IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee/Cross-Appellant,

v.

GENE A. TENNESSEN,
Defendant-Appellant/Cross-Appellee.

Supreme Court Case No.: CRA05-012
Superior Court Case No.: CF0292-02

OPINION

Cite as: 2008 Guam 21

Appeal from the Superior Court of Guam
Argued and submitted on May 14, 2007
Hagåtña, Guam

Appearing for Defendant-Appellant/Cross-Appellee:
F. Randall Cunliffe, *Esq.*
Cunliffe & Cook, P.C.
210 Archbishop Flores Street
Hagåtña, Guam 96910

Appearing for Plaintiff-Appellee/Cross-Appellant:
Clyde Lemons, Jr., *Esq.*
Office of the Attorney General
Prosecution Division
287 West O'Brien Drive
Hagåtña, Guam 96910

BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice;[1] and, RICHARD H. BENSON, Justice *Pro Tempore*.

BENSON, J.:

[1] Defendant Gene A. Tennessen appeals a conviction of two counts of Theft and two counts of Official Misconduct. Specifically, Tennessen appeals a motion to dismiss on the grounds that Attorney General Douglas Moylan had a conflict of interest. While we do not agree that Tennessen's indictment should have been dismissed due to the conflict of interest, the conflict wall erected around Moylan was clearly ineffective. We hold that the trial court abused its discretion in not disqualifying the entire Attorney General's office in October of 2005. For this reason alone, Tennessen's judgment of conviction must be vacated, and we need not reach the other issues presented in this appeal. The People's cross appeal is dismissed as moot.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] In 2002, a Grand Jury returned an indictment against Tennessen, charging him with multiple crimes including Theft of a Firearm and Official Misconduct. Tennessen moved to dismiss the indictment on grounds that Attorney General Douglas Moylan had a conflict of interest. The alleged conflict of interest resulted from Tennessen being listed as a witness in a criminal case against Moylan.[2] Prior to the motion, Moylan discussed the possibility of erecting a conflict wall with his office staff and eventually agreed to do so. The trial court heard the motion to dismiss, and on March 26, 2004, Judge Unpingco issued a Decision and Order denying Tennessen's motion but ordering that a conflict wall be erected to screen Moylan from the case.

[1] Prior to the issuance of this Opinion, Justice Robert J. Torres assumed the role of Chief Justice while Chief Justice F. Philip Carbullido assumed the role of Associate Justice.

[2] The criminal action involved an accusation of domestic assault made by Moylan's former wife. Tennessen advised Moylan's former wife to file criminal charges after she confided the alleged assault to Tennessen.

[3] A month before trial was scheduled to begin, Tennessen renewed his motion to disqualify the entire Office of the Attorney General ("the AG's Office") based on a conflict of interest. In a declaration submitted in support of the motion, Tennessen's counsel described a conversation with Mindy Fothergill from KUAM news that occurred more than nine months earlier. In that conversation, Fothergill allegedly described an interview with Moylan where he said Tennessen would be subject to new criminal charges. Three days later, new charges were filed against Tennessen alleging witness tampering in the underlying case against him. On October 21, 2005, Judge Maraman denied Tennessen's motion to recuse the AG's Office but ordered that the conflict wall remain in effect.

[4] At the end of the trial, a jury convicted Tennessen of two counts of Theft of a Firearm under 9 GCA § 43.20(b) and two counts of Official Misconduct under 9 GCA § 49.90(b). Tennessen timely filed a notice of appeal. The People timely cross-appealed, arguing that the trial court erred in merging some of the counts for purposes of sentencing.

II. JURISDICTION AND STANDARD OF REVIEW

[5] This court has jurisdiction to hear appeals of final judgments of convictions entered by the Superior Court. 7 GCA §§ 3107(b) and 3108(a) (2005); 8 GCA § 130.15(a) (2005); 48 U.S.C.A 1424-1(a)(1) (West 2008). It is unnecessary to establish our jurisdiction over the cross-appeal, which we dismiss as moot.

[6] The standard of review for the denial of a motion for vicarious disqualification of an entire prosecutor's office is an abuse of discretion. *Gatewood v. State*, 880 A.2d 322, 330 (Md. 2005) (citing *Young v. State*, 465 A.2d 1149 (Md. 1983)).

