibition, or writ of quo warranto given that the prosecuting attorney had taken a position inherently inconsistent with his duties of public office. To permit (or require) him to manage the case would have forced him to act contrary to his authority – not in a technical sense (since clearly he has the power to prosecute misdemeanors), but as a purely equitable concern. This would have invited disaster and mocked the court’s order. A prosecutor has no power to discontinue or abandon a prosecution except by order of the court. 2 Ballinger’s Ann. Codes & St. §§ 6914, 6915; *State v. Hansen*, 10 Wash. 235 (cited in *State v. Heaton*, 21 Wash. 59, 61). In essence, this is exactly what the prosecutor has requested, and the district court had the ability to replace him with a person or office more suited to the task, including the city prosecutor.

b. Disqualification.

In addition to making a special appointment pursuant to inherent equitable powers, the court also had the independent power to disqualify counsel upon knowledge of a breach of the RPC. Where a trial court knows of an attorney’s ethical breach, it must presume prejudice and automatically disqualify that attorney. *State v. Hunsaker*, 74 Wash.App. 38, 43 (1994)(cited in *State v. White*, 80 Wash.App. 406, 414 (II, 1995). Indeed, to have forced the prosecutor and his office to handle this case

could suborn several ethics violations.¹³ Brian O'Brien and Steve Tucker publicly opposed prosecution of Simmons and Bates based on their belief that no probable cause existed and that their actions were justified. By making these statements directly adverse to the goals of prosecution, it follows that their representation of the County involves a concurrent conflict of interest that will materially limit their ability to prosecute the animal cruelty charges. RPC 1.7(a)(2) says that a lawyer "shall not represent a client" where there is a "significant risk" that the representation will be "materially limited" by "a personal interest of the lawyer."¹⁴

¹³ While his office clearly had the wherewithal to prosecute animal cruelty, it may fail to thoroughly prepare to meet its obligations due to disinterest or outright hostility to its task, violating RPC 1.1 (competence). Nothing stops the prosecutor from ineffectively prosecuting this case, thereby allowing it to be dismissed due to inactivity, violating RPC 1.3 (diligence). By Mr. O'Brien and Mr. Tucker's own public statements, their representation of the citizens of Spokane County, both former and current clients, will be directly adversely affected by their vocal defense of Simmons and Bates; a conflict also arises with respect to their own personal interests (viz., that they do not support prosecution or the whole premise of citizen criminal complaints), thereby violating RPC 1.7 and 1.8 (conflicts). They have also engaged in pre-trial publicity that will likely affect the ability of the jury to fairly consider the case, potentially violating (in a strange about-face, since they are arguing for the defendants' innocence) RPC 3.6. With such an inherent conflict, it would not serve the citizens of Spokane County to appoint prosecutors who will also serve as apologists for Simmons and Bates.

¹⁴ The commentary to RPC 1.7 speaks to the situation where a lawyer takes inconsistent legal positions in different tribunals at different times on behalf of different clients. Normally, this Janus-facedness does not raise ethical issues. A conflict of interest exists, however,

[I]f there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in

Here, the conflict is more glaring given that the inconsistent position would be taken before the same tribunal with respect to the identical client. In essence, the duty of loyalty to the client was thoroughly forsaken by the prosecutor's strong defense position. To permit the prosecutor to continue handling this case would sanction an ongoing and substantial conflict of interest. These conflicts may be imputed to the entire office under RPC 1.10 given that Mr. O'Brien and Mr. Tucker would be disqualified from representing the County if practicing alone, for the reasons stated herein.

