HB
121

H3121

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 10, 1987

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that repeals AS 12.45.150, an obsolete statute that provides for the payment of costs for "malicious prosecutions" brought by private persons. 1/ This provision has been the cause of some confusion regarding who has the authority to institute criminal charges. In recent months several persons in the Kenai area have attempted to file "criminal charges" against other persons, primarily police officers who have arrested them, citing AS 12.45.150 as their authority to do so.

Well-established principles of statutory construction require that the language of AS 12.45.150 be interpreted in conjunction with AS 44.23.020(b)(3), which places responsibility in the attorney general to "prosecute all cases involving violation of state law." 2/ Thus AS 12.45.150 does not provide authority for

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1/ The precursor of present AS 12.45.150 appears to first have been adopted in 1900; it was apparently based upon an 1882 statute from Oregon. See Ann. Alaska Codes, Pt. II, ch. 19, § 193-194 (Carter 1900). The provision was included in the first codification of Alaska's criminal laws after statehood. See § 6.16, ch. 34, SLA 1962. Except for minor technical amendments (for example, ch. 8, SLA 1971, a revisor's bill which made technical corrections relating to the court system, inserted the word "judge" in four places in the statute), the language of AS 12.45.150 has remained virtually unchanged since 1900.

2/ There are rare instances in solely private disputes where it might be appropriate for private litigants to "prosecute" cases of criminal contempt as a way of

(Footnote Continued)

the private prosecution of a criminal case (i.e., motions, pretrial hearings, trial, appeals, etc.). Instead, the statute refers only to a person who unilaterally, and without the advice or concurrence of the police or prosecutors, "voluntarily appears before a judge" to complain about a matter or before a grand jury to testify. At that point the attorney general, through a state prosecutor, has the statutory authority under AS 44.23.020 to review the matter and to handle the case as appropriate. 3/

The primary purpose of AS 12.45.150 was not to authorize the filing of criminal actions by private persons, but rather to make it clear that malicious accusations, or those lacking probable cause, will subject the complainant to immediate judgment "for the costs of disbursements of the action." However, the statute is poorly drafted and, as already noted, has created confusion in lay persons as to their independent authority to file private criminal actions. Moreover, to the extent that the statute provides for a judgment of costs to be rendered automatically and "immediately" it is probably unconstitutional as a violation of due process. It does not allow a person to have his "day in court" to try to show that the accusation was in good faith. Thus the statute might also be a disincentive for people who might otherwise bring close or marginal cases to the attention of a judge or grand jury. The repeal of the statute will eliminate any lingering confusion regarding the existence of "private prosecutors", while leaving the common law protections against malicious prosecutions intact.

The filing of a criminal action is obviously a very serious matter. The fact that a criminal charge has been filed against a person may have a negative effect upon that person's reputation, position in the community, employment opportunities, etc. The need to defend oneself against criminal charges may also impose a

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(Footnote Continued)

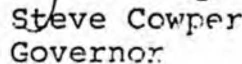
enforcing orders in contested divorce cases. See, e.g., Diggs v. Diggs, 662 P.2d 950 (Alaska 1983). In all other situations, however, AS 44.23.020(b)(3) gives the attorney general sole responsibility for handling criminal matters.

3/ Also see Rule 7(c), Alaska Rules of Criminal Procedure, which permits prosecution by indictment only if the indictment is signed by the prosecuting attorney.

great deal of financial expense and emotional strain. Thus the power to institute criminal proceedings ought not to rest with a private party involved in some sort of vendetta or a personal dispute with another.

There is no such thing as a "private prosecutor" in Alaska, nor should there be. Because AS 12.45.150 is apparently being interpreted by some persons as implicitly recognizing such a procedure, and because it probably violates due process requirements, this obsolete statute should be repealed.

Sincerely,



Steve Cowper
Governor

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

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JUNEAU, ALASKA 99811
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May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

H. JUD.	2-24-87	1:30 p.m.
H. JUD.	2-23-87	1:30 p.m.

HOUSE COMMITTEE REPORT

(7)

Date referred: 2/11/87 FURTHER REFERRALS: Finance

DATE: 2-24-87

The Judiciary Committee has considered HB 121

"An Act repealing a provision related to payment of costs by private prosecutor."

RECOMMENDS:

[ ] replace with ______________________ [ ] the same title

[ ] attached amendment(s) [ ] a new title

[✓] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the ______________ Committee

ADOPTS: [✓] ________ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact

[ ] zero fiscal note

[ ] zero with analysis

[ ] same as previous fiscal note published ______________

[✓] same as previous zero fiscal note published 2/11/87

SIGNING DO PASS:

[signatures]

SIGNING OTHER RECOMMENDATIONS:

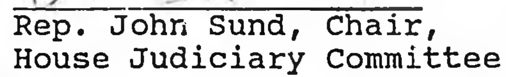
Robin L. Taylor (Do Not Pass Removes common law right in statute law)

[signature]

Chairman's signature

LETTER OF INTENT
HOUSE JUDICIARY COMMITTEE
HOUSE BILL 121

By repealing AS 12.45.150, the Legislature does not intend to limit the present practice allowing the filing, by private parties, of motions for orders to show cause for criminal contempt of court.



Rep. John Sund, Chair,
House Judiciary Committee

MEMORANDUM

April 8, 1987

TO: Rep. John Sund

FROM: J. Hartle, PA

RE: House Bill 121

19. HB 121 (Rules/Governor) An Act repealing a provision related to payment of costs by private prosecutor

A. Heard in Judiciary 2/23, 2/24
B. Passed out "Do Pass" 2/24
C. Status: H. Floor
D. Purpose: Repeals provision for immediate cost recovery against malicious prosecution by private prosecutor.
E. Issue: Kenai use of provision to imply right of private prosecution.
F. Issue: Why not have private prosecutors:
1) An individual is not constrained by the same public purpose and ethical considerations that a D.A. must follow.
2) Remedies are available in civil court.
3) The Court System doesn't know how to handle it.
G. In File:
1) HB 121
2) Letter from Karla Forsythe
3) Kenai Court Case
4) Governor's transmittal letter
5) Repealed statute
6) Statute giving authority to the Dept. of Law to prosecute all criminal cases.

APR 07 '87 15:53 ACA 2ND JUD DIST FAX276-6342

RECEIVED
OCT 0 [illegible]
Office of Administrative Director
Alaska Court System

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF LAW

CRIMINAL DIVISION

REPLY TO:

☒ CRIMINAL DIVISION CENTRAL OFFICE
POUCH KC
JUNEAU, ALASKA 99811
PHONE: (907) 465-3428

☐ OFFICE OF SPECIAL PROSECUTIONS AND APPEALS
1031 WEST 4TH AVENUE, SUITE 318
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424

October 2, 1986

Mr. Arthur H. Snowden, II
Administrative Director
Alaska Court System
303 K Street
Anchorage, Alaska 99501

Dear Art:

Your letter of September 22 to Attorney General Brown jogged my memory about the need to amend or repeal AS 12.45.150. I agree that the statute is beginning to cause quite a few problems, particularly in Kenai, by giving people the idea that they have the authority to prosecute criminal charges on their own. The Department of Law will therefore propose that the Governor introduce legislation to cure this misperception. For your information, we have opened a legislative file on this subject (No. 773-87-0067) in order to facilitate the drafting and review of the proposed bill.

Your letter included a copy of Mary Anne Henry's 1977 internal office memorandum on this subject, which I had never seen, and although I agree with her assessment of the problems that can be created by private prosecutors, I do not agree with her conclusion that AS 12.45.150 in fact authorizes private prosecutions. To that extent the memorandum does not, and never has, represented the position of the department.

It has always been our position that AS 12.45.150 must be read as consistent with AS 44.23.020(a)(3), which places responsibility in the Attorney general to "prosecute all violations of state law." There are rare instances in solely private disputes where it may be appropriate for private litigants to "prosecute" cases of criminal contempt as a way of enforcing orders in contested divorce cases. See, e.g., Diggs v. Diggs, 663 P.2d 950 (Alaska 1983). However, in all other cases we view AS 44.23.020(a)(2) as giving the attorney general sole responsibility over the handling of criminal matters.

In order to be consistent with AS 44.23.020 we have interpreted AS 12.45.150 to refer not to the actual prosecution of a case (i.e., motions, pretrial hearings, trial, appeals, etc.) but only to a person who unilaterally, and without the

advice or concurrence of the police or prosecutors, "voluntarily appears before a judge" to swear out a complaint or before a grand jury to testify. At that point the attorney general has the statutory authority under AS 44.23.020 to review the matter and to dismiss or compromise the case as appropriate. See also Criminal Rule 7(c), which permits prosecution by indictment only if signed by the prosecutor. 1/

In our view, the primary purpose of AS 12.45.150 is to make it clear that malicious accusations, or those lacking probable cause, will subject the complainant to immediate judgment "for the costs or disbursements of the action."

We have consistently advised all prosecutors who have run into cases involving these complainants that they should handle the cases just like any other. Therefore I believe that the procedure currently in operation in Kenai, whereby such complaints are simply filed in the clerk's office pending review by the district attorney, is adequate under the present statute. Nonetheless, the statute should be amended. I will keep you advised on the progress of any legislation on this subject.

Very truly yours,

HAROLD M. BROWN
ATTORNEY GENERAL

By: ______________________
Dean J. Guaneli
Assistant Attorney General

DJG:so-17

cc: Jim Ayers
Director/Legislative Relations

Art Peterson
Assistant Attorney General

1/ Several years ago a tenacious Rodney Wolff wrote to the Ombudsman and the grand jury foreman in an attempt to testify before a Fairbanks grand jury about some very shady business practices (see Wolff v. Arctic Bowl, Inc., 560 P.2d 758 (Alaska 1977)) and alleged perjury. The prosecutor finally relented and let him testify, but drew the line at letting Wolff and his attorney, Clem Stephenson, act as a private prosecutor. The grand jury even returned an indictment, which the prosecutor refused to sign.

