

NO. 81295-1

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE APPLICATION FOR A CITIZEN COMPLAINT,
CHRIS ANDERLIK,

Petitioner.¹

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

Petitioners,

vs.

BALLARD BATES and DUANE SIMMONS,

Respondents.²

ON APPEAL FROM THE MUNICIPAL COURT
OF THE CITY OF FIRCREST, STATE OF WASHINGTON

BRIEF OF RESPONDENT

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¹This caption is the name that the State believes should appear on this case. The State has a pending RAP 3.4 motion to change the title of the case.

²This caption is the caption that appears on the order granting review.

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I. COUNTER-STATEMENT OF ISSUES

1. Whether an individual who requests that a court of limited jurisdiction issue a citizen complaint pursuant to CrRLJ 2.1(c) has standing to appeal the denial of their request?
2. Whether the petitioner's failure to seek review of the denial of her request for citizen complaint through the timely filing of a writ deprives this Court of jurisdiction over her appeal?
3. Whether an appeal from the denial of a citizen complaint must be dismissed as moot once the statute of limitations for the proposed charge has expired?
4. Whether a prosecuting attorney may be removed solely because the prosecuting attorney has elected not to file charges in a particular case?
5. Whether a court may authorize the filing of a citizen complaint in the absence of a statute authorizing such complaints?
6. Whether the district court erred by failing to consider the prosecution standards contained in RCW 9.94A.411³ before ruling on the petition for a citizen complaint?

³CrRLJ 2.1(c)(7) directs the court to consider "[p]rosecution standards under RCW 9.94A.440." RCW 9.94A.440 has been recodified as RCW 9.94A.411.

II. STATEMENT OF THE CASE

On April 12, 2006, three cattle belonging to Ted and Judy Ward got loose from their property. D.Ct. File at 340.⁴ One of the cattle, a 500-600 pound, un-castrated male, was located in the area of Walmart on Broadway near Sullivan. D.Ct. File at 166, 342, 353. This bull entered Sullivan Road and proceeded north across the I-90 overpass. D.Ct. File at 142. At one point, the bull started down a ramp toward the freeway itself, before turning back. D.Ct. File at 342-43, 353. Eventually, the bull crossed over Indiana, through a mall area, and finally stood still behind a hotel located at 15015 E. Indiana. D.Ct. File at 340, 343.

A number of officers and civilians attempted to secure the bull at the scene until his owner could arrive. As people approached, the bull began to move away from them towards the street. D. Ct. File at 341. Concerned that the bull might reenter traffic in this urban area, two Spokane County Sheriff's Deputies deployed their tasers. D.Ct. File at 340, 341, 343. Regrettably, the two tasers were deployed for a significant period of time, and caused significant pain to the bull. D.Ct. File at 339-41, 343, 188, 178. Ultimately,

⁴The entire district court file was forwarded to the superior court pursuant to RALJ 6.2. The district court did not number the pages or otherwise index the documents. Counsel for the State has numbered the documents, beginning with the document entitled "Transmittal from District Court". This document, which was filed with the superior court on May 24, 2007, has been assigned page "1". The district court record will be cited to in this brief as "D.Ct. File". To assist the Court, an index of key documents with the page number assigned by the State appears in appendix A.

the bull died. The exact cause of death is unknown. D.Ct. File at 178.

On November 11, 2006, Chris Anderlik filed two affidavits for citizen complaints arising out of the events of April 12, 2006. One complaint requested that Spokane County Sheriff Deputies Ballard Bates and Damon Simmons be charged in the Spokane County District Court with a violation of RCW 16.52.207. D.Ct. File 376. The other complaint requested that both officers be charged in the City of Spokane Valley Municipal Court with a violation of Spokane Valley Municipal Code 8.20.030. D.Ct. File 378.⁵

Ms. Anderlik's name does not appear as a witness on either affidavit of complaining witness.⁶ She did, however, identify five witnesses who reside out-of-state⁷ and beyond the subpoena power of both the district and municipal courts.⁸ D. Ct. File 376-379. Finally, Ms. Anderlik identified one

⁵RCW 16.52.207 and Spokane Valley Municipal Code 8.20.030 are, as a matter of law, the same charge. The text of both appear in appendix B. An individual cannot be convicted under both a state statute and an identical municipal ordinance. *State v. Roybal*, 82 Wn.2d 577, 580, 512 P.2d 718 (1973).

⁶Ms. Anderlik acknowledged in open court that she had no personal knowledge of the events of April 12, 2006. RP (01/22/07) at 24-25.

⁷Ms. Anderlik's proposed out-of-state witnesses were Arabella Akossy of Santa Rosa, CA, Holly Cheever of Guilderland, NY, Temple Grandin of Fort Collins, CO; and Bernard Rollins, of Fort Collins, CO. Only Ms. Akossy is a fact witness. The other four witnesses are all properly classified as experts.

⁸CrRLJ 4.8 and 4.9 authorize a court of limited jurisdiction to issue subpoenas to any person anywhere in the state. The statute that gives effect to subpoenas outside the borders of Washington, Chapter 10.55 RCW, is limited to "courts of record". RCW 10.55.020(1). District and municipal courts are not "courts of record". Const. art. IV, § 11; *In re Eng*, 113 Wn.2d 178, 189, 776 P.2d 1336 (1989); *Pasco v. Mace*, 98 Wn.2d 87, 96, 653 P.2d 618 (1982).

expert witness from Bellingham, Washington, who charges \$150 an hour to testify. D. Ct. File at 169, 376, 378.

A hearing was held on Ms. Anderlik's application for a citizen complaint on January 22, 2007. During this hearing, Ms. Anderlik indicated that each of her identified witnesses understood the gravity of the claim being made. No representation was made, however, that any of the expert witnesses was willing to appear at no cost, or that any of the out-of-state witnesses was willing to pay their own travel expenses. RP (01-22-07) at 11.

A representative of the Spokane County Prosecuting Attorney's Office appeared at the January 22, 2007, hearing. While the judge carefully considered his argument regarding possible statutory immunity, the judge cut him off when he began to address the charging standards contained in RCW 9.94A.411. RP (01-22-07) at 19.

Ultimately, the judge found that there was probable cause to authorize the filing of charges. RP (01-22-07) at 32. No complaint, however, was actually filed, and the judge warned Ms. Anderlik that the prosecutor's office had the option of not prosecuting. RP (01-22-07) at 34-35.

Three days later, the State filed a motion to reconsider the judge's oral ruling authorizing the filing of charges. This motion asserted that CrRLJ 2.1(c) is unconstitutional. D.Ct. File at 155. The State's motion to reconsider was granted in a memorandum opinion over strenuous objection of Ms.

Anderlik. D.Ct. File at 68, 21. This same opinion denied Ms. Anderlik's motion to disqualify the Spokane County Prosecuting Attorney's Office and to have a special prosecutor appointed. D.Ct. File at 21.

