

ORIG.

No. 81295-1

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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CITY OF SPOKANE VALLEY, et al., ex rel. CHRIS ANDERLIK,  
Appellant,

vs.

BALLARD BATES and DUANE SIMMONS, et al., Respondents.

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RESPONSE TO MOTION FOR DISCRETIONARY REVIEW

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STEVEN J. TUCKER  
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**I. IDENTITY OF PARTIES**

The State of Washington is the Respondent. Ms. Anderlik is the Petitioner.

**II. RELIEF SOUGHT**

Petitioner asks this Court to grant discretionary review of the Court of Appeals Order filed November 20, 2007, denying discretionary review of a RALJ decision. That Court of Appeals Order ruled “that this matter is not appealable as a matter of right under RAP 2.2 because it originated in district court, nor is discretionary review warranted under RAP 2.3(d) as it appears that this matter is now moot and this Court could not grant any relief.”

The Petitioner’s Motion to Modify the Commissioner’s Ruling was denied by Acting Chief Judge John Schultheis on February 4, 2008.

**III. FACTS RELEVANT TO MOTION**

On April 12, 2006, Spokane County deputies were faced with three cattle running at large in Spokane Valley. One of these animals, a five or six-hundred-pound bull “was at Broadway and Shamrock headed toward the freeway when it started going down the ramp.” Court, at RP 25, lines 8-12 (1-22-07 PC hearing).

The Court recognized both the risk created by this bull, and the deputies’ legal duty to control this animal:

In Spokane County, we have deer collisions on the highways, accidents with dogs or cats, moose, or other large animals loose in the County. It can be very dangerous and damaging to ignore this situation. There is no question the officers had a duty to control the calf. It was loose and had been on a busy Valley street, and potentially had access to the freeway. The officers had a duty to control the calf, and under RCW 16.52.110, *impound* it.

Court's Memorandum Opinion, page 7.

Rather than kill the marauding bull, the officers tried to subdue it with tasers so that they could fetter the animal. "I think that their intent was not to kill the animal." Court, at RP 32, lines 5 (1-22-07 PC hearing). However, the officers' deployment of the tasers may have killed the animal in their attempt to save it. "Unfortunately, and pursuant to an article in the local paper, the officers had seen a video of an adult Brahma bull immobilized by a Taser and thought that would work here. Spokesman-Review, April 13, 2006; Exhibit 14 of Complainant's brief." Court's Memorandum Opinion, page 8. "Had the officers been unable to control the movement of the calf such that it endangered others and been obligated to shoot it, this matter would not be before a court." Court's Memorandum Opinion, page 7.

Even the Citizen Complainant, Ms. Anderlik, believed the whole incident was due to a lack of sufficient officer training. She stated, "I don't think they [the deputies] had any thought of being malicious," "[w]e

just think they weren't sufficiently trained about what Tasers can do." (Petitioner's exhibit 1, Petitioner's Motion to Appoint Special Prosecutor, filed February 16, 2007). Moreover, the only person potentially civilly damaged, the owner of the bull, one Ted Ward, stated "it was better [that the animal died] than it getting on the freeway or staying on the road and causing an accident."<sup>1</sup>

The Court recognized that remedial measures had been instituted as a result of this unfortunate incident:

The complainant here isn't even the owner of the calf. She's bringing it to protect against any subsequent behavior. I would suggest that law enforcement has been put on notice that this behavior isn't appropriate.

In point of fact, in one of the articles in our paper, the sheriff said that they were reviewing how they deal with animals. And I am also aware that SCRAPS is being funded for a tranquilizer gun and a large trailer to assist in large-animal issues. So I know that there has been activity to prevent this from happening again.

Court, at RP page 27 (3-26-07 Petitioner's Motion for Reconsideration of Court's written Opinion ).

By written Memorandum Opinion, filed March 12, 2007, the trial court held that no criminal citizen's complaint would be authorized or ordered and that the district court did not have the authority to appoint a special prosecutor. Therefore, there was never a criminal complaint filed

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<sup>1</sup> Contained in Police Report provided to the District Court and State by the Petitioner.

or a criminal case started charging the defendant officers as requested by the complainant.

The Petitioner appealed to Superior Court the District Court's discretionary denial of her petition to file a criminal complaint. The Superior Court dismissed the appeal, after briefing and arguments, holding that the RALJs did 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 Superior Court also noted and held that the Parties captioned in the appeal were not the parties involved in the appeal.

However, the Superior Court noted that review by a writ *was* provided for by the RALJ's, stating: "However, the RALJ's provide for review by writs, under RALJ 1.1(c). Under the procedural circumstance of this case, the petitioner is not without review. Either a writ of certiorari or a writ of mandate under RCW 7.16 may provide relief."

Petitioner thereafter filed an Application for a Writ of Certiorari/Writ of Review in the Superior Court for Spokane County, alleging, among other things, that she "had no other adequate remedies existing at law." (Exhibit 1, attached, "Petitioner's Motion for Issuance of Writ of Review/Certiorari).

The Writ request was initially denied. Petitioner timely filed a Motion for Reconsideration. On October 10, 2007, the Superior Court

denied his Motion for Reconsideration. (Exhibit 2 attached). Petitioner failed to appeal that Superior Court decision.

#### IV. ARGUMENT

1. **None of the Considerations governing Acceptance of Discretionary Review of an Interlocutory Decision, as set forth in RAP 13.5(b), warrant review in this case.**

RAP 13.5(b) sets forth the considerations governing acceptance of review in cases such as this. It states:

**(b) Considerations Governing Acceptance of Review.** Discretionary review of an interlocutory decision of the Court of Appeals will be accepted by the Supreme Court only:

(1) if the Court of Appeals has committed an obvious error which would render further proceedings useless; or

(2) if the Court of Appeals has committed probable error and the decision of the Court of Appeals substantially alters the status quo or substantially limits the freedom of a party to act; or

(3) if the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a trial court or administrative agency, as to call for the exercise of revisory jurisdiction by the Supreme Court.

Because decisions of the Court of Appeals denying discretionary review are reviewable only by motion for discretionary review, this Court should consider only whether the Court of Appeals obviously or probably erred or so far departed from the usual course of proceedings as to call for the Supreme Court's review.

The Court of Appeals has not committed an obvious error. RAP 2.2(c) limits direct appellate review of a superior court decision to those cases where the superior court proceeding was a trial de novo not involving a traffic infraction. All other RALJ proceedings are subject to discretionary review under RAP 2.3(d). The Court of Appeals determination that the instant matter was “not appealable as a matter of right” was correct. An appeal may not be entertained by a court unless a method of appeal is prescribed by statute or by rule of court. *City of Bremerton v. Spears*, 134 Wn.2d 141, 949 P.2d 347 (1998); RCW 2.06.030; *State ex rel. Northwestern Elec. Co. v. Superior Court*, 27 Wn.2d 694, 700, 179 P.2d 510 (1947); *Western American Co. v. St. Ann Co.*, 22 Wash. 158, 60 Pac. 158.

As an aside, the Superior Court correctly determined that the writ procedure, not direct review, was the appropriate path for review of the district court’s discretionary decision. Patently, CrRLJ 2.1, grants no right of appeal but relates merely to procedure, a procedural rule that is *discretionary* with the district court. See CrRLJ 2.1(c) (7) “. . . the judge *may* authorize the citizen to sign and file a complaint in the form prescribed in Cr RLJ 2.1(a).” No right to appeal from a denial of a request

that a complaint be filed is found in CrRLJ 2.1 or in the RALJs. However, the RALJs retain writ provisions.<sup>2</sup>

A decision resulting from a proceeding not mentioned in the RALJs as being subject to direct appeal indicates that the matter is not subject to direct review. See *City of Bremerton v. Spears*, 134 Wn.2d 141, 949 P.2d 347 (1998); RCW 2.06.030; and *See In re Chubb*, 112 Wn.2d 719, 721, 773 P.2d 851 (1989):

RAP 2.2(a) sets out the types of proceedings in which a litigant may appeal as a matter of right. Failure to mention a particular proceeding in RAP 2.2(a) indicates this court's intent that the matter be reviewable solely under the discretionary review guidelines of RAP 2.3. *Cf. In re Lewis*, 89 Wn.2d 113, 115, 569 P.2d 1158 (1997); *In re Watson*, 23 Wn. App. 21, 23, 594 P.2d 947 (1979).

In light of the above, the Court of Appeals did not commit obvious error when it determined the Superior Court decision was not appealable as a matter of right.

### **Mootness**

The Court of Appeals did not commit obvious error in denying discretionary review because the case was moot. It is a general rule that, where only moot questions or abstract propositions are involved, or where

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<sup>2</sup> RALJ 1.1(c) provides:

**Statutory Writs Retained.** These rules do not supersede and do not govern the procedure for seeking review of a decision of a court of limited jurisdiction by statutory writ.

the substantial questions involved in the trial court no longer exist, the appeal, or writ of error, should be dismissed. *Norman v. Chelan County Public Hosp. Dist. No. 1*, 100 Wn.2d 633, 673 P.2d 189 (1983).<sup>3</sup> Suggestions on why a court *may* accept review of a moot case does not make a Court's disinclination to do so "obvious error."

In light of the above cases, there is no obvious error in the court of Appeals decision denying discretionary review.

There is no probable error committed by the Court of Appeals denial of discretionary review that substantially altered the status quo or substantial limited the freedom of a party to act - especially here where the Petitioner has conceded that the case is moot, and was moot on April 12, 2007, some four or five months prior to any filing in the Court of Appeals. No party could "act" after April 12, 2007.

For the same reasons as set forth above, the Court of Appeals has neither "so far departed from the accepted and usual course of judicial proceedings," nor "so far sanctioned such a departure by a trial court or

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<sup>3</sup> The petitioner has no constitutional right to appeal. Because this is the only request for a Citizen's Complaint filed in District Court in the last eight years, a period of time during which present counsel for respondent has been supervisor of the District Court for the Spokane Prosecutors Office, it hardly presents an overriding issue of public interest.

administrative agency, as to call for the exercise of revisory jurisdiction by the Supreme Court.” This Court should deny discretionary review.

**2. Discretionary Review is not warranted where Petitioner sought a Writ and failed to appeal from the holding denying the Writ.**

While the RALJ’s do not authorize discretionary review, they have retained the writ process. RALJ 1.1(c) provides:

**Statutory Writs Retained.** These rules do not supersede and do not govern the procedure for seeking review of a decision of a court of limited jurisdiction by statutory writ.

Indeed, subsequent to the superior court’s ruling on the RALJ appeal, the Petitioner sought review in that same court by writ. The Petitioner’s Motion for Writ of Certiorari was denied. The Superior Court held that “‘the petition was not filed in a reasonable time,’ ‘[f]urther, Judge Derr’s ruling was within the District Court’s jurisdiction and authority, and the facts alleged by the petitioner do not establish that Judge Derr’s decision was arbitrary and capricious or illegal. (internal citations omitted).’” Superior Court Findings, (Exhibit 2, *Order Denying Motion for Reconsideration (on Writ of Review/Certiori)*).

The Petitioner purposefully failed to appeal from the Order Denying the Writ and now seeks to avoid those findings of the Superior Court, *sub silencio*, and thereby abuse the law of the case doctrine which

promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues.

In order to prevent repetitious litigation and to provide binding answers, the res judicata doctrine bars reasserting the same claim in a subsequent application. “ ‘The law of res judicata ... consists entirely of an elaboration of the obvious principle that a controversy should be resolved once, and not more than once.’ ” *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wash.2d 22, 30, 891 P.2d 29 (1995) (quoting 4 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 21:9, at 78 (2d ed.1983)).

