March 31, 1976

HON. RICHARD J. WILLIAMS
President, County Prosecutors' Association
600 Guaranty Trust Building
Atlantic City, New Jersey 08401

FORMAL OPINION NO. 11 – 1976

Dear Prosecutor Williams:

You have requested an opinion on behalf of all the County Prosecutors with regard to the power of a prosecutor to administratively terminate a criminal prosecution. It is my opinion that a prosecutor may administratively dispose of a criminal complaint both prior to and following a probable cause hearing.

Certain prefatory comments are in order. All would agree that the role of the public prosecutor has become infinitely more complex in recent years. This evolution in the nature of the office reflects the rising expectations of our citizens with respect to the criminal law. Our Legislature has often responded to difficult problems of social control by denominating conduct as criminal because it offends a regulatory policy aimed at promoting or protecting the public interest. In this manner, overwhelming demands are being made on the criminal justice system by the ever increasing volume of cases. In response, the expanded responsibility of the prosecutor requires the development of expertise in social disciplines not traditionally within the realm of law enforcement, and increasingly demands the exercise of reasoned discretion in the performance of his duties. To be sure, the prosecutor's primary duty is to prosecute. Protection of the public against criminal attack is government's primary mission. Nevertheless, our obligation is more far-ranging. In short, our perspective cannot be confined to seeking convictions in all instances in which the law has been breached. Indeed, it has long been recognized that "[t]he primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done."[1] Thus, courts throughout the country have held that prosecutors are vested with broad discretionary powers.[2] In brief, prosecutorial discretion is deeply embedded in our history and was rooted in the common law of England long before the birth of this country. The exercise of discretion, within the parameters of good faith reasoning, is as much a part of the prosecutorial function as is obtaining convictions in criminal cases.

In New Jersey, every prosecutor is charged by statute with the duty "to use all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the law."[3] Despite the seemingly mandatory nature of the statute, our courts have explicitly recognized that prosecution of criminal cases is not a ministerial function and that a "county prosecutor within the orbit of his discretion inevitably has various choices of action and even of inaction."[4] It is thus incumbent upon prosecutorial authorities to exercise discretion based upon their judgment and conscience. . .in accordance with established principles of law,"[5] "fairly, wisely, and with skill and reason."[6]

The concept of prosecutorial discretion implies conscientious judgment, not arbitrary action. Clearly, a prosecutor is duty-bound to perform his statutory responsibilities in good faith. Personal gain or favoritism are to play no part in decision-making. In point of fact, a prosecutor's range of choices, not unlike those within the judicial domain, depends upon the particular circumstances of each case.

Decision making occurs at every stage of a criminal prosecution. A county prosecutor has an "obligation to detect and arrest as well as to obtain indictments and prosecute them."[7] He is statutorily required "to investigate suspicious situations and to determine the facts in the process of detecting and arresting, especially when he receives information that makes it reasonably probable that the law has been violated.[8] Prosecutorial discretion is generally exercised after investigation is completed when alternative courses of action are available. It is at this stage of the proceedings that a prosecutor is confronted with the decision as to whether he must seek an indictment and, if so, the nature of the charge to be filed.

Research reveals that a prosecutor is vested with broad discretionary powers in determining whether to prosecute once an investigation has been completed.[9] However, such authority must be exercised within the parameters of the public interest. As with all discretionary powers, those of a prosecutor are subject to possible abuse. A prosecutor may not unilaterally suspend enforcement of a duly enacted statute. Surely, it is not within his power to willfully cripple or nullify the enforcement of the criminal law in his county or "to choose at his pleasure the portion of the criminal law he would enforce."[10] It has been aptly observed that the "suspending power sought so strenuously by the Stuart kings" was denied to them in the English Bill of Rights.[11] A prosecutor may not defy the law, nor may he prevent its effective execution. The discretion not to prosecute is, therefore, limited at the extreme where it becomes no longer a proper exercise of authority, but rather a criminal abuse of public office, *e.g.*, official misconduct.