In an attempt to stop the running of the statute of limitations, Ms. Anderlik requested that the district court judge reconsider the ruling and allow a criminal complaint to be filed. RP (03/26/07) at 2-3, 9-10. This request was denied, with the judge noting that she "never did order or [she] never did sign any kind of complaint." RP (03/26/07) at 22.

In the same hearing, Ms. Anderlik gave notice of her intent to appeal the denial of her citizen complaint. RP (03/26/07) at 3, 10, 18. The State unambiguously informed Ms. Anderlik that it believed the district court's ruling was only appealable by way of a statutory writ of review. RP (03/26/2007) at 18.

On April 6, 2007, Ms. Anderlik filed a notice of RALJ appeal to the superior court. CP 1. She served this notice of appeal by U.S. Mail upon only one of the two deputies and upon the Spokane County Prosecuting Attorney's Office. CP 3. The notice of appeal was never sent to the City of Spokane Valley.

The State promptly moved to dismiss the RALJ appeal on the grounds that Ms. Anderlik lacked standing to appeal the denial of the citizen complaint and that review of the citizen complaint could only be obtained

through the filing of a writ of review. CP 61-65. An order granting the State's motion to dismiss was entered on August 1, 2007. CP 112.

Ms. Anderlik filed a timely notice for discretionary review to the court of appeals. CP 114. Seven days later, she filed a notice of appeal. CP 118. The court of appeals rejected both notices and dismissed the action as unappealable. This Court, however, granted discretionary review.

III. ARGUMENT

A. THE PERSON PETITIONING FOR A CITIZEN COMPLAINT LACKS STANDING TO APPEAL THE DENIAL OF HER REQUEST

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

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

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

The State does not doubt that Ms. Anderlik is disappointed that the district court judge ultimately denied her request for a citizen complaint. Her disappointment, however, is insufficient to confer standing. CrRLJ 2.1(c) gave her the right to appear before a judge to request the filing of charges. The rule, however, allows the judge to deny the application even in cases in which probable cause exists. *See* CrRLJ 2.1(c) (“If the judge is satisfied that probable cause exists, and factors (1) through (7) justify filing charges . . . the judge *may* authorize the citizen to sign and file a complaint in the form prescribed in CrRLJ 2.1(a).”). In other words, the court rule does not give her a personal “right” to any particular outcome. This appeal must, therefore, be dismissed.

Massachusetts, which has a citizen complaint statute⁹ that allows a judge to exercise similar discretion, has “uniformly held that the denial of [an application for] a citizen complain creates no judicially cognizable wrong.” *Victory Distributors, Inc. v. Ayer Division of the District Court Department*, 435 Mass. 136, 755 N.E.2d 273, 279 (2001), quoting *Bradford v Knights*, 427 Mass. 748, 751, 695 N.E.2d 1068 (1998). This lack of standing extends to cases where an application is denied on the basis of an erroneous interpretation of the law. *Victory Distributors*, 755 N.E.2d at 279.

⁹Mass. G.L. c. 218, § 35A is reproduced in appendix C.

The Supreme Judicial Court of Massachusetts explains that this result is consistent with the notion that the right to pursue a criminal prosecution belongs not to a private party but to the government. *Id. Accord* Const. art. IV, § 27 (“The style of all process shall be, ‘The State of Washington,’ and all prosecutions shall be conducted in its name and by its authority.”).

The Pennsylvania Supreme Court has also determined that traditional notions of standing apply to an appeal from the denial of a citizen complaint.¹⁰ *See In re Hickson*, 573 Pa. 127, 821 A.2d 1238 (2003). After reviewing the history of criminal prosecutions in Pennsylvania, the *Hickson* court held that only a person who was directly impacted by the crime could seek judicial review of the disapproval of a private criminal complaint. 821 A.2d at 1245. In most instances, the people who can meet this test will be the victim or the victim’s family. *Id.* Under this test, Ms. Anderlik’s acknowledgment that the bull at issue did not belong to her and that she did not personally witness the bull’s demise prevents her from having standing.¹¹

¹⁰Pennsylvania also extends the traditional notions of standing to the petition for a private criminal complaint. *See In re Private Crim. Complaint of Wilson*, 2005 Pa. Super 211, 879 A.2d 199, 208 (2005). A person like Ms. Anderlik, who merely seeks to redress the harm done to society as a whole by the commission of the alleged crime, has no standing to seek a citizen complaint under Pa. R. Crim. Pro. 506. *In re Hickson*, *supra*

¹¹Ms. Anderlik acknowledges her lack of standing in her brief. *See* Petitioner’s Brief, at 21 (“Only citizens like Ms. Anderlik, who would otherwise have no standing to sue civilly for the animal’s injury or death, will be able to see that state cruelty laws are enforced, using the only tool at her disposal – the citizen criminal complaint.”).

B. THE DENIAL OF A CITIZEN COMPLAINT IS NOT APPEALABLE AS A MATTER OF RIGHT

RALJ 2.2 allows for an appeal as a matter of right from certain “final” decisions. Ms. Anderlik concedes that the denial or granting of a citizen complaint is not included in the list of “final” decisions. Petitioner’s Brief, at 9. Where a court rule specifically spells out what orders may be appealed, the failure to mention a particular proceeding in the rule indicates the Supreme Court’s intent that the matter be reviewable solely under the procedure reserved for discretionary review. *See In re Dependency of Chubb*, 112 Wn.2d 719, 721, 773 P.2d 851 (1989) (discussing RAP 2.2(a)). Such discretionary review is obtained from rulings of courts of limited jurisdiction by statutory writ. *See* RALJ 1.1(c).

Ms. Anderlik attempts to avoid this conclusion by baldly asserting that she may obtain review pursuant to RALJ 2.2(c)(1). This provision, however, only applies to criminal cases and until charges are actually filed there is no criminal case. *See generally*, CrRLJ 1.1(a)(1); CrR 2.1(a); RCW 10.37.010. RALJ 2.2(c)(1), moreover, only applies to the State or local government, and Ms. Anderlik is neither. Finally, the order denying Ms. Anderlik’s request for a citizen complaint does not preclude the State from filing charges, or another citizen from requesting the filing of charges. In this respect, it is most similar to a dismissal of charges without prejudice which

is a non-appealable order. *State v. Taylor*, 150 Wn.2d 599, 80 P.3d 605 (2003). This ability for reconsideration based upon changed circumstances also prevents the district court's ruling from being appealable under RALJ 2.2(a)(1). *See, e.g., In re Dependency of Chubb, supra* (dependency review orders); *accord, In re Detention of Turay*, 139 Wn.2d 379, 392-94, 986 P.2d 790 (1999) (post-commitment orders in SVP cases).