Memorandum

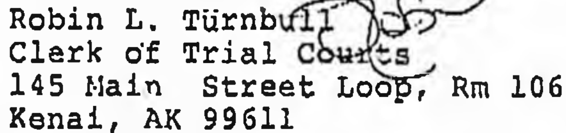
Alaska Court System

RECEIVED
SEP 08 1986
Office of Administrative Director
Alaska Court System

TO:
Ms. Karla Forsythe
Staff Counsel
Alaska Court System
303 K Street
Anchorage, AK 99501

DATE : September 4, 1986

FROM:



Robin L. Turnbull
Clerk of Trial Courts
145 Main Street Loop, Rm 106
Kenai, AK 99611

SUBJECT: State vs Ben Holly
3KN S86-1478 Cr.
Private Party filing

Please review the attached copy of a private party complaint filed in Kenai on August 27, 1986. I accepted the complaint for filing as I have been advised that I can not refuse such filings. Mr. Smallwood advised me that the District Attorney's office refused to file a complaint against Mr. Holly, and the Kenai District Attorney's office has further advised that they will be filing a Dismissal of this action. This is the second such filing within the last three months, and I am in need of written policy or direction as to handle such matters.

Thank you,

Adm. F-2
Rev. 2-73

IN THE DISTRICT COURT OF THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT KENAI

Clerk of the Trial Courts
Deputy

STATE OF ALASKA

PLAINTIFF

VS

BEN HOLLY

DEFENDANT

FELONY/[redacted]
CRIMINAL COMPLAINT

NO. 3KN S86-1478 CR

ASSAULT - THIRD DEGREE TWO COUNTS
AS 11.41.220 (a) (1)

CRIMINAL TRESPASS FIRST DEGREE
AS 11.46.320 (a)

Complainant, JOHN L SMALLWOOD (CITIZEN)

personally appearing before me and being duly sworn, states that on or about the 22 day of June, 19 86, at or near the area of SOLDOTNA, in the Third (3rd) Judicial District, State of Alaska, BEN T HOLLY

Complaint (1) Recklessly placed John L Smallwood in fear of imminent serious physical injury by means of a dangerious instrument, in violation of AS 11.41.220(a)(1)

Complaint (2) That Ben T. Holly did inter upon the private property, on the above date at approx. 200 Am, uninvited, and for the purpose of stealing from the home & busness of the Complainant at 391 Aspen Drive located in the city of Soldotna Alaska and did remove through a bedroom window of the Complainant and did flee off from said private property to avoid arrest and assaulted complainant, that was attempting to retrive stolen property.

John L Smallwood
(Signature of Complainant)

Sworn to and subscribed before me this 27th day of Aug, 1986

[signature]
~~DISTRICT JUDGE~~
Deputy Magistrate

(SEAL)

MEMORANDUM State of Alaska

TO: Joe Balfe

DATE: February 17, 1977

FILE NO:

TELEPHONE NO:

FROM: Mary Anne Henry MAH

SUBJECT: Re: AS 12.45.150
Private Prosecution

It is not clear from the history of this statute what the legislative intent was behind its enactment. It is likely that the reasoning was the same as in other states, that is, private prosecution has always existed in our court system, so why change it now? At common law, criminal prosecution was purely adversary, each aggrieved party retained his own counsel to prosecute his private interest. Over the years, private prosecution statutes have simply remained on the books, even though public-funded prosecutorial offices have since been established. In fact, in most states where private prosecution is no longer valid or extremely limited, it has been the judicial branch that has taken the initiative.

The Alaska statute does give the court some control over the proceedings conducted by a private prosecutor. However, there is no mention of any powers that can be exercised by the District Attorney's office. The Nebraska Supreme Court has construed its statute that set up the system of public-financed District Attorneys as precluding private prosecution. McKay v. State, 132 N.W. 741 (Nebraska, 1911). See also State v. Peterson, 218 N.W. 387 (Wis., 1928). AS 44.23.020(b)(3) states that the attorney general shall "prosecute all cases involving violation of state law..." (Emphasis added) It could be argued, as it was in Nebraska, that this precludes a private person from actually prosecuting a criminal case. Of course, it is not clear at all whether that was the legislative intent, and it should be noted that the private prosecution statute was amended as late as 1971, with no acknowledgement of a possible conflict of statutes. Two state courts have allowed the procedure only if it has first been approved by the public prosecutor or the state. State v. Bartlett, 74 A. 18 (Me., 1909); Handley v. State, 106 So. 692 (Ala., 1925).

It can be argued that the power to dismiss or defer prosecution on any case should remain in the hands of the District Attorney. The reasoning is that if the exercise of such discretion is possessed by an attorney who owes his loyalty to a private party, it could lead to prolonged harassment, or even a form of blackmail. The answer to that

argument in Alaska would be that the courts are empowered by AS 12.45.150 to prevent such misuse of that discretion.

Finally, it appears that there would be no difference if the crime were a misdemeanor or a felony. At common law the private prosecutor also had the power to present his case to the grand jury, as well as take charge of the trial with the petit jury. I was unable to find any cases that made a distinction between felony and misdemeanor trials.

Recently, some state courts have decided that the existence of private prosecutors is repugnant to our system of criminal justice, and some have hinted that it may be a violation of the defendant's constitutional rights. Similar arguments could be presented to the Alaska courts.

First of all, it can be argued that "private prosecutor" is a contradiction in terms. A prosecutor is not an advocate in the ordinary sense of the term. He is a representative of the people and his duty is to see that justice is done. This does not necessarily require that conviction be the final outcome. He is to see that the criminal laws of the State are honestly and impartially administered, and he should not be prejudiced by motives of private gain. He determines what evidence is to be presented to the trier of facts and it is his duty to show the entire transaction, regardless of whether it tends to establish guilt or innocence. On the other hand, a private attorney owes his client total allegiance, and ethically he cannot act for an interest even slightly adverse to his client. This conflict in roles can be clearly seen in the following areas: 1) decision whether to prosecute; 2) plea bargaining; 3) sentence recommendations and 4) determination of what evidence to present, including exculpatory evidence. <u>Private Prosecution, The Entrenched Anamoly</u>, 50 NC Law Rev. 1171 (1972), <u>Biemel v. State</u>, 37 N.W. 244 (1888).

It is also arguable that the defendant's constitutional right to due process may be violated by the use of a private prosecutor, or even the presence of a private prosecutor assisting the public prosecutor. The issue then becomes whether the practice inherently is so prejudicial as to infringe on the defendant's fundamental right to a fair trial. <u>Estes v. Texas</u>, 381 U.S. 532 (1965). Any degree of influence by a private prosecutor who is paid to obtain a conviction could impermissably taint a procedure that demands prosecutorial impartiality. In <u>State v. Harrington</u>, 534 S.W.2d 44 (Mo., 1976) the Missouri Supreme Court stated:

> We believe, and hold, that the practice of allowing private prosecutors, employed by private persons, to participate in the prosecution of criminal defendants, is inherently and fundamentally unfair, and that it should not be permitted on retrial of this case or in any case tried after publication of this opinion in the Southwestern Reporter.

Since it would be difficult to determine in specific cases whether there has been an impermissable taint, it would be much easier to ban the use of private prosecutors in all criminal cases. Any countervailing state interest in using private prosecutors is, at best, miniscule.

Therefore, although AS 12.45.150 allows private prosecution in this state, and only a few states have stopped or severely limited the practice, a criminal defendant could present some valid arguments based on prejudice to him, unethical behavior on the part of the prosecutor, and perhaps even a violation of his constitutional rights.

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ler Title II, the plaintiff would
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pproved by the district court.
m C. Allen Foster, Attorney

f Seniority Rights, 75 Harv.

Robinson v. Lorillard demonstrates at least two important principles regarding the elimination of racial discrimination in employment. First, it shows the vigor with which the courts will attack the system that shows the signs of perpetuating discrimination. Secondly, it reveals that the costs of this necessary effort are very high.

LEE A. PATTERSON, II

Private Prosecution—The Entrenched Anomaly

Since the days of our Constitution's infancy, traditional judicial truisms have been superseded by the viable doctrines of "due process," "equal protection," and "judicial fairness." Notwithstanding this evolution, there remain seemingly impregnable citadels of judicial tradition. One such remnant of the past is the policy allowing private prosecution in criminal actions. Recently in *State v. Best*,[1] the North Carolina Supreme Court reiterated[2] its stand condoning the practice.

I. BACKGROUND AND STATE OF LAW

At common law criminal prosecution adhered to the pure form of the adversary system; each aggrieved party retained his own counsel to prosecute his private interest. The private prosecutor had the case laid before the grand jury and took charge of th trial before the petit jury.[3] Despite statutory provisions requiring a public prosecutorial system[4] and judicial repudiation of the procedure in some jurisdictions[5] private prosecution remains well entrenched.[6]

While adhering to the philosophy of the common law rule, the North Carolina courts have modified its application. Whereas the clas-

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[1] 280 N.C. 413, 186 S.E.2d 1 (1972).

[2] *See, e.g.*, State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971); State v. Lippard, 223 N.C. 167, 25 S.E.2d 594 (1943); State v. Carden, 209 N.C. 404, 183 S.E. 898, *cert. denied*, 298 U.S. 682 (1936); State v. Davis, 203 N.C. 13, 164 S.E. 737 (1932).

[3] State v. Carden, 209 N.C. 404, 410, 183 S.E. 898, 902, *cert. denied*, 298 U.S. 682 (1936). *See generally* 42 AM. JUR. *Prosecuting Attorneys* § 10 (1942).

[4] *E.g.*, N.C. CONST. art. IV, § 18; N.C. GEN. STAT. § 7A-61 (Supp. 1971).

