

**LETTER OPINION**  
**95-L-154**

July 13, 1995

Ms. Patricia Burke  
Burleigh County State's Attorney  
514 East Thayer Avenue  
Bismarck, ND 58501

Dear Ms. Burke:

Thank you for your June 19, 1995, letter in which you have asked whether it is a violation of N.D.C.C. § 27-13-12 for a former assistant state's attorney to write a letter to the North Dakota Board of Parole and Pardons which is favorable to an inmate formerly prosecuted by that prosecutor. You have enclosed with your letter written materials in explanation of this issue. For your information, I have also received materials from James L. Norris, an attorney who represents the former defense attorney of the inmate who has initiated a defamation action against the former prosecutor.

N.D.C.C. § 27-13-12 provides:

**27-13-12. Attorney not to aid defense when formerly interested as public prosecutor - Penalty.** Every attorney who, having prosecuted or in any manner aided or promoted any action or proceeding in any court, as state's attorney or other public prosecutor, afterward, directly or indirectly, advises in relation to or takes any part in the defense thereof as attorney or otherwise, or takes or receives any valuable consideration from or on behalf of any defendant therein, upon any understanding or agreement whatever, express or implied, having relation to the defense thereof, is guilty of a class A misdemeanor and in addition to the punishment prescribed therefor, he forfeits his license to practice.

This section imposes a class A misdemeanor penalty and a forfeiture of a license to practice law if the following elements are proven beyond a reasonable doubt:

1. A state's attorney or other public prosecutor;

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2. Who, having prosecuted or in any manner aided or promoted an action or proceeding in any court;
3. Afterward, directly or indirectly advised in relation to or took any part in the defense of such action or proceeding as attorney or otherwise or received any valuable consideration from or on behalf of any defendant in such proceeding upon any understanding or agreement, express or implied, having relation to such defense.

Based upon the information that I have received, Dennis Houle pled guilty to murder and received a substantial penitentiary sentence. After learning of Houle's application to the parole board for release from incarceration, the assistant state's attorney who prosecuted Houle and who is no longer a public prosecutor but in private practice, sent a letter to the chairman of the North Dakota Parole Board on September 6, 1994, explaining his feelings and the circumstances surrounding Houle's plea of guilty and the sentence Houle received.

The former prosecutor stated in his letter to the chairman of the parole board that he was not, in any way, representing Houle and there was no evidence that the former prosecutor took or received any valuable consideration from or on behalf of Houle for the submission of that letter to the parole board.

The issue which faced you was whether the former prosecutor, directly or indirectly, took any part in the defense of the action or proceeding which led to the plea of guilty and sentencing of Houle or provided advice in relation to such defense.

After receipt of your letter, a review was made of N.D.C.C. § 27-13-12, its predecessor statutes, and statutes of other states similar to that in North Dakota. Although several states have statutes which are virtually identical to N.D.C.C. § 27-13-12, case law interpreting those statutes does not directly address the issue presented in your letter to me. These cases do, however, show application of the respective state's statutes to situations in which evidence was presented of active involvement of prosecutors in providing assistance to defendants facing a criminal charge.

In In Re Voss, 11 N.D. 540, 90 N.W. 15 (1902), the predecessor statute to N.D.C.C. § 27-13-12 was applied to a state's attorney who assumed the role of a defense counsel during a prosecution of a defendant. After the denial of the

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prosecutor's motion to dismiss a criminal complaint against the defendant, the prosecutor in this case, in effect, changed hats and became an advocate for the defendant in an effort to disparage the criminal charge brought against the defendant.

In People v. Spencer, 10 P.C.L.J. 127, 61 Cal. 128 (1882), a former district attorney was prohibited from appearing as the attorney for the defendant in opposition to an indictment drawn by that attorney as district attorney which provided the basis for the charges against the defendant. In Price v. State Bar of California, 179 Cal. Rptr. 914, 638 P.2d 1311 (1982), a statute very similar to North Dakota was invoked against a prosecuting attorney who sought a criminal defendant's promise not to appeal from his conviction in exchange for the prosecutor's promise to seek a more favorable sentence in an effort to hide misconduct of the prosecutor in that case.

Construing a statute similar to that in North Dakota, the Montana Supreme Court concluded that the Montana statute prohibits counsel from appearing as a defense attorney in the same case the counsel had previously prosecuted. In other words, the statute prohibited an attorney from defending a case in which the prosecutor instituted while a public official or from defending a case which arose while the attorney occupied an official position. State v. Gallagher, 162 Mont. 155, 509 P.2d 852 (1973); Petition of Allen, 161 Mont. 547, 507 P.2d 1049 (1973).