These principles were made manifest by our Supreme Court in *State v. Winne,* 12 *N.J.* 162 (1973). There, a county prosecutor was charged with misconduct in office. The principle thrust of the indictment related to the prosecutor's alleged willful neglect to perform his duty to use all proper and lawful means to detect, arrest, indict and convict those responsible for gambling operations in his county. Our Supreme Court squarely confronted the issue whether a corrupt agreement had to be alleged and proven to support a charge of nonfeasance, and, if not, whether a quasi-judicial officer, such as a county prosecutor, could be liable for nonfeasance for failure to perform discretionary acts. The Court concluded that nonfeasance, required *mens rea* but not a corrupt motive. In other words, nonfeasance was alleged where it was said that the defendant "willfully or corruptly" refused to fulfill his duties. It was not necessary that some motive of personal gain or favoritism be shown. It was enough that the refusal was willful and for invalid reasons, *e.g.*, in bad faith. The Court agreed that the prosecutor was a quasi-judicial officer endowed with discretion, but found that a standard of good faith would not unduly obstruct him in the performance of his office. Rather, the Court noted that the public had a right to expect care, skill, diligence, reason and judgment by a prosecutor.

The principle that a prosecutor must exercise his discretion in a reasoned manner and in good faith has been reaffirmed in an unbroken line of judicial decisions.[12] Most recently, our Supreme Court, albeit in a somewhat different context, applied the rule in a case involving an alleged violation of this State's election laws. In *In re Investigation Regarding Ringwood Fact Finding Comm.*, 65 *N.J.* 512 (1974), the Passaic County Prosecutor appealed from an order denying his motion to dismiss an election law complaint and directing him to present the matter to the grand jury. The prosecutor's refusal to seek an indictment was based upon the fact that his investigation had disclosed a technical and unintentional infraction. The Supreme Court reversed the Superior Court's order emphasizing the "broad" discretionary authority of a prosecutor "in selecting matters for prosectuion." *Id.* at 516. While noting

that the exercise of prosecutorial discretion may be reviewed under the judiciary's comprehensive prerogative writ jurisdiction, the Court specifically recognized the authority to administratively terminate a prosecution. *Id.* at 519. Absent "a showing of arbitrariness or abuse," a prosecutor's decision not to present a matter to a grand jury cannot be the subject of judicial interference. *Id.* at 518.

In sum, prosecutors may administratively terminate prosecutions both prior to and following probable cause hearings. *R.* 3:4-3 provides that "[i]f, from the evidence, it appears . . . that there is probable cause to believe that an offense has been committed and the defendant has committed it, the court shall forthwith bind him over to await final determination of the cause . . . ." It is significant that the Rule does not state that the defendant must be bound over for grand jury action.

The determination of probable cause by a municipal court judge does not compel the prosecutor to present the case to the grand jury. While it is true that a recent amendment to *R.* 3:25-1 provides that "a complaint may be dismissed prior to trial only by order of the assignment judge," this provision does not militate against the view taken here. It is to be noted that the commentary which accompanied the submission of the Rule to the Supreme Court by the Criminal Practice Committee noted that it was not intended to preclude the exercise of prosecutorial discretion, and certainly the amendment does not imply that the court may compel a prosecutor to present a frivolous matter to a grand jury. In short, the amendment, standing alone, does not prohibit a prosecutor from administratively terminating a criminal prosecution. Thus, prosecutors are not obliged to indulge in a charade by presenting a frivolous matter to a grand jury and recommending that a "no bill" be returned.

The prosecutor's world is a factual one. He is the link between the general ideals of the law and the unforseeable complexities of reality. No rigid code or formulation of conduct is possible. While the presumption must be that violations call for prosecution, that presumption may be overcome in a particular case. The character and history of the offender, the nature of the offense, the harm to the victim, the sentiment of the community, the morals and mores of the locality and other factors must be considered. The prosecutor's discretion can be abused not only by a refusal to prosecute but also by prosecutions in cases where justice mandates otherwise. See *e.g., State v. Hampton, supra.* Each decision must be made fairly, impartially and in good faith.

