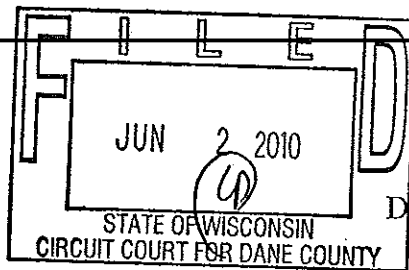

Alliance for Animals, and
People for the Ethical Treatment of Animals,

Petitioners.



DECISION

Case No. 10-CV-1398

INTRODUCTION

This Decision concerns a private petition for the issuance of a criminal complaint. On March 16, 2010, Alliance for Animals and People for the Ethical Treatment of Animals (collectively "PETA" or "petitioners") filed a petition asking the court to permit the filing of a private criminal complaint. In an accompanying brief, PETA alleged several facts suggesting that University of Wisconsin-Madison ("the University") employees had killed sheep through decompression, in the course of studies on diving physiology. (Pets. Br. 4-8). The petition identifies several researchers, staff members of the Diving Physiology Lab ("the Lab"), and supervising University officials as parties to the crimes. (*Id.*) The petition also alleged that Alliance for Animals had complained to the Dane County District Attorney, who declined to file a criminal complaint. (*Id.* at 11-12).

An open *ex parte* hearing was held with PETA's attorney on April 1, 2010.¹ Following the hearing, the petitioners submitted additional documents in support of their

¹ The applicable statute does not allow the alleged violators any role in the process, nor other members of the public. Wis. Stat. § 968.02(3) (2007-08); *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶¶ 18-19, 271 Wis. 2d 633, 681 N.W.2d 110.

petition on April 15, 2010. As discussed below, I grant the petition as to some of the identified individuals, and deny it as to others.

DISCUSSION

First, this opinion discusses the proceedings and a judge's role in evaluating a petition for the filing of a private criminal complaint. Second, it will lay out our State Supreme Court's guidelines for interpreting statutes. Third, it will analyze the specific criminal laws concerning the acts alleged in the petition. Fourth, it will apply these laws to the submitted evidence. Fifth, it will determine which offenses will be permitted in a criminal complaint. Sixth, it will discuss the petitioners' request for an injunction.

I. Private Criminal Complaints

Normally in Wisconsin, the district attorney issues criminal complaints. *See* Wis. Stat. § 968.02(1).² However, a private citizen can ask the judge to file a complaint under certain conditions:

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.

Id. § 968.02(3). In other words,

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."

² All citations are to the 2007-08 statutes.

State ex rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, ¶ 6, 271 Wis. 2d 633, 681 N.W.2d 110. A proceeding under this statute “is not a court proceeding,” and “an order issued by a judge in [the] proceeding is not a judgment or order of a circuit court.” *Gavcus v. Maroney*, 127 Wis. 2d 69, 70-71, 377 N.W.2d 200 (Ct. App. 1985). If the judge finds probable cause exists, it can order a special prosecutor to file the private criminal complaint. *See Kalal*, 2004 WI 58, ¶ 12.

II. Statutory Interpretation

“Statutory interpretation begins with the language of the statute. If the meaning of the statute is plain,” the court does not need to inquire further. *Kalal*, 2004 WI 58, ¶ 45. Courts can look at scope, context and purpose in determining a statute’s plain meaning. *Id.* ¶ 48. The language is considered “not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes.” *Id.* ¶ 46. Only if a statute is ambiguous does the court “consult extrinsic sources of statutory interpretation,” such as legislative history. *Id.* ¶ 50. “[A] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses.” *Id.* ¶ 47 (citations omitted).

III. Theories of Criminal Liability

In its simplest form, the petitioners’ theory is that the individuals named by petitioners violated Wisconsin’s statute prohibiting killing an animal through decompression. I also consider charges against those who were not directly involved in the deaths, if the deaths were caused intentionally or negligently, and evaluates whether those involved may be liable under a party to a crime theory pursuant to Wis. Stat. § 939.05. A person may be held liable even if that person did not directly commit the

crime if they aided and abetted the commission of it, or if that person solicits another to commit it.

A. Animal Death by Decompression

In Wisconsin, “[n]o person may kill an animal by means of decompression.” Wis. Stat. § 951.025. The statute contains only that statement, without exception or qualification. The plain meaning of this language is clear: killing animals by decompression violates Wisconsin law.

