IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

STATE OF ARIZONA,
Petitioner,

v.

HON. JOSEPH R. GEORGINI,
JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA,
IN AND FOR THE COUNTY OF PINAL
Respondent,

and

ELIZABETH M. KAY; NATHAN A. LAMB; AND GERAD N. PUNCH,
Real Parties in Interest.

No. 2 CA-SA 2015-0069
Filed April 1, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Spec. Actions 7(g), (i).

Special Action Proceeding
Pinal County Cause Nos. CR201500061, CR201500062, and
CR201500063

JURISDICTION ACCEPTED; RELIEF GRANTED

COUNSEL

M. Lando Voyles, Pinal County Attorney
By Janina N. Walters, Deputy County Attorney, Florence
Counsel for Petitioner

Heard Law Firm, Mesa
James L. Heard
Counsel for Real Party in Interest Kay

James E. Mannato, Pinal County Public Defender
By David P. Marviglia, Deputy Public Defender, Florence
Counsel for Real Party in Interest Lamb

Ballard Spahr LLP, Phoenix
By Booker T. Evans, Jr.
Counsel for Real Party in Interest Punch

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Judge Staring concurred and Chief Judge Eckerstrom concurred in part and dissented in part.

E S P I N O S A, Judge:

¶1 In this special action, the State of Arizona seeks relief from the respondent judge's order disqualifying the assigned prosecutor and the entire Pinal County Attorney's Office from the underlying criminal action against real-parties-in-interest Elizabeth Kay, Nathan Lamb, and Gerad Punch (collectively, the defendants). A disqualification order is properly reviewed by special action because there is no remedy by appeal; we therefore accept jurisdiction. *See Sec. Gen. Life Ins. Co. v. Superior Court*, 149 Ariz. 332, 333-34, 718 P.2d 985, 986-87 (1986); *see also* Ariz. R. P. Spec. Actions 1(a). Although we review a disqualification order for an

abuse of discretion, *see Villalpando v. Reagan*, 211 Ariz. 305, ¶ 6, 121 P.3d 172, 174 (App. 2005), the party seeking disqualification must demonstrate that disqualification is appropriate, *State ex rel. Romley v. Superior Court*, 184 Ariz. 223, 228, 908 P.2d 37, 42 (App. 1995). And we are mindful that "[o]nly in extreme circumstances should a party to a lawsuit be allowed to interfere with the attorney-client relationship of his opponent." *Alexander v. Superior Court*, 141 Ariz. 157, 161, 685 P.2d 1309, 1313 (1984). Because the defendants here have not met their burden of demonstrating disqualification is appropriate, we grant relief.

¶2 The defendants argued below that the entire office of the Pinal County Attorney must be disqualified because the assigned prosecutor and other employees of that office were necessary witnesses due to their involvement in a free talk by Punch and the subsequent loss of the recording of that free talk by an investigating sheriff's detective. They asserted the county attorney's office was therefore subject to disqualification under E.R. 3.7(a), Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42 (subject to certain exceptions, "lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness"). However, a witness is "necessary" in this context only when the witness will offer "relevant and material" testimony that "could not be obtained from other witnesses." *Sec. Gen. Life Ins. Co.*, 149 Ariz. at 335, 718 P.2d at 988.

¶3 The defendants have not identified any admissible testimony that only the assigned prosecutor or any other employee of the county attorney's office could offer at trial. Although the credibility of the investigating detective could under some circumstances be a fair topic of cross-examination, claims that the prosecutor could be called to contradict the detective about the lost free-talk recording rely on speculation. Moreover, the prosecutor's substantive testimony on the topic would, on this record, be prohibited by Rule 608(b), Ariz. R. Evid., and, in any event, appears to be collateral. *See State v. Lopez*, 234 Ariz. 465, ¶ 25, 323 P.3d 748, 753 (App. 2014).

¶4 Additionally, to the extent the defendants have raised the question, the prosecutor is not a necessary witness concerning

the content of the free talk because there were numerous other witnesses present, including at least four law enforcement officers and Punch's attorney. *See Sec. Gen. Life Ins. Co.*, 149 Ariz. at 335, 718 P.2d at 988 ("right to have the counsel of one's choice require[s] careful scrutiny of the facts before [disqualification] is permitted").

