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ARIZONA SUPREME COURT

STATE OF ARIZONA,
Plaintiff/Petitioner,
vs.

TAMIRA DURAND,
Defendant/Respondent,

Case No.: CR-21-0397

Maricopa County Superior Court

CR2019-005593-001
CR2020-001680-002

**DEFENDANT’S RESPONSE TO
THE STATE’S PETITION FOR
REVIEW**

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INTRODUCTION

Respondent Judge was correct in disqualifying the Maricopa County Attorney’s Office from prosecuting this case. The Maricopa County Attorney’s Office is conflicted in this case pursuant to the Arizona Supreme Court Rule 42, Ethical Rules 1.7 and 1.10, as well as the factors set forth in *Alexander v. Superior Court In and For Maricopa County*, 141 Ariz. 157, (1984).

The ethical rules and the present case law are sufficient for a court to determine whether there is a conflict that requires disqualification. The trial Court

1 did not abuse its discretion in making its decision. The Defendant/Appellee,
2 therefore, requests this Court deny the Appellant's request for special action. The
3 response is supported by the following memorandum of points and authorities.
4

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. STATEMENT OF THE CASE**

7 The Defendant in this case is charged with several counts of identity theft.
8 One of the charged offenses includes the victim, Scott Blum. In August of 2021,
9 while investigating this case and preparing a request for a more favorable plea
10 offer, the Defense discovered that Mr. Blum is a prosecuting attorney with the
11 Maricopa County Attorney's Office. The Defendant listed a potential conflict of
12 interest as one reason to grant a plea deviation.
13
14

15 Shortly after that a settlement conference was scheduled. The State asked
16 that the Defendant waive the conflict-of-interest issue to continue with the
17 settlement conference. The Defendant agreed and the parties attempted to
18 negotiate a resolution but were unsuccessful.
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21 The Defendant then filed a Motion to Disqualify the Maricopa County
22 Attorney's Office to which the State responded, and the Defendant replied. After
23 an oral argument, the trial Judge ruled granting the motion and disqualifying the
24 Maricopa County Attorney's Office.
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1 The trial Court found that Mr. Blum was conflicted from prosecuting this
2 case and that the Maricopa County Attorney’s Office had an inherent conflicted
3 as a result. It further found that any screening mechanism was insufficient to
4 overcome the conflict and that there was an appearance of impropriety in this case.
5 The question before this Court is whether the trial Court abused its discretion in
6 making those findings.
7

8
9 **II. STATEMENT OF FACTS**

10 In February of 2019, several police agencies in the Phoenix area were
11 investigating Lana Monst (Co-Defendant) for identity theft reported by Katherine
12 Groves. On February 20, 2019, Scott Blum made a complaint to Tempe Police
13 which police connected to their investigation of Lana Monst. He reported that
14 someone attempted to get a credit card in his name from Chase. He was able to
15 cancel the transaction. While he was working on cancelling the cards, he was
16 alerted by his RING door camera that someone was at his door. He viewed the
17 footage and saw a black “male” approach his door, look at the camera, mutter
18 something, and walk away. The State believes that the person who approached
19 Mr. Blum’s door was the Defendant.
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23 In July of 2019, investigators with the Arizona Department of Public
24 Safety’s Inspector General found that someone had ordered a duplicate driver’s
25 license in the name of Janine Hiltcher and had it sent via UPS to 4603 S. Adelle
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1 in Mesa. They investigated it and found that the address was a vacant house and
2 that Janine Hiltcher had been a victim of identity theft.

3 Inspectors watched the house and, at noon on July 6, a Ford F-150 stopped
4 in front of the house. Lana Monst got out of the truck and picked up a UPS
5 package. Detectives, in unmarked police cars, attempted to stop the F-150. The
6 driver did not stop and ultimately, they had to box the truck in. The Defendant
7 was driving the truck. Lana Monst was in the back seat with 2 UPS envelopes
8 addressed to different victims. (APP1 – 0002-0003).
9

10 The Defendant was retested on July 25, 2019, for crimes committed on July 6,
11 2019, arising out of the Arizona Department of the Transportation report and again
12 on March 24, 2020 for crimes committed between February and June of 2019
13 arising out of investigation reports from Phoenix Police, Tempe Police, and the
14 US Postal Inspection Service. (APP6 – 0038 – 0053)
15

