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(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

2005-06
(session year)

Assembly
(Assembly, Senate or Joint)

Committee on Corrections and the Courts...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
  (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

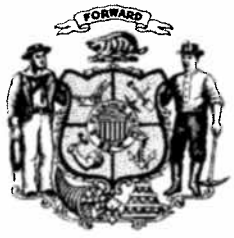
* Contents organized for archiving by: Stefanie Rose (LRB) (August 2012)

Deaths (2000 - present)

7/8/2005

PoliceAgency	ComplainantFullName	Death?	ReviewBy	IncidentNo	Notes
Cudahy PD	William Peterson	☑	Feiss/Simpson	05PC07	Privileged
HOC	Lashaunn Shields	☑	Kenney	05PC43	Medical care issue
HOC	Jalaine Thompson	☑	Reddin	02PC16	Accidental (inquest)
HOC	Ramsey Black	☑	Magowan	05PC38	Suicide
HOC	Steven Jasnau	☑	Martin	2001	Natural causes
HOC	Susan Dedering	☑	Martin	2001	Accidental
HOC - EM	George Rice	☑	Stoiber	01PC98	Natural causes
MCMHC	Richard J. Ramsey	☑	Reddin	01PC62	Natural causes
MCMHC	Shon Winstead	☑	Reddin	03PC56	Natural causes
MCSD	Lawrence Zak	☑	Reddin	05PC21	Overdose
MCSD	Edward Harris	☑	Reddin	04PC49	Natural causes
MCSD	Lamont Mitchell	☑	Martin	2002	Natural causes
MPD	Mario Mallett	☑	John Burr	01PC96	Accidental (inquest)
MPD	Michael D. Bordell	☑	Stoiber	00PC25	Suicide
MPD	Wilbert Javier Prado	☑	Kenney	05PC14	Inquest advised privilege - DA reviewing
MPD	Jennifer Patek	☑	EMM/Budde	05PC03	Suicide at traffic stop
MPD	Tou Yang	☑	Racine DA	05PC02	Justified
MPD	Felix L. Hopgood	☑	Donohoo	03PC63	Drug OD
MPD	Kenneth Allen	☑	Reddin	00PC111	Suicide at search warrant execution
MPD	Rodney Brzezinski	☑	EMM	2000	Privileged (inquest)
MPD	Justin P. Fields	☑	Kenney	03PC66	Privileged (inquest)
MPD	David A. Bushlow	☑	L. Johnson	2003	Privileged
MPD	Edward A. Pundsack	☑	Licata	2002	Privileged (inquest)
MPD	Larry J. Jenkins	☑	EMM	2002	Privileged
MPD	Samuel Rodriguez, Sr.	☑	Stoiber	2002	Privileged (inquest)
MPD	Michael Page, Jr.	☑	Mahoney	2002	Privileged (inquest)
MPD	Mannix Franklin	☑	DOJ	04PC24	Privileged (inquest)
MPD	Gabriel Guzman	☑	Martin	2001	Privileged
MPD	Laron Ball	☑	Martin	2002	Privileged (inquest)
MPD	Victor Johns	☑	Martin	05PC32	Pending
MPD	Michael Blucher	☑	EMM/Benkley	04PC38	Privileged (inquest)
MSDF	Cynthia Smith	☑	Reddin	04PC18	Suicide by hanging
UWMPD	Joseph Bauschek	☑	Licata	03PC64	Not justified/no PC (inquest)
WAPD	Bart Ross	☑	Reddin	05PC20	Suicide at traffic stop
Wauwatosa	William Berry	☑	Martin	2001	Privileged
WCS - PRC	James E. Parker	☑	EMM	00PC37	Natural causes


WISCONSIN STATE LEGISLATURE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SCR 20:3.8 Special responsibilities of a prosecutor. The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

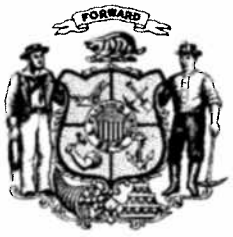
(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

Comment: A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. See also Rule 3.3 (d), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

WISCONSIN STATE LEGISLATURE



STEVENS, J. The district attorney represents the commonwealth,—a commonwealth which demands no victims, —a commonwealth which "seeks justice only,—equal and impartial justice. . . . It is as much the duty of the district attorney to see that no innocent man suffers as it is to see that no guilty man escapes." *Comm. v. Nicely,* 130 Pa. St. 261, 18 Atl. 737, 738; *People v. Fielding,* 158 N. Y. 542, 53 N. E. 497, 498; *State v. Kaufmann,* 22 S. Dak. 433, 118 N. W. 337, 339; *People v. Fong Sing,* 38 Cal. App. 253, 175 Pac. 911, 916.

