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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

CURTIS F. PRICE,

On Habeas Corpus.

S069685

~~S006~~685

Related Cases:
S004719, S018328

RESPONDENT'S OPPOSITION TO MOTION TO DISQUALIFY THE OFFICE OF THE CALIFORNIA ATTORNEY GENERAL AND SENIOR ASSISTANT ATTORNEY GENERAL RONALD A. BASS AS COUNSEL

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DEATH PENALTY

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INTRODUCTION

Petitioner moves this Court to disqualify the entire California State Attorney General's Office in this case due to the alleged misbehavior of one of the trial prosecutors in this case, Ronald Bass. Mr. Bass is now a Senior Assistant Attorney General, and is in charge of the Criminal Law Division of the San Francisco office of the Attorney General's Office. Petitioner claims Mr. Bass' alleged misconduct may have given rise to a sinister cover-up conspiracy that infects the entire staff, not only of the San Francisco Office of the Attorney General, but of the entire office statewide. At this point in these proceedings, petitioner's allegations of misconduct are based on hearsay allegations in his petition, speculation and supposition.

Petitioner's requested remedy would obviously be damaging to the cause of justice in this case. It took the undersigned deputy over a year to read the voluminous record in this case and prepare the respondent's briefs in the California State Supreme Court. That exercise obviously provided knowledge and insight into the case which would be difficult, if not impossible, for another attorney to duplicate.

Thus, petitioner's request for recusal would grossly delay the course of this case, and could cause substantive harm to the People's ability to defend the judgment of the state court.

Happily, the state and federal law in this area does not require this Court to act in such a precipitous manner. As we will discuss, the law essentially allows this Court to decide for itself whether its confidence in the good faith of the undersigned attorney and the San Francisco Attorney General's Office remains strong enough to allow current representation to continue. Petitioner's allegations of misconduct are at this point speculative and unsupported by admissible evidence, and given that those allegations will be fully adjudicated in due course in the adjudication of the substantive claims in the petition. Petitioner has provided no ground to challenge the prosecution's good faith at this point. Further, we believe the sort of misconduct alleged, even if to some degree established at some point in these proceedings, (which we do not anticipate) is not such as to cast doubt on the ability of unrelated members of this office to investigate and litigate fully in good faith on behalf of this Court.

For these reasons we oppose the motion to recuse.

1. PETITIONER'S ALLEGATIONS

Petitioner accuses the trial prosecutors in this case, including Ronald Bass, of several forms of misconduct. First, petitioner accuses Mr. Bass of numerous violations of the obligation to discover exculpatory materials. Petitioner also claims that numerous inducements were given to three prosecution witnesses, details of which were suppressed. The fact that those witnesses did not testify to these supposed inducements leads petitioner to accuse the prosecutors of

producing false testimony. Finally, petitioner makes a wild claim, based on anonymous hearsay, that Mr. Bass committed misconduct with one of the sitting jurors.

2. LEGAL ANALYSIS

Petitioner cites numerous state and federal cases, but, we believe, petitioner fails to adequately categorize and analyze them. None of these cases provides solid ground for petitioner's motion at this time.

Numerous cases discuss the situation where a defense attorney takes employment with a prosecution agency that has open cases against the former defense counsel's ex-clients. We believe it obvious that those cases are distinguishable from our situation. Those cases primarily concern the possibility that confidential, privileged information could leak, however inadvertently, from the ex-defense counsel to his new prosecutorial colleagues. Such a real possibility, independent of any accusation of bad faith, has been treated by the cases as an easily isolated problem.

In *United States v. Catalanotto* (D. Ariz. 1978) 468 F.Supp.503 the ex-defense counsel entered the small, 12 lawyer U.S. Attorney's Office in Tucson. The court there recused the entire Tucson office, but stated that the same blanket disqualification would not have been necessary in the larger Phoenix office. The court endorsed the general proposition of *United States v. Weiner* (9th Cir. 1978) 578 F.2d 757, 767 that the knowledge of one attorney in a prosecutorial office is not imputed to others in that agency. This presumption differs from the common presumption of communication in a private firm.

The court found it sufficient there to merely transfer the case from the small Tucson office to the Phoenix office. For our case, it is informative that both of those offices are in the district of Arizona, presumably under the supervision of the same United States Attorney.