III. DISCUSSION

[7] Although a prosecutor necessarily stands as an adversary to the accused, "[r]ecusal is . . . appropriate where the prosecuting attorney has a personal interest in convicting the accused, since the state's interest is in attaining impartial justice, not merely a conviction." *People v. Doyle*, 406 N.W.2d 893, 899 (Mich. Ct. App. 1987); *see also Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 803 (1987) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."). Guam has no specific statute governing recusal of a prosecuting attorney;[3] however, case law from other jurisdictions suggests that the standard is whether prosecution by the conflicted attorney would result in the "appearance of impropriety." *People v. Garcia*, 698 P.2d 801, 806 (Colo. 1985); *Doyle*, 406 N.W.2d at 899 ("American courts have consistently held that the appearance of impropriety is sufficient to justify disqualification of a prosecuting attorney.").[4] The "appearance of impropriety" standard means that "[a] defendant need not prove actual bad faith or unethical conduct on the part of the prosecutor and his staff." *Id.*

[8] A similar standard guides the decision whether to require vicarious disqualification of an entire prosecutor's office. "[T]he pertinent inquiry is whether the facts support the court's conclusion that the 'public would perceive continued prosecution by the district attorney's office, under the particular circumstances here, as improper and unjust, so as to undermine the credibility of the criminal process in our courts.'" *People v. Palomo*, 31 P.3d 879, 882 (Colo.

[3] Even so, we have no doubt that the Superior Court may appoint a special prosecutor based on its inherent power to supervise its own judicial proceedings. *See People v. Super. Ct. (Greer)*, 561 P.2d 1164, 1169-71 (Cal. 1977), *superseded by statute as stated in People v. Conner*, 666 P.2d 5, 8 (Cal. 1983).

[4] This standard is similar to that applied to judges in Guam; that is, whether a reasonable person, aware of all the relevant facts, would find that a judge had "the appearance of bias." *Van Dox v. Super. Ct. (Alcorn)*, 2008 Guam 7 ¶ 32 (quoting *Dizon v. Super. Ct. (People)*, 1998 Guam 3 ¶ 10 n.3).

2001) (quoting *People v. County Ct.*, 854 P.2d 1341, 1344-45 (Colo. Ct. App. 1992). In deciding whether to disqualify the entire office, one must determine "whether a reasonable person standing in the shoes of the defendant should be satisfied that his or her interests will not be compromised." *State v. Gonzales*, 119 P.3d 151, 159 (N.M. 2005) (quoting *State ex rel. Romley v. Super. Ct.*, 908 P.2d 37, 42 (Ariz. Ct. App. 1995)).

[9] The possible participation of Tennessen as a witness in Moylan's criminal case would certainly suggest to a reasonable person that Moylan might have a vindictive bias against Tennessen, whether or not such bias actually existed. It would also suggest to a reasonable person that Moylan might be motivated to discredit Tennessen as a witness by actively seeking his conviction. Tennessen himself might reasonably assume that his chances of obtaining a fair plea agreement would be considerably reduced because of his involvement in Moylan's case. For all of these reasons, Moylan was disqualified from participating in Tennessen's criminal case.

[10] The more difficult question is whether the trial court abused its discretion in deciding not to disqualify the entire AG's Office. There are two distinct inquiries here. The first is whether Judge Unpingco abused his discretion in declining to disqualify the entire AG's Office in his March 26, 2004 Decision and Order. The second is whether Judge Maraman abused her discretion in her October 21, 2005 Decision and Order when she refused to disqualify the entire AG's Office after Tennessen submitted additional evidence that Moylan may have violated the conflict wall. We address each of these questions in turn.

A. Disqualification of the AG's Office

[11] The case law discussing the disqualification of prosecutors generally fall under two categories. *See Doyle*, 406 N.W.2d at 897. The first category concerns disqualification arising

from a conflict of interest based on a professional, attorney-client relationship; for example, where the defendant is a former client of the prosecuting attorney. *Id.*; *see, e.g.*, *State v. Tippecanoe County Ct.*, 432 N.E.2d 1377 (Ind. 1982); *People v. Lepe*, 211 Cal. Rptr. 432 (Ct. App. 1985); *State ex rel. Keenan v. Hatcher*, S.E.2d 361 (W. Va. 2001). A second category concerns disqualification arising from a conflict based on a personal interest in the litigation or on a personal relationship with the accused. *Doyle*, 406 N.W.2d at 897-98; *see, e.g.*, *People v. Choi*, 94 Cal. Rptr. 2d 922 (Ct. App. 2000). The instant appeal falls within this latter category, and we therefore look to these cases for guidance.