Res judicata occurs when a prior judgment has a concurrence of identity in four respects with a subsequent action. There must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. The Petitioner argued the same claims and filed the same briefing in his application for writ of review/certiorari that he had filed in the superior court on appeal and then filed in his request for discretionary review to the Court of Appeals. The same claims are now made to this Court. The parties are the same as in the writ action, only older. The subject matter and the legal arguments are the same as those contained in the briefing to the superior court in the writ action.

Petitioner's request for Discretionary Review should be barred by the principles of res judicata.

**V. CONCLUSION**

The Court of Appeals has not obviously or probably erred or so far departed from the usual course of proceedings as to call for the Supreme Court's review. Additionally, Petitioner's request for Discretionary Review should be barred by the principles of res judicata.

Respectfully submitted this 31<sup>st</sup> day of March 2008 at  
Spokane, Washington.

STEVEN J. TUCKER  
Spokane County Prosecuting Attorney

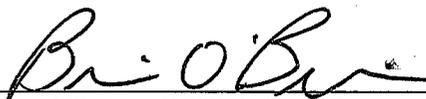
  
\_\_\_\_\_  
Brian O'Brien, WSBA # 14921  
Deputy Prosecuting Attorney

Exhibit 1  
Petitioner's Motion for Writ  
of Review/Certiorari

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**FILED**

AUG 13 2007

THOMAS R. FALLQUIST  
SPOKANE COUNTY CLERK

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE**

CHRIS ANDERLIK,  
Petitioner,

vs.

SPOKANE COUNTY DISTRICT COURT  
JUDGE SARA DERR et al.,  
Defendants

Case No.: 07-2-03520-1

**PETITIONER'S MOTION FOR ISSUANCE  
OF WRIT OF REVIEW/CERTIORARI**

**Hearing Date: Friday, August 24, 2007  
Hearing Time: 9 a.m.  
Petitioner Appearing Telephonically  
Before: Judge O'Connor**

**I. RELIEF REQUESTED**

Chris Anderlik, citizen criminal complainant under CrRLJ 2.1(c), through her attorney ADAM P. KARP, seeks a writ of review/certiorari to obtain partial reversal of Spokane County District Court Judge Sara Derr's March 12, 2007 conclusions of law holding CrRLJ 2.1(c) unconstitutional as applied based on a violation of separation of powers doctrine and refusing to appoint a special prosecutor or disqualify the Spokane County Prosecuting Attorney's Office. Ms. Anderlik is not assigning error to the court's findings of probable cause or its findings regarding the conditions enumerated in CrRLJ 2.1(c)(1-7) as being satisfied. This petition for a

PETITIONER'S MOTION FOR  
ISSUANCE OF WRITS - 1

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1 writ of review pertains only to the court's granting the prosecutor's motion for reconsideration  
 2 on separation of powers grounds and the court's denying Ms. Anderlik's motion to appoint a  
 3 special prosecutor and disqualify the Spokane County Prosecuting Attorney's office. In this  
 4 respect, Ms. Anderlik also seeks a writ of review for denial of her motion for reconsideration and  
 5 relief from judgment, heard on March 26, 2007.<sup>1</sup>

## 6 II. FACTS

7 To conserve judicial and environmental resources, for purposes of this motion only, Ms.  
 8 Anderlik incorporates by reference the memorandum opinion of Judge Derr dated March 12,  
 9 2007. *Exhibit 1 to Karp Decl.* In essence, this matter involves allegations of second-degree  
 10 animal cruelty arising from the prolonged Tasing of a tired, male calf positioned behind the  
 11 Oxford Suites near the Spokane Valley Mall and adjacent to an uninhabited Centennial Trail.  
 12 After the deputies discharged their Tasers for cumulatively over seven minutes, the calf  
 13 vocalized and died. In support of the allegations of criminal conduct, Ms. Anderlik presented  
 14 declarations of experts Temple Grandin, Bernard Rollin, Dr. Holly Cheever, and Michael Ashby,  
 as well as an eyewitness declaration of Arabella Akossy.<sup>2</sup>

15 On January 22, 2007, over the prosecutor's objection, the trial court found probable cause  
 16 to charge Duane Simmons and Ballard Bates with second-degree animal cruelty and additionally  
 17 found that all considerations (1) through (7) identified in CrRLJ 2.1(c) were satisfied.  
 18 Specifically, the court held:

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 21  
 22 <sup>1</sup> By telephonic agreement on August 13, 2007, Mr. O'Brien is graciously not objecting to the timeliness of this  
 motion being filed 11 days before the hearing. Ms. Anderlik hopes to have expedited review of this matter before 30  
 days run on Judge O'Connor's August 1, 2007 order dismissing the RALJ appeal of this matter. A ruling before  
 August 31, 2007 will obviate the need to clog the appellate courts with a motion for discretionary review, since it  
 would be rendered moot if the writs are issued.

23 <sup>2</sup> These declarations are not provided here since the errors of law asserted have nothing to do with merits of the  
 proposed charge (since the court found probable cause), but instead focus on purely constitutional issues. Upon  
 request and after the writ is issued, they will be produced as part of the record from the district court.

24 PETITIONER'S MOTION FOR  
 25 ISSUANCE OF WRITS - 2

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1 So here's my ruling. As far as the animal cruelty, and I have fairly well-defined  
 2 where I see the potential for that charge, I believe that probable cause does exist.  
 3 I've satisfied the additional factors that need to be considered. I just went through  
 4 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.

5 *RP Jan. 22, 2007, 33:19—34:3 (Exhibit 2 to Karp Decl., subjoined).*

6 The court instructed Ms. Anderlik to prepare a criminal complaint for review and  
 7 signature by her and Spokane County Deputy Prosecuting Attorney Brian O'Brien, as stated  
 8 below:

9 THE COURT: All right. Therefore, a complaint will be authorized as set  
 forth here. Mr. Karp, did you prepare one by any chance?

10 MR. KARP: I do not have one with me at the moment, Your Honor.

11 THE COURT: All right. I would like you to prepare one and present a  
 12 copy of the proposed complaint to Mr. O'Brien for review before the Court signs  
 13 off on it.

14 *Id.*, at 34:22—35:4.

15 This same day, Sheriff Ozzie Knezovich "defended his deputies" and told reporters that  
 16 the officers were "completely justified." Jan. 23, 2007, *Spokesman-Review*, dated Feb. 16,  
 17 2007. Prosecuting Attorney Steve Tucker and Brian O'Brien openly "refused to file charges" and  
 18 publicly argued "against the filing of the citizen's petition." *Id.* On January 25, 2007, the  
 19 Spokane County Prosecuting Attorney's Office filed a motion for reconsideration challenging the  
 20 entire citizen criminal complaint process as unconstitutional, a matter to be argued on March 2,  
 21 2007. On January 27, 2007, the Sheriff again said that "killing the animal was necessary for  
 22 public safety reasons." Jan. 27, 2007, *Spokesman-Review*. Excerpts from the prosecuting  
 23 attorney's motion were disseminated publicly in the local newspaper, voicing continued  
 opposition to filing of charges. *Id.*

24 PETITIONER'S MOTION FOR  
 25 ISSUANCE OF WRITS - 3

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1 On March 1, 2007, Ms. Anderlik submitted a proposed criminal complaint to the court  
2 and Mr. O'Brien. On March 2, 2007, the court heard oral argument on the prosecutor's motion  
3 for reconsideration and Ms. Anderlik's motion to disqualify the Spokane County Prosecuting  
4 Attorney's Office and appoint a special prosecutor. Judge Derr reserved ruling on these motions  
5 until she could prepare a written memorandum.

6 On March 12, 2007, the court issued a memorandum opinion upholding its findings of  
7 January 22, 2007 that Ms. Anderlik had satisfied the elements of CrRLJ 2.1(c), that probable  
8 cause existed to charge Simmons and Bates with second-degree animal cruelty, that Simmons  
9 and Bates were not immune under RCW 16.52.210, and that the court would otherwise have  
10 permitted Ms. Anderlik to file a criminal complaint as provided by CrRLJ 2.1(c) but for the  
11 additional conclusions of law that the court had no authority to appoint a special prosecutor and  
12 that to compel the prosecutor to handle this criminal matter would violate separation of powers  
13 doctrine as applied. *Exhibit 1 at 17-18.*

14 On March 19, 2007, Ms. Anderlik filed a motion for reconsideration and/or relief from  
15 this March 12, 2007 memorandum opinion. Argued on March 26, 2007, Ms. Anderlik's motion  
16 to finalize and certify the court's previous rulings for appeal under the RALJ and for direct  
17 review to the Supreme Court resulted in Judge Derr orally ruling that her order of March 12,  
18 2007 was appealable as a matter of right under the RALJ. First, the court confirmed that the  
19 complaint was ordered on January 22, 2007 but was not filed due to a motion for reconsideration  
20 filed within days of her oral ruling:

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

24 PETITIONER'S MOTION FOR  
25 ISSUANCE OF WRITS - 4

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1 *RP Mar. 26, 2007*, at 21:22—22:4 (Exhibit 3 to *Karp Decl.*, subjoined). While the court  
 2 acknowledged the statewide importance of this issue, including the fact that District Court judges  
 3 around the state were watching the case with avid interest, and while Judge Derr agreed that the  
 4 question of the rule’s constitutionality was a fundamental issue in need of clarification, the court  
 5 concluded that the matter was not sufficiently “urgent” to merit direct review. She added that  
 6 while she did not have the power to strike down a Supreme Court rule as facially  
 7 unconstitutional, Ms. Anderlik could go forward with her appeal to the Superior Court, which  
 8 might then certify it for further appellate review on different grounds. *Id.*, at 25:12-20 (statewide  
 9 importance); 27:5—28:13.

10 On April 5, 2007, Ms. Anderlik filed a Notice of RALJ Appeal to Spokane County  
 11 Superior Court. This was dismissed by the Honorable Kathleen O’Connor on August 1, 2007 on  
 12 the basis that Judge Derr’s decisions were not RALJ-appealable. Accordingly, without waiving  
 13 the claim that the matter is RALJ-appealable, Ms. Anderlik now seeks a writ of review/certiorari  
 14 of those same decisions.

15 **III. ISSUES PRESENTED**

Should a statutory writ of review or constitutional writ of certiorari be granted? **Yes.**

16 **IV. EVIDENCE RELIED UPON**

17 This motion is based on the pleadings and files herein, including the *Declaration in*  
 18 *Support of Writ of Review.*

19 **V. AUTHORITIES & ARGUMENT**

20 There exist three avenues to obtain judicial review of an lower court’s decision – (1)  
 21 direct appeal allowed by ordinance, statute, or rule; (2) a statutory writ of review under RCW  
 22 7.16.040 (statutory certiorari); and (3) discretionary review under the court’s inherent and  
 23 constitutional power (constitutional writ of certiorari). Ms. Anderlik initially sought review

24 PETITIONER’S MOTION FOR  
 25 ISSUANCE OF WRITS - 5

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1 under the RALJ (1), and now seeks review under Ch. 7.16 RCW (2) and by the constitution (3).

2 **1. Writ of Review.**

3 The pertinent statute for granting a writ of review follows:

4 **Grounds for granting writ.**

5 A writ of review shall be granted by any court, except a municipal or district  
6 court, when an inferior tribunal, board or officer, exercising judicial functions, has  
7 exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally,  
8 or to correct any erroneous or void proceeding, or a proceeding not according to  
9 the course of the common law, and there is no appeal, nor in the judgment of the  
10 court, any plain, speedy and adequate remedy at law.

