Avoiding Briar Patches

By CHARLES D. RAY

In In re Criminal Complaint & Application for Arrest Warrant, the Supreme Court was asked to opine on the constitutional validity (or invalidity) of Section 9-368 of the General Statutes. Sensing the potential for trouble, the Court declined the invitation. But let's start at the beginning. Section 9-368 provides:

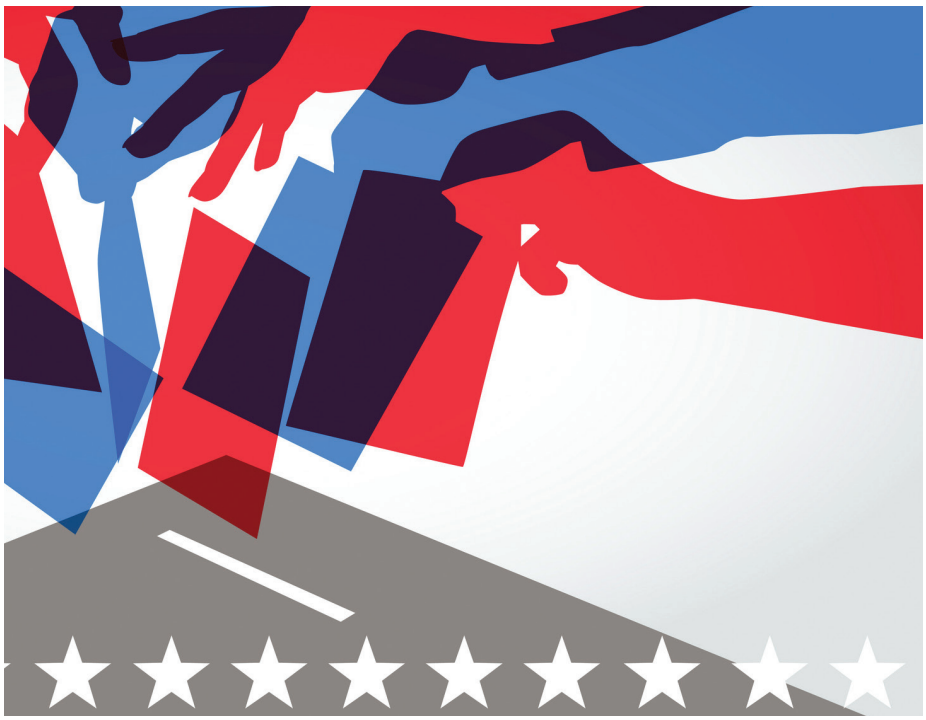
> Upon the complaint of any three electors of a town in which a violation of any law relating to elections has occurred to any judge of the superior court for the judicial district within which the offense has been committed, supported by oath or affirmation that the complainants have good reason to believe and do believe that the allegations therein contained are true and can be proved, such judge shall issue a warrant for the arrest of the accused.

The predecessor of Section 9-368 was enacted in 1868, but appears to have been invoked on only one prior occasion. It may be a while before it is invoked again.

The current case began when electors in Bridgeport sought two arrest warrants related to claimed violations of election laws during the September 2023 Democratic primary for the mayor's office in Bridgeport. The trial judge denied both applications, holding that the statute was unconstitutional under both the state and federal constitutions and also contravened the rules of practice. The electors brought a writ of error in the Appellate Court and the Supreme Court transferred the case to its own docket. The trial judge was defended by the attorney general, who argued that the electors were neither statutorily nor classically aggrieved and that the writ of error should be dismissed.

Justice D'Auria wrote the majority opinion for himself and Justices McDonald, Mullins, Alexander and Dannehy. The majority had little trouble dispensing with the statutory aggrievement argument. Justice D'Auria concluded that the attorney general's argument that the right to appeal could come only by way of an explicit statutory grant would be "antithetical to the purpose of a writ of error, which is to afford a nonparty appellate review of an adverse judgment when there is no express legislative fiat for doing so." Finding no prior precedent that would support the attorney general's argument, the majority concluded that statutory aggrievement was "immaterial" to the electors' standing to bring the writ of error.

