IN THE SUPREME COURT
STATE OF ARIZONA

STATE OF ARIZONA ex rel. ALLISTER ADEL, Maricopa County Attorney,

Petitioner,

v.

THE HONORABLE DAVID J. PALMER, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,

Respondent Judge,

TAMIRA MARIE DURAND,

Defendant/Real Party in Interest.

No. CR-21-0397-PR

Arizona Court of Appeals
No. 1 CA-SA 21-0241

Maricopa County Superior Court
No. CR2019-005593-001
CR2020-001680-002

STATE'S SUPPLEMENTAL BRIEF TO THE PETITION FOR REVIEW OF A SPECIAL ACTION DECISION OF THE COURT OF APPEALS

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I. Introduction.

The court of appeals erroneously affirmed Respondent Judge's order disqualifying Maricopa County Attorney's Office (MCAO). There is no actual conflict under the Arizona Rules of Professional Conduct (ERs) and there is not an appearance of impropriety to justify MCAO's disqualification.

Disqualification of a prosecuting agency is not warranted unless: (1) there is an actual impropriety or conflict under the ERs; or (2) the proponent demonstrates an appearance of impropriety after evaluating the *Gomez* factors and reviewing any evidence of prejudice to the parties or to the victims, or lack thereof.

II. Disqualification under the ethical rules requires an actual conflict.

To warrant disqualification of a specific attorney or an entire office under the ethical rules, the proponent must demonstrate an actual ethical violation. *See Alexander v. Superior Court in and for Maricopa County,* 141 Ariz. 157, 164 (1984) (no conflict of interest under ER 1.9 to justify disqualification of counsel and then analyzed whether an appearance of impropriety existed); *Rodriguez v. State,* 129 Ariz. 67, 72 (1981) (the ethical rules did not require defense counsel to withdraw representation, but other considerations, such as an appearance of impropriety, might allow a court to disqualify the attorney from representation); *see Foulke v. Knuck*, 162 Ariz. 517, 523 (App. 1989) (court of appeals found reliance on *Gomez* misplaced because there was an actual violation of ER 1.9(a)). To demonstrate an ethical

violation, there must be a significant risk that the personal interests of the affected attorney will materially limit the representation by the affected attorney under ER 1.7(a)(2), or the associated attorney, under ER 1.10(a).

A. Victim 12 does not have an actual conflict under ER 1.7(a)(2).

Under ER 1.7(a)(2) a lawyer is prohibited from representing a client if "there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the lawyer." A lawyer's representation is materially limited where the lawyer's personal interests "materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should have been pursued on behalf of the client." ER 1.7, cmt. 8; *compare Matter of Owens*, 182 Ariz. 121, 125 (1995) (attorney's representation of client was materially limited in bankruptcy proceeding because he was a creditor wanting to get paid but as the client's lawyer, he should have advised her to discharge the debt she owed him); *and State v. Sainz*, No. 2 CA-CR 2017-0381-PR, 2018 WL 2175801, * 2, ¶ 10 (Ariz. Ct. App. 2018) (mem.) (finding an ER 1.7 conflict where defense counsel represented co-defendants who were charged with possessing the same drugs and had antagonistic defenses); *with State v. Forde*, 233 Ariz. 543, 558, ¶ 39 (2014) (finding that attorneys' representation was not materially limited when an acquaintance of the client filed a bar complaint against the attorneys, because the client did not file or authorize the complaint and nothing

indicated a significant risk that the attorney's representation would be materially limited by the bar complaint).

In this case, Durand has not demonstrated that Victim 12 has an actual conflict of interest under ER 1.7(a)(2) that would bar him from prosecuting this case.[1] Durand argues that because Victim 12 suffered a loss, he therefore has a personal interest in the outcome of the case, rendering representation improper under ER 1.7(a)(2). But this is not the proper analysis. Regarding Victim 12, Durand must show there is a significant risk that Victim 12's representation of the State would be materially limited such that his personal interests as a victim would either interfere with his independent professional judgment in prosecuting the case or foreclose courses of action that reasonably should be pursued on behalf of the State. This has not been, and cannot be, demonstrated. Accordingly, Victim 12 does not have an actual conflict under ER 1.7(a)(2) that would bar him from prosecuting this case.

