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Washington Supreme Court

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Ct. of Appeals Div. I Docket No. 264122

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

CITY OF SPOKANE VALLEY ex rel. CHRIS ANDERLIK,

Plaintiff-Petitioner,

-against-

STATE OF WASHINGTON,

Defendants-Respondents.

**PETITION FOR REVIEW (RAP 13.4) AND/OR MOTION FOR
DISCRETIONARY REVIEW (RAP 13.5)**

ORIGINAL

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I. IDENTITY OF PETITIONER

The City of Spokane Valley and State of Washington *ex rel.* CHRIS ANDERLIK, through her attorney of record ADAM P. KARP, makes this petition for review pursuant to RAP 13.4(b)(3) and (4). Alternatively, she requests discretionary review per RAP 13.5(b)(2).

II. COURT OF APPEALS DECISION

Ms. Anderlik contests the February 4, 2008 Court of Appeals Decision Denying her Motion to Modify Commissioner McCown's November 20, 2007 Ruling, which, in turn, refused to accept review of Ms. Anderlik's challenge to Spokane County Superior Court Judge Kathleen O'Connor's August 1, 2007 Order Dismissing her RALJ Appeal. These rulings effectively terminated the proceedings and prevented adjudication of a matter of first impression and of substantial public importance. Copies of the Court of Appeals decision (A-1), Commissioner's ruling (A-2), superior court decision (A-3), and trial court memorandum opinion (A-4) are found in the Appendix.

III. ISSUES PRESENTED FOR REVIEW

1. Does a citizen, privately initiating a criminal complaint in district court, where the district court has found probable cause and compliance with all CrRLJ 2.1(c) factors, but nonetheless refuses to allow the complaint to be filed since to do so would be unconstitutional, have a right to appeal this decision under the RALJ?

2. Is CrRLJ 2.1(c) unconstitutional for violating separation of powers doctrine?

3. Do these above issues qualify under any mootness exceptions?

IV. STATEMENT OF THE CASE

This matter involves allegations of second-degree animal cruelty arising from the prolonged Tasing of a tired, male calf positioned behind the Oxford Suites near the Spokane Valley Mall and adjacent to an uninhabited Centennial Trail on April 12, 2006. After the deputies discharged their Tasers for cumulatively over seven minutes, the calf vocalized and died. Prior to filing her petition for a citizen criminal complaint on December 4, 2006, Ms. Anderlik contacted the city and county prosecuting attorney's offices to initiate prosecution, and the Sheriff's Office to conduct an internal affairs investigation. In support of the allegations of torture, Ms. Anderlik presented several declarations, including those of experts, most of whom have international reputations, including Dr. Temple Grandin (A-5 (w/o CV)), Dr. Bernard Rollin (A-6 (w/o CV)), and Dr. Holly Cheever (A-7 (w/o CV)).

On January 22, 2007, over the prosecutor's objection, the trial court Judge Sara Derr found probable cause to charge Duane Simmons and Ballard Bates with second-degree animal cruelty and additionally found that all considerations (1) through (7) identified in CrRLJ 2.1(c) were satisfied. *RP Jan. 22, 2007*, 33:19—34:3 (A-8). The court instructed Ms. Anderlik to prepare a criminal complaint for review and signature by her and Spokane County Deputy Prosecuting Attorney Brian O'Brien. *Id.*, at 34:22—35:4. In the *Spokesman-Review*, Sheriff Ozzie Knezovich

“defended his deputies” and told reporters that the officers were “completely justified.” And the Prosecuting Attorney openly “refused to file charges” and publicly argued “against the filing of the citizen’s petition.” On January 25, 2007, the Spokane County Prosecuting Attorney’s Office filed a motion for reconsideration challenging the entire citizen criminal complaint process as unconstitutional. On March 2, 2007, the court heard oral argument on the prosecutor’s motion for reconsideration and Ms. Anderlik’s motion to disqualify the Spokane County Prosecuting Attorney’s Office and appoint a special prosecutor. Judge Derr reserved ruling on these motions until she could prepare a written memorandum.

On March 12, 2007, the court issued a memorandum opinion upholding its findings of January 22, 2007 that Ms. Anderlik had satisfied the elements of CrRLJ 2.1(c); that probable cause existed to charge Simmons and Bates with second-degree animal cruelty; that Simmons and Bates were not immune under RCW 16.52.210; and that the court would otherwise have permitted Ms. Anderlik to file a criminal complaint as provided by CrRLJ 2.1(c) but for the additional conclusions of law that the court had no authority to appoint a special prosecutor and that to compel the prosecutor to handle this criminal matter would violate separation of powers doctrine as applied. **A-4, at 17-18.**

On March 19, 2007, Ms. Anderlik filed her own motion for reconsideration and/or relief from this March 12, 2007 memorandum

opinion. Argued on March 26, 2007, Ms. Anderlik's motion to finalize and certify the court's previous rulings for appeal under the RALJ and for direct review to the Supreme Court resulted in Judge Derr orally ruling that her order of March 12, 2007 was appealable as a matter of right under the RALJ. The court confirmed that the complaint was ordered on January 22, 2007 but was not filed due to a motion for reconsideration filed within days of her oral ruling. *RP Mar. 26, 2007*, at 21:22—22:4 (A-9). The court found her rulings to be RALJ-appealable under RALJ 2.2(a)(2) and 2.2(c)(1). *Id.*, at 22:11—23:7; 23:15-20; 25:5-8. The court acknowledged the statewide importance of this issue, noting that "every District Court who has ever had to deal with this issue is watching this case with avid interest, let's just put it that way." A-9, 25:12-20; 27:5—28:13. Judge Derr agreed that the question of the rule's constitutionality was a fundamental issue in need of clarification. *Id.*, at 25:12-20.

On April 5, 2007, Ms. Anderlik filed a *Notice of RALJ Appeal* to Spokane County Superior Court before the statute of limitations ran on prosecuting the deputies. Her RALJ appeal was dismissed by the Honorable Kathleen O'Connor on August 1, 2007 on the basis that Judge Derr's decisions were not RALJ-appealable. The next week, expressly without waiving her claim that Judge O'Connor erred, Ms. Anderlik filed a petition for a writ of review/certiorari in order to preserve these issues for review. On September 12, 2007, visiting Spokane County Superior Court Judge Allen Nielson denied her application. Her motion for

reconsideration was denied on October 8, 2007 – leaving Ms. Anderlik with no means of appellate review other than through the RALJ.

On August 30, 2007, Ms. Anderlik filed an *Amended Notice of Appeal* of Judge O'Connor's order. The Commissioner's Office requested that both the issue of finality and discretionary review be argued. On November 20, 2007, Commissioner McCown ruled that this decision was not a final appealable order. She also declined discretionary review on grounds of mootness. The Court of Appeals denied the motion to modify.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Ms. Anderlik styled her petition for appellate review before the Court of Appeals as an appeal of right. The Commissioner and Court of Appeals disagreed, regarding it as a petition for discretionary review. Technically, the February 4, 2008 order was not “a decision denying a motion to modify a ruling of the commissioner or clerk which denies a motion for discretionary review,” since what was actually decided was a motion to determine finality and/or a motion for discretionary review. RAP 13.3(a)(2). Thus, as to the finality determination, Ms. Anderlik files this petition for review under RAP 13.3(a)(1) as a decision terminating review. As to the discretionary review determination, she files this motion for discretionary review under RAP 13.3(a)(2).

1. PETITION FOR REVIEW (RAP 13.4)

A. The District Court's Ruling Denying Ms. Anderlik's Petition with Prejudice is a Final RALJ-Appealable Decision, and the Superior Court's Abstention Based on a Lack of Appellate Subject Matter

Jurisdiction was itself a Final Appealable Order Not Subject to RAP 2.2(c).

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

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

A-3. Nowhere in Judge O'Connor's order is there a discussion of the key constitutional issues underlying Ms. Anderlik's appeal. Accordingly, the court never reached the merits of the decisions from which Ms. Anderlik appealed. Instead of affirming or reversing Judge Derr's rulings, Judge O'Connor abstained on grounds of no appellate subject-matter jurisdiction.

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

same rule. *Id.* In other words, one should not scrutinize certain words in isolation while ignoring other phrases in the same rule.

Although the RALJ do not specify that a citizen criminal complaint under CrRLJ 2.1(c) is appealable, they also do not specifically bar such complaints from appeal. Therefore, such complaints must be appealable as of right. A structural analysis of the RALJ and its related provisions, in accordance with the approach taken by the *Chhom* court, reveals that: (1) RALJ 1.1(a) (emphasis added) establishes the procedure for review by the superior court of a final decision of a court of limited jurisdiction “subject to the restrictions defined in [the] rule.” RALJ 1.1(b) limits application of the rules only for certain types of de novo review, neither of which applies to Judge Derr’s final decision;¹ (2) RALJ 2.2(a)(1)(emphasis added) permits a party to appeal “from a final decision of a court of limited jurisdiction to which these rules apply under rule 1.1(a), except a decision in a mitigation hearing under RCW 46.63.100 and IRLJ 2.6(b), or a mitigation decision on written statement under IRLJ 2.6(c).” Neither of those decisions is at issue here; (3) RALJ 2.2(c)(1)(emphasis added), referencing the “final decision” language of RALJ 2.2(a), permits the state or a local government to appeal a “final decision, except not guilty.” RALJ 2.2(c)(1) also prohibits appeal where

¹ While RALJ 1.1(c) notes that statutory writs are retained and not superseded by the RALJ, writs customarily apply in the context of interlocutory (not final) orders. As much was acknowledged in *Commanda v. Cary*, 143 Wn.2d 651, 656, 23 P.3d 1086 (2001).

the defendant is placed in “double jeopardy.” Ms. Anderlik’s criminal complaint involves several final decisions, none of which involves a judgment or verdict of not guilty, or placing defendants in double jeopardy; and (4) There is no reason that a decision quashing or dismissing a citizen complaint is not appealable based on the plain text of the rules.

However, even if the court were to accept the superior court’s rationale that there is no specific path in the RALJ for appeal of a citizen complaint, “common sense and the intent underlying the rules” dictate that anything not specifically excluded from the appeal path is included. Otherwise, the intent of CrRLJ 2.1(c) would be strained and lead to unintended results, particularly where the rule expressly allows a citizen to stand in the shoes of the state or local government and initiate a criminal complaint for misdemeanors. It follows that the citizen necessarily stands in the state or local government’s shoes for the purpose of bringing the appeal under RALJ 2.2(a) and (c), as well.

While the appealability of the district court ruling to superior court (under the RALJ) has been explored above, the Court of Appeals was examining appealability of the superior court’s dismissal of the attempted RALJ appeal to the Court of Appeals (under the RAP). Because the question of appealability to superior court is jurisdictional, and does not begin to address the question of whether the district court erred substantively, RAP 2.2(c) does not operate as a bar since the superior

court never actually made a decision on the merits of Ms. Anderlik's RALJ appeal but instead claimed that it had no subject matter appellate jurisdiction via the RALJ.² Ms. Anderlik petitioned in the capacity of a relator of the city and state and may appeal Judge Derr's final orders as of right under RALJ 2.2(a)(2) and RALJ 2.2(c)(1), as Judge Derr explained.³

At its core, the court must appreciate the question of whether judicial review would ever exist for discretionary decisions made under CrRLJ 2.1(c). Appellate review of judicial decisions such as those made by Judge Derr should not fall into review-less lacunae or appellate "blind spots." The citizen criminal complaint process is "a necessary check and balance of the prosecutor's decision and protects against the possibility of error."⁴ Notably, this question of RALJ-appealability for CrRLJ 2.1(c), much less the interpretation of CrRLJ 2.1(c), is of first impression.

² Ms. Anderlik agrees that if the superior court did, in fact, affirm or reverse the district court's decision on the merits (here, the superior court simply abstained from ruling and dismissed on jurisdictional grounds), this matter would be subject to discretionary review only, per RAP 2.2(c). Such is not the case, however, as the superior court entered an order terminating the action with finality, precisely the type of decision reviewable as of right under RAP 2.2(a)(1) or (2).

³ A-9, at 22:11—23:7; 23:15-20, 25:5-8. By granting, in part, the prosecutor's motion for reconsideration, which, in turn, was premised on denying Ms. Anderlik's motion to appoint a special prosecutor or to disqualify the prosecuting attorney's office, the trial court entered a final appealable order under RALJ 2.2(a)(2). The court entered a decision which, "in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing a complaint or citation and notice to appear." RAP 2.2(c)(1). To the extent required, Ms. Anderlik also appealed Judge Derr's March 26, 2007 order denying, in part, her motion for reconsideration with respect to seeking relief from judgment. The cumulative effect of these three orders (granting prosecutor's motion for reconsideration on March 12, 2007, denying complainant's motion for special prosecutor/disqualification on March 12, 2007, and denying complainant's motion for reconsideration/relief from judgment on March 26, 2007) triggers both RALJ 2.2(a)(2) and RALJ 2.2(c)(1).

⁴ *Comm. v. Brown*, 447 Pa.Super. 454 (1995), *aff'd o.g.*, 550 Pa. 580 (1998)(citing

B. Discretionary Review Criterion RAP 13.4(b)(3) Satisfied as Several Constitutional Questions are Raised.

The question of RALJ-appealability implicates the Washington Constitution with respect to the Supreme Court's power to enact CrRLJ 2.1(c) to begin with.⁵ The respondent argues not only that CrRLJ 2.1(c) is facially unconstitutional, but that a CrRLJ 2.1(c) ruling is not RALJ-appealable. Presumably, if the Supreme Court had no right, under the Constitution, to enact CrRLJ 2.1(c), then it had no right to permit RALJ appeals from decisions on CrRLJ 2.1(c) petitions. In other words, the court cannot begin to examine the RALJ-appealability question until it can properly classify, define, and interpret CrRLJ 2.1(c) in the larger separation of powers context, for the respondent has argued that the Washington Constitution exclusively vests prosecutorial decisionmaking expressly in the Executive Branch and not the courts, notwithstanding the fact that the legislature expressly granted to the Supreme Court the right to make rules that affect criminal and civil procedure.

While the respondent may assert that the content of this rule allows the judiciary to serve in the capacity of an executive officer, the language of the rule only permits a judge to evaluate probable cause (as she does in every criminal case), weigh the petition against prosecutorial guidelines

Comm. v. Pritchard, 408 Pa.Super. 221, 233 (1991) with respect to Rule 106, a Pennsylvania rule allowing citizens to initiate criminal complaints).

⁵ See *Sackett v. Santilli*, 146 Wn.2d 498, 506 (2002) (vesting "coextensive authority" in the Supreme Court to make rules, even if they contradict rules established by the Legislature).

recommended by the legislature under RCW 9.94A.440, and entertain other equitable considerations including motivation of the complainant. If, and only if, all factors pass muster, may the court exercise its own discretionary authority to permit the filing of the criminal charge. Once filed, the judicial branch no longer controls the course of the prosecution but surrenders its fate to the executive branch. At least this is what the district court assumed. CrRLJ 2.1(c) does not expressly indicate what happens after a judge has authorized the citizen complainant to file the criminal complaint. One would suspect that the complainant could either privately prosecute or collaborate with the public prosecutor. This is, incidentally, an issue that will either nullify the separation of powers objection or invite clarification from the Supreme Court. The Supreme Court, being empowered by both the legislature and the constitution to enact CrRLJ 2.1(c), has clear coextensive authority to prepare rules of criminal procedure of this nature. Moreover, once promulgated, these rules trump and nullify all conflicting statutes.⁶

The respondent has failed to cite to a single constitutional provision expressly divesting the judiciary of exercising its inherent discretion to permit citizen-initiated criminal complaints, or that exclusive

⁶ RCW 2.04.200(1925); *see also State v. Smith*, 84 Wn.2d 498 (1974) (procedural court rulemaking is inherent power of Supreme Court, not abridged by legislative action); *City of Fircrest v. Jensen*, 158 Wn.2d 384 (2006); *see also Marine Power & Equip. Co. v. Indus. Indem. Co.*, 102 Wn.2d 457 (1984)(Supreme Court may dictate, under separation of powers, its own court rules, even if contradicted by legislature). *See also State v. Fields*, 85 Wn.2d 126, 128 (1975) (holding that court rule governing search warrants involved procedure, not substance, and was not ultra vires act). *See also CrRLJ 2.2(a)(2)*(arrest warrants and probable cause).

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). The *In re Boston* case is noteworthy for another reason. It is one of the few appellate decisions evaluating the superior court's jurisdiction to hear direct RALJ appeals.⁷ Under a broad interpretation of the rules, and given the liberal construction of RALJ 1.2(a), one may easily distinguish the case at bar from *Boston*.⁸

C. RAP 13.4(b)(4) Discretionary Review Criterion Applies.

This matter involves an issue of substantial public interest that should (and can only) be determined by the Supreme Court, since it is a Supreme Court-enacted rule. This matter received widespread attention in many media venues throughout the region – not simply because of the heinous allegations, but also with respect to the notion that citizens could initiate criminal prosecutions without assistance from, or even in opposition to, the public prosecutor. The citizen criminal complaint rule

⁷ In *Boston*, the superior court agreed that it had jurisdiction to hear direct appeal under the RALJ from coroner inquest proceedings where the district court judge acted as the coroner. In reversing, the Court of Appeals reasoned that the trial judge conducting an inquest stands in the shoes of the county executive, assists in rendering a purely advisory decision in a nonadversarial proceeding, does not operate as a court and does not result in a “final decision” under RALJ 1.1 and 2.2. Additionally, the inquest proceeding is a statutorily authorized (per Ch. 36.24 RCW), nonbinding inquiry, not one originating by Supreme Court rule.

⁸ There is little doubt that the decision of a district court judge acting in a judicial capacity to resolve adversarial claims, following a procedure outlined by the CrRLJs, and resulting in a criminal prosecution is assuredly a RALJ-appealable undertaking.

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

Private prosecutions are not new, but were part of a common practice in England and America for crime victims for several hundred years. They continue to coexist with public prosecutions.¹¹ Pennsylvania's Supreme Court enacted Pa.R.Crim.P. 106,¹² which faced an identical separation of powers challenge from a prosecuting attorney. In *Comm. v. Brown*, 447 Pa.Super. 454 (1995), *aff'd o.g.*, 550 Pa. 580 (1998), the court overruled the prosecuting attorney's objection that PRCP 106 violated the

⁹ See *State ex rel. Murphy v. Taylor*, 101 Wash. 148 (1918); *State ex rel. Romano v. Yakey*, 43 Wash. 15 (1906); Ballinger Code § 6695 (1897); RRC § 1949 (1932); Pierce Code § 3114 (1905).

¹⁰ JCrR 2.01 allowed citizen criminal complaints for felonies and misdemeanors. JCrR 2.01(d)(1963); JCrR 2.01(c) (1969). The JCrRs were replaced with the CrRLJs, providing the most current version of CrRLJ 2.1(c)(last amended in 1999).

