Branch No. _____

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

ALLIANCE FOR ANIMALS
P.O. Box 1632
Madison, WI 53701,

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS
501 Front St.
Norfolk, VA 23510,

Petitioners.

Case No. _____
Unclassified: 30703
Injunctive Relief: 30704

Brief in Support of Petition to Circuit Court Judge for Relief Pursuant to Wis. Stat. § 968.02(3)

Pursuant to Wis. Stat. § 968.02(3), the Petitioners hereby move the Circuit Judge to permit the filing of a complaint against the Defendants, all affiliated with the University of Wisconsin's decompression research conducted on sheep. The District Attorney has determined that strict liability Crimes Against Animals are being committed by the University of Wisconsin-Research Animal Resources Center in violation of Wis. Stat. § 951.025, which provides in full: "No person may kill an animal by means of decompression." In fact, the UW-Research Animal Resources Center has admitted to the same, stating "There is no dispute that … several animals have died from … decompression sickness." Yet, the DA has refused to prosecute based on his conclusion that "it would not be a wise use of [his] resources." The DA's refusal to prosecute has the obvious result of promoting disrespect for the law. The DA's decision allows research, which consistently and illegally kills 8% or more of the animals involved by means of decompression, to continue without fear of prosecution of even the strict liability forfeiture that the legislature has determined shall be imposed. This is harmful to the morals of the Wisconsin community, as determined by the legislature, and should be remedied by the Circuit Judge.

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Introduction

The Petitioners, Alliance for Animals and People for the Ethical Treatment of Animals, by their attorneys, The Jeff Scott Olson Law Firm, S.C., by Andrea J. Farrell, respectfully request an ex parte hearing and hereby move for the Circuit Judge to permit the filing of a complaint pursuant to Wis. Stat. § 968.02(3)[1].

The grounds for this motion are that (1) there is probable cause to believe that the person being charged has committed an offense, and (2) the district attorney has refused to issue a complaint. When these two thresholds are met, a Circuit Judge may permit the filing of a complaint. Wis. Stat. § 968.02(3).

I. There is probable cause to believe that UW personnel committed violations of Wis. Stat. § 951.025 either directly or as a party to the crime under Wis. Stat. § 939.05.

Probable cause is established when there are facts and reasonable inferences that "allow a reasonable person to conclude that a crime was probably committed and that the defendant is probably culpable." ***State v. Jensen***, 272 Wis. 2d 707, ¶ 95, 681 N.W.2d 230 (Wis. App. 2004). The facts are not viewed "in a hypertechnical sense but in a minimally adequate way through a commonsense evaluation by a neutral judge making a judgment that a crime has been committed." *Id*. "[T]he complaint will be held sufficient if it contains enough information to allow a fair-minded magistrate to

[1] Wis. Stat. § 968.02(3) provides: "If a district attorney refuses or is unavailable to issue a complaint, a circuit judge may permit the filing of a complaint, if the judge finds there is probable cause to believe that the person to be charged has committed an offense after conducting a hearing. If the district attorney has refused to issue a complaint, he or she shall be informed of the hearing and may attend. The hearing shall be ex parte without the right of cross-examination."

reasonably conclude that the charges are not simply capricious, and that further proceedings against the defendant are justified." ***State ex rel. Cornellier v. Black***, 144 Wis.2d 745, 760-761, 425 N.W.2d 21 (Wis. App. 1988).

a. Wis. Stat. § 951.025 prohibits killing an animal by decompression, and there is no dispute that the defendants have killed animals by means of decompression.

Wisconsin Chapter 951 defines *Crimes Against Animals*. Wis. Stat. § 951.025, entitled *Decompression prohibited*, provides in full: "No person may kill an animal by means of decompression." Any person in violation of Wis. Stat. § 951.025 is subject to a Class C forfeiture, unless the violation was intentional or negligent, in which case the person is guilty of a Class A misdemeanor. Wis. Stat. § 951.18. Any person who, within the last three years, has killed an animal by means of decompression is subject to prosecution under Wis. Stat. § 951.025. Wis. Stat. § 939.74(1).