B. The assigned prosecutor does not have an imputed conflict under ER 1.10(a).

ER 1.10(a) prohibits a lawyer from representing a client when another lawyer in the firm would be prohibited from doing so due to a conflict of interest. A conflict of interest based on the prohibited lawyer's personal interests, however, will not be

[1] As stated in the State's Petition, however, there are other reasons why Victim 12 cannot prosecute this case. *See* ER 3.7(a) ("A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness.").

imputed unless a significant risk exists that the associated lawyer's representation will be materially limited. ER 1.10(a); *In re Alexander*, 232 Ariz. 1, 10, ¶ 35 (2013). A lawyer's representation is materially limited if the prohibited lawyer's personal interests would adversely affect the associated lawyer's loyalty to the client or threaten the confidentiality of information. *Id.*, citing ER 1.10(a), cmt. 3.[2]

In *In re Alexander*, this Court reviewed the findings made and discipline imposed of an attorney, Rachel Alexander, who maintained a federal lawsuit while knowing the lawsuit lacked legal and factual merit. 232 Ariz. at 3, 7-8, ¶¶ 1, 24. There, even though a lawyer in Alexander's office had a conflict under ER 1.7, this Court declined to impute that conflict to Alexander under ER 1.10(a) because there was no showing that that the animosity of the affected attorney (i.e. the attorney with the conflict under ER 1.7(a)) impacted Alexander's loyalty to her clients or confidential information, and the record did not demonstrate such a threat. *Id.* at 10, ¶ 35. Facts apparently relevant to this Court's decision under ER. 1.10(a) included that Alexander was not one of the affected attorney's senior advisors, she was not involved in the decision to initiate the lawsuit, and she did not ask to be assigned the case. *Id.* at 8, ¶ 24. At most, this Court found that Alexander was motivated to please

[2] When this Court decided *In re Alexander*, comment 3 specified that, "The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented." In the current version of ER 1.10, that comment no longer exists.

the affected attorney and further her career, which was insufficient to demonstrate an imputed conflict under ER 1.10(a). *Id.*

Durand has not shown that the currently assigned prosecutor has an imputed conflict under ER 1.10(a).[3] Even if this Court were to find that Victim 12's representation of the State as a prosecutor would be materially limited because of the de minimus loss he suffered, this personal interest would not be imputed to MCAO or the assigned prosecutor under ER 1.10(a). There is no support for Durand's assertion that any personal interest of Victim 12 would adversely affect the assigned attorney's loyalty to the State or result in the sharing of confidential information about Durand. The assigned prosecutor has no relationship with Victim 12. She is not in the same bureau or even the same division. Victim 12 does not supervise the assigned prosecutor. And there is no proof that the de minimus loss Victim 12 suffered would cause the assigned prosecutor to be disloyal to the interests of the State. In fact, the assigned prosecutor's actions rebut this argument. She engaged in good faith negotiations with Durand, as further described below. Finally, Victim 12 has no confidential information about Durand, so there is no concern that the assigned prosecutor's representation of the State will result in the breach of trust that ER 1.10(a) was designed to prevent.

[3] Durand has never argued that the assigned prosecutor has an actual conflict herself under ER 1.7(a). Therefore, the State addresses solely whether there is an imputed conflict to the assigned prosecutor under ER 1.10(a).

There is no actual impropriety or conflict for either Victim 12 or the assigned prosecutor. Respondent Judge erred when he disqualified MCAO.

III. The *Gomez* factors and the lack of prejudice to Durand demonstrate there is no appearance of impropriety.

The trial court should consider the *Gomez* factors when a defendant seeks to disqualify an entire prosecutor's office. *State v. Marner in and for County of Pima*, 251 Ariz. 198, ¶11 (2021). "The *Gomez* factors are useful in determining whether an appearance of impropriety is sufficiently weighty to justify disqualification." *Id*. at ¶ 12. The *Gomez* factors include:

> (1) whether the motion is being made for the purpose of harassing the [nonmoving party], (2) whether the party bringing the motion will be damaged in some way if the motion is not granted, (3) whether there are any alternative solutions, or is the proposed solution the least damaging possible under the circumstances, and (4) whether the possibility of public suspicion will outweigh any benefits that might accrue due to continued representation.

Id. at ¶ 9, quoting *Alexander*, 141 Ariz. at 165. A trial court should also consider any showing of prejudice or lack thereof to the non-moving party if disqualification is granted. *See Turbin v. Superior Court in and for County of Navajo*, 165 Ariz. 195, 199 (App. 1990).