¹¹ Michael T. McCormack, *The Need for Private Prosecutors: An Analysis of Massachusetts and New Hampshire Law*, 37 *Suffolk U.L.Rev.* 497, 499-500 (2004); Kenneth L. Wainstein, *Judicially Initiated Prosecution: A Means of Preventing Continuing Victimization in the Event of Prosecutorial Inaction*, 76 *Cal.L.Rev.* 727, 751 (1988).

¹² PRCP 106 provides for approval of private criminal complaints for both felonies and misdemeanors. It permitted private citizens to submit complaints to the commonwealth's attorney, who was required to approve or disapprove it without unreasonable delay. If the attorney disapproved the complaint, she needed to state the reasons for disapproval and return it to the complainant. The complainant could then file the complaint with a judge of a court of common pleas for approval or disapproval.

separation of powers doctrine and that “the courts may never evaluate prosecutorial decisions that are based on policy determinations,” highlighting Rule 106 “as a necessary check and balance of the prosecutor’s decision and protects against the possibility of error.” *Id.*, at 461.¹³ Analogous matters have been raised with similar effect.¹⁴

Most importantly, and as further evidence that the questions raised here involve matters of public interest, Ms. Anderlik references the findings of Judge Derr on her motion for certification to the Supreme Court where she agreed that the question of CrRLJ 2.1(c)’s constitutionality was a fundamental issue of statewide importance in need of clarification. A-9, at 25:12-20; 27:5—28:13. Even the Washington State Bar Association has acknowledged that such issues “might be of substantial interest[.]” A-10.

D. Mootness

In briefing before Judges O’Connor and Nielson, the prosecutor argued that the matter was moot since the statute of limitations had run on prosecuting the two deputies.¹⁵ That aside, there remain significant

¹³ In examining the separation of powers doctrine, the court concluded that it does “not entirely preclude judicial review of discretionary decisions made by the executive branch.” *Id.*, at 462. It added that since the Pennsylvania Constitution gave their supreme court the exclusive power to establish rules of procedure, it lacked jurisdiction to interpret Rule 106 and any attempt to do so would amount to “an unwarranted intrusion into the supreme court’s authority.” *Id.*, at 462-63.

¹⁴ *Reilly by Reilly v. Southeastern Penn. Transp. Auth.*, 507 Pa. 204, 218-219 (1985); *Riley v. St. Luke’s Episcopal Hosp.*, 252 F.3d 749 (5th Cir.(Tex.)2001); *Morrison v. Olson*, 487 U.S. 654 (1988); *In re Wilson*, 879 A.2d 199, 210 (Pa. Super.2005); *State v. Ronek*, 176 N.W.2d 153 (Iowa, 1970); *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S.Ct. 2124 (1987).

¹⁵ Yet, but for the prosecutor’s public and willful refusal to prosecute the officers even

grounds meriting appellate review of the CrRLJ 2.1(c) process pursuant to well-established exceptions to mootness. Foremost, the court must determine how CrRLJ 2.1(c) fits within the RALJ framework. If it is RALJ-appealable, then the court should further examine the broader question of private prosecution in Washington and separation of powers challenges, such as the one raised in this matter and which nullified the Supreme Court rule that has been in place for over forty years, and before that for nearly another 80 years as a state law. Judge Derr did not have the power to declare CrRLJ 2.1(c) unconstitutional on its face because the rule was created by the Supreme Court. In rendering it unconstitutional as applied, however, the result is identical in practice as it would be in theory on its face. In every instance where a municipal or district court judge is inclined, as here, to allow a petitioner to file a criminal complaint under CrRLJ 2.1(c), the prosecuting attorney in that jurisdiction will raise separation of powers objections successfully forwarded here. In essence, such an argument will render CrRLJ 2.1(c) a nullity.

The issues at stake are of substantial and long-standing historical public importance, addressing at the core the tension between private and public prosecution. It is hard to fathom a question of law that is not so public in nature and of such fundamental importance to the citizens of this

after Judge Derr's order, no limitations period would have run. In thwarting Ms. Anderlik's efforts at initiating a criminal complaint, it seems disingenuous to then claim that she is to blame for the delay. Ms. Anderlik asserts that the statute of limitations was equitably tolled pending the outcome of the RALJ appeal, in much the way it would be tolled if RALJ-appealed by the prosecutor himself.

State who have enjoyed the right to privately initiate prosecutions of those who violate the public's criminal laws, since Washington was a territory; to the judges who must interpret the rule; to the prosecutors affected by it; and to other public officials (such as the clerks) who must docket and manage the processes of CrRLJ 2.1(c).

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

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

Sorenson v. City of Bellingham, 80 Wn.2d 547, 558 (1972). “Criteria to be considered in determining the ‘requisite degree of public interest are the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question.’” *Id.*

The continuing and substantial public interest exception has been used in cases dealing with constitutional interpretation, *see, e.g., Federated Publications, Inc. v. Kurtz*, 94 Wash.2d 51, 54, 615 P.2d 440 (1980); the validity and interpretation of statutes and regulations, *see, e.g., In re Wilson*, 94 Wash.2d 885, 887, 621 P.2d 151 (1980); and matters deemed sufficiently important by the appellate court, *see, e.g., In re Bowman*, 94 Wash.2d 407, 411, 617 P.2d 731 (1980).

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

Nor should this court worry of the “danger of an erroneous decision caused by the failure of parties, who no longer have an existing interest in the outcome of the case, to zealously advocate their position.” *Orwick v. City of Seattle*, 103 Wn.2d 249, 253 (1984). This case continues to be of profound interest to all prosecuting attorneys’ offices, all municipal and district court judges, and to all victim’s rights advocates who seek to use the CrRLJ 2.1(c) mechanism, particularly for causes that may be politically unpopular but otherwise well-grounded (as in this case). The other concern that the exception to mootness be raised “only after a hearing on the merits of the claim” that has been “fully litigated by parties with a stake in the outcome of a live controversy” is also satisfied given the intensive briefing at the trial level and above, the ongoing exposure to the courts and prosecutors with citizen criminal complaints, and the needs of animal welfare and rights advocates like Ms. Anderlik to ensure that animal cruelty is prosecuted to the fullest extent of the law. *Id.* District Court Judge Derr encouragingly noted that the fundamental and

significant questions involved in private prosecutions under CrRLJ 2.1(c) would be reviewed regardless of mootness given the intense interest from the district courts. **A-9, 25:12-20; 27:5—28:13.**

Indeed, the Courts of Appeal have reviewed cases that became moot before an appeal was sought. In *In re Welfare of B.D.F.*, 126 Wash.App. 562 (II, 2005), the court accepted review of a case involving the provision of shelter care to children. Though moot prior to appeal, review was granted due to “the likelihood that the issue will escape review because the facts of the controversy are short-lived.” *Id.*, at 569 (citing *In re Marriage of Horner*, 151 Wn.2d 884, 891 (2004)). Similarly, in *Westerman v. Cary*, 125 Wn.2d 277 (1994), a public defender challenged a district court order requiring domestic violence offenders to be detained without bail pending their first appearance. The Supreme Court granted review for several reasons including: (1) the issues were public in nature (as here); (2) guidance in the area was desirable and necessary (as here); (3) the issue was likely to recur (as here); (4) there was genuine adverseness on the issues because of adequate briefing from all parties (as here); (5) a hearing was held on the merits and the briefs were of good quality (as here); and (6) the issue is one that could escape review because an arrestee will be detained only pending a preliminary appearance.

On this last point, it is notable that CrRLJ 2.1(c) was amended to preclude citizen criminal complaints for felonies and permit initiation of misdemeanors only. The statute of limitations for misdemeanors is 1 year.

RCW 9A.04.080(1)(j)(one year limitation on misdemeanors). Given that even the most diligent and fastidious appellant could not obtain a decision from the Court of Appeals following an attempted RALJ appeal from a district court CrRLJ 2.1(c) hearing, it follows that this is an unorthodox, but prime, example of a case that will perpetually “escape review” before a definitive appellate ruling is handed down.¹⁶ Indeed, to truly evaluate the constitutionality of CrRLJ 2.1(c), a Supreme Court rule that only the Supreme Court can strike down as facially unconstitutional for violating separation of powers doctrine, the very legitimacy of the entire CrRLJ 2.1(c) process will perpetually escape meaningful (and binding) appellate review because of the 1 year statute of limitations – which is not tolled while the citizen criminal complainant is attempting to get her complaint filed. The time is ripe for this court or the Supreme Court to evaluate the scope and application of CrRLJ 2.1(c) with respect to the RALJ, the Washington Constitution, and other rules and statutes.

2. MOTION FOR DISCRETIONARY REVIEW (RAP 13.5(b)(2))

The Court of Appeals determined that the matter was not appealable under RAP 2.2(c), having originated in district court. For the

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

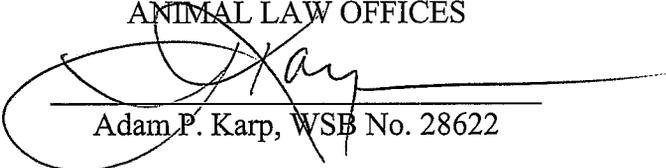
reasons stated above, this constituted probable error and substantially altered the status quo and/or substantially limited her freedom to act by, in essence, terminating review. The Court of Appeals then affirmed the Commissioner's ruling denying discretionary review under RAP 2.3(d) solely for the reason that the matter appeared moot. For the reasons stated above, the failure to recognize strong bases for exceptions to mootness constituted probable error that only the Supreme Court can rectify.

VI. CONCLUSION

By ruling that CrRLJ 2.1(c) is *de jure* unconstitutional as applied, has it not also declared CrRLJ 2.1(c) *de facto* unconstitutional on its face? The dearth of jurisprudence on any of the issues raised by this appeal is readily apparent, leaving municipal and district court judges, prosecuting attorneys, and citizens operating in the dark with regard to an historically and legally momentous question of private prosecution in Washington. Even the WSBA recognizes the import of such issues. On behalf of all interested public officials and citizens, Ms. Anderlik requests review.

Dated this March 3, 2008

ANIMAL LAW OFFICES



Adam P. Karp, WSB No. 28622

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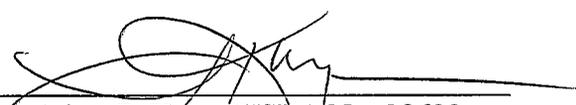
Kenneth L. Wainstein, Judicially Initiated Prosecution: A Means of Preventing Continuing
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 3, 2008, 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 (with previous consent from opposing counsel)
- Express Mail
- Hand Delivery
- Facsimile Transmission
- Federal Express/Airborne Express/UPS Overnight

Brian O'Brien
Spokane County Prosecuting Attorney
1100 W Mallon Ave
Spokane, WA 99620
(509) 477-3662
bobrien@spokanecounty.org



Adam P. Karp, WSBA No. 28622
Attorney for Plaintiff-Appellant

EXHIBIT A-1

FILED

FEB -4 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

**COURT OF APPEALS, DIVISION III, STATE OF
WASHINGTON**

CITY OF SPOKANE VALLEY, and
STATE OF WASHINGTON ex rel.
CHRIS ANDERLIK,

Appellants,

v.

BALLARD BATES, et al.,

Respondents.

) No. 26412-2-III
)
)
)
)
)
)
)
)
)
)

ORDER DENYING
MOTION TO MODIFY
COMMISSIONER'S RULING

Having considered appellants' motion to modify the commissioner's ruling of
November 20, 2007, and the record and file herein;

IT IS ORDERED the motion to modify the commissioner's ruling is denied.

DATED: February 4, 2008

FOR THE COURT:

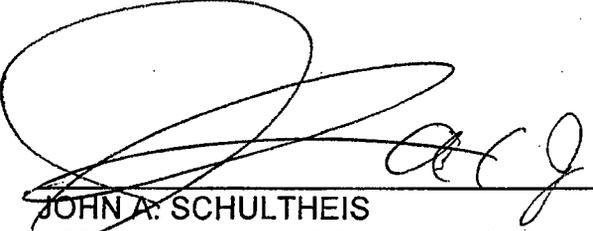

JOHN A. SCHULTHEIS
ACTING CHIEF JUDGE

EXHIBIT A-2

The Court of Appeals
of the
State of Washington
Division III

FILED

NOV 20 2007

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

CITY OF SPOKANE VALLEY, and)
STATE OF WASHINGTON ex rel. CHRIS)
ANDERLIK,)

Appellant,)

v.)

BALLARD BATES, et al.,)

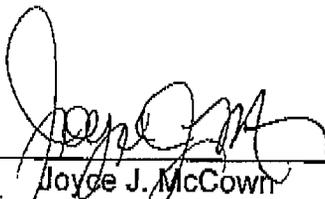
Respondents.)

COMMISSIONER'S RULING
No. 26412-2-III

Having considered this Court's motion to determine appealability, and/or in the alternative discretionary review, the parties' memoranda, the record, file, and oral argument of counsel, and being of the opinion 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; now, therefore,

IT IS ORDERED, this matter is not appealable of right and discretionary review is denied.

November 20, 2007.



Joyce J. McCown
COMMISSIONER

EXHIBIT A-3

FILED

AUG 01 2007

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

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

CITY OF SPOKANE VALLEY,

Plaintiff,

vs.

BALLARD BATES and DUANE SIMMONS,

Defendants.

No. 07-1-01318-1 (O'Connor)

ORDER DISMISSING APPEAL

I. OPINION AND ORDER

O'CONNOR, J. Pursuant to RALJ 9.1(g), the Court enters its written decision as follows, and incorporates its oral decisions of July 31, 2007 to this decision.

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

MOTION TO DISMISS APPEAL -1

Spokane County Prosecuting Attorney
1100 West Mallon
Spokane, WA 99260-0270
(509) 477-3662

1 The parties listed on this appeal are not the parties to this action. The appellant Ms.
2 Anderlik, is not the "State or Local Government" under RALJ 2.2(c)(1) to this action.
3 However, the RALJ's provide for review by writs, under RALJ 1.1(c). Under the procedural
4 circumstance of this case, the petitioner is not without review. Either a writ of certiorari or a
5 writ of mandate under RCW 7.16 may provide relief.
6

7 The RALJ cannot be amended to a writ proceeding.
8

9
10 **II. ORDER**

11 The appeal is dismissed.

12 
13 _____
14 Kathleen O'Connor, Superior Court Judge

15
16 STEVEN J. TUCKER
17 Spokane County Prosecuting Attorney

18 
19 _____
20 Brian O'Brien, WSBA # 14921
21 Deputy Prosecuting Attorney

22 Approved as to form only,

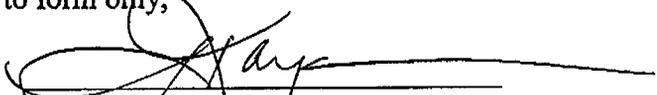
23 
24 _____
25 Adam Karp WSBA # 28622
26 Attorney for Appellant
27

EXHIBIT A-4

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

In Re: CITIZEN COMPLAINT)	Case Nos. CC1 and CC2
)	
BALLARD BATES)	MEMORANDUM OPINION
DUANE SIMMONS)	ON RECONSIDERATION
_____)	

PROCEDURAL BACKGROUND

A Citizen's Complaint was filed by Chris Anderlik on December 4, 2006, alleging that two deputy sheriff's named above negligently committed animal cruelty by Taserling a calf-at-large with two Tasers simultaneously for over three to four minutes simultaneously. The calf was alleged to have weighed around 500-600 pounds. While it was cornered, the officers apparently thought they could control it with Tasers and tie its legs together. They ultimately did that and left it on its side. It died within minutes.

A hearing was held on January 22, 2007, before this Court. The County Prosecuting Attorney's Office was represented by Mr. Brian O'Brien. The Complainant was represented by Mr. Adam Karp.

The potential defendants were unrepresented and offered no evidence contrary to or supplementing that provided by the Complainant, nor offered any briefing or testimony. Mr. O'Brien offered little evidence or testimony contrary to or supplementing

that provided by the Complainant. The prosecution argued legal issues, not factual issues.

The prosecution argued the officers were immune from liability under RCW 16.52.210, and that the calf was not neutered and, presumptively, a potentially dangerous animal. The Complainant provided the police reports, studies on the Taser, the Taser download report, affidavits by experts, affidavits by witnesses, collateral animal cruelty laws, as well as legal argument.

As the deputies or State offered nothing supporting their actions or positions, the Court was left with no choice but to accept the Complainant's factual allegations as verities. The Court had no mechanism to determine if the allegations were true or exaggerated, and neither the State nor the potential defendants offered any other set of facts or supplemental information.

The Court heard all the arguments and read the files. By oral ruling, the Court found that there was probable cause to support a charge of negligent animal cruelty, that the potential defendants were not immune from prosecution, that the conditions relating to the duties of the Complainant were met, and that the Complainant understood she would have to appear for any trial. The Court ordered a criminal complaint to be prepared.

Further the Court made very clear that once the complaint was granted, the prosecution of the matter was turned over to the County Prosecutor's Office for any action it deemed appropriate, including declining to prosecute.

Prior to a final order being entered, Prosecuting Attorney Brian O'Brien made a Motion for Reconsideration. The Motion was timely, but due to scheduling conflicts and the filing of a subsequent motion, the hearing was continued to March 2, 2007. The Complainant, through counsel, made a Motion to Appoint a Special Prosecutor and Disqualify the County Prosecutor. The Motion was opposed by the State. Both Motions were argued on March 2, 2007.

Issues on Motion for Reconsideration

The Prosecuting Attorney has, in his Motion for Reconsideration, raised the issues of:

1. The Immunity for Officers acting under the community care taking functions from civil or criminal liability per RCW 16.52.210, which issue was argued at the first hearing. The Prosecutor argues that large animals running at large are a public nuisance and impose a duty on an officer to act to impound the animal, or face civil liability toward all persons and property who come within the ambit of the risk created by the officer's failure to act. RCW 16.52.110. He argues the law required the officers to take action and that they are immune from prosecution for whatever action they chose to take; and
2. That CrRLJ 2.1(c) is unconstitutional in that it violates the Separation of Powers Doctrine. The Prosecutor argues that the Court Rule is a usurpation of the executive function of deciding whether to file and prosecute someone for a violation of a criminal law and delegating that authority to the Court through a private citizen. He further argues that a court cannot order a

prosecutor to act upon the newly filed charge, as it has no authority to do so either legislatively or inherently.

