

Private Prosecutions

by Jon Roland

There's a growing awareness that crimes are prosecuted selectively in the United States, especially at the Federal level. U.S. Attorneys have discretion to pick and choose which cases they wish to prosecute and as a result some cases – which many believe should be prosecuted – are ignored by U.S. prosecutors.

More troubling is the clear indication that many of the cases not prosecuted are rejected for political reasons. For example, it's virtually impossible for an average citizen to file criminal charges against a federal judge and find a U.S. Attorney willing to prosecute the case. As a result of this prosecutorial "discretion" (cowardice or corruption), the government is effectively shielded from criminal prosecution.

This article explores of an emerging solution for prosecutorial "discretion": private prosecutions.

Although almost all criminal prosecutions are currently conducted by public prosecutors, there is a long-standing

tradition of Anglo-American law for criminal prosecutions to be conducted by private attorneys or even by laymen.

The practice of using private attorneys to prosecute criminal offenses is derived from English common law. Until the late nineteenth century English criminal procedure relied heavily on a system of private prosecution even for serious offenses. This is discussed in some detail in a classic article by Morris Ploscowe, "The Development of Present-Day Criminal Procedures in Europe and America", 48 *Harvard Law Review* 433 (1935). On p. 437, Ploscowe states, "The Germanic procedure of Charlemagne and the Anglo-Saxon procedure of nearly the same period still looked upon the redress of most crimes as a private matter. . . . Since crime was in general treated as a private injury, there was no distinction between civil and criminal proceedings." On p. 469, "The English criminal procedure developed its traditional accusatory characteristics largely because it relied upon a system of private prosecution. . . . In the

course of the 19th century private prosecution proved itself inadequate. The private individual would frequently forego prosecution rather than incur the expense and responsibility involved. Sometimes there was no individual who could be called upon to prosecute a particular case, and when a private individual did institute proceedings, the case was very often badly prepared. Moreover, the system was abused for private ends, lending itself to bribery and collusion. . . . The office of the Director of Public Prosecutions was created by act of Parliament in 1879. . . . Many towns and boroughs appoint solicitors whose functions are to prosecute offenders. . . . Prosecutions are also carried on by the police, either directly or through private solicitors whom they hire. The traditional English system of private prosecution is therefore supplemented by various devices for public intervention. . . . The public prosecutor has no greater advantages than any private solicitor or barrister prosecuting a case on behalf of a client."

Today, the forms of criminal procedure are the same for both public and private prosecutions; they differ only in the official status and source of compensation of the prosecutor. Most of the cases of private prosecution that we've found in the federal courts were conducted by private attorneys who also represented the victim in a civil action against the accused.

The first of these federal cases was *State of New Jersey v. William Kinder* (1988).¹ A private complainant instituted a criminal case against the defendant by charging him with simple assault and battery under the authority of New Jersey Municipal Court Rule 7:4-4(b), which provides in part, "any attorney may appear on behalf of any complaining witness and prosecute the action on behalf of the state or the municipality". After removing the case from the Municipal Court of New

Brunswick, the defendant moved to dismiss. District Court Judge J. Debevoise held that:

(1) Municipal Court Rule 7:4-4(b) allowing state to prosecute defendant through use of private attorney was applicable even upon removal to federal court, and

(2) the private attorney who prosecuted the case did not have a conflict of interest that violated defendant's constitutional right to due process. In its opinion the Court stated that "there is no provision of the Federal Rules of Criminal Procedure which conflicts with its provisions".

Another case was *Wesley Irvn Jones, Appellant, v. Jerry E. Richards, Sheriff of Burke County, N.C.*⁶ (1985). On an appeal of a petition for habeas corpus denied, Circuit Judge Chapman held that no constitutional right was impaired by involvement of the same attorneys as prosecutors in a criminal trial and as plaintiff's

attorneys in civil suits filed against petitioner arising out of a traffic accident which produced both criminal charges and civil actions. In their appeal, attorneys for petitioner cited *Ganger v. Peyton*⁷ (1967), in which private prosecution was disallowed. However, in that case, the Commonwealth's attorney who prosecuted Ganger in his criminal case for an assault against his wife was at the same time representing Ganger's wife in a divorce proceeding. Ganger testified that the prosecuting attorney offered to drop the assault charge if Ganger would make a favorable property settlement in the divorce action. On the basis of that testimony, it was decided that Ganger's prosecutor "was not in a position to exercise fair-minded judgment" in the conduct of the case.

In North Carolina, the use of private attorneys to assist the state in the prosecution of criminal cases "has existed in our courts from their incipency," *State v. Best*⁸ (1972), and such use in a particular case is committed to the discretion of a trial judge. *State v. Lippard*⁹ (1943). However, when private attorneys are employed, the district attorney must remain in charge of and be responsible for the prosecution, *State v. Page*¹⁰ (1974).