As I have stated previously, the issue appears to be whether the former assistant state's attorney advised or took part in the "defense" of the action or proceeding of which the former prosecutor was involved. The term "defense" has been defined as:

That which is offered and alleged by the party proceeded against in an action or suit, as a person in law or fact why the plaintiff should not recover or establish what he seeks. That which is put forward to diminish plaintiff's cause of action or defeat recovery. Evidence offered by accused to defeat criminal charge. (Emphasis added.) Black's Law Dictionary, 6th Ed., p. 419.

Defense 5. Law. a. The action of the defendant in opposition to complaints against him. b. the defendant and his legal counsel. American Heritage Dictionary, 2d Col. Ed., p. 374.

The term "defend" is defined as:

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To prohibit or forbid. To deny. To contest and endeavor to defeat a claim or demand made against one in a court of justice. To oppose, repel, or resist. to protect, to shield, to make a stand for, or uphold by force or argument. To vindicate, to maintain or keep secure, to guaranty, to agree to indemnify. To represent defendant in administrative, civil or criminal proceeding. (Emphasis added.) Black's Law Dictionary, 6th Ed., p. 419

Defend 3. Law. a. to represent (the defendant) in a civil or criminal case. b. to contest (a legal action or claim). The American Heritage Dictionary, 2d. Col. Ed. p.374.

Houle was adjudged guilty upon his plea of guilty and was sentenced for the offense for which he is incarcerated. His application to the North Dakota Parole Board was not an effort to overturn the conviction but to allow his release from incarceration.

In his September 6, 1994, letter to the parole board, the former assistant state's attorney specifically stated that he did not, in any way, represent Houle. There is no indication in the documents that I have received that the former assistant state's attorney was, in any manner, acting as Houle's attorney in submitting the letter to the parole board.

It is anticipated that information will be supplied to the parole board pertaining to an application for a parole. N.D.C.C. § 12-59-10 requires the notice of an application for parole and the time and place of a hearing to be provided to the state's attorney who participated in the trial of the applicant or such state's attorney's successor in office. N.D.C.C. § 12-59-05 requires the parole board to consider all pertinent information regarding each prisoner including the circumstances of the offense, the presentence report, the previous social history, and criminal record, the conduct, employment, and attitude in prison, and the reports of physical and mental examinations that have been made pertaining to the inmate.

A broad reading of N.D.C.C. § 27-13-12 would prevent any comment by a former prosecutor of an applicant for parole if the information or statements made by the former prosecutor would be favorable, directly or indirectly, to the inmate. This broad reading of this statute could also include a potential violation if the prosecutor stated that he or she

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had no objection to the parole of the inmate. Since penal statutes should be strictly construed against the government (State v. Sheldon, 312 N.W.2d 367 (N. D. 1981)), viewing this section in this light would not be appropriate.

I do not believe that it is the intent or purpose of the statutory prohibitions of N.D.C.C. § 27-13-12 to totally muzzle comment by a prosecutor of an inmate when such comments are directed to a public board charged with determining whether continuing incarceration of an inmate is appropriate.

The specific language of N.D.C.C. § 27-13-12 makes specific reference to the "defense" of the action or proceeding prosecuted, aided, or promoted, by the former prosecutor. Whether the former assistant state's attorney advised or took part in the "defense" of the action or proceeding involving Houle's conviction, raises mixed questions of fact and law.

The proceeding or action against Houle for the crime of murder was concluded by his plea of guilty, sentence, and expiration of time for appeal. It does not appear that Houle had a pending action for relief from the underlying conviction through post conviction relief proceedings or direct appeal. Houle's application for consideration by the parole board sought the administrative approval of the board to release him from incarceration on parole and not to overturn his conviction.

The information submitted by the former assistant state's attorney related to the circumstances of the plea and sentence and the assistant state's attorney was not representing Houle before the parole board.

The determination of whether the former assistant state's attorney advised or took part in Houle's "defense" subject to the statutory prohibition is within your discretionary action as state's attorney. See, Keidel v. Mehrer, 464 N.W.2d 815 (1991); Hennebry v. Hoy, 343 N.W.2d 87 (N.D. 1983).

Based upon the information presented to me and a review of the statutory provisions and court decisions of this and other states, I do not believe that you abused your discretion in not initiating criminal charges against the former assistant state's attorney. You would be justified in concluding that the conduct of the former assistant state's attorney was not, directly or indirectly, advice in relation to, or the taking any part in the "defense" of the action or proceeding against Houle prosecuted by the former assistant state's attorney.

Sincerely,

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Heidi Heitkamp  
ATTORNEY GENERAL

rpb/vkk