The Complainant argues:

1. That the Motion for Reconsideration was not properly before the Court on procedural grounds. That the Prosecutor failed to identify which grounds of CrRLJ 59 apply for reconsideration. However, she waived the objection for this argument.
2. The Immunity argument under RCW 16.52.210 fails as it is a limited immunity to destroy an animal that has been seriously injured and would otherwise continue to suffer. The destruction is to be undertaken with reasonable prudence and whenever possible in consultation with a veterinarian and the owner. "Reasonable prudence" is the defining requirement for immunity. The action to destroy an animal is to reduce cruelty. It does not condone actions that are construed to be cruel.
3. The Separation of Powers argument as set forth by the prosecution indicates that the Supreme Court Rule improperly encroached upon the Executive Branch power to prosecute. Complainant believes and argues that courts play an integral role in the criminal proceedings, including the grand juries, inquests and the approval of search and arrest warrants. These actions by the courts are required to initiate criminal actions. Therefore, this Court has the ability to order a criminal complaint be filed without unduly intruding on

the authority of the Executive Branch. Further, the District Court has equity powers to authorize the criminal action.

Issues on Motion to Appoint a Special Prosecutor

The Complainant argues:

1. That CrRLJ 2.1(c) does not require the Citizen Complaint be prosecuted by the elected prosecutor and where, as here, the prosecutor has an obvious and inherent conflict the court should appoint a special prosecutor, under its equitable powers. And, since the County Prosecutor has publicly declared his position in support of the potential defendant, he is biased and unable to properly discharge his duty prosecuting this case.
2. Arguing in the alternative, Complainant alleges the Court has the independent power to disqualify counsel upon knowledge of a breach of Rules of Professional Conduct. Where a trial court knows of an attorney's ethical breach, it must presume prejudice and automatically disqualify that attorney.

The Prosecution argues:

1. The Court does not have the equitable powers, such as would exist in Superior Court, to appoint a special prosecutor. Further, that if such relief is sought by the Complainant, the Attorney General's Office is the proper agency.
2. The Complainant has imagined the disability of the Prosecutor, when it is merely a disagreement on the effect of the law.

DISCUSSION

1. Officer Immunity

The question of officer immunity from civil or criminal liability while acting under the community care taking function was addressed in the original hearing. It states in RCW 16.24.110, that any cattle running at large are a public nuisance. The officers had a duty to act to *impound* the animal. If they fail to act, they may face civil liability for that failure to all persons and property who come within the ambit of the risk created. Further, the owner of the animal can face criminal sanctions for allowing an animal to run at large.

The Prosecution cites to Livingston v. City of Everett, 50 Wn. App. 655 (1988), where an animal control officer released a dog he had reason to believe was dangerous and had been running loose. The Court in Livingston indicated the animal control officer had a duty to *exercise his discretion* when confronted with the situation.

In the earlier hearing, the prosecution cited to RCW 16.52.210, which sets forth the Immunity from Liability for an officer for destruction of an animal. This statute is part of the Animal Cruelty chapter and states that the limitations in the chapter shall not limit the right of a law enforcement officer to destroy an animal *that has been seriously injured and would otherwise continue to suffer*. The right of an officer to destroy such an animal is limited by the *exercise of reasonable prudence*, and whenever possible, in consultation with a licensed veterinarian and the owner of the animal. Both law enforcement officers and licensed veterinarians are immune from civil and criminal

liability for actions taken under the chapter *if reasonable prudence is exercised* in carrying out the provisions of this chapter.

Certainly, we have all experienced or heard of animals being put down, either humanely through a veterinarian or by deputies in the field, after the animal is involved in a car or other accident. 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. The calf was not, at the time these actions occurred, injured and in a state of continued suffering. It was exhausted and frightened, but not injured, so RCW 16.52.110 applied.

This situation required the officers exercise *reasonable prudence* in their actions with an otherwise healthy animal to *impound* it under RCW 16.52.110.

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. If the officers had determined early on that the Tasering of the calf was nonproductive, and had attempted other means of immobilizing it, this matter would not be here today. Had they successfully contacted the owner, or waited to contact the owner to appear and take control of the animal, this matter would not be here today. If SCRAPs, the Spokane animal control agency, had been authorized to use tranquilizer guns prior to this incident, this matter would not be here today.

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. They attempted to immobilize the calf using two Tasers (50,000 volts each) for three to four minutes simultaneously. This action went well beyond reasonable prudence and crossed over to negligent cruelty. These actions directly resulted in the death of the calf by the impact of the Tasers.

This Court is focusing only on the act of Tasering the calf beyond what is reasonably prudent to impound it. If death was the desired result, the officers should have humanely killed it. If impounding the calf was the desired result, it is highly questionable that using two Tasers simultaneously for three to four minutes was reasonably prudent, therefore, the actions of the officers fall outside the statutory immunity. The animal is not like a difficult human who is resisting the officer's request for cooperation and control. The animal cannot pull out the Taser probes. The animal is not intoxicated or out of control due to use of a controlled substance. The animal is frightened and exhausted, and its instinct is to find safety. No evidence was provided this Court that the calf was anything but lost, exhausted, frightened, and non-aggressive.

The animal cruelty statutes do not condone an officer's use of cruelty to discharge his duties, and it is this Court's opinion that the use of the Tasers as set forth by the Complainant, unchallenged by the prosecution or potential defendants, was beyond the contemplation of the statute.

Therefore, the officers are not immune from prosecution and probable cause for Animal Cruelty-Second Degree is established.

2. **Separation of Powers**

The Prosecution argues that CrRLJ 2.1(c) is unconstitutional as it violates the Separation of Powers Doctrine, in that it allows the Judicial Branch the power to decide who is or is not charged with a crime, a role belonging to the executive branch. The constitutional argument is first raised in the Motion to Reconsider.

CrRLJ 2.1(c) allows the following:

1. Any person alleging a misdemeanor or gross misdemeanor.
2. *Shall* appear before a judge empowered to commit persons charged.
3. The judge *may* require appearance on the record, *may* consider any allegations on the record, *may* consider any allegations by affidavit, *may* allow the prosecutor to give evidence, *may* allow the potential defendant or his attorney to give evidence, *may* allow the potential witnesses to give evidence, and *may* allow law enforcement to give evidence.
4. The Court will determine probable cause, and *may* consider the following:
 - a. Will the State be subject to costs or damages if unsuccessful prosecution;
 - b. Does Complainant have adequate recourse under civil actions;
 - c. Is a criminal investigation pending;
 - d. Would other criminal charges be disrupted if the complaint is filed;
 - e. Availability of witnesses at trial;
 - f. Criminal record of the Complainant, potential defendant and witnesses; and
 - g. Prosecution standards under RCW 9.94A.440 (argued here as the immunity standard).
5. If probable cause exists, and the above factors justify filing charges and the Complainant is aware of the gravity of the action, the necessity to appear in court, the possible liability for false arrest, then
6. The judge *may* authorize the citizen to sign and file a complaint in the form set out in the Rule.

As far as Court action, the Rule is entirely discretionary. The Court has discretion whether to require a criminal complaint. However, should all the conditions listed in

CrRLJ 2.1 be met, and the Court fails to order the criminal complaint, there can be only a few reasons. Those reasons could be that there is political or community pressure not to; or it is a waste of time and effort, as there will be no prosecution of the case due to the Prosecutor's office unwillingness to proceed.

The prosecution here agrees that the Court is fully empowered to determine whether or not probable cause exists in this or any criminal case. But the prosecution believes that the Court has no authority whatsoever to determine whether or not a criminal complaint should be filed.

3. **Facial Challenge**

The Separation of Powers Doctrine has been addressed in many Supreme Court cases and comes up generally in a determination between the Legislative Branch and the Judicial Branch. However, there are times when the Executive Branch and the Judicial Branch have clashed. The prosecution cites to Carrick v. Locke, 125 Wn.2d 129 (1994), acknowledging the three branches of government. The different branches must remain partially intertwined if for no other reason than to maintain an effective system of checks and balances, as well as an effective government. There is rarely a definitive boundary between the branches, and the boundary is grounded in flexibility and practicality. As stated in Zylstra v. Piva, 85 Wn.2d 743 (1975), the question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogative of another. All three branches are possessive of their fundamental powers and do not lightly tolerate a usurpation of those powers by other branches.

The Supreme Court also stated in State Bar Association v. State, 125 Wn.2d 901 (1995), that while some overlap can occur without violating the Doctrine, one branch of government cannot assume or exercise the power or duties of another branch, nor act to deprive the others of their lawful powers.

It is the State's contention that the criminal prosecution function is and historically has been an Executive Branch responsibility. The County Prosecutor is charged with the prosecution of all criminal actions in which the State is a party. RCW 36.27.020(4). The decision whether to file criminal charges is within the Prosecutor's discretion. State v. Judge, 100 Wn.2d 706 (1984). The decision to file or not file charges, or the number of such charges, is a matter left to the discretion of the prosecuting attorney. State v. Ammons, 105 Wn.2d 175 (1986). It is the Prosecutor's position that no legislation or case law has been found to grant any portion of the charging power to the judiciary or to a private citizen of this State, except CrRLJ 2.1(c).

Based upon the above, the prosecution argues that the judiciary, by power of Supreme Court Rule, is usurping the executive function deciding whether to file and prosecute a criminal case. Further, that if the Court orders the criminal complaint it has no ability to order the Prosecutor to go forward with the charge pursuant to Westerman v. Cary, 125 Wn.2d 277 (1994) and Ladenburg v. Campbell, 56 Wn. App. 701 (1990). Without that power, the Rule is an exercise in futility and without meaning.

The Complainant urges the Court to adopt a position which would allow the Rule to have meaning. The Carrick case recognized a high degree of collaboration between

the Judicial and Executive Branches. In fact, the Prosecutor in argument pointed out that all matters in the prosecution of a case, *except the decision to file a charge*, requires the Court to participate. It cannot be doubted that the judiciary plays a role even before the formal filing of charges. For instance, judges issue search warrants which allow police to further their investigations. Judges also preside over grand juries, which act in a manner closely analogous to inquest proceedings. Only when such cooperation changes to unwarranted coercion or intrusion should the branches exercise authority to sustain its separate identity. Zylstra.

Complainant suggests that the prosecutorial decision-making is not expressly vested in the Executive Branch. While statutorily there is an indication the charging decision rest with the Prosecutor, there is nothing in the Constitution setting up a delegation of authority to charge crimes.

In the experience of this Court, it can summons a defendant to court to answer an allegation of probation violation AFTER judgment and sentence has been entered. This Court is not aware of the ability to INITIATE a criminal case in any other instance except the Citizen's Complaint process.

The rule-making process used by the Supreme Court is complex and inclusive. The process includes comments from the Judges' Associations and the Bar statewide. The Supreme Court is very deliberative in its rule-making process and it is unusual for any Court to be asked to consider a constitutional challenge to Court Rule. It is a well-established principle that the Supreme Court has implied authority to dictate its own rules, even if they contradict those established by the legislature. Sackett v. Santilli,

146 Wn.2d 498 (2002). RCW 2.04.190 is a statutory reinforcement of the Supreme Court's authority to make rules. That statute states:

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

This statute gives broad powers to the Supreme Court to control proceedings and process in the State courts, including district courts.

It is a well understood precept of the law that Court Rule trumps conflicting statutes, should irreconcilable differences be determined to exist between the Rule and the statute. Id. It is also understood that a Court of Limited Jurisdiction is subject to Supreme Court Rule.

Considering that this matter is presently in a Court of Limited Jurisdiction, which Court is subject to the Supreme Court, this Court believes it does not have the authority to find a Court Rule facially unconstitutional, but will continue its analysis.

3. **As Applied Challenge and Special Prosecutor Appointment**

Complainant indicates that the language of CrRLJ 2.1(c) permits a judge to evaluate probable cause (which ability is not in issue), weigh the petition against

prosecutorial guidelines per statute (prosecution's immunity argument), and entertain other considerations including motivation of the Complainant. All else being equal the Court, under the Rule has discretion to order the filing of a criminal charge. After that, the Judicial Branch no longer has control of the prosecution. The issue raised by the Prosecutor is that the Court has NO authority to order a complaint filed to begin a criminal case. Only the Prosecutor can file a charge. The ONLY truly discretionary power the Prosecutor has is to decide to file a criminal action and that power rests with the Executive Branch.

The Complainant argues the ability to initiate a criminal action under this Rule is a co-extensive authority with the Prosecutor, granted to the court by Rule. It is a necessary check and balance of the Prosecutor's authority. The purpose is to prevent connivance with other parties; prevent acts against public interest, and allow the public a forum to be heard and to provide that public with an ability to take action.

The Rule is silent on who will prosecute the criminal complaint. However, the Rule's next section (d) requires the complaint to be filed with the Clerk of Court. Once filed the normal course of actions would proceed. The Prosecutor and the potential defendants are aware of the complaint due to the hearing, but beyond that, the Rule is silent.

CrRLJ 2.1(c) allows for a set of discretionary rulings by the judge. The rule drafters may have anticipated that most petitioners would not be able to meet all the criteria set out in the rule necessary to reach the point where the court would consider ordering a complaint filed. The ordering of a criminal complaint is also a discretionary

ruling. A court can avoid ever reaching the final determination, whether or not to order a criminal complaint, by simply finding one of the other criteria has not been met. Or, if all criteria are met, the court can still not order a criminal complaint. Then, should the court order a criminal complaint filed, there is the question of whether the prosecutor's office will allow it to go forward. The next section of CrRLJ 2.1 simply requires the complaint be filed with the clerk's office. If the matter proceeded that far, the prosecutor's office could decline or dismiss.

The only way a case could proceed to prosecution without the cooperation of the County Prosecutor's office is if this Court has the ability to appoint a special prosecutor. CrRLJ 2.1(c) is silent as to that authority. In Ladenburg v. Campbell, 56 Wn. App. 701 (1990), the Court held that District Court has no statutory authority to appoint a special prosecutor. This holding was supported in Westerman v. Cary, 125 Wn.2d 277 (1994).

The Complainant responds with several arguments. The basic premise is that the Spokane County Prosecutor's Office has made it clear that they oppose any criminal action against the potential defendants. That office has an open and apparent conflict as evidenced by the vigorous opposition to this action. While the Ladenburg court held a District Court has no statutory authority to appoint a special prosecutor, Complainant argues that the petition filed by Complainant is in the nature of an equitable, civil-type action and not technically a criminal case. He argues the petition resembles writ actions and lies in equity. The Ladenburg case was decided prior to the constitutional amendment expanding the District Court's equity jurisdiction and, Complainant argues, that Ladenburg cannot restrict the power of the Court to appoint.

Complainant also argues that under the 1993 amendment to the State Constitution granting concurrent original jurisdiction to superior courts and district courts in cases arising in equity, the District Court has the equitable power to appoint special prosecutors. Further, that this ability is necessary to allow a Citizen's Complaint to proceed. Without the power to appoint, the Citizen's Complaint process is an empty process.

This Court notes that the CrRLJ 2.1 is in the *Criminal* Rules for Court of Limited Jurisdiction. The presumption is that this is indeed a criminal action and not part of a quasi-civil rule. As such, the rules of equity, even under the 1993 constitutional amendment, do not apply.

In the alternative, if the Court finds it cannot appoint a special prosecutor, it should allow the case to proceed with a "private prosecutor" which is an attorney appointed to prosecute the case. The law does not allow for the appointment of private attorneys to act as prosecutors, except as they are deputized by the county prosecutor. This Court cannot appoint a "private prosecutor," nor would it be appropriate to set up a separate means of prosecuting cases.

The Complainant would have the District Court have the same authority and abilities as the Superior Court, blurring any lines of distinction between them. As that is not the reality, the District Court simply cannot exercise the equitable remedy of the appointment of special prosecutor to handle a citizen's complaint. Ladenburg.

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

As applied to the fact situation here, where this Court has found probable cause to charge, where the Complainant has met all the other criteria and where the Court has previously ordered a criminal complaint, the Rule is an unconstitutional violation of the Separation of Powers Doctrine as applied, since there is no means of prosecuting the matter and the Court cannot usurp the charging ability of the Executive Branch.

**CONCLUSION AND HOLDING ON MOTION TO
RECONSIDER AND MOTION TO APPOINT
SPECIAL PROSECUTOR**

1. As to the question of probable cause to charge the potential defendants with Second Degree Animal Cruelty for Tasering a calf to death, the Court will not disturb its earlier ruling. Probable Cause determinations are squarely with the Court's authority. The immunity of the potential defendants was not established.
2. As to ordering a criminal complaint be filed under CrRLJ 2.1(c), the Court previously exercised its discretion to order a criminal complaint be filed. CrRLJ 2.1 is a criminal rule and the equity powers of the District Court do not apply to it.
3. The Court grants reconsideration of its decision to order a criminal complaint based upon the challenge under the Separation of Powers Doctrine *as applied* to this matter. This Court does not have the authority to find a Rule

promulgated by the Supreme Court to be *facially* unconstitutional and cannot strike down the Rule.

4. This Court does not have the authority to appoint a special prosecutor and there is no provision in the law to appoint a "private prosecutor" as suggested by Complainant. Without the County Prosecutor's willingness to proceed with prosecution of this case, the Complainant's exercise of her claim under the Rule is meaningless.
5. The Prosecutor's challenge under the Separation of Powers Doctrine, *as applied* to this case, is successful. The Court, on reconsideration and based upon the violation of the Separation of Powers Doctrine, reverses its position on its ability to issue a criminal complaint in this matter. As no criminal complaint will be ordered, it is hereby

ORDERED that probable cause is found to support Second Degree Animal Cruelty; that the Court has no authority to issue a criminal complaint or appoint a special prosecutor.

Dated this 12th day of March, 2007.

Respectfully submitted,

SARA B. DERR, Presiding Judge
Spokane County District/Municipal Courts

EXHIBIT A-5

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DECLARATION OF TEMPLE GRANDIN

I, TEMPLE GRANDIN, being over the age of eighteen and fully competent to make this statement, hereby declare:

Credentials

1. I am a designer of livestock handling facilities and a professor of Animal Science at Colorado State University. Facilities I have designed are located in the United States, Canada, Europe, Mexico, Australia, New Zealand, and other countries. In North America, almost half of the cattle are handled in a center track restrainer system that I designed for meat plants. Curved chute and race systems I have designed for cattle are used worldwide and my writings on the flight zone and other principles of grazing animal behavior have helped many people to reduce stress on their animals during handling. I have also developed an objective scoring system for assessing handling of cattle and pigs at meat plants. This scoring system is being used by many large corporations to improve animal welfare. Other areas of research are: cattle temperament, environmental enrichment for pigs, reducing dark cutters and bruises, bull fertility, training procedures, and effective stunning methods for cattle and pigs at meat plants.
2. I obtained my B.A. at Franklin Pierce College and my M.S. in Animal Science at Arizona State University. I received my Ph.D in Animal Science from the University of Illinois in 1989. Today I teach courses on livestock behavior and facility design at Colorado State University and consult with the livestock industry on facility design, livestock handling, and animal welfare. I have appeared on television shows such as *20/20*, *48 Hours*, *CNN Larry King Live*, *PrimeTime Live*, *the Today Show*, and many shows in other countries. I have been featured in *People Magazine*, the *New York Times*, *Forbes*, *U.S. News and World Report*, *Time Magazine*, the *New York Times* book review, and *Discover* magazine. Interviews with me have been broadcast on *National Public Radio*. I have also authored over 300 articles in both scientific journals and livestock periodicals on animal handling, welfare, and facility design. I am the author of *Thinking in Pictures*, *Livestock Handling and Transport*, and *Genetics and the Behavior of Domestic Animals*. My book *Animals in Translation* was a *New York Times* best seller.
3. Attached as **Exhibit A** is my current curriculum vitae.