[12] The court in *Doyle* suggested that the disqualification of a supervising prosecutor requires disqualification of the entire office:

> The general rule is that a conflict of interest involving the elected county prosecutor himself requires recusal of the prosecutor and the entire staff. Since assistant prosecutors act on behalf of the elected country prosecutor and are supervised by him, the policies of fairness to the defendant and the avoidance of an appearance of impropriety require this result.

Doyle, 406 N.W.2d at 899. However, *Doyle* is distinguishable from the present case because the court never considered whether a conflict wall might be used in place of disqualification of the entire office. In fact, the court's ruling was based in part on the fact that the prosecutor did not erect a conflict wall at all and instead continued to represent the government against the defendant. *Id.* ("Recusal of the entire office is required because [the prosecutor] did not in fact withdraw from the [defendant's] case and because of [the prosecutor's] supervisory position in the prosecutor's office.").

[13] We therefore look to cases that have considered whether a conflict wall may be used in place of disqualification of the entire office. In *State v. Gonzales*, the Supreme Court of New Mexico considered whether the entire office of the district attorney was disqualified by

imputation. *Gonzales*, 119 P.3d at 163. Evidence was presented that the District Attorney in *Gonzales* disliked the defendant, a former employee of her office. *Id.* at 154. The court suggested that "screening mechanisms commonly utilized in public and private law offices may be effective to 'dissipate' the appearance of unfairness, as they were in *Pennington*."[5] *Id.* (citing *State v. Pennington*, 851 P.2d 494, 502 (N.M. Ct. App. 1993)). However, the District Attorney under scrutiny in *Gonzales* made no attempt to screen herself, and the Supreme Court of New Mexico therefore determined that the district court did not abuse its discretion in disqualifying the entire office. *Id.* at 163.

[14] On the other hand, where conflict walls are effectively implemented, disqualification of the entire office may be unnecessary. For example, the United States District Court of Puerto Rico considered whether the entire U.S. Attorney's Office should be disqualified because the

---

[5] Although *Pennington* is distinguishable based on the fact that the disqualification at issue was the result of an attorney-client relationship with the defendant, the majority rule in such cases disfavors disqualification of the entire office:

> The great majority of jurisdictions have refused to apply a per se rule disqualifying the entire prosecutor's staff solely on the basis that one member of the staff had been involved in the representation of the defendant in a related matter. In their view the entire staff ordinarily need not be disqualified from prosecuting the defendant if the staff member who had previously worked for the defendant is isolated from any participation in the prosecution of the defendant. *United States v. Caggiano*, 660 F.2d 184 (6th Cir. 1981); *United States v. Goot*, 894 F.2d 231 (7th Cir. 1990); *Jackson v. State*, 502 So. 2d 858 (Ala. Crim. App. 1986); *Upton v. State*, 257 Ark. 424, 516 S.W.2d 904 (1974); *People v. Lopez*, 155 Cal. App. 3d 813, 202 Cal. Rptr. 333 (1984) (applying new state statute); *State v. Bunkley*, 202 Conn. 629, 522 A.2d 795 (1987); *State v. Fitzpatrick*, 464 So. 2d 1185 (Fla.1985); *Frazier v. State*, 257 Ga. 690, 362 S.E.2d 351 (1987); *State v. Dambrell*, 120 Idaho 532, 817 P.2d 646 (1991); *State v. McKibben*, 239 Kan. 574, 722 P.2d 518 (1986); *Summit v. Mudd*, 679 S.W.2d 225 (Ky. 1984); *State v. Bell*, 346 So. 2d 1090 (La. 1977); *Young v. State*, 297 Md. 286, 465 A.2d 1149 (1983); *Pisa v. Commonwealth*, 378 Mass. 724, 393 N.E.2d 386 (1979); *Collier v. Legakes*, 98 Nev. 307, 646 P.2d 1219 (1982); *State v. Camacho*, 329 N.C. 589, 406 S.E.2d 868 (1991); *Commonwealth v. Harris*, 501 Pa. 178, 460 A.2d 747 (1983); *State v. Cline*, 122 R.I. 297, 405 A.2d 1192 (1979); *State v. Smart*, 278 S.C. 515, 299 S.E.2d 686 (1982); *Mattress v. State*, 564 S.W.2d 678 (Tenn. Crim. App.1977); *State ex rel. Eidson v. Edwards*, 793 S.W.2d 1 (Tex. Crim. App. 1990) (en banc); *State v. Miner*, 128 Vt. 55, 258 A.2d 815 (1969); *see generally* Annotation, T.J. Griffin, *Disqualification of Prosecuting Attorney on Account of Relationship with Accused*, 31 A.L.R.3d 953 (1970 & Supp. 1992).