The district attorney is a *quasi*-judicial officer. *State v. Russell,* 83 Wis. 330, 338, 53 N. W. 441; *State v. Kaufmann,* 22 S. Dak. 433, 118 N. W. 337, 338; *Comm. v. Nicely,* 130 Pa. St. 261, 18 Atl. 737, 738. In the trial of a criminal case, "the code of ethics of the district attorney in all such matters cannot too closely follow the ethics of the bench." *Coon v. Metzler,* 161 Wis. 328, 334, 154 N. W. 377. "A prosecutor should act not as a partisan eager to convict, but as an officer of the court, whose duty it is to aid in arriving at the truth in every case." *Hillen v. People,* 59 Colo. 280, 287, 149 Pac. 250, 253. "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. And, however strong may be his belief of the prisoner's guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet justice so attained is unjust and dangerous to the whole community." *Hurd v. People,* 25 Mich. 406, 416.

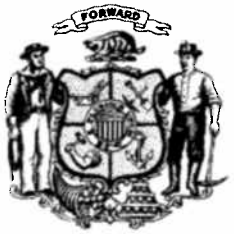
"No court has taken a higher view of the dignity of the office of district attorney than this court. 'He is an officer of the state, . . . to see that the criminal laws of the state are *honestly* and *impartially* administered, . . . holding a position analogous to that of the judge who presides at the

trial.'" *State v. Russell,* 83 Wis. 330, 337, 53 N. W. 441. The district attorney is not a mere legal attorney. "He is a sworn minister of justice." *State v. Russell,* 83 Wis. 330, 338, 53 N. W. 441.

"The defendant was entitled to a trial upon the evidence produced, unaffected by the statement of extrinsic facts or extraneous considerations," such as those presented by the statements of the district attorney to which objection was made. *Scott v. State,* 91 Wis. 552, 557, 65 N. W. 61. When a prosecuting officer makes such statements in his argument to the jury, "he tries his case upon unsworn statements and vilification, instead of evidence, and he obtains a verdict, if at all, based, in part at least, upon that which is not evidence, and which has no proper place in the trial." *Sullivan v. Collins,* 107 Wis. 291, 299, 83 N. W. 310.

The case presented to the jury a square conflict between the testimony of two witnesses—the defendant and the little girl who testified to the indecent liberties. It was a case in which the improper and inflammatory statements made by the district attorney in his argument to the jury might well have been the deciding factor in determining the verdict of the jury. There can be little doubt that these statements of the district attorney must have had their effect upon the jury. Nothing can more quickly inflame the mind of any man or any woman than the charge that a mature man has been guilty of the offense against young and innocent girls which was involved in the statement made by the district attorney. It would be given all the greater weight coming from the "sworn minister of justice," representing the State of Wisconsin. In view of the undisputed proof that little girls frequented his barber shop, it is hard to conceive of any remark that could have more seriously prejudiced the defendant in the eyes of the jury than to insinuate that these little girls, who had been attracted to his barber shop by gifts and by curios, had been sent "down the primrose paths


WISCONSIN STATE LEGISLATURE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*162 Wis. 291, *; 156 N.W. 197, **;*
*1916 Wisc. LEXIS 139, ****

ROCK, Respondent, v. EKERN, Appellant.

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF WISCONSIN

162 Wis. 291; 156 N.W. 197; 1916 Wisc. LEXIS 139

January 12, 1916, Argued
February 1, 1916, Decided

PRIOR HISTORY: **[***1]** APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. Reversed.

This is an action brought by the plaintiff, an attorney at law, to recover for services rendered pursuant to a contract in a criminal prosecution in which defendant was the complaining witness.

One Fowler, treasurer of a company in which defendant was interested, was charged with having embezzled some of the company's money. Plaintiff was employed by the defendant to secure a requisition from the governor for the return of the accused. After the requisition was issued the accused returned to the state in response to it. A short time before the preliminary hearing of the accused the defendant entered into a contract with the plaintiff by which the plaintiff was employed by the defendant privately to assist in the criminal prosecution of the accused. The district attorney consented to this assistance. The contract reads as follows:

"February 26, 1914.

"A. T. Rock, the undersigned, hereby agrees to assist the district attorney of Douglas county, Wis., in the prosecution of Homer T. Fowler so long as L. P. Ekern, the complaining witness, desires the services of said Rock therein, **[***2]** at and for the sum of twenty-five (25) dollars per day and his expenses when called from home in said prosecution; and said L. P. Ekern hereby agrees to pay said Rock for his services said sum of twenty-five (25) dollars per day for each and every day of his services and pay his expenses when out of Superior or Duluth, Minn., in said work.

(Signed) "A. T. ROCK.

"L. P. EKERN.