Documents Reviewed to Render Opinion

4. I have been asked to give an expert opinion concerning whether Spokane County Sheriff's Deputies Simmons and Bates unnecessarily caused appreciable pain or suffering in the black angus calf who was TASERed on April 12, 2006 in Spokane Valley, Washington. I have reviewed the following materials in arriving at my opinion:
 - a) The narrative reports of Officers Bates, Simmons, and Melton, and related public

DECLARATION OF TEMPLE GRANDIN

- 1

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1 disclosure surrounding the incident, as obtained through Spokane County Sheriff's
Office.

2 b) The TASER discharge logs.

3 c) The Declaration of Arabella Akossy.

4 d) The technical specifications for the M26 and X26 TASER models.

5 e) The expert opinion of Michael Ashby.

6 f) TASER training records for Deputies Bates and Simmons.

7 **Expert Opinion**

8 5. In my professional opinion, beyond a reasonable doubt, I state the following:

9
10 6. The calf would have suffered greatly by having the Taser applied for several minutes.
11 Since it was shot in the side of the body, the electric shock would not cause insensibility.
12 When electricity is used in a slaughterhouse, the current is passed through the brain,
which will cause instant insensibility. Immobilization by freezing the muscles is
extremely aversive and should not be used to restrain livestock (Grandin et al. 1986,
Lambooy 1985, Pascoe 1986, Rushen 1986.)¹

13 7. Applying shocks from two Tasers at the same time is torture.

14 8. According to the training records, only one of the officers had experienced being shocked
15 with a Taser. The one who had never experienced the shock was the first one to shoot the
16 animal. I have experienced having my arm immobilized with electricity and it felt like
my arm had been shoved up a light socket.

17 9. Officer Bates wrote on the training document that being Tasered was "Very unpleasant
18 and debilitating. I would not have been able to fight back." Officer Bates would have
been shocked for a maximum of five seconds.

19 10. The judgment of both police officers was terrible. The calf was standing still and winded
20 BEHIND a hotel on a grassy field. It could have been easily held by having two or three

21 ¹ Grandin T., Curtis S.S. and Widowski T. (1986), *Electro-immobilization versus mechanical restraint in an avoid-*
22 *avoid choice test for ewes.* Journal of Animal Science Vol. 62 pp. 1469-1480.; Lambooy, E. (1985), *Electro-*
23 *anesthesia or electro-immobilization of sheep, calves and pigs with the Feenix Stockstill,* Veterinary Quarterly 7:
120-126; Pascoe P.J. (1986), *Humaneness of electroimmobilization unit for cattle,* Amer. J. of Veterinary Res. 47:
2252-2256; Rushen, J. (1986), *Aversion of sheep to electro-immobilization and physical restraint,* Applied Animal
24 Behavior Science, Vol. 15, pp. 315-324.

24 **DECLARATION OF TEMPLE GRANDIN**

25 - 2

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1 people stand around it just outside the flight zone. There is a great need for better training
2 of police and other first responders on how to handle escaped livestock. Chasing them is
the WORST thing to do.

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

5 Executed this November 13 2006, in the city of Fort Collins.

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8 TEMPLE GRANDIN
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24 DECLARATION OF TEMPLE GRANDIN

25 - 3

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EXHIBIT A-6

ORIGINAL

DECLARATION OF BERNARD ROLLIN

1 I, BERNARD ROLLIN, being over the age of eighteen and fully competent to make this
2 statement, hereby declare:

Credentials

- 3
- 4 1. I am a University Distinguished Professor at Colorado State University with a primary
5 appointment in Philosophy and additional appointments in Biomedical Sciences and
6 Animal Sciences. I am a pioneer and expert in Veterinary Ethics (I am considered the
7 father of the field) and Animal Ethics. I am a member of the Pew Commission on
8 Confined Animal Feeding Operations and of the Institute of Laboratory Animal
9 Resources Council of the National Academy of Sciences. I am considered an authority on
10 animal pain, consciousness and distress, and was a principle author of 1985 U.S. federal
11 legislation mandating control of pain and suffering in laboratory animals. I have edited a
12 classic two volume book dealing with the issues covered by these laws. I taught the
13 world's first courses in veterinary ethics and in ethical and animal welfare issues in
14 animal science and agriculture. I have lectured to somewhere between 10,000 and 15,000
15 cattle ranchers in the U.S. over 25 years. I am considered a moderate who enjoys
16 credibility with parties on both sides of the animal welfare issues. I have written a
17 monthly column on veterinary ethical issues for the Canadian Veterinary Journal since
18 1990, and created the CSU Animal Care and Use Committee in 1980, and have served on
19 it ever since then. I also created and serve on the animal welfare committee of the
20 National Western Livestock Show and Rodeo and on the CDC Animal Care and Use
21 Committee. Attached as **Exhibit A** is my current curriculum vitae.
- 22 2. In my role as committee member of the National Western Livestock Show and Rodeo, I
23 have helped formulate plans for dealing with animals, including calves, who escape into
24 Denver city streets from the show. We require trained people who know livestock to
25 handle such situations.

Documents Reviewed to Render Opinion

- 18 3. I have been asked to give an expert opinion concerning whether Spokane County
19 Sheriff's Deputies Simmons and Bates unnecessarily caused appreciable pain or suffering
20 in the black angus calf who was TASERed on April 12, 2006 in Spokane Valley,
21 Washington. I have reviewed the following materials in arriving at my opinion:

22 a) The narrative reports of Officers Bates, Simmons, and Melton, and related public
23 disclosure surrounding the incident, as obtained through Spokane County Sheriff's
24 Office.

25 b) The TASER discharge logs.

24 DECLARATION OF BERNARD ROLLIN

- 1

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adam@animal-lawyer.com

- 1 c) The Declaration of Arabella Akossy.
2 d) The technical specifications for the M26 and X26 TASER models.
3 e) The expert opinion of Michael Ashby.

4 **Expert Opinion**

- 5 4. In my professional opinion, beyond a reasonable doubt, I state the following: No one who
6 knows anything about cattle would ever even think of TASERing a calf for the period of
7 time described to the point of death. Such an act could only come from incredible
8 ignorance, fear-induced panic, or deliberate sadism, none of which would be acceptable
9 from a police officer attempting to handle such a situation. The animal obviously suffered
10 unnecessary pain and fear. The police should receive training or designate an officer with
11 expertise to handle such situations.
- 12 5. In discussing this case with colleagues in animal science, I found the universal reaction to
13 be disbelief at such management of the situation.

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

16 Executed this November 5 2006, in the city of Fort Collins, Colorado

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Bernard Rollin

Bernard Rollin
BERNARD ROLLIN

DECLARATION OF BERNARD ROLLIN

- 2

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EXHIBIT A-7

I, Holly Cheever, D.V.M., being over the age of eighteen and fully competent to make this statement, hereby declare:

Credentials

1. I am a practicing veterinarian, licensed in the states of New York and Vermont. I received my A.B. degree from Harvard University (1971, *summa cum laude*), and my Doctor of Veterinary Medicine degree from the College of Veterinary Medicine at Cornell University, (D.V.M. 1980), from which I graduated with a class rank of #1. I practiced initially in a dairy practice in Cortland County in upstate New York and currently, since 1990, practice at the Animal Hospital in Guilderland, N.Y., at which I care for companion animals and injured wildlife. I manage a small farm at my place of residence, caring for horses, cattle, goats, and chickens. In addition to private practice in a clinical setting, I also serve as a consultant on animal welfare and animal cruelty issues. As Vice President of the New York State Humane Association, I and three colleagues present a day-long seminar, three times annually, in different locations in New York State, instructing law officers and animal control officers how to implement the State's anti-cruelty laws accurately and effectively to prosecute cases of animal abuse. To the best of my knowledge, I am the sole veterinarian in the State of New York to be certified as a General Topics Instructor for the State's Office of Public Safety Municipal Police Training Council (again, for this department I teach police officers how to use the State's anti-cruelty laws). I am a contributing author to Shelter Medicine for Veterinarians and Staff (my chapters deal with equine abuse) and also to How To Investigate Animal Cruelty in New York State: A Manual of Procedures. For my work in assisting in the prosecution of cruelty cases, I have received awards from The New York State Troopers, the American Society for the Prevention of Cruelty to Animals, the Humane Society of the United States (to name a few), and was named "1991 Veterinarian of the Year" by the New York State Humane Association.
2. Attached as **Exhibit A** is my current curriculum vitae.

Documents Reviewed to Render Opinion

3. I have been asked to give an expert opinion concerning whether Spokane County Sheriff's Deputies Simmons and Bates unnecessarily caused appreciable pain or suffering in the black angus calf who was TASERed on April 12, 2006 in Spokane Valley, Washington. I have reviewed the following materials in arriving at my opinion:
 - a) The narrative reports of Officers Bates, Simmons, and Melton, and related public disclosure surrounding the incident, as obtained through Spokane County Sheriff's Office.
 - b) The TASER discharge logs.
 - c) The Declaration of Arabella Akossy.
 - d) The technical specifications for the M26 and X26 TASER models.

e) The expert opinion of Michael Ashby.

Factual Understandings Concerning the Incident

4. It is my understanding that the calf in question was safely behind a side street, over half a mile from the freeway, completely exhausted with labored breathing and saliva dripping from his mouth (indicating stress and exhaustion), and standing still when TASERed. The calf was located behind a hotel near an uninhabited trail, and officers had surrounded the animal to prevent its escape. Thus, he did not constitute a danger to public safety.
5. While attempting to tie his legs with a rope, the two sheriff's deputies applied their TASERs for approximately three minutes, eighteen seconds (from one TASER) and for two minutes, fifty-three seconds (from the other TASER.) The entire episode lasted over 5 minutes. The calf vocalized audibly when struck with the first TASER; his vocalization was described as sounding "distressed" by the witness, Ms. Akossy.
6. The calf died shortly after the TASERs were deactivated.

Expert Opinion

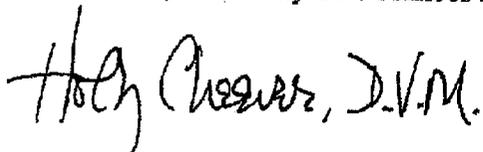
7. I am familiar with bovine physiology, anatomy, and pain receptivity, not only from my familiarity with this species, having worked as a milker on multiple occasions in a Vermont dairy, but also due to my years working with cattle as a veterinarian in a premier dairy practice in a New York region known for its dairy farms. In addition to my lifetime of familiarity with this species, my veterinary studies included extra course work in dairy medicine and physiology, since I knew I would be working in this field upon graduation. In addition, in preparation for giving my professional opinion in this case, I have been in contact with the Department of Anesthesiology (wherein pain perception is studied and controlled) at Cornell's College of Veterinary Medicine, and have been advised as to the degree of suffering incurred by the calf in this instance by experts in the field of bovine pain perception. These experts stress that pain perception in the bovine animal is every bit as acute as ours. Their disposition is stoic, so they do not vocalize with pain readily, but they feel it intensely. The fact that the calf bellowed in pain indicates that the animal was suffering extremely: in contrast, when a "downer" cow or steer is prodded with an electric cattle prod (which delivers a painful jolt of electricity), they will rise but not cry out, which underscores how painful this TASER application was to the victim. Furthermore, their hides are thin: as I understand from reviewing the TASER literature and speaking with a law officer who provides TASER training to N.Y. State law officers, the barbs penetrate one eighth inch into the target's body, which will penetrate the calf's thin hide very effectively; a young calf's hide is analogous to ours in terms of thickness, and his hair in April is not thick enough to provide protection from the barbs' penetration.
8. In my professional opinion, beyond a reasonable doubt, the actions of Deputies Bates and Simmons caused substantial and unacceptable pain and suffering to this calf without justification for the use of the TASERS since, at the time of the use

of these instruments, the calf was not a threat to any human safety due to his extreme exhaustion. Furthermore, the log of one TASER indicates that it was fired repeatedly, 42 times, into the body of the calf. This cannot help but impair cardiac function: the hide is not thick enough to minimize the electronic effect on the pain perception nerve endings, nor on the heart. To have done this so repeatedly, with complete disregard for their weapons' effect on the calf, is tantamount to torture.

9. Further, it is my professional opinion, beyond a reasonable doubt, that the actions of Deputies Bates and Simmons caused the pain and suffering described above for no legitimate reason. The calf, who by this time was no threat to public safety, sustained an acutely cruel episode of long duration that was completely unnecessary and non-emergent.
10. In my professional opinion, it is highly likely, though I cannot state that it is beyond a reasonable doubt, that the excessive discharge of this amount of electrical energy, which not only is excruciatingly painful but also can impair cardiac function, was the immediate cause of the calf's death.
11. Since the TASER used on this calf was designed for human use, and since a model exists that is designed expressly for animal use, it is clear that these officers used the wrong weapons to control their subject, in addition to ignoring their training and firing them repeatedly so that the target would, by such repeated applications, inevitably suffer cardiac impairment.
12. I hope that law officers are provided with training in the near future as to the proper use of the proper weapon for this kind of situation.

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

Executed this November 25, 2006, in the city of Voorheesville, N.Y...



Holly Cheever, D.V.M.

EXHIBIT A-8

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

STATE OF WASHINGTON and
CITY OF SPOKANE VALLEY
ex rel. ANDERLIK,
 Petitioners,

CASE NO. CC01 and CC02

PROBABLE CAUSE HEARING

vs.

BALLARD BATES and
DUANE SIMMONS,
 Respondents.

VERBATIM TRANSCRIPT OF DIGITAL RECORDING

THE HONORABLE SARA DERR PRESIDING

JANUARY 22, 2007

FOR THE PETITIONERS:

MR. ADAM P. KARP
Attorney at Law

MS. CHRIS ANDERLIK
The Complainant

FOR THE STATE OF WASHINGTON:

MR. BRIAN O'BRIEN
Deputy Prosecuting Attorney

SANDRA B. SULLIVAN, RPR, CCR #2647
Certified Court Reporter
Henry Reporting
3407 Robertson Road
Bellingham, Washington 98226
Tel: (360) 312-0202 Fax: (360) 312-8202

1 *** SPOKANE, WASHINGTON ***

2 *** 1:30 p.m. ***

3 THE COURT: Please be seated. Good afternoon. We have a
4 couple matters before the Court today. But, before we
5 proceed, as you can see, that there is press here and
6 cameras. I've authorized that they're generally going to be
7 pointing this way as far as the parties are concerned and
8 the Court, but if there's anybody who has any concerns about
9 being on camera, would you let us know so that the camera
10 does not show you or you -- or we can move it so it won't
11 catch you by mistake?

12 (There was no response.)

13 THE COURT: Nobody has any issues.

14 Okay. All right. Then the first matter before me is a
15 Citizen's Complaint 0002, 0001. Duane Simmons and Ballard
16 Bates, those are the alleged Defendants. I have received
17 substantial documentation from the citizen who would like a
18 complaint filed on her behalf, and have read through that.
19 I received a memorandum from Mr. O' Brien with the county
20 prosecutor's and I have read through that as well. I would
21 allow argument but not necessarily witnesses at this time
22 since I've read the affidavits.

23 So, Counsel, you're Mr. Karp?

24 MR. KARP: Yes, Your Honor. My client here is Chris
25 Anderlik, and we're here today on a petition for the filing

1 uncastrated young male calf is a potentially dangerous
2 animal as a matter of law.

3 But even if we move aside from the generalities of the
4 circumstance and we look at the specifics, the specific case
5 here is, we have an animal that, based on the eyewitness
6 testimony of Arabella Akossy and based on the statements of
7 the officers themselves, was not moving, was behind the
8 Oxford Suites, was not near a populated trail, was not near
9 the -- the road that's right next to the mall, and was a
10 good half mile or more from the freeway.

11 The animal was described by the officers and Ms. Akossy
12 as winded, saliva dripping from his lips, labored breathing.
13 This animal presented no danger to anybody at that moment
14 and I think that to rely on general propositions of law
15 don't help when we look at the specific facts of the
16 situation.

17 The question of immunity has been raised under RCW
18 16.52.210. This immunity statute is contained within a
19 chapter of cruelty to animals. Typically, this is used in
20 the circumstance of alleviating the pain and suffering of an
21 animal who really is so far gone that the only alternative,
22 the only humane alternative, is to put the animal out of his
23 or her misery.

24 First, there's no indication here that this calf was
25 seriously injured. This is -- the animal wasn't struck, the

1 of a citizen criminal complaint under CrRLJ 2.1(c). As Your
2 Honor has reviewed all of the materials, I basically stand
3 ready to respond to any questions, but I do want to
4 highlight some points.

5 The nature of this proceeding is unique. I'm not aware
6 of it coming to a hearing aside from this instance and in
7 the past several dozen years, so, you know, I ask the Court
8 to indulge me if the procedure that I'm following here is a
9 little bit off.

10 The standard under CrRLJ 2.1(c) essentially treats this
11 as a probable cause hearing, but with additional other
12 factors. The prosecutorial defined the factors and those
13 have each been addressed. I've received just now the
14 response from the prosecuting attorney and I had received
15 nothing, of course, for several months, but I would like to
16 sort of give you from the edge of my seat a rebuttal.

17 First, cruelty against an animal is simply not permitted
18 if the animal is being potentially dangerous as a matter of
19 law. There is no express exemption in Chapter 16.52 of the
20 state law that says that, well, you can go ahead and torture
21 an animal if the animal is presumed to be potentially
22 dangerous.

23 I should also note that the cases that are cited here are
24 not within our state, so there is no precedent that's been
25 cited by the prosecutor to indicate that a cas -- an

1 animal wasn't injured until the Tasers were applied.
2 Second, although he was winded and tired and was scared, he
3 wasn't suffering to the extent that would justify summary
4 euthanasia.

5 Next, the statute indicates that, if you're going to
6 attempt to euthanize an animal, it has to be undertaken with
7 reasonable prudence. Now, of course, if there were
8 reasonable prudence, then no criminal action would lie.
9 That's precisely why we're here. And while the officers
10 subjectively may have believed at some level that they were
11 doing what was necessary in good faith, that's what's to be
12 expected as a -- as a defense, a defense of necessity that
13 they might raise.

14 But under these facts here, it wasn't done with
15 reasonable prudence. And we've provided expert testimony
16 from a police officer, who's also a master -- a high-level
17 Taser instructor, who stated that this was unnecessary under
18 the circumstances.

