

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff/Respondent,

vs.

No. _____
Ct. App. No. 30,702

VINCENT "SMILEY" GALLEGOS,
DENNIS R. KENNEDY, and
ROBERT STRUMOR,

Defendants/Petitioners.

Interlocutory Appeal from the
Second Judicial District Court,
Hon. Ross Sanchez, Presiding

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF NEW MEXICO

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STATEMENT OF COMPLIANCE PURSUANT
TO RULE 12-502(E) NMRA

The body of the attached Petition exceeds the page limit set forth by Rule 12-502(D)(2) of the Rules of Appellate Procedure, but was prepared using Arial, a proportionally-spaced type style or typeface, and the body of the brief contains 2,861 words according to the word-count function of Corel WordPerfect 12.

INTRODUCTION

The participation of the New Mexico Attorney General's Office in the prosecution of this matter has, at the very least, created the appearance of impropriety and impartiality. Consequently, the constitutional rights of the individuals accused in this Indictment are impermissibly imperilled, as is the integrity of the justice system itself. The numerous conflicts, particularly the ongoing attorney-client relationship between the Attorney General's Office and interested parties, should disqualify the Attorney General's Office from this prosecution and have irrevocably tainted these proceedings.

Thus, Defendants/Petitioners Vincent "Smiley" Gallegos, Dennis R. Kennedy and Robert Strumor sought an interlocutory appeal to determine the propriety of the prosecution by an interested agency. The New Mexico Court of Appeals entered an Order denying that interlocutory appeal on January 13, 2011. The Order did not indicate the reasoning of the Court of Appeals in denying the interlocutory appeal.

Petitioners now petition this Court to issue a writ of certiorari to review that January 13, 2011, Order. (A copy of the January 13, 2011 Order of the Court of Appeals denying the application for interlocutory

appeal is attached hereto). This Petition is timely filed pursuant to Rule 12-502B NMRA.

QUESTIONS PRESENTED FOR REVIEW

1. Should New Mexico permit an agency to prosecute criminal charges when that agency has an attorney-client relationship with interested parties, including the alleged victim and numerous witnesses, particularly when that attorney-client relationship extended to representation in connection with the alleged crimes it is prosecuting and a professional relationship with the accused?

2. Can the New Mexico Attorney General's Office constitutionally prosecute a criminal case against Petitioners while simultaneously representing the alleged victim in a civil cause of action against the same individuals?

MATERIAL FACTS

The allegations in this matter relate to two related taxable single family residence acquisition and rehabilitation revenue bonds issued in 2003 and 2004 (hereinafter collectively the "Bonds") by the New Mexico Region III Housing Authority (hereinafter "Region III") and purchased by the New Mexico State Investment Counsel (hereinafter "SIC") under the

guidance of the New Mexico Attorney General's Office (hereinafter "AGO"). The SIC alleged the funds from those bonds were mishandled by Petitioners and asked its counsel, the AGO, to investigate the matter. As a result thereof, the AGO initiated a civil suit against Petitioners on behalf of the SIC, and then, a year later, began this criminal prosecution. The civil and criminal matters are simultaneously pending.

I. THE SIC RETAINS THE AGO IN CONNECTION WITH THE UNDERLYING ACTS COMPLAINED OF IN THE INDICTMENT

In July 2003, Region III issued a \$2.5 million bond to generate funds for the purchase, rehabilitation and maintenance of single-family dwellings for qualified individuals. The bond was a part of a bold initiative backed by the administrative branch to bolster the American dream and provide affordable housing for New Mexico's citizens. The SIC began preliminary discussions and negotiations to purchase the bond. During this process, the SIC was represented by the AGO. The AGO's representation of the SIC included review and approval of the bond transaction itself, the same bond transaction which is the subject of the Indictment and for which the AGO now prosecutes the Petitioners. In the course of this process, the AGO had professional contact with the Petitioners in connection with the very acts it now prosecutes as alleged crimes.

A second bond was issued the following year. The second bond was also purchased by the SIC through a similar process. (The 2003 and 2004 bonds are collectively “Bonds”). Once again, the purchase was accomplished under the guidance of the AGO.

This attorney-client relationship between the SIC and the AGO was pervasive during the time period covered by the Indictment in this matter, and continues to this day. Thus, throughout the pending civil and criminal cases, members and employees of the SIC have asserted the attorney-client privilege in relation to communications with the AGO. Moreover, the SIC minutes from this time period repeatedly refer to a member of the AGO as “Legal Counsel.” Those minutes also contain multiple references to the AGO’s representation of the SIC, particularly in regards to SIC’s ongoing relationship with Region III.

