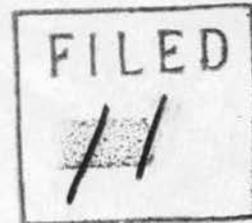


PROSECUTING ATTORNEYS

Not mandatory upon prosecuting attorney to file criminal information upon filing of complaint. Prosecuting attorney may use his discretion in this matter.

June 22, 1949

Mr. C. Dudley Brandom  
Prosecuting Attorney  
Daviness County  
Callatin, Missouri



Dear Sir:

This department is in receipt of your request for an official opinion upon the following statement of facts:

"Would you kindly furnish this office with your opinion relative to the proper interpretation of Sections 2 & 5 of the Magistrate Court code of procedure in misdemeanor cases, Laws of Missouri 1945 at page 751 & 752.

"It appears that Section 2 provides that if a duly signed complaint is filed with the Magistrate or with the Prosecuting Attorney, that the Prosecuting Attorney MUST immediately file an information and proceed to try such a case, regardless of the merits, facts, evidence, or circumstances which would even possibly justify such action.

"However, Section 5 provides one technical instance in which the Prosecuting Attorney may use his discretion in prosecution, and thereby can cull out those instances in which actually no crime has been committed, where such action is not justified, or where such complaint is merely a grudge claim.

"It appears to the undersigned that such statutes should be interpreted so that the Prosecuting Attorney could proceed in any instance at his discretion, and that the following portion of Section 5 should apply to all complaints:

"....and if, after investigation of such facts, the prosecuting attorney be satisfied that an offense has been committed, and that a case against the accused can be made, it shall be his duty ....!"

Section 2, Laws of Mo. 1945, page 751, to which you refer above, states:

"Prosecutions before magistrates for misdemeanors shall be by information, which shall set forth the offense in plain and concise language, with the name of the person or persons charged therewith: Provided, that if the name of any such person is unknown, such fact may be stated in the information, and he may be charged under any fictitious name; and when any person has actual knowledge that any offense has been committed that may be prosecuted by information, he may make complaint, verified by his oath or affirmation, before any officer authorized to administer oaths, setting forth the offense as provided by this section, and file same with the magistrate having jurisdiction of the offense, or deliver same to the prosecuting attorney; and whenever the prosecuting attorney has knowledge, information or belief that an offense has been committed, cognizable by a magistrate in his county, or shall be informed thereof by complaint made and delivered to him as aforesaid, he shall forthwith file an information with the magistrate having jurisdiction of the offense, founded upon or accompanied by such complaint."

This department does not believe that the language of the above quoted section contains anything which makes it mandatory upon a prosecuting attorney to institute criminal proceedings merely upon the filing of a complaint by an individual before an officer authorized to administer oaths.

Section 5 following states:

"Upon the filing of a complaint in a magistrate court, verified by the oath or affirmation of a person competent to testify against the accused, if the magistrate be satisfied that the accused is not likely to try to escape or evade prosecution for the offense alleged, it

shall be his duty to forthwith forward such complaint to the prosecuting attorney; and it shall be the duty of the complainant to forthwith inform the prosecuting attorney what facts can be proved against the accused, and by what witnesses, and the residence of such witnesses; and if, after investigation of such facts, the prosecuting attorney be satisfied that an offense has been committed, and that a case against the accused can be made, it shall be his duty to immediately file his information before the magistrate taking the complaint, and give to said magistrate a list of the witnesses to be subpoenaed on the part of the state; and upon the filing of the information by the prosecuting attorney, as herein provided, with the magistrate, or upon the filing of an information by the prosecuting attorney upon his own information and belief, without complaint of a private individual having previously been filed, it shall be the duty of the magistrate to forthwith issue a warrant for the arrest of the defendant, directed to the sheriff, or, if no such officer is at hand, then to some competent person who shall be specially deputed by the magistrate to execute the same, by written indorsement to that effect on such warrant."

It is the opinion of this department that Section 5, quoted above, does, in that portion of the Section which is underscored (underscoring ours) very definitely invest the prosecuting attorney with discretion as to whether he will or will not file an information subsequent to the filing of a complaint.

This department believes that the aforementioned portion of Section 5 clarifies Section 2 and, as we said, clearly gives a prosecuting attorney discretion in these matters. However, for the purpose of further clarification we invite your attention to the case of State, on information of McKittrick, Attorney General, v. Wymore, Prosecuting Attorney, 132 S.W. (2d) 979. In this case the defendant Wymore, prosecuting attorney of Cole County, Missouri, was charged with an offense which, in essence, was failure to discharge his official duty to prosecute individuals within his jurisdiction, who were suspected of criminal actions. The general defense of the Prosecuting Attorney was that he was invested with discretion in the conduct of his office and in instituting

prosecution proceedings. In this case, in which a decision was handed down by the Supreme Court in 1939, the court made an exhaustive analysis of this matter of the discretion, in instituting criminal prosecutions, allowed to prosecuting attorneys. In the course of this discussion the court stated:

"He (the defendant Prosecuting Attorney) also argues that he is a quasi judicial official, and as such vested with discretion in the performance of duty.