Petitioner cites to similar California cases. In *Younger v. Superior Court* (1978) 77 Cal.App.3d 892, one Johnnie Cochran left his defense firm to take the number 3 position in the Los Angeles District Attorney's Office. The appellate court found no abuse of discretion in the trial court's recusal of the entire Los Angeles District Attorney's Office from all pending cases of Cochran's ex-clients. (The Los Angeles District Attorney's Office requested such self-recusal in that case; the state Attorney General, to whom the cases fell, opposed it.) *Younger* relied on *People v. Superior Court (Greer)* (1971) 19 Cal.3d 255 to find that an appearance of misconduct due to Cochran's supervisory powers over line deputies justified the recusal.

Such reliance was later disapproved in *People v. Merritt* (1993) 19 Cal.App.4th 1573. *Merritt* pointed out that *Greer* was subsequently overruled by Penal Code section 1424 and *People v. Conner* (1983) 34 Cal.3d 141 which requires a two part test for recusal. First, the trial court must decide whether there is evidence of a real or apparent conflict. But, second, the trial court must then decide whether the conflict is *grave* enough to render it unlikely that the defendant would be treated fairly by the prosecution. (See Pen, Code, § 1424.)[1/] Given that the court in *Younger* did not assume that Mr. Cochran could not

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1. Section 1424 states in part: "The motion may not be granted unless the evidence shows that a conflict of interest exists would render it unlikely that the defendant would receive a fair trial."

We would argue that the federal and state standards are essentially identical for purposes of this case.

keep his confidences, it is difficult to see what ill effect his supervisory powers alone would have had on line deputies prosecuting cases against Cochran's ex-clients. As such, *Merritt's* disapproval of *Younger* seems to be persuasive, and *Younger* seems to be superseded.

People v. Lepe (1985) 164 Cal.App.3d 685 involved an essentially identical situation where a court ordered the entire district attorney's office recused after a defense counsel became the district attorney. *Lepe* seems unpersuasive for the same reasons as *Younger*. *Merritt* further stressed that the disqualification of an entire office is disfavored. These rulings were echoed in *Matter of Grand Jury Investigation*, 918 F.Supp. at 1381, which concurred in the belief that *Conner* overruled *Greer*, eliminating mere appearance of conflict as a ground for recusal. The latter case also disqualified an individual assistant U.S. Attorney, not the entire office. At any rate, the rationale for recusal in these cases differs sharply from that in our case, where simple communication is not an issue.

More to the point in our situation are cases concerning misconduct by a prosecuting attorney. Petitioner cites several of these, but none provides substantial support for his current position.

In *United States v. Omni International Corporation* (D. MD 1986) 634 F.Supp. 1414 the court found that the federal prosecutors in the case before it had concealed and created evidence. The district court found this the "worst" misconduct that it had ever seen. The misconduct was revealed to the court in evidentiary hearings on the subject. The court endorsed "the well-settled proposition that the supervisory power still exists for 'truly extreme cases.'" The court continued, ruling that supervisory powers "should be exercised sparingly and only on a showing of demonstrated and long standing prosecutorial

misconduct." We believe these statements form the basic rules that this Court should follow in evaluating this topic.

The court in *Omni* dismissed the indictment there without prejudice, and disqualified the individual assistant U.S. Attorney, and the investigatory agents involved in the case, from further proceedings in that case. However, the court disqualified no other attorneys in the local U.S. Attorney's Office. And, most importantly for our case, it appears from the caption of that case that attorneys from the local Maryland U.S. Attorney's Office were allowed to handle the proceedings which resulted in the exposure of the misdeeds involved, and the ultimate recusal of the culpable attorney. The court's decision was further based on a 28-day evidentiary hearing, at which the misconduct could be "demonstrated" by admissible evidence. There is no indication that the recusal preceded this hearing, or that the court had any doubt whatsoever that the attorneys of the local U.S. Attorney's Office could be trusted to competently and evenhandedly handle those proceedings even though they delved into the misconduct of one of their colleagues. Obviously, given the result, the court's faith in those attorneys was justified, and all of the culpable attorney's misdeeds were exposed. We believe that case provides strong guidance here.