Durand argues that MCAO has an imputed conflict from Victim 12 and any screening mechanism is insufficient to overcome an appearance of impropriety. (Defendant's Response to the State's Petition for Review, 01/14/2022, 13.) Under

Durand's argument, if a support staff member in a prosecuting agency became a victim of a misdemeanor offense, such as criminal trespass, within the jurisdiction of that agency, the entire office would need to be disqualified as a matter of course. This is contrary to Arizona cases which have consistently held that the trial court must analyze the case-specific facts to determine whether disqualification is justified under an appearance of impropriety standard. In this case, the *Gomez* factors do not support disqualification of MCAO, and both the State and the victims will suffer prejudice if MCAO is disqualified.

First, Durand's motion is made for the purpose of harassing the State. Durand repeatedly argues that the State did not tell her Victim 12 was also employed as a Deputy County Attorney. (Defendant's Response to the State's Petition for Review, 01/14/2022, 11-14.) But nowhere does she acknowledge that when the assigned prosecutor wanted to address the purported conflict issue, Durand wanted to move forward with plea negotiations first, expressly waiving any purported conflict before proceeding with the settlement conference. (APPV1-019-020; APPV2-029.) It was only after Durand learned what the State would be willing to offer that she claimed MCAO could not be trusted to prosecute this case. (APPV1-005-016.)

Second, Durand will not be damaged if the motion is not granted. The State has not obtained any confidential or privileged information about Durand via Victim 12's status as a victim. The State does not have a tactical advantage against Durand

by virtue of her victimizing someone who is also employed as a Deputy County Attorney.

Third, although there are no real alternatives to disqualifying MCAO if this Court were to find an appearance of impropriety,[4] MCAO has done everything in its power to eliminate any appearance of impropriety by implementing an effective screen since the beginning of this case. MCAO employs 299 attorneys and 970 employees. Victim 12 is in a different division and bureau within the office, Victim 12 was advised of his ethical obligations, Victim 12 does not supervise the assigned prosecutor or anyone in her bureau or division, and there is a written memorandum on the file to not discuss the prosecution aspect of the case with Victim 12.

Victims' rights do not interfere with an effective screen. An effective screen isolates a lawyer from participation in a matter by imposing adequate procedures to protect information that the isolated lawyer must protect. ER 1.0(j). Victim 12 has no protected information about Durand. Victim 12 is not participating in the matter.

[4] This third *Gomez* factor is more appropriately analyzed where disqualification of an individual is sought, not disqualification of an entire office. For example, In *Alexander*, the attorney recused himself from the related tax court case and the Court found that was a much less disruptive solution than disqualification in the pending matter. 141 Ariz. at 165. In *Gomez*, the defense attorney, who was also a city councilperson, recused himself from matters involving the city's police department and removed himself from cases against the city or in city court. 149 Ariz. at 226. The Court found this was less damaging than disqualifying him from defending a criminal case in which police officers from that city police department would testify. *Id*.

Although Victim 12 has the rights to be informed of hearings and release conditions, attend hearings, confer with the prosecutor, and be heard, he does not participate in the matter. For example, he does not make decisions on a plea offer, he does not review and disclose discovery, he does not engage in pretrial interviews, he does not contemplate strategy of moving forward in the case, he does not write or argue pretrial motions, and he does not try the case. He is not participating in the case, even though he is afforded certain rights by virtue of being a victim.

In evaluating this third factor, this Court should clarify that the harm to the non-moving party and any victims should be considered because if a criminal defendant uses a motion to disqualify as a tactic to further their own goals, it may harm the State and any victims. Courts should evaluate these circumstances in determining whether an entire agency should be disqualified.

Here, this case occurred in 2019. It is a complicated case with substantial discovery. Durand victimized 12 individual victims and eight business victims. The assigned prosecutor has become familiar with the case, engaged in plea negotiations with the co-defendant and Durand, met and spoke with the victims in the case, and worked with the case agent to learn about and further the case. Any newly assigned prosecuting agency will need to start this work anew in learning the facts, reviewing the discovery, and working with witnesses and victims moving forward. The victims will be further harmed because they will need to continue to wait for a new

prosecutor to become familiar with the case. *See* Ariz. Const. art. II, § 2.1(A)(10) (victims have a constitutional right to a speedy trial).

