

**STATE OF ARIZONA
IN THE COURT OF APPEALS
DIVISION TWO**

STATE OF ARIZONA
Ex rel. M. LANDO VOYLES
PINAL COUNTY ATTORNEY,
Petitioner,

No. 2 CA-SA 2014-0050

v.

Pinal County CR 201201764

THE HONORABLE PETER J. CAHILL,
VISITING JUDGE OF THE PINAL
COUNTY SUPERIOR COURT,
Respondent,

And

RICHARD T. WILSON,
Real Party in Interest,
Respondent.

PETITION FOR SPECIAL ACTION

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STATEMENT OF JURISDICTION

This Court has jurisdiction to consider this petition for special action under Article 6, §§ 5 and 9 of the Constitution of Arizona, A.R.S. §§ 12-2021 *et seq.*, and Rules 1, 3, 4, and 7, Arizona Rules of Procedure for Special Actions.

Special action review is discretionary. This Court will ordinarily exercise its discretion and grant special action review when the issue raised is a pure question of law with undisputed facts and the issue is likely to arise again. *See generally State v Kearney*, 206 Ariz. 547, 548, 81 P.3d 338, 339 (App. 2003); *Raney v Lindberg*, 206 Ariz. 193, 196, 76 P.3d 867, 870 (App. 2003); *State ex rel. Romley v Rayes*, 206 Ariz. 58, 60, 75 P.3d 148, 150 (App. 2003); *State ex rel. Hance v Arizona Bd. of Pardons and Paroles*, 178 Ariz. 591, 595, 875 P.2d 824, 828 (App. 1993).

“Special action relief is reserved for those instances where there is no other equally plain, speedy or adequate remedy and is appropriately granted on pure questions of law where the issue is a matter of first impression and of statewide importance.” *State ex rel. Miller v Superior Court*, 189 Ariz. 228, 230, 941 P.2d 240, 242 (App. 1997). See also *State ex rel. Collins v Superior Court*, 129 Ariz. 156, 159, 629 P.2d 992, 995 (1981); *State ex rel. Hyder v Superior Court*, 114 Ariz. 337, 339, 560 P.2d 1244, 1246 (1977).

This case meets the criteria for special action jurisdiction for several reasons. First, this is an issue which presents the purely legal question of whether the Pinal County Attorney's Office may be disqualified based on the mere appearance of impropriety when the defendant has not been prejudiced, there is no conflict of interest, and the prosecutors currently handling the case were not involved in the alleged misconduct. Furthermore, this issue is one of statewide importance, as Arizona's appeals courts have already made clear by accepting jurisdiction in other special actions based on other disqualifications of entire County Attorney's Offices.

Most importantly, special action jurisdiction is appropriate because the State has no equally plain, speedy, or adequate remedy by appeal. If the Respondent Judge's ruling is allowed to stand, then the State will be in the untenable position of trying to find conflict counsel with the desired expertise and experience for a death penalty trial that is set for November 12, 2014. Allowing Respondent Judge's ruling to stand would deprive the State of its right to have counsel of its choice.

Therefore, the State requests this Court to accept jurisdiction, grant relief, and issue an Opinion or order settling this issue and providing necessary guidance to the Arizona bench and bar.

STATEMENT OF THE ISSUE

With a trial date looming in a death penalty case, did the Respondent Judge abuse his discretion by disqualifying the entire Pinal County Attorney's Office based on conduct that occurred before the present lead trial attorney was employed by the office, that the court found did not prejudice the Defendant, and that the court found was unlikely to occur again?

STATEMENT OF FACTS

Six minutes. Two motions.¹ A single afternoon. (EH I, 65, 68-69, 131-132).

² That is how long it took for paralegal Tari Parish to realize that defense counsel had filed improper *ex parte* motions under Rule 15.9. (EH I, p. 103). She came upon this information by accident. (EH I, pp. 102-103,105-106). The accident that allowed Ms. Parish to access a document that had been ordered sealed was a flaw in the court clerk's computer system. (EH I, pp. 69, 81-82). The Pinal County Clerk's Office used a computer system called AJACS³ to make electronic copies of court filings available to the County Attorney's Office. (EH I, p. 98-99). Clerk

¹ The motion that was the focus of the hearings was the June 12, 2013 *ex parte* motion. There was another *ex parte* motion filed on April 4, 2013. This motion was subsequently unsealed because it was an improper use of Rule 15.9. (EH I, pp. 78-80; Appendix E).

² EH I refers to pages in the Evidentiary Hearing Transcript of May 6, 2014.

³ The AJACS system uses the OnBase document management system. (EH I, p. 130).

