

**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.

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

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

**STATE'S PETITION FOR
REVIEW OF A SPECIAL
ACTION DECISION OF THE
COURT OF APPEALS**

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I. INTRODUCTION.

No Arizona court has previously addressed under what circumstances a prosecuting agency should be disqualified where an employee is also a victim of the crime. This Court should grant review to address this issue of first impression and statewide importance that is likely to recur.

In 2019, Tamira Marie Durand headed an organization of at least four people that stole identities and caused losses exceeding \$500,000. At the time of these crimes, Durand had prior felony convictions and was on parole. After more than a month of plea negotiations, the State refused to provide an offer that stipulated to four years' imprisonment and Durand filed a motion to disqualify Maricopa County Attorney's Office ("MCAO"). In support, Durand argued that disqualification was proper because one of her victims who suffered a *de minimus* loss, is also an employee of MCAO – the third largest prosecutorial agency in the nation. There was no showing of a conflict, no showing that any alleged personal conflict was imputed to the entirety of MCAO, and no showing of an appearance of impropriety.

Arizona courts require a demonstrable conflict or an appearance of impropriety based on case-specific facts to warrant disqualification of a prosecuting agency. But Respondent Judge's ruling reads as though any time an MCAO employee is a victim of a crime, MCAO must be disqualified. This is an insufficient justification to disqualify an entire prosecuting agency, require another agency to

learn this complex case, and cause the victims further delay in resolving the case. This Court should grant review and reverse Respondent Judge's order disqualifying MCAO.

II. ISSUE PRESENTED.

1. A prosecuting agency may be disqualified after a showing of a conflict of interest. *See State ex rel. Romley v. Superior Court (Flores)*, 181 Ariz. 378, 379 (App. 1995). A prosecuting agency may also be disqualified based on an appearance of impropriety after conducting a fact-specific analysis. *State v. Marner*, 251 Ariz. 198, ¶ 12 (2021). Did the Court of Appeals err by approving of MCAO's disqualification where there is no legal or factual support for a showing of conflict of interest or appearance of impropriety, and where disqualification was based solely on the fact that a victim is also an employee of MCAO?

III. JURISDICTIONAL STATEMENT.

This Court has discretion to review a court of appeals' special action decision. Ariz. Const. art. VI, § 5(3). The State urges this Court to grant review because the State has no remedy by appeal, the case presents a novel question of statewide importance, and is likely to recur. *See Chronis v. Steinle*, 220 Ariz. 559, 560, ¶ 4 (2009). Also, the Court of Appeals' single-sentence decision order did not actually decide the merits of the State's claims.

IV. STANDARD OF REVIEW.

A trial court's decision on the disqualification of counsel is reviewed for an abuse of discretion. *Marner*, 251 Ariz. at ¶ 7 (quotation omitted). Conclusions of law are reviewed de novo. *Id.*

V. RULES AND CASES GOVERNING PROFESSIONAL CONDUCT AND DISQUALIFICATION.

Arizona Rules of Professional Conduct (“ERs”) 1.7(a)(2) prohibits a lawyer from representing a client if “there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the lawyer.” Representation is materially limited where a difference in interests arises between the client and the affected attorney and it materially interferes with “the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued.” ER 1.7(a)(2), cmt. 8.

Under ER 1.10(a) a lawyer may not represent 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 imputed unless a significant risk exists that the associated lawyer’s representation will be materially limited. ER 1.10(a). The associated 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.* cmt. 3.

When considering a motion to disqualify, the trial court should consider (1) whether the motion is made for the purpose of harassment; (2) whether the party bringing the motion will be harmed if the motion is not granted; (3) whether disqualification is the least damaging possibility under the circumstances; and (4) whether the possibility of public suspicion will outweigh any benefit of continued representation. *Alexander v. Superior Court*, 141 Ariz. 157, 165 (1984).

“While it is impossible to formulate a bright line rule in this area, the trial court should consider not only the requirements set forth in *Alexander*, but also any showing of prejudice or lack of it.” *Turbin v. Superior Court*, 165 Ariz. 195, 199 (App. 1990). An effective security wall demonstrates a lack of prejudice. *See State ex rel. Romley v. Superior Court (Pearson)*, 184 Ariz. 223, 230 (App. 1995).