Other states provide for private prosecutors by statute. In Texas, Vernon's Annotated Texas C.C.P. art. 2.07(a) [Attorney pro tem] provides that "Whenever an attorney for the state is disqualified to act in any case or proceeding, is absent from the county or district, or is otherwise unable to perform the duties of his office, or in any instance where there is no attorney for the state, the judge of the court in which he represents the state may appoint any competent attorney to perform the duties of

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the office during the absence or disqualification of the attorney for the state.” However, by Op.Atty.Gen. 1990, JM-925, a district judge is authorized to appoint a district attorney pro tem pursuant to the above article even though there is an assistant district attorney in place. In *Davis v. State*¹¹ (1992), it was held that appointment of a special prosecutor was within the discretion of trial courts, and that such appointment is not predicated on the absence or disqualification of elected district attorney.

However, some State courts have invalidated criminal prosecutions by private attorneys for cases involving serious crimes and those involving situations where a public prosecutor has *expressly* refused to prosecute the defendant. See e.g., *State v. Harton*² (1982) (prohibiting private prosecution for vehicular homicide absent consent and oversight of the district attorney); *State ex rel. Wild v. Otis*³ (1977) (where county attorney refused to prosecute and grand jury refused to indict on charges of perjury, conspiracy, and corruptly influencing a legislator, private citizen could not prosecute and maintain such charges; dicta suggests that this might be permissible with legislative approval and court-appointed private attorney as prosecutor); see also, *Commonwealth v. Eisemann*⁴ (1982) (Pennsylvania Rules of Civil Procedure require that a person who is not a police officer must get the district attorney’s approval to file felony or misdemeanor charges which do not involve a clear and present danger to the community); *People ex rel. Luceno v. Cuzzo*⁵ (City Court, White Plains 1978) (“exercising its discretion,” court prohibits private criminal prosecution against police officer where complainant

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I have fought for years against the **Ungodly** who, today, almost totally control America. Because I’ve fought corruption, our government has charged me with several felony indictments in a U.S. District Court. I, and others, believe these charges were filed to shut me up.

It’s time for us to reclaim God’s country — which He ordained for us — and live under God’s laws and not man’s laws. God’s warnings are coming to pass; they are being fulfilled every day. This is our last chance to stand up for God before God’s second and final coming.

My most precious possession is my soul that God gave me. If we sacrifice our souls to survive in this world, on judgement day, God states, “**He will know us not**”.

The cost for my upcoming court trial will exceed \$100,000. As one of God’s children, I am asking for any donations you can afford to send to me, to offset the cost of my upcoming trial and defense.

Let us all join together and create a united house and fight God’s unholy evil enemies. We will then be blessed by our God. God bless all who have eyes to see and ears to hear. To paraphrase Patrick Henry, “give me God’s liberty or give me death”.

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was charged with a criminal offense arising out of the same occurrence).

Nevertheless, the possibility remains that, with proper research and preparation, private individuals may be able to prosecute criminal cases which the “system” might prefer to ignore.

¹ *State of New Jersey v. William Kinder* 701 F.Supp. 486 (D.N.J.1988).

² *State v. Harton*, 163 Ga. App. 773, 296 S.E.2nd 112 (1982)

³ *State ex rel. Wild v. Otis*, 257 N.W.2nd 361 (Minn.1977), appeal dismissed, 434 U.S. 1003, 98 S.Ct. 707, 54 L.Ed.2nd 746 (1978)

⁴ *Commonwealth v. Eisemann*, 308 Pa.Super. 16, 453 A.2nd 1045 (1982)

⁵ *People ex rel. Luceno v. Cuzzo*, 97 Misc.2nd 871, 412 N.Y.S.2nd 748

⁶ *Wesley Irven Jones, Appellant, v. Jerry E. Richards, Sheriff of Burke*

County, N.C.; Rufus L. Edmisten, Attorney General, State of North Carolina, Appellees, 776 F.2d 1244 (4th Cir.1985)

⁷ *Ganger v. Peyton*, 379 F.2d 709 (4th Cir.1967)

⁸ *State v. Best*, 280 N.C. 413, 186 S.E.2d 1, 3 (1972)

⁹ *State v. Lippard*, 223 N.C. 167, 25 S.E.2d 594, 599, cert. denied, 320 U.S. 749, 64 S.Ct 52, 88 L.Ed. 445 (1943).

¹⁰ *State v. Page*, 22 N.C. App. 435, 206 S.E.2d 771, 772 cert. denied, 285 N.C. 763, 209 S.E.2d 287 (1974).

¹¹ *Davis v. State* (App. 12 Dist.1992) 840 S.W.2d 480.

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