Chad Roche testified that in addition to flaws in the system’s “security trees,” “human error on data entry” could cause documents to show up with the wrong filing party information or to continue to reflect that they are sealed when they have been ordered un-sealed. (EH I, pp. 79-82, 86, 88). After Ms. Parish inadvertently accessed the *ex parte* documents at issue here, the County Attorney’s Office worked with the Clerk’s Office to correct the access problem. (EH I, p. 87). Mr. Roche testified that the problem had been solved and that the State would no longer have access to documents that had been ordered sealed. (EH I, p. 83).

The document that started all this was an *ex parte* motion, filed by defense counsel, asking for the murder victim’s medical and mental health records. (EH I, p. 127). The motion was filed under Rule 15.9, which is a procedural rule that allows defendants to secure funding for experts, investigators, and mitigation specialists without revealing the defenses being explored.⁴ The victim whose records were being sought was Nolan Pierce. (EH I, pp. 6-7; Appendix B, p.2). Mr. Pierce was incarcerated in the Department of Corrections when his cellmate, Defendant Richard Wilson, strangled him. (Appendix B, pp. 1-2). At the time of Pierce’s murder, Defendant was already serving a life sentence for first-degree murder. (EH I, pp. 150-152). After strangling Mr. Pierce, Defendant simply left his body for at least two days in the cell they had shared before he told the guards

⁴ Ariz.R.Crim.Pro. Rule 15.9 Appointment of investigatory and expert witnesses for indigent defendants.

to “get this trash out.” (Appendix B, p. 2). The State filed a notice of intent to seek the death penalty in this case. (Appendix A, p. 1).

It was while doing a routine check of the electronic records for this case that Ms. Parish noticed the entry titled “*Ex parte* Motion for Court Ordered Disclosure of Medical/Mental Health Records of Alleged Victim.” (EH I, pp. 99, 101). Believing the motion must have been filed by the County Attorney’s Office, Ms. Parish clicked on the entry. (EH I, pp. 102-103, 105). When the document opened, a cover page indicated that it had been filed under seal. (EH I, pp. 102-103). And when Ms. Parish scrolled to the second page, she realized the *ex parte* motion had been filed by the defendant, not by the County Attorney’s Office. (EH I, p. 103). At the moment Ms. Parish realized the document was a defense motion, she already knew two things: 1) that the motion was an *ex parte* request for a murder victim’s medical and mental health records; and 2) that the defense was not entitled to have those records under Rule 15.9. (EH I, pp. 101-103).

The deputy county attorney assigned to this case was out of the office on leave, so Ms. Parish took the *ex parte* motion to another attorney in the office, Greg Hazard. (EH I, pp. 99-101, 104; EH II, p. 9).⁵ Mr. Hazard had been assigned to cover the Wilson case. (EH I, pp. 100-101, 114; EH II, p. 6). When Mr. Hazard reviewed the *ex parte* motion, his immediate and primary concern was whether the

⁵ EH II refers to pages in the Evidentiary Hearing transcript of May 8, 2014.

victim's records had yet been disclosed to the defendant. (EH II, pp. 21, 28-29). He instructed Ms. Parish to check the electronic records system ("AJACS") for an order granting the motion. (EH I, p. 104). Ms. Parish discovered that the court had entered an order granting the motion. (EH I, p. 104). Mr. Hazard immediately notified his supervisor and the next day he consulted the chair of the office's ethics committee and another supervisor about the impropriety of the defense motion and what to do to prevent the disclosure of the records. (EH II, p. 12-13, 27; Appendix B). His efforts to protect the integrity of the victim's medical records were ultimately successful because Judge Georgini stayed his order for their disclosure. (Appendix D). Defendant's *ex parte* motion was later found to be an improper use of Rule 15.9. (EH I, pp. 25-26). The State only used the information obtained by viewing the *ex parte* motion and order to prevent the improper disclosure of the victim's privileged medical information. (Appendix B).

Defendant responded to the State's Motion to vacate the order granting Defendant's *ex parte* motion by challenging how the *ex parte* motion had been accessed. (Appendix C). Defense counsel aggressively attacked the State for having discovered Defendant's attempt to improperly gain access to the victim's medical records via the *ex parte* provisions in Rule 15.9. (Appendix C).

In January, the Defendant moved to have the case heard by a judge from outside Pinal County. (HT, p. 16-17).⁶ It was Defendant's request for sanctions for the accidental access to his improper *ex parte* motion and the resulting order that shifted the focus of the evidentiary hearings that followed.