Ms. Anderlik's petition specifically requested that two different judges hear the petition (one from the City of Spokane Valley and one from Spokane County). DCF: Pet., at 2. Not considered by Judge Derr was appointing the City of Spokane Valley prosecutor Michael Connelly to handle this matter. *Id.*, at 1-2. The petition for the citizen criminal complaint was filed with both the district court and the city clerk for the City of Spokane Valley, since the alleged cruelty occurred within the city

determining whether the clients need to be advised of the risk include; where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

Comment 24 to RPC 1.7 (2007).

limits of Spokane Valley. *Id.*, at 1. Neither Mr. Connelly nor a representative from the city prosecutor's office appeared before Judge Derr or opposed, orally or in writing, Ms. Anderlik's petition. Given that CrRLJ 2.1(c) permits petitions to be filed with either the municipal or district court, it follows that Judge Derr had the authority to transfer the matter to the city attorney's office or to the Spokane Municipal Court.¹⁵

C. Several Exceptions to Mootness Justify Consideration of This Case, a Question that Itself Appears Moot Given the Supreme Court's Acceptance of Review.

In briefing before Judge O'Connor, the prosecutor argued that the matter was moot since the statute of limitations had run on prosecuting the two deputies. Yet, but for the prosecutor's public and willful refusal to prosecute the officers even after Judge Derr's order, no limitations period would have run. In thwarting Ms. Anderlik's efforts at initiating a criminal complaint, it seems disingenuous to then claim that she is to blame for the delay. Ms. Anderlik asserts that the statute of limitations was equitably tolled pending the outcome of the RALJ appeal, in much the way it would be tolled if RALJ-appealed by the prosecutor himself.

¹⁵ Of course, this move may have been contractually untenable and illegal, resulting in ultra vires activity, since the Spokane district court judges were then sitting as Spokane "municipal court judges" by designation. It appears that the City of Spokane Valley similarly contracted with the Spokane County District Court to handle their municipal matters. The result is that the district court lacked authority to provide a de facto judge. *See City of Spokane v. Rothwell*, 141 Wash.App. 680 (III, 2007) (finding that City of Spokane failed to comply with state statutory scheme for electing municipal court judges,

That aside, there remain significant grounds meriting appellate review of the CrRLJ 2.1(c) process pursuant to well-established exceptions to mootness. Judge Derr did not have the power to declare CrRLJ 2.1(c) unconstitutional on its face because the rule was created by the Supreme Court. In rendering it unconstitutional as applied, however, the result was identical. In every instance where a municipal or district court judge is inclined, as here, to allow a petitioner to file a criminal complaint under CrRLJ 2.1(c), the prosecuting attorney in that jurisdiction will raise separation of powers objections. If accepted by the court, such an argument will render CrRLJ 2.1(c) a nullity.

The issues at stake are of substantial and long-standing historical public importance, addressing at the core the tension between private and public prosecution. It is hard to fathom a question of law that is not so public in nature and of such fundamental importance to the citizens of this State who have enjoyed the right to privately initiate prosecutions of those who violate the public's criminal laws, since Washington was a territory; to the judges who must interpret the rule; to the prosecutors affected by it; and to other public officials (such as the clerks) who must docket and manage the processes of CrRLJ 2.1(c).

vacating convictions).

While “[i]t is a general rule that, where only moot questions or abstract propositions are involved”:

or where the substantial questions involved in the trial court no longer exist, the appeal, or writ of error, should be dismissed. There is an exception to the above stated proposition. The Supreme Court may, in its discretion, retain and decide an appeal which has otherwise become moot when it can be said that matters of continuing and substantial public interest are involved.

Sorenson v. City of Bellingham, 80 Wn.2d 547, 558 (1972).

Criteria to be considered in determining the “requisite degree of public interest are the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question.”

Id.

The continuing and substantial public interest exception has been used in cases dealing with constitutional interpretation; the validity and interpretation of statutes and regulations; and matters deemed sufficiently important by the appellate court.

Hart v. DSHS, 111 Wn.2d 445, 448 (1988)(citations omitted). “Further, decisions involving the constitution and statutes generally help to guide public officials.” *Id.* Most cases in which appellate courts utilized the exception to the mootness doctrine involve issues of constitutional or statutory interpretation, tending to be “more public in nature, more likely to arise again, and the decisions helped to guide public officials.” *In re Mines*, 146 Wn.2d 279, 284 (2002).