19 We take a look at the County's own protocols concerning
20 Taser usage and we see that there are some fail-safes that
21 are implemented to make sure that reasonable prudence is
22 used and those were violated. We have expert testimony from
23 a veterinarian who trained officers in New York and she
24 worked as a large-animal vet, and she's indicated that what
25 happened here was torture and unnecessary due to the

1 duration. And, finally, we have two animal behaviorists who
2 have extensive work with livestock who also agree that this
3 was just beyond the pale.

4 The statute, though, also indicates that for there to be
5 immunity, there must be an attempt by the law enforcement
6 officer to consult with a licensed veterinarian and the
7 owner of the animal if possible. There's no -- there's no
8 attempt here. SCRAP, the County animal control agency, was
9 a few miles away from the location. They were never called.
10 Spokanimal, to our knowledge, was never called. No
11 veterinarian was contacted. And the owner, although the
12 owner was apparently on route to pick up other animals that
13 had escaped that morning, could have been -- was on their
14 way.

15 And so, from the facts presented by the statements of the
16 officers themselves, they were able to prevent the animal
17 from moving if they simply created a human perimeter. They
18 could've waited, but they didn't. They, with premeditation,
19 selected the use of Tasers, Tasers that weren't rated for
20 use on a nonhuman animal and which were applied in a way
21 that, if done to a human being or to a dog, would be cruelty
22 or worse. So all that this immunity statute says is, if
23 they acted reasonably, they're immune. And, of course, if
24 they acted reasonably, there wouldn't be a criminal charge.

25 The next issue that's addressed is on the standard of

1 calf did suffer pain and it was far more than just mild
2 distress, so that element is satisfied. Whether it's
3 necessary or not, again, the key defense is going to be
4 that, under the circumstances, this animal was a threat. He
5 could have injured people or property. But the reason why
6 the maps were provided to Your Honor, the reason why the
7 audiotape footage was provided was to demonstrate that, in
8 the chronology of events, at the time that the Tasers were
9 applied, any punitive risk was minimal or none.

10 So, instead, we find the following features that go to
11 support a claim of criminal negligence or beyond. This was
12 not a split-second decision as in the instance of officers
13 confronting a pit bull that might be running immediately
14 toward them and they have one or two seconds to respond or
15 face serious bodily injury. This cow, in fact, ran away
16 from them. This was premeditated based on their indication
17 that they needed to get two Tasers, and that they would
18 eventually get a rope and try to tie the legs while it
19 happened, but there was ample lead time before they went in
20 to do this.

21 Second, they used two Tasers, not one, and for a duration
22 that, based on the video that the officers allegedly have
23 viewed as a justification to -- to engage the Tasers in this
24 fashion, was a good 90 to 100 times beyond what was seen on
25 the video with a huge Brahman bull.

1 care. While law enforcement officers are placed in perilous
2 situations, that doesn't mean that they must abandon
3 reasonable prudence. And, again, I would fall back on the
4 expert declarations of the four individuals we've provided,
5 Dr. Rollin, Dr. Grandin, Dr. Cheever, and Michael Ashby.
6 And the prosecutor has not rebutted any of those expert
7 statements with any declarations of his own and they haven't
8 been addressed, period.

9 To state a claim for second-degree animal cruelty under
10 state law, which is the same under the Spokane Valley
11 Municipal Code --

12 THE COURT: Which, by the way, Counsel, this is it. This
13 is the Court.

14 MR. KARP: Okay.

15 THE COURT: All right.

16 MR. KARP: Yes, Your Honor. The mens rea must be at
17 least criminal negligence or recklessness or knowledge that
18 unnecessary pain or suffering was caused. I don't think
19 there's any conceivable dispute here that this calf suffered
20 pain. And the Zawistowski case which I cited at 119 Wn.
21 App. 730 makes it very clear. The Court of Appeals in
22 Division 2 incorporated by reference a dictionary definition
23 of pain, and that included everything from mild discomfort
24 or dull distress to unbearable -- unbearable agony.

25 All of the experts and the eyewitness indicated that this

1 There were no efforts to use reasonable alternatives like
2 a perimeter, to tie the rope around the animal's neck and
3 lock him to a pole or a tree. He was still. He wasn't near
4 the freeway. No one was nearby and in jeopardy.

5 The cycles that were used here on this animal were
6 excessive and we believe that the evidence supports the fact
7 that the animal died as a result of the application, but
8 that's not even required for a cruelty charge. So long as
9 the animal suffered unnecessarily, that states the claim.

10 At this hearing, probable cause is essentially what needs
11 to be demonstrated. And based on their own statements and
12 the experts that we've presented, we believe that probable
13 cause can be met and that the mens rea can be implied based
14 on the circumstantial and direct evidence of the statements
15 that were made and recorded in the audiotape.

16 I sent off a letter to the Court a few weeks ago
17 referencing the Humane Slaughter Act and I believe this is
18 of some relevance, because we're dealing with a species that
19 many people in our society treat as food animals. But
20 simply because many of the people in this room may have had
21 a cow for lunch doesn't mean that there's a support for
22 cruel treatment of the animal, and the Humane Slaughter of
23 Livestock Act in our state makes that point. Slaughterers,
24 packers, they are simply forbidden to kill a cow, a horse, a
25 pig, any of those animals in a way that causes unnecessary

1 pain or suffering. And in the application of electrical
 2 current, as occurred here, had that been done at a
 3 slaughterhouse in Eastern Washington, it would've been a
 4 misdemeanor violation.
 5 Temple Grandin, who designs livestock facilities for
 6 slaughter, has written articles on electroimmobilization and
 7 said that unless the Taser would've been applied to the head
 8 of the animal to basically render this calf insensible to
 9 pain and then died, this was torture.
 10 Chapter 16.52, which is the cruelty to animal section,
 11 also defines euthanasia. The prosecuting attorney appears
 12 to be making an argument that these officers did what was
 13 justified. They tried to save the animal, they tried to put
 14 him out of his misery. That's exactly the opposite of what
 15 occurred.
 16 So, Your Honor, I stand ready to answer any questions you
 17 may have.
 18 THE COURT: Counsel, the statute or the rule, CrRLJ
 19 2.1(c), which is the one we're all looking at, also in
 20 addition to probable cause, the Court must consider or may
 21 consider whether there is adequate recourse civilly. Have
 22 you looked into that and do you -- can you respond to that?
 23 MR. KARP: Certainly, Your Honor. Civil recourse, the --
 24 the typical hurdle in any case involving a nonhuman animal
 25 is standing. So the purpose of the criminal statute

1 It's a bull. There's a -- a great deal of difference
 2 between a cow and a bull. And as I've indicated in the
 3 cases I've cited to the Court and they -- they just restate
 4 what we all know to be true. The --
 5 THE COURT: I'm sorry, how old was this animal?
 6 MR. O'BRIEN: We haven't -- you know, they're -- they're
 7 more aware of the facts. They've called it a 600 pound --
 8 THE COURT: How old?
 9 MR. O'BRIEN: Well, a calf. It's a male calf, it's a
 10 bull. I mean, unless it's cas --
 11 THE COURT: I just want to know how old.
 12 MR. KARP: The age is unclear, Your Honor, although the
 13 officers themselves indicate that this was around a 5- or
 14 600-pound-male calf, not a fully-grown bull.
 15 THE COURT: Thank you.
 16 Proceed.
 17 MR. O'BRIEN: It's a -- it's a bull unless it's castrated
 18 fairly early on in its development, usually before it's 300
 19 pounds; but that -- that's a -- something that I know that
 20 perhaps the -- the attorney for the other side doesn't, but,
 21 anyway, it's a -- it's a bull.
 22 They allege that it's confined. I don't know if this
 23 Court's ever dealt with a 600-pound animal that doesn't want
 24 to be confined. You know, you can't just stand there. A
 25 bull will run right over you. I've had some dealings with

1 involving animal cruelty is to punish the unnecessary pain
 2 and suffering of a nonhuman animal.
 3 Of course, civilly speaking, there is no basis to recover
 4 money damages for suffering as you would in the case of a
 5 human being. So that leaves what type of claim? It would
 6 be a money damage claim as a property claim by the Wards.
 7 The Wards are not involved here and even if a civil claim
 8 were brought, that would not at all address the deterrent
 9 effect that's important here, which involves cruelty to
 10 animals. I don't -- I'm not aware of an implied civil cause
 11 of action for animal cruelty, but even if there were one,
 12 who would have the standing to make that claim?
 13 THE COURT: Okay. And I assume, Counsel, you've also
 14 talked to your witnesses and they stand ready to testify
 15 should this matter go forward to trial?
 16 MR. KARP: Yes, Your Honor, each of the -- each of the
 17 experts, Ms. Akossy, Ms. Anderlik, although she was not an
 18 eyewitness, of course, she is the complaining witness and
 19 understands the gravity of the claims that are being made.
 20 THE COURT: Thank you.
 21 MR. KARP: Thank you, Your Honor.
 22 THE COURT: Mr. O'Brien.
 23 MR. O'BRIEN: Thank you, Your Honor. Briefly in
 24 response, first, I think we have to look at the main fact
 25 that Mr. Karp keeps calling this animal a cow, and it's not.

1 bulls. I think everybody on this side of the state has had
 2 dealings with bulls; but, in any event, they're more
 3 dangerous than cows. Stallions are more dangerous than
 4 mares or geldings. Rams are more dangerous than ewes. The
 5 reas -- the reason we allow the inherent dangers is because
 6 of the benefit, and that's for their -- their breeding
 7 purposes. They're -- they're -- they're large animals.
 8 What we have in this case is maybe unfortunate, but it's
 9 just not criminal. These officers were trying to save -- I
 10 mean, they could've -- justifiably, they could've shot this
 11 animal so that this chattel wouldn't damage the citizens of
 12 Spokane's property. It could run out in the street right in
 13 front of a -- a vehicle. If a vehicle hits a 600-pound
 14 animal, a lot of things could happen. If a -- if it runs,
 15 you know, over a person, we don't -- these officers don't
 16 know what the predisposition of this young bull is. But
 17 none -- nonetheless, it is a young bull. They -- they acted
 18 responsibly. They acted under the circumstances as they
 19 appeared to them at the time in trying to save this animal
 20 rather than try to kill it.
 21 The counsel for the other side, you know, skipped over in
 22 his brief, skipped over the immunity, said there was no
 23 immunity. There's a statute that applies. Indeed, there's
 24 another statute that says transporting or confining in an
 25 unsafe manner, if the officers were to confine this animal,

1 as they said they safely confined it, if it got away, then
2 in that -- under that circumstance, it'd be you're charged
3 with a misdemeanor under 16.52.080. It says, "Any person,"
4 and I'll -- "who willfully confines," and I'll skip some
5 words, "any domestic animal in a manner, posture or
6 confinement that will jeopardize the safety of the animal or
7 the public shall be guilty of the -- of a misdemeanor."

8 I mean, they could be here arguing that if -- if they
9 hadn't taken care of the bull and it got away and hurt
10 somebody that somebody else could be in here asking for a
11 citizen's complaint 'cause their confinement wasn't safe.

12 They're responding and they're responding to the
13 pressures of the minute. They're not out there -- you know,
14 they've -- they've conceded that these officers were not
15 acting maliciously or willfully. And, you know, there's no
16 mens rea involved that -- that they were attempting to cause
17 this animal harm. They're just saying that, as a -- as a
18 matter of law, that if the animal suffers that they're --
19 they're guilty of a crime.

20 And, as I've pointed out, there is that immunity statute,
21 which would apply. It's to the title. It's not -- it
22 doesn't say to a section of the title. It says to the
23 title. And law enforcement officers are immune from
24 liability for acting prudently. And I've outlined that the
25 standard of care for somebody that has to act is different

1 know, they filed a complaint. This is whether the Court
2 should even enter -- entertain the filing of a complaint.
3 The facts I don't believe are as they set forth, just as
4 they've missed the -- you know, the fact that there is
5 indeed when they -- you know, when Mr. Karp in his brief
6 said there's no immunity issues, well, there are. There's a
7 statute that deals directly with it. And he says negligence
8 is -- you know, that they have a higher standard of care
9 when, in fact, the opposite is true.

10 This is just a legal argument, Your Honor. Under all the
11 facts as given, it would be the State's, you know, position
12 that there's no crime that's occurred here. You know,
13 immunity, I mean, if -- if you're immune from criminal and
14 civil liability, that rises above the level of whether or
15 not you've committed an offense, if that makes sense to the
16 Court. You know, if you haven't committed an offense, you
17 don't need immunity.

18 You know, they -- they are immune because they have to
19 act. They have to deal with, you know, if -- if I'm in a --
20 in a bank and somebody comes up and sticks a -- a gun in the
21 -- in the teller's face, you know, it's not prudent for me
22 to step in; but an officer's got the duty to step in. He
23 has to undertake duties that normal people don't, because
24 they have to protect the public.

25 And it's -- it's that duty that gives them the immunity

1 than for somebody like yourself or myself that may react.

2 You know, if I see a -- a wild pit bull out running
3 around, I don't have to go after that dog. It wouldn't be
4 prudent for me to, but an officer has to take care of the
5 public, as do animal control officers. They -- that's their
6 -- one of their main purposes is to ensure the safety of the
7 public, and that's what these officers did. They did it in
8 good faith, they did it without any type of willful or
9 malicious intent, and that's conceded by this other side.
10 And they did it -- you know, 'cause what they're asking here
11 is that they be prosecuted for trying to save an animal when
12 -- you know, instead of killing it.

13 And it will be our position that legally, the -- the
14 State couldn't bring this type of a charge. We'd be facing
15 the immunity statute that is the legislative intent that
16 they, you know, remain immune unless they, you know, are
17 acting willfully. I guess that would be outside of
18 prudently, and there's no allegation of that in this case.

19 THE COURT: Counsel, Mr. O'Brien, there's allegations
20 that not only was it Tasered by one officer but by -- by
21 two. That 42 discharges were done by one and then about
22 three-minutes continuous by another. You didn't address --

23 MR. O'BRIEN: The facts of that, Your Honor, is because
24 those facts, I'm not -- you know, I'm here answering the
25 complaint. I'm not -- this isn't a civil case where, you

1 for when they, you know, step into a situation like -- like
2 this or any other situation they face on a daily basis. You
3 know, they don't have to know all the facts. They have to
4 do something.

5 You know, when we have a -- an animal that, you know, by
6 its sheer nature and size can create a lot of -- of property
7 damage and, you know, there's people killed by bulls all the
8 time, you know. And they're not inherently dangerous, just
9 like pit bulls aren't inherently dangerous under the law,
10 because, you know, unless there's a -- you know, the owner
11 knows of their dangerous propensity, but they're still
12 dangerous animals. And they have the potential just because
13 -- 'cause they are -- they are what they are.

14 A bull is not a cow. A bull is a bull, and it is what it
15 is. And they had to do something 'cause, you know, they're
16 required by law to do something. And it would be our
17 position that in reviewing all these facts that they -- they
18 did what, you know, was prudent under the circumstances.
19 And, if that's the case, then they're immune from liability
20 under the statute. And, if that's the case, it would be
21 a -- a -- a malicious prosecution to bring in an action when
22 there is immunity involved.

23 THE COURT: Okay. And, Counsel, you also feel that,
24 should this matter proceed, it would subject the State for
25 that liability --

1 MR. O'BRIEN: Yes, Your Honor.
 2 THE COURT: -- for malicious prosecution? Okay. And
 3 could you tell me, Mr. O' Brien, whether there's any other
 4 criminal investigation pending --
 5 MR. O'BRIEN: No, there's no --
 6 THE COURT: -- at this time?
 7 MR. O'BRIEN: -- other criminal --
 8 THE COURT: Nothing else going on?
 9 MR. O'BRIEN: -- investigation pending. No, there's not.
 10 THE COURT: All right.
 11 MR. O'BRIEN: I mean, other than -- there isn't.
 12 THE COURT: All right. Other than what we're doing here
 13 today.
 14 MR. O'BRIEN: Right. Well, there's -- I don't know what
 15 they -- what's going on with the owner of the -- the
 16 at-large animal, because he's probably or she'll be guilty
 17 of a misdemeanor for letting the animal run at large. Now,
 18 I don't know what the facts of that situation are, --
 19 THE COURT: Which I under --
 20 MR. O'BRIEN: -- but I don't imagine there's much more
 21 investigation. They dealt with the owner as to the fact of
 22 the animal being at large, the bull being, you know, at
 23 large in the public.
 24 THE COURT: Uh-huh. Sure, and I understand that. All
 25 right.

1 that's what happened here. That isn't what happened.
 2 Instead of using their weapon to kill -- if they had shot
 3 this calf in the head in the back of Oxford Suites several
 4 times and the animal died instantly, there wouldn't be a
 5 case of animal cruelty. Why? Because the animal would not
 6 have suffered.
 7 Instead, they Tasered the animal with 100,000 volts for
 8 seven minutes. You know, they're -- I mean, it's in the
 9 news with all of them and other people where the application
 10 of a Taser for five, 15 seconds or even 30 seconds is
 11 considered potentially excessive and cruel. When you're
 12 applying it for six or seven minutes and we have experts who
 13 are indicating that that's torture.
 14 THE COURT: Isn't that cumulative? You say six or seven
 15 minutes is cumulative?
 16 MR. KARP: That's correct, 42 cycles from Deputy Bates
 17 and 253 seconds from Deputy Simmons. There's an indication
 18 I believe from -- it may have been Deputy Melton -- Deputy
 19 Simmons, in his statement at page 7, Exhibit 11, says, "It
 20 lasted five to eight minutes. The animal died a short time
 21 later."
 22 There's an argument that there was some overlapping. The
 23 precise timing is uncertain, because the time-stamping of
 24 the Taser devices when downloaded are off. But we do have
 25 the admissions of the officers themselves that this took a

1 MR. O'BRIEN: You know, that nobody has any -- I don't
 2 think anybody in this case has any criminal record, so -- so
 3 I think that factor --
 4 THE COURT: I'm just making sure we have all the facts on
 5 the record. All right. Anything else, Mr. O'Brien?
 6 MR. O'BRIEN: No, Your Honor.
 7 THE COURT: Rebuttal?
 8 MR. KARP: Brief rebuttal, Your Honor. 16.52.210, the
 9 immunity statute, doesn't allow law enforcement unbridled
 10 discretion to dispatch animals that they may perceive to be
 11 potentially dangerous, although under these facts it
 12 certainly is the opposite, complete total immunity. The
 13 purpose of that statute was to put the animal out of its
 14 misery if it's so far gone that nothing else could happen.
 15 That's why they say try to contact a licensed veterinarian.
 16 There's no allegation that this calf was injured
 17 seriously and that was a component of that statute. You
 18 know, this statute would apply most sensibly where law
 19 enforcement are coming to the scene of a motor vehicle
 20 accident involving a loose cow or a horse, and the animal is
 21 sitting on the side of the road clearly suffering. Its --
 22 its legs are broken and it needs to be euthanized on the
 23 spot. Then an officer would be acting with prudence if he
 24 used his firearm to kill the animal with a few shots to the
 25 head. But, you know, that would've been far more humane if

1 period of five to seven minutes or more.
 2 I should also note that the reference to 16.52.080, the
 3 transport or confinement in an unsafe manner crime, doesn't
 4 provide any immunity, first of all, so it's irrelevant.
 5 But, second, having researched this case and the legislative
 6 history and listening to floor debates, I can tell the
 7 Court, and I can provide evidence to support it, that this
 8 ordinance was essentially put in place to prevent people
 9 from transporting in a truck or on some other type of
 10 vehicle animals in such a manner that they might cause an
 11 accident if they were to jump out in the middle of the
 12 freeway. And I believe the Spokane Humane Society even came
 13 out with a flier talking about the statute and saying just
 14 that, that you need to tie down your animals in the back of
 15 your bed of your pickup truck 'cause if they jump out on the
 16 freeway, it's going to hurt the animal, but could jeopardize
 17 the safety of the other drivers.
 18 That's the intent of that statute, and it doesn't make
 19 any sense under these circumstances. The officers weren't
 20 transporting the animal, they weren't confining the animal
 21 in such a way that would cause harm.
 22 The -- there -- we have not conceded that -- that there
 23 was no type of willful conduct here. At this point, all we
 24 have is the evidence that's presented in the statements and
 25 the inferences therefrom; but we do note Dr. Rollin

1 indicated that, based on his review of the materials, this
2 had to happen due to either incredible ignorance or sadism
3 or fear-induced panic.