¶5 The defendants additionally suggest they are entitled to call the prosecutor to testify about the detective's alleged untrue statements or mishandling of evidence to show bias and prejudice. *See State v. Almaguer*, 232 Ariz. 190, ¶ 22, 303 P.3d 84, 91-92 (App. 2013) ("The Sixth Amendment protects a defendant's ability to prove a witness's motive or bias."). But not only was this argument not raised in the motion to disqualify, the defendants have not demonstrated the prosecutor's testimony is necessary to establish bias. *See State v. Abdi*, 226 Ariz. 361, ¶ 25, 248 P.3d 209, 215 (App. 2011) (collateral evidence of bias subject to exclusion if jury has sufficient information to assess witness bias and motive). The record before us does not suggest the prosecutor is the only witness who could provide such evidence, to the extent it is permissible.

¶6 Finally, we reject the defendants' assertion the prosecutor could be called to provide his opinion of the quality of the law enforcement investigation or the effect the loss of the free-talk recording may have on the strength of the state's case. They cite no authority, and we find none, suggesting such testimony would be relevant or admissible. *Cf. Huff v. State*, 495 So. 2d 145, 148 (Fla. 1986) ("general critique of proper police practice" by expert inadmissible in part because it "would have presented no probative evidence of . . . guilt or innocence").

¶7 The defendants have not sustained their burden of demonstrating that disqualification is required or appropriate under E.R. 3.7(a), and have not sufficiently developed or supported any claim that disqualification was justified on any other basis, such as a conflict of interest constituting a due process violation. *See generally Villalpando*, 211 Ariz. 305, ¶ 8, 121 P.3d at 175. Nor does the record before us support any such claim.

¶8 Turning to our colleague's wide-ranging dissent, we disagree with several of his points, but in particular that we have

"overlook[ed]" anything in this case and that we have misstated the law. We recognize the respondent judge's discretion in evaluating whether the prosecutor must be disqualified. *See id.* ¶ 6. That deference, however, does not require the state to invent and then explain away any and all theoretical legal bases for the respondent's ruling—particularly those that would require not only an expansion of Arizona law but a series of evidentiary and discretionary determinations not urged by the defendants or contemplated by the respondent. Our colleague essentially acknowledges that the theory he advances was not raised below or addressed by the respondent. Thus, it cannot support a conclusion that the defendants have met their burden to demonstrate that disqualification was appropriate here. And the defendants' recitation of the phrase "due process" does not alter that fact. We do not address whether the dissent's due process theory is correct because that issue is not before us.

¶9 We accept jurisdiction and grant relief. Our decision is based on the record before us at this time and the arguments squarely raised below, and is not intended to resolve issues or circumstances that may or may not arise as a result of further developments. The respondent judge's order disqualifying the assigned prosecutor and the office of the Pinal County Attorney is vacated.

E C K E R S T R O M, Chief Judge, concurring in part and dissenting in part:

¶10 I fully agree that the record before us fails to support the respondent judge's order disqualifying the entire Pinal County Attorney's Office from prosecuting these cases. I respectfully disagree with my colleagues, however, to the extent they disturb the respondent's order disqualifying the particular deputy county attorney who had been assigned to these cases. In so doing, the majority applies a standard for disqualification, borrowed from the civil law, that fails to fully account for the unique due process concerns arising when a prosecutor becomes a potential witness in a criminal case.

¶11 In its reasoning, the majority both overlooks the wide latitude enjoyed by trial courts, *see Villalpando v. Reagan*, 211 Ariz.