By comparison, the animal cruelty statute exempts “bona fide experiments carried on for scientific research or normal and accepted veterinary practices.” *Id.* § 951.02. The decompression statute lacks any such exemption,³ and its language and meaning are plain. If the legislature had intended to provide a research exception for animal decompression deaths, it could have done so as it did in the animal cruelty statute. Accordingly, I do not inquire further to import meaning through legislative history or other collateral sources, because the decompression statute’s language and meaning are clear. *Kalal*, 2004 WI 58, ¶ 45.

Anyone violating the decompression statute is subject to varying sanctions, depending upon whether the violation is intentional or negligent. Simply violating the statute, without more, subjects a violator to a Class C forfeiture. Wis. Stat. § 951.18(1). “Conduct punishable only by a forfeiture is not a crime.” *Id.* § 939.12. An intentional or negligent decompression killing, however, is a misdemeanor, and therefore a crime. *Id.* §§ 951.18(1) (denoting misdemeanor penalty); 939.51(3)(a) (penalties for misdemeanor

³ Based on the documents submitted, it appears that the University interprets the decompression statute as containing a similar research exception, despite the absence of any language in the statute. As set forth in this Decision, the court does not agree with the University’s interpretation, as the relevant criminal statute barring killing animals by decompression provides no research exception.

include fine and/or jail time); 939.12 (definition of crime as “conduct which is prohibited by state law and punishable by fine or imprisonment or both.”). The statutes define both criminal negligence and “intentionally.” One who “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” acts “intentionally.” *Id.* § 939.23(3); *see also id.* § 939.23(1) (applying this definition to crimes in Wis. Stat. chs. 939-51). “Negligence” is “ordinary negligence to a high degree, consisting of conduct that the actor should realize creates a substantial and unreasonable risk of death or great bodily harm to another.” *Id.* § 939.25(1) (defining “criminal negligence”). That section also contemplates the application of this definition to chapter 951 violations, such as animal decompression deaths. Wis. Stat. § 939.25(2) (use of “negligently” indicates criminal negligence is an element of a crime). Thus, if the person causing the decompression death fulfills either of these mental elements (intent or negligence), they may be subject to the misdemeanor charge. *Id.* §§ 939.25, 939.12.

B. Aiding and Abetting/Soliciting (Party to a Crime)

The State can sanction those who assist in committing crimes:

Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime or of some other crime based on the same act.

Wis. Stat. § 939.05(1). A person is “concerned in the commission of the crime” if the person: 1) directly commits it; 2) intentionally aids and abets its commission; or 3) solicits or “advises, hires, counsels or otherwise procures another to commit it”. *Id.* §§ 939.05(2)(a), (b) and (c). They are not parties to a crime if they aid and abet or solicit an

act which could lead to a *forfeiture* only, because the act is not technically a “crime.” *Id.* § 939.12.

C. Probable Cause

“[P]robable cause is a fluid concept-turning on the assessment of probabilities in particular factual contexts-not readily, or even usefully, reduced to a neat set of legal rules.” *Illinois v. Gates*, 462 U.S. 213, 232 (1983). Courts employ a “totality-of-the-circumstances approach” in determining if probable cause exists. *Id.* at 230. It also differs depending on the stage of the proceedings:

Probable cause is not an unvarying standard because each decision at the various stages of the proceedings is an independent determination with the varying burdens of proof. Thus, the level of proof needed to establish probable cause for an arrest is less than that needed to bind a defendant over for trial after a preliminary examination

County of Jefferson v. Renz, 231 Wis. 2d 293, 603 N.W.2d 541 (1999) (internal quotations and citations omitted).

D. Analysis

In order to authorize the filing of a criminal complaint, I need to make several findings. First, I must find that the district attorney did not issue a complaint. Second, I must examine if probable cause exists for each person in the petition and each offense in the complaint. To undertake this analysis, I will examine the evidence to see if it suggests the following: a) if an animal died from decompression; b) if some direct actors were negligent or intentional in the decompression, and therefore committed a “crime”; and c) if the death was within the applicable statute of limitation. If any death was a “crime,” I will also analyze the others’ acts, to determine if probable cause exists that they aided and abetted or solicited the direct actors. Wis. Stat. § 939.05.

IV. The District Attorney Did Not Issue a Complaint

It is clear that the District Attorney declined to issue a complaint concerning the alleged offenses. In a letter dated October 2, 2009, District Attorney Brian Blanchard concluded that his office would not pursue a forfeiture action for each sheep death. (Pet. Aff. Ex. A at 164, Mar. 16, 2010). At the hearing on this petition, Blanchard confirmed that he had declined to issue a complaint. (Hr'g Tr. 6:4-7:8, Apr. 1, 2010). Therefore, I conclude that the District Attorney refused to issue a complaint under Wis. Stat. § 968.02(3).