11 RCW 7.16.040. To obtain a statutory writ of review under Ch. 7.16 RCW, the petitioner must  
12 show (1) that an inferior tribunal (2) exercising judicial functions (3) exceeded its jurisdiction or  
13 acted illegally, and (4) there is no adequate remedy at law. *Raynes v. City of Leavenworth*, 118  
14 Wn.2d 237, 244, 821 P.2d 1204 (1992).

15 Prongs (1) and (2) should not be disputed since the Spokane County District Court is an  
16 inferior tribunals exercising judicial functions. As for prong (4), the adequate remedy might have  
17 been the RALJ appeal had the superior court not dismissed it. As for prong (3), petitioner has  
18 claimed that Judge Derr fundamentally misinterpreted substantive and constitutional law, and  
19 caused procedural defects, thereby "acting illegally." Illegal acts include substantive errors:

20 OFM interprets "acts illegally" narrowly to include only those situations where  
21 there is a showing that the lower tribunal made a *procedural* error. Thus, it would  
22 exclude review of alleged substantive errors. This interpretation, however, is  
23 inconsistent with the legislative purpose behind the statutory writ: to provide a  
24 means to protect against administrative injustice. Thus, the intent of the  
25 legislation is best furthered by interpreting "illegality" to include errors of law and  
allow review where an inferior tribunal exercising quasi-judicial functions  
allegedly has made a legally erroneous ruling and there is no other adequate  
remedy.

26 *Washington Public Employees Ass'n v. Washington Personnel Resources Bd.*, 91 Wash. App.

27 PETITIONER'S MOTION FOR  
28 ISSUANCE OF WRITS - 6

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1 640, 652-53 (1998).

2 At the stage of applying for the writ of review, the petitioner need only make a slight  
3 showing, raising colorable arguments that the lower tribunal acted illegally without having meet  
4 a more substantial burden of proof as if this were a final adjudication on the merits. The *Leonard*  
5 case supports this interpretation of burdens. *Leonard v. Seattle Civil Service Comm'n*, 25  
6 Wn.App. 699, 703-04 (1980), *rev. den'd*, 94 Wn.2d 1009 (1980), Where plaintiffs' petition for a  
7 writ of certiorari simply alleged arbitrary or capricious action on the part of the defendant, and  
8 the King County Superior Court denied the writ, Division One of the Court of Appeals reversed  
9 stating that:

10 The proper course would have been to order the record of the hearing before the  
11 Commission to be sent for review, and permit the employees, before hearing the  
12 case on the merits, to amend the petition to state more specifically how the  
13 Commission's decision was contrary to law.

14 *Id.*, at 703-04 (emphasis added). The petitioner must merely state a claim upon which relief can  
15 be granted at this application stage:

16 We think it clear that, under normal rules of pleading, the employees' petition  
17 sufficiently states a claim upon which relief can be granted. "The only issue  
18 before the trial judge is whether it can be said there is no state of facts which  
19 plaintiff could have proven entitling him to relief under his claim." *Contreras v.*  
20 *Crown Zellerbach Corp.*, 88 Wash.2d 735, 742, 565 P.2d 1173, 1177 (1977). ...  
21 In reversing the trial court, our State Supreme Court stated that "(i)t is but trite to  
22 say that if the facts pleaded show any ground of relief, the general demurrer must  
23 be overruled." *State ex rel. West v. Seattle*, *supra* at 96, 309 P.2d at 753. We see  
24 no reason to adopt a rule different from that one.

25 *Id.*, at 702-03.

26 An alternative, though easily harmonized, interpretation of the showing to be made at a  
27 show cause hearing for issuance of the writ of review is found in *Kerr-Belmark v. Marysville*, at  
28 36 Wash. App. 370 (1984), *rev. den'd* 101 Wn.2d 1018 (1984). In *Kerr-Belmark*, the plaintiff

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1 contended that so long as it set forth a prima facie case that Defendant's action was arbitrary and  
2 capricious, the writ must be issued. Division One of the Court of Appeals affirmed the trial  
3 court's denial of the constitutional writ of certiorari on the basis that "bare assertions with no  
4 supporting facts of any kind and [which] do not demonstrate that Marysville's action was 'willful  
5 and unreasoning ...'" fail to meet the petitioner's "burden of showing that the action was  
6 arbitrary and capricious or contrary to law ...." *Id.*, at 374. In deciding whether to grant review,  
7 the court "looks initially to the petitioner's allegations to determine whether, if true, they clearly  
8 demonstrate such a violation." *King Cy. v. State Bd. of Tax Appeals*, 28 Wn. App. 230, 238, 622  
9 P.2d 898 (1981).

10 The *Leonard* case involved a completely discretionary writ of certiorari, as did *Kerr-*  
11 *Belmark* (the statutory writ of review was denied on the basis that Defendant's action was not  
12 quasi-judicial and thus statutory jurisdiction was improperly invoked). Neither *Leonard* nor  
13 *Kerr-Belmark* address the precise showing to be made for issuance of the statutory writ of  
14 review, but it arguably requires even less than that for issuance of a constitutional writ of  
15 certiorari, since the latter is purely discretionary.

16 Petitioner does not rely on "bare assertions" absent supporting evidence. She sets forth  
17 numerous errors of law, including constitutional violations that, if true, clearly state a claim  
18 under the *Kerr-Belmark* and *Leonard* tests. In addition, Ms. Anderlik has provided far more than  
19 the merely conclusory allegations presented in *Leonard*. Because the test is not solely whether  
20 the inferior tribunal's action was arbitrary or capricious, but also whether the official acted  
21 illegally or contrary to law, as described more fully below, there is no reason why the statutory  
22 writ of review should be denied.

23 Ms. Anderlik has asserted numerous errors in Judge Derr's interpretation and application  
24 of the law. *See Declaration in Support of Writ of Review*. So long as Ms. Anderlik has made a

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1 colorable showing of at least one error in the proceeding, the Superior Court *must* grant the writ  
 2 of review. Although Ms. Anderlik believes she need not make an elaborate showing for why  
 3 Judge Derr acted illegally, in order to provide the Court with as much information as possible to  
 4 make an informed decision, Ms. Anderlik presents the following argument. Petitioner Anderlik  
 5 challenges Judge Derr's ruling on the basis that she applied the law erroneously. The following  
 6 points of error exist, as described below:

7 (a) The court erred in declaring CrRLJ 2.1(c) unconstitutional as applied.

8 (b) The court erred in denying petitioner's motion to disqualify the Spokane County  
 9 Prosecuting Attorney's Office.

10 (c) The court erred in denying petitioner's motion to appoint a special prosecutor.

## 11 2. Writ of Certiorari

12 Superior courts enjoy inherent constitutional powers to review inferior tribunal decisions  
 13 for illegal or manifestly arbitrary acts. Wash. Const. Art. IV, § 6. The constitutional writ of  
 14 certiorari enables a court of review to determine whether the proceedings below were within the  
 15 lower tribunal's jurisdiction and authority. *Bridle Trails Community Club v. City of Bellevue*, 45  
 16 Wash.App. 248, 252-53, 724 P.2d 1110 (1986). Courts should accept review where the appellant  
 17 alleges facts that, if verified, establish the error of the lower tribunal's decision. *Pierce Cy.*  
 18 *Sheriff v. Civil Service Comm'n*, 98 Wn.2d 690, 693-94 (1983). Traditionally, such writs are  
 19 granted where the statutory writ of review or direct appeal routes are unavailable, unless good  
 20 cause can be shown for not using those methods. *Bridle Trails*, 45 Wash.App. at 253. The time  
 21 period for petitioning for a writ of certiorari, while not limitless, is also not constrained by  
 22 analogous times ordinarily prescribed for filing appeals. Rather, laches appears to be the only  
 23 affirmative defense. *Clark Cy. PUD No. 1 v. Wilkinson*, 139 Wn.2d 840, 847-48 (2000). *See also*  
*Hough v. Wash. State Personnel Bd.*, 28 Wash.App. 884, 888 (1981) (30-day statutory limitation

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1 limitation does not apply to common law writ of certiorari).

2 To the extent Spokane County objects to the applicability of the RALJ appeal or statutory  
3 writ of review mechanisms for evaluating Judge Derr's decision, the *Wilkinson* court clearly  
4 allows for certiorari since no other remedy exists. If Spokane County objects to the timeliness of  
5 said writ of review, a good cause basis for considering a discretionary writ exists since Ms.  
6 Anderlik timely filed (within 30 days) her RALJ appeal, which was accepted by the district  
7 court. Furthermore, the trial judge ruled that the RALJ applied to her rulings. It would invite  
8 fundamental unfairness to invoke a timeliness objection to this alternative method of appellate  
9 review under these circumstances.

10 Having established good cause, *Wilkinson* allows for reasonably timely petitions for  
11 discretionary writs of certiorari, particularly where the delay is excusable and there is no  
12 prejudice to any party by the delay. *Wilkinson*, at 848. The delay, if one describes it as such, is  
13 reasonable given the sequence of events and reliance by complainants on statements by  
14 defendants in this matter.

15 **3. Error One: "As Applied" Decision Facially Nullifies CrRLJ 2.1(c)**

16 On January 22, 2007, and again on March 12, 2007, the court found that probable cause  
17 existed to charge Simmons and Bates with second-degree animal cruelty, that all elements of  
18 CrRLJ 2.1(c) were satisfied, and that but for the perceived inability to appoint a special  
19 prosecutor and alleged separation of powers violation, the court would have permitted Ms.  
20 Anderlik to file her criminal complaint. As applied, the court held that CrRLJ 2.1(c) was  
21 unconstitutional. But where a citizen complainant has qualified under a rule promulgated by the  
22 Washington State Supreme Court, does not the district court's "as applied" decision in essence  
23 render the rule a nullity in every circumstance? In other words, by ruling that CrRLJ 2.1(c) is *de*

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1 *jure* unconstitutional as applied, has the district court not also declared CrRLJ 2.1(c) *de facto*  
2 unconstitutional on its face?

3 Traditionally, "a facial challenge must be rejected unless there exists no set of  
4 circumstances in which the statute can constitutionally be applied." *In re Detention of Turay*, 139  
5 Wn.2d 379, 417 fn. 27 (1999) (quoting *Ada v. Guam Soc'y of Obstetricians & Gynecologists*,  
6 506 U.S. 1011, 1012 (1992)); *City of Richmond v. Moore*, 151 Wn.2d 664, 669 (2004); *see also*  
7 *State v. Clinkenbeard*, 130 Wash.App. 552 (III, 2005). Furthermore, the prosecutor must prove  
8 unconstitutionality beyond a reasonable doubt. *Clinkenbeard*, at 560-561.

9 The Prosecutor argues that the Supreme Court, in enacting CrRLJ 2.1(c), has improperly  
10 encroached upon the executive branch's power to make discretionary prosecutorial decisions. In  
11 evaluating the separation of powers challenge, "The question to be asked is not whether two  
12 branches of government engage in coinciding activities, but rather whether the activity of one  
13 branch threatens the independence or integrity or invades the prerogatives of another." *Carrick v.*  
14 *Locke*, 125 Wn.2d 129, 135 (1994) (citing *Zylstra v. Piva*, 85 Wn.2d 743, 750 (1975)). "In  
15 adjudging the potential damage to one branch of government by the alleged incursion of another,  
16 it is helpful to examine both the history of the practice challenged as well as that branch's  
17 tolerance of analogous practice." *Id.*, at 136 (citing *Minstretta v. U.S.*, 448 U.S. 361, 398-401  
18 (1989)). "Deeply embedded traditional ways of conducting government cannot supplant the  
19 Constitution or legislation, but they give meaning to the words of a text or supply them." *Id.*  
20 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952)(Frankfurter, J.,  
21 concurring)). The *Carrick* court expressly rejected a rigid categorical view of governmental  
22 functions for purposes of separation of powers analysis. *Id.*, at 137 (citing *Morrison v. Olson*,  
487 U.S. 654, 689-91 (1988)).