On May 6 and May 8, 2014, Respondent Judge heard evidence regarding the Pinal County Attorney's Office's inadvertent access to documents, which had been ordered sealed, but that had not been sealed electronically.⁷ County Clerk Chad Roche admitted that due to problems with the computer system, the Clerk's Office was not able to electronically seal some documents while allowing access to others. (EH I, p. 81). The computer system's problem was brought to light by the documents accessed on July 18, 2013. (EH I, p. 70, 131-132). The County Attorney's Office worked with the Clerk's Office to correct the problem, and Mr. Roche said the problem had been resolved. (EH I, p. 87).

During the course of the hearing and at its conclusion, Respondent Judge offered some guidance as to the way the court viewed the issues. In doing so, Respondent Judge said it was unlikely that this situation – accidental accessing of sealed documents – would occur again. (EH II, p. 64). Respondent Judge expressed trust in Ms. Eazer's assurances that the office would train its employees

⁶ HT refers to pages in the January 24, 2014 Hearing Transcript.

⁷ There was some confusion over whether documents that had been ordered to be filed under seal but that were electronically available should be deemed to have been electronically "sealed." (EH I, p. 82).

to better handle any inadvertent access to sealed documents in the future. (EH II, p. 64). Finally, Respondent Judge indicated that he did not believe disqualification was necessary or appropriate. (EH II, pp. 49-50; Appendix G [May 8, 2014 Minute Entry]).

Sixty days later, Respondent Judge entered an order disqualifying the Pinal County Attorney's Office from prosecuting this case. (Appendix A). He made this ruling despite Mr. Roche's assurances that the problem had been fixed and despite his confidence in Deputy County Attorney Eazer that neither she nor anyone in her office would view documents that were ordered sealed. (EH I, p. 83; EH II, pp. 50-51, 64). Instead he based his order on findings that Ms. Parish had viewed the documents intentionally and that the Office would continue to engage in willful disobedience of court orders in the future. (Appendix A, pp. 2, 6-8). But there is no support in the record for his findings. See EH I & EH II generally.

ARGUMENT

With a trial date looming in a capital case, the Respondent Judge abused his discretion by disqualifying the entire Pinal County Attorney’s Office based on the “appearance of impropriety” for a paralegal’s inadvertent access to two sealed motions. Respondent Judge made that decision despite lead counsel not being employed by the office at the time, substantial evidence that the access problem was fixed, and his own finding that the defendant was not prejudiced.

In this case, the Respondent Judge disqualified the entire Pinal County Attorney’s Office from prosecuting this case based on his finding of an “appearance of impropriety.” His conclusion that there was an “appearance of impropriety” stems from Respondent Judge’s findings that the Pinal County Attorney’s Office *intentionally* violated a court order and that it would do so again in the future. Neither finding is supported by the record, which shows that the deputy county attorney handling this case had nothing to do with the conduct at issue and that the defendant was not prejudiced by the conduct.

Standard of Review

Disqualification of counsel is reviewed for abuse of discretion. *Amparano v ASARCO, Inc.*, 208 Ariz. 370, 376, 93 P.3d 1086, 1092 (App.2004). An abuse of discretion occurs if the court erred in its application of the law or when the record does not substantially support its decision. *Villalpando v Reagan*, 211 Ariz. 305, 307, ¶6, 121 P.3d 172, 174 (App.2005). In this case the Respondent Judge

committed an error of law by mis-applying the standard for disqualification, disregarded the evidence by making unsupportable extrapolations from the testimony, and lacked a substantial basis for the decision.

Respondent Judge Failed to Correctly Apply the *Alexander* Factors.

Most claims for attorney disqualification are based on a conflict of interest, whether real or perceived. In *Alexander v Superior Court*, 141 Ariz. 157, 165, 685 P.2d 1309, 1317 (1984) the Arizona Supreme Court said that stricter judicial scrutiny should be applied to motions to disqualify based on the appearance of impropriety and that “when there is no claim the trial will be tainted, appearance of impropriety is simply too slender a reed upon which to rest a disqualification order except in the rarest of cases.”

The Court in *Alexander* set forth the standard for attorney disqualification. Specific to a motion to disqualify based on the appearance of impropriety the Court found the following should be considered:

- 1) Whether the motion is being made for the purposes of harassment;
- 2) Whether the party bringing the motion will be damaged in some way if the motion is not granted;
- 3) Whether there are any alternative solutions, or whether the alternative solution is the least damaging under the circumstances; and

4) Whether the possibility of public suspicion will outweigh any benefits that might accrue due to continued representation.

And while Respondent Judge cited the *Alexander* standard, he did not apply it correctly to the facts adduced at the hearing.