The University of Wisconsin's Chief Campus Veterinarian, Janet Welter, has reported that three sheep in the past three years (out of 35 used in the decompression studies in the same period of time) have been killed by means of decompression. (A:71.)[2] (The other 32 animals reportedly either lived or died by means of legal and humane euthanasia.) (A:71.) Moreover, counsel for the Defendants, Attorney Ben Griffiths, has reported that there "is no dispute that in the course of certain research studies conducted at the University several animals have died from symptoms commonly associated with the decompression sickness." (A:21:¶2.)

[2] The citation format is Exhibit Letter:Page Number. If the document lends itself to a more pinpoint cite, such as paragraph, that is denoted last.

Furthermore, the Dane County District Attorney has already determined that there is probable cause to believe that the University violated the law when it killed animals by decompression. By letter dated October 2, 2009, also addressed to the Petitioners, District Attorney Brian Blanchard stated:

> Three sheep out of 303 died in the hyperbaric chamber over the last 10 years, and during the same period an additional 23 sheep unexpectedly died within 24 hours of being removed from a chamber without having been humanely euthanized. Over the last three years, one out of 35 sheep has died in the pressure chamber. Two others died within the first 24 hours, after first appearing clinically normal.

(A:165.)

District Attorney Blanchard then concludes:

> If the death of each sheep by means of decompression does not qualify as a forfeiture violation, one is hard pressed to imagine what conduct, not intentional or negligent, would fit the definition of a forfeiture violation. No intent whatsoever is required. The plain terms of the substantive statue and its penalty provision ban any practice that kills by this means.

(A:170:¶5)

Hence, there really is no question as to probable cause. Nevertheless, for the sake of thoroughness, the factors are considered below.

> A criminal complaint is a self-contained charge that must set forth facts within its four corners that are sufficient, in themselves or together with reasonable inferences to which they give rise, to allow a reasonable person to conclude that a crime was probably committed and the defendant is probably culpable. *State v. Haugen,* 52 Wis.2d 791, 793, 191 N.W.2d 12, 13 (1971); *State v. Hoffman,* 106 Wis.2d 185, 197, 316 N.W.2d 143, 151 (Ct.App.1982). To be sufficient, a complaint must only be minimally adequate. This is to be evaluated in a common sense rather than a hypertechnical manner, in setting forth the essential facts establishing probable cause. *Gaudesi,* 112 Wis.2d at 219, 332 N.W.2d at 305. A complaint is sufficient under this standard if it answers the following five questions: "(1) Who is charged?; (2) What is the person charged with?; (3)

> When and where did the alleged offense take place?; (4) Why is this particular person being charged?; and (5) Who says so? or How reliable is the informant?" *White,* 97 Wis.2d at 203, 295 N.W.2d at 350.

State v. Adams, 152 Wis.2d 68, 73-74, 447 N.W.2d 90 (Wis. App. 1989).

b. Who is being charged?

a. As parties to a crime.

Martin T.Cadwallader, William S. Mellon, Eric P. Sandgren, Richard R. Lane, and Janet Welter, by way of their job descriptions, have aided and abetted, counseled and procured their subordinates to cause a violation of Wis. Stat. § 951.025 as parties to crime under Wis. Stat. § 939.05, as follows:

Martin T. Cadwallader serves as the Dean of the Graduate School and, per his position description, is chief research officer. He has held this position since 2002. He is the provost on research and is responsible for the instructional and research environment of the graduate student research and the master's, doctoral, and capstone levels. (C:1-3.)

William S. Mellon serves as the Associate Dean for Research Policy. He has held this position since 2005. He is the campus officer responsible for UW-Madison's animal subjects and research ethics, among other things. He is the direct supervisor of the Director of the Research Animal Resources Center. (C:1, 7-8.)

Eric P. Sandgren is the Director of the Research Animal Resources Center, and has been the acting director since 2005. Dr. Sandgren is responsible for oversight of RARC and the veterinary care of all research animals. He is also responsible for knowledge of all laws and regulations pertinent to the use of animals in research. He

assists the Associate Dean for Research Policy and the campus Animal Care and Use Committees in complying with all state regulations governing research animal health and welfare. (B:1, 3-7.)

Richard R. Lane is the Associate Director of the Research Animal Resources Center and has been since at least 2006. Mr. Lane is ultimately responsible for assisting Director Sandgren with all of his functions. (B:1, 8-11.)