Ms. Anderlik's sole method of seeking review of the order denying her request for a citizen complaint was by way of a writ of certiorari pursuant to Chapter 7.16 RCW. *See, e.g., Grays Harbor County v. Williamson*, 96 Wn.2d 147, 150-53, 634 P.2d 296 (1981). Ms. Anderlik's failure to file a petition for a writ of certiorari within 30 days of the district court's March 26, 2007, ruling denying Ms. Anderlik's motion for reconsideration requires the dismissal of this appeal. *See Clark County Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840, 847, 991 P.2d 1161 (2000) (a statutory writ must be filed within the time prescribed by statute or court rule for bringing an appeal); RALJ 2.5(a) (notice of appeal must be filed within 30 days of the entry of the decision which the party seeks to appeal); *State ex rel Clark v. Superior Court for King County*, 167 Wash. 481, 484-85, 10 P.2d 233 (1932) ("We feel compelled to conclude that the writ of review was not sought in time by relator, and the motion to quash must be granted."). Even if Ms. Anderlik timely sought a writ of certiorari, her petition was doomed to failure

as even an erroneous discretionary ruling by a court of limited jurisdiction acting within its jurisdiction may not be reviewed by a superior court by a writ of review under Chapter 7.16 RCW. *Commanda v. Cary*, 143 Wn.2d 651, 656, 23 P.3d 1086 (2001).

C. THIS APPEAL IS MOOT BECAUSE THE STATUTE OF LIMITATIONS FOR THE REQUESTED CHARGE HAS EXPIRED

Another specific rule of appellate procedure is that an appellate court will dismiss an appeal wherein only moot questions or abstract propositions are involved. *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). An appeal becomes moot when the court of appeals can no longer provide the appellant with effective relief. *In re Labelle*, 107 Wn.2d 196, 200, 728 P.2d 138 (1986).

Here, Ms. Anderlik requested that Spokane County Sheriff Deputies Ballard Bates and Damon Simmons be charged with violations of RCW 16.52.207 and Spokane Valley Municipal Code 8.20.030 for their actions on April 12, 2006. Both of these offenses are misdemeanors. See RCW 16.52.207(3)(a) (“Animal cruelty in the second degree under subsection (1), (2)(a), or (2)(b) of this section is a misdemeanor.”). No misdemeanor may be prosecuted more than one year after its commission. RCW 9A.04.080 (1)(j) (“No misdemeanor may be prosecuted more than one year after its commission.”). Thus, the relief sought by Ms. Anderlik can no longer be

granted.

Ms. Anderlik asserts that the statute of limitations was equitably tolled pending the outcome of the RALJ appeal. Petitioner's Brief, at 42. Equitable tolling, however, is not available for jurisdictional statutes. *Hazel v. Van Beek*, 135 Wn.2d 45, 61, 954 P.2d 1301 (1998). The Washington Court of Appeals has held that the statute of limitations contained in RCW 9A.04.080(1)(j) are jurisdictional. *State v. Ansell*, 36 Wn. App. 492, 496, 675 P.2d 614, *review denied*, 101 Wn.2d 1006 (1984).¹² This appeal, therefore, should be dismissed as moot.

D. A PROSECUTOR MAY NOT BE REPLACED SOLELY
BECAUSE THE PROSECUTOR REFUSES TO FILE
CHARGES

Ms. Anderlik requested the removal of the Spokane County Prosecuting Attorney's Office with respect to any proceeding arising out of the April 12, 2006, incident, based upon that office's refusal to file animal cruelty charges against the two sheriff deputies. D.Ct. File at 38-41 and 114-128. Ms. Anderlik's persistence in this position¹³ requires a review of the

¹²The State is aware that the Court of Appeals' jurisdictional holding is the minority view. *See, e.g., Acevedo-Ramos v. United States*, 961 F.2d 305, 307 (1st Cir.), *cert. denied*, 506 U.S. 905 (1992) ("[E]very circuit that has addressed [the issue] has held that the statute of limitations is a waivable affirmative defense rather than a jurisdictional bar."). The State believes that the federal court's characterization of the statute of limitations is the better reasoned view. Ms. Anderlik, however, presents no argument in support of overruling the existing Washington case law.

¹³*See* Petitioner's Brief at 32 to 42.

role of the prosecuting attorney in America and in Washington state.

1. The American Prosecutor

The modern American prosecutor is a unique office that combines features of the English attorney general, the French *procureur publique* and the Dutch *schout*. He has the power, like the *procureur*, to initiate all public prosecutions; he is a local official of a regional government like the *schout*; and he has the power to terminate all criminal prosecutions like the attorney general. J. Jacoby, *The American Prosecutor in Historical Context*, *The Prosecutor*, at 33 (May/June 1997).

Although the early colonists founded much of their legal system on English common law, they largely rejected the British system of private prosecutions in favor of a more egalitarian public prosecution system with its basic supposition that a crime is a public occurrence and society as a whole is the ultimate victim. *Id.* at 36. This policy choice led to the gradual elimination or restriction upon the use of private prosecutors, and a clear trend toward the election of prosecutors. *See generally*, J. Jacoby, *The American Prosecutor: From Appointive to Elective Status*, *The Prosecutor*, at 25-29 (September/October 1997); J. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 *Ark. L. Rev.* 511(1994); *see also State v. Storm*, 141 N.J. 245, 661 A.2d 790 (1995) (describing the concerns associated with private prosecutors).

The trend toward the popular local election of a prosecuting attorney was accompanied by an accompanying independence from the courts. By 1850, the majority of the new state constitutions listed the district attorney in the executive article along with other county officers. J. Jacoby, *The American Prosecutor: From Appointive to Elective Status*, *The Prosecutor*, at 28 (September/October 1997).

The elected prosecutor was granted enormous discretionary enforcement authority. She enjoyed the power to decide whether criminal action would be brought, the level at which an individual would be charged, when charges would be filed, and whether a prosecution should be terminated. *See, e.g. Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 668-69, 54 L. Ed. 2d 604 (1978); *United States v. Lovasco*, 431 U.S. 783, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977). The exercise of this discretion requires the prosecuting attorney to consider a myriad of factors including the cost of prosecution, the strength of the case, the public interest, the motives of the complaining witness, the availability of diversion programs in the community, the criminal history of the offender, and the extent of the harm caused by the offense. *See, e.g., Lovasco*, 97 S. Ct. at 2051-52; *Newman v. United States*, 382 F.2d 479, 481-82 (D.C. Cir. 1967).

A prosecutor's decision not to file charges is virtually unreviewable by the courts. The first barrier to judicial review of the prosecutor's decision to

not file charges is the inability of a private citizen to establish standing to compel the prosecution. *See, e.g., Kelly v. Dearington*, 23 Conn. App. 657, 583 A.2d 937 (1990) (surveying cases that hold a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another); *see also Leeke v. Timmerman*, 454 U.S. 83, 86-87, 102 S. Ct. 69, 70 L. Ed. 2d 65 (1981) (a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973) (same).