[5] *E.g.*, McKay v. State, 90 Neb. 63, 132 N.W. 741 (1911); Bird v. State, 77 Wis. 276, 45 N.W. 1126 (1890); Biemel v. State, 71 Wis. 444, 37 N.W. 244 (1888).

[6] *E.g.*, Handley v. State, 214 Ala. 172, 106 So. 692, 694-95 (1925); Robinson v. State, 69 Fla. 521, 68 So. 649 (1915); State v. Bartlett, 105 Md. 212, 74 A. 18 (1909). State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

sic interpretation precluded any challenge to the private prosecutor,[7] North Carolina courts have reserved the final determination for the discretion of the trial judge[8] but have intimated that the practice is not to be interferred with in the absence of a showing of abuse.[9] As justification for retaining the practice it has been tersely stated that it has "existed in our courts from their incipiency."[10]

Decisions in other jurisdictions reflect diverse judicial attitudes ranging from agreement with the common law view[11] to abolishment of the practice.[12] Various jurisdictions condition allowance of the procedure on the approval of the prosecutor,[13] the state,[14] or the court.[15] Language in some decisions espouses the public duty to carry out such prosecutions.[16] Indeed, in the face of a statute that banned private prosecutors, one court ruled that the definition of "private prosecutor" did not include an attorney hired by the complaining witness to prosecute.[17] On the other side of the spectrum it has been ruled in cases involving prosecuting for contingent fees that prosecuting for the private purse of the solicitor in such cases is abhorrent to the sense of justice.[18] Another court[19] construed a statute providing for publicly financed solicitors[20] as precluding private prosecution because of its inherent private motivation. Similarly, numerous cases forbid a prosecutor to appear in any capacity where he is financially backed or is appointed by any private interest.[21] Rulings on challenges to the private prosecutor appearing before the grand jury overwhelmingly hold that prejudice to the defendant is too damaging to be tolerated[22] because the prosecutor's position

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[7] *See generally* 42 AM. JUR. *Prosecuting Attorneys* § 10 (1942).

[8] State v. Davis, 203 N.C. 13, 26, 164 S.E. 737, 744 (1932).

[9] State v. Carden, 209 N.C. 404, 411, 183 S.E. 898, 902, *cert. denied*, 298 U.S. 682 (1936).

[10] State v. Best, 280 N.C. 413, 416, 186 S.E.2d 1, 3 (1972). *See also* State v. Lippard, 223 N.C. 167, 171, 25 S.E.2d 594, 597 (1943).

[11] Price v. Caperton, 62 Ky. 204, 1 Duv. 207 (1864).

[12] Biemel v. State, 71 Wis. 444, 37 N.W. 244 (1888).

[13] State v. Bartlett, 105 Me. 212, 74 A. 18 (1909).

[14] Hendley v. State, 214 Ala. 176, 106 So. 692, 694-95 (1925).

[15] State v. Kent, 4 N.D. 577, 62 N.W. 63 (1895).

[16] Robinson v. State, 69 Fla. 521, 68 So. 649 (1915).

[17] Warren v. State, 130 Tex. Crim. 448, 94 S.W.2d 430 (1935).

[18] Bacca v. Padilla, 26 N.M. 223, 190 P. 730 (1920).

[19] McKay v. State, 90 Neb. 63, 132 N.W. 741 (1911).

[20] North Carolina has a similar statute. *See* N.C. GEN. STAT. § 7A-61 (Supp. 1971).

[21] *E.g.*, Bird v. State, 77 Wis. 276, 45 N.W. 1126 (1890). Biemel v. State, 71 Wis. 444, 37 N.W. 244 (1888).

[22] Nicholas v. State, 17 Ga. App. 873, 87 S.E. 817 (1916); Wilson v. State, 70 Miss. 595, 13 So. 22. (1893); Flege v. State, 93 Neb. 610, 142 N.W. 276 (1913); Hartgraves v. State, 5 Okla. Crim. 266, 114 P. 343 (1911).

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as an officer of the court demands a degree of impartiality unlikely in the private prosecutorial setting. Those decisions abolishing or severely restricting private prosecution have generally based their determinations on the contemporary judicial philosophy recognizing its almost complete morphasis since the concept of private prosecution emerged.

II. Conflict in Roles

Perhaps the one area which has changed most drastically since the inception of the doctrine permitting private prosecutors has been the role of the public prosecutor. From his sole function as procured advocate for a prosecution, the duties of the public prosecutor have taken on new dimensions. He is not an advocate in the ordinary sense of the word, but is the people's representative, and his primary duty is not to convict but to see that justice is done.[23] The prosecutor is an officer of the state who should have no private interest in the prosecution and who is charged with seeing that the criminal laws of the state are honestly and impartially administered, unprejudiced by any motives of private gain.[24] It is his duty to show the whole transaction as it was, regardless of whether it tends to establish a defendant's guilt or innocence.[25]

Conversely, a privately retained attorney owes his client individual allegiance, and once employed he must not act for an interest even slightly[26] adverse to that of his client in the same general matter.[27] Therefore, in view of the ethical[28] and judicial[29] restrictions imposed on the public prosecutor and the generally recognized loyalties of the private advocate, "private prosecutor" is a contradiction in terms. The high standard of impartiality demanded of a prosecutor realistically cannot be expected of the private advocate.[30]

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[23] Berger v. United States, 295 U.S. 78, 88 (1935); NCSB Canons of Ethics No. 5.

[24] Biemel v. State, 71 Wis. 444, 37 N.W. 244 (1888).

[25] McKay v. State, 90 Neb. 63, 132 N.W. 741 (1911). *See generally* 23A C.J.S. *Criminal Law* § 1081 (1961).

[26] Parker v. Parker, 99 Ala. 239, 13 So. 520 (1893).

[27] People v. Hanson, 290 Ill. 370, 371, 125 N.E. 268, 270 (1919); People v. Gerald, 265 Ill. 448, 107 N.E. 165 (1914).

[28] NCSB Canons of Ethics No. 5; *see* NCSB Canons of Ethics Nos. B, C.

[29] Biemel v. State, 71 Wis. 444, 37 N.W. 244 (1888).

[30] The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success . . . [even though] counsel employed by outside parties . . . would not feel bound by any such rule of conduct. He appears as private counsel simply, to represent the wishes,

Besides the conceptual anomaly in the conflicting roles and loyalties of the two types of prosecutors, the practical consequences of a private advocate in today's prosecutorial role results in intolerable prejudices. Unlike their common law counterparts, modern prosecutors wield the power of the state's investigatory force, decide whom to indict and prosecute, negotiate the state's position in plea bargaining, and, because of their supposed impartiality as officers of the court, are influential in recommending punishment to the court.

In the normal private prosecutorial setting, the prosecutor remains in charge. Where the private advocate only observes the proceedings from indictment to completion of trial, arguably his presence exposes the defendant to minimal prejudice. However, since the private prosecutor's influence is not confined to the open courtroom, in which obvious prejudice could be more easily detected by the court, all stages of the judicial process must be considered in determining whether the mere presence of the private prosecutor is intollerably prejudicial. The following illustrations of the possible consequences of allowing a private prosecutor demonstrates the prejudice. Because of the varying degrees of control relinquished by the prosecutor, the following discussion by no means illustrates the actual situation in any given case, but it does indicate that the practice is fraught with possible prejudice.

One prosecutorial power that, if imprudently employed, could result in dire consequences to those suspected of a crime is the discretionary authority to decide when to prosecute. At this initial stage of the criminal proceeding, the private advocate is unlikely to play any normal role. However, though the public prosecutor decides whether to prosecute, possibly his decision may be influenced by the pressure of a privately retained attorney.

The solicitor's discretionary power to prosecute is restricted in federal criminal actions by the fifth amendment requirement that all prosecutions for infamous crimes be commenced by grand jury indictment. The function of the grand jury is to stand between the accusor and accused and determine whether a charge is well founded or possibly whether it is a result of malice or ill will.[31] However, the fifth amendment requirement of grand jury indictment does not apply to states indictments, which may be served on the formal charge of the prosecu-

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prejudice, and animosities of this clients: to secure a conviction at all hazards. McKay v. State, 90 Neb. 63, 74, 132 N.W. 741, 745 (1911).

[31] Wood v. Georgia, 370 U.S. 375, 390 (1962).

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tor.[32] In this setting, a private prosecutor could, in those cases where the public prosecutor abdicated to the private attorney, use the discretion of his position at the whim of his client. Likewise, where the private prosecutor also represents a client in a civil suit arising from the same situation, the indictment power could be used as a lever to procure or enhance a financial settlement in the civil action. The reverse of this blackmail situation may be as damaging. For example, a private advocate retained by parties sympathetic to the defendant's plight could move for dismissal, fail to prosecute, or emasculate the indictment through plea bargaining.

Closely related to the power of the prosecutor to indict and prosecute is his discretionary use of the nolle prosequi.[33] Though officially in the province of the court, the employment of nolle prosequi and capias is normally left to the discretion of the solicitor.[34] Prejudices inherent in the exercise of such discretion when the possessor of it owes his loyalty to a private party seeking a conviction are repugnant to our system of justice and could lead to prolonged harassment.[35] The practice of plea bargaining is well established in the criminal process. Recently the United States Supreme Court indicated that plea bargaining is not inherently incompatible with a reasonable judicial standard and that the courts should not interfere unless there has been prosecutorial overreaching.[36] Because the allegiance owed by a private prosecutor to a possibly vengeful client must coexist with the impartiality demanded in the role of solicitor, a fair termination of any plea bargaining based on the equities of the situation is highly unlikely. The public solicitor who is in control of the plea bargaining is less likely to be fair if he is assisted and counseled by a private advocate. If the private prosecutor is given control of the plea bargaining, the interest of his client might override those of the public in determining whether a plea

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[32] Hurtado v. California, 110 U.S. 516 (1884).