23 In evaluating the governmental functions of investigation of potential crimes, the *Carrick*

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1 court recognized the high degree of collaboration between the judicial and executive branches:

2 **Although the primary responsibility for the investigation of potential crimes**  
 3 **lies with the executive, it cannot be doubted that the judiciary plays a role**  
 4 **even before the formal filing of charges. For instance, judges issue search**  
 5 **warrants which allow police to further their investigations. Judges also**  
 6 **preside over grand juries, which act in a manner closely analogous to inquest**  
 7 **proceedings.** <sup>FN3</sup> *See RCW Chapter 2.36.* These instances of judicial  
 8 involvement in investigations into potentially criminal activity are not unique.<sup>FN4</sup>  
 9 Indeed, we have noted that cooperation and coordination among the branches is to  
 be encouraged, and only when such cooperation changes to unwarranted coercion  
 or intrusion should the judiciary exercise its authority to sustain its separate  
 identity. *Zylstra*, 85 Wash.2d at 750, 539 P.2d 823. Respondents, in urging us to  
 abandon our tradition of bilateral investigations, envision a government founded  
 on a distrustful truce rather than a synergistic union.

10 *Carrick*, at 137 (emphasis added). The court further examined the role of the grand jury as  
 11 having been described as “an institution [that] has one foot in the judicial branch and the other in  
 12 the executive.” *Id.*, at fn. 3 (quoting *In re Request for Access to Grand Jury Materials*, 833 F.2d  
 13 1438, 1444 (11th Cir.1987)). In finding that “[t]he unique function of the grand jury necessitates  
 14 a high degree of cooperation between the judicial and executive branches,” the court concluded  
 15 that “[t]he constitutionality of this arrangement under both the federal constitution and  
 16 Washington's constitution is unquestionable.” *Id.* Indeed, the judicially led investigation by Chief  
 17 Justice Earl Warren of the United States Supreme Court into the assassination of President John  
 18 F. Kennedy bespeaks this point. *Id.*, at fn. 4.

19 **a. Historical Antecedents to CrRLJ 2.1(c)**

20 Historical antecedents to CrRLJ 2.1(c) predate enactment of Washington's Constitution,  
 21 much like the statutes authorizing inquests. The *Carrick* court found no separation of powers  
 22 violation by the inquest statute:

23 Considering first the statute authorizing inquests, we perceive no separation of

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1 powers violation. RCW Chapter 36.24 dates back virtually unchanged to the 1854  
 2 territorial laws of Washington.<sup>FNS</sup> Thus, it predates the enactment of our state's  
 3 constitution by some 35 years and has played an active role in our legal system for  
 4 over a century. Judges have been assuming the role and duties of coroners for as  
 long as Washington has been part of the United States. Such a long and heretofore  
 unchallenged association between the executive and judicial branches is prima  
 facie evidence of the constitutionality of the statute.

5 *Id.*, at 137-38.

6 The citizen criminal complaint rule has been Washington law (in various forms) from the  
 7 early days of Washington's statehood and even before, when it was made a territory in 1853. In  
 8 1854, thirty-five years before the Washington Constitution was approved, Washington law  
 9 permitted any person to approach a superior court judge or any justice of the peace asking that a  
 10 warrant be issued for misdemeanors and felonies:

11 Upon complaint being made to any justice of the peace, or judge of the superior  
 12 court, that a criminal offense has been committed, he shall examine on oath the  
 13 complainant, and any witness provided by him, and shall reduce the complaint to  
 14 writing, and shall cause the same to be subscribed by the complainant: and if it  
 15 shall appear that any offense has been committed of which the superior court has  
 16 exclusive jurisdiction, the magistrate shall issue a warrant reciting the substance  
 17 of the accusation, and requiring the officer to whom it shall be directed forthwith  
 18 to take the person accused and bring him before the person issuing the warrant,  
 unless he shall be absent or unable to attend thereto, then before some other  
 magistrate of the county, to be dealt with according to law, and in the same  
 warrant may require the officer to summon such witnesses as shall be therein  
 named, to appear and give evidence on the examination. [L. '54, p. 106, § 27; Cd.  
 '81, § 1921; 2 H. C., § 1852]

19 Ballinger Code § 6695 (1897); Remington Revised Code § 1949 (1932); Pierce Code § 3114  
 20 (1905). Indeed, early cases before our Supreme Court discuss instances where private citizens  
 21 appeared in court to prefer a criminal charge against a third party. *See State ex rel. Murphy v.*  
 22 *Taylor*, 101 Wash. 148 (1918); *State ex rel. Romano v. Yakey*, 43 Wash. 15 (1906). Eventually,  
 23 the private criminal complaint became a court rule. JCrR 2.01 allowed citizen criminal

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1 complaints for felonies and misdemeanors. JCrR 2.01(d)(1963); JCrR 2.01(c) (1969). The JCrRs  
 2 were replaced with the CrRLJs, providing the most current version of CrRLJ 2.1(c)(last amended  
 3 in 1999).

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

13 RCW 2.04.190 states:

14 The supreme court shall have the power to prescribe, from time to time, the forms  
 15 of writs and all other process, the mode and manner of framing and filing  
 16 proceedings and pleadings; of giving notice and serving writs and process of all  
 17 kinds; of taking and obtaining evidence; of drawing up, entering and enrolling  
 18 orders and judgments; and generally to regulate and prescribe by rule the forms  
 19 for and the kind and character of the entire pleading, *practice and procedure to be*  
 20 *used in all suits*, actions, appeals and proceedings of whatever nature by the  
 21 supreme court, superior courts, and district courts of the state. In prescribing  
 22 such rules the supreme court shall have regard to the simplification of the  
 23 system of pleading, practice and procedure in said courts to promote the  
 24 speedy determination of litigation on the merits.

25 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). In addition,

RCW 2.04.020 states:

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1 The supreme court shall be ... vested with all power and authority necessary to  
 2 carry into complete execution all its judgments, decrees and determinations in all  
 3 matters within its jurisdiction, according to the **rules and principles of the**  
 4 **common law**, and the Constitution and laws of this state.

5 RCW 2.04.020(1890)(emphasis added).

6 The legislature, therefore, acknowledges the role of court rulemaking and common law in  
 7 civil procedure. Although there is no express constitutional provision for rulemaking by the  
 8 Supreme Court, the power was intended by the Framers:

9 Nowhere is there a constitutional provision that the Supreme Court shall have  
 10 power to make rules for its own government. It can hardly be contended that the  
 11 able framers of the Constitution intended to grant the superior courts power to  
 12 make rules and deny it to the Supreme Court. The power to make rules for its  
 13 general government has always been an attribute of the court. The framers of the  
 14 Constitution, realizing this, saw that there was no need for such a grant of power  
 15 to either the Supreme Court or the superior courts.

16 *State v. Superior Court for King Cy.*, 148 Wash. 1, 12 (1928). The Constitution does not prohibit  
 17 the Supreme Court from making rules for the inferior courts. *Id.* While a court rule may  
 18 contradict and trump a statute, it cannot contradict the state constitution. *Sackett*, at 504.

19 The Constitution does not expressly state that prosecutorial decisionmaking is expressly  
 20 vested in only the Executive Branch. Article III, Section 1 merely notes that the executive  
 21 department consists of several officials including an "attorney general." The prosecutor has not  
 22 provided any evidence of exclusive constitutional delegation of authority to the prosecuting  
 23 attorney. Rather, he references Article XI, Section 5, to support the argument that the legislature  
 24 established the powers of the county prosecutor by statute, at Ch. 36.27 RCW. *State's Motion for*  
 25 *Reconsideration*, at 9:9-12.

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

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1 to the county prosecuting attorney alone. Indeed, the argument appears to support the notion that  
2 the powers of the county prosecutor are completely delineated by the legislative branch, and that  
3 the county-level executive branch possesses no inherent constitutional power outside the scope  
4 delegated to it by the legislature. The constitution neither demands nor prevents the legislature  
5 from similarly empowering the judiciary.

6 Rather, as described above, the legislature expressly granted to the Supreme Court the  
7 right to make rules that affect criminal and civil procedure. This occurred through enactment of  
8 JCrR 2.01 and CrRLJ 2.1. While the prosecutor may assert that the content of this rule allows the  
9 judiciary to serve in the capacity of an executive officer, the language of the rule only permits a  
10 judge to evaluate probable cause (as she does in every criminal case), weigh the petition against  
11 prosecutorial guidelines recommended by the legislature under RCW 9.94A.440, and entertain  
12 other equitable considerations including motivation of the complainant. If, and only if, all factors  
13 pass muster, may the court exercise its own discretionary authority to permit the filing of the  
14 criminal charge. Once filed, the judicial branch no longer controls the course of the prosecution  
15 but surrenders its fate to the executive branch.

16 At least this is what the district court assumed. CrRLJ 2.1(c) does not expressly indicate  
17 what happens after a judge has authorized the citizen complainant to file the criminal complaint.  
18 One would suspect that the complainant could either privately prosecute or collaborate with the  
19 public prosecutor. This is, incidentally, an issue that will either nullify the separation of powers  
20 objection or invite clarification from the Supreme Court.

21 The Supreme Court, being empowered by both the legislature and the constitution to  
22 enact CrRLJ 2.1(c), has clear coextensive authority to prepare rules of criminal procedure of this  
23 nature. Moreover, once promulgated, these rules trump and nullify all conflicting statutes. RCW  
24 2.04.200(1925); *see also State v. Smith*, 84 Wn.2d 498 (1974) (procedural court rulemaking is

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1 inherent power of Supreme Court, not abridged by legislative action); *City of Fircrest v. Jensen*,  
2 158 wn.2d 384 (2006)(while finding that SHB 3055, regarding admissibility of BAC results,  
3 does not violate separation of powers in contradicting ER 401, 402, 403, and 404(b), court held  
4 that court rule prevails where in irreconcilable conflict with statute concerning matter related to  
5 court's inherent power); *see also Marine Power & Equip. Co. v. Indus. Indem. Co.*, 102 Wn.2d  
6 457 (1984)(Supreme Court may dictate, under separation of powers, its own court rules, even if  
7 contradicted by legislature).

8 In making rules, the "judiciary's province is procedural and the legislature's is  
9 substantive." *City of Fircrest*, at 394. Substantive law "prescribes norms for societal conduct and  
10 punishments for violations thereof" and "creates, defines, and regulates primary rights," while  
11 "practice and procedure pertain to the essentially mechanical operations of the courts by which  
12 substantive law, rights, and remedies are effectuated." *Id.* (quoting *State v. Smith*, 84 Wn.2d 498,  
13 501 (1974)). The proposed BAC bill in *City of Fircrest* did not violate the separation of powers  
14 doctrine by invading the prerogative of the courts to create evidentiary rules because the trial  
15 court still retained discretion to exclude test results under its rules of evidence. *Id.*, at 399. This  
16 conclusion comports with the view that unless harmonized, an irreconcilable conflict between a  
17 statute and rule must be resolved in favor of the rule.