II. THE AGO SEEKS MONETARY DAMAGES FROM PETITIONERS ON BEHALF OF ITS CLIENT, THE SIC

The AGO’s involvement continued after the purchase of the Bonds by the SIC. After previous extensions were routinely granted to Region III as it began its important business, in August 2006, the SIC refused to grant another. At that time, the SIC declared a default on the Bonds and requested its counsel, the AGO, to investigate the handling of the Bonds’

funds “to the extent that the AG’s Office represents the SIC in these matters.” According to the minutes of an SIC meeting in which an Assistant Attorney General was present as “Legal Counsel,” high-ranking members of the SIC directed the AGO to “take action on the SIC’s behalf to recover the assets.”

Based on this direction from its client, the AGO initiated a civil claim to recover monetary damages from Petitioners and others on behalf of its client, the SIC. Eventually, “Special Assistant Attorneys General” at the firm of Robles, Rael and Anaya, PC were appointed as lead counsel in the civil claim to act under the direction of Attorney General Gary King.

III. THE SIC’S LAWYER PROSECUTES CRIMINAL CHARGES

The civil case prosecuted by the AGO on the SIC’s behalf was filed on May 2, 2008. In June 2008, Petitioner Strumor filed a motion to dismiss that civil case for failure to state a claim upon which relief could be granted. In May 2009, Petitioner Strumor filed a second motion to dismiss based on failure to adequately plead a factual basis for the requested relief. With two motions to dismiss pending, the AGO, acting as SIC’s counsel, initiated a criminal prosecution against Petitioners. On June 19, 2009, an Indictment was returned in relation to the Petitioners professional

relationship with the AGO's client, the SIC. The charges specifically revolved around the transactions in which the AGO was involved.

The allegations in the civil case mirror those in the criminal indictments and the AGO's representation of the SIC and the prosecution of the criminal case is nearly indistinguishable. Members of the AGO, such as Zach Chandler, "Legal Counsel" to the SIC throughout the period of the allegations, are expected to be called as witnesses in the criminal prosecution, as are a plethora of witnesses represented by the AGO, including numerous governmental officials. When counsel for Petitioners in the instant criminal case sought to view discovery at the office of the AGO, the "civil" files were intermixed with the "criminal" files. At the same time, the AGO is ethically bound to advocate zealously on behalf of the SIC, the client to which it owes a duty of loyalty, it also is ethically and constitutionally bound to see that justice is done in the criminal case.

IV. PROCEDURAL BACKGROUND

As a result of the actual and apparent conflict of interest, Petitioners filed a motion to disqualify the AGO from prosecuting the criminal case and to dismiss the Indictment. A hearing was held before the Honorable Ross Sanchez on February 8, 2010. On June 16, 2010, the District Court issued

an Order denying the motion. (A copy of the District Court's ruling was attached to the Application for Interlocutory Appeal). However, that June 16, 2010 ruling did not directly address the broader issue raised by Petitioners; whether New Mexico permits a prosecutorial body to maintain an attorney-client relationship with an alleged victim and interested party.

Due to the issues involved, on September 1, 2010, the District Court entered an Order certifying this matter for interlocutory appeal. An application for interlocutory appeal was filed with the Court of Appeals on September 16, 2010. The AGO filed a Response to the application in which it argued facts not presented to the trial court, including that counsel for Petitioner Gallegos should be disqualified due to his assistance in the transition between gubernatorial administrations. Although the AGO's new argument implicitly admitted the impropriety of its own involvement in the prosecution of this matter, on January 13, 2011, the application for interlocutory appeal was denied by the Court of Appeals without specific reasons therefor. This Petition followed.

BASIS FOR GRANTING THE WRIT

Writ of certiorari is an appropriate avenue for review of questions contained in applications for interlocutory appeal improperly denied by the

Court of Appeals. Marchiondo v. Brown, 95 N.M. 651, 653, 625 P.2d 580, 582 (1981); see also State v. Riordan, 2009-NMSC-022, ¶19, 146 N.M. 281, 209 P.3d 773; Martinez v. Chavez, 2008-NMSC-021, ¶13, 144 N.M. 1, 183 P.3d 145. This petition raises issues of substantial public interest and significant questions of constitutional law. Thus, this Court should exercise its jurisdiction, utilize this avenue of review and grant the writ of certiorari. See Rule 12-502(C)(2)(d) NMRA; Marchiondo, 95 N.M. at 652-653, 625 P.2d at 581-582.

