

Brief summary of the case: Death during a human smuggling operation involving a U-Haul truck  
Defendants: State v. Elizabeth Kay, Nathan Lamb, and Gerad Punch  
CR# 2015-00061, 2015-00062, 2015-00063  
Charges: Count 1: Second Degree Murder (Extreme Indifference), class 1 felony  
Counts 2 – 7: Aggravated Assault, class 6 felony

Amicus Brief: - A request for leave to file may be appropriate given the filing history on the Wilson case. This should probably be done by close of business tomorrow, November 25<sup>th</sup>. With the current filing schedule the Brief should probably be filed by the time our Reply is due, which is currently December 8<sup>th</sup>.

#### Case facts:

July 2013 D-Punch recruited D-Kay and D-Lamb, in Phoenix, to pick up illegal immigrants in Douglas and to transport them to Phoenix.

Kay and Lamb drove to Douglas and picked up a UHaul moving truck, which can only be opened from the back, on the outside, with 12 illegal immigrants in the back. It is July and there are no windows and there is no air conditioning in the back of the truck.

After a detour through NM, in order to avoid suspicion, Kay and Lamb stopped on the SE side of Tucson to give the people in the back water and Cokes. They stopped again to get gas while in the area of Tucson and they heard knocking and banging from within the UHaul truck. People at the gas station noticed the noise.

They drove toward Picacho Peak and on the way, Kay and Lamb sent text messages to Punch to let him know about the knocking and banging. Punch instructed them to meet at Picacho Peak, at the Dairy Queen.

Kay and Lamb pulled off at the DQ and opened up the back of the UHaul truck. The people spilled out of the truck. Lamb, Kay, and five of the people ran into the desert. They were all eventually apprehended by Border Patrol. Seven of the people stayed with the truck and one of them eventually died.

Punch was seen on surveillance video as arriving at the DQ. His license plate was noted by an officer and that is how he was eventually contacted a few weeks later.

Kay and Lamb confessed to being solicited to drive the truck full of people and then to the chain of events that occurred leading up to their apprehension.

Punch initially confessed to being an integral part of the events but created an elaborate story about how he was forced to participate at gun point.

#### Procedural facts:

July 7, 2013 – Kay and Lamb were arrested. The five illegal immigrants who ran with them were deported. The six surviving people who did not leave the UHaul van were given U Visas.

July 12, 2013 - A Preliminary Hearing was held to preserve the testimony against Kay and Lamb.

August 2013 – Punch was indicted.

September 12, 2013 – A free talk was conducted with Punch. Present were, DCA Mark Mendoza, Defense attorneys Booker Evans and Quentin Cushner, PCSO Detectives Rankin and Stoltz. In the monitor room observing, were PCSO paralegal, Barb Marvel, and PCSO Sergeant Tarango (now Justice of the Peace.)

In the free talk, Punch confessed to his involvement and gave information as to the organization. He explained the organizational structure of the group and how this particular incident was planned.

After the free talk, after the defense attorneys left, DCA Mark Mendoza and Barb Marshall went to the monitor room where Det. Rankin burned a copy of the interview and tried to hand it to DCA Mendoza. DCA Mendoza refused to accept the disc and told Det. Rankin that he will request it if Punch accepts a plea at which time, DCA Mendoza will disclose the disc. Present were DCA Mendoza, Barb Marvel, Det. Rankin, and Det. Stoltz.

December 11, 2013 – The remaining co-defendants were taken into custody and all 6 co-defendants were indicted together on Felony Murder charges. (2<sup>nd</sup> indictment against Punch).

2014 – A plea was given to Punch and the disc was requested. PCSO did not respond. The disc was requested multiple times, as were the notes taken by the detectives. An investigation was launched by Det. Bonnucci as to the whereabouts of the disc and notes. An Internal Affairs investigation was opened where DCA Mendoza and Barb Marvel were interviewed in October 2014.)

Fall of 2014 – 9<sup>th</sup> Circuit decision striking down Arizona Human Smuggling law issued.

November/December 2014 – Defense attorneys filed motions to dismiss based on 9<sup>th</sup> Circuit ruling

January 2015 – All six co-defendants were re-indicted on new charges under a new theory of the case. This is the current indictment in the case.

April 2015 – PCSO IA investigation was concluded.

July 2015 – DCA Mendoza disclosed the IA investigation results. New offers were made and three defendants entered a plea.

September 2015 – Defense Counsel for Punch, Kay, and Lamb filed three motions – a motion to dismiss, a motion to disqualify PCAO, and a motion to modify release conditions. DCA Mendoza responded to all three motions.

10/1/15 – Oral Arguments were held. Judge Georgini specifically asked only Defense whether they planned to call any witnesses – they did not indicate that they would. Only the motion to disqualify was argued and Judge Georgini took it under advisement. A new hearing date was set. No ruling was issued.

10/27/15 – Judge Georgini pulled all of the attorneys up to the bench (off the record) and notified them of his decision to grant the motion to disqualify the entire Pinal County Attorney's Office. This was done in between hearings on his regular law and motion calendar. They went back on the record and the Judge put his ruling on the record without giving any reasoning or rationale.

10/30/15 – PCAO Motion to Reconsider and Request for Evidentiary Hearing was filed

11/4/15 – The Minute Entry with the ruling to disqualify PCAO was issued – with no reasoning or rationale.

11/16/15 – A Special Action was filed with the COA.

11/17/2015 – Punch and Lamb responded to motion to reconsider and request for evidentiary hearing, timely.

11/18/15 – Kay responded, a day late.

11/20/15 – PCAO filed a Reply.

11/20/15 - Judge Georgini denied the motion for reconsideration.

12/1/15 – Defense Responses to the SA are due in the COA. On 11/23, 2015, defense counsel for Lamb filed a request for an extension of time to 12/23/15 (and indicated the State's opposition).

12/8/15 – PCAO Reply is due.

Staying the Case - Today we will file a request for a stay in the trial court and request a hearing next week. If the stay is denied, we will immediately request a stay from the COA. Their practice is to hold a telephonic stay conference within a day or two of the request. If it is granted at either level, we will be relieved from having to find a new agency to appear at the December 8 status conference.

**Reasons disqualification is not appropriate:**

Disqualification of DCA Mark Mendoza is inappropriate because he was not the only witness to the free talk. There were several people there who witnessed it, including two attorneys representing Punch. DCA Mendoza was not the only witness to the verbal exchange between himself and Det. Rankin regarding the disc. Paralegal Barb Marvel and Det. Stoltz were also present.

Defense argued that DCA Mendoza is a necessary witness to Det. Rankin's mishandling of the evidence and that he would be called to testify to impeach Rankin's investigation and credibility. Most of the testimony they apparently want to elicit, regarding the overall handling of the investigation and the effect that Rankin losing the free talk had on the State's case is not admissible. Paralegal Barb Marvel could be used instead if the question is limited to whether Rankin gave the cd to Mendoza while Marvel was present.

Disqualification of PCAO is inappropriate because there are other DCAs in the office who could prosecute the case. The ethical rules do not prohibit another member of the office from acting as an advocate even if Mendoza is called as a witness. The only legal theory under which the whole office could be disqualified is that it creates an appearance of impropriety. But to deny the people of Pinal County their choice of attorney on that basis is inappropriate and does not meet the standard set forth in Alexander.

Further, no Evidentiary Hearing was ever held and therefore, no factual record was ever established upon which the ruling was made. Indeed, there are no findings of fact in the order. No proper analysis was ever given and the rulings lack reasoning and rationale.