"February 26, 1914.

"Received from L. P. Ekern twenty-five (25) dollars as advance fees on above contract.

(Signed) "A. T. ROCK."

The plaintiff assisted in the preliminary examination of Fowler, and the court, the district

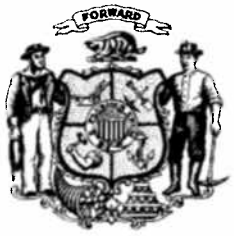
The **[**198]** question of the policy of the state, regarding such contracts as this, was examined by this court in the case of *Biemel v. State*, 71 Wis. 444, 37 N.W. 244. In that case an attorney who had been employed **[***5]** and paid for his services by a private party was permitted by the court to assist the district attorney in the prosecution of the case. This court there held that HN1 the statutes of the state providing **[*294]** for the election of a district attorney to act as the public prosecutor and prohibiting him from receiving "any fee or reward from or on behalf of any prosecutor or other individual, for services in any prosecution or business to which it shall be his official duty to attend; nor be concerned as attorney or counsel for either party, other than for the state or county, in any civil action depending upon the same state of facts upon which any criminal prosecution commenced but undetermined shall depend," together with the statute vesting in the judges of the courts the power to appoint attorneys to assist the district attorney whenever the court finds it necessary and proper in prosecuting felonies and prosecutions before grand juries, declare a policy of the state which regulates and limits the appointment of such counsel to assist in such prosecutions to attorneys who are not employed and paid by private parties, and that such counsel must be appointed by the court and paid **[***6]** from the public fund and thus place such assisting attorney in the same position of impartiality as the district attorney elected by the people. The court declared:

"We think it is quite clear from the reading of our statutes on the subject, as well as upon public policy, that an 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."

It is emphasized in the opinion that HN2 prosecutors in criminal cases should be free from prejudice and have no private interest in prosecutions. In *Wight v. Rindskopf*, 43 Wis. 344, in speaking of the duties and functions of prosecuting officers, the court states that he "is a *quasi*-judicial officer, retained by the public for the prosecution of persons accused of crime, in the exercise of a sound discretion to distinguish between the guilty and the innocent. . . . He is trusted with broad official discretion, generally subject, however, to judicial control." These views are supported in the case of *State* **[*295]** *v. Russell*, 83 Wis. 330, 53 N.W. 441. These adjudications clearly establish that employment **[***7]** and payment of private counsel to assist the district attorney in the prosecution of persons for crime by private parties is against the public policy of this state. We are of the opinion that this policy has not been changed by subsequent legislation and must be adhered to. From the facts and circumstances shown in this case it appears that plaintiff contracted with the defendant "to assist the district attorney of Douglas county, Wis., in the prosecution of Homer T. Fowler so long as *L. P. Ekern* [defendant], the complaining witness, desires the services of said *Rock* [plaintiff] therein. . . ." It is without dispute that the amount of the recovery against defendant was for services plaintiff rendered under this contract in the preliminary examination of Fowler upon defendant's complaints. 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 **[***8]** no excuse to enforce it. *Wight v. Rindskopf, supra.* In *Melchoir v. McCarty*, 31 Wis. 252, it was held: HN3 "The general rule of law is, that all contracts which are repugnant to justice, or founded upon an immoral consideration, or which are against the general policy of the common law, or contrary to the provisions of any statute, are void;" even where such statute does not expressly declare them void.

It is argued that the plaintiff rendered the services here involved upon the preliminary examination and hence they are not of the class of services which are prohibited to be performed by counsel employed by private parties under this public policy. We cannot accede to this claim. A preliminary examination of a person accused of crime is one step in **[*296]**


WISCONSIN STATE LEGISLATURE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*195 Wis. 351, *; 218 N.W. 367, **;*
*1928 Wisc. LEXIS 127, ****

STATE, Plaintiff in error, v. PETERSON, Defendant in error.

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF WISCONSIN

195 Wis. 351; 218 N.W. 367; 1928 Wisc. LEXIS 127

February 10, 1928, Argued
March 6, 1928, Decided

PRIOR HISTORY: **[***1]** ERROR to review an order of the circuit court for Crawford county: S. E. SMALLEY, Circuit Judge. Affirmed.

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.

DISPOSITION: Order affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant was convicted of embezzlement and moved for a new trial, alleging that the evidence was insufficient 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 Circuit Court for Crawford County (Wisconsin) granted the motion for a new trial on the latter ground. The State sued out a writ of error to test the correctness of the ruling.