VI. FACTS AND PROCEDURAL HISTORY.

A. The Crimes.

Between February 2019 and June 2019, Durand headed an organization of least four people who stole identities to obtain money and vehicles and resulted in over \$500,000 of losses. Durand victimized 12 individuals and eight banking institutions. Some of these victims suffered significant financial harm: one victim seeks \$10,867.00 in restitution. (APPV2-038.) Some of the victims suffered great emotional harm: another victim spent over 300 hours attempting to repair the damage Durand caused and had to seek care from a cardiologist; she suffered a

hemorrhage from her nose and mouth due to the stress Durand's crimes caused. (APPV2-092.)

An individual victim who suffered a *de minimus* loss of \$56, is also employed by MCAO, the third largest prosecutorial agency in the country that employs 907 people, including 299 prosecutors. The victim at issue, Scott Blum ("Victim 12"), works as a bureau chief of one of the eight trial bureaus in the trial division and supervises approximately 14 attorneys. Durand's case was assigned to an attorney in the White Collar/Cyber Crimes bureau, which is in the Special Prosecutions 2 Division – a separate division from where Victim 12 works. Victim 12 has no supervisory authority over the assigned prosecutor, her bureau, or her division. Victim 12 was instructed to not access the file or discuss the prosecution aspect of the case with assigned staff or prosecutors. There is a conspicuous notice upon opening MCAO's electronic case file that Victim 12 is screened from the case because he is a victim.

B. Procedural History.

Durand was indicted on July 26, 2019 in CR 2019-005593 for offenses occurring on July 6, 2019. She was indicted again on March 24, 2020 in CR 2020-001680 for offenses occurring between February and June 2019. The State filed allegations that Durand committed offenses over multiple days (APPV1-081-082), that she has historical prior convictions (APPV1-085-086), and she committed the

offense while she was on parole. (APPV1-089-090.)

Durand's co-defendant entered plea agreements and was sentenced in CR 2019-005593-002 to six years' imprisonment in the Arizona Department of Corrections, followed by probation in CR 2020-001680-001. (APPV2-094, 097-099.)

The State's original plea offer included a stipulation to 3.5 years' imprisonment in CR 2019-005593-001 (APPV2-007) and a range of 6-13 years' imprisonment in CR 2020-001680-002, to run concurrently. (APPV2-014.)

Durand submitted a deviation request seeking "a plea to Count 1, Amended, Theft, a class 6 undesignated felony with a stipulation to probation for both cases." (APPV2-021.) Durand also noted there was an "inherent possibility of a conflict" because Victim 12 is employed by MCAO. (APPV2-023.) The assigned prosecutor advised defense counsel that the deviation request was denied and Victim 12 had been walled off from working on the case. (APPV2-026.)

At a settlement conference, Durand "waived" the purported conflict. (APPV2-029.) Durand requested additional time to consider the plea offer and engage in further negotiations. (APPV1-020.)

Defense counsel requested a plea stipulating to four years' imprisonment. (APPV2-033.) The assigned prosecutor advised that she could not stipulate to a term less than six years because (1) Durand was the mastermind of the operation; (2) the

co-defendant, who was less involved, received a sentenced of six years' imprisonment; (3) Durand had more serious prior convictions than her co-defendant; and (4) even if Durand was acquitted of a higher level offense, there was strong evidence of a lower level offense where she faced more than four years' imprisonment because of her prior convictions. (APPV2-033.) Yet, the assigned prosecutor provided a new plea offer that allowed Durand to plead guilty with either an open-range term of 4.5 to 7 years' imprisonment, or a stipulated term of 6 years. (APPV2-033.) Durand rejected the deviated plea offer. (APPV2-044.)

Nearly eighteen months after being indicted and after more than a month of failed plea negotiations, Durand filed a Motion to Disqualify MCAO because "there may be pressure to extend an offer that is less favorable to the defendant or even force the case to trial." (APPV1-010.)

The State argued that (1) any alleged conflict of interest as to Victim 12 is not imputed to the entire office; (2) there is no appearance of impropriety; and (3) victims' rights do not interfere with the screening procedure put in place. (APPV1-018.)

Respondent Judge issued a minute entry and listed the points made by the State and Durand in their pleadings. (APPV1-052-054.) Respondent Judge then found, "[b]ased on the considerations noted above, as well as others noted in the

Defendant’s pleadings filed on this issue, that is in the interest of justice to grant Defendant’s Motion.” (APPV1-054.)

The State sought special action relief in the Court of Appeals, arguing that Respondent Judge committed error in disqualifying MCAO when there was no legal basis to do so. The Court of Appeals, in a single-sentence decision order, denied relief to the State: “It is ordered the Court of Appeals accepts special action jurisdiction, but denies relief.” (*See* Decision Order, 12/09/2021, at 1.)

The State now petitions this Court for review.