First, Respondent Judge found that the motion to disqualify was not made for purposes of harassment. (Appendix A, p. 8). No formal motion to disqualify the office was ever filed. Instead, defense counsel requested disqualification as a sanction for the access to *ex parte* filings in his response to the State's motion requesting that the order granting Defendant's *ex parte* request for the victim's medical/mental health records be stayed. Rather than responding to the State's motion by explaining his improper use of Rule 15.9, the Defendant completely changed the subject to accuse the State of impropriety for how it stumbled onto his abuse of Rule 15.9. (Appendix C; HT, p. 5). That opportunistic tactical maneuver to get the County Attorney's Office disqualified amounts to harassment.

Requesting the disqualification of opposing counsel "for delay or other tactical reasons, in the absence of prejudice to either side, is a practice" that the Arizona Supreme Court will not tolerate. *Cottonwood Estates v Paradise Builders*, 128 Ariz. 99, 105, 624 P.2d 296, 302 (1981). The tactical advantage gained by the Defendant is to ensure that the State is not as prepared for trial as it would be otherwise.

Under the second *Alexander* factor, Respondent Judge found “that Defendant would be prejudiced if the Pinal County Attorney’s Office continues to disregard court orders that are intended to keep some matters *ex parte*.” (Appendix A, p.8). While prejudice to the defendant is not a required showing to disqualify a prosecutor based on alleged appearance of impropriety, courts are supposed to consider any prejudice or the lack thereof. *Turbin v Superior Court In and For County of Navajo*, 165 Ariz. 195, 199, 797 P.2d 734, 738 (App.1990). In this case, the Respondent Judge found no specific prejudice from the State’s conduct, but instead went out of his way to conclude that the defendant could be prejudiced in the *future* if the County Attorney’s Office accesses additional *ex parte* filings. There is no basis in the record for finding that the Pinal County Attorney’s Office is likely to access the defendant’s *ex parte* filings in the future. Moreover, the Respondent Judge’s conclusion in the July 8, 2014 Order is in direct contradiction with what he said at the conclusion of the May 8, 2014 hearing: “I think the assumption...the Court has is it’s unlikely for that to happen again in this case.” (EH II, p. 64). And this conclusion is supported by the testimony of the County Clerk who testified that the systemic problem that made those sealed documents available had been fixed. (EH I, p. 87; EH II, p. 49). The Respondent Judge’s finding that there is a theoretical, future harm to the defendant is belied by the record, which demonstrates that the Court and the County Attorney’s Office has

taken steps to ensure that access to sealed documents does not happen again. (EH I, p. 87; EH II, pp. 50-51, 62).

As additional support for his findings on the second *Alexander* factor, the Respondent Judge says that actual prejudice has been shown – “to the authority of the court.” (Appendix A, p. 8). The State is not aware of any case law or legal theory under which the authority of a court may be found to have been prejudiced. Protecting the court from prejudice is not one of the grounds for a due process violation. The prejudice that prosecutor disqualification is designed to remedy is rooted in the protection of a defendant’s due process rights.⁸ And there are prosecutorial conflicts that implicate and pose a threat to a defendant’s due process rights. *State v Counterman*, 8 Ariz.App. 526, 529-30, 448 P.2d 96, 99-100 (1969). But an appearance of impropriety is generally not a sufficient basis to state a due process violation. A defendant does not state a claim for a violation of substantive or procedural due process “unless the conflict is so severe as to deprive him of fundamental fairness in a manner ‘shocking to the universal sense of justice.’” *Villalpando*, supra 211 Ariz. at 308. Surely a mistake, which was brought to light by the offending party, that resulted in no prejudice to the defendant, and gave the County Attorney’s Office no substantive or tactical benefit, cannot be so severe as

⁸ “The Due Process Clause of the Arizona Constitution is construed similarly to the same clause in the United States Constitution.” *State v Kaiser*, 204 Ariz. 514, 516, 65 P.3d 463, 465 (App. 2003).

to shock the ‘universal sense of justice.’ Further proof that what happened in this case does not rise to the level of a due process violation is that there was a similar situation that occurred in Yavapai County where sealed documents were inadvertently accessed by paralegals because the On Base⁹ document management system did not electronically seal the documents.¹⁰ There the trial court did not disqualify the County Attorney’s Office.

Under the third *Alexander* factor, Respondent Judge said disqualification “is an appropriate remedy considering the gravity of the violation.”(Appendix A, p. 8). The Order mentions in passing that the Respondent Judge considered lesser remedies, but the Respondent Judge does not explain why he found lesser remedies inadequate in this situation. (Appendix A, p. 2).

Finally, under the fourth *Alexander* factor, the Respondent Judge said: “...most importantly, the appearance of impropriety and possibility of public suspicion significantly outweighs any benefits of continued representation by the Pinal County Attorney’s Office.” (Appendix A, p. 9). Unfortunately the Respondent Judge did not say which, if any, benefits of continued representation it weighed against the appearance of impropriety. As discussed above, the lack of substantial support for the Respondent Judge’s finding of an appearance of

⁹ The On Base document management system is used for AJACS. (EH I, p. 130).

