Branch No. 6

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.

Petitioner.

IN RE: Wis. Stat. §968.02(3) Complaint

Case No. 2022JD000009

PETITIONER'S MOTION FOR RECONSIDERATION OF THE NON-FINAL DECISION AND ORDER OF OCTOBER 12, 2023

I. Introduction

On October 12, 2023, the Honorable Nia Trammell issued a non-final Decision and Order in this action pursuant to Wis. Stat. § 968.02(3), following the District Attorney's refusal to prosecute, which, based on the evidence from the *ex parte* hearing, as required by the statue, properly found probable cause to believe that violations of Wisconsin's cruelty-to-animals statutes occurred and that, therefore, the Judge was authorized to allow a complaint to issue and to appoint a special prosecutor.[1]

[1] The Decision and Order (Dkt. 90) incorrectly states in footnote 3 that Petitioner PETA argued that the Judge did not have discretion in considering the issuance of a complaint, and rather that she was required to do so upon a finding of the two threshold requirements of refusal and probable cause, citing *State v. Schober*, 167 Wis. 2d 371, 381-384, 481 N.W.2d 689 (Ct. App. 1992). However, PETA did not make or even imply such an argument. Rather, PETA argued that the Judge's discretion must be *exercised* consistent with well-established legal principles. *See e.g.* Dkt. 87, p. 3 ("In exercising discretion to permit the filing of a complaint, a judge must not consider exculpatory evidence, potential affirmative defenses, or

The Judge exercised her discretion and refused to permit prosecution, but in doing so improperly gave *dispositive* weight to unsworn, out-of-court, anonymous assertions made by the putative defendants or person(s) associated with them, which were submitted by third parties outside of and following the *ex parte* hearing, despite the fact that the statute dictates an *ex parte* record, consistent with the long-standing jurisprudence of probable cause proceedings in Wisconsin as well as elementary evidentiary principles. This motion respectfully requests reconsideration of the refusal to permit prosecution, which Petitioner believes is based on a manifest error of law.[2] (Dkt. 87, pp. 30-31).

II. Legal Standard

A "circuit court possesses inherent discretion to entertain motions to reconsider 'nonfinal' pre-trial rulings." *Bauer v. Wisconsin Energy Corp.,* 2022 WI 11, ¶13, 400 Wis. 2d 592, 970 N.W.2d 243. To prevail on a motion for reconsideration a party must present either "newly discovered evidence or establish a manifest error of law or fact." *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129 ¶ 44, 275 Wis. 2 397, 685 N.W.2d 853. Manifest error means "more than disappointment or umbrage with the ruling"

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controlling facts and inferences…"). As was held in *State v. Schober*, "the John Doe proceeding does not turn the John Doe magistrate into some kind of super-prosecutor with the power to mandate continuing the legal process to jury verdict. Instead, the magistrate must be 'neutral and detached' and his or her 'power' is limited to determining only 'probable cause.'…the John Doe proceeding can[not] be equated with a denial of a prosecutor's motion to dismiss in the public interest…**Wisconsin case law is replete with instances where the appellate courts have ruled that judges hearing probable cause determinations may not weigh inculpatory evidence against evidence supporting the defendant, may not delve into the credibility of witnesses, and may not choose between conflicting facts and inferences…the limitations upon the John Doe judge are at least as great as those of the magistrate hearing the probable cause determination after a formal complaint is issued by the district attorney.** We have no hesitancy in declaring that the John Doe proceeding inherently fails to account for the public interest beyond the requirement of probable cause." *Id*. at 381-82. (emphasis added.)

[2] Petitioner recognizes that the Judge applied the proper legal standard on the proper evidentiary record in consideration of whether probable causes exists to charge the putative defendants, and does not dispute that finding.

and requires a "heightened showing of 'wholesale disregard, misapplication, or failure to recognize controlling precedent.'" *Bauer*, 400 Wis. 2d 592, ¶ 14. "Stated differently, a manifest error is 'that self-evident kind of error which results from ordinary human failings due to oversight, omission, or miscalculation…and which tends to immediately reveal itself as such to reasonable legal minds." *Sullivan v. Lucky 239, LLC*, 2022 WI App 1, ¶19, 968 N.W.2d 875. (internal quotation marks, brackets, and citation omitted.) A discretionary decision is sound if it "examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a reasonable conclusion." *Id.* at ¶17.