We next move to the case that is the centerpiece of petitioner's discussion, and on which he places greatest reliance. *United States v. Boyd* (N.D. Ill. 1993) 833 F.Supp. 1277 concerns the multiple trials of numerous defendants accused of being members of the notorious Chicago gang the El Rukns. After convictions at separate trials of five separate groups of defendants, new trial motions were held on multiple grounds. Primarily, the defendants claimed that the "cooperating

witnesses", that is, ex El Rukn members who were testifying for the prosecution, continued to use drugs while in custody during the trial, with the knowledge of the prosecutors. These allegations were heightened by the fact that the witnesses had testified that they could be believed because they had "seen the light" and had gone straight. Further, the witnesses were accused of having received favored treatment in jail, including broad phone privileges, conjugal visits, and other benefits, all of which were known to, and suppressed by, the prosecutors in the cases.

The court in *Boyd* found that these allegations were substantially true, and that the prosecutors suppressed knowledge of these facts. Further, the prosecutors allowed the witnesses to testify in a way that the prosecutors knew was false. The *Boyd* court granted new trials to the individual group of defendants before it. The courts in at least two of the other four severed trials granted similar new trial motions on similar evidence and similar rulings. (See *United States v. Boyd*, 833 F.2d at p. 1287.)

Petitioner relies on *Boyd*, obviously patterning his allegations as to Mr. Bass on the misdeeds of the prosecutors in the *Boyd* case. Unfortunately for petitioner's argument, none of his arguments are supported by the opinion in *Boyd*.

First, there is no indication in *Boyd* that the court there recused ***any*** attorney from the case, let alone the entire United States Attorney's Office involved. The Court there noted that the United States Attorney for the Northern District of Illinois was recused from supervision over the case, but the court did not indicate the genesis of that recusal. (Note the use of passive voice in this statement.) This minor mystery is settled by the related case of *United States v. Burnside*

(N.D. Ill. 1993) 824 F.Supp. 1215, one of the other four El Rukn trials. There, the district court recites:

> "The evidentiary hearing before this court as to the *Burnside* trial was scheduled to begin October 13, 1992. It was delayed a the request of the then United States Attorney for the Northern District of Illinois Fred Foreman, so an 'internal investigation with the U.S. Attorney's office' (Transcript of Proceedings of October 13, 1992, p. 5) could be conducted into information that had been received by the U.S. Attorney's Office from a former AUSA, Lawrence Rosenthal. Rosenthal had reported that he talked to AUSA Hogan in 1989 about a drug test report he, Rosenthal, had received regarding certain 'El Rukn' witnesses. None of this had been disclosed by AUSA Hogan to the defense in the *Burnside* trial." (*United States v. Burnside*, 824 F.Supp. at pp. 1223-12224.)

Footnote seven states:

> "United States Attorney Foreman subsequently recused himself effective December 7, 1992 from supervisory control over the 'El Rukn' cases. His recusal was accepted by the Department of Justice, and John A. Smietanka, the United States Attorney from the Western District of Michigan, was appointed Acting United States Attorney for this District as to the 'El Rukn' matters. (H.3866-667.) Mr. Foreman has since resigned his position as U.S. Attorney for the Northern District of Illinois.' (*Id.*)

Thus, the court in *Boyd* did not itself recuse ***anyone***. Petitioner's even broader argument that an entire office should be recused is wholly unsupported by the opinion. Further, *Boyd* indicates that the recusal of the United States Attorney from that case occurred on December 7, 1992. It appears that evidentiary hearings in at least two of the other trials, hearings which resulted in a grant of the new trial motion, were at minimum commenced before that recusal. (October 15, 1992, and November 16, 1992, see *United States v. Boyd*, 833 F.Supp. at p. 1287.) As such, even with the grave allegations standing against the United States Attorney's Office, the district court

judges in those cases apparently felt confident that they could commence the hearings with the cooperation of the United States Attorney's Office which was accused of the misconduct. The fact that the hearings developed plenary evidence on the issues, resulting in the granting of the new trial motions, seems to support the district court's confidence that no sinister coverup would be conducted. The involvement from beginning to end of these hearings of attorneys from the very United States Attorney's Office in which the misconduct occurred further shows that no blanket recusal, nor any recusal of any but the most culpable prosecutors, was reasonable.