VII. REASONS TO GRANT THE PETITION.

A. The Court should review whether MCAO must be disqualified in every case in which an employee is a victim.

Whether a prosecutorial agency should be disqualified in every case in which an employee is also a victim of a crime warrants this Court’s review for multiple reasons.

First, this issue presents a purely legal “issue of first impression” in Arizona. *Carbajal v. Indus. Comm’n of Ariz.*, 223 Ariz. 1, 3, ¶ 6 (2009); *see* Ariz. R. Crim. P. 31.21(d)(1)(C).

Second, “the question of vicarious disqualification of a prosecutor’s office is of statewide importance and likely to recur.” *Marner*, 251 Ariz. at ¶ 7.

Finally, and for the reasons set forth below, Respondent Judge’s incorrectly found that MCAO should be disqualified simply because Victim 12 is employed by

MCAO. *See* Ariz. R. Crim. P. 31.21(d)(1)(C).

B. Before a prosecuting agency is disqualified, there should be some showing to justify this result.

1. Ethical Rules 1.7 and 1.10 do not apply.

A conflict under ER 1.7(a)(2) occurs when there is a personal interest sufficient to materially limit representation. A conflict of interest based on personal interests will not be imputed unless a significant risk exists that the lawyer's representation will be materially limited. ER 1.10(a). 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.* cmt. 3.

"[T]he prosecutor's responsibility is to represent society's interests and 'see that justice is done on behalf of *both* the victim and the defendants.'" *Lindsay R. v. Cohen*, 236 Ariz. 565, 567, ¶ 8 (App. 2015) (quoting *Flores*, 181 Ariz. at 382); *see Villalpando v. Reagan*, 211 Ariz. 305, 309, ¶ 11 (App. 2005) (A prosecutor's interest is to ensure that "justice shall be done."). Courts "will not presume that the prosecutor will seek defendants' convictions at all costs, when his duty is to see that justice is done on behalf of both the victim and the defendants." *Flores*, 181 Ariz. at 382; *Berger v. United States*, 295 U.S. 78, 88 (1935); *see also* ER 3.8, Comment 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

Here, nothing demonstrates that Victim 12 has a conflict in representing the State of Arizona, much less the entirety of MCAO. Victim 12 learned of Durand's fraudulent activity, stopped the credit line from being opened, and therefore only suffered a *de minimus* loss of \$56. This does not demonstrate a significant risk that Victim 12's representation will be materially limited. Furthermore, and more to the point, there is also no support that any conflict would threaten the assigned prosecutor's loyalty to the client – the State of Arizona – or confidentiality of information.

Durand's actions demonstrate that she does not believe a conflict exists because she engaged in plea negotiations with MCAO that lasted over a month. During these negotiations, the State provided a more lenient plea offer. The assigned prosecutor explained that the final plea offer was based on Durand's role as the head of the organization, her prior felony convictions and the fact that she was on parole at the time of the offense, the less-involved co-defendant's sentence, the opinions of the victims (some of whom have suffered extreme emotional and financial harm), and Durand's sentence exposure after trial. (APPV2-033.)

Courts will not presume that prosecutors will act to get a conviction at all costs. There is no evidence to show that Victim 12 has a conflict or that any alleged conflict is imputed to MCAO.

Respondent Judge abused his discretion and committed an error of law in disqualifying MCAO because there was no legal basis to find a conflict of interest or appearance of impropriety. The Court of Appeals therefore erred in denying relief.

2. There is no appearance of impropriety.

Although there is no Arizona case pertaining to the scenario presented here, the trial court should have considered the *Alexander* factors when evaluating Durand's motion to disqualify an entire prosecutor's office. *Marner*, 251 Ariz. at ¶ 11. Because there is no bright line test in determining whether there is an appearance of impropriety, courts should also consider "any showing of prejudice or lack of it." *See Turbin*, 165 Ariz. at 199. Neither Respondent Judge nor the Court of Appeals considered these factors, either explicitly or implicitly.

The *Alexander* factors show that (1) Durand only filed the motion to disqualify MCAO once she did not get as lenient a plea offer as she wanted; (2) Durand will not be harmed if the motion to disqualify is not granted and there has been no showing that any right to "fundamental fairness" would be violated by MCAO's continued prosecution of the case; (3) disqualification is not the least damaging possibility under the circumstances because this case involves multiples dates of offense; it occurred in 2019; it includes co-defendants, 12 individual victims, eight business victims, and voluminous discovery that will require any

other prosecuting agency to review and become familiar with this complicated case, resulting in lengthy delays for the victims; and (4) possible public suspicion does not outweigh the benefits of continued representation because MCAO has not gained an advantage by prosecuting a case where one of their employees – who works in a different division and suffered a *de minimus* loss – is a victim.