¹⁰ See *State v Democker*, Case No. P1300CR2010-01325 reproduced in Appendix F.

impropriety means that *any* benefit derived from the Pinal County Attorney's Office's continued handling of the case is enough. With a capital trial set only three months away, the benefits are plain. Most prosecutors have never handled a death penalty case and it requires specialized knowledge. The number of prosecutors with the desired expertise in Arizona is finite, and there is no guarantee that logistics would permit any of those prosecutors to take over this case and have it ready for trial on November 12, 2014. (Appendix A, p. 9).

Arizona courts have generally honored the right of a party, even the State, to be represented by counsel of its choice, and cases where an entire office has been disqualified are rare.¹¹ Of the Arizona cases where an entire county attorney's office has been disqualified, none have been the result of the kind of conduct alleged here. See e.g. *State v Latique*, 108 Ariz. 521, 502 P.2d 1340 (1972) (where attorney who served as co-counsel on defendant's case and had access to all privileged information changed employment and became Chief Deputy for Maricopa County, the appearance of impropriety was impossible to overcome); and *Turbin, supra* (where attorney who had been intensely involved in the defendant's representation took a job at the very office responsible for prosecuting

¹¹ No federal court of appeals has ever approved the disqualification of an entire United States Attorney's Office. *United States v Bolden*, 353 F.3d 879, 878-79 (10th Cir. 2003); *United States v Basciano*, 763 F.Supp.3d 303, 313 (E.D.N.Y.2011).

defendant, the appearance of impropriety was too great to overcome with proper screening).

In the most analogous case, the Court of Appeals upheld a trial court in its finding that defendant was unable to make the necessary showing of an appearance of impropriety where the criminal division of the county attorney's office was prosecuting him and the civil division of the same office was defending against the civil rights lawsuit filed by the defendant. Even though there was a temporal relationship between the filing of the lawsuit and the withdrawal of a plea offer, the trial court assumed that the county attorney's office acted in good faith and found no conflict or impropriety. *State v Lucas*, 123 Ariz. 39, 41, 597 P.2d 192, 194 (App. 1979).

Most trial court orders disqualifying an entire county attorney's office are found to be an abuse of discretion on appeal. Two examples come to mind: *State ex rel. Romley v Gottsfield*, 171 Ariz. 195, 829 P.2d 1241 (App. 1992) (finding the contact between new deputy county attorney and defense counsel, with whom he had previously shared office space and had social conversations about the defendant, was insufficient to trigger a vicarious disqualification); and *State ex rel. Romley v Superior Court for the County of Maricopa*, 184 Ariz. 223, 908 P.2d 37 (another vicarious disqualification case where proper screening of newly hired deputy county attorney was sufficient to overcome any appearance of impropriety).

Like the trial courts in the *Romley* cases, Respondent Judge here abused his discretion by misapplying the *Alexander* factors. Even if Respondent Judge's factual findings were sound, his error of law is an abuse of discretion that warrants this Court accepting Special Action jurisdiction and vacating the Respondent Judge's order disqualifying the Pinal County Attorney's Office.

Respondent Judge Lacked Any Factual Basis for Finding that the Pinal County Attorney's Office Would Willfully Violate Court Orders

The record in this case simply does not support the Respondent Judge's finding of an appearance of impropriety. The Respondent Judge based his finding on his belief that the Pinal County Attorney and his staff willfully disregarded an order of the court and that they would do so again in the future. In making this finding, the Respondent Judge did not apply the presumption of good faith to which a county attorney's office is entitled. *Villalpando*, supra at 310. Without hearing any evidence about the policies and procedures of the office or taking testimony from any person in the office with policy-making authority, Respondent Judge decided that it was and is the policy of the Office to ignore the court's order because it is a "wrong ruling" or a "bad call." (Appendix A, pp. 2, 6, 8-9).

First, Respondent Judge found that the initial, inadvertent access to the *ex parte* documents was not only improper but the result of some underhanded use of a computer terminal designated for victim assistance. (Appendix A, p. 3). The record does not support this finding. At the hearing Mr. Roche testified that the

documents were accessed using the CAVA (Count Attorney Victim Assistant) login on the Victim Assistance Terminal in the County Attorney's office. (EH I, pp. 69, 131). Ms. Parish testified that she used the AJACS terminal in the County Attorney's Office for general file updating and research – both legitimate purposes. (EH I, pp.98-100). There is no testimony on the record that the Victim Assistance AJACS computer was for the exclusive use of the victim assistance department. Nor was there any testimony that only the Victim Assistance AJACS computer could access sealed documents. To the contrary, Mr. Roche testified that the flaw in the system allowed anyone on AJACS to access the sealed documents. (EH I, pp. 69-70, 81-82).