[33] A nolle prosequi is merely a declaration on the part of the solicitor that he will not prosecute the suit further at this time. It is not an acquittal, although its effect is to discharge the defendant without delay. Wilkinson v. Wilkinson, 159 N.C. 265, 74 S.E. 740 (1912). However, the defendant may be arrested and tried again. State v. Faggart, 170 N.C. 737, 87 S.E. 31 (1915); State v. Smith, 129 N.C. 546, 40 S.E. 1 (1901); State v. Thornton, 35 N.C. 256 (1852).

[34] State v. Moody, 69 N.C. 529 (1873); State v. Buchanan, 23 N.C. 59 (1840); State v. Thompson, 10 N.C. 613 (1825).

[35] Coupled with the prosecutor's discretionary power to prosecute, this device could be employed to blackmail an accused.

[36] Brady v. United States, 397 U.S. 742 (1970).

to a lesser crime[37] should be accepted.

With the development of the concept of the public prosecutor as an unbiased officer of the court has evolved the influence on the bench of the prosecutor's recommendations for punishment. A solicitor is under a duty to weigh all the mitigating and exculpatory circumstances in arriving at a fair recommendation. Such a duty would be meaningless if the private prosecutor, intent on conviction, possessed the responsibility.

Perhaps the most important power of the prosecutor is his discretion to choose what evidence is submitted to the court.[38] Through the evidence-collecting machinery available to prosecutors such as police investigatory agencies, the prosecutor uncovers both exculpating and inculpating evidence, which may not be discoverable by the defense despite an array of Supreme Court decisions that have proscribed the suppression of evidence which would exonerate the defendant.[39] Notwithstanding the court's admonishments, the prosecution still determines which evidence is exonerating and which is not. This discretion of the prosecution to determine initially what constitutes discoverable evidence should not be tainted with self-dealing.

Finally, at least some jurymen have confidence that the obligations imposed on the prosecutor will be faithfully observed. Consequently, improper suggestions and insinuations from the prosecutor are apt to carry much weight against the accused.[40] Notwithstanding the presence

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[37] The duty incumbent upon the office of prosecutor to ask for a verdict for a lesser offense when the facts and circumstances warrant presents a similar problem in the private prosecutorial setting. *See* State v. Josey, 112 S.C. 20, 99 S.E. 768 (1919). Again there is a discrepancy between the duty of a public prosecutor and that of a private advocate.

[38] At common law, the state was under little duty to disclose to the defense any information concerning the defendant's case. For a more complete description of the common law tradition, see People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 156 N.E. 84 (1927).

[39] The common law approach to prosecution's immunity from defense discovery has been diluted somewhat by the application of the fourteenth amendment to certain prosecution tactics. The prosecution cannot intentionally use perjured testimony against the defendant at trial. Mooney v. Holohan, 294 U.S. 103, 111 (1935). *See also* Miller v. Pate, 386 U.S. 1, 7 (1967). The state is under a duty to correct perjured testimony when presented. Alcorta v. Texas, 355 U.S. 28 (1957); Napue v. Illinois, 360 U.S. 264 (1959). In Brady v. Maryland, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In addition, Court has strongly intimated that the prosecution is under a duty to initiate disclosure of evidence of the defense if the evidence will exonerate the defendant. Giles v. Maryland, 386 U.S. 66 (1967).

[40] Berger v. United States, 295 U.S. 78 (1935). There has also been concern about the appearance of a prejudiced solicitor before the grand jury. Nichols v. State, 17 Ga. App. 593, 87 S.E. 817 (1916).

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of the private prosecutor, in most situations arising during the criminal proceeding the public solicitor or the court is in a position to avoid any resulting prejudice. This is not true, however, in the situation in which the private advocate examines a witness, addresses the jury, or argues to the bench. On such occasions, the harm is inflicted the instant an unwarranted implication or vituperation is released. Likewise, in some instances the mere presence of a private prosecutor is likely to bolster any inference of the guilt of the defendant in the minds of the jury, since the jury probably would ascribe more credence to a prosecuting witness who had invested heavily in the prosecution

III. Due Process Considerations

The fourteenth amendment due process clause is viewed as incorporating traditional notations of fundamental fairness implicit in the concept of liberty;[41] it is a mandate to the states to afford the defendant the fundamental fairness essential to the concept of justice.[42] To determine if a defendant has been deprived of due process by a particular practice, the crucial question is whether the practice inherently is so prejudicial as to infringe the defendant's fundamental right to a fair trial.[43]

As applied to the private prosecution situation, the constitutional question depends on whether a procedure that demands impartiality on the part of the prosecutor becomes impermissably tainted when substantial private influence is interposed. The question is easily answered in the negative when the public prosecutor remains in complete control of the litigation and his decisions are unaffected by the presence of the private prosecutor. The answer should be different once the private prosecutor, who is paid to obtain a conviction, actually assumes any degree of influence, because his inherently biased suggestions and actions may compromise a crucial and effectively dispositive exercise of

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[41] Palko v. Connecticut, 302 U.S. 319 (1937).

[42] Lisenba v. California, 314 U.S. 219 (1941); Foster v. Illinois, 332 U.S. 134, 136 (1947). The emphasis is upon basic fairness, not upon compliance with the Bill of Rights, and a state procedure may be held to violate due process even though its operation is not contrary to any specific guarantees of the first eight amendments. Israel & LaFave, Criminal Procedure in a Nutshell 7 (1971). This "federalism" theory, though subordinated to the "selective incorporation" theory several years ago has recently re-surfaced in the Supreme Court's opinions. Williams v. Florida, 399 U.S. 78, 117-43 (1970) (Harlan, J., concurring and dissenting).

[43] Estes v. Texas, 381 U.S. 532, 587 (1965) (Harlan, J., concurring, interpreting the majority opinion).

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prosecutorial discretion.[44] Moreover, the difficulty in determining whether in specific cases the private prosecutor has actually prejudiced the defendant militates toward a ruling that private prosecutors should be banned in all cases, especially since the countervailing state interest in continuing the practice is miniscule. Arguably, any process which subjects the accused to the abuses inherent in the questioned method of trial deprives him of the fundamental fairness required by the due process clause.

IV. Ethical Considerations

Throughout the history of judicial review of private prosecution in North Carolina the ethical question of the propriety of private prosecution has been overlooked.[45] Though related to and often commingled with the conflict-in-roles consideraitons previously discussed, ethical decisions dealing with prosecutors have been less confined to the substantive structures of the past. The North Carolina State Bar has imposed a high moral obligation on the solicitor to seek justice at the expense of being denied convictions.[46] Moreover, both the Council of the North Carolina State Bar and the General Assembly have attempted to segregate the public solicitor from all private influences.[47] This philosophy has been followed to the extent of declaring it unethical for an attorney who shares office space or expenses with any judge, assistant judge, solicitor, assistant solicitor, or substitute solicitor to practice law in a criminal court of such officer[48] or for any attorney who is or has been such an officer to accept professional employment in any case growing out of any matter connected with his office during his incumbency.[49] These strict ethical standards result from the realization by the Council of the frailty of all men and of the adverse effect on public opinion of such associations regardless of whether actual prejudice in the courtroom results.[50] However, because of inconsistent opinions in

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[44] See text accompanying notes 4-9 *supra*.

[45] *See* cases cited note 2 *supra*.

[46] NCSB Canons of Ethics No. 5.

[47] NCSB Canons of Ethics Nos. 5, B, B-1, C. The need for citation to Ethics Opinions which restrict the solicitors private practice of law has been alleviated by the abolishment of such practice by statute. N.C. Gen. Stat. § 7A-61 (Supp. 1971).

[48] NCSB Canons of Ethics No. B-1; *see, e.g.*, NCSB Council, Ethics Opinions, No. 675 (1969); *id.* No. 623 (1968); *id.* No. 606 (1968); *id.* No. 588 (1967).

[49] NCSB Canons of Ethics No. C; *see, e.g.* NCSB Council, Ethics Opinions, No. 659 (1969); *id.* No. 665 (1969); *id.* No. 626 (1968); *id.* No. 555 (1967).

[50] Such a practice on the part of a court officer in accepting such employment would

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areas tantamount to private prosecution, such as where a city attorney criminally prosecutes a city employee, the Council's ethical stand on the issue is less than clear.[51] These inconsistencies are evidenced by the cumulative impact of the opinions which reveal that while the Council acknowledges that private prosecutors are proper it prohibits solicitors from accepting private fees.[52] It remains anomalous that the Council expects "clean hands" of the solicitor but accepts privately financed prosecution.[53]

V. Conclusion

Because of the inherent discrepancies in roles in both the philosophical and practical application, the possible ethical compromises, and the questionable constitutional legitimacy, the private prosecution should be abolished.[54] In the event a party can demonstrate that a particular prosecution is inadequate in a certain situation, the North Carolina General Statutes provide adequate means of alleviating the problem by the appointment of a temporary assistant to the public prosecution. This system avoids the prejudices resulting from private prosecution and results in the appointment of attorneys who prosecute in the state's interest and only for compensation by the state.

John A.J. Ward

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have the appearance of evil whether or not evil grows out of the practice and the solicitors . . . should not permit themselves to become next friends through the influence of attorneys practicing in their courts.

It is human frailty to return favors and consciously or unconsciously favors received often times influence one's conduct . . . .

NCSB Council, Ethics Opinions, No. 454 (1964).

[51] *See* NCSB Council, Ethics Opinions, No. 595 (1967); *id.* No. 284 (1959); *id.* No. 234 (1958); *id.* No. 142 (1954); *id.* No. 103 (1953).

[52] NCSB Council, Ethics Opinions, No. 470 (1965); *id.* No. 250 (1958).

[53] Of notable significance is the fact that although the Council has issued in excess of 735 decisions, only seven have mentioned private prosecution. In addition, the Council has neither justified its confirmation of the practice nor addressed itself squarely to the issue.