State v. Pennington, 851 P.2d 494, 498 (N.M. Ct. App. 1993).

U.S. Attorney's brother was a government witness in a grand jury investigation. *In re Grand Jury Proceedings*, 700 F. Supp. 626, 629-30 (D.P.R. 1988). The U.S. Attorney had recused himself from the proceedings, and the court therefore declined to disqualify the entire office. *Id.* at 630. The court considered the Model Code of Professional Conduct, Rule DR 5-105(D), which states that "[i]f a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment." *Id.* n.1 (quoting Model Code of Prof'l Responsibility DR 5-105(D)). The court was guided by commentary from the ABA Ethics Committee, which suggested that if DR 5-105(D) were construed to apply to government agencies negative consequences would result:

> The government's ability to function would be unreasonably impaired. Necessity dictates that government action not be hampered by such a construction of DR-5-105(D). The relationships among lawyers within a government agency are different from those among partners and associates of a law firm. The salaried government employee does not have the financial interest in the success of departmental representation that is inherent in private practice. The important difference in the adversary posture of the government lawyer is recognized by Canon 7: the duty of the public prosecutor to seek justice, not merely to convict, and the duty of all government lawyers to seek just results rather than the result desired by a client. The channeling of advocacy toward a just result as opposed to vindication of a particular claim lessens the temptation to circumvent the disciplinary rules through the action of associates. Accordingly, we construe DR 5-105(D) to be inapplicable to other government lawyers associated with a particular government lawyer who is himself disqualified by reason of DR 4-101, DR 5-105, DR 9-101(B), or similar disciplinary rules.

Id. (quoting ABA Committee on Professional Ethics, Formal Op. 342, 62 A.B.A. J. 57 (1976)).

[15] We find this reasoning to be persuasive. Prosecutors within the AG's Office do not have a financial incentive to side with the Attorney General in every instance, as they would in a private law firm. *Id.* Instead, they are guided by a duty to seek justice rather than a desire to vindicate a particular claim in favor of the AG's Office. *Id.* While one can argue that an

Attorney General's disqualification coupled with his supervisory power weighs in favor of disqualification of the entire office, we are confident that a non-disqualified prosecutor can effectively dispense justice if protected by an effective conflict wall surrounding his or her supervisor. To hold that the entire AG's Office has a "disqualifying emotional stake in the [case would] stretch the concept of intra-office loyalty to a breaking point." *Id.* at 630-31. Thus, disqualification of the AG's Office would only be necessary if the particular conflicted attorney were not properly screened from the case.

B. Judge Unpingco's March 26, 2004 Decision and Order

[16] While Judge Unpingco had the discretion to order erection of a conflict wall rather than disqualifying the entire office, *id.*, we are not confident that he properly exercised that discretion in analyzing the pertinent facts and law. The present case is extraordinary in that the original prosecutor, Assistant Attorney General James J. Casey, filed a declaration in support of Tennessen's motion. In it, he described how he was impeded from finalizing the plea agreement that he and Tennessen's attorney had agreed to. Casey also indicated he did not "believe that this case [could] ever be prosecuted without the influence of Attorney General Moylan having input because the powers that be know the importance of trying to effect [sic] Mr. Tennessen as a witness against the Attorney General in his upcoming criminal case." Appellant's Excerpts of Record ("ER"), at 26 (Decl. James J. Casey, Mar. 16, 2004). Casey's prediction that Moylan would be incapable of avoiding Tennessen's case should have raised concerns as to the possibility of successfully implementing a conflict wall.