Additionally, an effective security wall and the lack of high public profile or strong political overtones demonstrates a lack of prejudice to Durand if MCAO prosecutes this case. Victim 12 has never represented Durand and has no confidential information. Victim 12 received directives regarding his ethical obligations. A written notice on the file directs anyone involved in the case to not discuss the prosecution aspect with Victim 12, or anyone else in his bureau. The prosecution is being handled by an attorney in a different bureau and a different division within MCAO. The case is not high public profile; nor does it have strong political overtones. Durand’s crimes are not the kind that “a reasonable person would believe might tempt a prosecutor to risk a career by violating his or her ethical principles to breach the screening procedures.” *Pearson*, 184 Ariz. at 230.

Durand advocates for what Arizona courts have expressly found improper: a bright line rule requiring disqualification anytime an employee of a prosecutorial agency becomes a victim. Respondent Judge erred in disqualifying MCAO in light of the specific facts of this case. This Court should grant review to clarify the law

on this issue.

3. The mere fact that a victim is also an employee of MCAO does not justify disqualification.

The Victims' Bill of Rights ("VBR") grants crime victims in Arizona certain constitutional rights. Ariz. Const. art. II, § 2.1(A). These include rights to be informed of release conditions, § 2.1(A)(2), to be present at criminal proceedings, § 2.1(A)(3), to be heard at proceedings related to release conditions, a negotiated plea, and sentencing, § 2.1(A)(4), and to confer with the prosecution after the crime has been charged and before trial or disposition and be informed of the disposition, § 2.1(A)(5).

However, these rights do not mean – and they do not convey – any right or capability to participate in the case as a prosecutor. Victims are not parties to the criminal proceedings. *State v. Lamberton*, 183 Ariz. 47, 49-50 (1995); *see Villalpando*, 211 Ariz. at 308, ¶ 10. Furthermore, “[a] prosecutor does not ‘represent’ the victim in a criminal trial; therefore, the victim is not a ‘client’ of the prosecutor.” *Flores*, 181 Ariz. at 382; *see State ex rel. Montgomery v. Padilla*, 238 Ariz. 560, 565, ¶ 19 (App. 2015); *Lindsay R.*, 236 Ariz. at 567, ¶ 9.

Victim 12 is not a prosecutor in the pending cases. He is not a party to the matter. The assigned prosecutor does not represent Victim 12. He is one of the 299 prosecutors employed by MCAO. He is in a different bureau and division from the assigned prosecutor. He has no supervisory role over the assigned prosecutor or

anyone in the assigned prosecutor's bureau or division. The assigned prosecutor has no relationship and no professional or regular contact with Victim 12. *See Pearson*, 184 Ariz. at 230.

The fact that Victim 12 has constitutional rights by virtue of being a victim does not interfere with an effective screen. "Screened" is defined as "the isolation of a lawyer . . . from any participation in a matter of timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer . . . is obligated to protect under these Rules or other laws." ER 1.0(j). Victim 12 does not have any confidential information about Durand that he is "obligated to protect." Screening requires isolation from participation within a firm. That is being met here. MCAO has assigned the case to an attorney in a different bureau and division than Victim 12, Victim 12 was directed not to participate in the prosecution of the case, and the assigned attorney and anyone who accesses the file is advised that Victim 12 (and his entire bureau) is not to participate in the prosecution of the case - the same effective procedure as in *Pearson* in both "fact and appearance." 184 Ariz. at 230.

Without legal or factual basis, Respondent Judge disqualified MCAO. The only thing presented, and the only thing Respondent Judge had to rely upon, is the fact that Victim 12 is both a victim in the pending case and an employee of MCAO. Under this logic, any time there is a victim that is an employee of MCAO, no matter

the crime, no matter how many victims are impacted, no matter what losses are suffered, no matter how complex the case, an agency with 299 attorneys has a conflict imputed to them such that the entire agency must be disqualified. Respondent Judge committed an abuse of discretion to disqualify MCAO where ER 1.7(a)(2) and 1.10 do not apply, an effective screen is in place, there is no appearance of impropriety, and victims' rights do not convey to Victim 12 the right to "participate" in the case as a prosecutor. This Court should grant review and to resolve this issue.

VIII. CONCLUSION.

The Court should grant this Petition for Review and reverse Respondent Judge's decision to disqualify MCAO.

Submitted December 22, 2021.

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BY /s/

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