18 An analogous case to this matter of first impression involved the court's inherent and  
19 statutory power to specify the circumstances of when a search warrant will issue. *State v. Fields*,  
20 85 Wn.2d 126, 128 (1975). The *Fields* court concluded that the court rule concerning issuance of  
21 search warrants involved procedure, rather than substance, and was not an *ultra vires* act. *Id.*, at  
22 129. The court reached this conclusion by noting that it "is well established that the issuance of a  
23 search warrant is part of the criminal process," and that once categorized as part thereof, it  
24 follows that "it involves a matter of procedure." *Id.* (citing *State v. Noah*, 150 Wash. 187 (1928),

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et al.):

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 prosecutor has failed 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)(finding that outcome of statutorily authorized inquest proceedings into death of individual by district court judge as coroner not appealable under the RALJ, but otherwise legitimate "quasi-judicial" procedure falling in "a gray zone at the periphery of both the executive and judicial branches").

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1 It is also worth noting that this alleged criminal act occurred in the city limits of Spokane  
 2 Valley, in violation of municipal law. While RCW 36.27.020 speaks to the powers of county  
 3 prosecutions, it is silent on municipal ones. Even assuming that the legislature intended to  
 4 prevent private prosecutions at the county level, using the maxim *expressio unius est exclusio*  
 5 *alterius*,<sup>3</sup> one may assume that the legislature did not intend to prohibit private prosecutions in  
 6 municipal criminal actions.

#### 7 **b. History of Private Prosecutions**

8 Private prosecutions are not new but were part of a common practice in England and  
 9 America for crime victims for several hundred years. They continue to coexist there with public  
 10 prosecutions. Michael T. McCormack, *The Need for Private Prosecutors: An Analysis of*  
 11 *Massachusetts and New Hampshire Law*, 37 Suffolk U.L.Rev. 497, 499-500 (2004); Kenneth L.  
 12 Wainstein, *Judicially Initiated Prosecution: A Means of Preventing Continuing Victimization in*  
 13 *the Event of Prosecutorial Inaction*, 76 Cal.L.Rev. 727, 751 (1988) (“Although public  
 14 prosecution is the norm in most criminal proceedings, this country has a strong and continuing  
 15 tradition of criminal prosecution by private parties. Private parties, in fact, prosecuted all  
 16 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.”)

17 New Hampshire’s common law allowed the practice of private prosecutors for many  
 18 years, and it continues to this day *Id.*, at 504. New York permitted private attorneys to prosecute  
 19 petty offenses. *People ex rel. Allen v. Citadel Mgmt. Co.*, 78 Misc.2d 626, 630 (Crim.Ct.1974).  
 20 New Jersey has also sanctioned the practice of private prosecution. *State of N.J. v. Imperiale*, 773  
 21 F.Supp. 747, 754-55 (D.N.J.1991); *State v. Storm*, 278 N.J.Super. 287 (App.Div.1994)(private  
 22

23 <sup>3</sup> A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the  
 24 alternative. *Black’s Law Dictionary*, 7<sup>th</sup> ed. 602.

1 (App.Div.1994)(private prosecution does not deny due process unless there is a conflict); *State v.*  
2 *Kinder*, 701 F.Supp. 486, 491-92 (D.N.J.1988)(N.J. Municipal Court Rule 7:4-4(b) constitutional  
3 because offenses considered penalty and punishment not severe); see also *State v. Avena*, 281  
4 N.J.Super. 327 (1995); see also *State v. Leonardis*, 73 N.J. 360, 388 (1977)(noting that “where a  
5 prosecutor proposes to drop such a prosecution the possibility of connivance or culpable non-  
6 feasance, contrary to the public interest, activates a strong public policy for judicial  
7 superintendence of such a decision.”)(Conford, P.J.A.D., concurring). Virginia’s common law  
8 allows the use of private prosecutors to assist the public prosecutor. *Cantrell v. Comm.*, 329  
9 S.E.2d 22, 25 (Va. 1985). Other states permitting private prosecutors to participate without  
10 consent or supervision of the district attorney include Alabama, Montana, and Ohio. *Hall v.*  
11 *State*, 411 So.2d 831, 838 (Ala.Crim.App.1981); *State v. Cockrell*, 309 P.2d 316 (Mont.1957);  
12 *State v. Ray*, 143 N.E.2d 484 (Ohio App.1956).

### c. Identical Challenge in Pennsylvania

13 Pennsylvania’s Supreme Court enacted Pa.R.Crim.P. 106, which provides for approval of  
14 private criminal complaints for both felonies and misdemeanors. It permitted private citizens to  
15 submit complaints to the commonwealth’s attorney, who was required to approve or disapprove  
16 it without unreasonable delay. If the attorney disapproved the complaint, she needed to state the  
17 reasons for disapproval and return it to the complainant. The complainant could then file the  
18 complaint with a judge of a court of common pleas for approval or disapproval. In *Comm. v.*  
19 *Brown*, 447 Pa.Super. 454 (1995), *aff’d o.g.*, 550 Pa. 580 (1998), Mr. Buckley, a private citizen,  
20 petitioned the trial court to direct the commonwealth attorney to prosecute the charges outlined  
21 in his private criminal complaint. The trial court granted his request. The commonwealth  
22 appealed, asserting that the order to prosecute over the attorney’s objection violated the  
23 separation of powers doctrine and that “the courts may never evaluate prosecutorial decisions

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1 that are based on policy determinations.” *Id.*, at 461. The appeals court disagreed, highlighting  
2 the importance of Rule 106 “as a necessary check and balance of the prosecutor’s decision and  
3 protects against the possibility of error.” *Id.*, citing *Comm. v. Pritchard*, 408 Pa.Super. 221, 233  
4 (1991).

5 In examining the separation of powers doctrine, the court concluded that it does “not  
6 entirely preclude judicial review of discretionary decisions made by the executive branch.” *Id.*, at  
7 462. It added that since the Pennsylvania Constitution gave their supreme court the exclusive  
8 power to establish rules of procedure, it lacked jurisdiction to interpret Rule 106 and any attempt  
9 to do so would amount to “an unwarranted intrusion into the supreme court’s authority.” *Id.*, at  
10 462-63; Penn.Const. Art. V §10(c); see also *Reilly by Reilly v. Southeastern Penn. Transp. Auth.*,  
11 507 Pa. 204, 218-219 (1985) (enforcement of rules of judicial conduct is beyond jurisdiction of  
12 superior court and to extent that it attempts to interpret canon by creating new standards of  
13 review on recusal motions, procedures for raising recusal questions, or for enforcement of  
14 violations of the code, they are without effect, as unwarranted intrusions upon Supreme Court’s  
15 exclusive right to supervise the conduct of all courts and officers of the judicial branch).

16 Analogous matters have been raised with similar effect. In *Riley v. St. Luke’s Episcopal*  
17 *Hosp.*, 252 F.3d 749 (5<sup>th</sup> Cir.(Tex.)2001), although the relator handled his own False Claims Act  
18 (FCA) qui tam action from start to finish, the court found no contravention of the doctrine of  
19 separation of powers because the Executive retained significant litigation control. In *Morrison v.*  
20 *Olson*, 487 U.S. 654 (1988), the independent counsel provisions of the Ethics in Government  
21 Act, permitting delegation of criminal prosecution functions to a judicially appointed prosecutor  
22 removable only by the Attorney General, and only under a highly constrained “good cause”  
23 requirement, did not infringe upon the Executive’s constitutional duties of Article II and violate  
24 separation of powers. In *In re Wilson*, 879 A.2d 199, 210 (Pa. Super.2005), the court found no

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1 violation of separation of powers in allowing an appellate court to review the trial court's order  
 2 sustaining the commonwealth attorney's disapproval of a private criminal complaint. In *State v.*  
 3 *Ronek*, 176 N.W.2d 153 (Iowa, 1970), a statute giving sole power to an injured spouse to  
 4 commence prosecution for adultery does not violate separation of powers. In *Young v. United*  
 5 *States ex rel. Vuitton et Fils S.A.*, 107 S.Ct. 2124 (1987), the United States Supreme Court held  
 6 that FRCP 42(b), the rule authorizing courts to initiate prosecution for criminal contempt and to  
 7 appoint attorneys to prosecute said charges, did not impermissibly intrude upon the executive  
 8 charging discretion.

9 **d. Commentary from WSBA and Other Commentators**

10 As described above, in the 1960s, JCrR 2.01 was enacted by the Supreme Court. It  
 11 permitted citizens to initiate criminal complaints for felonies and misdemeanors. A proposal to  
 12 amend JCrR 2.01 by restricting its scope to misdemeanors and gross misdemeanors and later, to  
 13 repeal CrRLJ 2.1(c), elicited comment from concerned lawyers, judges, and the WSBA. See Apr.  
 14 27, 1987 letter from Howard K. Todd; Apr. 18, 1995 letter from Judge William V. Cottrell; Apr.  
 15 13, 1995 letter from WSBA Court Rules and Procedures Committee and referenced Oct. 24,  
 16 1994 minutes (finding that rule deals with probable cause determinations, not "initiation" of a  
 17 case, making separation of powers a non-issue).<sup>4</sup> After hearing all comments, the efforts to  
 18 repeal CrRLJ 2.1(c) were rejected, and rule has been in effect in its current form since 1999. Ms.  
 19 Anderlik incorporates by reference the well-fashioned arguments of these commentators.

20 **4. Errors Two and Three: Vocal Opposition by Prosecutor Requires Disqualification**

21 The citizen criminal complaint petition process is a unique device that has statutory  
 22 origins from before the earliest days of Washington's statehood, including when it was a territory  
 23 in 1853. In 1854, Washington law permitted any person to approach a superior court judge or any

24 <sup>4</sup> These documents are part of the record below and will be referenced if a writ is issued.

1 judge or any justice of the peace asking that a warrant be issued for misdemeanors and felonies.  
2 Indeed, early cases before our Supreme Court discuss instances where private citizens appeared  
3 in court to prefer a criminal charge against a third party. *See State ex rel. Murphy v. Taylor*, 101  
4 Wash. 148 (1918); *State ex rel. Romano v. Yakey*, 43 Wash. 15 (1906); Remington Revised Code  
5 § 1949 (1932); Ballinger's Code § 6695 (1897). After the RCWs were codified, this statute was  
6 transformed into a Washington Justice Court Criminal Rule 2.01, allowing citizen criminal  
7 complaints for felonies and misdemeanors. When the CrRLJs were authorized by the Supreme  
8 Court, JCrR 2.01 (enacted in 1963) evolved into its current form as CrRLJ 2.1, restricting such  
9 complaints to misdemeanors only.

10 This procedure, however, is still under development at each stage of litigation, and in the  
11 absence of appellate guidance, requires this court to interpret the rule with discretion, equity, and  
12 common sense. District courts possess inherent equitable powers in light of the 1993 amendment  
13 to the Washington Constitution. A district court's core authority to exercise equitable power is  
14 not presently sourced by statute, but by constitution. Such powers include those of contempt and  
15 appointing counsel for a criminal defendant. Statutes only serve to limit a court's authority  
16 granted by the constitution, rather than create new authority, since equitable powers originate at  
17 the constitutional level.

18 Where the prosecuting attorney has resisted efforts to initiate prosecution, publicly  
19 argued against the presence of probable cause, and attacked the entire premise of a citizen  
20 criminal complaint process as unconstitutional, it follows that this office cannot represent the  
21 state without violating core ethical tenets that will be the product of half-hearted, if not self-  
22 sabotaged, prosecution. The result will be a farce of justice, a high risk of a charade that the court  
23 has the power to resolve responsibly at the front end of this litigation. It is not inconceivable that  
24 the defendants could call Brian O'Brien or Steve Tucker as witnesses in the defense case or to

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1 defense case or to assist with their team (if this has not already occurred given the exculpatory  
2 briefing and oral argument made to date).