[54] In *Best*, the North Carolina Supreme Court accurately pointed out that the legislature has provided for the appointment of a full-time solicitor to prosecute in the name of the state and to be compensated by the state, and for the appointment of temporary assistants when the dockets are crowded. However, the court concluded that since the statute did not specifically prohibit private prosecution, the practice was allowable. State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972). However, it could be argued that since the statute established the office of public solicitor, restricted his compensation and loyalties, and provided for the appointment of assistants by a disinterested court in case of emergencies, the legislature intended to exclude the intrusion of private interests.

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who is the officer provided by the laws of the state to initiate and carry on such trials, who shall be unprejudiced and unpaid except by the state, and that he shall have no private interest in such prosecution. He is an officer of the state . . . . 'The prosecuting officer represents the public interests, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simply justice; and he has no right to sacrifice this to the pride of professional success.' . . . [The prosecutor has a duty to present evidence favorable to the defendant]. This method of presenting a case is not that favored or pursued in civil cases, where the paid attorneys of the respective parties conduct them. And criminal cases are not likely to be so presented if the prosecution is permitted to be conducted by the paid attorneys of parties who from passion, prejudice, or even an honest belief in the guilt [sic] of the accused, are desirous of procuring his conviction."

In a later Wisconsin case, *State v. Peterson*, 195 Wis. 351, 218 N.W. 367, 369 (1928), the Court said:

"In an early day in England private parties prosecuted criminal wrongs which they suffered. They obtained an indictment from a grand jury, and it became the duty and the privilege of the person injured to provide a prosecutor at his own expense to prosecute the indicted person. Our scheme of government has changed all this. It is now deemed the better public policy to provide for the public prosecution of public wrongs without any interference on the part of private parties, although they may have been injured in a private capacity different from the general public injury that accrues to society when a crime is committed. So under our system we have private prosecution for private wrongs and public prosecution for public wrongs. Our scheme contemplates that an impartial man selected by the electors of the county shall prosecute all criminal actions in the county unbiased by desires of complaining witnesses or that of the defendant."

This Court has recognized the inherent vice and potential prejudice arising from the participation of privately retained prosecutors in the prosecution of criminal defendants, but, nevertheless, has yet to strike down a conviction because of a private prosecutor's participation. The decisions have cast the burden on the defendant to allege and prove prejudice. We have come to believe that, by reason of the public policy enunciated by the Legislature, such a burden is unwarranted.

We are not unaware that in most jurisdictions private prosecutors continue to participate in public prosecutions and text authorities proclaim such practice to be the general rule. 63 Am.Jur.2d Prosecuting Attorneys § 9 (1972); 27 C.J.S. District & Prosecuting Attorneys § 23 (1959). The reasons advanced are many and diverse but the underlying assumption is that the prosecuting attorney will retain control and management of the case and presupposes the trial court will keep a watchful eye on the private prosecutor throughout the proceedings.

In "Private Prosecution—The Entrenched Anomaly", 50 North Carolina Law Review 1171 (1972), the author discusses the conflicting roles of public and private prosecutors. Mention is made of the drastic change of the role of the public prosecutor since the inception of the doctrine permitting participation by private prosecutors. "From his sole function as procured advocate for a prosecution, the duties of the public prosecutor have taken on new dimensions. He is not an advocate in the ordinary sense of the word, but is the people's representative, and his primary duty is not to convict but to see that justice is done. The prosecutor is an officer of the state who should have no private interest in the prosecution and who is charged with seeing that the criminal laws of the state are honestly and impartially administered, unprejudiced by any motives of private gain. It is his duty to show the whole transaction as it was, regardless of whether it tends to establish a defendant's guilt or innocence.

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"Conversely, a privately retained attorney owes his client individual allegiance, and once employed he must not act for an interest even slightly adverse to that of his client in the same general matter. Therefore, in view of the ethical and judicial restrictions imposed on the public prosecutor and the generally recognized loyalties of the private advocate, 'private prosecutor' is a contradiction in terms. The high standard of impartiality demanded of a prosecutor realistically cannot be expected of the private advocate." 50 N.Car.L.Rev. at 1173 (footnotes omitted).

Our Court recognized this contradiction in *State v. Moreaux*, 254 Mo. 398, 409, 162 S.W. 158, 161 (1914), when the view was expressed that "they [special prosecutors] are usually employed by private individuals solely to secure a conviction, and their zeal and energies are bent to accomplish that end. This is not the sole purpose of a criminal prosecution, but a result which may, and if the accused is shown to be guilty should, follow a fair and impartial trial, always best afforded the accused when the prosecution is conducted by the state's accredited representative, who, no matter how vigorously he may prosecute, does not, or at least should not, under his oath, lose sight of the fact that the accused is entitled to a fair trial."

The distinction between the roles of a public prosecutor and a private prosecutor is recognized in Supreme Court Rule 4, Code of Professional Responsibility. Rule 4, EC 7-13 points out that the responsibility of a public prosecutor differs from that of the usual advocate, noting that it is the public prosecutor's duty to seek justice, not merely to convict. Reasons are spelled out why the public prosecutor has this special duty. Rule 4, DR 7-103(B) further amplifies the duty and obligations of the public prosecutor in criminal litigation. On the other hand, Rule 4, EC 5-1, EC 5-14, EC 5-21, and EC 7-1, concerning the duties his cause, free from the interests or desires of others.

The modern day prosecutor wields the power of the State's investigatory force, decides whom to indict and prosecute, decides what evidence to submit to the court, negotiates the State's position in plea bargaining and recommends punishment to the court. The entry of a private prosecutor into a criminal prosecution exposes all of these areas to prejudicial influence. We consider such exposure intolerable.

The judgment is reversed and the cause remanded.

SEILER, C. J., and MORGAN, BARDGETT, FINCH and DONNELLY, JJ., concur.

HOLMAN, J., dissents in separate dissenting opinion filed.

HENLEY, J., dissents and concurs in separate dissenting opinion of HOLMAN, J.

HOLMAN, Judge (dissenting).

I respectfully dissent. My dissent is based on the point which rules that privately employed attorneys may no longer assist prosecuting attorneys in this state.

In the first place this ruling is contrary to the general rule in this nation. In 27 C.J.S. District & Pros. Attys. § 28a, p. 711, it is said that, ". . . special prosecutors, privately employed, are permissible if agreeable to the prosecuting attorney; and provided the district or prosecuting attorney retains control and management of a criminal prosecution, . . ." and at § 29(1)(c), p. 725, it is stated that, "By the great weight of authority the court may, in its discretion, permit the prosecuting attorney to have the assistance of counsel employed by the prosecuting witness or other persons interested in securing a conviction; but such appointment, it has been held, can be made only on the request or consent of the prosecuting attorney, which, however,

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Likewise, in this state the practice has long been approved. In the early case of *State v. Hamilton*, 55 Mo. 520, 521 (1874) this court stated that, "There is no law in this State to prevent the employment of counsel to assist the Circuit Attorney in carrying on a prosecution. It is very often necessary to promote the ends of justice that it should be done. When counsel are engaged and take part in the conduct of a case, the peculiar position or attitude that they shall assume in reference thereto, is primarily a matter to be arranged between themselves, under the supervision and control of the trial court. It was within the discretion of the court to permit the assistant counsel to conclude the argument in the case, if the prosecuting officer waived his right to do so, and we will not attempt to revise that discretion here. . . ." Also, in *State v. Finley*, 245 Mo. 465, 150 S.W. 1051, 1054 (1912) the court stated that, "Error is also assigned in the trial court's action in permitting special counsel to conduct the examination of witnesses for the state. This assignment must also be disregarded. *State v. Stark*, 72 Mo. 37; *State v. Coleman*, 199 Mo. 120, 97 S.W. 574. The information must be preferred by the prosecuting attorney; but after that is done we see no reason why a special counsel may not conduct the trial in the same manner as the public prosecutor. He is under the eye of the court, and must conform to all the rules of the court and laws which regulate the conduct of the prosecuting attorney." And in the more recent case of *State v. Matthews*, 111 S.W.2d 62, 65 (Mo.1937) Judge Westhues stated that, "If parties interested in a prosecution feel that the prosecuting attorney, elected by the people, is unable to cope with the legal talent employed by the defendant, they ought in justice be permitted to employ additional counsel at their own expense. Lawyers, after all, are sworn officers of the court and while conducting a trial are under the direct control of the trial court. How, then, can the employment of counsel in a criminal prosecution be legally [illegible]

reason for departing from our previous rulings."

Other cases of like import are: *State v. Stark*, 72 Mo. 37[1] (1880), *State v. Robb*, 90 Mo. 30, 2 S.W. 1[3] (1886), *State v. Orrick*, 106 Mo. 111, 17 S.W. 176[8] (1891), *State v. Taylor*, 98 Mo. 240, 11 S.W. 570[1] (1889), *State v. Coleman*, 199 Mo. 112, 97 S.W. 574[9] (1906), *State v. Barnes*, 325 Mo. 545, 29 S.W.2d 156[9] (1930), *State v. Boyer*, 232 Mo. 267, 134 S.W. 542[6] (1911) and *State v. McCracken*, 341 Mo. 697, 108 S.W.2d 372[2] (1937). While the principal opinion does not mention that any cases are being overruled thereby it seems clear that the decision overrules all of the cases (and no doubt others) that have been heretofore cited.

Great reliance seems to be placed on S.C. Rule 4-E.C. 7-13 which specifies the duties of a prosecuting attorney and his responsibilities to the defendant as well as to the public. I do not think that rule should affect this decision. When a lawyer is employed to assist the state he is probably bound by that rule. If not, it is clear that the prosecuting attorney is in absolute charge of the case and he will see to it that the rule will not be violated in connection with the prosecution of the case. The private attorney does not become the prosecuting attorney but is merely employed to assist him.