Boyd thus stands as evidence that prosecutors may be overzealous. But, it does not support any recusal argument made by petitioner in this case.

3. ANALYSIS OF THE GRAVITY OF THE CONFLICT IN THIS CASE AT THIS TIME

We assert that the state standard under section 1424 concerns the belief of this Court as to the gravity of the possibility that a given prosecutor will, because of a demonstrable conflict, lose his ability to act in an even handed manner. In *People v. Eubanks* (1996) 14 Cal.4th 580 this Court informatively addressed the reasoning process to be engaged in by the trial court. The court there addressed the situation where a private corporation in Santa Clara County financed an investigation by the local district attorney's office into a case in which the corporation was the victim. The Court found such a situation could satisfy the first prong of the *Conner* test by showing a legally cognizable conflict. But, the Court reversed the lower court's disqualification of the district attorney's office because the lower court did not consider

whether the gravity of the conflict made even handed treatment of the defendants "unlikely." The question involved there was whether the local district attorney would be reluctant to refuse to prosecute given its indebtedness to the victim-corporation in the case. The Court remanded the case for the lower court to consider numerous factors in order to evaluate the gravity of the conflict. One proper factor was the strength of the government's case there. We believe that this Court should undertake a similar factor analysis, based on numerous indications in the record as to the gravity of the conflict alleged in this case. We suggest that such factors include the following:

1) The proof is at present insubstantial. The first factor we believe this Court should consider is the lack, at this stage, of real evidence of a conflict. None of the cases we have discussed endorse recusal without hard demonstrable evidence to establish the conflict, and the likelihood of misbehavior. Here, the court has no such evidence. For example, the current showing on the issue of Mr. Bass' alleged suborning of a juror is a hearsay declaration by counsel that she has some evidence from a source who refused personally to sign a declaration. The claim, legally speaking, does not exist at this juncture. If such a claim, which may or may not be even maintained later by petitioner, could force a recusal, any petitioner could gain such a strategic advantage at virtually any time.

Petitioner's claims as to the issue of lack of discovery, and the resulting claims of use of false testimony, are similarly substantially unsupported at this point. No "grave" conflict is shown by petitioner at this juncture.

2) The alleged misconduct does not concern a crucial issue. The entire topic of the government informants in this case is not a

"grave" one, because their testimony in this case has already been repudiated by respondent in the state supreme court. In *Boyd*, the court found reversal necessary because the informant-witnesses were crucial to the government's case, by the government's own admission. (See *United States v. Boyd*, 833 F. Supp. at p. 1365.) Further, the witnesses there gained credibility by forcefully asserting that they had "seen the light" and gone straight. This meant impeachment on current misdeeds was not merely cumulative to the litany of other powerful impeachment already proffered there by the defense. (Note that in *United States v. Bates* (N.D. Ill. 1994) 843 F.Supp. 437, 438 which concerned another of the five El Rukn trials, the district court there denied the new trial motion on a similar evidentiary basis as in *Boyd*. The district court there refused to overturn the convictions precisely because the cooperating witnesses there had already been thoroughly impeached. The court of appeal affirmed *Bates* in *United States v. Williams* (7th Cir. 1996) 81 F.3d 1434. Chief Judge Posner endorsed the refusal of the district court in *Bates* to overturn the verdict, finding that the impeachment of the cooperating witnesses would not have been substantially increased by the evidence the government suppressed. Further, Judge Posner strongly hinted that had the district court judges in *Boyd* and the other El Rukn trials denied the new trial motions, those decisions would have been supported by substantial evidence, and would have been affirmed on appeal.)

Here, to the contrary, the government witnesses Thompson and Smith, on which petitioner bases his primary claims of prosecutorial misconduct, were utterly destroyed as credible witnesses, a factor respondent willingly conceded at length in the Respondent's Brief on appeal, in this Court. While Thompson and Smith gave much colorful

testimony regarding prison life and gang behavior, the only crucial issue in the case was which Aryan Brotherhood member actually murdered the victim Richard Barnes. On this individual point, there is no reason to believe that the jury trusted Smith and Price. (See Respondent's Brief on appeal at 274, 184. (Discussing harmless error analysis, impeachment of Smith and Thompson, and lack of necessity of their testimony.))