OVERVIEW: Although the State acknowledged that the participation in the trial of a criminal case by a privately-paid attorney was error sufficient to vitiate a conviction, it contended that the assistance rendered by the private attorney was not such as to come within the established rule because the attorney only sat at the district attorney's table while the jury was being drawn and thereafter stayed out of the courtroom. The issue before the court was thus whether private parties could pay an attorney to prepare for the trial of a criminal case, where the preparation consisted of summoning prospective witnesses to the district attorney's office and questioning them, taking notes and giving them to the district attorney, and consulting with the district attorney as to the prosecution. The court held that material aid given to the district attorney in preparing for trial or at the actual trial by a private attorney paid for by private parties invalidated the conviction. Attorneys were not permitted to be employed by private parties for the purpose of prosecuting criminal cases, whether the services were rendered in the courtroom or beforehand in preparing for trial.

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. 444, 450, 37 N.W. 244, this subject is **[***9]** 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 HN11 an attorney employed and paid by private parties should not be **[*357]** permitted either by the court 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; and in *Income Tax Cases,* 148 Wis. 456, 134 N.W. 673, 135 N.W. 164. **[***10]** In *Rock v. Ekern,* 162 Wis. 291, 156 N.W. 197, 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 court room. The trial court in his opinion granting a new trial stated:

"At the opening of the trial Mr. Grubb, an attorney **[*358]** residing **[***11]** 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 affidavits 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 **[***12]** 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 in court and advised **[**370]** 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 court room and outside.

The conclusion reached is that HN12 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.

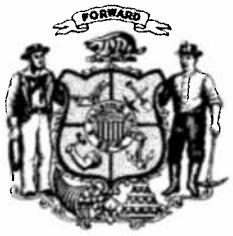
This conclusion does not mean that a district attorney may not consult with parties interested in the prosecution of criminal cases, nor with attorneys who are under pay investigating **[*359]** the facts involved in the criminal prosecution. But it does mean that attorneys cannot be employed **[***13]** by private parties for the purpose of prosecuting criminal cases whether the services are rendered in the court room in the trial of the case or in the office preparing the case for trial.

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.

HN13 In his investigation of any alleged offense the district attorney must of necessity consult those who know the facts,--the parties who may 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 **[***14]** 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.

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 **[*360]** 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 sec. 343.20, Stats., 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 **[***15]** 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

WISCONSIN STATE LEGISLATURE



*481 U.S. 787, *; 107 S. Ct. 2124, **;*
*95 L. Ed. 2d 740, ***; 1987 U.S. LEXIS 2261*

YOUNG v. UNITED STATES EX REL. VUITTON ET FILS S. A. ET AL.

No. 85-1329

SUPREME COURT OF THE UNITED STATES

481 U.S. 787; 107 S. Ct. 2124; 95 L. Ed. 2d 740; 1987 U.S. LEXIS 2261; 55 U.S.L.W. 4676; 2 U.S.P.Q.2D (BNA) 1809

January 13, 1987, Argued
May 26, 1987, Decided *

* Together with No. 85-6207, Klayminc v. United States ex rel. Vuitton et Fils S. A. et al., also on certiorari to the same court.

PRIOR HISTORY:

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

DISPOSITION: 780 F.2d 179, reversed.

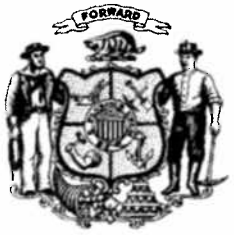
CASE SUMMARY

PROCEDURAL POSTURE: Petitioners sought review of the judgment of the United States Court of Appeals for the Second Circuit affirming the convictions of petitioners for criminal contempt pursuant to 18 U.S.C.S. § 401(3) for violation of an injunction prohibiting petitioners' infringement of respondent's trademark.

OVERVIEW: Respondent corporation alleged petitioners were manufacturing imitations of corporation's leather goods. A settlement was reached whereby petitioners were enjoined from further reproductions of corporation's products. When violations of this order were discovered, petitioners were prosecuted and found guilty of criminal contempt. The appellate court affirmed petitioners' convictions. Petitioners appealed asserting the district court erred in appointing corporation's attorneys as special prosecutors as such violated petitioners' right to be prosecuted by an impartial prosecutor. The Court held that because private attorneys appointed to prosecute a criminal contempt action represented the United States and not the party that was the beneficiary of the court order allegedly violated, the private attorney should be as disinterested as a public prosecutor who undertook such a prosecution. Further, the harmless error standard of review was not the proper standard to review the appointment of an interested prosecutor in this instance. Therefore, appointment of the corporation's attorneys to conduct the contempt prosecution was improper, and the judgment was reversed.

OUTCOME: Petitioners' convictions were reversed where the appointment of respondent's attorneys to conduct contempt hearings against petitioners was improper.