What happened in this case is strikingly similar to what happened in *State v Democker*, a case from Yavapai County where paralegals used the Clerk's electronic document management system to keep their case files up to date.¹² In the *Democker* case, paralegals and employees of the Yavapai County Attorney's Office accessed dozens of documents that had been ordered sealed over a span of months. (Appendix F, pp. 6-10). While the trial court there found "plenty of

¹² This case is not cited for controlling authority. But rather the opinion is provided as an example of how a situation like what happened in this case can occur and how another court handled the issue. It is interesting to note that the document management system that created the problems in Yavapai County is On Base. On Base is the same document management system that is used for AJACS in Pinal County. (EH I, p. 130).

blame to go around,” he also determined that the County Attorney’s Office had not done anything intentionally improper. (Appendix F, p. 1-2, 56).

Second, Respondent Judge said that Ms. Parish’s reason for opening the documents “is not the point.” (Appendix A, p. 4). It is, of course, precisely the point when one is considering the gravity of the conduct at issue. Ms. Parish testified that, due to her experience with another online court records system, she operated under the belief that if a document opened, it was a document she was permitted to access. (EH I, p. 103). It was her firm belief before she opened the document titled “Ex-parte Motion for Victim’s Medical and Mental Records” that it had been filed by her office.¹³ (EH I, p. 101-102). By the time Ms. Parish realized the document had been filed by defense counsel, she had already recognized that the *ex parte* motion was obviously improper.¹⁴ Despite Ms. Parish’s uncontested testimony about her internal thought process and motivations,

¹³ The Defendant would not have been entitled to receive a victim’s medical or mental health records under Rule 15.9 because that rule only allows indigent defendants to make *ex parte* motions to the court for experts, investigators, and mitigation specialists.

¹⁴ Another improper *ex parte* motion was filed in this same case under Rule 15.9 and was subsequently ordered unsealed. (Appendix E; EH I, p. 77-80, 88). The cover page of that document saying “sealed” and the title of the motion, including “*Ex-parte*” would not have been simultaneously altered to reflect their having been unsealed because the Clerk’s Office cannot alter pleadings once they are filed. So even when the Clerk’s Office executes its duties perfectly, the physical document will look exactly the same once it has been ordered unsealed as it looked while still under seal. Ms. Parish was not aware of this particular flaw at the time and she knew the motion was *ex parte* before she was aware of the filing party. (EH I, pp. 102-103).

the Respondent Judge determined “she knew exactly what she was doing. She knew she was violating a court order.” (Appendix A, p. 4). Nothing in the record supports a finding that Ms. Parish knew she was violating a court order when she first opened the *ex parte* motion. Once it was open and she realized its contents, she sought direction from the attorney handling the case, Mr. Hazard. (EH I, p. 103-104).

Third, the Respondent Judge found fault with the conduct of the attorney to whose attention Ms. Parish brought the improper *ex parte* motion. (Appendix A, pp. 4-6). Former Deputy County Attorney Greg Hazard found himself in a situation novel to him: on one hand, he had a paralegal who had inadvertently accessed documents that should not have been available, and on the other hand, he believed he had a concurrent duty to protect the victim’s rights in a case that he was only covering. (EH II, pp. 6, 9, 21-22, 32). There is no doubt that the best practice would have been to immediately notify the court, the court clerk, and defense counsel of the accidental access.¹⁵ Since he was faced with an unfamiliar situation he contacted his supervisor and sought guidance from the chair of the office’s ethics committee.¹⁶ (EH II, pp. 12-14, 25, 27). Normally, seeking counsel

¹⁵ Notice was given to the court and to opposing counsel when Mr. Hazard filed his motion requesting Judge Georgini to reconsider his order granting the improper *ex parte* request. (Appendix B).

¹⁶ It is unclear from Mr. Hazard’s testimony at exactly what point he made it clear to his supervisors that the *ex parte* documents in question had been ordered sealed

is considered indicative of a good faith effort to handle a situation correctly. See *United States v Armstrong*, 781 F.2d 700, 711-12 (9th Cir.1986). But incredibly, Respondent Judge cites Mr. Hazard’s consultation with his supervisors and Mr. Easterday as part of the problem. That makes no sense.