The issues presented concern the proper role of the public prosecutor in the criminal justice system. This is of great and immediate importance because there are overwhelming constitutional ramifications that touch the heart of our notions of due process and fundamental fairness. It is not just the rights of these Petitioners, but the public's faith in the criminal justice system, that is being denigrated.

Furthermore, a continued failure by the appellate courts to address this issue *now* will only ensure protracted litigation in this matter and others.¹ This litigation will come at great cost to all, including the general

¹ The trial court's September 1, 2010, Order held that the issue presented in this Petition "involves a controlling question of law as to which there is substantial ground for difference of opinion and immediate appeal

public. In this particular matter, any conviction in this case will undoubtedly result in lengthy appeals directed at precisely this issue, thereby depriving both Petitioners and the State and its citizens of much deserved finality.² In other matters, the courts and governmental agencies need necessary guidance from the appellate courts because that guidance is currently lacking and the result is potentially costly litigation statewide.

For these reasons, this appeal is of great public interest and should be decided sooner rather than later. This Court should grant the writ of certiorari.

ARGUMENT

Prosecutors play a unique role in our adversarial system of justice. because they act as “quasi-judicial officers” with the “distinctive role of disinterested and impartial public advocates,” State v. Robinson, 2008-NMCA-036, ¶16, 143 N.M. 646, 179 P.3d 1254, who “should represent public justice and stand indifferent between the accused and any private interest.” State v. Gonzales, 2005-NMSC-025, ¶36, 138 N.M. 271, 119 P.3d 151. “Unlike other participants in the traditional common-law

[of the issue] may materially advance the ultimate termination of the litigation.”

² There is no trial date set in this matter.

adversarial process, whose more singular function is to protect and advance the rights of one side, a [prosecutor] carries an additional and more sensitive burden...he must never lose sight of the fact that a defendant, as an integral member of the body politic, is entitled to a full measure of fairness.” People v. Zimmer, 414 N.E.2d 705, 707 (N.Y.1980); see also Gonzales, 2005-NMSC-025, ¶36 (prosecutor must “see that the accused receives a fair trial).

This burden is amplified because, as a people, we “have come to grant to the office wide latitude in the allocation of its resources...[including] a discretion to investigate, initiate, prosecute and discontinue broad enough, conceptually and practically, to merit the observation that, overall, more control over individuals’ liberty and reputation may thus be vested than in perhaps any other public official.” Zimmer, 414 N.E.2d at 707. This awesome power also carries great responsibility; the responsibility to avoid actual conflicts of interest as well as the very appearance of impropriety. Gonzales, 2005-NMSC-025 at ¶1; Robinson, 2008-NMCA-036 at ¶17 (prosecutor must maintain actual and perceived impartiality); State v. Pennington, 115 N.M. 372, 375, 851 P.2d 494, 497 (Ct.App.1993).
Appearances are crucial because the bedrock of the American legal

system requires that “[j]ustice and the law must rest upon the complete confidence of the thinking public” that the prosecutor is entirely even-handed and ruled by no master but the law. Pennington, 115 N.M. at 375, 851 P.2d at 497. If the public loses faith in the system, it no longer works.

Thus, if our system is to survive, prosecutors such as the AGO must act “to foster the trust of the public in the criminal justice system.” People v. Gentile, 127 A.D.2d 686, 688, 511 N.Y.S.2d 901, 904 (N.Y.A.D. 1987); see also Young v. United States ex rel. Vuitton, 481 U.S. 787, 803 (1987); Gonzales, 2005-NMSC-025, ¶31 (the “ultimate goal is to maintain both public and individual confidence in the integrity of our judicial system”). “Like Caesar’s wife, they [prosecutors] must be above reproach,” Pennington, 115 N.M. at 375, 851 P.2d at 497, particularly because “unlike judges, prosecutors are advocates whose potential conflicts of interest are not as clear.” Robinson, 2008-NMCA-036 at ¶18. In the instant matter, the AGO has failed in this regard.