V. Probable Cause Exists That a Crime Was Committed

I find probable cause exists that those who decompressed the sheep acted either intentionally or negligently. I note that many if not all documents submitted in support of the petition were obtained from the University via open records requests, and therefore appear to be highly reliable to establish probable cause.

A. Sheep Died from Decompression

The petitioners have provided University Necropsy Submission Forms showing that four sheep died from decompression. (Pet. Aff. Exs. A-D, Apr. 14, 2010). These indicate that Sheep 244 and 245 died from decompression on June 16 or 17, 2008, and Sheep 226 and 227 died from decompression on September 18 or 19, 2007. (*Id.*)

B. Evidence Establishes Probable Cause to Conclude that the Authors Intentionally or Negligently Killed Sheep Via Decompression, Either Directly or as Parties to a Crime

The petitioners' brief groups named individuals into three categories: the Authors of a research paper, Lab Employees and University officials. I find probable cause exists

that the Authors intentionally or negligently killed sheep by decompression, contrary to Wis. Stat. § 951.025, either directly or as party to a crime. Accordingly, I examine the other individuals to see if the documents provide some evidence that they either directly acted, aided and abetted, or solicited. I find that probable cause exists that some identified University officials and Lab employees were concerned with violating Wis. Stat. § 951.025.

Probable cause exists that five researchers intentionally or negligently violated Wis. Stat. § 951.025, either directly or as party to a crime. The petition named the authors of an article detailing decompression: Aleksey S. Sobakin,⁴ M.A. Wilson, Charles E. Lehner,⁵ R. Tass Dueland,⁶ and A.P. Gendron-Fitzpatrick (collectively “the Authors”). It also provided a copy of the paper: *Oxygen Pre-Breathing Decreases Dysbaric Diseases in UW Sheep Undergoing Hyperbaric Exposure*, 35 UNDERSEA HYPERBARIC MED. 61-67 (2008) (located at Pet. Aff. Ex. A at 4-10, Mar. 16, 2010). The research partially concerned respiratory decompression sickness, referred to as RDCS, “chocks” or “chokes.” (Pet. Aff. Ex. A at 6, Mar. 16, 2010).

1. Sheep Died During this Research

As part of the Authors’ study, “[s]ixteen adult Suffolk ewes . . . were subjected to a single 24-hour exposure of compressed air in a large, high pressure chamber at the UW

⁴ He was Lab Manager of the Diving Physiology Lab, August 2005 – 2009 and became a Co-Principal Investigator in Oct. 2008. (Pet. Aff. Ex. D at 1, Apr. 14, 2010).

⁵ He was Co-Principal Investigator of the Diving Physiology Lab from 1996 until April 2008. (Pet. Aff. Ex. D at 1, Apr. 14, 2010).

⁶ He was Co-Principal Investigator of the Diving Physiology Lab until April of 2008. (Pet. Aff. Ex. D at 1, Apr. 14, 2010).

Biotron Laboratory.” (Pet. Aff. Ex. A at 5, Mar. 16, 2010). The experiments resulted in the death of several sheep:

The clinical signs of DON observed vary as a result of the length of the oxygen prebreathing experienced by the sheep prior to decompression. Decompression from the 24-h hyperbaric exposure at 2.79 atm abs . . . caused six fatal cases of the chokes or respiratory decompression sickness (RDCS). All four ‘control’ sheep that breathed only air during dropouts from 19 msw . . . pressure died of RDCS. One sheep in each of the 15-min and 1-h O₂ pre-breathing groups also died of RDCS.

....

Ten sheep survived at least six weeks after hyperbaric exposure, the other sheep died of ‘chokes’ or [were] euthanized (control group only required euthanization because of RDCS).

(*Id.* at 6).⁷

This research is connected to the sheep identified on the Necropsy Forms. Sobakin is the contact person on the forms concerning Sheep 244 and 245. (Pet. Aff. Exs. A-B, Apr. 14, 2010). Lehner is listed as the Investigator for Sheep 226 and 227. (*Id.* Exs. C-D).