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

9 In the present matter, the Spokane County Prosecuting Attorney's Office has a clear  
10 incentive to lose this case since it will prove their point that there was no probable cause and the  
11 defendants are innocent. As a result, they will not prosecute vigorously. Their challenge to the  
12 entire process as invalid bolsters this point. The conflict is direct and unmistakable. More  
13 importantly, it undermines the court's authority, expressly bestowed upon it by court rule, to  
14 grant the petition of a citizen to initiate a criminal prosecution and ensure that its order will not  
15 be an illusory gesture. If the court cannot use its equitable powers to guarantee that its order is  
16 followed in earnest, then its judicial pronouncement becomes little more than rhetoric. Such  
17 impudence would not be tolerated in other contexts and would be punished by the court's  
18 inherent equitable power of contempt. No material distinction lies here. For the above reasons,  
19 the court should appoint a special prosecutor and/or disqualify the Spokane County Prosecuting  
20 Attorney's Office.

21 **a. District Court Has Equitable Power to Appoint Special Prosecutor**

22 The petition filed by Ms. Anderlik is not technically a criminal case, but rather an  
23 equitable type of action with the purpose of *initiating* a criminal case. It shares characteristics  
24 most akin to a mandamus proceeding (i.e., compelling enforcement of state law, albeit in a

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1 private capacity). In essence, it is a pre-criminal matter that does not result in issuance of a  
2 warrant, seizure of property, or arrest unless the court grants the equitable relief requested.

3 Given the continuous opposition between Ms. Anderlik and the prosecuting attorney's  
4 office, this matter has presently evolved into a dispute that most closely resembles a petition for a  
5 writ of prohibition, injunction, or quo warranto. Although not representing her personally, the  
6 prosecuting attorney's office is taking an adverse position to her (and the state's) interests. Under  
7 such circumstances, to permit Mr. Tucker's office to proceed with this case would sanction  
8 ineffective (if not unethical) assistance of counsel.

9 Equitable relief incidental to this petition-stage criminal proceeding is appropriate due to  
10 the novel character of the action. Ambiguity in the rule requires exercise of judicial authority. It  
11 is almost incumbent on the court not to allow the Spokane County Prosecuting Attorney's Office  
12 to handle this case for if the jury convicts, they will undermine the prosecutor's current, contrary  
13 position. From the original hearing on January 22, 2007 to date, the Spokane County Prosecuting  
14 Attorney's Office has made abundantly clear its intention not to prosecute Simmons and Bates.  
15 Where the prosecuting authority openly expresses its lack of commitment to prosecuting this  
16 matter, both in open court and in the court of public opinion (through statements to newspaper  
17 and television reporters), it follows that these attorneys are not competent to ethically handle this  
18 matter.

19 CrRLJ 2.1(c) does not mandate that the matter be tried by the prosecuting attorney. It  
20 merely states that, after considering probable cause and other discretionary factors, the "judge  
21 may authorize the citizen to sign and file a complaint in the form prescribed in CrRLJ 2.1(a)."  
22 CrRLJ 2.1(c). CrRLJ 2.1(a)(1) adds that "all criminal proceedings shall be initiated by a  
23 complaint," without specifying who will prosecute. Furthermore, CrRLJ 2.1(c) contemplates that  
24 the prosecutor may have already declined to prosecute the matter. CrRLJ 2.1(c) [in proposed

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1 Affidavit, it concludes with the statement, "I (*have*) (*have not*) consulted with a prosecuting  
2 authority concerning this incident."]

3 Where the prosecutor has a conflict of interest that disables him from representing the  
4 state or city, the court has no other option than to appoint a special prosecutor. *Westerman v.*  
5 *Cary*, 125 Wn.2d 277, 301 (1994)(where prosecutor's ability to represent District Court was  
6 compromised even before trial began, and where he advised Sheriff to disobey a court order,  
7 appointment of special prosecutor was justified). The court has the authority to appoint a special  
8 prosecuting attorney under such circumstances. Although *Ladenburg v. Campbell*, 56 Wash.App.  
9 701 (II, 1990) concludes that a district court does not have this authority, that decision may be set  
10 aside in light of the constitutional amendment number 87. Wash. Const. Art. IV, § 6 (1993). The  
11 superior courts, as courts of general jurisdiction, have always had full equitable powers to grant  
12 injunctive relief in the form of writs of prohibition and quo warranto, as well as other  
13 traditionally equitable devices. A 1993 amendment to the Washington Constitution gave the  
14 district courts concurrent equitable jurisdiction. This constitutional provision states:

15 **Superior courts and district courts have concurrent jurisdiction in cases in**  
16 **equity.** The superior court shall have original jurisdiction in all cases at law which  
17 involve the title or possession of real property, or the legality of any tax, impost,  
18 assessment, toll, or municipal fine, and in all other cases in which the demand or  
19 the value of the property in controversy amounts to three thousand dollars or as  
20 otherwise determined by law, or a lesser sum in excess of the jurisdiction granted  
21 to justices of the peace and other inferior courts, and in all criminal cases  
22 amounting to felony, and in all cases of misdemeanor not otherwise provided for  
23 by law; of actions of forcible entry and detainer; of proceedings in insolvency; of  
24 actions to prevent or abate a nuisance; of all matters of probate, of divorce, and  
25 for annulment of marriage; and for such special cases and proceedings as are not  
otherwise provided for. The superior court shall also have original jurisdiction in  
all cases and of all proceedings in which jurisdiction shall not have been by law  
vested exclusively in some other court; and said court shall have the power of  
naturalization and to issue papers therefor. They shall have such appellate  
jurisdiction in cases arising in justices' and other inferior courts in their respective  
counties as may be prescribed by law. They shall always be open, except on

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1 be open, except on nonjudicial days, and their process shall extend to all parts of  
 2 the state. Said courts and their judges shall have power to issue writs of  
 3 mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas  
 corpus, on petition by or on behalf of any person in actual custody in their  
 4 respective counties. **Injunctions and writs of prohibition and of habeas corpus**  
 5 **may be issued and served on legal holidays and nonjudicial days.**

6 Wash.Const. Art. IV, § 6 (2007). Amendment 87 added the first sentence and, near the beginning  
 7 of the resulting second sentence, following "shall have original jurisdiction," deleted "in all cases  
 8 in equity and." This Amendment eliminated the provision giving exclusive equitable jurisdiction  
 9 to the superior court. *Hough v. Stockbridge*, 150 Wn.2d 234 (2003) ("In 1993, the Washington  
 10 Constitution was amended to vest district court with original jurisdiction in cases of equity.")

11 Courts of equity have the power to appoint receivers. *Boothe v. Summit Coal Min. Co.*, 55  
 12 Wash. 167 (1909), and to protect the rights of infants and incompetents. *In re Hudson*, 13 Wn.2d  
 13 673, 699 (1942). The jurisdiction of a court of equity "does not depend upon precedents, but  
 14 upon the great principles of natural justice which are a part of the law of the land." *Id.*, at 698. It  
 15 is well recognized, both in Washington and nationally, that child custody and visitation orders  
 16 may be established by reliance on courts' equity powers and the common law." *In re Parentage*  
*of L.B.*, 155 Wn.2d 679, 699 fn. 18 (2005).

17 As a matter of fundamental fairness, and as implied from the list of other expressly  
 18 recognized inherent equitable powers, this court has the authority to appoint a special prosecutor.  
 19 Inherent powers for courts of this state include the power to:

20 compel funding of their own functions; **punish for contempt; insure a fair**  
 21 **criminal trial;** appoint counsel for a criminal defendant; grant bail; **review**  
 22 **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.

23 *State v. Gilkinson*, 57 Wash.App. 861, 865 (citing *In re Juvenile Director*, 87 Wn.2d 232, 246

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1 (1976); 20 Am.Jur.2d *Courts* § 79 (1965)(emphasis added). "The court has inherent power to  
 2 punish for contempt and the legislature may not destroy this power." *Mead Sch. Dist. No. 354 v.*  
 3 *MEA*, 85 Wn.2d 278, 287 (1975)(superior court). "The legislature, however, may regulate that  
 4 power as long as it does not diminish it so as to render it ineffectual." *Id.*

5 Washington's courts of limited jurisdiction are created by the legislature, which has the  
 6 sole authority to prescribe their subject matter jurisdiction and powers. Const. art. IV, §§ 1, 12;  
 7 see also *Smith v. Whatcom Cy. Dist. Ct.*, 147 Wn.2d 98, 104 (2002). Sections 1 and 12 of Article  
 8 IV provide:

9 **SECTION 1 JUDICIAL POWER, WHERE VESTED.** The judicial power of  
 10 the state shall be vested in a supreme court, superior courts, justices of the peace,  
 11 and such inferior courts as the legislature may provide.

12 **SECTION 12 INFERIOR COURTS.** The legislature shall prescribe by law the  
 13 jurisdiction and powers of any of the inferior courts which may be established in  
 14 pursuance of this Constitution.

15 In 1993, by constitutional amendment, the legislature expressly delegated to district courts the  
 16 equivalent equitable powers granted to the superior courts of this state. Const. Art. IV, § 6 (see  
 17 supra). This authoritative grant was recognized in *Hough v. Stockbridge*, 150 Wn.2d 234 (2003).  
 18 The Washington Supreme Court has expressly recognized that the amended Constitution  
 19 provides district court equitable powers to "fashion broad remedies to do substantial justice" that  
 20 did not previously exist:

21 A district court has power to issue mutual protection orders on its own motion.  
 22 **Authority to issue such orders can be found both in the state constitution and**  
 23 **the applicable statute.** In 1993, the Washington Constitution was amended to  
 24 vest district courts with original jurisdiction in cases of equity. See WASH.  
 25 CONST.. art. IV, § 6 ("Superior courts and district courts have concurrent  
 jurisdiction in cases in equity."). And an action under chapter 10.14 RCW is an  
 action in equity. *State v. Brennan*, 76 Wash.App. 347, 349, 884 P.2d 1343  
 (1994).<sup>FNI</sup> The applicable statute, RCW 10.14.080(6), provides that a court

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1 granting a protection order "shall have broad discretion to grant such relief as the  
 2 court deems proper." **Sitting in equity, a court "may fashion broad remedies to  
 3 do substantial justice to the parties and put an end to litigation."** *Carpenter v.  
 Folkerts*, 29 Wash.App. 73, 78, 627 P.2d 559 (1981) (citing *Esmieu v. Hsieh*, 92  
 Wash.2d 530, 535, 598 P.2d 1369 (1979)).

4 **FN1. Under former WASH. CONST.. art. IV, § 6 (1977), only the superior  
 5 courts were vested with equitable power. The *Brennan* court declared  
 6 chapter 10.14 RCW unconstitutional because it vested equitable power in  
 7 the district courts, contrary to the constitutional provision. The court did  
 8 note that the 1993 constitutional amendment saved the statutory scheme,  
 9 but the case before the court involved a preamendment protection order.**

10 Because district courts have equitable powers and the statute specifically grants  
 11 broad discretion to fashion relief, we hold that district courts may issue mutual  
 12 protection orders even in the absence of a petition requesting that relief, as the  
 13 facts of the relationship between the parties may warrant. We thus reverse the  
 14 Court of Appeals insofar as it vacated the restraining order against the Houghs.

15 *Id.*, at 235-36 (emphasis added).

16 Now that the mantle of equitable power has extended to district court by constitution, "in  
 17 the absence of any constitutional provisions to the contrary, such power may not be abrogated or  
 18 restricted by the legislative department. Any legislation, therefore, the purpose or effect of which  
 19 is to divest, in whole or in part, a constitutional court of its constitutional powers, is void as being  
 20 an encroachment by the legislative department upon the judicial department." *Blanchard v.  
 Golden Age Brewing Co.*, 188 Wash. 396, 415 (1936)(discussing abrogation of superior court's  
 21 constitutional powers in equity by legislative enactment). "The superior court has all the powers  
 22 of the English chancery court." *Id.*, at 415 (citing *State ex rel. Burrows v. Superior Court*, 43  
 23 Wash. 225).