Fourth, Respondent Judge found that Mr. Hazard “knew, or certainly should have known, that he was violating a court order.” (Appendix A, p. 4). Initially Mr. Hazard only knew that the motion was *ex parte*, it was not until the next day that he learned that the motion and order had been ordered sealed. (EH II, pp. 9-11, 13, 39, 41-42). Once Mr. Hazard knew of the content of the *ex parte* documents, there was no way for him to un-know it. And if anything was clear from Mr. Hazard’s testimony, it was that he felt an obligation to prevent the improper release of a murder victim’s prison health records. (EH II, pp. 21-22, 29-30). He admitted that his concern over the propriety of the *ex parte* request took precedence over the problem inherent in the way the information was obtained. (EH II, pp. 21, 24-26). In response to questioning, he did say he would feel a duty to investigate a similar abuse of Rule 15.9 if the situation arose again. (EH II, pp. 32-33). But that is not the same as the Respondent Judge’s finding that Mr. Hazard “would do again just what he did here.” (Appendix A, p.5).

by the court and that the documents were still supposed to be under seal. (EH II, pp. 12-14, 27). Mr. Hazard and his supervisors focused on addressing the impropriety of the *ex parte* motion itself. (EH II, pp. 27, 30).

Even if Mr. Hazard had exactly the motive the Respondent Judge imputed to him, it still would not justify any finding that the entire Pinal County Attorney's Office would feel "free to do whatever they wanted" if they believed the court or defense counsel were wrong. Mr. Hazard is no longer an employee of the Pinal County Attorney's Office. (EH II, pp. 5-6). Even when he was an employee, he had no supervisory or policy-making authority. (EH II, p. 6). Mr. Hazard therefore cannot commit the Pinal County Attorney's Office to *any* policy. Further, the record clearly shows that both of the *ex parte* motions were accessed during a single afternoon. (EH I, pp. 130-132). There is no evidence on the record that Ms. Parish, Mr. Hazard, or anyone else in the County Attorney's Office maintained a pattern or practice of reviewing *ex parte* documents or other documents that had been ordered sealed.

Fifth, Respondent Judge also found that County Attorney Voyles, Chief Deputy Wintory, Mr. Long, and Mr. Easterday deliberately disregarded court orders and believed "the ends justified the means." (Appendix A, p. 7). Mr. Easterday, like Mr. Hazard, is no longer with the office, and he did not have policy-making authority during his employment there.¹⁷ Mr. Long was not even in town when this incident occurred, and nowhere does the record show he ever

¹⁷ While it is not in the record that Jason Easterday is no longer employed at the Pinal County Attorney's Office, the State asks this Court to take judicial notice of the records maintained by the State Bar of Arizona, which reflect that Mr. Easterday is currently employed at the Attorney General's Office.

personally saw the *ex parte* documents. (EH II, p.12). Mr. Wintory did meet with Hazard one time about an appropriate course of action. (EH II, pp.12, 27). The result of the meeting was the filing of the State's motion, which effectively gave the court and counsel notice that an *ex parte* motion had been accessed. (Appendix B). There is no indication in the record that Mr. Wintory disseminated, published, or in any way directed that the documents be accessed or printed. Nothing in the record indicates that at any point Mr. Voyles ever saw the actual documents.¹⁸

Sixth, Respondent Judge's order consistently claims that office personnel "were violating a court order," but it is unclear from the order what the precise nature of that violation was. (Appendix A, p. 4). By choosing the phrase "were violating" as opposed to "had violated," the Respondent Judge makes it sound as though some sort of misconduct was ongoing. But the evidence is that the documents were accessed and printed in a single afternoon and that supervisory and specialty attorneys were then consulted to determine the best course of action. (EH I, pp. 130-132; EH II, pp. 12-14, 25, 27).

Based on the hearing transcripts it seems that the Respondent Judge thought it improper for other attorneys in the office to review the documents to provide guidance to Mr. Hazard. The State concedes that the *ex parte* documents should

¹⁸ On July 30, 2013 Mr. Voyles made a media statement about the discovery of the improper Rule 15.9 motion that was based on information provided to him by office staff. The Respondent Judge did not cite or seem to consider the media statement in making his determination.

not have been available and should not have been accessed, but the record reflects a genuine, one-time mistake. The subsequent “distribution” was limited to supervisory personnel within the Pinal County Attorney’s Office. Nothing in the court’s order justifies its implied belief that a supervisory review was improper in light of fact that the access had already occurred.

Respondent Judge did not find a pattern of similar improper access to *ex parte* filings. In fact, Respondent Judge said at the hearing, “It’s looking at two sealed records and printing them, but I don’t think you’re going to get too far on showing some sort of a pattern that entitles you to relief just within the 3:00 o’clock hour on July 18th.” (EH II, p. 53).

