

Private Prosecutions

Although almost all criminal prosecutions today are conducted by public prosecutors, there is a longstanding tradition of Anglo-American law for criminal prosecutions to be conducted by private attorneys or even by laymen. The forms of criminal procedure are the same for both kinds of prosecution, and they differ only in the official status and source of compensation of the prosecutor.

Most of the cases of private prosecution that we find in the federal courts were conducted by private attorneys who also represented the victim in a civil action against the accused.

In the early days of our Republic, "prosecutor" was simply anyone who voluntarily went before the grand Jury with a complaint. — *United States v. Sandford*, Fed. Case No.16, 221 (C.Ct.D.C. 1806).

But by 1871 the principle found voice only in a dissent:

[I]t is a right, an inestimable right, that of invoking the penalties of the law upon those who criminally or feloniously attack our persons or our property. Civil society has deprived us of the natural right of avenging ourselves, but it has preserved to us all the more jealously the right of bringing the offender to justice. By the common law of England, the injured party was the actual prosecutor of criminal offenses, although the proceeding was in the King's name; but in felonies, which involved a forfeiture to the Crown of the criminal's property, it was also the duty of the Crown officers to superintend the prosecution. ...

To deprive a whole class of the community of this right, to refuse their evidence and their sworn complaints, is to brand them with a badge of slavery; is to expose them to wanton insults and fiendish assaults; is to leave their lives, their families, and their property unprotected by law. It gives unrestricted license and impunity to vindictive outlaws and felons to rush upon these helpless people and kill and slay them at will, as was done in this case.

[*Blyew v. United States*](#), 80 U.S. 581, 598-99 (1871) (Bradley, J., dissenting).

The right was quashed by the case of [*Leeke v. Timmerman*](#), 454 U.S. 83 (1981), which affirms the precedent in [*Linda R. S. v. Richard D.*](#), 410 U. S. 614 (1973), which denies the right of private prosecution, and serves as a bar to criminal prosecution in federal courts by persons not federal government employees.

But a glimmer of the former fire survives in later cases. One such case of interest was the federal case *State of New Jersey v. William Kinder*, 701 F.Supp. 486 (D.N.J.1988). 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. The District Court, Debevoise, J., 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".

The attitude of the courts on private prosecutions was made clear in a recent case:

Congress has by statute conferred the power to prosecute crimes in the name of the United States on the United States Attorney General and his delegates. See 28 U.S.C. §§ 516, 519. The long-standing view of the Supreme Court is that such power is exclusive. See, e.g., *United States v. Nixon*, 418 U.S. 683, 693 (1974) (“the Executive Branch has *exclusive* authority and absolute discretion to decide whether to prosecute a case”) (emphasis added); *id.* at 694 (“Under the authority of Art. II, [§] 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government. 28 U.S.C. [§] 516.”); *The Confiscation Cases*, 74 U.S. 454, 457 (1868) (“Public prosecutions, until they come before the court to which they are returnable, are within the *exclusive* direction of the district attorney”) (emphasis added). Therefore, as the district court concluded, [Appellant] has no right to initiate a criminal prosecution in the name of the United States under the Ninth or Tenth Amendments, or otherwise.

Smith v. Krieger, et al., No. 10-1012 (10th Cir. 2010)

State courts which have invalidated criminal prosecutions by private attorneys have done so in 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*, 163 Ga.App. 773, 296 S.E.2d 112 (1982) (prohibiting private prosecution for vehicular homicide absent consent and oversight of the district attorney); *State ex rel. Wild v. Otis*, 257 N.W.2d 361 (Minn.1977), appeal dismissed, 434 U.S. 1003, 98 S.Ct. 707, 54 L.Ed.2d 746 (1978) (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 suggesting that this might be permissible with legislative approval and court appointed private attorney as prosecutor); see also, *Commonwealth v. Eisemann*, 308 Pa.Super. 16, 453 A.2d 1045 (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*, 97 Misc.2d 871, 412 N.Y.S.2d 748 (City Court, White Plains 1978) (“exercising its discretion,” court prohibits private criminal prosecution against police officer where complainant was charged with a criminal offense arising out of the same occurrence).

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 *Harv.L.Rev.* 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."

Another case was *Wesley Irvan 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). 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*, 379 F.2d 709 (4th Cir.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 judgement" 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 incipiency," *State v. Best*, 280 N.C. 413, 186 S.E.2d 1, 3 (1972), and such use in a particular case is committed to the discretion of a trial judge. *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). However, when private attorneys are employed, the district attorney must remain in charge of and be responsible for the prosecution, *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).

Other states provide for private prosecutors by statute. In Texas, *Vernon's Ann.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 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* (App. 12 Dist.1992) 840 S.W.2d 480 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.