2. The Authors Acted Intentionally or Negligently, Either Directly or as Parties to a Crime

Evidence strongly suggests the Authors knew some sheep would die from decompression, or that there was a substantial and unreasonable risk of such a death. Among the papers the Authors cite is Atkins, C.E. et al., *Experimental Respiratory*

⁷ The article reiterates the findings and deaths:

In this study, all sheep without oxygen pre-breathe died of respiratory decompression sickness with few episodes of limb lifting before death or symptom required euthanasia. Sheep with a 15-min O₂ pre-breathe developed extensive DON, and one died from RDCS. Each sheep with a 1-h pre-breathe developed DON in both tibiae and one radius, and one of this group died from RDCS.

(Pet. Aff. Ex. A at 9, Mar. 16, 2010).

Decompression Sickness in Sheep, 65 J. OF APPLIED PHYSIOLOGY 1163-71 (1988). (Pet. Aff. Ex. A at 10 n.20, Mar. 16, 2010). The authors of the 1988 paper were also a group of University employees. (*Id.* at 11). Similar to the Authors' study, the 1988 paper documented the result of "[s]imulated dives . . . in the high-pressure chamber at the University of Wisconsin by exposure of unanesthetized sheep to compressed air . . ." (*Id.* at 12). The earlier study also found that the exposure killed several sheep:

We observed restlessness, evidence of respiratory difficulty, collapse and death in affected sheep. . . . Nine sheep with clinical grades of 0-2 . . . survived 2 h of altitude exposure. . . . Eight animals with more severe signs were judged to be moribund and were killed within 90 min at altitude.

(*Id.* at 12-13 (chart references omitted); *see also id.* at 13 ("Only 12 of the original 18 sheep remained for study after 45 min at altitude"))).

These documents establish probable cause to believe that the Authors intentionally or negligently violated Wis. Stat. § 951.025, either directly or as party to a crime. The Authors' cite the 1988 paper, which clearly documents a number of deaths resulting from placing sheep inside a decompression chamber. It is probable that the Authors knew that their experiments were "practically certain to cause" the death of at least some sheep, and therefore acted intentionally. Wis. Stat. § 939.23(3). Alternatively, I believe the Authors could be criminally negligent in that they should have realized their research created "a substantial and unreasonable risk of death", based on the prior research. *Id.* § 939.25(1). Additionally, the two deaths in 2007 should have given them knowledge that deaths would happen again, as they did in 2008. (Pet. Aff. Exs. A-D, Apr. 14, 2010).

Thus, I find probable cause exists that the Authors intentionally or negligently killed sheep through decompression, thereby violating Wis. Stat. § 951.025, either directly or as party to a crime.

C. Statute of Limitations

Prosecution for a misdemeanor must be “within 3 years after the commission thereof.” Wis. Stat. § 939.74(1). Forfeiture actions have a 2 year statute of limitations. *Id.* § 893.93(2)(a).

The identified deaths occurred in June of 2008 and in September of 2007. Accordingly, as of the date of this Decision, all four are within the statute of limitation for misdemeanors, and the later deaths could also be charged as forfeiture violations.

D. Conclusion

I find probable cause to believe that violations of Wisconsin’s criminal code have been committed within the applicable statute of limitations. *See* Wis. Stat. §§ 951.18(1), 939.12. I therefore examine whether others named in the petition helped in the decompression, and may also be liable as party to a crime.

VI. There is Probable Cause to Believe that Some Lab Personnel Were Concerned in the Commission of the Crimes

Probable cause also exists that two Diving Physiology Lab employees aided and abetted the Authors’ research, and the sheep decompression. Therefore, they may be held liable as parties to the crime. Wis. Stat. § 939.05. PETA’s petition identifies three additional Lab Employees during the period when the deaths occurred: Marlow Eldridge, David Pegelow and Averi Sauder. I will briefly discuss each.

1. Marlow Eldridge

Eldridge was the Director of the Diving Physiology Lab from Jan. 2008 – 2009, and was the Principal Investigator from April 2008 through 2009. (Pet. Aff. Ex. D at 1, Apr. 14, 2010). He is listed as the Investigator on the Necropsy Submission Forms concerning the two deaths of sheep 226 and 227 in June of 2008. (Pet. Aff. Exs. A-B, Apr. 14, 2010).

2. David Pegelow

Pegelow worked as a Researcher in the Diving Physiology Lab from Apr. 2009 through Dec. 2009. (Pet. Aff. Ex. D at 1, Apr. 14, 2010). “Throughout this time he assisted with operation and maintenance of the hyperbaric chamber.” (Id).

3. Averi Sauder

Finally, Sauder was a Researcher at the Diving Physiology Lab from July 24, 2007 to the present. (Pet. Aff. Ex. E at 2, Apr. 14, 2010). Part of his job was to “[m]aintain and handling [sic] of sheep before, during and after experiments.” (Id). He is identified as the contact person on the Necropsy Submission Forms for Sheep 226 and 227. (Pet. Aff. Exs. C-D, Apr. 14, 2010).