16 In August of 2021 Defense counsel recognized Mr. Blum’s name and asked
17 the prosecuting attorney to confirm that it was the same Mr. Blum who worked
18 for the Maricopa County Attorney’s office. The prosecuting attorney responded
19 that it was the same person but that he was screened off from involvement. (APP8
20 – 0054).
21

22 On September 21, 2021, a settlement conference was held. The Defendant
23 agreed to waive the issue of the State’s conflict to attempt to resolve the case.
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1 Ultimately, the State and Defendant could not come to an agreement.
2 Subsequently, the Defendant filed a motion to disqualify the Maricopa County
3 Attorney's Office. (APP2 – 0006 – 0017).
4

5 The Court ruled in favor of the Defendant in disqualifying the Maricopa
6 County Attorney's Office from prosecution of these cases because of the conflict
7 of interest. The Court's concerns were:
8

- 9 1. That courts must take care to avoid even the appearance of
10 allowing impropriety or indiscretion in the prosecution of a case,
11 and that allowing MCAO to maintain its prosecution of the case
12 given Mr. Blum's constitutionally mandated rights as a victim, as
13 well as a victim raises serious concerns about the propriety of
14 MCAO prosecuting the case.
- 15 2. That the conflict of interest arising from Mr. Blum's status as a
16 victim may fairly be imputed to MCAO as an agency for the
17 reasons stated in Ms. Sallen's analysis in Exhibit A to Defendant's
18 Reply. (APP4 – 0031 – 0034).
- 19 3. That in analyzing whether an agency such as MCAO has a conflict
20 of interest, "a Defendant should not be forced to attempt to prove
21 that there was actual indiscretion or impropriety" as "evidence of
22 such conduct" would be "Under the control of the prosecution" and
23 "would be well-nigh" impossible for a defendant to bring forth.
24 *Turbin v. Superior Court*, 165 Ariz. 195, 198, 797 P.2d 734, 737
25 (App.1990).
- 26 4. Further, forcing the Defendant to prove actual prejudice sidesteps
27 the notion that "criminal prosecutions must appear fair, as well as
actually be fair." *Id.*
5. That MCAO is actually conflicted.
6. That given his status as a victim, the Arizona Constitution imbues
on Mr. Blum rights to participate in and influence the case separate
and apart from the status of an attorney who may have previously
represented a defendant, which is the fact pattern in the cases relied
upon by the State.
7. That as a victim he is entitled to be involved in the representation
provided by other lawyers, and that a prosecutor's interaction with

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him as a victim may create an actual or apparent conflict of interest that impairs the prosecutor’s ability to remain neutral.

8. That in the circumstances presented here with Mr. Blum’s status as a victim, no screening mechanism will effectively quarantine Mr. Blum and keep the conflict from being imputed to the entire office.

(APP5 – 0035 – 0037).

The Court further referred to reasons “noted in the Defendant’s pleadings filed on this issue.” (APP5 – 0037). Those reasons include the fact that the motion was brought in good faith and not for harassment; the Defendant will suffer irreparable harm if the case is not transferred; disqualifying the Maricopa County Attorney’s Office is the least damaging resolution; and there is an aura of high suspicion surrounding how all of this developed.

III. STATEMENT OF ISSUES

The issues before this Court on this Special Action are: 1) Can the State agree in its special action that Scott Blum is not conflicted when it waived that issue to the lower court? 2) Did the lower court abuse its discretion in finding that the Maricopa County Attorney’s Office is actually conflicted and should be disqualified? 3) Did the lower court abuse its discretion in applying the *Alexander* factors when it found that the Maricopa County Attorney’s Office has a conflict of interest?

1 **IV. ARGUMENT**

2 The trial Court did not abuse its discretion in ruling that the Maricopa
3 County Attorney’s Office had a conflict. The Court correctly applied ER 1.7 and
4 1.10, as well as the factors set forth in *Alexander v. Superior Court In and For*
5 *Maricopa County* in making its determination. Furthermore, the State is
6 presenting a novel issue to this Court in its attempt to overturn the trial Court’s
7 decision.
8

9 **A. The State is arguing new issues.**

10 The State never argued to the trial Court or the Court of Appeals that Mr.
11 Blum was not conflicted. Rather, it rested on the assertion that he was effectively
12 screened. (APP3 – 0021). In its brief to this Court, the State, for the first time is
13 arguing that Mr. Blum is not conflicted.
14