"We also agree that in performing his duties he is authorized to exercise a sound discretion. However, 'there is nothing sacred about the words quasi judicial'. In Ex parte Bentine, 181 Wis. 579, 196 N.W. 213, 215, 216, it was correctly ruled as follows: 'A public prosecutor 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, between the certainly and the doubtfully guilty.' Of necessity, 'in distinguishing between the certainly and doubtfully guilty,' the prosecuting attorney should make a reasonable effort to discover witnesses and interview them with reference to the facts. After doing so he should give careful consideration to both the law and the facts before determining the question of prosecution or no prosecution. He has no arbitrary discretion, and sound discretion is not usable as a refuge for unfaithful prosecuting attorneys.

"The rule is stated as follows:

"'It is the duty of the prosecuting attorney to initiate proceedings against parties whom he knows, or has reason to believe, have committed crimes. \* \* \* The fact that his duties rise to the dignity of exercising discretion cannot excuse neglect of duty on his part. \* \* \*

"The contention made by the appellant is to the effect that, because a wide discretion is vested in the prosecuting attorney with reference to the prosecutions of parties for crime, the right of discretion must necessarily shield him from indictment or prosecution for omission to perform his duties. This court takes a contrary view of the law. It is the duty of the prosecuting attorney, under the statute, though endowed with discretion in the performance of his duties, to exercise his discretionary powers in good faith.' Speer v. State, 130 Ark. 457, 198 S.W. 113, 114, 115.

\* \* \* \* \*

"He (the defendant Prosecuting Attorney) also argues that he was not compelled to sign, swear to and file complaints.

"We also agree that he is not compelled to do so. He may and should exercise an honest discretion in determining if he should make and file a complaint. Under Sec. 3467, R.S. 1929, Mo. St. Ann. Sec. 3467, p. 3110, he is not required to have 'first hand knowledge' to be qualified to make a complaint. State v. Frazier, 339 Mo. 966, 98 S.W. 2d 707, 712; State v. Layton, 332 Mo. 216, 58 S.W. 2d 454, 457. In this connection respondent stated 'that no request was ever made to him by any person to file a complaint or otherwise institute a prosecution for violation of the law'. He thereby admitted that he was authorized to make complaints.

\* \* \* \* \*

"The people of this state are not idiots. They know that a prosecuting attorney cannot, under his oath of office, hide behind Sec. 3505, R.S. 1929, Mo. St. Ann. Sec. 3505, p. 3130, which authorizes private persons to file complaints with the clerk of the circuit court or with the prosecuting attorney. If he could do so, the law-abiding citizens of the state would be helpless and at the mercy of the 'underworld'. It is well known that private persons rarely file complaints. They may subject themselves to costs and the hazard of an action for malicious prosecution. If a private person files a complaint, the prosecuting attorney is not compelled, for that reason, to file an information. However, it is his duty to make a reasonable investigation and then determine if an information should be filed."

From the above it is the conclusion of this department that a prosecuting attorney is not compelled to file a criminal information and thereby institute criminal prosecution proceedings against an individual or individuals simply because a complaint, under oath, is filed against such individual or individuals by some person or persons. We do believe that before such information is filed and criminal proceedings instituted by the prosecuting attorney, that it is his duty to make a thorough investigation of the complaint, and that if, after such an investigation, he is of the opinion that the complaint is not well founded and cannot be substantiated, that he should abstain from further proceedings in the matter.

It is the further opinion of this department that a prosecuting attorney owes as definite a duty to the person complained against to thoroughly investigate the charges made against such person before instituting criminal proceedings, as the prosecuting attorney owes to the commonwealth of the State of Missouri to protect it against criminals. It is the duty of the prosecuting attorney to protect innocent people against whom groundless charges are filed, either through malice or misinformation or inadequate information, from public prosecution and all of the injury to character and the feelings of the accused person which inevitably follow the filing of a criminal information and the institution of criminal prosecution proceedings, even though the result of the institution of criminal proceedings finally results in the acquittal of the accused.

#### CONCLUSION

It is the conclusion of this department that Sections 2 and 5 of the Magistrate Court Code of Procedure in Misdemeanor Cases, Laws of Mo. 1945, pages 751 and 752, do not make it mandatory upon a prosecuting attorney to file an information and institute criminal proceedings merely upon the filing of a complaint, under oath, by a person or persons charging another person or persons with the commission of a crime, but that the prosecuting attorney should make a thorough investigation of the charges made in the complaint, and, if he finds that such charges have a reasonable basis in fact, to proceed to file an information, but that if he finds that, in his opinion, they do not have, to abstain from instituting criminal proceedings.

Respectfully submitted,

HUGH P. WILLIAMSON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
ATTORNEY GENERAL