Of course, no one wants to see an innocent man convicted of a crime. By the same token good citizens do not desire to see a guilty man acquitted. Conviction of the guilty is necessary if we are to have any substantial enforcement of laws. Many courthouses have the motto inscribed thereon that, "Obedience of law is liberty." The defendant is entitled to a fair and just trial. The state and the public are also entitled to fair and just treatment. The defendant has always been awarded many advantages in the trial of a criminal case and recent decisions have added to them. Some of these advantages are: (1) the state must prove its

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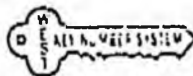
defendant is presumed to be innocent, (3) the defendant is entitled to twice as many peremptory jury challenges as the state in felony cases, (4) the defendant may refuse to testify and the state cannot comment thereon, (5) if he does testify his cross-examination is restricted, (6) there are restrictions upon the use of confessions and line-ups, (7) the verdict must be unanimous as distinguished from three-fourths in civil cases, and (8) prior to trial the prosecutor must disclose all of his information to the defendant which might aid him. And the decision today will add one more restriction upon the prosecution.

Many prosecuting attorneys are very able. In many areas, however, young attorneys are elected to that office just to enable them to obtain experience. It is not unusual to elect a man prosecuting attorney who has never actually tried a case. And yet he will often have to match his ability with highly skilled criminal lawyers. Under the principal opinion when that situation develops a private attorney could not be employed to assist the prosecution.

The practice of employing private counsel is rarely used in this state. I see no necessity for this court, however, to decree that the practice is absolutely outlawed. There are no doubt a few cases from time to time where assistance is necessary and desirable. This practice which has been approved in this state for more than a century should not be disturbed.



Ex parte William Clyde HOUSTON, Jr., Petitioner,

v.

Wm. J. HENNESSEY, Jr., Respondent.

No. 36657.

Missouri Court of Appeals, St. Louis District, Division Two.

Nov. 10, 1975.

Habeas corpus proceeding was brought by petitioner who had been found guilty of criminal contempt for violating temporary injunction. The Court of Appeals, Stewart, J., held that where petitioner's answer to verified return to writ was not under oath of petitioner, allegations of return must be taken as true; that court did not improperly deny petitioner's request to disqualify judge; and that since petitioner who knew of temporary injunction allowed approximately 50 days to elapse without his attacking it before he knowingly displayed film which was substantially the same as the film which was the subject of the temporary injunction, petitioner was properly found guilty of criminal contempt.

Writ of habeas corpus quashed and petitioner remanded to custody.

1. Habeas Corpus ⇐63

Where court issued writ of habeas corpus and respondent made verified return to writ in which he alleged that he held petitioner pursuant to commitment order which followed judgment and order entered by the court and petitioner's answer to return was not made under oath of petitioner as required by rule, the allegations of return must be taken as true. V.A.M.R. Civil Rule 91.28.

2. Contempt ⇐33

Constitutional courts of common-law jurisdiction have inherent power to punish for contempt.

[illegible] district attorney (St. [illegible] 59.47, 340.37, and § 59.44, subds. 1-3).

Where attorney, paid from private sources, sat at district attorney's table while jury was being drawn, and assisted outside courtroom in preparation of state's case in prosecution for embezzlement, defendant was entitled to new trial, for though district attorney may incidentally receive advice or help from outside parties, it is against public policy for attorney employed by private individual to assist him, except as provided in St. 1925, §§ 59.46, 59.47, 340.07, and section 59.44, subds. 1-3.

2. District and prosecuting attorneys ⟹8—District attorney must interview all whom he has reason to believe know any fact material to criminal prosecution.

It is duty of district attorney to interview all whom he has reason to believe may know any fact material to criminal prosecution, whether person interviewed be attorney retained by those interested in prosecution or other witnesses.

3. District and prosecuting attorneys ⟹8—Every citizen has duty to inform district attorney of facts known with reference to law violation.

Citizens have duty to inform district attorney of facts known to them with reference to any violation of law, whether they are laymen or members of bar representing those interested in prosecution.

4. District and prosecuting attorneys ⟹1—District attorney, investigating alleged offense, acts in quasi judicial capacity.

District attorney, in making investigation of any alleged offense, must of necessity consult those who know facts, and in such cases he acts in quasi judicial capacity, and determines what course should be pursued, in view of facts disclosed.

5. Embezzlement ⟹9—Proof of village treasurer's embezzlement of funds collected for payment to school district treasurer shows embezzlement of village funds (St. 1927, § 343.20).

Showing that village treasurer embezzled funds collected, which were ultimately to reach school district treasurer, shows embezzlement of funds belonging to village, since it is considered that funds belonged to village treasurer within meaning of St. 1927, § 343.20, until village treasurer performed d[uty] and paid funds to school district treasurer.

6. Embezzlement ⟹11(2)—In prosecution of village treasurer for embezzlement of funds collected for payment to school district treasurer, defendant may show that funds were so paid, or disbursed for benefit of district.

In prosecution of village treasurer for embezzlement of funds collected for payment to school district treasurer, defendant *held* entitled [illegible]

[illegible] district treasurer [illegible] able to produce receipt from school district treasurer or show payment directly to him, where sums were actually devoted to use of school district by payment to bank in discharge of obligations of school district.

8. Embezzlement ⟹9—Village treasurer cannot be convicted of embezzlement for misappropriation of funds collected by him after they had reached school district treasury.

Village treasurer cannot be convicted of embezzlement of funds collected for payment to school district treasurer by proof that, after moneys had reached school district treasury, they were thereafter misappropriated.

Error to the Circuit Court for Crawford County; S. E. Smalley, Circuit Judge.

Clarence Peterson was convicted of embezzlement, and moved for a new trial. The court granted the motion, and the State brings error. Affirmed.—[By Editorial Staff.]

The defendant was convicted of embezzlement, and moved for a new trial on several grounds, among which was that the evidence was not sufficient to sustain a conviction, and that the trial court erred in permitting private counsel to appear in the preparation and prosecution of the case. The court granted the motion for a new trial on the latter ground, and the state sued out a writ of error to test the correctness of the ruling.

John W. Reynolds, Atty. Gen., J. E. Messerschmidt, Asst. Atty. Gen., and J. S. Earll, of Prairie du Chien, for the State.

Kopp & Brunckhorst, of Platteville, J. P. Evans, of Prairie du Chien, and Alvin B. Peterson, of Soldiers Grove, for defendant in error.

VINJE, C. J. [1] The state does not challenge the fact that it is the established rule in this state that the participation in the trial of a criminal case in court by an attorney paid by private parties is error sufficient to vitiate the conviction. But it is claimed by the state that the assistance given in the trial of this case was not such as to come within the established rule; that at most all that Mr. Grubb, the private attorney, did, was to sit at the district attorney's table while the jury was being drawn, and that afterwards he refrained from coming into the courtroom, though he remained in Prairie du Chien, oc-

cupied the office of the district attorney, and assisted in questioning prospective witnesses for the state. The trial court, in announcing his decision, stated at least some of the things that Mr. Grubb did in the preparation and assistance in the trial of the case. If we eliminate from the case that part that Mr. Grubb did in the trial thereof in the courtroom, we are faced with the question as to whether private parties can pay an attorney for preparing for the trial of a criminal case, such preparation consisting in occupying the office of the district attorney, in summoning prospective witnesses to the office, and in questioning them and making memoranda of what they can testify to, and in transferring these memoranda to the district attorney for use on the trial, and in consulting with the district attorney as to the prosecution. The fact that the district attorney may incidentally receive advice or help from outside parties, including private attorneys, does not render a criminal prosecution void. The gist of the error lies in the fact the private parties are permitted to pay private attorneys for the prosecution of criminals, which prosecution consists, not only in appearing in court, producing witnesses, questioning them as well as those adduced by the defendant, and arguing the case to the jury, but includes also a preparation for trial, finding out what witnesses can testify to, and producing such testimony in court.

It is clear that the statute contemplates such preparation for trial, for subdivision 2 of section 59.44 provides that, when a judge appoints counsel to assist the district attorney in the trial of a case, it may allow $25 per day for each day actually occupied in the trial, but not to exceed $15 per day, and for not more than five days actually and necessarily occupied in preparing for trial. Thus it seems quite clear that, if it is against public policy to pay from private sources for work done in the actual trial or in the open courtroom, it is equally against public policy to permit private parties to pay for necessary work in preparing for trial. It is true that in cases hereinafter cited the work had all been done in the courtroom. But it seems to us that more harm may be done to the defendant by preparation outside the courtroom and privately paid for than by assistance given in open court. In this case it is not very easy to determine the full extent and scope of the assistance given by Mr. Grubb to the district attorney in the work which he performed in his office. If the work is performed in open court, it is obviously easily ascertainable by both parties, as well as subject to the control of the judge during the trial. Here Mr. Grubb was subject to no one in the work which he did in preparation for trial, and no opportunity was given to the trial court or to this court to determine the exact scope and character of the work Mr. Grubb did. Therefore, when it appears that some substantial work is done by an attorney paid by private parties in the preparation of a trial, and that the result of his labors is given to the district attorney for such use as he may make of it, we think it comes equally within the ban of the rule prohibiting the payment by private parties for work done in assisting the district attorney in the courtroom. Of course, to come within such prohibition all aid, whether given in the courtroom or outside, must be aid which is paid for by private parties, and not by the state or district attorney.

Section 59.17 makes it the duty of the district attorney to prosecute or defend "all actions, * * * civil or criminal, in the courts of his county in which the state or county is interested or a party; and when the place of trial is changed in any such action or proceeding to another county, prosecute or defend the same in such other county." Section 59.44 provides:

"When there is no district attorney for the county, or he is absent from the court, or has acted as counsel or attorney for a party accused in relation to the matter of which the accused stands charged and for which he is to be tried, or is near of kin to the party to be tried on a criminal charge, or is unable to attend to his duties, the circuit court, by an order entered in the minutes stating the cause therefor, may appoint some suitable person to perform, for the time being, or for the trial of such accused person, the duties of such district attorney, and the person so appointed shall have all the powers of the district attorney while so acting." Subdivision 1.