WISCONSIN STATE LEGISLATURE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May 26, 2005

HAND DELIVERED

Mr. Mel Johnson, Asst. U.S. Attorney
Office of the United States Attorney
517 East Wisconsin Avenue, Room 530
Milwaukee, WI 53202

Re: March 2, 2003 MPD Shooting

Dear Mr. Johnson:

It is my understanding that your office and the Department of Justice are still reviewing various shootings involving the Milwaukee Police Department. I was advised that if any additional information became available, that I should submit it to you for further review. Reading yesterday's Journal Sentinel, I noted the article by Gina Barton regarding the Prado inquest involving a shooting by Police Officer Alfonzo Glover. Deputy District Attorney Patrick Kenney is conducting the inquest as he did in the Fields case. The article noted that Police Officer Svensson was questioned during the inquest at length with respect to inconsistent statements Officer Glover had reported to Officer Svensson immediately after the shooting. This seemed to reflect a prudent use of a basic practice of impeaching a witness by prior inconsistent statements and/or statements inconsistent with the physical evidence.

However, I thought this was rather ironic in that during the inquest led by Attorney Kenney with respect to the March 2, 2003 shooting of Justin Fields involving Officer Craig Nawotka, a white versus African American police officer, Attorney Kenney did not utilize this basic method. For example, Attorney Kenney's office called Det. Billy Ball, an African American homicide detective, who first interviewed Officer Nawotka after he shot Mr. Fields. During the pending civil case, I showed Det. Ball the Wisconsin Crime Lab Photographs marked as Exhs. 16, 18 and 27 and asked him what he thought in light of the fact that Officer Nawotka initially told Det. Ball that Mr. Fields' vehicle was coming at him at the time he shot and that Mr. Fields' vehicle turned after he shot. (Ball Dep. dated 5/11/05, pp.30-34).

Det. Ball reviewed the photos and stated:

> **Q** **So would it be fair to say that when I showed you these pictures, the first time you saw them today, and you realized that, that the bullets were coming from the back, this came as a surprise to you?**
>
> **A** **Yes, its inconsistent with what he said originally.**

(Id.). Det. Ball testified further:

> Q The other thing I'm going to show you what's been marked as Exhibit 55. This is the assistant district attorney's questions of you at the inquest; correct?

A Yes, that's correct.

Q The assistant district attorney never showed you Exhibit 16, 18, or 27; correct?

A Yes, that's correct.

Q The assistant district attorney never asked you, based on your years as a homicide detective, whether Officer Nawotka's statements to you were consistent with the physical evidence; correct?

A Yes, that's correct.

Q Would you agree with me -- Strike that. You have testified in murder trials?

A Yes.

Q Where a witness -- or strike that. Where a suspect has told you facts inconsistent with the physical evidence, isn't it routine practice for the D.A. to have you point that out to the jury?

A Yes, normally they would say ask me what the inconsistencies are.

Q And the purpose of that is to point out to the jury that the suspect isn't telling the truth; right?

A Yes.

Q That they're not believable?

A Yes.

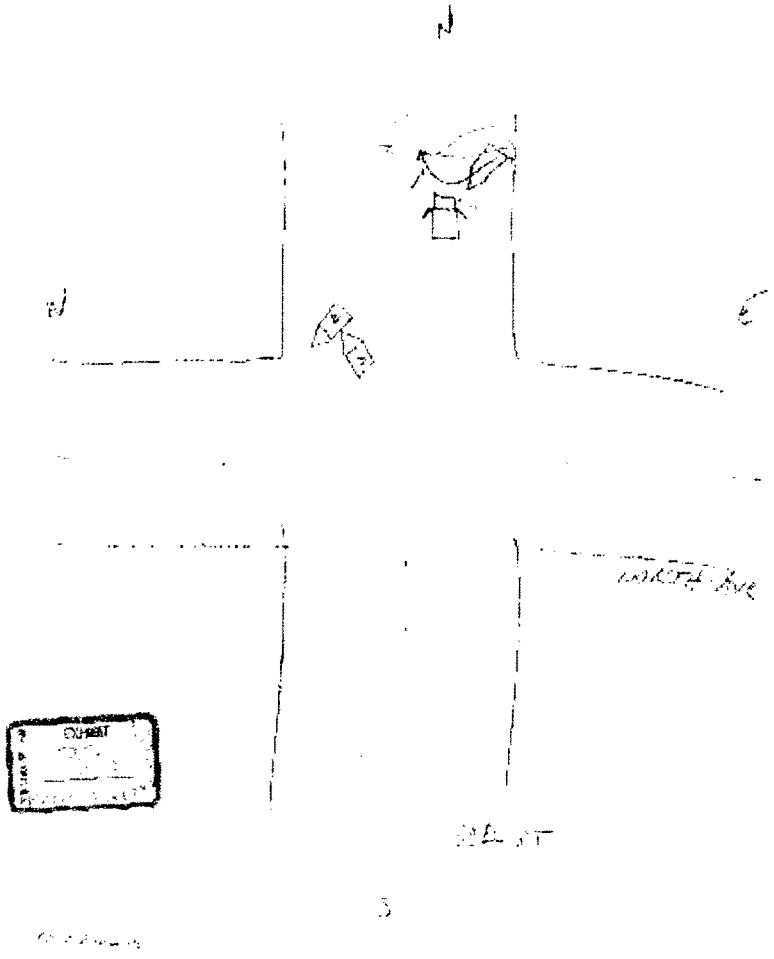
Q And in this case, with Officer Nawotka with this shooting, the D.A. at the inquest did not do that with you; correct?