Nor should this court worry of the:

danger of an erroneous decision caused by the failure of parties, who no longer have an existing interest in the outcome of the case, to zealously advocate their position.

Orwick v. City of Seattle, 103 Wn.2d 249, 253 (1984). This case continues to be of profound interest to all prosecuting attorneys' offices, municipal and district court judges, and victim's rights advocates who seek to use the CrRLJ 2.1(c) mechanism, particularly for causes that may be politically unpopular but otherwise well-grounded (as in this case).

The other concern that the exception to mootness be raised "only after a hearing on the merits of the claim" that has been "fully litigated by parties with a stake in the outcome of a live controversy" is also satisfied given the intensive briefing at the trial level and above, the ongoing exposure to the courts and prosecutors with citizen criminal complaints, and the needs of animal welfare and rights advocates like Ms. Anderlik to ensure that animal cruelty is prosecuted to the fullest extent of the law. *Id.* District Court Judge Derr voiced confidence that the fundamental and significant questions raised by CrRLJ 2.1(c) would be reviewed regardless of mootness. RP 3/26/07, 25:12-20; 27:5—28:13.

The Courts of Appeal have reviewed cases that became moot before an appeal was sought. In *In re Welfare of B.D.F.*, 126 Wash.App. 562 (II, 2005), the court accepted review of a case involving the provision

of shelter care to children. Though moot prior to appeal, review was granted due to “the likelihood that the issue will escape review because the facts of the controversy are short-lived.” *Id.*, at 569 (citing *In re Marriage of Horner*, 151 Wn.2d 884, 891 (2004)). Similarly, in *Westerman v. Cary*, 125 Wn.2d 277 (1994), a public defender challenged a district court order requiring domestic violence offenders to be detained without bail pending their first appearance. The Supreme Court granted review for several reasons including: (1) the issues were public in nature (as here); (2) guidance in the area was desirable and necessary (as here); (3) the issue was likely to recur (as here); (4) there was genuine adverseness on the issues because of adequate briefing from all parties (as here); (5) a hearing was held on the merits and the briefs were of good quality (as here); and (6) the issue is one that could escape review because an arrestee will be detained only pending a preliminary appearance.

On this last point, it is notable that CrRLJ 2.1(c) was amended to preclude citizen criminal complaints for felonies and permit initiation of misdemeanors only. The statute of limitations for misdemeanors is 1 year. RCW 9A.04.080(1)(j). Given that even the most diligent and fastidious appellant could not obtain a decision from the Court of Appeals following an attempted RALJ appeal from a district court CrRLJ 2.1(c) hearing, it follows that this is an unorthodox, but prime, example of a case that will

perpetually “escape review” before a definitive appellate ruling is handed down.¹⁶ Where the likelihood that issues in short-lived controversies will repeatedly escape review is high, the courts have nonetheless granted review. *See Seattle v. State*, 100 Wn.2d 232, 250 (1983); *Hart v. DSHS*, 111 Wn.2d 445, 451-452 (1988) (citing *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)).

Indeed, to truly evaluate the constitutionality of CrRLJ 2.1(c), a Supreme Court rule that only the Supreme Court can strike down as facially unconstitutional for violating separation of powers doctrine, the very legitimacy of the entire CrRLJ 2.1(c) process will perpetually escape meaningful (and binding) appellate review because of the 1 year statute of limitations – which is not tolled while the citizen criminal complainant is attempting to get her complaint filed.

