

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

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ALFRED P. CENTOFANTI, III.,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA, IN
AND FOR THE COUNTY OF CLARK,
AND THE HONORABLE LEE A. GATES,
DISTRICT JUDGE

Respondents,

And

THE STATE OF NEVADA,

Real Party in Interest.

FILED

MAR 27 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Malone*
DEPUTY CLERK

Case No. 52994

**ANSWER TO PETITION
FOR WRIT OF MANDAMUS**

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Counsel for Petitioner

Counsel for Respondents

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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5 ALFRED P. CENTOFANTI, III.,)

6 Petitioners,)

7 vs.)

8 THE EIGHTH JUDICIAL DISTRICT)
9 COURT OF THE STATE OF NEVADA, IN)
10 AND FOR THE COUNTY OF CLARK, AND)
11 THE HONORABLE VALERIE ADAIR,)
12 DISTRICT JUDGE)

Case No. 52994

11 Respondents,

12 And

13 THE STATE OF NEVADA,

14 Real Party in Interest.

15 **ANSWER TO PETITION**
16 **FOR WRIT OF MANDAMUS**

17 COMES NOW, the State of Nevada, Real Party in Interest, by DAVID
18 ROGER, District Attorney, through his chief deputy, STEVEN S. OWENS, on behalf
19 of the above-named respondents and submits this Answer in obedience to this Court's
20 order filed March 6, 2009 in the above-captioned case. This Answer is based on the
21 following memorandum and all papers and pleadings on file herein.

22 Dated March 26, 2009.

23 DAVID ROGER
24 Clark County District Attorney
25 Nevada Bar # 002781

26 BY



27 STEVEN S. OWENS
28 Chief Deputy District Attorney
Nevada Bar #004352
Attorney for Respondents

1 **MEMORANDUM**

2 **Procedural History**

3 In 2005, Alfred Centofanti, III, was convicted of First Degree Murder With
4 Deadly Weapon and was sentenced to life without the possibility of parole for the
5 shooting death of his ex-wife Virginia on December 20, 2000. Ex. 3, p.2.¹
6 Centofanti's trial counsel was California attorney Allen Bloom, who was allowed to
7 associate in per SCR Rule 42. RA 1-11.² On direct appeal, this Court issued an Order
8 of Affirmance on December 27, 2006. Remittitur issued on March 27, 2007.

9 Thereafter, Centofanti filed a petition for post-conviction relief on February 29,
10 2008. He then filed a motion to disqualify the district attorney's office on July 9,
11 2008, alleging that Gloria Navarro's subsequent employment as an attorney in the
12 civil division of the Clark County District Attorney's Office created a conflict of
13 interest. Ex. 2. Gloria Navarro was only involved in the case because the Special
14 Public Defender's Office was the locally associated counsel for trial attorney Allen
15 Bloom. RA 12-13. The State opposed the motion, (Ex. 3), and argument was heard
16 on July 21, 2008. Ex. 6. The Order denying the motion to disqualify was filed on
17 July 31, 2008. Ex. 4. No further action was taken in the case until Centofanti filed
18 the instant petition for writ of mandamus five (5) months later on December 26, 2008.
19 The State was directed to answer the petition by order of this Court filed on March 6,
20 2009.

21 **Issue Presented**

22 Whether the district court abused its discretion in denying the motion to
23 disqualify the district attorney's office from handling post-conviction proceedings
24 where defendant's out-of-state trial counsel had been associated through local counsel
25 who is now employed in the civil division of the district attorney's office but where
26 screening measures are in place.

27 _____
28 ¹ All Exhibit numbers refer to those six exhibits attached to Centofanti's current Petition.

² "RA" refers to Respondent's Appendix submitted herewith.

1 **Extraordinary Relief is Not Warranted**

2 This Court may issue a writ of mandamus to compel the performance of an act
3 which the law requires as a duty resulting from an office, trust, or station or to control
4 a manifest abuse of or arbitrary or capricious exercise of discretion. NRS 34.160;
5 Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536
6 (1981). This Court may issue a writ of prohibition to arrest the proceedings of any
7 tribunal exercising judicial functions in excess of its jurisdiction. NRS 34.320; Hickey
8 v. District Court, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989). Neither writ issues
9 where the petitioner has a plain, speedy, and adequate remedy in the ordinary course
10 of law. NRS 34.170; NRS 34.330; Hickey, 105 Nev. at 731, 782 P.2d 1336, 1338
11 (1989).

12 The disqualification of a prosecutor's office rests with the sound discretion of
13 the district court. Collier v. Legakes, 98 Nev. 307, 646 P.2d 1219 (1982) (citing
14 Tomlin v. State, 81 Nev. 620, 407 P.2d 1020 (1965); Hawkins v. 8th District Ct., 67
15 Nev. 248, 216 P.2d 601 (1950); Trone v. Smith, 621 F.2d 994 (9th Cir. 1980)). In
16 exercising that discretion, the trial judge should consider all the facts and
17 circumstances and determine whether the prosecutorial function could be carried out
18 impartially and without breach of any privileged communication. Id. While
19 mandamus lies to enforce ministerial acts or duties and to require the exercise of
20 discretion, it will not serve to control the proper exercise of that discretion or to
21 substitute the judgment of the Nevada Supreme Court for that of the lower tribunal.
22 Id. The record shows that the district court's decision to deny disqualification was
23 well-founded in law and provided for the protection of privileged communications
24 through screening. The exercise of discretion was not arbitrary or capricious and
25 extraordinary relief is not warranted.

