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Supreme Court of Washington
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Ref: Order 25700-A-1373
Re: Opposition to Repeal of CrRLJ 2.1(c)

Justices of the Supreme Court of Washington—

I am an attorney with the Animal Legal Defense Fund (ALDF)—a nonprofit attorney organization formed in 1979 and dedicated to protecting and advancing the interests of animals through the legal system. ALDF operates nation-wide, with just under 4,000 members in Washington; 71 members of the Washington State Bar have opted into our network of pro bono animal lawyers. ALDF works with stakeholders across the justice system to ensure that crimes against animals are taken seriously and resolved in line with the principles of justice embodied in our legal system. In the course of these efforts, we work closely with law enforcement, prosecutors, victim rights attorneys, judges, and others throughout Washington.

ALDF opposes the proposal that this Court eliminate Criminal Rules for Courts of Limited Jurisdiction (CrRLJ) 2.1(c). Methods for private involvement in criminal complaints such as CrRLJ 2.1(c) are a long-established, constitutionally legitimate feature of many state systems. CrRLJ 2.1(c)'s fate is, therefore, ultimately a policy decision. While acknowledging that certain citizens may at times misunderstand the operative rule, or attempt to bring frivolous claims pursuant to it, we observe that this is true of the law in general—and that having CrRLJ 2.1(c) is a better policy choice than not.

It is important to be clear about what CrRLJ 2.1(c) and analogous rules in other states do. These rules simply offer a means by which crime victims and other relevant parties may participate in initiation of criminal complaints alternative to the usual method of reporting the mater to law enforcement. CrRLJ and its brethren do not enable privately maintained prosecutions, nor offer private parties unilateral authority to commence criminal proceedings, nor provide private parties a veto over how public prosecutors choose to weigh factors such as mercy and individualized justice in resolving charged cases—or any control over how prosecutors choose to resolve charged cases at all.[1]

Nor is CrRLJ 2.1(c) anomalous. More than twenty-three states have codified the common law tradition of private parties playing a role in the avenues by which criminal complaints may be initiated.[2] The jurisprudential history grounding these rules is venerable. For Washington, the common law rule allowing for private parties to participate in the initiation of criminal cases, eventually codified as CrRLJ 2.1(c), predates the state itself.[3]

CrRLJ 2.1(c) and its brethren have not in general been struck on constitutional grounds. Indeed, in the case of CrRLJ 2.1(c), earlier iterations of similar rules—that were operative during the period when the Washington Constitution was drafted—allowed crime victims and other private parties to seek initiation of

[1] *See Stout v. Felix*, 198 Wash. 2d 180, 188 (2021) (CrRLJ 2.1(c) requires judicial authorization before a private party can sign and file the criminal complaint that initiates criminal proceedings).
[2] *See*, NATIONAL CRIME VICTIM LAW INSTITUTE (NCVLI), FIFTY STATES AND D.C. SURVEY OF LAWS THAT AUTHORIZE OR RECOGNIZE PRIVATE CITIZEN-INITIATED INVESTIGATION AND/OR PROSECUTION OF CRIMINAL OFFENSES, https://law.lclark.edu/live/files/26911-50-states-victim-initiated-investigation (2018) (noting twenty two states with such rules); *see also* CALIFORNIA CORPORATIONS CODE § 10404 (nonprofit animal protection organizations authorized to proffer criminal complaints regarding crimes against animals; this animal-specific law is not counted in the NCVLI national summary). The common law right of crime victims to engage with prosecution is notably broader than the process as codified in CrRLJ 2.1(c): at common law, a victim (or the victim's family) may retrain private counsel to prosecute the case themselves. *Cantrell v. Commonwealth*, 229 Va. 387, 392 (1985) (discussing "the right of a citizen to hire a private prosecutor[as] rooted in the early common law….").
[3] See Kenneth L. Wainstein, *Judicially Initiated Prosecution: A Means of Preventing Continuing Victimization in the Event of Prosecutorial Inaction*, 76 CAL.L.REV. 727, 751 (1988) ("Although public prosecution is the norm in most criminal proceedings, this country has a strong and continuing tradition of criminal prosecution by private parties. Private parties, in fact, prosecuted all criminal cases in English and American common law…").

criminal proceedings. This counsels that private party involvement does not conflict with such bedrock constitutional principles as separation of powers. The Wisconsin Supreme Court's analysis in a similar line of inquiry is instructive:

> [Defendant] relies heavily on . . . the proposition that discretion to charge or not in a criminal case is exclusively an executive power . . . . assert[ing] that the procedure [relied upon by a sexual assault victim in petitioning a judge to initiate charges against her alleged assailant] provided by the statute violates the doctrine of separation of powers . . . . We may confidently presume that the framers were familiar with, and earnestly concerned about, the question we address in this case: the proper procedure for initiation of criminal actions. In this circumstance, we find especially persuasive the fact that the same procedure we review today was in use in 1848, and was presumably considered constitutionally sound by the framers themselves.[4]

Similarly, for Washington, rules regarding private party involvement in criminal case initiation akin to CrRLJ 2.1(c) were in place during the era when the Washington Constitution was ratified.[5] Notably, given the evident familiarity of private prosecutorial conduct during the framing era, the Washington Constitution does not itself bar private participation in initiation of charges, nor explicitly restrict such activity to prosecutors. In short, in merely providing Washingtonians with the option to seek initiation of criminal charges by petitioning the court, the limited scope of CrRLJ 2.1(c) does not generate separation of powers conflicts.