Janet Welter is the Interim Chief Campus Veterinarian and has been since 2006. Dr. Welter is responsible for supervising the laboratory animal veterinarians and laboratory animal veterinary technicians on Campus and developing Campus policy regarding the care and use of animals. She participates with the Animal Care and Use Committees and serves on the All Campus Animal Care and Use Committee. Dr. Welter is responsible for providing expertise on relevant and current compliance regulations and guidelines. (B:1, 12-16.)

b. As direct violators.

Aleksey S. Sobakin[3] of the Department of Surgical Sciences, M.A. Wilson of the Department of Radiology UW Hospital and Clinics, Charles E.Lehner[4] of the

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[3] Aleksey Sobakin served as Lab Manager of the Diving Physiology Lab from August 2005 through 2009. In October 2008, Mr. Sobakin became Co-Principal Investigator. He was responsible for the care and evaluation of the sheep after hyperbaric exposures. (D:1, 10-14.)

[4] Charles Lehner was a Co-Principal Investigator of the Diving Physiology Lab from 1996 through April 2008. He was responsible for conducting the diving physiology research using the sheep model. (D:1, 5-6.)

Department of Surgical Sciences, R. Tass Dueland[5] of the Department of Surgical Sciences, and A.P. Gendron-Fitzpatrick of Comparative Pathology Laboratory Research Animal Resources Center, were directly involved in causing the death of animals by means of decompression as is evident by the published results of their decompression studies, *Oxygen pre-breathing decreases dysbaric diseases in UW sheep undergoing hyperbaric exposure*, UHM 2008, Vol. 35, No. 1 – 02 pre-breathe effects on dysbaric osteonecrosis. (*See* A:4.) In this study, "[s]ixteen adult Suffolk ewes (85-127 kg) with no evidence of clinical lameness and with normal limb bone scans were subjected to a single 24-hour exposure of compressed air in a large, high pressure chamber at the UW Biotron Laboratory." *Id*. at 62. (A:5.) Of these sixteen sheep, "ten survived at least six weeks after hyperbaric exposure, **the other sheep died of "chocks"** or [were] euthanized (control group only required euthanization because of RDCS[6])." *Id*. at 63. (A:6.) (emphasis added.) "Chocks" is "labored breathing or panting, indicative of pulmonary gas embolism [also known as] respiratory decompression sickness." *Id*. at 62. (A:5.) Hence, by virtue of their own published admissions, there is probable cause to believe these researches violated the statue within the past three years.

Additionally, there is probable cause to believe that other members of the Diving Physiology Laboratory, not necessarily published, were direct violators by way of their employment with the University and their job descriptions.

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[5] R. Tass Dueland was Co-Principal Investigator from 1980 through April of 2008. (D:1, 3-4.)

[6] Respiratory Decompression Sickness

Marlowe Eldridge was the Director of the Diving Physiology Lab from January 2008 through 2009, and additionally served as the Principal Investigator from April 2008 through 2009. (D:1.)

David Pegelow was a researcher with the Diving Physiology Lab from April 2009 through the rest of the year, and he assisted with the operation and maintenance of the hyperbaric chamber. (D:1, 17.)

Michael J. Maroney, Doctor of Veterinary Medicine, is the veterinarian who signed the University of Wisconsin – Madison Animal Care and Use Protocol Review Form,[7] Amendment Approval on April 2, 2008, for a study which has the purpose of predicting "the likelihood of fatal outcomes in untreated, rapidly decompressed individuals" and testing the "potential effectiveness of pharmacologic intervention and O2 before decompression known as a 'pre-breathe.'" (A:127-128.) This Protocol form states that:

> "Our Navy research with the UW sheep model has shown the very precipitous high risk of developing lethal cases of DCS[8] associated with prolonged hyperbaric exposures (>24h) at relatively modest pressures followed by escape, to the surface pressure, simulated in the [redacted] hyperbaric chamber. From our analyses of lethal dose pressures from 24-hour hyperbaric exposures, **we have shown a precipitous rise in lethal outcomes with approximately 10% of individuals exposed to 41-fsw pressure for 24 hours or greater. Individuals exposed to the equivalent to 73-fsw pressure face a 90% likelihood of lethal outcome with an ascent to surface**."