The second barrier to judicial review of a prosecutor's discretionary decision to not file charges is the separation of powers doctrine. This doctrine recognizes that the executive branch may not exercise judicial power, and the judiciary is prohibited from entering upon executive functions. *People v. Smith*, 53 Cal. App. 3d 655, 126 Cal. Rptr. 195, 198 (1975). Numerous courts have concluded that the judiciary improperly enters upon executive branch functions when it attempts to initiate criminal charges. *See, e.g., Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379-380 (2nd Cir. 1973); *People v. Smith, supra*; *State v. Iowa District Court for Johnson County*, 568 N.W.2d 505, 508 (Iowa Sup. 1997) (citing 63C Am. Jur.2d *Prosecuting Attorneys* § 21, at 134-35 (1997)).

The separation of powers doctrine also prevents the courts from removing a prosecuting attorney from an action except as authorized by

statute. See, e.g., *In re Petition for Appointment of Special Prosecuting Attorney*, 122 Mich. App. 632, 332 N.W.2d 550, review denied, 417 Mich. 1086 (1983). A prosecutor's removal solely because he elects not to file charges in a particular case has been repeatedly rejected. See, e.g., *Venhaus v. Pulaski County*, 186 Ark. 229, 691 S.W.2d 141 (1985); *Iowa District Court for Johnson County*, 568 N.W.2d at 509 (a prosecutor's controversial professional judgment about the appropriateness of pressing charges does not constitute a conflict of interest disqualifying him); *People v. Herrick*, 216 Mich. App. 594, 550 N.W.2d 541, 542 (1996) (a court commits an error of law in ruling that a prosecutor's decision not to prosecute constitutes a conflict of interest authorizing the appointment of a special prosecutor). Only the people in an election have the right to remove a prosecuting attorney from office due to objections to use of discretion. *Venhaus v. Pulaski County, supra*; *In re Padgett*, 678 P.2d 870, 873 (Wyo. 1984 (if private individuals "are unsatisfied [with a prosecutor's inaction], they are free to express their feelings at the polls.")).

2. The Washington Prosecutor

The role of prosecutor in Washington underwent the same gradual metamorphosis from a position shared with private persons, to judicial branch control, and finally to executive branch independence. The earliest Territorial statutes allowed virtually anyone to bring a criminal complaint. *See, e.g.*, Laws of 1854, 1st sess. § 1, at 100; Laws of 1854, 1st sess. § 11, at 104. An accused person, however, could not be held to answer in any court for an alleged crime unless upon indictment by a grand jury, or before a court martial or a justice of the peace. Laws of 1854, 1st sess. § 1, at 76. Once someone was indicted or a complaint was sustained, the prosecuting attorney's ability to forego further prosecution was strictly prescribed. *See generally* Laws of 1854, 1st. sess. § 85, pg. 115 (prosecutor not to nolle prosequi a case without the leave of the court); Laws of 1854, 1st sess. § 60, pg. 112 (court to require prosecuting attorney to endorse indictment). Nearly 30 years later, the Territorial legislature expressly granted private attorneys the ability to personally access the grand jury and the right to function as private prosecutors. Code 1881, § 996.

In 1877, the electors of Washington Territory convened a convention to frame a constitution. This convention, which met in Walla Walla County, drafted a constitution that was ratified by the people at the general election in 1878. E. Meany and J. Condon, *Washington's First Constitution, 1878 and*

Proceedings of the Convention, at 5 (1924) (Reprint. from the Washington Historical Quarterly, 1918-19). This proposed constitution never went into effect as Congress was reluctant to admit more states. *Id.*

This failed constitution distributed the government “into three separate and distinct departments, to wit: the Legislative, the Executive, and the Judicial.” Walla Walla Const. art. III, § 1 (1878). Consistent with the existing concept of a prosecutor, the position of “circuit attorney” was included in the judicial branch. *See* Walla Walla Const. art. VIII, § 19 (1878).

By the time Washington’s next attempt at statehood occurred in 1889, the criminal prosecution function was vested in the constitutionally created locally elected-executive branch office of prosecuting attorney. Const. art. XI, §§ 4, 5; *State v. Campbell*, 103 Wn.2d 1, 25-26, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985) (recognizing prosecuting attorney as executive branch official); *State v. Cascade District Court*, 94 Wn.2d 772, 781-782, 621 P.2d 115 (1980) (same); *State v. Thorne*, 129 Wn.2d 736, 762, 921 P.2d 514 (1996) (same).

The constitution directed the Legislature to determine the duties of the prosecuting attorney. *See* Const. art. XI, § 5 (Legislature to prescribe the duties of the prosecuting attorney). Consistent with the creation of the new independent office of prosecuting attorney, the constitution conferred the ability to file charges by information, with no input from a grand jury. Const.

art. I, § 25. When the constitution was amended to allow counties to adopt “Home Rule” charters, the selected language ensured that the prosecuting attorney would be insulated from local meddling. Const. art. XI, § 4 (Amend. 21).

The legislature promptly assigned various duties to the prosecuting attorney. Among the initial duties, was the obligation to “[p]rosecute all criminal and civil actions in which the state or the county may be a party.” RCW 36.27.020(4); *see also* 2 Hill’s Code § 89 (Feb. 26, 1891, § 7). The legislature did not, however, require that the prosecuting attorney file charges whenever an offense is technically supported by sufficient evidence.

In modern times, the legislature has provided guidance to the prosecuting attorney as to factors that the prosecutor might consider in exercising her discretion to forego the filing of charges that are technically supported by sufficient evidence. RCW 9.94A.411.¹⁴ The prosecutor’s decision to not file charges under these guidelines does not provide a cause of action. *Cf.* RCW 9.94A.401 (“These standards are intended solely for the guidance of prosecutors in the state of Washington. They are not intended to,

¹⁴Case law echoes these factors and identifies additional ones, stating that in exercising his charging discretion, the prosecutor must consider numerous factors, including the strength of the case, pending conviction on another charge, confinement on other charges, the availability of diversion programs, available personnel, and the cost of the prosecution and defense. *State v. Lewis*, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990); *State v. Howard*, 106 Wn.2d 39, 44, 772 P.2d 783 (1985); *State v. Judge*, 100 Wn.2d 706, 713, 675 P.2d 219 (1984); *State v. Ashue*, ___ Wn. App. ___, 188 P.3d 522 (2008) (recognizing the authority of prosecutors to create pre-trial diversion programs).

do not and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party in litigation with the state.”).