305, ¶ 6, 121 P.3d 172, 174 (App. 2005), and incorrectly states that the defendants have the burden to demonstrate that the respondent judge's order should not be disturbed. *Supra* ¶¶ 1, 7. Rather, it is the state, as the petitioner in this special action, that bears the burden of demonstrating the respondent abused his substantial discretion. *See* Ariz. R. P. Spec. Actions 3(c) & cmt. (stating "plaintiff" in special action "must always carry the burden of persuasion as to discretionary factors"); *see also State ex rel. Romley v. Hutt*, 195 Ariz. 256, ¶ 14, 987 P.2d 218, 224 (App. 1999) (Lankford, J., dissenting) ("The State, as the petitioner, bears the heavy burden of persuading us that the trial court made such an egregious error as to require our intervention."); *cf. State v. Inzunza*, 234 Ariz. 78, ¶ 28, 316 P.3d 1266, 1274 (App. 2014) ("[A]n appellant always carries the burden of demonstrating an error that entitles him to relief."). Although my colleagues are correct that criminal defendants bear the threshold burden of demonstrating grounds for disqualifying a prosecutor, trial courts have "'substantial latitude' in deciding whether counsel must be disqualified" in a criminal case. *United States v. Frega*, 179 F.3d 793, 799 (9th Cir. 1999), *quoting United States v. Stites*, 56 F.3d 1020, 1024 (9th Cir. 1995); *accord State v. Williams*, 136 Ariz. 52, 57, 664 P.2d 202, 207 (1983) ("[T]he standard of review for disqualification of the prosecutor by the trial court is whether the court abused its discretion.").

¶12 The majority reasons that the standard set forth in our ethical rules governing a lawyer as a witness is the only relevant standard here. Under that standard, defendants must demonstrate the assigned prosecutor would likely be both a material and necessary witness—and that he cannot be deemed a necessary witness so long as other witnesses could testify to the same topic. *See supra* ¶ 2. As seen above, this construct finds support in the pertinent ethical rules and applications of those rules in civil jurisprudence. And I find no fault with the majority's application of this standard to the specific evidentiary theories urged to date by defense counsel.

¶13 However, defense counsel did not exclusively argue that the assigned prosecutor must be disqualified pursuant to ER 3.7(a), Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42. Counsel also

maintained that the assigned prosecutor's role as prospective trial counsel might foreseeably violate their clients' rights to due process at trial. In assessing this question, the civil ethical standards are not, and cannot be, the end of the analysis.

¶14 When an issue arises that involves a criminal defendant's due process rights, long-standing precedent establishes courts must balance the defendant's interests against those of the government. *See Villalpando*, 211 Ariz. 305, ¶ 8, 121 P.3d at 175. To apply the Due Process Clause, a court "'must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.'" *Id.*, *quoting Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24-25 (1981). Here, the respondent was required to balance the defendants' right to a fair trial against the state's interest in using a particular prosecutor. This balancing test is firmly committed to the trial court's discretion: "A ruling on a motion to disqualify counsel is one within the court's discretion to make, 'limited only by the applicable legal principles.'" *Id.* ¶ 6, *quoting Smart Indus. Corp. Mfg. v. Superior Court*, 179 Ariz. 141, 145, 876 P.2d 1176, 1180 (App. 1994). Such "substantial latitude" is essential "to avoid the [trial court] being whipsawed—damned if it does and damned if it doesn't disqualify." *Stites*, 56 F.3d at 1024.

¶15 Given a criminal defendant's substantial and constitutionally protected interest in due process, I cannot agree that the standards for disqualification in a criminal case should be limited to those set forth for civil cases. Citing a civil disqualification case, the majority concludes that a prosecutor does not become a necessary witness unless he is "the only witness" who can provide testimony on a material fact. *Supra* ¶¶ 4-5. But that limitation makes little sense in the criminal context, where defendants have a protected right to bring all the relevant, probative evidence they can marshal. "The defendant's obligation to resort to alternative means of adducing factual testimony is not absolute. Both the quality and quantity of the alternate sources of evidence are proper subjects for comparison with that sought directly from the participating prosecutor." *United States v. Prantil*, 764 F.2d 548, 552-53 (9th Cir. 1985). And, in making that assessment, "the court must

honor the defendant's constitutional rights under the confrontation and compulsory process clauses of the Sixth Amendment." *Id.*

¶16 Of course, the due process interests of the defendant are not the only interests in the balance. The trial court must also consider the interest of the state in employing the particular prosecutor assigned. But when, as here, the state has other prosecutors capable of trying the case effectively without undue delay,[1] and the state does not have a constitutionally protected right to counsel of choice,[2] I am skeptical that this interest is substantial. *See Robinson v. Hotham*, 211 Ariz. 165, ¶¶ 11-12, 118 P.3d 1129, 1132-33 (App. 2005) (right to counsel of choice is based on criminal defendant's right to counsel under United States and Arizona constitutions).