(A:129:¶ 7.) (emphasis added.)

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[7] The Animal Care and Use Protocol Forms, also referred to simply as "protocol forms," are completed and approved before any animal research may be initiated.

[8] Respiratory Decompression Sickness.

The Protocol form specifically describes the sheep suffering Respiratory Decompression Sickness as follows:

> "[o]nset can be sudden, with signs developing within 15-20 min after decompression, or the signs can be delayed, with latencies of 1-1/2 to 2 hours. Spontaneous, complete recovery predictably occurs in mild cases. **Fatal collapse can occur abruptly in severe cases**, and severe cases may also undergo a fatal relapse."

(A:136:¶1.) (emphasis added.) Because the decompression of the sheep would not have occurred unless a UW veterinarian reviewed and approved the Protocol, and because Dr. Maroney was the veterinarian who reviewed and approved this Protocol, there is probable cause to believe that Dr. Maroney is directly responsible for the violations of the decompression statute.

Finally, Averi Sauder was an Animal Research Tech who worked under Mr. Sobakin from since July 24, 2007. Mr. Sauder was appointed by Mr. Dueland, and Mr. Sauder was responsible for the "handling of sheep before, during and after experiments." (E:2-3.) Hence, there is probable cause to believe Mr. Sauder is directly responsible for the violations of the decompression statute.

c. What is the person charged with?

Any person in violation of the decompression statute, Wis. Stat. § 951.025 is subject to a Class C forfeiture, unless the violation was intentional or negligent, in which case the person is guilty of a Class A misdemeanor. Wis. Stat. § 951.18.

District Attorney Blanchard has determined that the violations committed by the agents of the UW-Research Animal Resources Center are merely the strict liability

violations, subject to a Class C forfeiture. (A:170:¶¶4-5.) Clearly, this, at the very least, is the case.

However, there is probable cause to believe that intentional violations are occurring. "'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." Wis. Stat. § 939.23. "As glossed by the case law in Wisconsin and elsewhere, this definition is satisfied by conduct carrying a known high risk of the forbidden result even if that result is not desired." ***Planned Parenthood of Wisconsin v. Doyle***, 162 F.3d 463 (7th Cir. 1998).

On the record as it stands, there is an admission of 3 out of 35 sheep being killed by means of decompression in the past 3 years, or just over 8%. (A:71, 165.) The previous studies, stemming back as far as 1988, have predicted these results. (A:11.) Moreover, there is probable cause to believe that a greater number of deaths than reported are actually occurring.

For instance, the University of Wisconsin – Madison Animal Care and Use Protocol Review Form, Amendment Approval signed on April 2, 2008, states that, "Our Navy research with the UW sheep model has shown the very precipitous high risk of developing lethal cases of DCS associated with prolonged hyperbaric exposures (>24h) at relatively modest pressures followed by escape, to the surface pressure, simulated in the [redacted] hyperbaric chamber . . . Individuals exposed to the equivalent to 73-fsw pressure face a **90% likelihood of lethal outcome** with an ascent to surface." (A:129:¶ 7.) (emphasis added.) If the knowledge that carrying on these research studies

involving placing live sheep in decompression chambers will result in a 90% likelihood of lethal outcome, then the agents were aware that their conduct was "practically certain to cause that result."

It should be noted that the information currently available is somewhat limited, as the University is allowed to provide redacted copies of their files, and they understandably charge for copies of files as permitted under the Open Records Act. Upon a criminal investigation, backed with police power, more information could be obtained. Regardless, there is probable cause to believe there are intentional violations of the decompression statute occurring, and obviously, the lesser included charge of a strict liability violation is available.

d. When and Where did the offense take place?

The violations have been taking place at the University of Wisconsin, Madison for at least the past 10 years, and most likely since 1988. (*See* A:11.) However, the only prosecutable violations are those that have occurred in the past three years. Wis. Stat. § 939.74(1). The University of Wisconsin's Chief Campus Veterinarian, Janet Welter, has reported that three sheep in the past three years been killed by decompression. (A:71.)

e. Why are these people being charged?

The people charged were either directly involved in causing the death of animals by means of decompression, or by way of their responsibilities and positions within the University have hired, counseled, or procured their subordinates and graduate students in causing the same.