Over the years, the legislature has gradually eliminated the surviving remnants of the pre-modern-era executive branch model of prosecutor. In 1971, in a bill that modernized the grand jury system, the legislature repealed the statute that allowed a non-governmental attorney to attend the grand jury as a “private prosecutor.” *See* Laws of 1971, ex. sess. c. 67.¹⁵ Under the Criminal Investigatory Act of 1971, a grand jury can now only be summoned by a court on the request of a “public attorney” or upon an order signed by a majority of the judges sitting in the county. *See* RCW 10.27.030. The same Act created special inquiry judges, who could only be appointed upon the request of a “public attorney.” RCW 10.27.170.

In 1981, the legislature took the final step toward ensuring the availability of an independent executive branch professional prosecutor. RCW 43.10.232 provided that when a prosecutor declines to file charges for any reason that another executive branch official, the attorney general, could immediately step in and prosecute if appropriate.¹⁶ This statute filled the gap created by the repeal of the private prosecutor statute, by allowing a victim

¹⁵Laws of 1971, ex. sess. ch. 67, § 20 repealed RCW 10.28.160. This territorial statute authorized indictments obtained by private prosecutors.

¹⁶Const. art. III, § 1 identifies both the attorney general and the governor as members of the executive department.

who is dissatisfied with the local prosecutor's handling of a case, a path to prosecution.¹⁷ *See, e.g., State v. Howard*, 106 Wn.2d 39, 40-41, 722 P.2d 783 (1985) (murder victim's family contacted the Governor to request his intervention after the county prosecutor concluded there was insufficient evidence to prosecute the suspected murderer).

Accompanying the 1889 constitution's designation of the prosecuting attorney as an independently elected officer, the legislature took affirmative action to limit the ability of the courts to remove the people's chosen lawyer. *See generally* Bal. Code, §§ 466, 471, 4755. Within a decade, the Supreme Court had the opportunity to consider the propriety and efficacy of the legislature's action.

¹⁷RCW 43.10.232 currently provides that:

(1) The attorney general shall have concurrent authority and power with the prosecuting attorneys to investigate crimes and initiate and conduct prosecutions upon the request of or with the concurrence of any of the following:

(a) The county prosecuting attorney of the jurisdiction in which the offense has occurred;

(b) The governor of the state of Washington; or

(c) A majority of the committee charged with the oversight of the organized crime intelligence unit.

(2) Such request or concurrence shall be communicated in writing to the attorney general.

(3) Prior to any prosecution by the attorney general under this section, the attorney general and the county in which the offense occurred shall reach an agreement regarding the payment of all costs, including expert witness fees, and defense attorneys' fees associated with any such prosecution.

In *State v. Heaton*, 21 Wash. 59, 56 P. 843 (1899), a prosecutor moved to dismiss an information that he had filed against a defendant for forgery after the defendant made full restitution. One superior court judge granted this motion, while two other superior court judges convened a grand jury to investigate whether the prosecuting attorney had acted corruptly. While that grand jury exonerated the prosecutor of any wrongdoing, finding that the prosecutor acted in the best interests of the county relative to the dismissal of the suit, it nonetheless, indicated that this defendant should be prosecuted to the fullest extent of the law and it recommended that a special counsel be appointed by the court to advise the grand jury as the prosecuting attorney was compromised by his prior position that charges should be dismissed. This request was granted by the superior court over the objections of the prosecuting attorney. *Heaton*, 21 Wash. at 60-61.

Ultimately the grand jury indicted the defendant, but this indictment was set aside on the grounds that the special counsel was not required or permitted by law to attend the grand jury. *Id.*, at 59. On appeal, a unanimous Supreme Court affirmed the dismissal of the indictment. In its opinion, the Court recognized that the prosecuting attorney's office is defined and his authority comes from the Washington constitution. The prosecuting attorney must exercise his independent judgment as to the prosecution or dismissal of an information or indictment and that "his discretion in the exercise of his

duties must not be in any wise controlled by legal consequences unpleasant or unfavorable to himself.” *Heaton*, 21 Wash. at 62.

The Court went on to hold that a superior court judge may only replace a prosecuting attorney as authorized by statute. The only statutory grounds for replacing a prosecuting attorney with a special prosecuting attorney is when the prosecuting attorney fails, from sickness or other cause, to attend court.¹⁸ *Heaton*, 21 Wash. at 61-62. A prosecutor’s decision that further prosecution

¹⁸The statutory grounds for replacing a prosecuting attorney with a special prosecuting attorney have remained essentially unchanged. RCW 36.27.030 provides that:

When from illness or other cause the prosecuting attorney is temporarily unable to perform his duties, the court or judge may appoint some qualified person to discharge the duties of such officer in court until the disability is removed.

When any prosecuting attorney fails, from sickness or other cause, to attend a session of the superior court of his county, or is unable to perform his duties at such session, the court or judge may appoint some qualified person to discharge the duties of such session, and the appointee shall receive a compensation to be fixed by the court, to be deducted from the stated salary of the prosecuting attorney, not exceeding, however, one-fourth of the quarterly salary of the prosecuting attorney: PROVIDED, That in counties wherein there is no person qualified for the position of prosecuting attorney, or wherein no qualified person will consent to perform the duties of that office, the judge of the superior court shall appoint some suitable person, a duly admitted and practicing attorney-at-law and resident of the state to perform the duties of prosecuting attorney for such county, and he shall receive such reasonable compensation for his services as shall be fixed and ordered by the court, to be paid by the county for which the services are performed.

Case law generally equates “other cause” to a conflict of interest. See *Westerman v. Carey*, 125 Wn.2d 277, 892 P.2d 1067 (1994) (prosecutor disagreed with his client’s position); *State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988) (defendant was prosecutor’s former client); *State v. Tolias*, 84 Wn. App. 696, 929 P.2d 1178 (1997), *rev’d on other grounds*, 135 Wn.2d 133, 954 P.2d 907 (1998) (prosecutor had mediated dispute that gave rise to criminal charges). Case law further indicates that an appointment pursuant to RCW 36.27.030 is improper if the prosecuting attorney has already appointed a suitable person to act. See *Herron v. McClanahan*, 28 Wn. App. 552, 625 P.2d 707, *review denied*, 95 Wn.2d 1029 (1981).

is not advisable,

does not in any sense disqualify him from the further discharge of his duties in the matter. It is his duty, if the court declines to order a dismissal, to proceed with the prosecution. There cannot even an implication arise that the prosecuting attorney is disqualified, or will not do his duty, because he has so advised the dismissal of a criminal proceeding.

Heaton, 21 Wash. at 62.

This Court's analysis in *Heaton* is dispositive of Ms. Anderlik's instant request for the disqualification of the Spokane County Prosecuting Attorney's Office and the appointment of a special prosecuting attorney. Just as in *Heaton*, the only ground Ms. Anderlik identifies for replacing the prosecuting attorney is her stated opposition to proceeding with the charge. Ms. Anderlik's failure to demonstrate why this century old precedent should be overruled mandates the denial of her request. In addition, no statute authorizes a district court to replace the duly elected prosecuting attorney with a special prosecutor. *Ladenburg v. Campbell*, 56 Wn. App. 701, 784 P.2d 1306 (1990).