Far from having seen the light, Thompson and Smith admitted that they enjoyed criminal behavior and longed to commit more and better crimes. They bragged about their ability to lie and to implicate the innocent. Thus, substantively, there is no strategic reason for any attorney in this office to fear revelations about these witnesses, because damage to their credibility is immaterial.

Also, as petitioner partly notes, the subject of discovery of prisoner records was extensively treated by the state trial court. Mountains of material was given under seal to that trial court, which reviewed and redacted it almost daily throughout the lengthy trial proceedings. Petitioner's claims of withheld discovery were then reviewed in camera by this Court, on direct appeal. Petitioner has adduced no evidence whatsoever at this juncture to disprove the presumption that *all* of the materials he claims were suppressed were in fact given to the state trial court, and to this Court, and found to be non-discoverable.

3) The case law does not endorse petitioner's "infection" theory. No case cited by petitioner advances the proposition that attorneys in a prosecutor's office must be distrusted because other attorneys in that office have allegedly, or actually, committed misconduct. As we have pointed out, the court that excoriated the trial

prosecutor in *Boyd* evidently did not distrust or recuse the remainder of that office. That court in fact repeatedly lauded the cooperation of the remainder of that office in the investigation of misconduct. (See *United States v. Boyd*, 833 F.Supp. at fns. 17 & 19.) In all of the misconduct cases cited by petitioner, it appears the same office was permitted to defend against the allegations of misconduct and in all of those cases, the findings of misconduct were created with the aid of other members of the office of the targeted attorney. This Court can expect no less cooperation and good faith from the attorneys in this office.

4) The good faith of the attorney handling this case can be relied upon. The fact that the attorney accused of misconduct is the supervisor of the attorney of record has never been cited as grounds for recusal in a misconduct case. No court has claimed to discern a sinister conspiracy to coverup the misdeeds of other attorneys in a prosecutor's office. To the contrary, such misdeeds have been readily unearthed with the help of the other prosecution attorneys. It is simply not plausible that one prosecution attorney would jeopardize his honor and career to cover up despicable actions of another, especially in the factual circumstances of this case. Petitioner's basic premise should receive the harsh skepticism it is due.

CONCLUSION

In sum, we make the following arguments: There is, at present, no evidence of misbehavior. The raw allegations made by petitioner are of little weight at this stage. Substantively, petitioner's allegations are minor, given that they relate primarily to witnesses who did not contribute substantially to the verdict.

In order to decide whether a grave conflict exists here, this Court will have to consider the substance of petitioner's claims. These claims can and should be treated in due course in this habeas corpus proceeding. If such claims can be raised to the level of evidentiary allegations, an evidentiary hearing can be convened. If, during the course of that hearing, this Court believes sufficient evidence has been adduced to show a sufficiently grave possibility of conflict, this Court's powers can then be exercised in a judicious manner.

For these reasons, petitioner here has not at this juncture shown by demonstrable evidence a conflict of such gravity as to cause this Court to doubt the good faith of the California State Attorney General's Office in general, nor of the undersigned attorney in particular. As such, the filing of the motion to dismiss for lack of exhaustion can be seen to have been filed in good faith, and should be considered by this Court in due course. No recusal is appropriate at this time.

WHEREFORE, respondent respectfully requests this Court deny petitioner's motion for disqualification.

Dated: July 20, 1998

Respectfully submitted,

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DECLARATION OF SERVICE

Case Name: **In re Curtis F. Price** No.: **S0069685**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.
On July 20, 1998, I placed the attached

RESPONDENT'S OPPOSITION TO MOTION TO DISQUALIFY THE OFFICE OF THE CALIFORNIA ATTORNEY GENERAL AND SENIOR ASSISTANT ATTORNEY GENERAL RONALD A. BASS AS COUNSEL
in the internal mail collection system at the Office of the Attorney General, 50 Fremont Street, Suite 300, San Francisco, California, 94105, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 20, 1998, at San Francisco, California.

GLORIA MILINA

Gloria Milina
Signature