A Yes, that's correct.

(Id.).

The Journal Sentinel article also pointed out that during the Prado inquest Attorney Kenney had the jury review the shooting scene and other forensic evidence. During the Fields inquest, the

jury was not provided with similar forensic testimony. For example, the Fields criminal investigation did not preserve the evidence of the location of Officer Nawotka's squad on Martin Luther King Drive at the time he shot. Thus the inquest jury could not compare the relationship between the squad and the empty shell casings which were noted on inquest diagram exhibits previously submitted to you. Also, Fields Inquest Exh. 25 diagramed the position of the Fields' vehicle at rest in a southwest direction before Mr. Fields made his "Y" turn to proceed north but did not diagrm the location of Mr. Fields' vehicle northbound at the time Officer Nawotka pulled the trigger 3 times. During his deposition, Officer Nawotka's partner, Officer Brummond, diagramed that the Fields vehicle (in green outline) was going north/northwest away from Officer Nawotka at the time his partner shot.



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Finally, in his closing remarks to the inquest jury, Deputy Kenney advocated on behalf of Officer Nawotka, a white police officer, rather than the interests of justice. For example:

> So when I asked Sergeant Terriquez, Well, what about reaching into the car? Well, you know, that seems like a bad idea. And what about breaking the window? Sergeant Terriquez's response is, Well, the officer had to do something because you just can't let a drunk driver, you just can't let a drunk driver decide whether he wants to be arrested or not; it can't be up to the drunk driver. And we know after the medical examiner's testimony that's what he was. He was a drunk driver.
>
> So Sergeant Terriquez's response is the officer has to do something because drunk driving is dangerous. It kills people. Doing nothing is not an option. And when the suspect is in control, it makes his job, the police officer's job, a lot, a lot more difficult.

(Transcript of Inquest Testimony 7/11/03, p.45). This is simply not true. During the civil case, Inspector Steven Settingsgaard testified that the events on Water Street involving Mr. Fields "began as a traffic stop" (Settingsgaard Dep. p.18) and that it was inappropriate and unreasonable for Officer Nawotka to smash Mr. Fields' window on Water Street. (Id., p.167).

Attorney Kenney also told the inquest jury:

> Well, what about when the suspect doesn't cooperate? Well, you know, they should do this, and be very careful, and approach the car carefully, and, you know, they have to assume that the person is armed and dangerous. They're taught that; that's part of their training.

(Transcript of Inquest Testimony 7/11/03, p.46). Again this simply was not true. Sgt. Harold Hampton, hired by the Milwaukee Police Department in 1978 and was the primary fact finder for the Internal Affairs investigation of the Fields shooting, testified:

> **Q** **Would it be fair to say, Sgt. Hampton, that you told your superiors that you believed Officer Nawotka's misconduct in smashing Mr. Fields' window on Water Street actually precipitated the pursuit?**
>
> **A** **Yes.**
>
> **Q** **And then that pursuit was engaged by Officers Brummond and Nawotka in direct violation of the rules?**
>
> **A** **In my opinion, yes.**

Attorney Kenney further justified Officer Nawotka's illegal conduct stating:

> And the officer put himself in front of the car; but, ladies and gentlemen of the jury, that's not against the law. He had a right to be

there. He had a lawful right to be standing in the middle of the street to try to make an arrest.

Unlike Jory Willis, Craig Nawotka did not have time to say a prayer and turn to the right. He used what he was taught to use. He reached for the option that the police department gives him, the option that he is taught to use, and he did it in the way he was taught to do it. He aimed in the direction of the threat, and he shot this young man and killed him.

He shot quickly and in a very deadly fashion until he believed the threat was gone. That is what he did, and it turned out that he was mistaken. A split second decision in a chaotic situation, a decision that was wrong, a decision that was wrong, mistaken, but reasonable.

* * *

To put it simply the reason we have this privilege is that at the next intersection the next Jory Willis might not be so lucky. He might not have the time to get out of the way of this powerful automobile driven by this reckless young man.