Subdivision 2 of the same section provides that the court "may, in the same manner, and in its discretion, appoint counsel to assist the district attorney, in the prosecution of persons charged with crime punishable by imprisonment in the state prison, and in cases of prosecutions before a grand jury, and upon indictments found by grand juries, and in bastardy cases. Such counsel shall be paid such sums as the court, by order entered in the minutes, certifies to be a reasonable compensation therefor, which sum shall in no case exceed $25 per day for each day actually occupied in such prosecution, and not to exceed $15 per day for not more than five days actually and necessarily occupied in preparing for trial in any one case, the same to be paid in the manner provided by law for the payment of counsel for indigent criminals." And subdivision 3 of the same section reads:

"When there is an unusual amount of civil litigation in which the county is a party or in which it is interested, the circuit court may, on the application of the county board, by order filed with the clerk of said county, appoint an attorney [illegible] to assist the district attorney [illegible]."

Section 59.46 provides for assistance for the district attorney in other than special counties, and section 310.57 provides the district attorney shall not office with other attorneys than partners.

It will be seen from these statutory provisions that the legislative scheme was and is that the district attorney shall prosecute all criminal actions in the courts of his county, and that, where he is not able to do so for any reason, the court shall appoint some suitable person in his place to prosecute. It will also be observed from the statutory scheme that it provides for every contingency that one can think of wherein the district attorney needs aid, and where it may properly be given him and in what manner it may be given. In the prosecution of criminal actions, the district attorney prosecutes for public wrongs, not for private wrongs, and such prosecution should be by a public officer, and not a private party. This court has from its earliest days given full effect to our statutory scheme, and has declared it to be the public policy of the state.

In an early day in England private parties prosecuted criminal wrongs which they suffered. They obtained an indictment from a grand jury, and it became the duty and the privilege of the person injured to provide a prosecutor at his own expense to prosecute the indicted person. Our scheme of government has changed all this. It is now deemed the better public policy to provide for the public prosecution of public wrongs without any interference on the part of private parties, although they may have been injured in a private capacity different from the general public injury that accrues to society when a crime is committed. So under our system we have private prosecution for private wrongs and public prosecution for public wrongs. Our scheme contemplates that an impartial man selected by the electors of the county shall prosecute all criminal actions in the county unbiased by desires of complaining witnesses or that of the defendant.

In Biemel v. State, 71 Wis. 450, 37 N. W. 244, this subject is treated at length, and the court there says:

"We think it is quite clear from the reading of our statutes on the subject, as well as upon public policy, that no attorney employed and paid by private parties should not be permitted either by the courts or by the prosecuting attorney to assist in the trial of such criminal cases. The laws have clearly provided that the district attorney, who is the officer provided by the laws of the state to initiate and carry on such trials, shall be unprejudiced and unpaid except by the state, and that he shall have no private interest in such prosecution. He is an officer of the state, provided at the expense of the state for the purpose of seeing that the criminal laws of the state are honestly and impartially administered, unprejudiced by any motives of private gain, and holding a position analogous to that of the judge who presides at the trial."

Cases from other states and from England are there cited to sustain the policy declared. That policy has been reaffirmed in State v. Russell, 83 Wis. 330, 53 N. W. 441; Smith v. State, 146 Wis. 111, 130 N. W. 894, 38 L. R. A. (N. S.) 403, and in Income Tax Cases, 148 Wis. 456, 134 N. W. 673; 135 N. W. 164. In Rock v. Ekern, 162 Wis. 291, 156 N. W. 197, L. R. A. 1916D, 456, it was held that a contract which provided for the payment by Mr. Ekern to Mr. Rock in assisting in the prosecution of one Fowler was void upon the ground of public policy. Mr. Rock had rendered services in the preliminary examination of Mr. Fowler which this court held to be a part of the services contracted for, but that he could not recover because the contract between the two was against public policy. The court says:

"The contract as proved is against the public policy of this state and the trial court erred in permitting the plaintiff to recover thereon. The acquiescence of the accused, the court, and the district attorney to allow plaintiff to assist in the prosecution of Fowler under his private employment by defendant does not purge the contract of employment of its illegal character and affords no excuse to enforce it."

It is not quite clear how much Mr. Grubb of Janesville participated in the preparation or trial of the case, as most of his work was done outside of the courtroom. The trial court in his opinion granting a new trial stated:

"At the opening of the trial, Mr. Grubb, an attorney residing at Janesville, appeared in court and sat at the table with Mr. Earll, who was district attorney pro tempore, appointed by the court to prosecute the case, and remained at the table during the impaneling of the jury. Before any further proceedings were had, counsel for defendant stated to the court, in substance, that they would object to Mr. Grubb appearing in the case or participating in the trial, as he was in the employ of private persons interested in prosecuting the defendant. No record was made of this, but the court stated that it would not be proper for Mr. Grubb to participate in the trial, and he thereupon withdrew, and did not again appear in court during the trial. Upon the argument of the motion for a new trial, it was made to appear by affidavit that Mr. Grubb remained in Prairie du Chien, where the trial was held, during the entire time the trial was in progress, which lasted nearly two weeks, made use of Mr. Earll's office, and that he so remained in Prairie du Chien for the purpose of aiding and assisting Mr. Earll in securing evidence to be presented, examining witnesses prior to their testifying in court, etc. Mr. Earll in reply stated that Mr. Grubb was given the right to use his office; that he used it largely for conferences with his own clients, but that he did question some of the witnesses for the state prior to their testifying [illegible]

Mr. Earll as to what their testimony would be. It is further alleged in affidavits upon information and belief that a fund of about $3,000 was raised by private parties for the purpose of investigating and prosecuting the defendant, which allegations are not denied. So it must be taken as a fact that Mr. Grubb rendered some assistance, and did to some extent partake, in the trial and prosecution of the defendant both inside the courtroom and outside.

"The conclusion reached is that material aid given to the district attorney in the preparation for trial or in the trial of a criminal case, by a private attorney who is paid for such aid by private parties, invalidates the conviction. This conclusion does not mean that a district attorney may not consult with parties interested in the prosecution of criminal cases, nor with attorneys who are under pay investigating the facts involved in the criminal prosecution. But it does mean that attorneys cannot be employed by private parties for the purpose of prosecuting criminal cases whether the services are rendered in the courtroom in the trial of the case or in the office preparing the case for trial."

[2, 3] This conclusion does not prevent the district attorney from fully investigating every alleged offense against the public. It is his duty to interview all who he has reason to believe may know any fact material to any criminal prosecution, whether the person interviewed be an attorney retained by those interested in the prosecution or any other witnesses. This conclusion does not absolve any citizen from the duty of informing the district attorney of the facts known to him with reference to any violation of the law, whether such citizen is a layman or a member of the bar representing those interested in the prosecution.

[4] In his investigation of any alleged offense, the district attorney must of necessity consult those who know the facts—the parties who have been wronged and their attorneys, if they have employed them. In all such cases the district attorney acts in a quasi judicial capacity, and determines what course should be pursued, in view of the facts disclosed by his investigation. It is only when the prosecuting officer shares his quasi judicial functions and permits the attorney employed and paid by private parties to participate in determining what shall be done with reference to the commencement of a criminal prosecution, or with reference to the manner in which the prosecution shall be conducted, that the case comes within the condemnation of the rule which is here applied.

[5, 6] On behalf of the defendant, it is urged that the order granting a new trial in this case should be affirmed, on the ground that the defendant was prosecuted under an allegation in the information alleging that he had embezzled funds belonging to the village of Soldiers Grove, and that he was found guilty of embezzling funds belonging to the school district. Although the funds collected by the village treasurer were by law ultimately to reach the hands of the school district treasurer, it is considered that they belonged to the village treasurer, within the meaning of section 343.20, until the defendant, as village treasurer, had performed his duty and paid the funds to the school district treasurer. However, in view of the method in which the business of the village and school district was conducted, the defendant was entitled to show in any way that he could that he had in fact discharged his duty as village treasurer, and that all of the funds which should have gone to the treasurer of the school district had in fact passed to the treasurer of the district, or been disbursed for the benefit of the district.

[7, 8] In view of the circumstances of this case and the method in which the business was transacted, the defendant should be credited with such sums as were actually devoted to the use of the school district whether paid direct to the school district treasurer or paid to the bank in discharge of other obligations of the school district. It is, as we understand the facts in the case, would require a full accounting between the defendant and the school district. If the moneys belonging to the school district were actually devoted to its lawful uses and purposes, the defendant cannot be held liable as for a conversion merely because under the circumstances of this case he was unable to produce a receipt from the school district treasurer, or show payment directly to the treasurer of the school district. A conviction under the information could not be sustained by proof that, after the moneys had reached the school district treasury, they were thereafter misappropriated.

Leave to amend the information, if deemed necessary upon a new trial, is granted.

Order affirmed.

Memorandum

Alaska Court System

TO: Arthur H. Snowden, II
Administrative Director

DATE: February 23, 1987

FROM: Karla L. Forsythe KLF
Staff Counsel

SUBJECT: House Bill 121: Repeal of AS 12.45.150, relating to payment of costs by private prosecutor.

In September I sent you a memorandum outlining concerns expressed to me by Robin Turnbull, clerk of the Kenai court. She told me that several times within that month private citizens had appeared in the clerk's office and wanted to file private person criminal complaints, citing AS 12.45.150 as authority. Ms. Turnbull asked about processing procedures, since the statute and court rules are silent. Just this past week, Judge Jones called me from Kotzebue with similar questions.

Although attempts by private parties to file complaints are relatively infrequent, they do occur several times each year, and when they do courts are perplexed about the proper procedure to follow. The Department of Law has always taken the position that the statute does not authorize private persons to file criminal complaints. Accordingly, I recommended to you that the court system approach the Department of Law about introducing legislation to repeal the statute.

You wrote to Attorney General Brown in September asking if the department would be willing to introduce such legislation, and indicating that the court system would be glad to testify in support.