It remains then to ask whether as a policy matter CrRLJ 2.1(c) should go unchanged, be modified, or be abolished entirely? While acknowledging that CrRLJ 2.1(c) can—like most laws—be put to spurious use,[6] it is critical to acknowledge the legitimate purposes underlying the rule. CrRLJ 2.1(c) and similar laws that provide avenues for private party involvement in initiating

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[4] *State v. Unnamed Defendant*, 150 Wis. 2d 352, 358-362 (1989).
[5] *See e.g.* Ballinger Code §6695 (1897) (authorizing private parties to petition court for issuance of criminal warrants).
[6] While the circumstances giving rise to *Stout v. Felix* exemplify this sort of bad-faith usage specific to CrRLJ 2.1(c), Washington courts have seen similar attempts to deploy other laws in bad faith. *E.g. Clark County v. Darby*, No. 49023-4-II (Washington Court of Appeals, 2017) (in which Darby filed various motions in a tax case, attempting to bend the law to fit his sovereign citizen ideology).

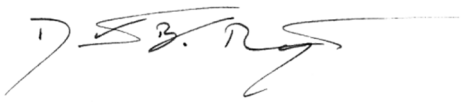
criminal charges have particular utility in scenarios where victims of crime (including animals) occupy a place of lower social or political power compared to the alleged offender, and declined charges are framed not as an exercise of prosecutorial discretion, but rather as a matter of law. Pennsylvania's *Commonwealth v. Benz* is illustrative. There, an argument between the victim and an off-duty police officer cumulated in the officer shooting the victim in the head.[7] Despite a coroner's inquest recommending manslaughter charges against the officer, the prosecutor's office declined to charge on their "ultimate determination . . . that no crime had been committed."[8] The victim's mother then invoked Pennsylvania's analog to CrRLJ 2.1(c), asking the court to review her affidavit in support of a criminal complaint.[9] The court found the fact pattern presented prima facie evidence of a crime, and thus the prosecution's erroneous claim that charges were *impossible as a matter of law* would not bar the complaint from issuing.[10] On review, the Pennsylvania Supreme Court affirmed: because the prosecutor had framed declination to charge as a matter of law rather than policy (1) not only was no separation of powers issue implicated,[11] but (2) the process of the court being able to review a private affidavit for legal sufficiency supporting a criminal complaint was the system working as intended.[12]

Similarly, CrRLJ 2.1(c) provides Washington citizens with an avenue to address crimes when legally unsupportable rationales are used to decline vindicating the interests of crime victims. While such legal tools may at times be misused by bad-faith actors, they have also historically been the refuge of crime victims whose suffering was otherwise shunted aside on specious grounds. We

[7] *Commonwealth v. Benz*, 523 Pa. 203, 205 (1989).
[8] *Commonwealth v. Benz* at 208 n.4.
[9] *Commonwealth v. Benz* at 207.
[10] *Commonwealth v. Benz* at 210. The Superior Court issued charges. *Id.*
[11] *Commonwealth v. Benz* at 208 n.4.
[12] *Commonwealth v. Benz* at 209-10; *see also Commonwealth v. Benz* at 211-13 (concurrence, arguing that effective judicial review of the prosecutor's decision not to charge as a matter of law was sound policy).

do not believe frivolous legal action by some Washingtonians should result in a beneficial option being removed from the legal toolkit available to all Washingtonians. Narrowing access to justice due to the bad-faith acts of the few cannot be the proper conclusion. Rather, if this Court seeks to restrict bad-faith usages of CrRLJ 2.1(c), we urge amendment of the rule to reduce frivolous complaints, while preserving the ability of the rule to support equitable access to justice.

Sincerely,



-David B. Rosengard
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From: OFFICE RECEPTIONIST, CLERK
To: Linford, Tera
Subject: FW: Comment re Order No. 25700-A-1373
Date: Monday, May 2, 2022 11:04:37 AM
Attachments: CrRLJ 2.1c - ALDF Comment.pdf

From: David Rosengard [mailto:drosengard@aldf.org]
Sent: Saturday, April 30, 2022 11:35 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment re Order No. 25700-A-1373

Attached please find a comment from the Animal Legal Defense Fund in opposition to the proposed repeal of CrRLJ 2.1(c).

Per Order No. 25700-A-1373, this comment is of less than 1.5k words (not inclusive of address information) and has been sent by email to the Supreme Court of Washington no later than April 30, 2022.

With thanks,
-David

David B. Rosengard (he/his/they) | Managing Attorney, Criminal Justice Program
Animal Legal Defense Fund | aldf.org
David B. Rosengard

ANIMAL LEGAL DEFENSE FUND