Now you may be thinking to yourself, and I wouldn't blame you, this is supposed to be an advisory verdict to the District Attorney? It looks to me like the District Attorney has already made up his mind. Well, I'm not the District Attorney. Mike McCann is the District Attorney, and he cares and will look very closely at whatever verdict you, you render in this case.

(Transcript of Inquest Testimony 7/11/03, pp.53-55). This too is not accurate and constitutes a travesty of justice.

The Fields' inquest jury never heard testimony from Milwaukee Police Officers that Officer Nawotka's conduct was inconsistent with and in fact violated the rules and his training. Sgt. Hampton testified that (1) Officer Nawotka's conduct in leaving his partner with two white arrestees, one of which was left unattended for a mere traffic violation is inconsistent with the rules in training; (2) that under the circumstances, drawing his weapon on Water Street was inconsistent with his training and violated the rules; (3) that upon approaching Mr. Fields' vehicle, reaching into his window violated training and rules; (4) that drawing his baton and (5) then smashing the window also constituted separate violations of his training and rules; (6) that engaging in the pursuit violated the training rules; and (7) that firing his weapon at Mr. Fields as he was driving away constituted a violation of his training and rules. (Hampton 5/12/05 Dep. p.66-72). If the Fields jurors would have heard similar testimony, they would have recognized Attorney Kenney's bias for what it is.

Further, Police Officer Corey Washington, who witnessed the shooting, testified in the civil case:

Q **Part of why you were so surprised [at the time of the shooting] was that the fact that Officer Nawotka was shooting at a car driving away was inconsistent with everything that you had been taught [by the Milwaukee Police Department] to that point in time; correct?**

A **I was so surprised because this was my sixth night on the job, and it was the first interaction I had with anything like this. And from what observed, correct, with what you said.**

(Corey Washington Dep. p.29-30).

Finally, Deputy Kenney said nothing at the Fields Inquest about the fact that inquest jurors could consider race as a factor in the Fields' shooting. Inspector Settingsgaard testified:

Q You were aware that there's been testimony to the effect that Officer Brummond said, to the passengers in the vehicle, with Officer Nawotka present, that, if you don't shut up, we're going to take you downtown with the brothers? You're aware of that?

A I do have a recollection of that comment. I don't remember if that was the exact comment I remember, but something to that effect.

Q That indicates that -- a racial component?

A That doesn't -- that doesn't show to me that the officer had a racial motivation in his actions, no.

Q That's a hard thing to prove?

A That's very hard to prove.

Q **But certainly one, in looking at this, and evaluating Officer Nawotka's conduct, one could reasonably question whether race was somewhere in his head or in his heart; right?**

A **I think you could reasonably weigh that in your decision, yes.**

(Settingsgaard Dep. p. 138). Sgt. Hampton concluded his 5/18/05 deposition testimony stating:

It's my strong belief that [Officer Nawotka] aggravated the situation. There is no one that could convince me that it was right for Mr. Fields to lose his life under the circumstances that started out as a traffic stop, no.

(Hampton 5/18/05 Dep., p.172).

Justin Fields and his family were entitled to have this or similar evidence presented at the inquest. Milwaukee has long been stereotyped the most segregated City in the Country. For too long, the African American community, and in particular young African American men feel that they are the target of racist police officers. When a review of sworn testimony elicited in a civil proceeding demonstrates that significant testimony was neither mentioned nor pursued in an earlier inquest proceeding, can anyone be surprised that our community wonders whether justice is served by the inquest process or that our City remains divided along racial lines. On January 1, 2002, Pope John Paul II delivered his message for the celebration of The World Day of Peace entitled "No peace without justice, no justice without forgiveness." Until the Fields' family and others similarly situated obtain justice, forgiveness and reconciliation among Milwaukee's diverse communities will be very hard to achieve.

I again respectfully request on behalf of the Fields family, that your office and the Department of Justice reconsider the extent of their involvement in this matter.

Enclosed for your review:

1. Transcript from the 04/19/05 deposition of Steven M. Settingsgaard
2. Transcript from the 04/06/05 deposition of Cory Washington
3. Transcript from the 04/06/05 deposition of Craig Nawotka
4. Transcript from the 03/16/05 deposition of Mike Restivo
5. Transcript from the 3/16/05 deposition of Brian Amstadt
6. Transcript from the 05/05/05 deposition of Thomas J. Brummond
7. Transcript from the 05/11/05 deposition of Billy Ball
8. Transcript from the 05/11/05 deposition of Douglas Wiorek
9. Transcript from the 05/12/05 deposition of Harold T. Hampton
10. Transcript from the 5/12/05 deposition of Arthur Jones
11. Transcript from the 5/18/05 deposition of Harold T. Hampton

Thank you again for your consideration.