The AGO’s failure to uphold the appearance of fairness has endangered the integrity of the entire criminal justice system. The AGO’s involvement in the underlying transactions, including its professional relationship with the Petitioners, and its continued representation of

numerous interested parties, ranging from witnesses to the alleged victim, has created a significant appearance of impropriety. This prosecution is thus tainted irretrievably.

The AGO maintains an attorney-client relationship with several witnesses as well as the alleged victim. Thus, the prosecutorial agency is in the ethically dubious position of owing a duty of undivided loyalty to individuals with interests that diverge from justice and the AGO's ethical duties and crucial role as prosecutor. This conflict is substantially aggravated since the AGO initiated a civil claim for damages on behalf of the alleged victim against the individuals it is also prosecuting. The AGO cannot possibly uphold its ethical duties to its clients while also upholding the unique ethical duties of a public prosecutor. In this impossible situation, one must give way to the other, and neither Petitioners, nor the public, can be assured that justice will prevail.

The dual role played by the AGO serves only to ensure that it "may be tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards for the private client [the SIC]." Young, 481 U.S. at 805. In this context, the prospect of an award of damages has a strong potential to influence the prosecution of this matter, which itself

may be shaped by a desire to obtain information of use to the AGO and its client in the civil suit. Id., 481 U.S. at 806. “[T]hey might be tempted to manipulate [the processes of the criminal justice system] to root out additional evidence useful in the civil suit.” United States v. Sells Engineering, Inc., 463 U.S. 418, 432 (1983).

Thus, regardless of whether or not one can point to specific, glaring instances of prosecutorial misconduct, the situation “illustrate[s] the *potential* for private interest to influence the discharge of public duty.” Id., 481 U.S. at 805 (emphasis in original). There is now a real possibility that the prosecution’s motivations are influenced by “more than just prosecutorial judgment,” or at least “the real possibility that the public will perceive that to have happened.” See Gonzales, 2005-NMSC-025, ¶44. At a minimum, the AGO acting as prosecutor *and* counsel for interested parties such as the alleged victim SIC and several witnesses creates impermissible opportunities for conflicts to arise, and thus creates the appearance of impropriety. Young, 481 U.S. at 806; Sells, 463 U.S. at 433 (“Such potential for misuse should not be allowed absent a clear mandate in the law”).

This Court has previously recognized the importance of appearances

in the criminal justice system when addressing concerns of conflicted prosecutorial bodies. Gonzales, 2005-NMSC-025, ¶17. In doing so, it has instructed that these matters must be resolved “with an eye to the ultimate goal of maintaining confidence in the integrity of the judicial system.” Id., 2005-NMSC-025, ¶37. To maintain this confidence, the American criminal justice system relies upon the public prosecution model precisely because permitting private interests to become involved leads to perverse incentives of the sort that should play no role in justice.

The AGO’s prosecution of this case has thus now imperilled the integrity of the justice system. The longer this prosecution continues, particularly with the AGO at the helm, the more damage is done to the system’s integrity. As the District Court’s September 1, 2010 Order recognizes, these issues must be addressed at this important juncture. Accordingly, the writ should be granted and the ruling of the District Court should be overturned.

PRAYER FOR RELIEF

Defendants/Petitioners, by and through undersigned counsel, respectfully request that the Court grant the petition for writ of certiorari,

and review and decide the questions presented herein with the benefit of full briefing and oral argument.

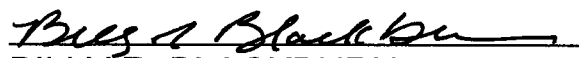
Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the following this Monday, the 14th day of February, 2011.

Honorable Ross Sanchez
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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
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2 **STATE OF NEW MEXICO,**

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[Signature]

4 **vs.**

No. 30,702
Bernalillo County
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CR-2009-2951
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9 **VINCENT "SMILEY" GALLEGOS,**
10 **DENNIS R. KENNEDY, and**
11 **ROBERT STRUMOR,**

12 **Defendants-Applicants.**
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14 _____

15 **ORDER**

16 This Court has considered the application of **Defendants-Applicants** for leave
17 to file interlocutory appeal and the response filed by **Plaintiff**.

18 **THE COURT ORDERS** that the application is **DENIED**, and that this matter
19 is remanded to the District Court of Bernalillo County for further proceedings.

20 *[Signature]*
21 **MICHAEL D. BUSTAMANTE, Judge**

22 *[Signature]*
23 **RODERICK T. KENNEDY, Judge**