[17] Furthermore, Judge Unpingco applied a "prejudice" standard where none was warranted. The misapprehension apparently arose after the People's inappropriate cite to *In re Appeal of Infotechnology, Inc.* for the proposition that Tennessen was required to prove by "clear and

convincing evidence" that "the conflict will prejudice the fairness of the proceedings." 582 A.2d 215, 221 (Del. 1990). However, *Appeal of Infotechnology* involved a party's standing in a civil suit to challenge the other party's attorney on the grounds of an alleged conflict of interest. *Id.* at 218. Similarly, *Dawson v. City of Bartlesville*, 901 F. Supp. 314, 314 (N.D. Okla. 1995), another case cited by the People, also involves a question of standing in a civil suit. We are unaware of any common law authority that suggests a defendant in a *criminal* case must show prejudice before he or she can challenge a prosecutor's alleged conflict of interest.[6] We assume that no such authority exists.

[18] Nevertheless, in denying Tennessen's motion to recuse the entire AG's Office, Judge Unpingco stated that "[a]bsent proof that Tennessen is unfairly prejudiced by the conflict, this [c]ourt cannot make a finding that defendant is unable to obtain a fair and impartial trial." ER, at 42 (Dec. & Order, Mar. 26, 2004). This is not the correct standard for determining whether recusal of the entire AG's Office was necessary. Instead, the court should have considered all the relevant evidence, including Casey's declaration, and determined whether the continued participation of the AG's Office in the prosecution would result in an appearance of impropriety. *See Palomo*, 31 P.3d at 882. While "'[a] trial court abuses its discretion when its decision is based on . . . an incorrect legal standard,'" *Carlson v. Perez*, 2007 Guam 6 ¶ 15 (quoting *Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir. 1986)), this court cannot say that on March 26, 2004 it

[6] California, however, has a recusal standard that is set by statute. Section 1424 of the California Penal Code states that a motion to recuse "may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." Cal. Penal Code § 1424 (Westlaw 2008). California courts have interpreted this requirement to mean actual prejudice to the defendant as opposed to an appearance of impropriety. *People v. Neely*, 82 Cal. Rptr. 2d 886, 892 (Ct. App. 1999); *see also People v. Choi*, 94 Cal. Rptr. 2d 922, 926 (Ct. App. 2000) (finding that the defendant's right to a fair trial was prejudiced). In fact, section 1424 appears to have been enacted for the purpose of overruling the "appearance of impropriety" standard set forth in *People v. Super. Ct. (Greer)*, 561 P.2d 1164, 1173 (Cal. 1977). *See* Ryan W. Herrick, *Hurry Up and Get On with It: Judicial Review of Prosecutor Recusal Order by Extraordinary Writ*, 30 McGeorge L. Rev. 555, 558 (1999).

would have necessarily reached a different decision than Judge Unpingco did. We therefore look to the events leading up to Judge Maraman's October 21, 2005 Decision and Order for additional evidence of the conflict wall's ultimate effectiveness.

C. Judge Maraman's October 21, 2005 Decision and Order

[19] The People argued—and Judge Maraman agreed—that the law of the case required the court to deny Tennessen's renewed motion to disqualify the entire AG's Office. However, "[a] court has discretion to depart from the law of the case where . . . changed circumstances exist." *People v. Hualde*, 1999 Guam 3 ¶ 13. This exception is especially relevant to the present case, because the decision not to disqualify the entire AG's Office was contingent upon the continuing effectiveness of the conflict wall around Moylan. Evidence that the conflict wall was no longer effective would constitute "changed circumstances" allowing Judge Maraman to disqualify the entire office without violating the law of the case. *Id.*