4 And you find that even if the officers didn't think or
5 didn't believe that they were trying to cause harm to this
6 animal, they were trying to save the animal, they had -- at
7 every five-second interval, they had a chance to reassess
8 the situation.

9 So Deputy Bates had 41 opportunities to reconsider, every
10 five seconds that that current is entering the animal.
11 Deputy Simmons had, what, four minutes or more to reconsider
12 the position while they're fumbling with the rope or doing
13 whatever they need to do while the animal is being
14 electrocuted constantly.

15 So there, even if their initial intentions were good,
16 they immediately transformed into recklessness. And the
17 premeditation is an instance here, because they knew they
18 were going to use two Tasers even before they tried to
19 corral the animal. And you have audio footage and the
20 statements saying, we know if you stand in the field of view
21 of the animal, he will not move.

22 There was nothing reasonable done here and immunity
23 doesn't apply. That's just like saying, well, if you're not
24 criminally negligent, well, then you didn't commit a crime.
25 Well, of course. That's all this immunity statute says.

1 nature. It's simply, at this point in time, can we go
2 forward with this case? The prosecutor has either declined
3 to prosecute after a report or maybe was never asked to
4 prosecute, so there -- there is no charge on this case at
5 this time. And Mr. O'Brien has indicated there's no
6 criminal investigation pending or moving forward.

7 So, basically, what I have here is quite a bit of
8 information that has been gleaned from various sources. The
9 complainant has -- was there and saw part of this. There
10 was some --

11 MR. O'BRIEN: No, that's --

12 MS. ANDERLIK: Not me. Not me.

13 MR. O'BRIEN: Your Honor, --

14 MS. ANDERLIK: I --

15 MR. O'BRIEN: -- the complainant has no percipient
16 knowledge of the events in this.

17 THE COURT: Oh, you don't. You're just --

18 MS. ANDERLIK: I have personal -- personal contact with
19 the -- with the -- with the person who saw this, saw what
20 happened.

21 THE COURT: Okay. So --

22 MS. ANDERLIK: And I had a long conversation with her
23 afterwards.

24 THE COURT: Okay. So it's essentially hearsay.

25 MS. ANDERLIK: Yes, she was a -- she was a member of a

1 So, Your Honor, that -- we would contend that there is
2 ample evidence for probable cause and the other standards
3 are met under the -- the rule.

4 THE COURT: Thank you. Thank you, Mr. Karp.

5 This is a fascinating case and, as Mr. Karp has
6 indicated, we have very few citizen complaints that either
7 are filed and, if they are filed, that actually go forward.
8 Most citizen complaints cannot meet the rather rigorous
9 standards set out in the statute or the rule, CrRLJ
10 2.1(c).

11 I've asked questions regarding some of that just to make
12 sure that I have the information for purposes of my ruling.
13 The only facts that have been provided to me are the facts
14 presented by the complainant at this point in time. That
15 doesn't mean that there isn't another viewpoint or another
16 set of facts that would need to be provided or perhaps
17 looked at should this matter go forward.

18 This is a probable cause hearing, which is essentially is
19 there enough -- is there sufficient facts to allow the
20 charge to move forward? It's not beyond a reasonable doubt
21 standard. It's -- it's just looking at what I have and what
22 the law is, and do those facts meet the law and allow this
23 case to proceed.

24 It doesn't say you're going to win, it doesn't say what
25 will happen to it if it goes forward, nothing of that

1 group.

2 THE COURT: That's fine, ma'am. There was a person who
3 saw and her affidavit is in here. We have information, the
4 logs that law enforcement made with -- as they were
5 reporting what was going on, where the cow, calf, cows,
6 whatever, there were several loose at this time. There were
7 three. This is the one that they were working on, looking
8 for. You know, the -- the cow was at Broadway and Shamrock
9 headed toward the freeway when it started going down the
10 ramp. All of this has been produced variously and from
11 different sources, including the police reports that the
12 officers in question wrote of the incident.

13 So the facts, then, show that we have a -- for purposes
14 of this hearing, a 500-pound calf, bull calf, because that's
15 not disputed. That is probably I would guess, what, about
16 six months old. I -- I don't do cows, but I do horses; but,
17 you know, so I would guess from there it'd be about a
18 six-month-old.

19 Mr. O'Brien is correct, most are neut -- are neutered
20 early, making them less aggressive. The secondary sex
21 characteristics don't come out. At six months, this calf
22 is -- is seeing some hormonal changes I'm sure going forward
23 with that.

24 We have a calf that was loose, running. Frankly, the --
25 my understanding or my belief is that the cows we have these

1 days aren't really made like the range cows of old where
2 they would travel many, many miles and not have any issues
3 or problems. These guys don't have any endurance and
4 they're made to stand around, get fat basically and grow.

5 So this animal is tired, cornered, and being chased by
6 law enforcement, as is appropriate to maintain the safety of
7 the community and to make sure that, for example, nobody's
8 car gets hit by an animal on the freeway or the roads, that
9 nobody is attacked by a -- a frightened animal. And not
10 that the animal would attack them knowingly or
11 intentionally, it's just they would try to get through
12 something or away from somebody, and they have this tendency
13 not to see fences and, you know, they go forward.

14 So it was appropriate that law enforcement was going
15 after this calf. They got it cornered in a space that
16 appeared to be safe from interfering with the public. There
17 was information that they'd already decided to Tase the
18 animal to get it under control, and, in fact, had two Tasers
19 available to do that.

20 The calf was -- had labored breathing, obvious signs of
21 exhaustion. That doesn't mean that people who aren't used
22 to animals might say, this thing could still jump one way or
23 the other. We don't know what it's going to do. Okay? So
24 this may have been -- and it's purely subjective. I'm just
25 presuming this may have been their mind-set. They're going

1 and honor it.

2 Now, let's get to what we're really looking at in terms
3 of the animal-cruelty piece. I think what the citizen here
4 is really saying is, all that I've addressed so far was
5 fine, up to that point of applying the Tasers. And that, at
6 that point in time, the complainant is indicating that the
7 nonjudicious, nonresponsible, in her mind, application of
8 the Tasers to control the calf constituted the cruelty.
9 And, as Mr. Karp had indicated, had they shot the calf,
10 there wouldn't have been any cruelty. There might have been
11 a claim for the value of the animal, but the cruelty piece
12 is solely, as I read this, in the application of the Tasers
13 to an animal that is obviously in distress already.

14 So the officers came and they both had -- they had two
15 Tasers, which on its surface makes perfect sense. They
16 don't know which way this calf is going to jump, if it
17 jumps, so now they have people positioned to deal with
18 circumstances that may arise depending on what this calf
19 does. The one officer who had the 42 discharges indicated
20 that he hit the calf, it got up, cried -- or cried, it got
21 up and started moving again, and he went after it and had
22 hit it again. And then that continued while the other one
23 tried to tie the legs.

24 Now, my understanding of Tasers is that it's like a
25 full-body charley horse I believe was the statement in the

1 in and they want to make sure that this calf gets held back.
2 It's fairly decent size. They don't know. They're not
3 perhaps animal people, or at least large-animal people, and
4 so they decide that, if they Taser it, they can get it under
5 control, tie it up, and then the owner could come and get
6 it.

7 Someplace in here it said they were having trouble
8 contacting the owner from their location, but they knew who
9 the owner was. They did not call Animal Control, or at
10 least there's no indication they called Animal Control to
11 assist in controlling this calf.

12 And I have -- I have nothing but respect for law
13 enforcement that go into these situations. As Mr. O'Brien
14 indicated, I -- I wouldn't want to face down a pit bull that
15 was coming at me, and I wouldn't want to face down, you
16 know, something that is potentially dangerous, even if I
17 knew the animal and knew that it really didn't mean to hurt
18 me, that it could possibly hurt me.

19 And, like I said, I do have horses. I understand what
20 it's like to have a large animal not want to be in a certain
21 place. So, and if they choose not to, unless you really
22 know what you're doing, there's -- you can't stop them. So
23 that's -- that's something that law enforcement was facing,
24 concerns for themselves as well as concerns for the public
25 and concerns for the animal. And I acknowledge that and --

1 training here. So I would assume that either the legs were
2 hard to tie or, you know, the Taser would keep it from
3 kicking, but it might also make it difficult to bring those
4 feet together to tie. So -- so they chose to continue with
5 the Taser to make sure that the animal remained supine,
6 didn't get up while the other officer tied it.

7 Now, somewhere in there was a second Taser, which was
8 then applied to the cow. I'm not sure of the necessity or
9 why that second Taser was applied to the cow at all, or the
10 calf. Sorry, it's a bull calf. And I think that's really
11 what we're talking about here is, not only that -- not that
12 there was one Taser used, but the length of time it was used
13 and the fact that a second one was used on an animal that
14 was already in physical distress, which seemingly, if it
15 were a human, that kind of thing would not have happened.
16 And I recognize that this calf outweighs even a very large
17 man two to one, but, again, the question is, was -- was the
18 amount of Tasering really necessary? I think that's --
19 that's really what we're at here.

20 Now, let's talk to and address the immunity issues raised
21 by the State. RCW 16.52.210 does indeed allow law
22 enforcement to destroy an animal that's been injured or
23 otherwise would continue to suffer. You see that when they
24 come out to shoot a deer, for example, that's been hit by a
25 car and is wandering the road or is so injured but still

1 alive that it needs to be put down. A dog that's hit by a
 2 car, any -- any -- anything else of that nature.
 3 "Such action shall be undertaken with reasonable prudence
 4 and, whenever possible, a consultation with a veterinarian
 5 and the owner of the animal." That relates to any -- like
 6 if a horse is hit or a cow is hit or a dog is hit. If you
 7 can identify the owner, you say, you know, "The animal is
 8 suffering. Let me put it down." Or if you can't, you try
 9 to get hold of a veterinarian.
 10 And I believe the complainant here is saying the law
 11 enforcement knew who the owner was, and yet, did not contact
 12 that owner from that location. Now, there may have been
 13 some -- you know, it may have been a dead zone for all I
 14 know, or they were trying to go through dispatch and
 15 dispatch was having trouble getting ahold, but, again, I
 16 don't have any of those facts.
 17 "Law enforcement and veterinarians shall be immune from
 18 civil and criminal liability for actions taken under this
 19 chapter if reasonable prudence is exercised in carrying out
 20 the provisions of this chapter." That refers to the entire
 21 chapter, not just this statute. And it is designed to make
 22 sure that law enforcement and veterinarians are -- don't
 23 suffer from the, you know, good-samaritan concerns that it
 24 used to be before the laws were changed that made doctors
 25 liable if they came forward and tried to help somebody, only

1 immobilize the calf. It makes sense. So, in this, now it
 2 comes down to whether their intent was to save the animal
 3 rather than to kill the animal, and then we have to look at
 4 again the Taser-ing.
 5 I think their intent was not to kill the animal. The
 6 actions that they did take, in reality, killed the animal.
 7 It would not otherwise have died from running. And so, was
 8 it prudent what they did in terms of the two Tasers
 9 allegedly at the same time and for the duration that they
 10 Tased this animal?
 11 To me, as far as making any kind of determination whether
 12 that was prudent, I think both of these officers have had
 13 Taser training. They both understand the impact of the
 14 Taser. And, like I said, even if you looked at this calf
 15 and said it's as big as two men, what would've been a
 16 reasonable Taser impact for somebody that weighed -- a -- a
 17 large person who weighed 500 pounds? Would two Tasers have
 18 been used under the guidelines? Would they have been used
 19 for the period of time that these Tasers were used? 42
 20 discharges sounds like an awfully large number to me. I've
 21 never been Tasered, but I have spoken to people who have.
 22 Officers often do it as part of their training, nobody seems
 23 to like it.
 24 All right. So, in addition to probable cause, I have to
 25 make a determination or I will consider whether or not

1 to find out they're going to be sued for malpractice.
 2 So law enforcement and veterinarians who step up to the
 3 plate to deal with an injured animal need to have that
 4 immunity. And, again, we're going to be talking about, was
 5 reasonable prudence exercised in carrying out the provisions
 6 of the chapter?
 7 (There was a brief interruption.)
 8 THE COURT: Sorry about that.
 9 Law enforcement is required to take risks which ordinary
 10 -- ordinarily a reasonably prudent person would avoid in
 11 situations. And, again, here we have deputy sheriffs who
 12 may or may not have experience with large animals, are
 13 looking for an expeditious, yet prudent, way of dealing with
 14 a loose, rather large bull calf who has already potentially
 15 endangered people by trying to get onto the freeway, running
 16 across on the roads, but that they do have corraled, so to
 17 speak.
 18 Now, we're asking law enforcement to stand there and
 19 recognize that there is a flee zone, and I would suggest to
 20 you that most deputies wouldn't know that unless they worked
 21 with horses or cows or large animals, that to come up on
 22 that calf, if they'd stood back, that calf would not move.
 23 And, as Mr. O'Brien points out, that that may or may not
 24 have been considered a responsible reaction, too. So -- so
 25 they -- they are prudently deciding to go forward and

1 necessity of prosecution will subject the State to damages
 2 or other civil proceedings. Mr. O'Brien says that
 3 potentially, should this matter proceed, that there would be
 4 liability for malicious prosecution.
 5 With a finding of probable cause to proceed, I'm not sure
 6 that that action would lie. Whether the complainant has
 7 adequate resources under the laws governing small claims for
 8 other -- or other civil recourse, the complainant here does
 9 not own the calf or did not own the calf and has no
 10 recourse. The owner has not taken any action in terms of
 11 the value of the animal in civil court. So, apparently, the
 12 owner might have some recourse, but the complainant does
 13 not.
 14 There's no criminal investigation pending, so it would
 15 not disrupt any criminal charges that may be out there.
 16 Witnesses are available, and there's no criminal records of
 17 the complainant that Mr. O'Brien was able -- or any
 18 potential Defendants that Mr. O'Brien was able to discern.
 19 So here's my ruling. As far as the animal cruelty, and I
 20 have fairly well-defined where I see the potential for that
 21 charge, I believe that probable cause does exist. I've
 22 satisfied the additional factors that need to be considered.
 23 I just went through one to seven. The complaining witness
 24 indicates that she is aware of the gravity of this
 25 complaint, the necessity of court appearances for herself as

1 well as any witnesses, and several have been identified to
2 set this up. And possible liability for any kind of false
3 arrest.

4 (A cell phone is ringing.)

5 MAN: Excuse me.

6 THE COURT: Uh-huh.

7 MAN: I apologize.

8 THE COURT: That's fine. And, also, I need to caution
9 Mr. Karp and the complaining witness that, once this is
10 turned over to the prosecutor, the prosecution will proceed
11 as the prosecution deems appropriate. So there is no
12 guarantee that this matter would even go to trial. All
13 right?

14 MR. KARP: That is understood, Your Honor. It was
15 unclear from the rule itself what happens.

16 THE COURT: Well, that's pretty much what happens. And
17 it would be treated as any other charge, any other
18 prosecution. It may or may not be allowed to go forward, or
19 how far it will go forward, what the disposition would be
20 all rest with the prosecutor. Okay?

21 MR. KARP: That is understood, Your Honor.

22 THE COURT: All right. Therefore, a complaint will be
23 authorized as set forth here.

24 Mr. Karp, did you prepare one by any chance?

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

1 STATE OF WASHINGTON)
2) ss: CERTIFICATE
3 COUNTY OF WHATCOM)
4

5 I, SANDRA B. SULLIVAN, a Court Reporter and Notary Public in
6 and for the State of Washington, do hereby certify that the
7 foregoing 35 pages comprise a true and correct transcript of the
8 digital recording of the proceedings had in the within entitled
9 matter, recorded by me by stenotype, and thereafter transcribed
10 into printing by computer-aided transcription.
11 Dated this _____ day of JUNE 2007.
12
13
14

15
16 SANDRA B. SULLIVAN, RPR, CCR
17 Certified Court Reporter
18 Henry Reporting
19 3407 Robertson Road
20 Bellingham, Washington 98226
21 Tel: (360) 312-0202
22 Fax: (360) 312-8202
23
24
25

1 Honor.

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

5 MR. KARP: Thank you, Your Honor.

6 THE COURT: You're welcome. Any other matters?

7 MR. KARP: No, Your Honor.

8 THE COURT: Thank you.

9 MR. O'BRIEN: At this time, Your Honor, I believe Mr.
10 Korsmo -- and I guess -- I don't know if this case has a
11 cause number yet, because until something's filed, there
12 really isn't a cause number.

13 THE COURT: We just have Citizen's Complaint, CC00 -- six
14 zeroes and then a 1 and a 2. And then, once it's filed as a
15 real complaint, it'll be a prosecutor's complaint, unless
16 you want to leave it under these numbers, which you
17 certainly may.

18 MR. O'BRIEN: Thank you, Your Honor.

19 MR. KARP: Thank you, Your Honor.

20 MS. ANDERLIK: Thank you.

21 (The hearing was adjourned
22 at 2:21 p.m.)
23
24
25

EXHIBIT A-9

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

STATE OF WASHINGTON and
CITY OF SPOKANE VALLEY
ex rel. ANDERLIK,
Petitioners,

CASE NO. CC01 and CC02

vs.