15 Issues not raised to the trial court are inappropriate to bring in special
16 action. “Matters not presented to the trial court cannot for the first time be raised
17 on appeal.” *Brown Wholesale Elec. Co. v. Safeco Ins. Co. of America*, 135 Ariz.
18 154 (App. 1982). “[T]he purpose of a special action is to provide extraordinary
19 relief where the trial court has already acted.” *Zuckernick v. Royston*, 140 Ariz.
20 605, 607 (App. 1984).
21

22 The scope of consideration, therefore, is very narrow.
23

24 The only questions that may be raised in a special action are:
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- 1 (a) Whether the defendant has failed to exercise discretion which he
2 has a duty to exercise; or to perform a duty required by law as to
3 which he has no discretion; or
4 (b) Whether the defendant has proceeded or is threatening to proceed
5 without or in excess of jurisdiction or legal authority; or
6 (c) Whether a determination was arbitrary and capricious or an abuse
7 of discretion.

8 Az. St. Spec. Act. Rule 3.

9 A Special Action is not a forum for relitigating an issue that was decided or
10 waived before the lower Court. For that reason, this Court must consider that Mr.
11 Blum is conflicted in this case.

12 Even so, the State's argument fails. As a victim, Scott Blum, could not
13 ethically prosecute this case. He has a direct personal and financial interest. The
14 degree to which he might be tempted toward that end is not the appropriate
15 inquiry. The rules are in place to give the public trust in the legal process and
16 their representation. What matters is the objective outside perception, not the
17 subjective point of view of the attorney.

18 The State is asking the Court to ignore the issue. They would allow a victim
19 to go as far as working on a case so long as he could still testify as a witness. This
20 solution is so inappropriate it is almost a satire of itself.

21 **B. A conflict is established under Ethical Rules 1.7 and 1.10.**

22 The Arizona Rules of Professional Conduct, Ethical Rule 1.7(a) states,
23 "Except as provided in paragraph (b), a lawyer shall not represent a client if the
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1 representation involves a concurrent conflict of interest. A concurrent conflict of
2 interest exists if: . . . (2) there is a significant risk that the representation of one or
3 more clients will be materially limited by the lawyer’s responsibilities to another
4 client, a former client or a third person or by a personal interest of the lawyer.”

5
6 AZ ST S CT Rule, 42, RPC ER 1.7.

7 Comment 8 to Rule 1.7 states:

8
9 Even where there is no direct adverseness, a conflict of interest exists
10 if there is a significant risk that a lawyer's ability to consider,
11 recommend or carry out an appropriate course of action for the client
12 will be materially limited as a result of the lawyer's other
responsibilities or interests.

13 *Id.* Comment 8.

14 Not only is this a case of “direct adverseness” – the victim is a prosecuting
15 attorney – but there is a “significant risk” that Scott Blum will be materially
16 limited in his ability to “recommend or carry out an appropriate course of action”
17 because of his other interests. *Id.* A prosecutor must be concerned with issues
18 that a victim need not be. And a victim may be concerned with issued that a
19 prosecutor cannot be. A victim is perfectly right to be concerned with monetary
20 compensation, for example. Arizona Constitution, Article II § 2.1. A prosecutor
21 cannot be motivated by financial compensation.
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25 The State’s attempt to blunt the application of these rules by referring to
26 Mr. Blum as merely an “employee” of the Maricopa County Attorney’s Office is
27

1 misplaced. Mr. Blum is an attorney and subject to the regulation of the Ethical
2 Rules. He is also a deputized prosecutor with duties to justice and to the court.

3 **C. The *Alexander* factors demonstrate an appearance of impropriety.**

4 [T]he court, when considering a motion for disqualification based
5 upon the appearance of impropriety, should consider the following:
6 (1) whether the motion is being made for the purposes of [harassment]
7 (2) whether the party bringing the motion will be damaged in some
8 way if the motion is not granted, (3) whether there are any alternative
9 solutions, or is the proposed solution the least damaging possible
10 under the circumstances, and (4) whether the possibility of public
11 suspicion will outweigh any benefits that might accrue due to
12 continued representation.

13 *Alexander v. Superior Court In and For Maricopa County*, 141 Ariz. 157, 165
14 (1984).