26 //

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1 **Disqualification of the Entire District Attorney's Office is**
2 **Unwarranted Where Screening Measures are Implemented**

3 From October 2001, through jury trial in March and April of 2004, Centofanti
4 was represented by privately retained counsel, Allen Bloom, from California. RA 1-
5 11, 14-15. Because Bloom was not licensed to practice law in Nevada, he applied for
6 local association through SCR Rule 42, and the Special Public Defender's Office was
7 appointed as local counsel. RA 1-13. Pursuant to SCR Rule 42(14), it is the duty of
8 local counsel to actively participate in the representation of a client, to be present at all
9 court hearings, and to ensure compliance with all Nevada procedural and ethical rules.
10 On occasion, other attorneys in the Special Public Defender's were present in court
11 (i.e., Phil Kohn and Daren Richards), but primarily the Special Public Defender
12 assigned as local counsel at the time of trial was Gloria Navarro. The record shows
13 that Navarro, although present, did not question any of the witnesses at trial or
14 participate in arguing the case to the jury, nor has Centofanti alleged how she is
15 conflicted.

16 Defendant asserts that under NRPC Rule 1.9, Gloria Navarro could not
17 personally represent the State of Nevada in the current post-conviction proceedings
18 against Defendant because she formerly represented him at trial in the same or
19 substantially related matter, even though it was just as locally associated counsel.
20 However, Defendant's assertion that NRPC Rule 1.10 imputes the conflict to the other
21 lawyers in the district attorney's "firm" is misplaced. NRPC Rule 1.10 applies only to
22 conflicts in the *private* sector. In the case of attorneys in the *public* sector, NRPC
23 Rule 1.11 controls and conflicts of one attorney are *not* imputed to other government
24 attorneys in the same office. Comment 2 to Rule 1.11 provides that:

25 Paragraphs (a)(1), (a)(2) and (d)(1) [of Rule 1.11] restate the obligations
26 of an individual lawyer who has served or is currently serving as an
27 officer or employee of the government toward a former government or
28 private client. ***Rule 1.10 is not applicable to the conflicts of interest
addressed by this Rule.***

1 Because of the special problems raised by imputation within a
2 government agency, paragraph (d) *does not impute the conflicts of a*
3 *lawyer currently serving as an officer or employee of the government to*
4 *other associated government officers or employees, although ordinarily*
5 *it will be prudent to screen such lawyers.*

6 Ann. Mod. Rules Prof. Cond. Rule 1.11, Comment 2 [emphasis added].

7 Furthermore, the notice and informed consent requirements found in NRPC Rule 1.9
8 and 1.10 likewise only apply to waiver of conflicts in the private sector. As to
9 government attorneys, the waiver provisions are unnecessary because individual
10 conflicts are screened off and not imputed to others in the governmental office per
11 NRPC Rule 1.11. The former client's informed consent and written waiver is
12 immaterial.

13 Accordingly, the appointment of a criminal defendant's lawyer as a new U.S.
14 Attorney for the same district which was handling the criminal defendant's
15 prosecution, did not disqualify other attorneys in the office where screening measures
16 were in place. U.S. v. Goot, 894 F.2d 231 (7th Cir. 1990). Also, the U.S. Attorney's
17 Office was not disqualified from investigating specific incidents of a state court
18 corruption case even though one Assistant U.S. Attorney, who was not assigned to the
19 investigation, represented one of the subjects during the state's investigation of the
20 same allegations. In re Grand Jury Inv. Of Targets, 918 F.Supp. 1374 (S.D. Cal.
21 1996). A prosecutor's office is not disqualified as long as the personally disqualified
22 prosecutor effectively was screened from the case. State ex rel. Tyler v. MacQueen,
23 447 S.E.2d 289 (W.Va. 1994).

24 Appropriate "screening" means the conflicted lawyer is isolated from any
25 participation in a matter through the timely imposition of procedures within a firm
26 that are reasonably adequate under the circumstances to protect information that the
27 isolated lawyer is obligated to protect under the rules or other law. NRPC Rule 1(k).
28 According to Comment 9 of the same rule, "the purpose of screening is to assure the
affected parties that confidential information known by the personally disqualified
lawyer remains protected."

1 Such is not a concern in a post-conviction proceeding where a criminal defendant
2 must waive attorney-client confidentiality with regards to prior trial counsel. NRS
3 34.735(6) forewarns a post-conviction litigant that “[i]f your petition contains a claim
4 of ineffective assistance of counsel, that claim will operate to waive the attorney-
5 client privilege for the proceeding in which you claim your counsel was ineffective.”
6 See also NRS 49.115 (There is no attorney-client privilege “as to a communication
7 relevant to an issue of breach of duty by the lawyer to his client or by the client to his
8 lawyer.”) To the extent Centofanti alleges the ineffectiveness of locally associated
9 counsel Gloria Navarro, he has waived any confidentiality of information which the
10 conflict rule was designed to protect.