Very truly yours,

CANNON & DUNPHY, S.C.

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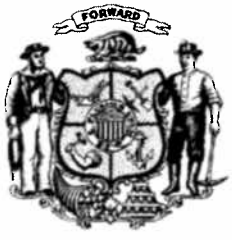
MLT/tmm
Encls.
cc: Gina Barton, w/encls.

WISCONSIN STATE LEGISLATURE



Milwaukee Journal Sentinel May 13, 2005

McCann backs state-run inquests

Bill would empower attorney general

By JESSE GARZA
jgarza@journalsentinel.com

Milwaukee County District Attorney E. Michael McCann said Thursday he supports a bill that would grant the state attorney general the authority to call and conduct inquests into police shootings.

McCann told a gathering of local religious organizations that he supports the bill as long as inquests are still held before a judge and a jury from the county in which the shooting occurred, and as long as the attorney general, upon concluding a crime was committed, prosecutes the case.

But McCann cautioned the 200 people assembled at Free Spirit Baptist Church, 1234 W. Juneau Ave., that the individual authorized under the legislation would not likely come from Milwaukee County. James Finnegan, the last attorney general from Milwaukee County, left office in 1937.

The bill, sponsored by state Rep. Annette "Polly" Williams (D-Milwaukee), would give the state attorney general authority over inquests involving a person who died as a result of an act by a law enforcement officer. Under current law, an inquest can be held either before a six-person jury or before a judge or court commissioner. If the district attorney or medical examiner requests an inquest, the proceedings can also be held in secret. The bill would require that inquests be held in open session and in front of a jury.

The bill also would allow certain relatives of the victim to be represented by an attorney. The attorney could ask the court to subpoena witnesses and could question witnesses, argue before the court and request a special prosecutor. Currently, private attorneys may be present when relatives are questioned but may not participate.

The meeting was called in response to what organizers called "the recent surge in police violence" and highlighted the beating of Frank Jude, an African-American, by off-duty white Milwaukee police officers, and the death of Wilbert Prado, a Latino man who was shot eight times by a black off-duty officer.

Organizers, including Milwaukee Innercity Congregations Allied for Hope, the Milwaukee Lutheran Coalition, the Wisconsin General Baptist Pastors Conference and Citizen Action of Milwaukee Faith-Based Caucus, blasted what they called "known racist" officers on the Milwaukee Police Department.

The Rev. Kenneth Bonner, pastor of Free Spirit, said a breach of trust between police and the African-American community needs to be repaired.

"At the root of the problem is the age-old problem of racism," Bonner said. Organizers called the event a "Summit on Police Violence" where it called on McCann, Milwaukee Mayor Tom Barrett, Deputy Police Chief Joseph Whiten and David Heard, executive director of the Fire and Police Commission, to support proposals they said would help mend relations between police and citizens.

The proposals included video equipment in patrol cars, a procedure for MICAH to receive complaints about alleged police misconduct and the change in the state law governing inquest procedures.

Along with McCann pledging support for the inquest proposal, both Barrett and Whiten promised to secure funding for video cameras for all police conveyance vehicles.

"It's important for the police to earn the respect of the community," Barrett said. "It's also important for the community to respect the Police Department."

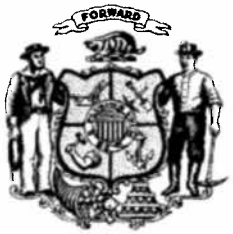
Whiten said police command staff members are committed to obtaining the equipment.

All four officials also agreed to support a MICAH walk-in procedure to field complaints against police officers.

Adam Bergstrom of the Journal Sentinel staff contributed to this report.

OVER→


WISCONSIN STATE LEGISLATURE


FORWARD

Corrections Committee
Public Hearing
July 11, 2005 - Milwaukee
MPS Admin Building
AB 359

(1) Eliminates the DA's discretion to call an inquest. The AG must.

(2) Allows the AG to appoint a spec. pros. if conflict of interest exists.

(3) Inquest must be before hearing of at least 6 people.

(4) Allows relative to retain attorney

(5) Allows for inquest to be called in any county in which criminal charges may be filed in the case

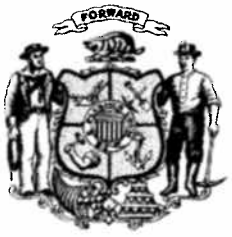
Any death involving police officer must precipitate an inquest.

↳ Testimony at inquest inadmissable in civil proceedings

or

If relative allowed an attorney then officer and city are provided / permitted representation as well.

WISCONSIN STATE LEGISLATURE



Rep. Polly Williams has sought a Public Hearing on this bill in Milwaukee on 6-6-05. The Speaker's office has given clearance for the expenses.