Eldridge and Sauder worked during the time that the sheep died at the Lab. Accordingly, I find the documents submitted establish probable cause that Eldridge and Sauder either directly decompressed sheep and knew that the likelihood of death, and/or aided and abetted those who did. Pegelow began at the Lab after the most recent reported death; therefore, I find that probable cause does not exist to charge Pegelow for any decompression death.

VII. Probable Cause Exists That Some University Officials Aided and Abetted or Solicited

Finally, the petition names a number of individuals whose job duties indicate that they supervised and approved the Authors' acts. I find probable cause exists that some of these people intentionally aided and abetted or solicited the deaths.

A. University Procedures

PETA's arguments rely heavily on University records of its research review and approval process. The documents suggest that researchers must complete an Animal Care and Use Protocol Review Form before conducting certain types of research. Researchers submit the Forms to the Research Animal Resource Center.⁸ (e.g., Pet. Aff. Ex. A at 141, Mar. 16, 2010). "Animal protocols are assigned for review to the Animal Care and Use Committee(s) that provides oversight of the facility or facilities where the animals assigned to this protocol will be housed."⁹ (Id).

PETA submitted several Protocol Forms for sheep research, two of which appear to have governed the University's research at the time of the identified decompression

⁸ It appears these Protocol Forms may be the University's system of complying with the Federal Animal Welfare Act. *Compare*, e.g., Pet. Aff. Ex. A at 76-87, Mar. 16, 2010 *with information required in* 9 CFR § 2.31(d) (2010).

⁹ It appears that the University has several ACUCs. Most likely these are Institutional Animal Care and Use Committees required under 7 U.S.C. § 2143(b) and 9 CFR § 2.31. Those Committees are required to "inspect at least semiannually all . . . animal facilities of [the] research facility and review as part of the inspection . . . practices involving pain to animals." 7 U.S.C. § 2143(b)(3) (2006); *see also* 9 CFR § 2.31(c) (2010). These committees also must review activities involving animals to ensure compliance with federal regulations. 9 CFR § 2.31(d) (2010).

Prior to IACUC review, each member of the Committee shall be provided with a list of proposed activities to be reviewed. Written descriptions of all proposed activities that involve the care and use of animals shall be available to all IACUC members, and any member of the IACUC may obtain, upon request, full Committee review of those activities.

Id. § 2.31(d)(2).

deaths. The earlier document is date stamped March 9, 2005 for Protocol V00926-4-10-02. (Pet. Aff. Ex. A at 101, Mar. 16, 2010). The form establishes that the proposed research will most likely result in the death of some sheep via decompression:

... Importantly, large-animal decompression outcomes appear remarkably similar to those in the decompressed human experiencing a submarine escape and high-risk decompression practiced by many seafood divers and sometimes by avid recreational scuba divers.

We know that submarine escapes can impose severe, fatal decompression consequences to humans ...

(*Id.* at 114) (formatting removed).

The importance of the chokes had been dismissed by most diving authorities until our UW studies demonstrated its potential severity and high likelihood of fatal DCS possible in extreme decompression events such as submarine escape. ... Subsequent confirmatory studies in our lab ... have demonstrated that respiratory DCS (chokes) is the most clinically significant form of potentially fatal DCS likely to be faced in life-threatening submarine escape and rescue.

(*Id.* at 116).

Submarine escape sheep research intentionally evaluates the risk of serious, life-threatening respiratory DCS following 24-h hyperbaric exposures.

(*Id.* at 121).

Fatal collapse [of sheep] can occur abruptly in severe cases, and severe cases may also undergo a fatal relapse.

(*Id.* at 122).

The next Protocol Form is date stamped March 19, 2008, and is for Protocol V00926-0-05-05, an amendment to the previous Protocol, V00926-4-10-02. (Pet. Aff. Ex. A at 127, Mar. 16, 2010). It also has an "AMENDMENT APPROVAL" stamp on it – Michael J. Maroney signed as "Veterinarian," and an illegible signature appears above

“Chair.” (*Id.*) It uses the identical language cited above from the prior Protocol Form, clearly indicating that some sheep will die from decompression. (*Id.* at 127-40).