[20] In a similar case, a trial court disqualified an entire district attorney's office after initially allowing the District Attorney to isolate himself from the case through a conflict wall. *People v. Choi*, 94 Cal. Rptr. 2d 922, 926 (Ct. App. 2000). In *Choi*, a district attorney's office was prosecuting a defendant who was suspected of killing the District Attorney's personal friend. *Id.* at 924. The defendant was on trial for a different alleged murder and had not yet been charged with killing the District Attorney's friend. *Id.* Nevertheless, a conflict wall was erected around the District Attorney at the inception of the case. *Id.* at 926. Subsequently, the District Attorney discussed his theory of the case with the media and eventually made an *ex parte* motion to lift a gag order so he could publish a letter to the editor of a local newspaper. *Id.* at 925. The California appeals court determined that the District Attorney's "deep emotional involvement which stemmed from the loss of his close friend . . . prevented him from exercising the

discretionary functions of his office in an evenhanded manner." *Id.* at 926. As a result, the court held that it was not an abuse of discretion for the lower court to recuse the entire office because it was "clear that the ethical wall in the district attorney's office did not prevent [the district attorney] from communicating about the case to others within the office." *Id.* at 928.

[21] *Choi* stands for the proposition that a judge does not abuse his or her discretion in recusing the entire office once a conflict wall has been breached. *Id.*; *cf. Gonzales*, 119 P.3d at 163 (recusal of the entire office was not an abuse of discretion when no attempt was made to erect a conflict wall). The case before us presents a slightly different question—whether a judge abuses his or her discretion in *not* recusing the entire office once a conflict wall has been breached. While a court might be able to shore up a breached conflict wall through its contempt powers, the "policies of fairness to the defendant and the avoidance of an appearance of impropriety" would seem to require the more drastic remedy of recusing the entire office in this case. *Doyle*, 406 N.W.2d at 897-98. We therefore hold that a court abuses its discretion in not recusing the entire AG's Office once the conflict wall surrounding the Attorney General has been shown to be ineffective.

[22] Next, we examine the ultimate effectiveness of the conflict wall erected in the present case. Judge Unpingco's original order erecting the conflict wall was very specific:

> The [c]ourt hereby ORDERS that a conflict wall be in place to shield Moylan from any further participation in the prosecution of this case. Moylan shall not discuss this case with anyone, shall not review files concerning this case, shall not have access to any files or information concerning this case, and shall not obtain or share confidential information concerning this case with anyone.

ER at 42 (Dec. & Order). Not only does the order forbid Moylan from participating in Tennessen's prosecution, it forbids him from having access to or sharing any information or files connected with the case. *Id.*

[23] Tennessen's counsel presented a declaration in the lower court concerning a conversation with Mindy Fothergill of KUAM news. During the conversation, Fothergill recounted an interview with Moylan in which he allegedly indicated that a new case would be filed against Tennessen in the near future. A new case against Tennessen was filed three days later. Later, Assistant Attorney General Lewis W. Littlepage admitted in court that he had informed Moylan of the impending charges against Tennessen. Littlepage's admission lends credence to the allegation that Moylan communicated with Fothergill regarding Tennessen's case. The communication with Fothergill, if true, raises serious concerns regarding Moylan's judgment and ability to maintain the confidentiality of the AG's Office. Moreover, Moylan's discussions with both Littlepage and Fothergill were in direct violation of Judge Unpingco's order that Moylan "shall not discuss the case with anyone, shall not review files concerning the case, shall not have access to any files or information concerning [Tennessen's] case, and shall not obtain or share confidential information concerning [Tennessen's] case with anyone." ER at 42 (Dec. & Order).

[24] Having thus called the conflict wall into question, the burden falls upon the government to show that the conflict wall provided an effective screen. *Gonzales*, 119 P.3d at 163. Attorney R. Anthony Welch, who was assigned the prosecution of Tennessen's case sometime around September of 2005, declared in an affidavit that the attorney transferring the case to him had informed him of the existence of the conflict wall. He indicated that he had no communication with Moylan, with the exception of an incident where Moylan attempted to assign him more work and he refused. Welch also declared that "[t]he Attorney General has not been involved in any way in the management or preparation of this matter. Nor has the Attorney General been involved in consideration or decision making concerning any plea offer." ER, at 55 (Decl. of Counsel, Oct. 14, 2005).