24 "The writ of injunction is the principal, and the most important, process issued by courts  
 25 of equity, it being frequently spoken of as the 'strong arm of equity.' Its function is to furnish  
 preventive relief against irreparable mischief or injury. Its object and purpose is to preserve and

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1 keep things in status quo until otherwise ordered and to restrain an act which, if done, would be  
2 contrary to equity and good conscience." *Id.* The relief sought by Ms. Anderlik is in the nature of  
3 an injunction, writ of prohibition, or writ of quo warranto given that the prosecuting attorney has  
4 taken a position inherently inconsistent with its duties of public office. To permit (or require) it  
5 to manage this case will force it to act contrary to its authority – not in a technical sense (since  
6 clearly it has the power to prosecute misdemeanors), but as a purely equitable concern – invites  
7 disaster and mocks this court's order.

8 The prosecutor may cite to *Hoppe v. King Cy.*, 95 Wn.2d 332, 339 (1980) for the  
9 proposition that special appointments may only be made by statute. *Hoppe* bases this position on  
10 *State v. Heaton*, 21 Wash. 59, 62 (1899) and the Washington Constitution, art. XI, § 5. The  
11 Constitution merely states that the legislature shall provide for elections of prosecuting attorneys,  
12 but says nothing about special appointments or disqualifications. In *Heaton*, the court appointed  
13 special counsel to attend the grand jury to reinvestigate a charge against an accused (as well as to  
14 explore corruption by the prosecuting attorney who formerly recommended dismissal of the  
15 previous indictment). The grand jury recommended that the criminal charge be prosecuted and  
16 the accused moved to quash the indictment. The Supreme Court quashed the indictment on the  
17 grounds that there was no statutory authority to appoint a special prosecutor. *Id.*, at 59-61.

18 *Heaton* does not cite any authority for the proposition that only statutes may confer the  
19 specific power to appoint special prosecutors except for a Michigan Supreme Court decision,  
20 *Sayles v. Genesee Circuit Judge*, 46 N.W. 29 (1890). *Heaton*, at 62. In *Sayles*, the Supreme Court  
21 held that the circuit court lacked the statutory power to appoint a special prosecuting attorney.  
22 This decision was premised, however, on the specific language in Michigan's constitution and  
23 statute. It did not suggest that authority to appoint special prosecutors only arose by statute.

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1 *Heaton* expressly echoes this sentiment:

2 Doubtless, **in addition to the statutory grounds** authorizing this action of the  
 3 court in appointing special counsel, **any reason** which would disqualify the  
 4 prosecuting attorney alike common to the general office of an attorney in his  
 conduct of a cause would justify such action of the court[.]

5 *Heaton*, at 62-63 (emphasis added). Unlike *Sayles*, the Washington Constitution was amended to  
 6 expressly grant district courts full equitable powers. While the *Heaton* court notes that  
 7 prosecutorial duties are prescribed by statute and that the prosecuting attorney has charge of all  
 8 criminal proceedings, these citations only prove that the legislature narrowed the scope of tasks  
 9 to be performed by the elected official, not as a restraint on the power of the courts to appoint a  
 10 special prosecutor when the elected official and has taken a position in direct conflict with  
 11 statutory obligations. *Id.*, at 61 (citing 2 Ballinger's Ann. Codes & St. §§ 6812, 4754, 4757; 1  
 12 Ballinger's Ann. Codes & St. § 472). As stated above, nor could the legislature abrogate the  
 13 inherent constitutional powers afforded the courts. In this respect, the statute authorizing  
 14 appointment of a special prosecutor, RCW 36.27.030, merely makes express the implied power  
 15 of the superior court.

16 *Heaton* may be distinguished by the fact that it does not address the sea change in original  
 17 jurisdiction for certain equitable matters, of which this is one – viz., an injunction preventing the  
 18 Spokane County Prosecuting Attorney's Office from managing the prosecution of a citizen-  
 19 initiated criminal process. At the time *Heaton*, *Hoppe*, and *Ladenburg* were decided,  
 20 Constitutional Amendment 87 had not yet passed. Prior to amendment, the legislature gave  
 21 equitable powers piecemeal to the district court. *See* RCW 10.14.150 (anti-harassment orders  
 22 expressly within the jurisdiction of the district courts); RCW 26.50.020 (domestic violence  
 23 protection orders expressly within the jurisdiction of district courts). While *Ladenburg* holds that  
 RCW 2.28.150 is strictly procedural in nature and does not confer upon district courts the ability

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1 to appoint special prosecutors, *Ladenburg* does not address the significant expansion of inherent  
2 substantive powers conferred following constitutional amendment.

3 A prosecutor has no power to discontinue or abandon a prosecution except by order of the  
4 court. 2 Ballinger's Ann. Codes & St. §§ 6914, 6915; *State v. Hansen*, 10 Wash. 235 (cited in  
5 *State v. Heaton*, 21 Wash. 59, 61). In essence, this is exactly what the prosecutor has requested,  
6 and this court has the ability to replace him with a person or office more suited to the task.

7 **b. Equity**

8 The prosecutor argues that principles of equity do not apply to criminal proceedings,  
9 citing *Munro v. Superior Court*, 35 Wn.2d 217 (1949). This is a curious reading of the case,  
10 given that the two paragraphs following the abridged quotation provided to the court identify the  
11 precise circumstances where equity will interfere to prevent prosecution of a criminal matter. The  
12 full text follows:

13 **'It is, of course, true that equity exercises no criminal jurisdiction.** In cases  
14 where it appears that public officers are threatening to proceed against individuals  
15 under a criminal statute which is unconstitutional or for any reason invalid, and  
16 where it appears that such action by the authorities will result in a direct invasion  
17 of property rights which will result in irreparable injury, **equity will interfere by  
18 way of injunction to restrain the officers of the government from proceeding.**  
19 The rule is well stated in 32 C.J., page 280, title 'Injunctions,' as follows:

20 **"It is only where the statute or ordinance is unconstitutional or otherwise  
21 invalid and where in the attempt to enforce it there is a direct invasion of  
22 property rights resulting in irreparable injury that an injunction will issue to  
23 restrain the enforcement thereof.** Both of these elements are indispensable, and  
24 the latter element is not present where it appears that the injury or loss to  
25 plaintiff's business or rights of property would be only such as would incidentally  
flow from the arrest and prosecution thereunder. Courts will not interfere by  
injunction where the injury inflicted or threatened is merely the vexation of arrest  
and punishment of complainant who is left free to litigate the questions of  
unconstitutionality of the statute or ordinance or its construction or application in  
making his defense at the trial or prosecution for its violation."

24 PETITIONER'S MOTION FOR  
25 ISSUANCE OF WRITS - 32

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1 *Munro*, 35 Wn.2d at 221-222 (emphasis added). Besides, Ms. Anderlik is not seeking injunctive  
2 relief to restrain institution or prosecution of criminal proceedings – the issue central to *Munro*.  
3 Instead, she is soliciting enforcement of the court's equitable power to permit and enable  
4 institution and prosecution of criminal proceedings without conflict.

5 **c. Motion to Disqualify**

6 Even if this court does not reverse the district court's decision not to choose to appoint a  
7 special prosecuting attorney pursuant to inherent equitable powers, it should reverse in requiring  
8 the district court to exercise the independent power to disqualify counsel upon knowledge of a  
9 breach of the Rules of Professional Conduct. Where a trial court knows of an attorney's ethical  
10 breach, it must presume prejudice and automatically disqualify that attorney. *State v. Hunsaker*,  
11 74 Wash.App. 38, 43 (1994)(reviewing court presumes prejudice per se in an interlocutory  
12 appeal from a trial court ruling)(cited in *State v. White*, 80 Wash.App. 406, 414 (II, 1995).

13 Indeed, to force Mr. Tucker and his office to prosecute this case could result in several  
14 ethics violations. While this office clearly has the wherewithal to prosecute animal cruelty, it  
15 may fail to thoroughly prepare to meet its obligations due to disinterest or outright hostility to its  
16 task, violating RPC 1.1 (competence). Nothing stops the prosecutor from ineffectively  
17 prosecuting this case, thereby allowing it to be dismissed due to inactivity, violating RPC 1.3  
18 (diligence). By Mr. O'Brien and Mr. Tucker's own public statements, their representation of the  
19 citizens of Spokane County, both former and current clients, will be directly adversely affected  
20 by their vocal defense of Simmons and Bates; a conflict also arises with respect to their own  
21 personal interests (viz., that they do not support prosecution or the whole premise of citizen  
22 criminal complaints), thereby violating RPC 1.7 and 1.8 (conflicts). They have also engaged in  
23 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'

24 PETITIONER'S MOTION FOR  
25 ISSUANCE OF WRITS - 33

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1 innocence) RPC 3.6. With such an inherent conflict, it would not serve the citizens of Spokane  
2 County to appoint prosecutors who will also serve as apologists for Simmons and Bates.

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

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

13 [I]f there is a significant risk that a lawyer's action on behalf of one client will  
14 materially limit the lawyer's effectiveness in representing another client in a  
15 different case; for example, when a decision favoring one client will create a  
16 precedent likely to seriously weaken the position taken on behalf of the other  
17 client. Factors relevant in determining whether the clients need to be advised of  
18 the risk include; where the cases are pending, whether the issue is substantive or  
19 procedural, the temporal relationship between the matters, the significance of the  
20 issue to the immediate and long-term interests of the clients involved and the  
21 clients' reasonable expectations in retaining the lawyer. If there is significant risk  
22 of material limitation, then absent informed consent of the affected clients, the  
23 lawyer must refuse one of the representations or withdraw from one or both  
24 matters.

25 Comment 24 to RPC 1.7 (2007). Here, the conflict is more glaring given that the inconsistent  
position is taken before the same tribunal with respect to the identical client. In essence, the duty  
of loyalty to the client has been 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

PETITIONER'S MOTION FOR  
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1 1.10 given that Mr. O'Brien and Mr. Tucker would be disqualified from representing the County  
2 if practicing alone, for the reasons stated herein.

### 3 VI. CONCLUSION

4 The Supreme Court, in enacting CrRLJ 2.1(c), exercised its inherent constitutional and  
5 delegated statutory authority to prepare this procedural criminal rule. Any statute in  
6 irreconcilable conflict with CrRLJ 2.1(c) must be negated. CrRLJ 2.1(c) has not been shown to  
7 violate the Constitution if only for the reason that the Constitution does not give exclusive  
8 prosecutorial authority to the executive branch. Following historical antecedents to decades prior  
9 to adoption of our constitution, one finds a lengthy Washington tradition of private prosecution  
10 for all crimes, including felonies. Although the constitution does empower the legislature to  
11 outfit the county prosecutor with specific duties, a power it wielded in passing RCW 36.27.020,  
12 nothing in the constitution prevented the legislature from vesting prosecutorial powers in other  
13 individuals.<sup>5</sup> If this were the case, then RRS § 1949 (1932) – the statute authorizing private  
14 prosecution – could clearly not have existed and would have been in direct conflict with RRS §  
15 4132 and RRS § 4134.<sup>6</sup>

16 When the legislature expressly delegated to the Supreme Court the power to create rules  
17 through RCW 2.04.190 and RCW 2.04.020, it reaffirmed the notion of coextensive authority to  
18 engage in rulemaking of this nature. The fact that grand juries and inquests do not offend  
19 separation of powers principles bolsters this point. More importantly, RCW 36.27.020 can be  
20 read in harmony with CrRLJ 2.1(c) if only for the reason that while the statute states that the  
21 prosecuting attorney shall “prosecute all criminal and civil actions in which the state or the  
22 county may be a party,” it does not restrict who may petition for judicial authorization to initiate

23 <sup>5</sup> As an aside, RCW 36.27.020 does not apply to municipal prosecutors.