PETA also submitted the notes from a meeting of the Graduate School Animal Care and Use Committee, in which a later version of the sheep protocol was reviewed. (Pet. Aff. Ex. A at 152-55, Mar. 16, 2010). This suggests that this ACUC was the committee which reviewed the prior protocols, under which sheep were killed via decompression.¹⁰

B. University Officials

Much like the Lab Employees, PETA offers different evidence for each official which it claims aided and abetted or solicited the decompression deaths, and I will briefly discuss each. The documents discussed are the individuals’ job descriptions unless otherwise noted.

1. Martin T. Cadwallader

Cadwallader is Dean of the University’s Graduate School. PETA highlights part of his job description:

The dean, as the chief research officer and the principal advisor to the chancellor and the provost on reseach [sic], is responsible for the instructional and research environment of over 8,700 graduate students in 185 fields at the master’s level, 109 fields at the doctoral level, and 6 capstone certificates. The dean administers the Graduate School’s \$130 million budget and oversees a wide array of research programs with a total annual budget of more than [sic] \$500 million [sic]. The dean supervises the directors of 18 research centers, the Office of Research and Sponosred [sic] Programs,

(Pet. Aff. Ex. C at 3, Mar. 16, 2010). There is no indication that he reviewed any documentation related to the diving physiology research.

¹⁰ The submission contains references to other, separate ACUCs such as the “All Campus Animal Care and Use Committee.” (e.g., Pet. Aff. Ex. A at 155, Mar. 16, 2010).

2. William S. Mellon

Mellon is the University's Associate Dean for Research Policy ("RARC"). Again, the petitioners cite his job description as evidence that he aided and abetted the deaths:

The Graduate School has responsibility for 17 research centers and facilities and oversight of a \$750 million dollar research enterprise.

The Associate Dean will lead the Graduate School Research Compliance Office and serve as the campus officer responsible for UW-Madison's efforts in the following areas: . . . animal subjects, . . . research ethics . . .

(Pet. Aff. Ex. C at 8, Mar. 16, 2010). Like Cadwallader, no evidence suggests he had any direct supervisory relations with the sheep research.

3. Eric P. Sandgren

Sandgren is Director of the Research Animal Resources Center, and was formerly the Acting Director. His job description contains the following as principal duties:

Assist the Associate Dean for Research Policy and the campus Animal Care and Use Committees (ACUCs) in complying with all University, state and federal regulations governing research animal health and welfare.

(Pet. Aff. Ex. B at 6, Mar. 16, 2010). Another duty is to:

Provide leadership for auditing research animal compliance programs, ACUCs, and the conduct of research to ensure compliance with state and federal laws, as well as University policies and procedures, in collaboration with the Graduate School and campus internal audit.

(*Id.* at 7). Sandgren also was a voting member of the Graduate School ACUC during its April 13, 2009 review of the sheep protocols. (Pet. Aff. Ex. A at 152-56, Mar. 16, 2010). These suggest that he has been involved with the committee on a regular basis.

4. Richard R. Lane

Lane is the Associate Director of the Research Animal Resources Center. His job includes assisting the Director: “in duties which may be assigned in the overall operation of the department.” (Pet. Aff. Ex. B at 10, Mar. 16, 2010). Nothing submitted to the court beyond this sentence ties him to the diving physiology research.

5. Janet Welter

Welter is the Chief Campus Veterinarian. Among her duties is to “[p]rovide expertise on relevant and current compliance regulations and guidelines.” (Pet. Aff. Ex. B at 15, Mar. 16, 2010).

6. Michael J. Maroney

Michael J. Maroney signed as the Veterinarian approving an amendment to the Protocol on April 2, 2008. (Pet. Aff. Ex. A at 127, Mar. 16, 2010).

C. Probable Cause Exists for Some Officials

Probable cause exists to charge some of the Officials with aiding and abetting or soliciting in the deaths. Nothing PETA submitted ties Deans Cadwallader and Mellon directly to the sheep research, either through direct review or approval of the Protocols. Therefore, no documents show that they acted “intentionally,” that is – aided and abetted or solicited the decompression deaths. *See* Wis. Stat. §§ 939.05 (aiding and abetting) and 939.23(3) (definition of criminal intent). I therefore find that the petitioners have not shown probable cause exists to charge Cadwallader or Mellon with violating Wis. Stat. § 951.025.

As for the heads of the RARC, probable cause exists that Sandgren aided and abetted or solicited, but not his assistant Lane. Sandgren’s job description and

participation in the Graduate School ACUC indicate a good likelihood that he read the relevant Protocol Forms and therefore knew that some sheep deaths were practically certain.¹¹ Sandgren also was responsible to ensure research complied with state and federal laws, which includes Wis. Stat. § 951.025. See Wis. Stat. § 939.23(3). In contrast, Lane's job only required him to assist Sandgren and take on additional assigned duties. There is no indication that he reviewed the Protocols or was involved in any way with the sheep research.