E. ABSENT AN AUTHORIZING STATUTE, COURTS MAY NOT ORDER THE FILING OF A CRIMINAL CHARGE

The separation of powers doctrine is not specifically enunciated in either the Washington or Federal Constitutions, but is universally recognized as deriving from the tripartite system of government established in both Constitutions. *State v. Blilie*, 132 Wn.2d 484, 489, 939 P.2d 691 (1997),

citing Wash. Const. Arts. II, III, and IV; U.S. Const. Arts. I, II, and III; *Carrick v. Locke*, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994). When separation of powers challenges are raised involving different branches of state government, only the state constitution is implicated. *Carrick*, 125 Wn.2d at 135 n.1. However, federal principles regarding the separation of powers doctrine are relied upon in interpreting and applying the state's separation of powers doctrine. *State v. Wadsworth*, 139 Wn.2d 724, 735, 991 P.2d 80 (2000); *Blilie*, 132 Wn.2d at 489.

While the separation of powers doctrine does not require that one branch of government be hermetically sealed off from another, the doctrine does seek to ensure that the fundamental functions of each branch remain inviolate. To that end, the doctrine precludes the assignment to, or assumption by, one branch of a task that is more properly accomplished by other branches and that no provision of law impermissibly threatens the institutional integrity of another branch. *Carrick*, 125 Wn.2d at 135; *In re Juvenile Director*, 87 Wn.2d 232, 239-40, 552 P.2d 163 (1976). Judge Derr correctly concluded that CrRLJ 2.1(c) violates both of these concerns.

CrRLJ 2.1(c) is an improper attempt to assign to the judiciary a function that our constitution assigns to the executive branch. As discussed in section III. D. 2. of this brief, the prosecuting attorney is a member of the executive branch. The decision to charge an offense is an executive, not a

judicial function. *See, e.g., State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999) (“A prosecutor’s determination to file charges, to seek the death penalty, or to plea bargain are executive, not adjudicatory”). *Accord Greenlaw v. United States*, ___ U.S. ___, 128 S. Ct. 2559, 2565, 171 L. Ed. 2d 399 (2008) (“This Court has recognized that ‘the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.’ *United States v. Nixon*, 418 U.S. 683, 693, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974)”; *People v. Adams*, 43 Cal. App. 3d 697, 117 Cal. Rptr. 905, 911-12 (1974) (the discretion whether or not to file a charge is not in any way “an exercise of judicial power or function”).

CrRLJ 2.1(c) is also an improper intrusion by the judiciary upon duties belonging to the legislature. Const. art. I, § 25 directs the legislature to prescribe how prosecutions shall be initiated, while Const. art. XI, § 5 directs the legislature to define the duties of prosecutors. In response to these directives, the legislature has restricted the filing of charges and the prosecution of charges to “public attorneys.” *See generally* RCW 36.27.020(4); RCW 10.27.170; RCW 10.37.015; RCW 10.01.190; RCW 43.10.232. No statute currently exists that grants the power to file charges to the judiciary or to a private citizen of this state, nor is the ability to file charges included in the powers of district court judges. *See* RCW 3.66.010; RCW 3.66.060. No statute, moreover, allows a district court judge

to appoint a special prosecutor if the elected prosecuting attorney declines to proceed with charges that the judge orders to be filed pursuant to a citizen complaint.¹⁹ See *Ladenburg v. Campbell*, 56 Wn. App. 701, 784 P.2d 1306 (1990).

CrRLJ 2.1(c) is also problematic in that it requires the judiciary to wear two hats at the same time – that of prosecutor and of neutral and detached magistrate. The separation of powers doctrine prohibits such a feat. *Mistretta v. United States*, 488 U.S. 361, 404, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989). CrRLJ 2.1(c) requires the judge to both determine the existence of probable cause *and* to evaluate the wisdom of filing charges in light of the complainant's motives, prosecutorial resources, and other myriad factors. See CrRLJ 2.1(c)(7) (incorporating RCW 9.94A.411). This combining of the accusatory process with that of the neutral and detached magistrate could constitute a violation of the defendant's due process rights. See *In re*

¹⁹The legislature knows how to provide judges with such authority. Chapter 7.21 RCW deals with contempt of court. RCW 7.21.040 addresses punitive contempt. This section specifically authorizes a judge to appoint a special prosecuting attorney if the prosecuting attorney or the city attorney does not act upon a complaint:

(c) A request that the prosecuting attorney or the city attorney commence an action under this section may be made by a judge presiding in an action or proceeding to which a contempt relates. If required for the administration of justice, the judge making the request may appoint a special counsel to prosecute an action to impose a punitive sanction for contempt of court.

A judge making a request pursuant to this subsection shall be disqualified from presiding at the trial.

RCW 7.21.040(4)(1)(c).

Murchison, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955) (improper for judge who served as part of the accusatory process that led to a contempt charge to later preside at the contempt hearing).

The majority of jurisdictions that have considered this issue have held that courts may not order the filing of criminal charges over the objection of the prosecuting attorney. See, e.g., *Inmates of Attica Correctional Facility*, 477 F.2d at 379-380; *Iowa District Court for Johnson County*, 568 N.W.2d at 508; *People v. Benoit*, 152 Misc. 2d 115, 575 N.Y.S.2d 750 (1991); *State v. Wild*, 257 N.W.2d 361 (Minn. 1977), *cert. denied*, 434 U.S. 1003 (1978). The vast majority of these holdings are predicated upon the separation of powers doctrine. Of particular note is the *Inmates of Attica Correctional Facility* case as it is predicated on federal separation of powers doctrine that is relied upon when considering the Washington separation of powers doctrine. *Wadsworth*, 139 Wn.2d at 735; *Blilie*, 132 Wn.2d at 489.

Critics of these holdings predominately take the position that legislative authority is required in order to allow a court to authorize the filing of charges at the request of a citizen. See, e.g., *Wild*, 257 N.W.2d at 366 (citing Comment, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 Yale L.J. 209, 233 (1955-56)); S. Green, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 Yale L.J. 488 (1988); J. Rackstraw, *Reaching for Justice: An Analysis of*

Self-Help Prosecution for Animal Crimes, 9 Animal L. 243, 264-265 (2003).

The position taken by these authorities is consistent with this Court's position that perceived "gaps" in criminal justice procedures must be plugged by the legislature, not the judiciary. *Cf. State v. Hughes*, 154 Wn.2d 118, 151-52, 110 P.3d 192 (2005), *overruled on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (the creation by the court of a procedure to empanel a jury on remand to find aggravating circumstances would constitute an improper usurpation of the power of the legislature).