The Respondent Judge did not hear testimony from anyone at the Pinal County Attorney’s Office who had the ability to speak to office policy regarding the inadvertent access to *ex parte* documents. Mr. Hazard did not have any policy making authority. See e.g. *Pembauer v City of Cincinnati*, 475 U.S. 469, 482-483, 106 S.Ct.11292, 1299-1300, 89 L.Ed.2d 452 (1986). Defense counsel asked to call many of the supervisors, but the State objected and the Respondent Judge indicated he had heard enough testimony. (EH II, p. 42-44, 47-49). Had the County Attorney’s Office had *any* indication that Respondent Judge believed there was a policy or practice of violating court orders, the State would certainly have called the supervisors as witnesses itself. The process used by the Respondent Judge

deprived the State of the opportunity to prove that its policy is in compliance with the law and ethical rules.

Respondent Judge acknowledged that Ms. Eazer would, if pressed: “tell me that she and people under control would no longer seek to access sealed records...she would assure me that she and those under her direction and control would not seek to access that which they ought not to because of a court order sealing the records...” (EH II, pp. 50-51). And at the end of the hearing, the Respondent Judge suggested that a sufficient remedy would be ordering the County Attorney’s Office to: “make sure there were no further access of sealed documents, and if that happened inadvertently that the Court would be promptly notified and your client properly notified...I think the assumption...the Court has is it’s unlikely for that to happen again in this case.”(EH II, p. 64). There was no hint on this record that the Respondent Judge was thinking that it was the policy and practice of the Pinal County Attorney’s Office to seek to open ex parte sealed documents.

Then, the July 8, 2014 Order was issued. (Appendix A). The dramatic change between the language Respondent Judge used at the May 8, 2014 hearing and the scathing Order he issued on July 8, 2014 reflected a process so arbitrary that it deprived the Pinal County Attorney’s Office of a meaningful opportunity to address Respondent Judge’s perception that the office would not comply with court

orders in the future. Since there is no evidence to support Respondent Judge's finding members of the Pinal County Attorney's Office would defy future court orders, the Respondent Judge may have based his belief that the Office would violate court orders in the future on considerations not contained within the record.

Moreover, the Pinal County Attorney's Office was deprived of a fair hearing because the Respondent Judge did not give any indication of the need to present evidence related to its policies and training practices. There are many steps that the Pinal County Attorney's Office has taken to address this problem, including working with the Clerk's Office.

Judicial decisions based on outside considerations are arbitrary, capricious, and an abuse of discretion.

Pinal County Attorney's Office Cannot Be Disqualified because Neither Trial Counsel nor County Attorney Voyles are Disqualifiable.

Since there is no support in the record for a finding of an appearance of impropriety, this Court should consider whether vicarious disqualification is appropriate. To vicariously disqualify the Pinal County Attorney's Office, either trial counsel or County Attorney Voyles would have to be disqualifiable. *Romley*, supra 184 Ariz. at 227-228.

Respondent Judge has already found the current lead deputy county attorney Ms. Eazer, who did not work for the Pinal County Attorney's Office at the time of the incident, blameless. (Appendix A, p. 4, fn. 1). Mr. Powell, who was previously

assigned to this case, was on leave at the time of the access. (EH I, p. 100; EH II, p. 6). And Mr. Chapman, who is the current second chair on this case, has not had any contact with the ex parte documents because he was not assigned until long after the documents were accessed.

The only remaining question is whether County Attorney Voyles is disqualifiable. Although in his Order the Respondent Judge suggested that Mr. Voyles would not comply with future court orders, there is no indication in this record that he ever violated any court order in the first place. Without a substantial basis for the Respondent Judge's finding that Mr. Voyles would disregard future court orders, he cannot be personally disqualified. Therefore, vicarious disqualification is not available.

CONCLUSION

Respondent Judge's finding of an "appearance of impropriety" is not supported by the record, and his decision to disqualify the Pinal County Attorney's Office is an abuse of discretion. Therefore the State of Arizona respectfully requests that this Court grant oral argument, accept jurisdiction, enter an order vacating the July 8, 2014 Opinion and Order, and remand this case to the trial court for further proceedings.

Respectfully submitted,

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11 August 2014

CERTIFICATE OF COMPLIANCE

Rosemary Gordon Pánuco certifies that in accordance with Arizona Rules of Procedure for Special Actions 7(e), the State's Petition for Special Action is double spaced, uses proportionately spaced CG Times 14 point type, and has a word count of 7,036 words.

/s/Rosemary Gordon Pánuco

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CERTIFICATE OF SERVICE

Rosemary Gordon Pánuco certifies that she is a Deputy County Attorney for Pinal County, Arizona, and that on the 12th day of August, 2014, the original of the **State’s Petition for Special Action** was electronically filed with:

Clerk of the Court of Appeals
Division Two
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Tucson, AZ 85701-1374

And that one copy of the **State’s Petition for Special Action** was e-mailed/mailed to:

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