Finally, I do not find probable cause exists to charge Welter, but does for Maroney. There is no indication in the materials submitted that Welter had any knowledge that sheep would be killed using decompression, nor does her job description tie her to the Graduate School's ACUC. Therefore, there is no indication she had any foreknowledge of the risks. The offense leveled against Maroney is more defined; he directly approved the Protocol Amendment which was in place when two deaths occurred. As the Protocol indicated the almost certain deaths of sheep from decompression, there is probable cause that Maroney aided and abetted or solicited the violations of Wis. Stat. § 951.025.

VIII. Judge's Discretion in Charges Authorized to be Filed

"Men may intend what they will; but it is only the laws that they enact which bind us." *Kalal*, 2004 WI 58, ¶ 52 (citing ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 17 (1997)). This decision is to be made within Wis. Stat. § 968.02(3)'s confines, and I have found probable cause to charge certain individuals pursuant to a criminal complaint. Regardless of the University's beliefs and interpretations, or the merit of its animal

¹¹ Additionally, the federally-imposed duties of an ACUC suggest its members would be aware of the nature of the research. See 9 CFR § 2.31(c).

research, probable cause exists that some of its employees have violated Wis. Stat. § 951.025. The District Attorney has declined to act upon a complaint by an animal rights group. Therefore, the two conditions precedent to permit a complaint to be filed per Wis. Stat. § 968.02(3) have been met.

The statute gives judges the power to permit a criminal complaint to be filed if the District Attorney declines to prosecute, and if probable cause exists. The statute, however, does not mandate that criminal complaints be issued. *See* Wis. Stat. § 968.02(3). Normally, prosecutors exercise discretion in determining whether to charge a crime for which probable cause exists. *See Kalal*, 2004 WI 58, ¶ 19. The law does not require “prosecution in all cases where there appears to be a violation of the law no matter how trivial.” *Id.* ¶ 30 (citation omitted). Therefore, I conclude that exercising discretion similar to that of a prosecutor is appropriate in evaluating whether charges should be brought.

I have also examined the available options under Wis. Stat. § 968.02(3), and conclude that they are limited. While future actions by the University might well be tempered by lesser alternatives available to a prosecutor (*e.g.*, the issuance of civil citations instead of criminal charges, injunctive relief, etc.), the statute limits me to determining whether criminal charges may be permitted. *See State v. Folk*, 117 Wis. 2d 42, 342 N.W.2d 761 (Ct. App. 1983). Therefore, in the event I determine that action is required, I lack authority under Wis. Stat. § 968.02(3) to specifically authorize anything but the filing of a criminal complaint. As suggested below, I believe a Special Prosecutor is not similarly limited.

In this situation, the University has apparently engaged in behavior resulting in the above-described animal deaths for years. Of some concern is that the University asserts continually that its practices are somehow authorized under an unwritten "research exception" to the law, a conclusion with which I disagree for the reasons stated above. This position suggests that, because the University interprets the statute in its favor, it may well continue to decompress animals to death contrary to law, unless I take action.

On the other hand, the documents suggest that the researchers and supervisors may have believed they operated legally, although, as detailed above, I have found that probable cause exists that the alleged activities violate Wisconsin's criminal code. It is also reasonable to infer that some of the identified individuals relied on the direction and/or guidance of various protocols, committees or supervisors; however, this reliance was misplaced, as such guidance was contrary to Wisconsin law. Nothing indicates that those involved were motivated by malice. It is also reasonable to assume that the individuals named would suffer significant personal and professional consequences if criminal complaints are issued against them.

Given the limited nature of my role in making a Decision pursuant to Wis. Stat. § 968.02(3), I lack that information about the individuals named in the petition which would be relevant to a prosecutor in determining appropriate action. This includes whether substantial defenses may be effectively raised to combat a criminal prosecution. I also do not have that information which a prosecutor would weigh before issuing charges, including the individuals' character if known, criminal records (if any), the severity of impacts of a criminal charge/conviction, and myriad additional factors.

It is also obvious that, no matter how this matter is decided, the sheep fatalities resulting from the University's actions cannot be reversed. Future fatalities, however, may be prevented.

