

HB 1507: Establishing a mechanism for independent prosecutions of criminal conduct arising from police use of force.

In answer to the overwhelming frustration, anger, and demand for change from members of the public over the deaths of community members by law enforcement, it is critical that the legislature strengthen the criminal legal system by creating a Washington State Independent Prosecutor with the *sole* authority and jurisdiction to direct the investigation and prosecution of cases involving police use of deadly force. We believe the Washington Supreme Court will uphold the constitutionality of such a narrowly tailored statute.

Enhancing Public Trust through Transparency:

We must reimagine a justice system that removes the mechanisms that are used to oppress marginalized communities in Washington State. Since the untimely murder of George Floyd, the legislature must attempt to address the inherent conflict of interest between local law enforcement and local prosecutors who are responsible for charging decisions involving local law enforcement's use of deadly force. This cannot be adequately addressed by leaving jurisdiction for these cases with county prosecutors.

Vesting sole initial jurisdiction in a statewide prosecutor is necessary and will remedy some of the structural reasons for racially disparate treatment that local prosecutors have been unable or unwilling to address. "I believe the system should change," said Chad Enright, Kitsap County Prosecutor, in a June 11, 2020 letter to legislators concerning the need for an independent prosecutor to investigate and prosecute police deadly force cases. The primary concern voiced by communities grossly impacted by law enforcement involved homicides, including black and indigenous people, as well as people in the throes of a mental health crises, emphasizes the necessity of enhancing the public trust through transparency. This can only be accomplished by removing the inherent and blatant conflict of interest that the local prosecutor and local law enforcement suffer.

Law enforcement and local prosecutors exist in an entrenched, symbiotic relationship and codependency which precludes the ability to be fair or the appearance of fairness. The local prosecutor relies upon local law enforcement daily to investigate and prosecute serious crimes in the community. These duties include, but are not limited to, discovering and providing evidence, serving subpoenas in criminal and civil cases, locating and securing State's witnesses in criminal cases, providing state trial testimony, assisting at the State's table during trial, and referring cases with charging recommendations. It is untenable that local prosecutors are allowed to both criminally investigate and potentially prosecute the same local law enforcement that they so heavily rely on. Furthermore, a significant personal conflict of interest exists when local prosecutors and potential prosecutors rely on law enforcement support during county elections.

It will be unfair to have similar cases treated in a different manner depending upon which county the death occurs. With concurrent jurisdiction, as a matter of course, some counties may readily cede the case to the independent prosecutor while others will retain most cases creating an

unequal result to the public and potential violation of the equal protection clause of the constitution.

Structural and Constitutional Considerations:

We agree with the Solicitor General's memorandum in which he stated that: the independent prosecutor should be assigned a relatively narrow set of cases; the independent prosecutor should be appointed by and housed within a constitutionally created executive office or executive branch entity; and, the independent prosecutor must have sole discretion in making charging decisions. However, contrary to the Solicitor General, we believe that vesting sole initial jurisdiction in the independent prosecutor to charge police with crimes arising out of the illegal use of serious or deadly force will not lessen the chance of this bill being found constitutional.

For the following reasons, we believe this will be upheld by the Supreme Court:

- **First, the Solicitor General's memorandum correctly states that there are no cases directly on point for this issue.** Consequently, it argues by analogy from other Washington Supreme Court cases that have addressed what the Legislature can do concerning the powers and duties of county prosecutors. The case closest to the present situation is *State v. Rice*, 174 Wn. 2d 884 (2012). *Rice* held that it is a violation of the Washington Constitution, Article 11, Sec. 5, for the Legislative branch to usurp or eliminate "core functions" of county prosecutors because county voters have a reasonable expectation that an elected county prosecutor will make the decisions on whether and how to charge crimes in their county. *However, it is hard to imagine that the Washington Supreme Court would hold that prosecuting cases in which the county attorney has an actual or apparent conflict of interest is a core function of the prosecutor's office and is a reasonable expectation of county electors under Article 11, Sec. 5.*
- **Second, investigating and prosecuting criminal cases in which the county prosecutor has an actual or apparent conflict of interest violates the due process and equal protection rights of voters and litigants.** Voters and litigants have the constitutional rights to due process and equal protection by the criminal justice system. That means the rights to a fair and unbiased system in which everyone similarly situated is treated equally. We submit that county prosecutors with conflicts of interest making charging and prosecuting decisions in police deadly force cases violate those constitutional rights.
- **Third, the Supreme Court is often called upon to decide cases in which two or more constitutional rights are in conflict.** Thus, even if the Court did find that vesting sole initial jurisdiction in the independent prosecutor violates Art. 11, Sec. 5 of the Washington Constitution, it would then have to balance this somewhat procedural right against the more substantive constitutional rights of due process and equal protection. We believe the latter rights would prevail.
- **Fourth, the sole initial jurisdiction issue is factually and legally quite different from the issue that confronted the Court in *Rice*.** In *Rice*, the Court held that the Legislature could not require or mandate that the prosecutor charge crimes in a certain, very specific way. That ruling is based on citizens' constitutional rights under Art. 11, Sec. 5 to have the elected county prosecutors make those charging decisions. In our case, the Legislature would not be directing any prosecutor on how or when to charge or prosecute any

individual case. It simply would prohibit county prosecutors from prosecuting a very narrow set of cases in which they have a conflict of interest. This is something that the Rules of Professional Conduct for all lawyers, including prosecutors, already prohibits. No one has ever alleged that ethical rule to be unconstitutional.

- **Finally, concurrent Jurisdiction has the potential to generate far more litigation than sole initial jurisdiction.** It has been argued by some that vesting sole initial jurisdiction with the independent prosecutor should be resisted because it would lead to litigation to determine its constitutionality. However, almost every criminal statute is the subject of numerous constitutional challenges. That is not a reason not to pass them. Additionally, allowing concurrent jurisdiction has the potential to create far more litigation. That is because the bill, as currently drafted, allows both the independent prosecutor and county prosecutor to file charges. If they cannot agree on who should handle the case, it will be decided by the Superior Court. It is not hard to imagine that such motions, and appeals from court rulings on them, will be filed in many, if not most, cases.

Vesting sole initial jurisdiction in a statewide prosecutor is intended to remedy some of the structural reasons for racially disparate treatment that local prosecutors have been unable or unwilling to address. It is a constitutional exercise of the Legislature's authority. Therefore, we believe it is necessary and that the Court will uphold the constitutionality of this narrowly tailored statute.

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