III. The "Factual" Findings that the Judge Used to Exercise Her Discretion Were Not in the Evidentiary Record in Clear Contravention of the Law.

The dispositive findings of fact that are cited in support of the decision to decline prosecution in this matter, despite probable cause to believe that crimes were committed, relied on inferences from outside the record. (Dkt. 90, p. 18, "Without question, the photos and information PETA submitted as evidence shock the conscience and are extraordinarily alarming. The context that unfolded during the proceeding and that emerged through the District Attorney's investigation painted a fuller picture…). Those specific findings were as follows:

- The District Attorney recognized that, while not all, "a large number of primates, at any given time, that are part of studies or approved protocols and procedures and experiments which would create a [statutory] exemption in those situations," and the availability of this potential defense represents a hurdle that any prosecutor would need to overcome. (Dkt. 90, p. 17.)[3]

[3] This finding was supported by the District Attorney's explanation that the animals at issue during the relevant time, Corneluis and Princess, were not used in experimental protocols but simply for breeding. As a result, the District Attorney framed the pertinent question regarding the statutory exemption for cruelty to animals who are enrolled in experimental protocols, as follows:

> "if the breeding process is part of a protocol. I'm not certain that the breeding would be part of a protocol….So there is, you know, some argument there. I'm not certain the argument is as broad as the UW would like it to be, which would cover anything and everything that goes on."

- The District Attorney reported to the Court that, approximately two years after the alleged crimes occurred, the lab allowed him to tour the facility and Cornelius was, at that scheduled time, housed with a handful of primates in "an environment of connected cages which allowed movement throughout those spaces." (Dkt. 90, p. 18.)

- The District Attorney submitted unsigned, unsworn, anonymously written assertions by the putative Defendants, or person(s) associated with them, "which included information on how the animals are cared for, how their housing is kept clean, explanations for the causes of hair loss in primates, and records of Princess' weight throughout her time at WNPRC." (Dkt. 90, p. 18, *citing* Dkt. 85.)

- Putative Defendant Dr. Levine "represented, and PETA does not dispute, that the lab is in good standing with the regulatory bodies overseeing it." (Dkt. 90, p. 18.)[4]

- In 2020, one of those regulatory bodies, OLAW, "investigated WNPRC after receiving a complaint from PETA containing many of the same allegations put forth in this case, and that investigation resulted in no sanctions or reprimands." (Dkt. 90, p. 18.)[5]

(Dkt. 86, pp. 10-11.) While not mentioned in the Decision and Order, the undisputed fact is that at all times pertinent, Princess and Corenlius were used for breeding and were not enrolled in experimental protocols. (Dkt. 42, Tr., pp. 51, 152.)

[4] The Court in making this finding did not define "good standing." The evidence of record shows that the laboratory has been the subject of significant sanctions, repeatedly, from federal regulatory bodies overseeing the facility's compliance with federal regulations. (*See e.g.* Dkt. 42, pp., 83-88, *see also* Hearing Exhibit 19 Stipulated Fines from the USDA for the period between 2015 and 2019 for "handling" violations resulting in "sustained oral and muzzle trauma," numerous hand injuries resulting in amputation of digits, partial digits, a toe, and tongues; "environment" violations including finding a non-human primate "dead in its enclosure. A necropsy showed severe trauma and suggests the animal died acutely with traumatic thoracic injuries;" "watering" violations including dehydration requiring intravenous fluid therapy and, for one non-human primate, death; a housing violation resulting in an escaped and lost animal; and finally, a "feeding" violation where a sickly mouse resorted to cannibalizing another mouse, who himself had meager stomach contents of "hair, paper, and bedding," and both mice ultimately died.) "Institutions see these fines as a cost of conducting business. . . . the USDA actions heretofore have [not] provided a deterrent to institutions to deter their behavior." (Dkt. 42, pp. 86-87)

[5] While this fact is in the record, it is not presented in a vacuum, but rather alongside testimony, again not recognized in the Decision and Order, that OLAW has no field inspectors and OLAW "investigations" are routinely concluded with simple inquiries falling far short of sanctions or reprimands, and most importantly, that OLAW is "not authorized" to "determine whether institutions are compliant with state anti-cruelty statutes." (Dkt. 42, pp. 41-42.)