24 <sup>6</sup> These were the prior versions (pre-1886) of RCW 36.27.020, sections (iv) and (vi).

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1 a criminal prosecution. This court granted Ms. Anderlik's petition to file a criminal complaint,  
2 but expressly returned the matter to the county prosecutor to actually "prosecute" the action. For  
3 these reasons, Judge Derr's order on reconsideration finding CrRLJ 2.1(c) unconstitutional as  
4 applied should be reversed.

5 Should the district court not be reversed, municipal and district court judges around the  
6 state will not hesitate to hold CrRLJ 2.1(c) unconstitutional as applied. When this practice is  
7 duplicated repeatedly, the rule becomes practically unconstitutional on its face. Such outcome  
8 would bypass the appropriate test for facial challenges. The prosecutor cannot meet his burden to  
9 prove that CrRLJ 2.1(c) is unconstitutional beyond a reasonable doubt under all factual  
10 circumstances. Certainly, there would be at least one instance where a citizen prefers a criminal  
11 charge to a district court judge without first seeking approval from a prosecuting attorney (which  
12 is not required by CrRLJ 2.1(c)), the court finds probable cause and sufficient compliance with  
13 the other discretionary considerations identified in subsections (1) through (7) of CrRLJ 2.1(c),  
14 and the prosecutor who later learns of the granted petition, does not oppose the citizen's  
15 industrious effort to initiate prosecution through this rule.

16 A separation of powers challenge to a similar rule was rejected in Pennsylvania on the  
17 grounds that the superior court did not have the jurisdiction to interpret or repeal a Supreme  
18 Court rule. Should the court nonetheless feel compelled to affirm the district court in its decision  
19 rejecting CrRLJ 2.1(c)'s constitutionality, Ms. Anderlik respectfully requests that the matter be  
20 certified to the Supreme Court for direct review under RAP 4.2(a)(2) or discretionary review  
21 under RAP 2.3(d)(2) and 2.3(d)(3).

22 If the court reverses the separation of powers position taken by the district court, then the  
23 court should also reverse as to the decision not to appoint a special prosecutor. First, CrRLJ  
24 2.1(c) does not mandate that citizen-initiated prosecutions be prosecuted only by the elected

25 PETITIONER'S MOTION FOR  
ISSUANCE OF WRITS - 36

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1 official. Second, even if the court reads the rule this way, given the constitutional amendment  
 2 expanding the jurisdiction of the district courts to have all the equitable powers of superior  
 3 courts, the holdings of *Heaton*, *Hoppe*, and *Ladenburg* must be reevaluated and the equities at  
 4 bar strongly demand appointment of a special prosecutor. Ms. Anderlik asks that an attorney who  
 5 does not harbor pro-defense sentiment be appointed, whether from the Spokane City Prosecuting  
 6 Attorney's Office, or from a neighboring county. Third, if special appointments are not  
 7 considered viable, the court has the power to automatically disqualify Mr. O'Brien and Mr.  
 8 Tucker and his entire office based on imputed conflict. The fact that this procedure is expressly  
 9 vested in only the district court (there is no analog for superior court) further bolsters the claim  
 10 that district court has the inherent authority to take all necessary steps to ensure that its orders  
 11 (such as those for contempt) are followed in earnest and not undermined by prosecutorial  
 12 sabotage.

13 Ms. Anderlik prays that this court issue either a writ or both a statutory writ of review and  
 14 constitutional writ of certiorari.

15 Respectfully submitted this August 13, 2007.

16 ANIMAL LAW OFFICES  
 17 /S/ Adam P. Karp

18 Adam P. Karp, WSBA #28622  
 19 Attorney for Petitioner

20 **DECLARATION**

21 I, ADAM P. KARP, being over the age of eighteen and fully competent to make this  
 22 statement, and having personal knowledge of the matters contained herein, hereby affirm:

- 23 1. Attached as **Exhibit 1** is a true copy of the March 12, 2007 memorandum decision of  
 24 Judge Derr.
- 25 2. Attached as **Exhibit 2** is a true copy of the verbatim report of proceedings from January

PETITIONER'S MOTION FOR  
 ISSUANCE OF WRITS - 37

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1 expanding the jurisdiction of the district courts to have all the equitable powers of superior courts,  
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 17 Adam P. Karp, WSBA #28622  
 18 Attorney for Petitioner

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 21 statement, and having personal knowledge of the matters contained herein, hereby affirm:

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- 24 2. Attached as **Exhibit 2** is a true copy of the verbatim report of proceedings from January  
 25 22, 2007.

26 PETITIONER'S MOTION FOR  
 27 ISSUANCE OF WRITS - 37

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3. Attached as **Exhibit 3** is a true copy of the verbatim report of proceedings from March 26, 2007.

I declare under penalty of perjury under the laws of the State of Washington that the above is true to the best of my knowledge.

Executed this August 13, 2007, in the city of Bellingham, Washington.

ANIMAL LAW OFFICES

*[Signature]*  
By: ~~/s/ Adam P. Karp~~  
Adam P. Karp, WSBA 28622

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on August 13, 2007, I caused a true and correct copy of the foregoing to be served upon the following person(s) in the following manner:

- U.S. Mail, First Class, Postage Prepaid
- U.S. Mail, Certified, Return Receipt Requested
- Email (by agreement of defense counsel)**
- Express Mail
- Hand Delivery/Legal Messenger
- Facsimile Transmission
- Federal Express/Airborne Express/UPS Overnight
- Personal Delivery

Brian O'Brien  
Spokane County Prosecuting Attorney  
1100 W Mallon Ave  
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(509) 477-3662  
[bobrien@spokanecounty.org](mailto:bobrien@spokanecounty.org)

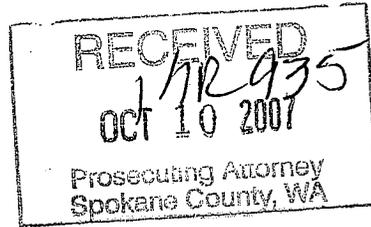
*[Signature]*  
Adam P. Karp, WSB No. 28622

PETITIONER'S MOTION FOR  
ISSUANCE OF WRITS - 38

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[adam@animal-lawyer.com](mailto:adam@animal-lawyer.com)

## Exhibit 2

Order Denying Petitioner's Motion  
for Reconsideration of Petitioner's  
Motion for Writ  
of Review/Certiorari



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE

CHRIS ANDERLIK, )  
)  
Plaintiff, )  
)  
v. )  
)  
SPOKANE COUNTY DISTRICT COURT )  
JUDGE SARA DERR, ET AL., )  
)  
Defendants. )  
\_\_\_\_\_ )

No. 07-2-03520-1  
ORDER DENYING MOTION  
FOR RECONSIDERATION

The Court denies petitioner's Motion for Reconsideration because the Order Denying Writ of Review/Certiorari was not in error and did not work a substantial injustice.

A constitutional writ of certiorari should not issue because:

1. The one year statute of limitations for the misdemeanor animal cruelty in the second degree ran on April 12, 2007, or one year following the death of the bull. No complaint had been filed within the period of limitation. No statutory exemption is available and equitable tolling would be contrary to the rights of Deputy Duane Simmons and Deputy Ballard Bates.

*Anderlik v. Spokane County District Court*

ORDER DENYING MOTION  
FOR RECONSIDERATION – Page 1 of 4

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2. Spokane County District Court Judge Sara Derr issued her memorandum opinion on March 12, 2007. She refused to appoint a special deputy prosecutor and found the CrRLJ 2.1 citizen's complaint rule to be unconstitutional in that case. The petitioner failed to file the Petition for Writ within 30 days, waiting until August, 2007. Instead, she filed a RALJ appeal on April 5, 2007, which was dismissed on August 1, 2007.

3. And, a constitutional Writ of Certiorari is not available. A constitutional writ was sought beyond the period allowed for a statutory writ and it would be prejudicial to the possible defendants to grant the application. The petition was not filed in a reasonable time. *State, ex rel, Citizens v. Murphy*, 151 Wn.2d 226, 241-42, 88 P.3d 375 (2004). Further, Judge Derr's ruling was within the District Court's jurisdiction and authority; and the facts alleged by the petitioner do not establish that Judge Derr's decision was arbitrary and capricious or illegal. *Clark County PUD v. Elec. Workers*, 150 Wn.2d 237, 245-47, 76 P.3d 248 (2003); *Clark County PUD No. 1 v. Wilkinson*, 139 Wn.2d 840, 848-49, 991 P.2d 1161 (2000). Judge Derr's Memorandum Opinion on Reconsideration, which is now the focus of petitioner's application for a constitutional writ, is well reasoned and makes sense – she had found probable cause for a prosecution under CrRLJ 2.1(c), but when the Spokane County Prosecuting Attorney refused to file a complaint for animal cruelty in the second degree, was then unable to appoint a special prosecuting attorney. “The Prosecutor's challenge under the separation of Powers Doctrine, as applied in this case, is successful.” (Memorandum Opinion, p. 18). The District Court had jurisdiction and authority to make its ruling. *Public Employees v. Resources Board*, 91 Wn.App. 640, 657-58, 959 P.2d 143 (1998). Further, the

*Anderlik v. Spokane County District Court*

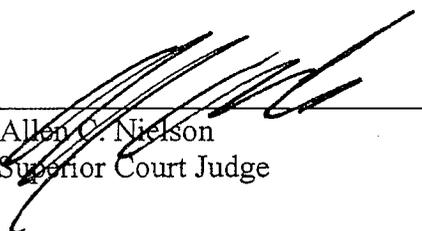
ORDER DENYING MOTION

FOR RECONSIDERATION – Page 2 of 4

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1 petitioner's position has morphed in response to the statute of limitations from requesting a  
2 writ to allow prosecution by a special prosecuting attorney to a constitutional examination of  
3 the citizen complaint rule.

4 DATED this 8<sup>th</sup> day of Oct., 2007.

5  
6   
7 Allen C. Nielson  
8 Superior Court Judge

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25 *Anderlik v. Spokane County District Court*  
ORDER DENYING MOTION  
FOR RECONSIDERATION – Page 3 of 4

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CERTIFICATE OF MAILING/DELIVERY

I hereby certify, under penalty of perjury of the laws of the State of Washington, that I am a U.S. citizen and neither a party to nor interested in the above-entitled action and that a true copy of the Order Denying Motion for Reconsideration, was mailed by U.S. Mail, postage prepaid, or hand delivered to the following parties on the date shown below:

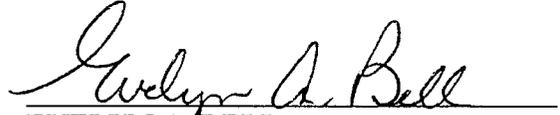
Adam P. Karp  
Attorney at Law  
114 W. Magnolia St., Suite 425  
Bellingham, WA 98225

U.S. Mail  
 Hand delivery

Mr. Brian O'Brien  
Deputy Prosecuting Attorney  
1100 West Mallon  
Spokane, WA 99260-0270

U.S. Mail  
 Hand delivery

DATED this 8<sup>th</sup> day of October, 2007.

  
EVELYN A. BELL

*Anderlik v. Spokane County District Court*  
ORDER DENYING MOTION  
FOR RECONSIDERATION – Page 4 of 4

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