IV. CONCLUSION

The Supreme Court, in enacting CrRLJ 2.1(c), exercised its inherent constitutional and delegated statutory authority to prepare this

¹⁶ As this court knows, from the moment a notice of appeal is filed to the date a decision is rendered – assuming no statement of arrangements is ordered, that briefing is timely filed, that the case is set for oral argument within 90 days of being “ready,” and that the decision is rendered within 90 days of argument, an average of nine months will elapse. Since citizen criminal complainants must first prepare for and conduct the actual CrRLJ 2.1(c) hearing, lodge a RALJ appeal (which may take at least 3 months for briefing and argument), and then must seek discretionary review (building in additional delay on account of the gatekeeping function of the commissioner), it follows that virtually no citizen criminal complaint for a misdemeanor will ever obtain appellate review before

procedural criminal rule. Any statute in irreconcilable conflict with CrRLJ 2.1(c) must be negated. Although the constitution does empower the legislature to outfit the county prosecutor with specific duties, a power it wielded in passing RCW 36.27.020, nothing in the constitution prevented the legislature from vesting prosecutorial powers in other individuals. If this were the case, then RRS § 1949 (1932) – the statute authorizing private prosecution – could clearly not have existed and would have been in direct conflict with RRS § 4132 and RRS § 4134.¹⁷ Additionally, RCW 36.27.020 can be read in harmony with CrRLJ 2.1(c) if only for the reason that while the statute states that the prosecuting attorney shall “prosecute all criminal and civil actions in which the state or the county may be a party,” it does not restrict who may petition for judicial authorization to initiate a criminal prosecution.¹⁸

The Respondent cannot meet its burden to prove that CrRLJ 2.1(c) is unconstitutional beyond a reasonable doubt under all factual circumstances. Certainly, there would be at least one instance where a citizen prefers a criminal charge to a district court judge with (or without) first seeking approval from a prosecuting attorney (which is not required

being mooted by what appears to be an un-tollable statute of limitations.

¹⁷ These were the prior versions (pre-1886) of RCW 36.27.020, sections (iv) and (vi).

¹⁸ The trial court granted Ms. Anderlik’s petition to file a criminal complaint, but expressly returned the matter to the county prosecutor to actually “prosecute” the action.

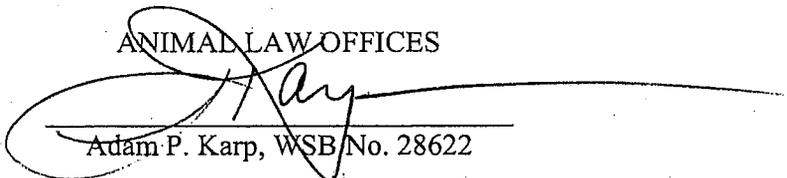
by CrRLJ 2.1(c)), the court finds probable cause and sufficient compliance with the other discretionary considerations identified in subsections (1) through (7) of CrRLJ 2.1(c), and the prosecutor does not oppose the citizen's industrious effort to initiate prosecution through this rule.

The fact that this procedure is expressly vested in only the municipal or district court (there is no analog for superior court) further bolsters the claim that district court has the inherent authority to take all necessary steps to ensure that its orders (such as those for contempt) are followed in earnest and not undermined by prosecutorial sabotage.

The dearth of jurisprudence on any of the issues raised by this appeal is readily apparent, leaving municipal and district court judges, prosecuting attorneys, and citizens operating in the dark with regard to an historically and legally momentous question of private prosecution in Washington. The time is ripe for this court to evaluate the scope and application of CrRLJ 2.1(c) with respect to the RALJ, the Washington Constitution, and other rules and statutes.

Dated this August 13, 2008

ANIMAL LAW OFFICES



Adam P. Karp, WSB/No. 28622

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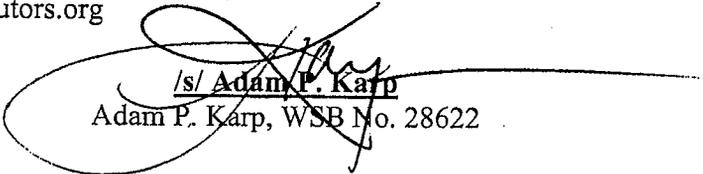
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 13, 2008, I caused a true and correct copy of the foregoing to be served upon the following person(s) in the following manner:

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