Rather than address the fact that the Washington Constitution and the Washington legislature have both, to the exclusion of private citizens, assigned the charging function to the prosecuting attorney, Ms. Anderlik's brief focuses on this Court's authority to enact procedural rules. *See Petitioner's Brief*, at 22-23. Court rules, however, cannot contravene the constitution. *Auburn v. Brooke*, 119 Wn.2d 623, 632-33, 836 P.2d 212 (1992). The constitution provides that a defendant shall only be charged with a crime in accordance with the framework adopted by the legislature. That framework does not currently provide for citizen complaints or private prosecutors.

Ms. Anderlik also contends that CrRLJ 2.1(c) must be constitutional because other jurisdictions authorize private prosecutions. *Petitioner's Brief*, at 29-31. In making her argument, Ms. Anderlik fails to explain how these

jurisdiction's constitutions, statutes, and history compare with Washington's constitution, statutes, and history. That Ms. Anderlik is attempting to equate apples to broccoli becomes clear when reviewing her discussion of *Commonwealth v. Brown*, 447 Pa. Super. 454, 669 A.2d 984 (1995), *aff'd by equally divided court*, 550 Pa. 580; 708 A.2d 81 (1998).

The *Brown* case involved a separation of powers challenge to Pa. R. Crim. P. 106.²⁰ The Pennsylvania Superior Court did not fully analyze the merits of the claim as the Attorney General's failure to raise the claim in the lower court waived the issue, and the court concluded that it was "not empowered to declare that a rule established by the supreme court violates the separation of powers doctrine." *Brown*, 669 A.2d at 988.

If the *Brown* court had reached the merits of the separation of powers issue, its resolution would shed no light on the constitutionality of CrRLJ 2.1(c) for the simple reason that prosecution in Pennsylvania has a different history than in Washington, and this history includes statutory authorization²¹ for private prosecutions:

In colonial Pennsylvania, crimes were viewed "as an offense against the individual victim[,]" and private prosecutions were the most common mode by which the criminal justice system functioned in the colonial era. Note,

²⁰Pa. R. Cim. P. 106 has been renumbered as Pa. R. Crim. P. 506. *In re Hickson*, 573 Pa. 127, 821 A.2d 1238,1240 n.1 (2003).

²¹*See generally* 16 P.S. § 1409; 16 P.S. § 4408; 16 P.S. § 7710.

The Constitutional Validity of Pennsylvania Rule of Criminal Procedure 133(B)(2) and the Traditional Role of the Pennsylvania Courts in the Prosecutorial Function, 52 U.Pitt.L.Rev. 269, 274 (1990) (hereinafter "*Pennsylvania Courts in the Prosecutorial Function*"). This was consonant with the English common law principle that "the Crown did not supply a public prosecutor to handle routine felonies. The victim or his family was therefore required to hire counsel to bring the guilty party into the criminal justice system." *State v. Atkins*, 163 W. Va. 502, 261 S.E.2d 55, 57 (W. Va. 1979). In fact, the victim served a multi-function role, in which he apprehended, prosecuted, and sometimes even jailed the accused. *Pennsylvania Courts in the Prosecutorial Function*, *supra*, 52 U. Pitt. L. Rev. at 274.

In the post-Revolutionary era, the state, as the representative for society as a whole, began to be seen as the injured party in criminal matters, and the role of the government in prosecuting criminal matters began to grow; ultimately, the Pennsylvania Legislature established the office of district attorney in 1850. *See id.* at 275. Yet, with this shift in how crimes were generally prosecuted, a citizen's right to pursue his victimizer in criminal courts via a private criminal complaint was never abolished in this Commonwealth. Rather, the Legislature enshrined it in statutory enactments, *id.*, and later, this court provided an avenue via the predecessor to Rule 106.

Hickson, 821 A.2d at 1244. Just as substituting broccoli for apples in a pie recipe results in an inedible mess, Ms. Anderlik's analysis falls flat.

Finally, even with its statutory and historical basis for citizen complaints, Pennsylvania still empowers the prosecuting attorney to dismiss a private criminal complaint after it is filed. *See Commonwealth v. Michaliga*, 2008 PA Super 78, 947 A.2d 786, 794 (2008); *In re Private Crim. Complaint of Wilson*, 2005 Pa. Super 211, 879 A.2d 199, 211-12 (2005). When a

prosecutor disapproves of a private criminal complaint on policy grounds, the prosecutor's decision will only be overridden if the complainant can "demonstrate the district attorney's decision amounted to bad faith, fraud or unconstitutionality." *Id.* at 215. "Bad faith" in this context requires a showing that the action under review was undertaken with a dishonest or corrupt purpose. *Michaliga*, 947 A.2d at 794 (adopting Judge Cappy's definition from *Commonwealth v. Brown*, 550 Pa. 580, 708 A.2d 81 (1998)).

Ms. Anderlik makes no showing that the Spokane County Prosecuting Attorney's decision to not file charges was made fraudulently, unconstitutionally, or was undertaken with a dishonest or corrupt purpose. Accordingly, the district court's denial of her citizen complaint must be affirmed.

F. THE INITIAL GRANTING OF TWO CITIZEN COMPLAINTS IN THIS CASE CONSTITUTED AN ABUSE OF DISCRETION

CrRLJ 2.1(c)(7) specifically mandates that a judge considering a petition for a citizen complaint consider the prosecution standards contained in RCW 9.94A.411. This statute contains numerous, non-exclusive grounds that justify a decision not to prosecute a charge that is supported by probable cause. When the representative of the Spokane County Prosecuting Attorney's Office attempted to discuss the absence of any criminal records and other factors, the trial court judge essentially terminated the policy discussion by

indicating that she was only concerned that the record contained the facts. RP (01-22-2007) at 19. These policy decisions, however, are critical to any charging decision.

Although Ms. Anderlik contends that “budgetary triage and political expediency” should not be allowed to “cloud”²² the decision to prosecute, the legislature disagrees. *See* RCW 9.94A.411(1)(f) (prosecuting attorney may properly decline to prosecute, even though technically sufficient evidence to prosecute exists, “where the cost of locating or transporting, or the burden on, prosecution witnesses is highly disproportionate to the importance of prosecuting the offense in question”). Ms. Anderlik’s position is also rejected by the National District Attorney’s Association. *See* National District Attorneys Association, *National Prosecution Standards*, Std. 43.6(n), at 130 (2d ed. 1991) (factors to be considered in determining whether the filing of a charge is consistent with the interests of justice is the “[e]xcessive cost of prosecution in relation to the seriousness of the offense”).

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

²²*Petitioner’s Brief*, at 20.

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

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

Howard, 106 Wn.2d at 44.