Although not required, I have considered the District Attorney's resource analysis in reaching his decision to decline to act. (Pet. Aff. Ex. A at 164-171, March 16, 2010). I recognize that District Attorneys' Offices' resources are limited, and that given the wide range of serious offenses for which that Office is responsible, any reluctance to pursue this matter is understandable. However, I note that citizen groups distressed by the University's actions have taken the unusual step of filing the petition to seek justice. I believe that Wis. Stat. § 968.02(3)'s essential purpose is to allow those aggrieved by a District Attorney's decision not to prosecute to avail themselves of judges to seek redress, regardless of prosecutors' limited resources.

In assessing the totality of the circumstances known to me at this time, I conclude that to do nothing in response to this petition would unduly depreciate the significance of the alleged misconduct. The allegations are made more serious by the claim that these transgressions have gone on for years, and apparently have become accepted practice in University animal research. To do nothing would, in essence, tacitly allow the University to continue the alleged unlawful practices without sanction.

Therefore, I conclude that I must take action on the petition to address the violations described above. I do so with the hope that, at a minimum, it will deter future acts contrary to law. I also hope that the University will use this Decision as an opportunity to re-examine its policies and activities so as to be in compliance with the plain language of Wisconsin law, not its own interpolated version.

Therefore, I will permit, but not compel, the filing of complaints consistent with this Decision. I invoke my authority under Wis. Stat. § 978.045(1g) and appoint Attorney David A. Geier to serve as Special Prosecutor to pursue these matters in accordance with this Decision.

I recognize that any legal action permitted by virtue of this Decision will have a real impact on real people, and that this Decision is based only upon the limited information in the petitioners' submissions. I believe a mechanism to further evaluate additional information is essential for a fair and appropriate determination as to how action should be taken. Therefore, after reviewing additional facts not before me, the Special Prosecutor may exercise appropriate prosecutorial discretion in accordance with *Kalal*, 2004 WI 58, ¶ 19. This discretion can include, but is not limited to, initiating actions short of criminal charges, if appropriate, or seeking injunctive relief pursuant to Wis. Stat. § 951.18.

IX. Petitioners' Request for an Injunction

Finally, petitioners ask for a temporary injunction against the offenders. An injunction is a remedy the district attorney can use when pursuing a criminal action for violations of the decompression statute. *See* Wis. Stat. § 951.18. However, I can only allow charges to be filed, not grant any injunctive relief under the court's limited authority per Wis. Stat. § 968.02(3). Any injunction would have to be pursued as part of any subsequent case pursued by the Special Prosecutor. I lack authority to act on the

petitioners' request for injunctive relief, and therefore decline their request for an injunction.

CONCLUSION

This opinion is not an accusation or finding of guilt; it is merely my determination that the petitioners have shown facts establishing probable cause that some individuals intentionally or negligently violated Wisconsin law, either directly or as parties to a crime. The petitioners claim to be distressed at the nature of the University's research; also concerning is the University's approach to interpreting the plain language of the decompression statute when conducting this research. Wisconsin law contains no special rules or exceptions in this situation, even for a State university.

This Decision determines that probable cause exists to conclude that certain named individuals in the petition violated Wis. Stats. § 951.025, either directly or as party to a crime. This Decision permits, but does not compel, complaints to issue against the nine named individuals listed for the reasons stated above,¹³ and does not permit complaints to issue against the others named in the petition.¹⁴ This Decision also appoints a Special Prosecutor, and further contemplates that, as additional information becomes available, the Special Prosecutor may exercise appropriate prosecutorial discretion. This Decision also denies petitioners' request for injunctive relief for the reasons stated above.

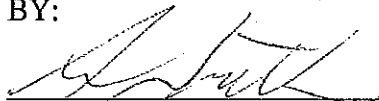
¹³ Individuals for whom probable cause has been established are: Aleksey S. Sobakin, M.A. Wilson, Charles E. Lehner, R. Tass Dueland, A.P. Gendron-Fitzpatrick, Marlow Eldridge, Averi Sauder, Eric P. Sandgren and Michael Maroney.

¹⁴ Probable cause has NOT been established for the following individuals named in the Petition: David Pegelow, Martin T. Cadwallader, William S. Mellon, Richard Lane, and Janet Welter.

Copies of this Decision shall be conveyed to petitioners' attorney as well as the Special Prosecutor. Courtesy copies shall be conveyed to the Dane County District Attorney and counsel for the University.

Dated this 2nd day of June, 2010.

BY:



Hon. Amy Smith
Circuit Judge, Branch 4

cc: Attorney Andrea J. Farrell
Special Prosecutor David A. Geier
Dane County District Attorney Brian Blanchard
Attorney Lester Pines