¶17 Finally, the trial court and the parties possess a clear interest in facilitating a completed trial.[3] Yet, the materiality and relevance of any witnesses' testimony often does not become fully

---

[1]During oral argument, the Pinal County Attorney maintained that his office employed "approximately ten" attorneys who could try the case.

[2]The majority relies on *Alexander v. Superior Court*, 141 Ariz. 157, 161, 685 P.2d 1309, 1313 (1984), to support the contrary proposition. But *Alexander* involved the disqualification of the *defendants'* attorneys. *Id.* at 160-61, 685 P.2d at 1312-13. Furthermore, no personal relationship exists between the state and the county attorney who prosecutes criminal cases on its behalf, *see* A.R.S. § 11-532(A)(1); thus, when a court disqualifies a single prosecutor from a county attorney's office, this does not "interfere with the attorney-client relationship" as it would for an individual client. *Alexander*, 141 Ariz. at 161, 685 P.2d at 1313.

[3]The parties' interest in avoiding a mistrial is more substantial in a criminal case than a civil case. In a criminal case, jeopardy attaches once a jury has been empaneled and a mistrial therefore creates the risk that the case may not be tried a second time. *See State v. Jorgenson*, 198 Ariz. 390, ¶¶ 4, 6, 10 P.3d 1177, 1178 (2000).

apparent until trial has begun, other witnesses have testified, and respective trial strategies have ripened in light of that testimony. For this reason, the trial court must be entitled to consider the risk of a mistrial arising if the prosecutor remains on the case and his testimony later becomes material. It therefore follows that the trial court's "'substantial latitude,'" *Frega*, 179 F.3d at 799, *quoting Stites*, 56 F.3d at 1024, must include the power to remove an assigned prosecutor if the court can identify a reasonable possibility that the prosecutor's testimony will be required during trial. To the extent the majority adopts the ethical rule as the sole standard and concludes that the court must instead find a "likel[ihood]" that the prosecutor will become a material witness, ER 3.7(a), Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42, it has unduly restricted the trial court's discretion.

¶18 Here, the respondent judge was presented with a motion for disqualification of the assigned prosecutor on the ground that the prosecutor might become a witness in the case. That motion was presented together with a detailed record about the prosecutor's involvement as a witness to potentially important events in the case. The parties do not dispute that the assigned prosecutor was present during a free talk by one of the three codefendants, the recording of which has been lost by the state. The prosecutor was also a crucial witness during an internal investigation conducted by the Pinal County Sheriff's Office to determine how that evidence was lost. In that investigation, the lead detective contradicted the assigned prosecutor and maintained he had provided the recording to the assigned prosecutor after the free talk. We must therefore determine on this record whether the respondent judge acted within his substantial discretion in disqualifying the assigned prosecutor. Our analysis must turn on (1) whether some or all of the codefendant's statements about the events surrounding the alleged crime, memorialized during the free talk, will be admissible at trial; (2) if so, whether the details and nuances of those statements might be disputed, given that the recording has been lost; (3) whether the defendants will be entitled to a *Willits* instruction on the ground that the specific contents of those statements may have been exculpatory, *see State v. Willits*, 96 Ariz. 184, 191, 393 P.2d 274, 279 (1964) (allowing jury to consider state's explanation for loss of evidence

when determining whether to draw inference against state); *cf. State v. Glissendorf*, 235 Ariz. 147, ¶¶ 18-19, 329 P.3d 1049, 1054 (2014) (requiring instruction for lost recordings); and (4) whether the defendants will therefore be entitled to explore as a substantive matter the circumstances of the loss of that evidence.[4]