An individual may be held criminally responsible for acts done in the name of a corporation. ***State v. Lunz***, 86 Wis. 2d 695, 707, 273 N.W.2d 767 (1979). "Since a corporation is an individual existing only in contemplation of the law, its criminal acts are those of its officers and agents; and thus persons in control of a corporation and who knowingly acquiesce to the corporation's [crime] may be personally prosecuted for the criminal act." *Id.*; *see also* ***Oxmans' Erwin Meat Co. v. Blacketer***, 86 Wis. 2d 683, 273 N.W.2d 285 (1979).

II. The District Attorney has issued a refusal to prosecute.

District Attorney Brian Blanchard has issued a refusal to prosecute on October 2, 2009 after an informal investigation. He stated in pertinent part:

> …it is also true that the lowest standard of liability applies to each instance in which a sheep dies as a result of decompression. The objective of this research is survival assessment; the method of the research causes some deaths by decompression. The fact that the deaths are considered adverse experimental events does not mean they are not occurring. If the death of each sheep by means of decompression does not qualify as a forfeiture violation, one is hard pressed to imagine what conduct, not intentional or negligent, would fit the definition of a forfeiture violation. No intent whatsoever is required. The plain terms of the substantive statute and its penalty provision ban any practice that kills by this means. It is irrelevant that Wisconsin's flat prohibition appears to have arisen out of concern about use of decompression chambers as a euthanasia technique, because the plain language of the statute is unambiguous and no purpose other than a flat ban can be read into the statute. The legislature established a per se category of offense, assigned it to the forfeiture level, and decided not to shield bona fide research from its reach, regardless of the degree to which these experiments are scientifically sound and morally justified. Legislators settled on language that goes beyond the euthanasia context. Whether or not the explicit thought ever passed through the mind of any legislator, the legislature decided to use sweeping language that unambiguously prohibits the use of decompression chambers for any use, even peer reviewed scientific research, that kills an animal.

(A:170:¶¶4-6.) Yet, DA Blanchard concluded, "that it would not be a wise use of the resources of this office to pursue a forfeiture violation in court." (A:171:¶3.)

III. Because there is probable cause to believe that crimes have been committed, and the DA has refused to issue a charge, a judge has discretion in the charging function under Wis. Stat. § 968.02(3).

"Admittedly, the district attorney has great discretion in his decision to charge an accused for a given offense or offenses. A district attorney also has great discretion in his negotiation of plea bargains. Neither of these discretions, however, is unfettered." ***State ex rel. White v. Gray***, 57 Wis. 2d 17, 29, 203 N.W.2d 638 (1973). District attorneys must take into consideration "not only the benefit to the public in securing a prompt disposition of the case, but also the importance of a disposition that furnishes the public adequate protection and does not depreciate the seriousness of the offense or promote disrespect for the law." *Id*. at 30. (citation omitted.) (discussing the negotiation of plea bargains).

"[A] complaint charging a person with an offense shall be issued only by a district attorney," unless a judge permits the complaint's filing "if the district attorney refuses or is unavailable to issue" the complaint. ***State v. McKinney***, 168 Wis.2d 349, 355, 483 N.W.2d 595 (Wis. App. 1992). "[A]fter a refusal of the district attorney to initiate prosecution," a judge has discretion in the charging function under Wis. Stat. § 968.02(3). ***State ex rel. Unnamed Petitioner v. Circuit Court for Walworth County***, 157 Wis. 2d 157, 159, 458 N.W.2d 575 (Wis. App. 1990).

a. The purpose of Wis. Stat. 968.02(3) is to provide a check on the district attorney's discretion.

The "initiation of prosecution has traditionally been considered a judicial power." ***State v. Unnamed Defendant***, 150 Wis. 2d 352, 366, 441 N.W.2d 696 (1989). Hence, John Doe proceedings as well as petitions under Wis. Stat. § 968.02(3) are constitutional proceedings which do not violate the separation of powers doctrine. *Id*.