[25] While Welch's declaration shows that the conflict wall was effective throughout the month of September, Welch justifies the earlier breach as follows:

> The court's order made clear that the Attorney General was to have no input in this case. Defendant is now attempting to say that information about another case somehow violates this court's order. That argument is simply nonsense.
>
> The court order is crystal clear in its repetition of the phrase "this case." The order required that the Attorney General keep his nose out of this case and there is no evidence that the Attorney General had any participation in the case following the issuance of the order.

ER, at 52 (People's Response in Opp. to Defendant's Mot. to Disqual. & Dismiss, Oct. 14, 2005). We disagree. The case that Moylan discussed with Fothergill involved allegations that Tennessen tampered with witnesses in the underlying criminal case against him. In our view, Moylan would have been conflicted from the witness tampering case for the same reasons he was conflicted from the underlying case. Thus, the undisputed facts lead to the conclusion that Moylan violated Judge Unpingco's order.

[26] Finally, the record does not account for the period of time between Casey's declaration in favor of Tennessen and the date when Welch took over the case. We can only assume that by March 16, 2004, when Casey provided a declaration in favor of Tennessen, he was no longer assigned to Tennessen's case. In Welch's declaration, he indicated that he was assigned Tennessen's case sometime in September of 2005. The People provide no information as to who was in charge of the documents relating to Tennessen's case between March of 2004 and September of 2005. At a minimum, the People would be obligated to provide at least *some* information regarding the status of the conflict wall during that period in order to meet their burden of proving that the conflict wall provided an effective screen. *See Gonzales*, 119 P.3d at 163.

[27] In the end, Judge Maraman found the evidence "insufficient to show that the Defendant [was] prejudiced or that Moylan obtained confidential information regarding this case which could affect the Defendant's right to a fair trial." ER at 63 (Dec. & Order, Oct. 21, 2005). As with Judge Unpingco's order, Judge Maraman's order describes the wrong standard for determining whether recusal of the AG's Office is necessary. Rather than applying a prejudice standard, the court should have noted the breach of the conflict wall and determined whether continuing prosecution by the AG's Office would have seemed unfair to the public or to a reasonable person standing in Tennessen's shoes. *See Gonzales*, 119 P.3d at 159; *Palomo*, 31 P.3d at 882. Because the facts relating to the issue of disqualification are essentially undisputed, we can apply the correct standard without need to remand.

[28] Tennessen has provided evidence that the conflict wall was not effective in screening Moylan from Tennessen's case, and the People have failed to meet their burden of proving otherwise. A reasonable person in Tennessen's shoes could have concluded that his interests, especially those related to obtaining a fair plea agreement, had been compromised. *See Gonzales*, 119 P.3d at 159. In addition, Moylan's apparent inability to isolate himself from Tennessen's prosecution reflected poorly on the AG's Office as a whole, which may have led to a public perception that "continued prosecution by the [AG's Office], under the particular circumstances here, [was] improper and unjust, so as to undermine the credibility of the criminal process in our courts.'" *Palomo*, 31 P.3d at 882 (quoting *People v. County Ct.*, 854 P.2d 1341, 1344-45 (Colo. Ct. App. 1992)). In other words, by October of 2005 participation by the AG's Office was tainted with an "appearance of impropriety." *Doyle*, 406 N.W.2d at 899. At that point, the court had no real option except to recuse the entire office, and failure to do so was an abuse of discretion. However, nothing in this opinion should be construed as either mandating or

prohibiting recusal of the AG's Office at the present time, given that Moylan is no longer the Attorney General of Guam. Because the only available remedy at this point is to vacate Tennessen's judgment of conviction, we need not reach any of the remaining issues raised by Tennessen on appeal.

IV. CONCLUSION

[29] The trial court abused its discretion in not disqualifying the entire AG's office once it became clear that the conflict wall was ineffective. As a result, we **VACATE** Tennessen's judgment of conviction and **REMAND** this matter for further proceedings consistent with this opinion. The People's cross-appeal is **DISMISSED** as moot.

Original Signed By: **Robert J. Torres**
ROBERT J. TORRES
Associate Justice

Original Signed By: **Richard H. Benson**
RICHARD H. BENSON
Justice, *Pro Tempore*

Original Signed By: **F. Philip Carbullido**
F. PHILIP CARBULLIDO
Chief Justice