MOTION FOR RECONSIDERATION

BALLARD BATES and
DUANE SIMMONS,
Respondents.

VERBATIM TRANSCRIPT OF DIGITAL RECORDING

THE HONORABLE SARA DERR PRESIDING

MARCH 26, 2007

FOR THE PETITIONERS:

MR. ADAM P. KARP
Attorney at Law
(Via Telephone)

MS. CHRIS ANDERLIK
The Complainant

FOR THE STATE OF WASHINGTON:

MR. BRIAN O'BRIEN
Deputy Prosecuting Attorney

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1 *** SPOKANE, WASHINGTON ***

2 *** 11:02 a.m. ***

3 MR. KARP: Thank you.

4 THE COURT: All right. And Mr. O'Brien is also here, and
5 your client's also here, and we are now on the record for
6 your motion in Citizen's Complaints 1 and 2 to ask the Court
7 to reconsider my written ruling, and to also certify the
8 matter to the Supreme Court under RAP 4.3.

9 Your motion, sir.

10 MR. KARP: Thank you, Your Honor. I did receive
11 Mr. O'Brien's response yesterday. I have no objection to it
12 being considered, but I do have a few points I want to
13 reference. I didn't see any authority that Mr. O'Brien
14 cited stating that the rules on reconsideration and relief
15 from judgment don't apply in a criminal matter. It seems
16 strange since the motion that resulted in Your Honor
17 reconsidering was a motion for reconsideration, which
18 presumably came under some similar authority. So I've also
19 found appellate basis where the State has filed motions for
20 reconsideration in criminal matters, and that hasn't been
21 objected to on this procedural ground.

22 On the merits of this motion, I don't want to -- to
23 rehash it in great detail except to note that the procedural
24 quagmire that we're stuck in is based on the statute of
25 limitations. And I think it's safe to say, based on your

1 this up, but I'm looking for the rule right now on stay of
2 enforcement in a criminal case. It's really -- it talks
3 about staying the -- the sentence. Hum. "Superior Court
4 may stay enforcement of a judgment in a civil case."

5 Okay. Well, have you -- have you addressed those or
6 think that perhaps a stay is -- is something that we can
7 look at, Counsel?

8 MR. KARP: Your Honor, that's an excellent point. I -- I
9 -- I am not aware of a criminal rule for courts of limited
10 jurisdiction that permits such a stay. But I'm looking
11 through it right now to see if I can confirm the existence.
12 The alternative, of course, would be to have the complaint
13 filed, but then set aside. Then at least then the complaint
14 has been lodged and the statute can then stop at that point.
15 Then we've satisfied that mootness potential problem.

16 THE COURT: Uh-huh. Well, let me hear from Mr. O'Brien
17 and then we can discuss the procedural issues to preserve
18 the appeal I guess is where we're -- what we're looking at.
19 All right.

20 MR. O'BRIEN: Thank you, Your Honor.

21 THE COURT: Can you hear him?

22 MR. KARP: I can. Thank you.

23 MR. O'BRIEN: Thank you. May it please the Court,
24 Mr. Ander -- Ms. Anderlik, and Mr. Karp.

25 First, Your Honor, as to the -- his -- I did indicate I

1 written decision, that the Court found Ms. Anderlik had
2 complied with the Supreme Court rule in every respect and
3 that the elements were all satisfied. And that didn't
4 change even in light of the prosecutor's reconsideration
5 motion.

6 Because, however, of the inability to appoint a special
7 prosecutor and because of the prosecutor's vocal opposition
8 to wanting to take this case once the complaint is filed, it
9 appears that the Court was forced into a position of a
10 perceived separation of powers violation; and, for that
11 reason only, the complaint was not allowed to be filed.

12 In order for Ms. Anderlik to have judicial review and to
13 have some appellate guidance on this rule, which is
14 admittedly sparse, the only way to do it is to stop the
15 statute of limitations from running. And I can't envision
16 any other way to do that than to allow the complaint to be
17 filed at least to then halt the statute. And then, if the
18 Court still wants to enforce its latest order, that would
19 still allow Ms. Anderlik to go forward on appeal, whether to
20 the Superior Court or to the Supreme Court. And, for the
21 reasons that I've stated, I believe that the grounds exist
22 and the avenue is available.

23 And I'm available to answer any questions that the Court
24 has.

25 THE COURT: And perhaps the prosecutor's going to bring

1 don't think that the civil rules apply. That doesn't mean
2 that the Court can't reconsider the motion as a
3 jurisdictional issue. I was just pointing out that the -- I
4 guess the bases for reconsideration weren't -- you know, the
5 Court can generally reconsider its -- its own motion, so I
6 didn't -- I didn't add to say he couldn't bring the motion
7 for reconsideration. I just pointed out that the civil
8 rules don't really apply.

9 Your Honor, the -- what the Petitioner is asking for is
10 the Court to disregard its prior ruling. I mean, to reverse
11 itself and then to set aside the complaint. And I don't
12 know if the Court can set aside the complaint and stay the
13 proceedings 'cause once a complaint's filed, generally
14 people are arraigned, you know, and proceed through the
15 procedure. I don't think a Court can stay its own
16 proceedings, you know. And -- you know, the -- the
17 avenues --

18 THE COURT: You -- you just said you didn't think the
19 Court could stay?

20 MR. O'BRIEN: Its own proceedings.

21 THE COURT: Oh, as opposed to on -- a stay on appeal?

22 MR. O'BRIEN: Stay on appeal, yeah.

23 THE COURT: Okay.

24 MR. O'BRIEN: Another Court can stay the proceedings of
25 this Court. I mean, you know, that's what a motion for

1 discretionary review generally is. You know, on appeal,
 2 they can stay the sentence, they can stay the -- the
 3 judgment; but the -- you know, what the Petitioner's asking
 4 the Court to do is disregard its ruling and -- you know, and
 5 then after it's disregarded its ruling, then to say that the
 6 ruling I guess is correct. And I don't -- you know, it's
 7 not a correct procedural device for doing that.
 8 And the -- the implication, I mean, it's -- it's a little
 9 odd here, the -- you know, and I don't represent the -- the
 10 punitive Defendants in this case, and I haven't talked to
 11 them because I can't do that and I can't present their side
 12 of -- of anything in the case, because I'm not their
 13 attorney. But, you know, if -- if something was filed,
 14 they'd have the ability to answer to those charges. You
 15 can't just charge people whimsically and then stay it.
 16 And -- and -- and one of the reasons the legislature has
 17 put a statute of limitations, a statute it would impose on
 18 something, is so that it doesn't go on forever. And this
 19 would -- you know, this type of a procedure would, you know,
 20 throw that out of whack. I mean, there's lots of cases that
 21 I can't file, because an investigation isn't done or
 22 whatever. And -- and, you know, you can't come to the Court
 23 and say, "Hey, we've got something we'd like to do some time
 24 in the future," and -- and hold people charged on that. You
 25 can't do that.

1 doctrines of judicial avoidance on some things. And the --
 2 what the -- the rule was meant to do, I mean, he's got his
 3 regular avenues of appeal or, you know, whatever type of
 4 relief he wants to seek in this. And it wasn't, you know,
 5 the -- the immediacy of the action isn't -- it may not be
 6 anybody's fault I guess, but it's certainly not the -- you
 7 know, it's not the State's fault.
 8 I mean, if -- if Mr. Karp were here on the last day of
 9 the statute of limitations and said, "I want to file this
 10 complaint, I want to get this thing heard," we'd be in the
 11 same position. You know, if the State doesn't comply with
 12 the statute imposed or whatever, we're -- that's -- you
 13 know, it's the same with lawsuits. You can't file something
 14 saying, "Hey, we really don't have a complaint here, but we
 15 want to file a lawsuit." We can't really do that, but to --
 16 you have to get something filed to stop the statute of
 17 limitations.
 18 You know, there's not a legal basis and that's what the
 19 Court held. The Court held that, you know, it couldn't in
 20 this case -- and, again, that's this case, not every case.
 21 In this case, it couldn't file a complaint and it's held
 22 that. And they want the Court to do exactly that and then
 23 say, you know, I guess say, "I was incorrect," and then say,
 24 "I was incorrect in being incorrect," and then set it aside.
 25 And I don't -- it would be our position that that doesn't

1 But the -- the underlying -- the -- the problem that we
 2 truly face in this is, the Court has issued an 18-page
 3 opinion that it spent a lot of time doing it and coming to a
 4 conclusion. And now they're suggesting that we, you know,
 5 do away with -- with the law and with the Court's decision
 6 and have the Court reverse itself and do something, and then
 7 say, well, it didn't really mean to reverse itself. And
 8 that just creates a -- a -- that's something a Court
 9 shouldn't do.
 10 If the Court's opinion is correct, the Court should stick
 11 with it. If it's not correct, then, you know, it can be
 12 reconsidered; but it can't say, "Well, I'm -- I'm going to
 13 do something that I can't do and then undo that."
 14 I guess it's -- it's the State's position that doesn't
 15 help the credibility of a Court in any procedure. You know,
 16 I don't want to impugn the Court at all, but it's a -- you
 17 know, it's a -- just an odd -- it's an odd way of doing
 18 something. And, you know, there's -- it doesn't really
 19 satisfy the -- the rule anyway if it were to -- you know, if
 20 it were to be done.
 21 I mean, we've had one of these cases in -- in nine years
 22 and now because, you know, the Petitioner thinks, "I -- I
 23 really like this issue, I should thrust it upon another
 24 Court" by doing some things that we really, in my opinion,
 25 can't be doing, and then, you know, there's -- there's

1 suit the orderly orders of a -- of any Court.
 2 So, for those reasons, we'd ask that the Court deny the
 3 second motion for reconsideration. The first one was
 4 thoroughly briefed by both parties. The -- the Court I'm
 5 sure spent a great deal of time issuing its memorandum
 6 opinion. Its memorandum opinion has been lauded by the
 7 other side, saying it was thorough and well thought out, but
 8 they're saying throw that all away and do something it
 9 shouldn't do, so that, you know, we can do something. And
 10 we would ask the Court not to accept that invitation.
 11 Thank you.
 12 THE COURT: Any rebuttal on that issue?
 13 MR. KARP: Yes, Your Honor. The -- the reason why this
 14 motion seems a little bit out of line chronologically is in
 15 part based on the -- the -- the history of the motions that
 16 have been brought.
 17 On January 22nd, the Court was ready to let us file the
 18 complaint. And, within that week, I was to prepare one and
 19 run it by Mr. O'Brien, and then Your Honor would then look
 20 at it. That didn't happen because, two days later, the
 21 motion for reconsideration was filed. And it was ultimately
 22 heard in March and, at that point, the Court did reverse
 23 itself at least on the separation of powers grounds, not on
 24 the -- the core merits, though, in terms of did Ms. Anderlik
 25 comply with the rule. That is still undisturbed.

1 So what we're asking simply is to relate back to a time
 2 before the Court reversed itself and at least preserve our
 3 appeal rights without running up against the statute; that's
 4 it. Nothing -- substantively, the Court isn't being asked
 5 to change its mind. It's merely being asked to enter an
 6 order that will still preserve the right to appellate
 7 review; that's it.

8 In terms of -- let's see here -- the right of a
 9 prosecutor to appeal when a judge sets aside a complaint,
 10 RALJ 2.2(c), which I cited to in the materials, expressly
 11 allows the prosecutor to seek review by the Superior Court
 12 when a -- when a judge dismisses or sets aside or in some
 13 fashion dismisses a criminal case once it's been filed.

14 So, clearly, there is a right to do so, and Ms. Anderlik
 15 is sitting in really the same shoes as the prosecutor. And,
 16 by this Court's ruling, the Court has, in essence, dismissed
 17 or set aside the complaint had it been filed. All we're
 18 asking for is really the equitable relief to preserve that
 19 right.

20 Now, I've been looking at -- excuse me. I've been
 21 looking at the issue of staying the proceedings, and CR 62,
 22 albeit in Superior Court, does talk about staying
 23 proceedings to enforce a judgment. There's also the RAP
 24 8.2, which talks about staying I believe execution and
 25 staying certain criminal matters as well.

1 THE COURT: Okay.

2 MR. O'BRIEN: -- I guess is what -- you know, that's --
 3 that's fine. I'm not -- you know, the Court's made a
 4 decision, just like the Court makes any decision. And the
 5 -- the review of those decisions, if available, are -- are
 6 reviewable, but, you know, the --

7 THE COURT: Yeah. And I understand what you're saying.
 8 So anything else?

9 MR. O'BRIEN: No.

10 THE COURT: Okay. All right. Now, before I rule on
 11 that, do you want to argue the direct appeal?

12 MR. KARP: Sure. Your Honor, I believe that RAP 4.3
 13 requires that the Court make written findings and in order
 14 to essentially certify the case for direct review. If the
 15 Supreme Court takes it, obviously that's their discretion.

16 THE COURT: Uh-huh.

17 MR. KARP: But the first element is, is this a final
 18 decision that is appealable under the RALJ? And, as Your
 19 Honor noted, I believe it is for two reasons. First, under
 20 2.2(c)(1), this is a decision that, in essence, has
 21 dismissed a complaint that otherwise would have been filed
 22 had not the separation of powers issue arisen.

23 And then there's an interesting point I want to make.
 24 You know, the -- the prosecutor is stating that this is sort
 25 of out of order, but there's really not a substantial

1 I don't -- having just found it, I -- I'd have to
 2 research it more closely to see how -- how it might apply,
 3 if at all; but, at the District Court level, I'm not aware
 4 of a criminal counterpart to CR 62.

5 And that's all I have.

6 THE COURT: Mr. O'Brien, I see that you have the rule
 7 book in front of you. Have you --

8 MR. O'BRIEN: The -- yeah. I mean, I can answer.

9 THE COURT: Regarding 2.2(c), it would appear that it's,
 10 "A final decision which in effect abates, discontinues or
 11 determines the case other than by judgment or verdict."

12 MR. O'BRIEN: That -- Your Honor, as I said in my
 13 brief, --

14 THE COURT: Uh-huh.

15 MR. O'BRIEN: -- I mean, what -- you know, he can pursue
 16 whatever remedies he has. The -- but what he's asking this
 17 Court to do is to do -- is to reverse itself. The Court
 18 said in this case --

19 THE COURT: I -- I know what I said.

20 MR. O'BRIEN: Yeah. Okay. Well, I -- yeah, I'm not -- I
 21 wanted to make sure I -- if I looked at it, that I wasn't
 22 misquoting the Court.

23 THE COURT: I have it right here.

24 MR. O'BRIEN: But, you know, that's -- you know, I'm not
 25 -- you know, he can do what he wants with it --

1 difference between this Court allowing the complaint to be
 2 filed and then regarding the motion for reconsideration as a
 3 subsequent motion to dismiss that complaint.

4 And then for the very same reasons that the Court has
 5 already ruled, before the complaint would be filed, the
 6 Court can rule the same way after the complaint has been
 7 filed. I don't see that there's really any difference here.
 8 It's just a better procedure. But under 2.2(c)(1), yes, it
 9 would be appealable and, also, it would be appealable under
 10 2.2(a)(2) since, in essence, the Court granted a motion for
 11 reconsideration.

12 As to the three prongs that have to be certified, first,
 13 is this a matter of fundamental and urgent importance,
 14 statewide importance? And although it is true that this
 15 mechanism is not used frequently, part of the reason is, is
 16 that no one really knows about it. I dare say many
 17 attorneys aren't aware of it, and certainly the public
 18 wouldn't be much aware of it, but that has changed. It's
 19 changed because the media has taken an interest, and it's --
 20 it's of statewide importance, because it's a statewide rule.

21 Also, this was -- the private prosecution avenue had
 22 existed for a hund -- over 150 years, and so it -- I think
 23 it originated in part of the Populist movement of -- of our
 24 -- of our state, the founders of our state. And it -- so it
 25 has a long-term history that's been converted into a rule.

1 And, for that reason, it's -- it is really fundamental. It
 2 goes to the core of -- of Washington's history.
 3 It needs to be clarified, though, for the very reasons
 4 that the Court stated in its opinion. And this goes beyond
 5 just animal welfare and Ms. Anderlik. It goes to victim's
 6 rights groups, it goes to constitutional scholars, and
 7 really to whoever was a stakeholder in getting this rule
 8 created, and that's our very own bar association, of course,
 9 had a role, as Your Honor knows.
 10 The second prong of this test is whether there's a
 11 significant detriment from delay, and really this part of it
 12 has to do with a statute of limitations. Obviously, if this
 13 isn't certified before the statute runs, then that may
 14 create a movement problem. But -- but, furthermore, by --
 15 in light of this Court's ruling, the prosecution has ended
 16 or the chance for prosecution has ended, so there is a
 17 detriment to her case. Her case doesn't exist unless there
 18 is some revision on appeal.
 19 The third prong is whether the record is adequate, and as
 20 I did say, and I reiterate it here, the Court did a very
 21 thorough job in the treatment of this question, which
 22 doesn't have a lot of guidance. So long as the record from
 23 before the complaint may be filed is incorporated after the
 24 complaint is filed and then I guess set aside, there will be
 25 more than adequate rec -- there will be a more than adequate

1 MR. O'BRIEN: And, you know, that was the reason that
 2 they did it 'cause they want to expedite review, because a
 3 thousand cases would be languishing on one decision and
 4 that's why they have it. This is no different than the
 5 review to the Court of Appeals other than it's an expedited
 6 review, so that, you know, the Courts don't have to wait
 7 throughout the normal process.
 8 And it was -- it was -- it wasn't designed to look at one
 9 issue that arises every nine years out of the court. It was
 10 designed to look at something that was affecting thousands
 11 and thousands of cases across the state so they could get
 12 the final answer, because, otherwise, something goes to the
 13 Court of Appeals, it renders a decision, then it goes -- you
 14 know, it goes through the -- the circuitry we'll call it.
 15 There's no -- you know, there's no reason in this case to
 16 bypass the Superior Court or the Court of Appeals. You
 17 know, but the -- our real issue is -- I mean, we don't -- it
 18 doesn't fit that. It doesn't -- it doesn't demand expedited
 19 review. We've got one case. We've had one case in -- I
 20 mean, since I've been here, this is the only case we've had.
 21 Well, we've had two. We had one application I remember, and
 22 that was -- you know, it was -- so it doesn't require this
 23 direct review.
 24 And the -- just in closing, the Court shouldn't reverse
 25 itself and then reverse itself. I mean, that's -- however

1 record for the appellate court to review. So I think, with
 2 those findings, this matter can be certified.
 3 And -- and I will note, when we argued this initially
 4 back -- I think back in March, the Court recognized that it
 5 could not revise a Supreme Court rule. And I -- I think I
 6 had indicated, well, the only way that the Supreme Court
 7 will hear about this is on appeal, and perhaps that the
 8 Court could certify it; but there is no mechanism for you,
 9 as a District Court judge, to have done that independently
 10 like a Federal Court judge or District Court judge could do,
 11 but this is the method now to do it. This is the way that a
 12 District Court judge can essentially certify for review this
 13 -- this core question. And that's what we're asking.
 14 THE COURT: Thank you.
 15 MR. KARP: Thank you.
 16 THE COURT: Mr. O'Brien.
 17 MR. O'BRIEN: Thank you, Your Honor. The -- the reason
 18 that they adopted direct review to the Supreme Court was
 19 basically of the DWI cases.
 20 THE COURT: D.W.I., in case you don't -- you know,
 21 drinking under the --
 22 MR. O'BRIEN: Driving while under --
 23 THE COURT: Driving under --
 24 MR. O'BRIEN: -- the influence.
 25 THE COURT: -- the influence. Thank you. That, too.