A "district attorney's charging power is not unlimited or unfettered. 'The district attorney in Wisconsin is a constitutional officer and is endowed with a discretion that approaches the quasi-judicial.'" ***State ex rel. Kalal v. Circuit Court for Dane County***, 271 Wis. 2d 633, ¶ 28, 681 N.W.2d 110 (2004). (citation omitted.) "The district attorney's role is 'quasi-judicial' in the sense that it is his or her duty to administer justice rather than simply obtain convictions." *Id*. "A sec. 968.02(3), Stats., proceeding is a check on the district attorney's virtually unfettered discretion to initiate criminal charges." ***Gavcus v. Maroney***, 127 Wis. 2d 59, 71, 377 N.W.2d 200 (Wis. App. 1985).

b. Proceedings under Wis. Stat § 968.02(3) should be open to the public, fair and thorough, and uphold the tradition of judicial fairness and openness of the American system of law.

Section 968.02(3) proceedings based on a district attorney's refusal to issue a complaint "are to be presumptively open to the public and may be closed only upon a showing of a substantial, compelling reason to do so." ***State ex rel. Newspapers, Inc. v. Circuit Court for Milwaukee County***, 124 Wis. 2d 499, 501, n.4, 370 N.W.2d 209 (1985). "[A] section 968.02(3) hearing is designed to be a method of scrutinizing the district attorney's decision to issue a complaint – a decision which the prosecutor usually

makes out of the public eye. Thus the very purpose of the statute – to make possible the examination of the charging process in the rare instance – would be defeated if the procedures were closed for other than compelling reasons." *Id*. at 506.

If one or both of the parties are well known by the judge, a judge from another county may be appointed to consider the petition. ***State v. Unnamed Defendant***, 150 Wis. 2d 352, 356.

A judge holding the proceeding should "conduct a thorough hearing, examine all of the key witnesses and available relevant evidence, and render a dispassionate, unbiased decision on whether probable cause exists." ***State ex rel. Newspapers, Inc. v. Circuit Court for Milwaukee County***, 124 Wis. 2d 499, 506-507.

Upon a finding of probable cause, the judge may first order the district attorney to reevaluate his charging decision, or the judge may simply order the district attorney, or his designee, to file charges. ***State v. Unnamed Defendant***, 150 Wis. 2d 352, 356-57. Or, the judge may "direct[] the filing of a complaint 'consistent with the criminal complaint that is proposed'" and, at the petitioner's request, "order[] the appointment of a special prosecutor." *Id*. at ¶ 12.

c. The accused has no right to participate in the proceeding, request reconsideration, or appeal the judge's use of discretion in a Wis. Stat. § 968.02(3) proceeding.

A Wis. Stat. § 968.02(3) proceeding is not a court proceeding, it is a judicial proceeding, "and there is an express distinction between a judge and a court." ***Gavcus v. Maroney***, 127 Wis. 2d 59, 70, 377 N.W.2d 200 (Wis. App. 1985); citing ***State ex rel. Newspapers v. Circuit Court***, 124 Wis.2d 499, 506. Hence, a judge's order on a petition

brought under Wis. Stat. § 968.02(3) "is not a judgment or order of a circuit court" and hence is not appealable by either party. *Id*. at 70-71. Similarly, because Wis. Stat. § 968.02(3) expressly specifies an ex parte proceeding, it "does not confer upon the person who is the subject of a proposed prosecution the right to participate in any way or to obtain reconsideration of the ultimate decision reached." ***State ex rel. Kalal v. Circuit Court for Dane County***, 271 Wis. 2d 633, ¶ 18. "To the extent that a circuit judge's decision to permit the filing of a complaint under Wis. Stat. § 968.02(3) is legally or factually unsupported, the defendant named in the complaint may seek its dismissal in the circuit court after it has been filed, and may pursue standard appellate remedies thereafter." *Id*. at ¶ 25.

However, the petitioner can get a second kick at the can by a petition for the commencement of a John Doe proceeding pursuant to Wis. Stat. § 968.26. *See* ***State v. Unnamed Defendant***, 150 Wis. 2d 352, 357. Section "968.02(3) allows judges greater discretion: the John Doe judge 'shall' charge upon finding probable cause, whereas a judge under sec. 968.02(3) 'may permit' the filing of a complaint." *Id*. at 366. Moreover, while there is no right to appeal, the supervisory writ procedure is available "in limited circumstances to obtain review of a judge's decision under [§ 968.02(3)]." ***State ex rel. Kalal v. Circuit Court for Dane County***, 271 Wis. 2d 633, ¶ 21.

d. The district attorney could moot this petition by issuing any criminal charge for these violations.