15 **1. This motion is not made for the purposes of harassment.**

16 The State made no attempt to disclose this conflict and the Defendant only
17 found it by accident when a separate attorney recognized the name of Scott Blum.
18 Defense counsel reached out to confirm that Mr. Blum was employed by the
19 Maricopa County Attorney's office. The State confirmed that it was the same
20 person but said he was walled off.
21

22 The State's contention that the Defendant brought this motion for the
23 purposes of getting a better plea offer with a different agency is misplaced. The
24 Defendant engaged in good faith plea negotiations and was unable to reach an
25 agreement with the State. The Defendant concedes that she waived this issue for
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1 purposes of engaging in settlement negotiations hoping to resolve this issue short
2 of litigation and trial. It would have been unreasonable to expect that the State
3 would hold its plea open while the parties litigated this issue.
4

5 The State, through the course of this litigation, has repeatedly made a point
6 of stating, “Nearly eighteen months after being indicted and after more than a
7 month of failed plea negotiations[.]” Yet they conspicuously omit when they
8 disclosed the fact that “Victim 12” was a deputy county attorney. Part of the trial
9 Court’s consideration was that the State did not disclose it to the Defendant.
10

11 The State is incorrect in inferring that the Defendant demonstrated that she
12 does not believe there is a conflict by participating in a settlement conference.
13 What her participation in the settlement conference demonstrates is that she was
14 willing to try and settle the case before she pursued litigation. Whether or not the
15 Court ruled in her favor regarding the conflict, she was still going to have to deal
16 with this case.
17

18 Plea negotiations did not resolve this case. But this is an appealable issue
19 and the only way for the Defendant to preserve this issue was to give the trial
20 Court an opportunity to rule on it.
21

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23 **2. The Defendant will be damaged if the motion is not granted.**
24

25 The Defendant has a reasonable and rightful expectation that those
26 entrusted to enforce the law will also abide by it. The Defendant has a right to
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1 due process guaranteed by both the United States and Arizona Constitutions. If
2 the prosecuting agency is conflicted and is allowed to remain it will be in violation
3 of the Defendant's rights. Any continued prosecution, trial, or conviction will be
4 illegal and of serious harm to the Defendant as well as to the public interest. These
5 issues are more than enough for the trial Court to conclude there was a conflict
6 and the Defendant would be harmed by it.
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9 **3. Disqualifying the Maricopa County Attorney's Office is the least**
10 **damaging – and only – resolution.**

11 As discussed below, the conflicted attorney cannot be walled off because
12 he is a victim and a witness. Furthermore, he has not been walled off. He
13 exercised his right to attend the settlement conference. It is simple enough to
14 resolve this matter by transferring the case to another agency. The State proffers
15 that it would be harmed because a new prosecutor will have to become familiar
16 with a complicated case but this could have been avoided had they recognized the
17 conflict and acted appropriately from the beginning. There are multiple agencies
18 that can take the case. There is no reason to believe the State will suffer any harm
19 in transferring the case.
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23 **4. Suspicion will outweigh any public benefits that accrue from**
24 **continued representation.**
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1 Unfortunately, the State’s failure to disclose this issue has only fostered
2 suspicion in the mind of the Defendant and even the State. In an email exchange
3 the prosecuting attorney informed the defense that Mr. Blum had been walled off
4 but there was no explanation of what measures had been taken or what his
5 involvement had been heretofore. Following that, the defense was taken aback
6 when Mr. Blum appeared personally at the settlement conference.¹
7

8 The Defendant only discovered this conflict by random chance. The State
9 should have disclosed it from the very beginning. The State cannot now attempt
10 to hold against the Defendant that she did not act on this knowledge.
11

12 The fact that this conflict was not disclosed by the State and likely would
13 not have been disclosed had the Defendant not brought it up casts a shadow of
14 impropriety over this case. Further troubling this case is the fact that it is doubtful
15 that the co-defendant was ever afforded this information before she accepted the
16 State’s plea offer.
17

18 The State has an understandable concern that defendants not be allowed to
19 go “forum shopping” for their prosecution. But had they recognized the conflict
20 and dealt with it appropriately they would not have put the Defendant in this
21 position.
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26 _____
27 ¹ This happened during the implementation of COVID responses by the Court. The Defendant notes that the appearance was in person and not electronically.