It appears that this law has been on the books since 1900. Under AS 44.23.020(b)(3), the attorney general is authorized to prosecute <u>all</u> cases involving violations of state law. The Department of Law believes the purpose of AS 12.45.150 is not to authorize private prosecutions, but to give the court the ability to impose costs immediately in the event of malicious accusations. The Department of Law favors repeal because the statute is poorly drafted, because it probably violates a citizen's constitutional rights by allowing immediate imposition of costs without a hearing, and because it appears to authorize private criminal prosecutions.

In summary, this is a small but vexing concern that arises at least several times each year, and repeal of the statute would clear up the confusion.

KLF:bs

2/24/87-3

Sec. 44.23.010. Attorney general. The principal executive officer of the Department of Law is the attorney general. (§ 9 ch 64 SLA 1959)

Collateral references. — 7 Am. Jur. 2d, Attorney General, § 1 et seq.; 72 Am. Jur. 2d, States, Territories and Dependencies, § 62.

7A C.J.S. Attorney General, § 1 et seq.; 81A C.J.S. States, § 61.

Sec. 44.23.020. Duties. (a) The attorney general is the legal advisor of the governor and other state officers.

(b) The attorney general shall

(1) bring, prosecute and defend all necessary and proper actions in the name of the state for the collection of revenue;

(2) represent the state in all civil actions in which the state is a party;

(3) prosecute all cases involving violation of state law, and file informations and prosecute all offenses against the revenue laws and other state laws where there is no other provision for their prosecution;

(4) administer state legal services (including the furnishing of written legal opinions to the governor, the legislature, and all state officers and departments as the governor directs), and give legal advice on a law, proposed law or proposed legislative measure upon request by the legislature or a member of the legislature;

(5) draft legal instruments for the state;

(6) make a report to the legislature, through the governor, at each regular legislative session

(A) of the work and expenditures of the office, and

(B) on needed legislation or amendments to existing law; and

(7) perform all other duties required by law or which usually pertain to the office of attorney general in a state;

(8) prepare, publish and revise as it becomes useful or necessary to do so an information pamphlet on landlord and tenant rights and the means of making complaints to appropriate public agencies concerning landlord and tenant rights; the contents of the pamphlet and any revision shall be approved by the Department of Law, division of consumer protection, before publication. (§ 9-1-5 ACLA 1949; am § 1 ch 128 SLA 1959; § 9 ch 64 SLA 1959; am § 1 ch 8 SLA 1976)

NOTES TO DECISIONS

Powers and duties are those ascribed at common law. — This section indicates that the office of the attorney general is to function with those powers and duties normally ascribed to it at common law. Public Defender Agency v. Superior Court, Sup. Ct. Op. No. 1140 (File No. 2071), 534 P.2d 947 (1975).

Under the common law, an attorney general is empowered to bring any

Sec. 12.45.130. Acknowledgment of satisfaction by injured party. If the party injured appears before the court in which the defendant is bound to appear, at any time before trial, and acknowledges in writing that satisfaction has been received for the injury, the court may, on payment of the costs incurred, order the prosecution dismissed and the defendant discharged. The order is a bar to another prosecution for the same crime. (§ 6.14 ch 34 SLA 1962)

NOTES TO DECISIONS

The crime of leaving the scene of an accident is not amenable to civil compromise. Hensel v. State, Sup. Ct. Op. No. 1755 (File No. 3719), 585 P.2d 878 (1978).

The act constituting the crime of leaving the scene of an accident is the failure to stop and make the necessary exchanges of information or assistance after the accident has occurred. This omission is not one which causes injury to the private citizen within the meaning of the civil compromise statutes. Settlement of the claim for injuries resulting from the accident cannot settle the state's claim for a violation of its laws. Hensel v. State, Sup. Ct. Op. No. 1755 (File No. 3719), 585 P.2d 878 (1978).

Sec. 12.45.140. Compromise or stay upon compromise by other means prohibited. A crime may not be compromised or the prosecution or punishment upon a compromise dismissed or stayed except as provided by law. (§ 6.15 ch 34 SLA 1962)

NOTES TO DECISIONS

The crime of leaving the scene of an accident is not amenable to civil compromise. Hensel v. State, Sup. Ct. Op. No. 1755 (File No. 3719), 585 P.2d 878 (1978).

The act constituting the crime of leaving the scene of an accident is the failure to stop and make the necessary exchanges of information or assistance after the accident has occurred. This omission is not one which causes injury to the private citizen within the meaning of the civil compromise statutes. Settlement of the claim for injuries resulting from the accident cannot settle the state's claim for a violation of its laws. Hensel v. State, Sup. Ct. Op. No. 1755 (File No. 3719), 585 P.2d 878 (1978).

Sec. 12.45.150. Order for private prosecutor to pay costs for malicious prosecution without probable cause. The name of a person who voluntarily appears before a judge, magistrate or grand jury to prosecute a person in a criminal action, either for a misdemeanor or felony, shall be endorsed upon the complaint, information, or indictment as a private prosecutor. If it is found by a judge, magistrate or court trying the action or hearing the proceeding that the prosecution is malicious or without probable cause, those facts shall be entered upon the record in the action or proceeding by the judge, magistrate or court. Upon making the entry, the judge, magistrate or court shall immediately render judgment against the private prosecutor for the costs and disbursements of the action or proceeding, which may be enforced by execution in the same manner as a judgment in a civil action. (§ 6.16 ch 34 SLA 1962; am § 16 ch 8 SLA 1971)

Sent to all members

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K – STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

April 9, 1987

The Honorable John Sund
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: House Bill 121

Dear Representative Sund:

I was pleased to see that HB 121 (repealing AS 12.45.150) passed the House yesterday. I am concerned, however, about some apparent misconceptions which may have arisen during debate on the bill. As stated in the bill's transmittal letter, it is our position that there is no such thing as a "private prosecutor" in the State of Alaska. Because it is poorly drafted and confusing on this point, AS 12.45.150 should be repealed. Repeal of this statute would not remove or reduce any powers which citizens now have, it would merely eliminate a source of confusion.

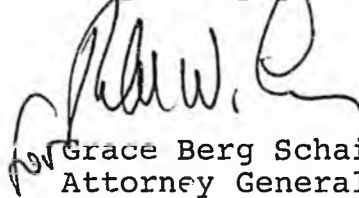
More importantly, I was surprised to hear that some legislators apparently believe that permitting private persons to prosecute criminal actions would be good social policy and in the public interest. In my view, the power to criminally prosecute, to cause someone to be charged, arrested, and brought to trial, is one that should not be influenced by personal disputes and private animosities. Instead, that power ought to be exercised by an objective prosecutor, who is bound by the canons of professional ethics and the rules of court.

AS 12.45.150 is a misleading statute which has, until now, primarily been used for filing private criminal charges against police and prosecutors in Kenai. If HB 121 is not passed (thereby strengthening the perception that any private citizen is free to file criminal charges as he or she sees fit), I predict that the statute will be used with increasing frequency against all types of government officials--state, federal, and local--who incur the displeasure of private individuals. "Private" prosecutions would also tend to clog the criminal courts with things such as private boundary disputes (criminal trespass), breaches of contract (criminal fraud), and could conceivably give persons legal remedies that were never intended under Alaska's landlord-tenant laws.

Criminal actions could also be filed against legislators and judicial officers under broadly-worded criminal statutes such as AS 11.56.850 (official misconduct) or AS 39.50.090 (conflict of interest). Although the concept of legislative and judicial immunity may ultimately be a shield against conviction, it will not protect against unfair charges, and the attendant publicity cannot help but decrease public confidence in our government.

I urge you and your colleagues to again pass HB 121 on reconsideration so that the Senate can expeditiously consider this legislation.

Very truly yours,



Grace Berg Schaible
Attorney General

GBS:DJG:so-15

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill version: HB 121
Published Date: 2/11/87

cc

REQUEST

Bill/Resolution No.: Law Log 773-87-0067
Title: An Act repealing a provision related to payment of costs by private prosecutor
Sponsor: Rules
Requestor: Governor
Date of Request:

FISCAL DETAIL

Agency Affected: Alaska Court System
BRU: Trial Courts

Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -

CAPITAL						

REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -

POSITIONS:

FULL-TIME	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

The Alaska Court System concurs with this legislation.

Prepared by: Karla Forsythe
Phone: 264-8228
Division: General Counsel, Alaska Court System
Date: 1-5-87

Approved by Commissioner: Arthur H. Snowden, II
Date: 1-5-87
Agency: Alaska Court System

Distribution (by Agency preparing fiscal note):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

9/16/86

NO. 2

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill version: HB 121
Published Date: 2/11/87

REQUEST

Bill/Resolution No.:
Title: "An Act repealing a provision related to payment of costs by private prosecutors."
Sponsor: House Rules/By req. of the Gov.
Requestor: Office of the Governor/OMB
Date of Request: December 29, 1986

FISCAL DETAIL

Agency Affected: Department of Law
BRU: Prosecution

Components: All

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING : (Thousands of Dollars)

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS :

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Please see the attached analysis.

Richard I. Pegues
Prepared by: Richard I. Pegues, Director — Phone: 465-3672
Division: Administrative Services — Date: 12/30/86
Richard I. Pegues/for/Ronald W. Lorensen,
Approved by Commissioner: Acting Attorney General — Date: 12/30/86
Agency: Department of Law

Distribution (by Agency preparing fiscal note):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

9/16/86

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 121

2/11/87

This bill repeals AS 12.45.150, which provides that malicious accusations, or those lacking probably cause, will subject the complainant to immediate judgment "for the costs of disbursements of the action." This statute, drafted in 1900, has also created confusion in lay persons as to their independent authority to file private criminal actions. This authority simply does not exist in Alaska. Both the Department of Law and the Alaska Court System are recommending repeal of the statute due to the confusion and the cost involved when lay persons attempt to bring complaints as "private prosecutors."