Once a district attorney brings a charge, a judge does not have the authority "to order the district attorney to file a different or additional charge than the charge or

charges already brought." ***State ex rel. Unnamed Petitioner v. Circuit Court for Walworth County***, 157 Wis. 2d 157, 159.

e. The judge has an important role, after a district attorney issues a refusal, to determine if probable cause exists and then use judicial discretion to uphold the full effect of the law by permitting the issuance of a complaint.

> By its terms, Wis. Stat. § 968.02(3) requires the circuit judge to make two determinations prior to authorizing the issuance of a complaint: 1) that "the district attorney *refuses* or *is unavailable* to issue a complaint;" and 2) that "there is probable cause to believe that the person to be charged has committed an offense." The statute contemplates an exercise of discretion by the judge following these threshold determinations: the statute says the judge "may permit" the filing of a complaint. Wis. Stat. § 968.02(3).

State ex rel. Kalal v. Circuit Court for Dane County, 271 Wis. 2d 633, ¶ 6. In this case there is no question as to whether either prong has been met. There has been an admission of guilt, and an express refusal to prosecute.

"A hearing conducted under this statute is not only a check upon the prosecutor's decision not to file charges; additionally, it is a check performed under the tradition of judicial fairness and openness that our American system of law provides." ***State ex rel. Newspapers, Inc. v. Circuit Court for Milwaukee County***, 124 Wis. 2d 499, 507.

This function of the a judge is especially important in cases where there is more than sufficient showings of probable cause, but the district attorney nonetheless refuses to issue a complaint. Wis. Stat. § 968.02(3) does not appear from Wisconsin case law to be a commonly used vehicle to justice; however, a common theme in cases where it is used is that the accused is a popular or powerful party, much like the University of

Wisconsin here. *See* ***State v. Unnamed Defendant***, 150 Wis. 2d 352, 441 N.W.2d 696 (1989) (Complaint issued by judge via Wis. Stat. § 968.02(3) after the DA refused to bring charges because he did not believe that he would be able to establish guilt beyond a reasonable doubt against the defendant, who was well known to members of the local legal community); ***State ex rel. Newspapers, Inc. v. Circuit Court for Milwaukee County***, 124 Wis. 2d 499, 501-02, 370 N.W.2d 209 (1985) (Complaint issued by judge via Wis. Stat. § 968.02(3) after the DA refused to bring charges, "not on the basis of lack of probable cause but upon his perceived inability to prove guilt at trial," against two professional football players who were allegedly sexually assaulted a female dancer in the dressing room of a Milwaukee nightclub); ***State ex rel. Kalal v. Circuit Court for Dane County***, 271 Wis. 2d 633, 681 N.W.2d 110 (2004) (Judge directed the filing of a complaint via Wis. Stat. § 968.02(3) when the DA failed to issue a charge for a period of time, and then told the petitioner that she "was free to proceed legally in whatever manner she believed necessary," against her employer, a local law firm, that she accused of stealing funds earmarked for her retirement account.)

The accused here are agents of the University of Wisconsin, clearly a popular, powerful, and persuasive entity in Madison. Moreover, as in the cases where this statute is often used, there has been a finding of probable cause by the district attorney (even as much as an admission by the accused), but some other reason was cited for the failure to prosecute – here, an unwise use of the district attorney's office's resources. This reason for refusal is suspect, as the district attorney contemplated only a strict liability violation, punishable by a $500 forfeiture for each of three deaths which

occurred in the last three years, and it is hard to imagine what great amount of resources would be used in obtaining compliance with this forfeiture from a "research program[] with a total annual budget of more thatn [sic] $500 milliion [sic]" (C:3:¶2 [dated 8/22/02]), especially when guilt has already been conceded.

IV. The need for the filing of a complaint is urgent, as there is probable cause to believe the law will continue to be violated absent an injunction.