It is readily apparent that reliance on assertions made anonymously, by unsworn out-of-court persons – the putative defendants or those associated with them - led the Judge to "agree with" the District Attorney "that it would not be prudent to issue a complaint or attempt prosecution in a case such as this where, given the totality of the allegations made and evidence available, it appears it would be difficult for any prosecutor to meet their burden of proof and obtain a conviction on the alleged offenses." (Dkt. 98, p. 18.)

But when the putative defendants' hearsay assertions are given the evidentiary and legal weight to which they are entitled – *zero* – all that remains is a potential exemption (that the District Attorney affords short shrift), an issue of first impression, which, if anything, is good reason in and of itself to permit prosecution, so that the exemption can be tested and there can be certainty for litigants moving forward. *See e.g. State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 26 (recognizing the virtue of addressing a question that is likely to recur but evade review). By relying on assertions of the putative defendants, as funneled in through the District Attorney, not part of the relevant evidentiary record, in the year and a half following the *ex parte* hearing, discretion was erroneously exercised. *See* Wis. Stat. § 968.02(3); *see also Kalal*, 2004 WI 58, ¶ 19 (Because the "statute expressly specifies an ex parte hearing and no right of cross-examination" the putative Defendants "have no right or standing to be heard.")

IV. It is wholesale error for a judge acting as a neutral magistrate in a proceeding under Wis. Stat. § 968.02(3) to use her discretion to credit the anonymous, unsworn statement of a putative defendant over the sworn testimony and photographic evidence[6] submitted in the *ex parte* evidentiary hearing.

A. The Judge's Discretion in Deciding Whether to Permit Prosecution is Not Absolute or Unbounded.

[6] The United State Supreme Court has explained that it is unreasonable to disregard what can be clearly seen in a videotape in favor of testimony. *Scott v. Harris*, 550 U.S. 372, 380-81, 127 S. Ct. 1769, 167 L.Ed.2d 686 (2007).

As the Judge correctly noted, Wis. Stat. § 968.02(3) states that a judge 'may permit' the filing of a complaint" upon finding that a District Attorney has refused to pursue a complaint and upon the judge determining that probable cause exists. However, that discretion is not without limits. "The word 'may,' when used in a statute, usually implies some degree of discretion." *See, eg*., *United States v. Rodgers*, 461 U.S. 677, 706, 103 S. Ct. 2132, 76 L.Ed. 2d 236 (1983). There is always a requirement a court exercise discretion based on an examination of the relevant factual record, a proper legal standard, and a demonstrated rational process to come to a reasonable conclusion. *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698; *State v. Salas Gayton*, 2016 WI 58, ¶ 91, 370 Wis. 2d 264, 285, 882 N.W.2d 459 (the proper exercise of discretion contemplates a reasoned process that "*must depend on facts that are of record* or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards") (emphasis added.) Here, the erroneous consideration of "facts" that were not "of record," is an error affecting the substantial rights of PETA, because they were used to support the determination that prosecution should not commence. *See id*. at ¶ 32.

The Decision and Order recognized and applied the proper legal standard and evidentiary record contemplated by the statute:

> "the judge's consideration of whether probable cause is met here, is statutorily limited to the evidence provided through an ex-parte evidentiary hearing…[meaning] the four corners of the evidence presented at the July 27, 2022 evidentiary hearing."

(Dkt. 90, p. 14.) But without explanation, this proper legal and evidentiary standard is entirely disregarded during the judicial exercise of discretion.

The Decision and Order is devoid of an explanation as to why Petitioner's objection to the consideration of the putative defendants' assertions, in violation of *Kalal*, was apparently overruled. Petitioner explained that Dkt. 85 was anonymously written and therefore implicitly

unreliable, that case law establishes a self-exculpatory note such as Dkt. 85 is inherently unreliable, and "to allow the putative defendants to funnel in arguments and unsigned, unsworn, unverified assertions would turn the principals that underlie a fair and just proceeding on their head," and put PETA "in a *worse* position than if these were a traditional contested case, where it would be required that the laboratory's statements be made in open court, under oath, subject to cross examination, and subject to rebuttal by PETA's witnesses. This could not have been the legislature's intention when it required an *ex parte* record in Wis. Stat. § 968.02(3), as is consistent with probable cause jurisprudence." (Dkt. 90, p. 31.)