To recapitulate, it is my opinion that a criminal complaint may be disposed of by a prosecutor without presenting the matter to the grand jury. The reasoned exercise of discretion by prosecutors enables them to concentrate their resources on combating serious violations of the law. Administrative termination of frivolous prosecutions strengthens our grand jury system by effectively screening the matters presented, and protects the citizen who is the subject of an unwarranted charge. To be sure, standards, guidelines and office procedures must be adopted to prevent abuses. I note in this regard that the County Prosecutors' Association and the Division of Criminal Justice are presently preparing uniform standards toward this end. The American Bar Association has studied this question and has provided guidelines to assist prosecutors in this regard. In any event, the exercise of prosecutorial discretion permits the State's law enforcement resources to be wisely spent and protects the citizen who is unfairly charged. The reasoned exercise of prosecutorial authority is, thus, decidedly within the public interest.

Yours very truly,

WILLIAM F. HYLAND
Attorney General

1. *Canons of Professional Ethics,* Canon 5. See also *State v. Farrell,* 61 *N.J.* 99, 104 (1972).
2. Note, "Prosecutorial Discretion," 1 *Crim. Just. Q.* 154 (1973). See *e.g., United States v. Cox,* 342 F. 2d 167 (5 Cir. 1965); *Moses v. Kennedy,* 219 *F. Supp.* 762 (D.D.C. 1963); *Pugach v. Klein,* 193 *F. Supp.* 630 (D.D.C. 1961).
3. *N.J.S.A.* 2A:158-5.
4. *State v. Winne,* 12 *N.J.* 152, 174 (1973).
5. *State v. LaVien,* 44 *N.J.* 323, 327 (1965).
6. *Id.*
7. *State v. Winne, supra* at 174.
8. *Id.*
9. See, *e.g.,* A.B.A. Project on Standards, "The Prosecution Function and the Defense Function," §3.4 (Tent. Draft 1971).
10. *State v. Winne, supra* at 171.
11. *Id.*
12. See *e.g., State v. Zimmelman,* 62 *N.J.* 279 (1973); *State v. Hampton,* 61 *N.J.* 250 (1972); *State v. States,* 44 *N.J.* 285 (1965); *Kingsley v. Wes Outdoor Advertising Co.,* 59 *N.J.* 182 (1971); *State v. Reed,* 34 *N.J.* 554 (1961); *State v. Covington,* 113 *N.J. Super.* 229 (App. Div. 1961), aff'd 59 *N.J.* 536 (1971); *State v. White,* 105 *N.J. Super.* 234 (App. Div. 1969); *State v. Milano,* 94 *N.J. Super.* 337 (App. Div. 1967).

April 6, 1976

HONORABLE RICHARD LEONE
State Treasurer
State House
Trenton, New Jersey 08625

FORMAL OPINION NO. 12–1976

Dear Treasurer Leone:

The Division of Taxation has asked whether income derived by authors in the form of royalties paid for rights to utilize their writings is subject to taxation under N.J.S.A. 54:8B-1 *et seq.*, enacted as L. 1975, c. 172, and known as the "Tax on Capital Gains and Other Unearned Income Act." It is our opinion that royalty payments taxable under the Act include only royalties derived from a taxpayer's investment of his capital and do not include payments derived from property which has been created by a taxpayer's personal efforts.

Section 3 of the Act (N.J.S.A. 54:8B-3) imposes a tax upon "unearned income," which is defined in Section 2 (N.J.S.A. 54:8B-2) to consist of certain enumerated categories of income:

> " 'Unearned income' means dividends, gains from the sale or exhange of capital assets, interest, royalties, income from an interest in an estate or trust pursuant to regulations of the director and compensation derived from a partnership or corporation which represents a distribution of earnings or profits rather than a reasonable allowance as compensation for personal services actually rendered."