¶19 On each of these four potential trial topics, the assigned prosecutor was indisputably a percipient witness. In evaluating whether these topics were likely to become admissible and thereby create a reasonable possibility that the prosecutor would become a material witness at trial, we must be mindful that, in this special action proceeding, the petitioner bears the burden of demonstrating that the respondent judge abused his broad discretion in disqualifying the prosecutor. *See* Ariz. R. P. Spec. Actions 3(c) &

---

[4] As the majority has correctly observed, the prosecutor's assertion that the lead detective never gave him the recording of the free talk might also be a relevant topic during cross-examination of the lead detective. Although I would submit that such cross-examination of the detective on his credibility would be both relevant and predictable, I agree that Rule 608(b), Ariz. R. Evid., would preclude the defense from calling the prosecutor as a witness to support that line of cross-examination. However, the trial prosecutor's comparative credibility would be injected into the trial solely by such cross-examination of the detective. Under such circumstances, defense counsel would face the prospect of the prosecutor becoming an implicit witness to the detective's credibility—an implicit witness equipped with the power to conduct redirect examination on that very question and make direct arguments about those events to the jury with the added credibility of having been present when they occurred. Thus, while this set of wholly predictable circumstances does not implicate Rule 3.7(a) with its exclusive focus on whether the prosecutor might become an actual witness, it does trigger significant due process concerns about confrontation and implicit prosecutorial vouching. *See State v. Vincent*, 159 Ariz. 418, 423, 768 P.2d 150, 155 (1989) (impermissible vouching occurs when "prosecutor suggests that information not presented to the jury supports the witness's testimony").

cmt.; *see also Prantil*, 764 F.2d at 552 (trial court "is charged with the responsibility of making determinations as to the materiality of witness testimony").

¶20 Therefore, we must focus primarily on whether the record supports the respondent judge's ruling. *See State v. Green*, 200 Ariz. 496, ¶ 28, 29 P.3d 271, 277 (2001) ("'An abuse of discretion exists when the record, viewed in the light most favorable to upholding the trial court's decision, is devoid of competent evidence to support the decision.'"), *quoting Little v. Little*, 193 Ariz. 518, 520, 975 P.2d 108, 110 (1999); *Villalpando*, 211 Ariz. 305, ¶ 6, 121 P.3d at 174 (in disqualification case, no abuse of discretion occurs when record substantially supports decision); *see also State v. Robinson*, 153 Ariz. 191, 199, 735 P.2d 801, 809 (1987). Put another way, the respondent was entitled to consider the argument broadly raised by the defendants—that on this record the prosecutor could become a witness—even if the specific theories of relevance advanced by defense counsel might be unpersuasive. In my view, the state has failed to demonstrate that the respondent erred on this record in finding a risk that the prosecutor might be called as a witness. At a minimum, the respondent was entitled to conclude that some or all of the contents of Punch's free talk would become admissible at trial.

¶21 The defendants are charged with second-degree murder on a theory that they displayed extreme indifference to human life. A.R.S. § 13-1104(A)(3). Thus, the nuances of Punch's actions and the content of his conversations with the codefendants, before and during the transportation of the victims, would undoubtedly be probative as to the codefendants' respective states of mind.[5] And, although the hearsay rule might provide obstacles to the presentation of that evidence, all or some of Punch's statements would become readily admissible if (1) Punch takes the witness stand; (2) Punch's statements are not offered for the truth of the matter asserted, because they demonstrate a state of mind; or (3) the codefendants can successfully argue that the lost statements

[5] Notably, the state's paralegal asserted as part of the questioning during the internal investigation that she believed portions of the free talk would be exculpatory.

contained exculpatory evidence and therefore a reconstruction of those statements is necessary to inform a *Willits* instruction.

¶22 From this, the respondent judge was entitled to consider that the contents of Punch's free talk could possibly, if not likely, become admissible at trial and, in the absence of a recording, the details of that free talk would likely be disputed. Because the risk of the assigned prosecutor becoming a witness is evident from the record presented, and the state has failed to demonstrate that the prosecutor would not be called as a witness, I would affirm that portion of the respondent's order disqualifying the individual prosecutor assigned to the case.