B. The Judge Must Exercise Neutral and Detached Judicial Discretion.

Any reviewer would be left to guess why the abandonment of the legal and evidentiary standard took place, such as whether it was because, as the Court earlier stated, it would consider exercising discretion if the District Attorney was unavailable, but not if he refused, to prosecute:

> "[I]f the District Attorney's Office indicates that they are unable to prosecute, they don't make a decision on the merits, then I would consider a different agency, if that makes sense? So if he doesn't think that there's probable cause to move forward, this Court would not refer to a different agency for a refresh review, if that makes sense?...If there's a probable cause finding [made by the District Attorney], I would see no reason to refer it to someone else for another look…I think if our District Attorney in our jurisdiction reaches a decision, I'm going to trust that decision."

(Dkt. 79, p. 5-6.)

It is clear, however, from *State v. Schober*, 167 Wis. 2d 371, 381-384, 481 N.W.2d 689 (Ct. App. 1992), that a judge acts with judicial and not prosecutorial discretion. And, it is clear from *Kalal v. Cir. Ct. for Dane Cnty*., 2004 WI 58, ¶ 8, that Wis. Stat. § 968.02(3) is not to be interpreted in a way that defeats the statutory procedure – such as would clearly occur if Judges decided they would only exercise discretion to permit prosecution to move forward if the District Attorney was unavailable, despite the statute contemplating discretion in cases of *refusal* in

addition to unavailability. The refusal to exercise discretion when required is an abuse of discretion.

C. Longstanding Legal and Evidentiary Principles Underscore the Error in the Judge's Dispositive Reliance on Out-Of-Court Assertions.

The error in applying dispositive reliance on out-of-court assertions of a putative defendant, even if funneled into the courtroom through the District Attorney, is buttressed by longstanding legal and evidentiary principles, over and above the direct "*ex parte*" mandate of the statute and the clear directive of *Kalal*. Judges sitting as neutral magistrates on probable cause issues are generally required to base decision-making on information supported by oath or affirmation, though that oath or affirmation need not take any particular form. *State v. Moeser*, 2022 WI 76, ¶ 18, 405 Wis. 2d 1, 982 N.W.2d 45, *cert. denied*, 143 S. Ct. 612 (2023); *see also State v. Ward*, 2000 WI 3, ¶26, 231 Wis. 2d 723, 604 N.W.2d 517; *State v. Hess*, 2010 WI 82, ¶ 60, 327 Wis. 2d 524, 785 N.W. 2d 568 (2010). A judge who acts on facts "without the facts being properly presented" does so in error, because the judge's act lacks "basis in fact or law." *Hess*, at ¶ 60-62.

The case law that analyzes standard probable cause proceedings concentrates on the prosecutor/complainant/police officer's information being sworn, precisely because the putative defendant generally does not provide information to the Court until after a complaint is filed. Likewise, the standard of review in probable cause hearings, like Wis. Stat. § 968.02(3) contemplates, are limited in scope to a study of the facts contained in the sworn information supporting probable cause and the reasonable inferences that could be drawn therefrom, and prohibits reliance on outside facts including those the Judge could supply based on his own, subjective, experience. *See State v. Ward*, 2000 WI 3, ¶25-26, 231 Wis. 2d 723, 604 N.W.2d 517.

It is an elementary legal principal in most all applications that hearsay, "due to its second hand nature, is inherently suspect," and "**a determination based solely on hearsay can never be**

more than conjecture." *Gehin v. Wisconsin Grp. Ins. Bd.*, 2005 WI 16, ¶ 58, 278 Wis. 2d 111, 135–45, 692 N.W.2d 572, 583–89. (emphasis added.) Even administrative agencies who are free to make findings on "substantial evidence," free from the rigors of "technical evidentiary rules," cannot "go so far as to justify administrative findings that are not based on evidence having rational probative force." *Id.* at ¶54. *Gehin* upheld "the long-standing rule in Wisconsin…consistently followed for 65 years…that uncorroborated hearsay alone does not constitute substantial evidence [even] in administrative hearings. The rule balances competing concerns about the administrative expediency and fundamental fairness." *Id*. at ¶ 81, *see also* ¶ 70 ("the bench and bar would be scandalized if this Court should approve the receiving of evidence of ex parte, unsworn statements…") (citation omitted.). This concern is even more pressing when the unsworn statements relied upon are not of an independent, third-party, but the putative defendants with a direct interest and motive to minimize their responsibility and conduct, as is the case here.