This harm to the State and the victims is further exacerbated by Durand's actions: she told the assigned prosecutor that she wanted to move forward with a settlement conference and plea negotiations. The prosecutor ultimately provided Durand with two sentencing options: either be sentenced to a stipulated six-year term of imprisonment, just as her less-involved co-defendant was; or be sentenced to a term between 4.5 and 7 yeas' imprisonment. (APPV2-033.) The only thing that changed between Durand's waiver of any alleged conflict and her motion to disqualify MCAO is MCAO's refusal to offer as lenient a plea offer as she wanted. Yet the fact that the assigned prosecutor was unwilling to provide a plea offer that would have allowed Durand to serve four years' imprisonment does not lead to an appearance of impropriety. Durand was the mastermind of a fraudulent scheme that resulted in over $500,000 financial damages and significant emotional harm to several victims. She has two prior felony convictions and was on parole at the time of the offense. She faces significantly more time in custody if she is convicted at trial. At Durand's request, the assigned prosecutor engaged in good faith plea negotiations. When Durand did not get the plea offer she wanted, she filed her motion to disqualify MCAO. Her actions caused further delay and harm to the State and the victims.

Conversely, if MCAO remained on the case, Durand would suffer no harm. The State has been fair and engaged in good faith plea negotiations. The State has not obtained a tactical advantage over Durand in prosecuting these cases.

Fourth, nothing supports a showing that the possibility of public suspicion will outweigh the benefit of MCAO's continued representation. This case is about a scheme that resulted in over $500,000 in losses to individuals and businesses. Some of the victims have also suffered extreme emotional distress and resulting physical harm. The fact that Victim 12 suffered a $56 loss and is also employed as a deputy county attorney at the same office does not raise the possibility of public suspicion, much less public suspicion that would outweigh the benefits of MCAO's continued representation of the State. To the contrary, public suspicion could be increased if MCAO is disqualified because Durand knew that Victim 12 was employed with MCAO, and despite the assigned prosecutor asking that settlement negotiations be paused to address any alleged conflict, Durand agreed to waive any perceived conflict, engaged in full plea negotiations, and then cried "conflict" when she did not get as lenient of a plea offer as she wanted.

Finally, another factor that should be considered in deciding whether the prosecuting agency should be disqualified is whether actual prejudice exists to either party, such that a fair prosecution would be endangered if disqualification were granted or denied. *See Marner*, 251 Ariz. at ¶ 13 ("the appearance of impropriety

was grounded not in a mere perception of wrongdoing but an actual finding of misconduct with no ability to determine the scope of the impact"); *Alexander*, 141 Ariz. at 165 (to use appearance of impropriety "[t]o call for disqualification of opposing counsel for delay or other tactical reasons, in the absence of prejudice to either side, is a practice which will not be tolerated") (citation omitted); *Turbin*, 165 Ariz. at 199 ("Actual prejudice, or the lack of it, is but one facet of whether a fair prosecution is endangered by the appearance of impropriety," "the trial court should consider not only the requirements set forth in *Alexander*, but also any showing of prejudice or the lack of it").

"Only in extreme circumstances should a party to a lawsuit be allowed to interfere with the attorney-client relationship of his opponent." *Alexander*, 141 Ariz. at 165. In fashioning a rule to guide trial courts, this Court should find that the *Gomez* factors apply when determining whether a prosecuting agency should be disqualified from a case for an appearance of impropriety. *Marner*, 251 Ariz. at ¶ 11. Under the first *Gomez* factor, the moving party's conduct – such as whether they wait for a significant time to file a motion to disqualify or waive any alleged conflict only to later file the motion to disqualify – should be considered in evaluating whether the motion is being made to harass the non-moving party. *See Gomez*, 149 Ariz. at 226 (This Court found the non-moving party was harassed because they were ready to go to trial, but if they "must obtain a new attorney unfamiliar with the case, it will

cause inconvenience, delay and additional costs."). In the analysis of the third *Gomez* factor, whether the proposed situation is the least damaging possible under the circumstances, the court should review any harm to the State and to any victims if disqualification were to be granted. And finally, the court should consider whether there exists actual prejudice (or a lack thereof), such that a fair prosecution is endangered by the appearance of impropriety.

IV. Conclusion.

Respondent Judge erred as a matter of law in disqualifying MCAO. There is no actual conflict under ER 1.7(a)(2) or imputed conflict under ER 1.10(a). There is no appearance of impropriety. This Court should reverse Respondent Judge's order disqualifying MCAO from prosecuting these cases.

Submitted May 24, 2022.

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