Classical aggrievement turned out to be a horse of a different color. To establish classical aggrievement, a party must first show "a specific, personal and legal interest in the subject matter of the [controversy], as opposed to a general interest that all members of the community share . . . ." Second, the party must also demonstrate that the conduct alleged has "specially and injuriously affected that specific personal or legal interest." With the background out of the way, the majority jumps directly to the proposition that a number of courts, including the United States Supreme Court, have made clear that private citizens do not hold a judicially cognizable interest in the criminal prosecution of others. That being the case, the majority adopted the reasoning of the Massachusetts Supreme Judicial Court: "even where the [l]egislature has given a private party the



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opportunity to seek a criminal complaint, we have uniformly held that the denial of a complaint creates no judicially cognizable wrong."

In further support, the majority analogized to the grievance process governing claims of attorney misconduct. There, an individual is free to make a complaint against an attorney, but lacks standing to challenge the outcome of a grievance proceeding. In this context, "[i]nput from the complaining party is a logical component of the attorney discipline process. Granting the complainant the right to challenge, or appeal from the outcome of the process, is not." According to Justice D'Auria, the electors brought their allegations to a judge as they were permitted to do by way of Section 9-368. "[T]he judge denied their applications, and that is when their legal interest in the participation of the initiation of a criminal prosecution against others terminated."

Justice D'Auria recognized that the majority's ruling "effectively precludes appellate review of the denial of a § 9-368 arrest warrant application." And while that could well have been the point of the exercise, the majority concluded that the outcome is fully compatible with the underlying process of citizen complaints and the specific notion that the right to pursue criminal prosecutions belongs to the state and not to individual citizens.

Justice Ecker disagreed on the issue of aggrievement but would have dismissed the appeal regardless. He began by focusing on the difference between appellate review by way of an appeal and review by means of a writ of error. The former is available to: 1) parties; 2) aggrieved; 3) by a final judgment. The latter is available to nonparties only and is mutually exclusive from an appeal. Thus, for Justice Ecker, the two pertinent questions are whether the electors were "parties" to the court actions below and whether they were aggrieved by the court's denial of their applications. There is little doubt, according to Justice Ecker, that the electors were parties to the proceedings in the trial court.

On aggrievement, Justice Ecker opined that § 9-368 supplies the required judicially cognizable interest to the electors who filed the warrant applications. In short, the statute provided standing to the electors to initiate an action in the trial court and that court denied the relief requested by the electors. For Justice Ecker, that "injury" was "distinct from other members of the community due to their party status and participation in the trial court proceedings, regardless of whether they would prevail on the merits of their underlying claims." And the statutory grant of standing to bring applications to the Superior Court distinguished these cases from disciplinary proceedings, which do not permit a grievant to challenge in court the doings of grievance officials.

Based on his conclusion that the electors were aggrieved parties in a judicial proceeding, Justice Ecker then concluded that an appeal, and not a writ of error, would have been the proper way for the electors to obtain appellate review. Thus, Justice Ecker would dismiss the writ of error, but without prejudice to the electors filing a motion for permission to file a late appeal—a subject on which Justice Ecker offered no opinion.

He did, however, offer an opinion the case as a whole:

> The statute is old and today may very well be antiquated, obsolete, or even unconstitutional. But it has never been repealed, and this court is not at liberty to ignore the undeniable fact that its plain language expresses a legislative intention to confer standing on a defined class of persons—plainly including the [electors]—to seek and obtain an arrest warrant under specified conditions.

But so long as trial court judges take the sensible route and deny any application that comes their way, we will never know whether § 9-368 is constitutional. I leave it to you whether that's a good result or not.

Charles D. Ray *is a partner at McCarter & English LLP, in Hartford. He clerked for Justice David M. Shea during the Supreme Court's 19891990 term and appears before the Court on a regular basis. Any views expressed herein are the personal views of the author.*