The Decision and Order makes clear that the Judge credited the laboratory's anonymous hearsay assertions to any extent that they were contrary to the highly-credentialed independent experts' sworn testimonial evidence that was supported by graphic photographs of the cruel conditions that Cornelius and Princess were made to endure. And in so doing, the Judge "made assumptions that cross-examination might well have undermined." *Crawford v. Washington*, 541 U.S. 35, 66, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004). In declining to follow the standard evidentiary, statutory, and case law requirements, and apparently accepting these assertions as reliable, the Judge up-ended established law and allowed "unpredictable and inconsistent

application" of justice,[7] because, as the U.S. Supreme Court has noted, "[r]eliability is an amorphous, if not entirely subjective concept." *Id*. at 64-66.[8]

In sum, not only does Wis. Stat. § 968.02(3) instruct that the Judge serve as a neutral magistrate and make findings on an *ex parte* evidentiary record, but the well-established principles of evidence and legal standard and procedure applied to probable cause proceedings also dictate that discretion is not properly exercised when based on anonymous hearsay assertions. There is nothing in the Decision and Order to explain why the Judge deviated from the requirements of the statute and the applicable rules and principles, which Petitioner contends is manifest error.

[7] For example, the Decision and Order found that prosecution was not warranted, in part, because of crediting the laboratory's "explanations of the [medical] causes of hair loss in primates," (dkt. 90, p. 18, *citing* Dkt. 85), despite the sworn expert opinions that the hair loss was abnormal and distressing **behavioral** plucking (dkt. 90, p. 12), as recognized and admitted by the laboratory's official contemporaneously made records:

Alopecia - rh2519

More Actions

DATE(Date) >= Wed May 28 2014 00:0...

Id	Date	Alopecia Score	Cause	Head	Shoulders	Upper Arms	Lower Arms	Hips	Rump	Dorsum	Upper Legs	Lower Legs	Other	Remark
rh2519	2017-06-20 11:08	4	Behavioral	Yes	No	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	lower left dorsum, tail base
rh2519	2017-01-10 10:47	3	Behavioral	No	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	No	
rh2519	2016-07-28 11:35	4	Behavioral	No	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	No	
rh2519	2016-01-05 10:26	4	Behavioral	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	back of head, lower dorsum
rh2519	2015-10-22 10:30	4	Behavioral	Yes	Yes	Yes	No	Yes	Yes	No	Yes	Yes	No	
rh2519	2015-07-21 09:25	3	Behavioral	No	Yes	Yes	Yes	No	No	No	Yes	Yes	No	
rh2519	2015-01-08 10:10	3	Behavioral	No	Yes	Yes	No	No	No	Yes	Yes	Yes	No	
rh2519	2014-07-03 10:25	3	Behavioral	No	No	Yes	Yes	No	No	No	Yes	Yes	No	
rh2519	2014-06-19 10:07	3	Behavioral	No	No	Yes	Yes	No	No	No	Yes	Yes	No	
rh2519	2014-06-05 09:51	4	Behavioral	Yes	No	Yes	Yes	No	No	No	Yes	Yes	No	

[8] The fact that Dkt. 85 was funneled into the Courtroom through the District Attorney is of no weight. Id. ("The Framers would be astounded to learn that ex parte testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers.")

Because the lack of explanation would evade review even by supervisory writ, Petitioner respectfully requests that if the motion for reconsideration is denied, the Judge provide explanation as to why she would cast aside the proper exercise of her role and why she would credit an unsworn, out-of-court, anonymous statement from the putative defendants or their representative over the in-court sworn testimony of Petitioner supported by photographic evidence and the putative defendants' own contemporaneous business records.

V. Conclusion

For the above stated reasons, Petitioner respectfully requests this court reconsider its decision and allow the filing of a criminal complaint and appointment of a special prosecutor based on record evidence.

Dated: November 1, 2023

People for the Ethical Treatment of Animals, Inc.

By

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Electronically Signed By Lisa C. Goldman

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