In addition to the misdemeanor or forfeiture penalties for violations of Wis. Stat. § 951.025, the offenders should be subject to a temporary injunction restraining any person from further violations of the decompression statute pending the resolution of this matter.[9]

"[S]ociety's legitimate concern in a criminal case is not only to impose criminal sanctions and to seek the truth, but also to make sure that the victim is not damaged or injured further." ***State ex rel. Newspapers, Inc. v. Circuit Court for Milwaukee County***, 124 Wis. 2d 499, 510. It is "a solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature," and to give "deference to the policy choices enacted into law by the legislature." ***State ex rel. Kalal v. Circuit Court for Dane County***, 271 Wis. 2d 633, ¶ 44.

These violations have been ongoing occurrences at UW since at least 1988. *See* C. E. ATKINS, C.E. LEHNER, K.A. BECK, R.R. DUBIELZIG, E.V. NORDHEIM, AND E.H.

[9] Wis. Stat. § 951.18, providing the Penalties for Crimes Against Animals, provides in subsection 3, that "[i]n addition to the penalties applicable to this chapter under this section, a district attorney may apply to any court of competent jurisdiction for a temporary or permanent injunction restraining any person from violating this chapter."

LANPHIER., Experimental respiratory decompression sickness in sheep, *Am. J. Psysiol.*, 1163-1171, 1988. (A:11.) The University of Wisconsin – Madison Animal Care and Use Protocol Review Form, dated October 4, 2005, it provides that 10% of individuals exposed to 41-fsw pressure for 24 hours or greater will be killed, and those exposed to 73-fsw pressure "face a 90% likelihood of lethal outcome." (A:115:¶7.)

There is probable cause to believe these violations are ongoing. The April 13, 2009 Graduate School ACUC Minutes – Open Session show that these studies are ongoing and these studies still present a high danger of violating the law. (A:152, 154.)[10]

The Seventh Circuit has stated, in comparing "the state's legitimate interest in the criminalization of the killing of animals through decompression" to the state's legitimate interest in the criminalization of the more immoral forms of abortion, such as partial birth, that the state had a legitimate interest "in regulating the practice of medicine, and in the moral underpinnings of state law," and that "[i]t is for the Wisconsin legislature, not this court, to determine whether and how to address these interests." ***Planned Parenthood of Wisconsin v. Doyle***, 162 F.3d 463, 477-78 (1998). It is certainly not for the University of Wisconsin to determine whether and how to address Wisconsin's interests and regulate Wisconsin's moral underpinnings.

An injunction is proper when there is (1) a reasonable probability of ultimate success on the merits, (2) a need to preserve the status quo and avoid irreparable harm,

[10] As discussed above, *see* pp. 7-8, there is a recent protocol for continuing these studies which predicts abrupt fatal collapse by means of decompression. (*See also* A:136:¶1.)

and (3) when there is a lack of adequate remedy at law. ***Werner v. A.L. Grootemaat & Sons, Inc.***, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977).

The Petitioners respectfully request that as soon as the Criminal Complaint is filed, a temporary injunction restraining UW from further violations of the decompression statute be issued. This is necessary because these violations have been occurring for the past 10 years at least, and the evidence shows that UW plans to continue risking violations.

In the past 10 years, 303 sheep were subject to high-pressure chambers, resulting in the illegal death of 26 animals. (A:165.) In April of 2009, the Graduate School Animal Care and Use Committee met in open session and discussed that UW's current protocol contemplates simulation of deeper (and hence more dangerous) depths than the prior protocols, and discussions were had regarding how to avoid deaths by decompression by humanely/legally euthanizing an animal immediately prior to its would-be death by decompression, stating, "In as much as the sheep are studied in pairs, will rapid decompression for purposes of euthanasia necessitate euthanasia of both sheep?" (A:155:¶1.) Hence, these experiments are ongoing, despite the known risk that, regularly, at least 8% of animals (and up to 90%) will die, illegally, by means of decompression, despite the Wisconsin Legislature stating oh so clearly, "No person may kill an animal by means of decompression." Wis. Sat. § 951.025. There is no adequate remedy at law once the animal has died by means of decompression.

Conclusion

The Petitioners respectfully request that the Judge grant the relief requested herein, namely that a district attorney be appointed and ordered to issue a complaint against the agents of UW-Research Animal Resources Center for their violations of Wis. Stat. § 951.025, and that the same be enjoined from future violations.

Dated this 16th day of March, 2010.

Respectfully submitted,

Alliance for Animals, and People for the Ethical Treatment of Animals,

By

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