1 sophisticated you make the argument, that's what the Court
 2 is apparently being asked to do. It's being -- you know,
 3 the Court says it couldn't do something, and they say,
 4 "Well, Your Honor, could you do it anyway and then undo it?"
 5 And it would be our position that that doesn't behoove
 6 the -- the -- you know, the Court should not put its
 7 imprimatur on that type of a -- of a process.
 8 THE COURT: If I could interrupt you, Mr. O'Brien. If
 9 this was something that the State or -- or County were
 10 bringing, you were bringing, and, say, the final decision
 11 came down to, in essence, under 2.2(c)(1), "A final decision
 12 except not guilty would abate, discontinue, and determine
 13 the case other than judgment or verdict," is it your opinion
 14 that this matter would fall within that subsection?
 15 MR. O'BRIEN: The -- well, that subsection, that's
 16 (c)(1).
 17 THE COURT: (c)(1).
 18 MR. O'BRIEN: I mean, we're not -- if -- if he -- if
 19 Mr. Karp was to file something, then the -- either the --
 20 the --
 21 THE COURT: Superior Court.
 22 MR. O'BRIEN: -- Superior Court or the Court of Appeals
 23 will answer that, but it would be my position sitting here
 24 reading it saying that that's an appeal by State or local
 25 government in a criminal case.

1 THE COURT: I understand that. If it were you and this
 2 were the situation, this would fall under that section, if
 3 it were the State.
 4 MR. O'BRIEN: Right.
 5 THE COURT: Okay.
 6 MR. O'BRIEN: I -- I'm not -- I can't say that it would.
 7 THE COURT: Okay.
 8 MR. O'BRIEN: I mean, you know, that's -- when I say
 9 that, I mean, I'm not trying to be, you know, clever with
 10 Mr. Karp or Mr. -- or the Court; but the -- the -- it's not
 11 that clear. I'm not -- you know, if the Court did this and
 12 it were my case, I think my review would have to be by --
 13 perhaps by writ, and get a writ of mandate in the present
 14 circumstances.
 15 MR. KARP: Your Honor, if I could have a real quick
 16 response.
 17 THE COURT: Sure.
 18 MR. KARP: Okay. The reason why direct review is
 19 important here is for the very reason that the only Court
 20 that can evaluate this rule in a -- in a fashion that's
 21 going to matter for all of the district and municipal courts
 22 in the state is the Supreme Court. The Court of Appeals
 23 will be in the same bind as this Court in determining
 24 whether -- how the rule is to be interpreted and applied,
 25 and whether it's essentially, on its face, problematic.

1 know, we could seek review of that. This Court's not unable
 2 to do that, you know. Obviously, the -- you know, that
 3 would -- his -- he can't -- Mr. Karp can't force -- you
 4 know, he can't say that the Court of Appeals couldn't decide
 5 this issue; they can. Superior Court can. They -- you
 6 know, rules have been declared, you know, statutes have been
 7 declared unconstitutional by lower courts, by District
 8 Courts. You know, that's -- you know, in many ways, that's
 9 the Court's obligation. It's -- you know, if something's
 10 un -- the Court is bound to follow the constitution.
 11 And, you know, but I -- you know, the -- just the bottom
 12 line in this case is that the Court issued a memorandum
 13 opinion saying it couldn't do something, and now they want
 14 you to do it. That's really the -- you know, to say that,
 15 "I was wrong," and then -- and then to go through some
 16 set-aside business 'cause that's the only way. There isn't
 17 an -- an ability to set something aside.
 18 THE COURT: Okay. I -- I understand the arguments that
 19 are being made.
 20 Mr. Karp, one last rebuttal and then I believe I'm ready
 21 to rule.
 22 MR. KARP: Your Honor, I think I've stated everything
 23 that needed to be said.
 24 THE COURT: Okay. Thank you.
 25 MR. KARP: Thank you.

1 And there is no writ of man -- I mean, I -- I -- I
 2 respect the recommendation from Mr. O'Brien, but I -- I
 3 don't believe that there's any other way except either
 4 direct review or a RALJ appeal to Superior Court, and then
 5 some possible discretionary review from there. But as I
 6 read the RALJ -- or, I'm sorry, as I read the RAP, there
 7 simply is no right at all of review from the Superior Court
 8 to the Supreme Court after it has reviewed a matter from
 9 District Court unless it's a trial de novo, which it won't
 10 be. So I don't see any other real clear mechanism other
 11 than direct review.
 12 MR. O'BRIEN: May I just respond to that, Your Honor?
 13 THE COURT: Okay.
 14 MR. O'BRIEN: The -- that -- when this -- you know, when
 15 this Court, first of all -- and I didn't respond. When this
 16 Court said it couldn't say that a -- a rule that the Supreme
 17 Court had promulgated wasn't good, I -- that's not correct.
 18 The -- you know, the Court -- the Superior Courts, the Court
 19 of Appeals deal with the court rules all the time. I mean,
 20 the -- the last -- until they changed the rule, the last ten
 21 years of -- of jurisprudence on the speedy trial rule came
 22 from the, you know, four or five cases in the Supreme Court
 23 and hundreds in the -- in the Court of Appeals. The Courts
 24 have the -- the duty and obligation.
 25 This Court could say a rule is unconstitutional and, you

1 THE COURT: I have two issues here today. One is -- the
 2 first is the motion on the reconsideration basically of my
 3 motion to reconsider in order to preserve the issue for
 4 appeal. It is Petitioner's position that I need to go back
 5 to my original ruling which granted the complaint to be
 6 filed, order it, and then make it subject to my motion for
 7 reconsideration, my opinion on that motion to reconsider by
 8 the prosecutor, which under the constitutional separation of
 9 powers issue, I reversed myself on only that issue and said
 10 that I -- I didn't have the authority to order a complaint
 11 filed, that it fell under the executive branch of the
 12 government. In that opinion, I also stated I didn't feel
 13 that at my level of court I could reach out and find an
 14 entire rule of the Supreme Court that applied to my level of
 15 court unconstitutional.
 16 Part of the reason for this motion is to preserve the
 17 issue for appeal so that the statute of limitations doesn't
 18 run. And that it is an appealable issue and not moot even
 19 before it hits the Superior Court, which would be, you know,
 20 in a normal course of events, the next level of court that
 21 would be required to hear this matter.
 22 Regarding that issue -- and -- and I agree with Mr. Karp.
 23 The reason that the complaint didn't get filed was because
 24 the motion for reconsideration was filed in the interim, and
 25 then another motion by the complainant here to -- regarding

1 the special prosecutor and responding to the other motion.
2 So, based upon that, I never did order or I never did sign
3 any kind of complaint that was put into play; however, the
4 record is clear that I ordered it.

5 And just for your information, Mr. Karp, for any appeal,
6 the entire record would go up and is available to go up to
7 any -- any appellate level from the filing of the original
8 document as well as any of our oral records that have not
9 been reduced to writing. At least, in my opinion, the
10 entire record would be available.

11 Having said that, I want -- I'm referring to RALJ 2.2,
12 final decision. What is a final decision under sub 2 is,
13 "Any order granting or denying a motion for new trial,
14 reconsideration, or amendment of judgment, and any order
15 granting or denying arrest of a judgment in a criminal
16 case."

17 We -- we did a motion on reconsideration. It is -- it is
18 on point, and the effect of that reconsideration is an
19 appealable order under 2.2. The 2.2(c) talks about an
20 appeal by the State or the local government in a criminal
21 case, and this rule, which is very unique, allowing
22 citizen's complaints.

23 It is -- it is my opinion and my ruling that the
24 complainant stands in the shoes of the prosecutor and that
25 the matter is not really turned over to the prosecution

1 probable cause affidavits, the prosecutors have signed off,
2 and the Court makes a determination of probable cause. And,
3 without that determination, you know, if we say we don't see
4 probable cause in this case, it goes back to the prosecutor,
5 which is exactly the role that the complainant or Petitioner
6 in this matter, Ms. Anderlik, was playing. And I believe
7 that you can go forward under 2.2 that way.

8 Further, in a criminal case, the Court can stay the
9 enforcement of a judgment. This doesn't technically follow,
10 but I -- I believe that the Appellate Court also in the
11 rules, the RALJs and the RAPs, have the ability to stay.
12 That stay would be necessary in this case, so that the whole
13 issue does not become moot.

14 However, even if they decide that the factual -- and --
15 and this has nothing to do with my holding here. If the
16 factual basis they decide is moot, the constitutional issue
17 is still alive. That can be appealed. No problem. And,
18 frankly, we've been reversed and told to do certain things
19 by Appellate Courts well after a statute of limitation has
20 run, and that ruling, that remand and the instructions on
21 remand are binding upon us.

22 So I -- I think, Mr. Karp, that you're -- you're well
23 within the strictures of the rules that will allow you to go
24 forward with any appeal on this without filing that
25 complaint. It is part of the record. Certainly, it's been

1 until such time as the Court rules. With that ability of
2 the complainant or the Petitioner in these matters to stand
3 in the shoes of the prosecutor, I would believe -- I believe
4 that the Petitioner could take it up under 2.2(c)(a) --
5 (c)(1), "Final decision except not guilty, a decision which,
6 in effect, abates, discontinues, or determines the case
7 other than by judgment or verdict of not guilty."

8 In this argument in the rule, the prosecutor has taken an
9 adverse position, not representing the Defendants or the
10 alleged Defendants or potential Defendants, the police
11 officers or the deputies in this case. His position is
12 essentially -- or let's just say he won on the position of
13 separation of powers, which now becomes the issue that needs
14 to go up.

15 I believe that by allowing the Petitioner to stand in the
16 shoes of the prosecutor until such time as -- as a complaint
17 is filed, because the rule, by its -- on its face, says,
18 once the complaint's filed, in essence, it's turned over to
19 the prosecutor to proceed. But, until that time, the
20 Petitioner is acting in the capacity of a prosecutor.

21 So the Petitioner brought the facts, the Petitioner
22 brought it to the Court, in essence, to determine probable
23 cause prior to the filing of a complaint, which is a
24 prosecutorial function and quite common in our courts. And
25 the prosecutors will send up summons and complaints with the

1 part of the record several times, and my ruling that ordered
2 it is also part of the record. I don't think technically I
3 need to go back and say this is the complaint that would be
4 filed for purposes of your appeal.

5 Secondly, the reconsider -- or the request that a direct
6 review to the -- from the courts of limited jurisdiction up
7 to the Supreme Court, this is a final decision appealable
8 under the RALJs, as I've indicated. I have entered, you
9 know, written findings on the reconsideration, there's oral
10 findings on the original hearings, and oral findings on this
11 hearing. All of that's available to you.

12 Regarding RAP 4.3(a) -- (a)(2)(a), "The case involves a
13 fundamental and urgent issue of statewide importance which
14 requires a prompt and precedential determination." I agree
15 that this has statewide importance in that every District
16 Court who has ever had to deal with this issue is watching
17 this case with avid interest, let's just put it that way.
18 These -- these cases are difficult no matter what course we
19 go -- what court we're in. The case involves fundamental
20 issues of statewide importance because of that.

21 The question on that piece is, is it urgent? You are
22 arguing that the urgency goes to the history of this law,
23 the fact that the press has reviewed it. Certainly, the
24 press here in Spokane County handled it as well as it's of
25 importance to animal welfarists, victim's rights

1 organizations supporters, constitutionalists, scholars,
 2 prosecuting attorneys, and the District Court judges.
 3 Generally speaking, yes, I agree with all of that.
 4 However, is it urgent that this matter be resolved at the
 5 Supreme Court? My answer to that would probably be no. And
 6 that would also go with the second prong, which is the delay
 7 in obtaining such a determination would cause significant
 8 detriment to the party. I think I've addressed that
 9 regarding the statute of limitations issues and the
 10 preservation of any of your arguments that could go up to
 11 any appellate level.
 12 Mr. O'Brien is correct in that these -- this rule is
 13 generally implicated when there are hundreds, if not
 14 thousands, of cases out there that need resolution.
 15 Statewide, people are waiting. Filed criminal matters are
 16 not being handled because of issues that have been raised in
 17 one county that impact all counties. People are perhaps,
 18 like in the DUI cases, continuing to drink and drive,
 19 continuing to offend, because some issue hasn't been
 20 resolved that needs to be resolved.
 21 Unfortunately for us in this courtroom, this is one
 22 issue, one county, one case. And I -- I can't in conscience
 23 send it up to the Supreme Court to handle this, even though
 24 it is of a constitutional nature. I would note --
 25 therefore, I'm denying that direct appeal; but I would note

1 statute is unconstitutional or the entire statute is
 2 constitutional, but I want another level of court to do
 3 that. And I don't believe I can, because it's -- it's a
 4 rule that applies to my level of court. And that's just my
 5 opinion on that and it affected my holding.
 6 So I think, Mr. Karp, you're welcome to go forward with
 7 your appeal to the Superior Court of Spokane County, and
 8 again review rule 2 point -- or 4.2 of the RALJs. That may
 9 be something you wish to argue again at that level and
 10 proceed on the entire record. And this is an appealable
 11 rule both under the constitutional issue as well as the
 12 complainant standing in the shoes of the prosecutor until
 13 such time as a complaint is filed.
 14 I think under either -- both of those, you can go
 15 forward. Preserving the issue for appeal will not be moot
 16 and also acting to, in essence, stay the running of the
 17 statute of limitations until such time as the matter is
 18 ruled on remand or it's either remanded to my level of court
 19 or it is upheld at the Court of Appeals, and then at the --
 20 at the Superior Court, and then you can go forward with it
 21 at that time.
 22 MR. KARP: Thank you, Your Honor. Should I prepare an
 23 alternative order? I think it's important to at least have
 24 some of the core oral rulings reduced to writing today, such
 25 as the determination that the decisions are final appealable

1 that, if this goes to the Superior Court, they have a
 2 similar rule under 4.2 and a Superior Court judge may feel
 3 differently than myself.
 4 And at any level of court, it can be certified. Or not
 5 my level, but at -- at a higher court, it can be certified
 6 directly to the Supreme Court under a different set of
 7 facts. And the Court of Appeals or the Superior Court may
 8 choose to say this is a such constitutional level issue or
 9 dealing with the Supreme Court rule that they feel it should
 10 go up.
 11 But, at this point in time, I don't show that there'd be
 12 a detriment to the party. The complainant here isn't even
 13 the owner of the calf. She's bringing it to protect against
 14 any subsequent behavior. I would suggest that law
 15 enforcement has been put on notice that this behavior isn't
 16 appropriate.
 17 In point of fact, in one of the articles in our paper,
 18 the sheriff said that they were reviewing how they deal with
 19 animals. And I am also aware that SCRAPs is being funded
 20 for a tranquilizer gun and a large trailer to assist in
 21 large-animal issues. So I know that there has been activity
 22 to prevent this from happening again. So I think the
 23 urgency, that also has reduced the urgency in this matter
 24 going directly to the Supreme Court.
 25 Another level of court may be able to say the entire

1 orders under RALJ 2.2(a)(2)(a).
 2 THE COURT: Well, the -- the oral ruling is the record.
 3 MR. KARP: Okay.
 4 THE COURT: Mr. O'Brien.
 5 MR. O'BRIEN: Your Honor, the oral ruling is the record.
 6 I mean, it's -- that's provided in -- you know, if you look
 7 at --
 8 THE COURT: We're under a little different ruling or
 9 rules in that, at our level of court, the oral ruling can
 10 substitute for any kind of written --
 11 MR. O'BRIEN: Yeah.
 12 THE COURT: -- decision. And we can certainly --
 13 MR. KARP: Okay.
 14 THE COURT: -- send it to you for transcription for your
 15 appeal. In fact, I'll send you the other oral ruling as
 16 well, Counsel. We -- we actually don't have to reduce our
 17 opinions to writing. I did it on that reconsideration,
 18 because that was such a -- an important ruling in this
 19 piece, and so we'll go ahead and do that.
 20 Would you like us to send that trans -- or that disk, it
 21 comes on CD, send that to you?
 22 MR. KARP: Oh, that would be wonderful and I appreciate
 23 that. Thanks for the explanation.
 24 THE COURT: All right.
 25 MR. KARP: Yeah.

1 THE COURT: Thank you, Counsel.
 2 MR. O'BRIEN: Thank you, Your Honor.
 3 Thank you, Mr. Karp.
 4 (The hearing was adjourned
 5 at 11:48 a.m.)
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1 STATE OF WASHINGTON)
) ss: CERTIFICATE
 2 COUNTY OF WHATCOM)
 3
 4
 5 I, SANDRA B. SULLIVAN, a Court Reporter and Notary Public in
 6 and for the State of Washington, do hereby certify that the
 7 foregoing 30 pages comprise a true and correct transcript of the
 8 digital recording of the proceedings had in the within entitled
 9 matter, recorded by me by stenotype, and thereafter transcribed
 10 into printing by computer-aided transcription.
 11 Dated this _____ day of JUNE 2007.
 12
 13
 14

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EXH. A-10



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October 1, 2007

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Re: Amicus Brief Request

Dear Mr. Karp:

The WSBA Amicus Brief Committee reviewed your request that the WSBA appear as amicus curiae in the case *City of Spokane Valley et al. ex rel. Chris Anderlik v. Ballard Bates et al.*. The Committee unanimously recommended that the WSBA not appear amicus at this time because the issue currently before the Court on the appealability of the order of the Superior Court does not meet the criteria set forth in the WSBA Amicus Curiae Brief Policy. However, if the issues of whether CrRLJ 2.1(c) violates separation of powers and whether it permits a private party to prosecute, or only to initiate prosecution and transfer the matter to the public prosecutor, come before the appellate court, those issues may be issues that might be of substantial interest to the WSBA and, if those issues are properly before an appellate court, the Committee suggests that you renew your request.

Pursuant to the Amicus Brief "emergency procedure," the WSBA President and Executive Director accepted the Committee's recommendation.

Very truly yours,

Robert D. Welden
General Counsel

cc: Stanley A. Bastian, President
Paula C. Littlewood, Executive Director
Brian O'Brien, Spokane County Prosecuting Attorney's Office
Amicus Brief Committee

Working Together to Champion Justice