11 As to any remaining confidentiality for issues unrelated to attorney
12 performance, such a conflict is not imputed to other government attorneys, especially
13 where screening measures are in place. At the hearing on the motion for
14 disqualification, the State’s attorney represented that Gloria Navarro was employed in
15 the civil division, not the criminal division of the district attorney’s office and that
16 “she is Chinese-walled off this pending case.” Ex. 6, p. 6. In denying the motion to
17 disqualify, the judge found that Navarro became employed in the civil division of the
18 district attorney’s office after the defendant’s trial had been concluded but prior to the
19 filing of his petition. Ex. 5. Satisfied that screening would protect the defendant’s
20 interests, the district court ordered that Navarro was not to work on this case. Id.

21 In addition to the protection of a former client’s confidences, the district court
22 judge also considered the potential conflict with her current employer should Gloria
23 Navarro be called to testify. Ex. 6, p. 6. Nonetheless, the judge still did not find that
24 her potential testimony in the case warranted disqualification. Importantly, there has
25 been no judicial determination of need for an evidentiary hearing as required by NRS
26 34.770, and it is unknown at this time whether Gloria Navarro will ever be called to
27 testify in the post-conviction proceedings. It is premature to disqualify the district
28 attorney’s office based on the potential for a conflict which may never arise.

1 Furthermore, if an evidentiary hearing were warranted, it is primarily the performance
2 of trial counsel Allen Bloom that is at issue, not that of locally associated counsel who
3 did not participate in the trial. Finally, disqualification of the district attorney's office
4 will do nothing to alleviate concerns that Navarro's testimony may be tainted and
5 biased in favor of her current employer. Any potential bias and her current
6 employment situation will remain entirely unaffected regardless of the entity charged
7 with prosecuting the case. Accordingly, it is better addressed as potential bias and
8 motive that can be inquired into on cross-examination should she testify, but not as a
9 conflict because it is not remedied in anyway by disqualifying the district attorney's
10 office.

11 In Nevada, disqualification of an entire district attorney's office is warranted
12 only in "extreme circumstances" where the appearance of impropriety "is so great that
13 the public trust and confidence in our criminal justice system could not be maintained
14 without such action." Collier v. Legakes, 98 Nev. 307, 646 P.2d 1219 (1982). Even
15 where a lawyer who has represented a criminal defendant on prior occasions is one of
16 the deputy prosecutors, disqualification of the entire office is not necessarily
17 appropriate. Id. While it is an abuse of discretion to disqualify the district attorney's
18 office without an evidentiary hearing, it does not necessarily follow that an
19 evidentiary hearing is required to deny such a motion. See Attorney General v. Eighth
20 Judicial District Ct., 108 Nev. 1073, 844 P.2d 124 (1992). Especially where the
21 alleged conflict arises from the employment of locally associated counsel who did not
22 participate in trial and against whom no allegation of ineffectiveness is specifically
23 alleged, disqualification is far too attenuated and does not rise to the level of extreme
24 circumstances contemplated in Collier, supra. Centofanti has failed to allege what
25 role Navarro played in his representation at trial, whether she was privy to
26 confidences, or how he is prejudiced by her current employment.

27 Upon the facts of this case, Centofanti has failed to show a conflict of interest
28 under the local rules or an appearance of impropriety so extreme as to justify

1 imputation of a conflict to the entire district attorney's office. Locally associated
2 counsel's role in Centofanti's representation was minimal and certainly not the same
3 as that of trial counsel Allen Bloom. Any conflict is mitigated by screening measures
4 and the assurance that Navarro will have no involvement in the prosecution. Even if
5 she were called to testify, disqualification would not remedy any perceived bias
6 occasioned by her current employment situation.

7 WHEREFORE, the district court's denial of the motion for disqualification was
8 not arbitrary or capricious and this Court's extraordinary intervention is unwarranted.

9 DATED March 26, 2009.

10 Respectfully submitted,

11 DAVID ROGER
12 Clark County District Attorney
13 Nevada Bar # 002781

14
15
16 BY



17 STEVEN S. OWENS
18 Chief Deputy District Attorney
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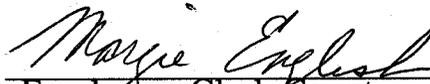
1 **CERTIFICATE OF MAILING**

2 I HEREBY CERTIFY AND AFFIRM that on this 26th day of March 2009 I
3 deposited in the United States Mail a true and correct copy of the foregoing Answer to
4 Petition for Writ of Mandamus addressed to:

5
6 Carmine Colucci, Esq.
7 Carmine J. Colucci, Chtd.
8 629 South Sixth Street
9 Las Vegas, Nevada 89101

10 The Honorable Lee A. Gates
11 Eighth Judicial District court
12 Department VIII
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16 Catherine Cortez Masto
17 Nevada Attorney General
18 100 North Carson Street
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21 
22 _____
23 Employee, Clark County
24 District Attorney's Office

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