Here, Ms. Anderlik assembled a proposed case that included one out-of-state fact witness, three out-of-state expert witnesses, and one Bellingham-based expert witness who charges \$150 an hour to testify. D. Ct. File at 169, 376-379. Neither Ms. Anderlik nor the district court judge who initially granted Ms. Anderlik's citizen complaint addressed the cost of bringing these prospective prosecution witnesses to Spokane, or the cost of securing their testimony in order to prosecute this misdemeanor offense. Neither Ms. Anderlik nor the district court judge considered the cost of this prosecution compared to the overall prosecution budget and the number of other offenses

that had to be covered out of that budget.²³ The judge's failure to balance the costs of the proposed misdemeanor prosecution against the entire budget and the public good, constituted an abuse of discretion. *See, e.g., In re Horner*, 151 Wn.2d 884, 895-97, 93 P.3d 124 (2004) (a trial court abuses its discretion by making a decision without considering and balancing all statutory factors); *Kucera v. Dept. of Transportation*, 140 Wn.2d 200, 224, 995 P.2d 63 (2000) (court's refusal to balance the relative interests of the parties and the public constituted an abuse of discretion that requires the vacation of the injunction);

IV. CONCLUSION

The denial of Ms. Anderlik's requested citizen complaint should be affirmed as she lacks standing to bring this appeal and the citizen complaint rule violates the separation of powers doctrine.

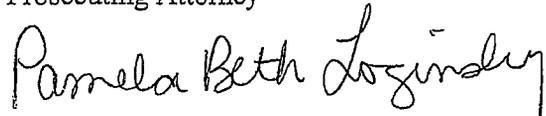
²³In 2006, the Spokane County Commissioners provided the Spokane County Prosecuting Attorney's Office \$609,161.00 for "supplies and services". Spokane County 2006 Annual Budget, at 41. In that same year, 9,504 criminal matters were filed in the Spokane County District Court, 5,071 criminal matters were filed in the Spokane County Superior Court, and 1,630 juvenile offender matters were filed in the Spokane County Superior Court. *See* Administrative Office of the Courts, *Superior Court 2006 Annual Caseload Report*, at 43, 114; Administrative Office of the Court, *Courts of Limited Jurisdiction 2006 Annual Caseload Report*, at 47.

In 2007, the Spokane County Commissioners provided the Spokane County Prosecuting Attorney's Office \$ 624,561.00 for "supplies and services." Spokane County 2007 Annual Budget, at 42. In that same year, 9,274 criminal matters were filed in the Spokane County District Court, 4,841 criminal matters were filed in the Spokane County Superior Court, and 1,668 juvenile offender matters were filed in the Spokane County Superior Court. *See* Administrative Office of the Courts, *Superior Court 2007 Annual Caseload Report*, at 28; Administrative Office of the Court, *Courts of Limited Jurisdiction 2007 Annual Caseload Report*, at 45.

DATED this 19th day of September, 2008.

Respectfully submitted,

STEVEN TUCKER
Prosecuting Attorney

Handwritten signature of Pamela Beth Loginsky in cursive script.

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

**FILED AS
ATTACHMENT TO EMAIL**

**APPENDIX A
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APPENDIX B

Spokane Valley Municipal Code 8.20.030 states that:

The following provisions of the Revised Code of Washington as presently constituted or hereinafter amended are adopted by reference:

RCW:

9.08.030 False certificate of registration of animals – False representation as to breed.

9.08.065 Definitions.

9.08.070 Pet animals – Taking, concealing, injuring, lulling, etc. – Penalty.

16.52.080 Transporting or confining an animal in an unsafe manner.

16.52.100 Confining animals without food or water.

16.52.117 Animal fighting.

16.52.190 Poisoning animals.

16.52.195 Poisoning animals – Penalty.

16.52.207 Animal cruelty in the second degree.

16.52.300 Dogs or cats used as bait.

(Ord. 46 § 17, 2003).

RCW 16.52.207 states that:

(1) A person is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the person knowingly, recklessly, or with criminal negligence inflicts unnecessary suffering or pain upon an animal.

(2) An owner of an animal is guilty of animal cruelty in

the second degree if, under circumstances not amounting to first degree animal cruelty, the owner knowingly, recklessly, or with criminal negligence:

(a) Fails to provide the animal with necessary shelter, rest, sanitation, space, or medical attention and the animal suffers unnecessary or unjustifiable physical pain as a result of the failure;

(b) Under circumstances not amounting to animal cruelty in the second degree under (c) of this subsection, abandons the animal; or

(c) Abandons the animal and (i) as a result of being abandoned, the animal suffers bodily harm; or (ii) abandoning the animal creates an imminent and substantial risk that the animal will suffer substantial bodily harm.

(3)(a) Animal cruelty in the second degree under subsection (1), (2)(a), or (2)(b) of this section is a misdemeanor.

(b) Animal cruelty in the second degree under subsection (2)(c) of this section is a gross misdemeanor.

(4) In any prosecution of animal cruelty in the second degree under subsection (1) or (2)(a) of this section, it shall be an affirmative defense, if established by the defendant by a preponderance of the evidence, that the defendant's failure was due to economic distress beyond the defendant's control.

APPENDIX C

Mass. G.L. c. 218, § 35A states that:

If a complaint is received by a district court, or by a justice, associate justice or special justice thereof, or by a clerk, assistant clerk, temporary clerk or temporary assistant clerk thereof under section 32, 33 or 35, as the case may be, the person against whom such complaint is made, if not under arrest for the offense for which the complaint is made, shall, in the case of a complaint for a misdemeanor or a complaint for a felony received from a law enforcement officer who so requests, and may, in the discretion of any said officers in the case of a complaint for a felony which is not received from a law enforcement officer, be given an opportunity to be heard personally or by counsel in opposition to the issuance of any process based on such complaint unless there is an imminent threat of bodily injury, of the commission of a crime, or of flight from the commonwealth by the person against whom such complaint is made. The court or said officers referred to above shall consider the named defendant's criminal record and the records contained within the statewide domestic violence record keeping system maintained by the office of the commissioner of probation in determining whether an imminent threat of bodily injury exists. Unless a citation as defined in section 1 of chapter 90C has been issued, notice shall also be given of the manner in which he may be heard in opposition as provided herein.

The court, or said officer thereof, may upon consideration of the evidence, obtained by hearing or otherwise, cause process to be issued unless there is no probable cause to believe that the person who is the object of the complaint has committed the offense charged.

The term district court as used in this section shall include the Boston municipal court department and the juvenile court department.

PROOF OF SERVICE

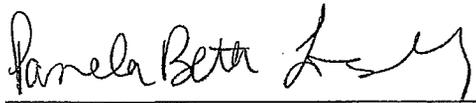
I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On the 19th day of September, 2008, I e-filed a copy of the document to which this proof is attached with the Washington Supreme Court by sending this document to supreme@courts.wa.gov.

A copy of this document was served by e-mail on counsel for Chris Anderlik, Adam Karp, by sending this document to Mr. Karp at adam@animal-lawyer.com.

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

Signed this 19th day of September, 2008, at Olympia, Washington.



Pamela B. Loginsky, WSBA 18096

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