IN THE SUPREME COURT OF GUAM

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

v.

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

AMENDED OPINION

Cite as: 2009 Guam 3

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

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

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

BENSON, J.:

[1] The court issued an earlier opinion in *People v. Tennessen*, 2008 Guam 21. The opinion did not address the insufficiency of the evidence arguments. On rehearing, we determined that this court should have addressed the insufficiency of the evidence arguments in its earlier decision. As a result, we now issue this Amended Opinion to supersede our earlier opinion in *People v. Tennessen*, 2008 Guam 21.

[2] Defendant Gene A. Tennessen appeals a conviction of two counts of Theft and two counts of Official Misconduct. Specifically, Tennessen appeals the Superior Court's denial of both a motion for acquittal and a motion in arrest of judgment. Insofar as the appeal of these denials argues insufficiency of the evidence, we find the evidence to be sufficient. Tennessen also appeals the denial of a motion to dismiss, arguing 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 remaining issues presented in this appeal. The People's cross appeal is dismissed as moot.

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

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] In late November 1999, the police were called to respond to a disturbance involving Gerald Duenas and his sister. There was an argument between the siblings concerning possession of firearms, in particular a .38 caliber Rossi revolver and an Ithaca shotgun. The guns belonged to their late father, Francisco Duenas, who had recently passed away. Police Officer David Manila advised Gerald Duenas to turn in the firearms to the police for safekeeping. Gerald Duenas agreed and handed the firearms to Officer Manila.

[4] According to Manila's testimony, Officer Manila was approached at the precinct by then-Lieutenant Tennessen, his supervising officer. As Manila began filling out property receipts for the firearms, Tennessen allegedly told the officer that he would take care of the weapons. No property receipts were ever filed or completed for the firearms.

[5] In February of 2002, Tennessen's home was burglarized. Investigating police officers inquired as to what had been stolen, and Tennessen reportedly replied that there had been a .38 caliber gun in the safe. While executing a warrant to search the residence of the individual suspected of burglarizing Tennessen's home, the police found the .38 caliber Rossi revolver belonging to Francisco Duenas.

[6] Later that year, 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

[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.

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.

[7] 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.

[8] The jury trial began on October 27, 2005 based on an Amended Indictment. On the second day of trial, Tennessen moved for a judgment of acquittal. The court subsequently granted an acquittal on one of the Official Misconduct charges, but denied Tennessen's motion on the remaining charges. At the end of 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 then moved for an arrest of judgment, arguing that the indictment was defective in not describing all elements of the charges. 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

[9] This court has jurisdiction to hear appeals of final judgments of convictions entered by the Superior Court. 7 GCA §§ 3107(b), 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.

[10] The standard of review for the denial of a motion for vicarious disqualification of an entire prosecutor's office is abuse of discretion. *Gatewood v. State*, 880 A.2d 322, 330 (Md. 2005) (citing *Young v. State*, 465 A.2d 1149 (Md. 1983)). This court reviews a ruling on a Motion for Judgment of Acquittal *de novo*. *People v. Jung*, 2001 Guam 15 ¶ 21 (citing *People v. Quinata*, 1999 Guam 6, ¶ 9).

III. DISCUSSION

[11] Because "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only 'just' remedy available for that court is the direction of a judgment of acquittal." *Burks v. United States*, 437 U.S. 1, 18 (1978). Therefore, even if Tennessen's conviction can be vacated on other grounds, his arguments relating to the sufficiency of the evidence must be considered. This is because a finding of insufficiency would result in acquittal rather than a less favorable outcome to the defendant, such as vacating the conviction and exposing him to possible retrial. *See Justices of Boston Mun. Ct. v. Lydon*, 466 U.S. 294, 321-22 (1984) ("[W]hen a defendant challenging his conviction on appeal contends both that the trial was infected by error and that the evidence was constitutionally insufficient, the court may not, consistent with the rule of *Burks* . . . , ignore the sufficiency claim, reverse on grounds of trial error, and remand for retrial."). We therefore begin by examining Tennessen's insufficient-evidence arguments as presented in his Motion for Judgment of Acquittal.

A. Motion for Judgment of Acquittal

[12] Tennessen argues the trial court erred in denying his motion as to the First Charge of Theft of a Firearm (As a 3rd Degree Felony) under 9 GCA § 43.20(b).[3] He asserts that the People failed to prove that the stolen items meet the definition of a "firearm" according to 10 GCA § 60100, because they did not prove beyond a reasonable doubt the items were capable of being discharged. He therefore contends that the People failed to prove an essential element of the crime. The People contend that circumstantial evidence may be used to prove that a firearm is operable, and policy reasons support rejecting Tennessen's analysis.

[13] Second, Tennessen argues the trial court erred in denying the motion because the People failed to prove that Gerald Duenas had any legal or possessory interest in the stolen items. The People contend that a reasonable jury could have found that Gerald Duenas had a legitimate property interest in the firearms.

[14] Under Guam law, a trial court "shall order the *entry of a judgment of acquittal* of one or more offenses charged in the indictment . . . after the evidence on either side is closed *if the evidence is insufficient to sustain a conviction* of such offense or offenses." 8 GCA § 100.10 (2005) (emphases added). Furthermore, in *People v. Cruz*, 1998 Guam 18, we stated that a sufficiency of the evidence analysis is used:

> A court determines whether a judgment of acquittal should be granted by applying the same test used when the sufficiency of the evidence is challenged. [citation omitted] Thus, an appellate court reviews the evidence presented in a light most favorable to the government and determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Id. ¶ 9.

[3] Title 9 GCA § 43.20(b) states that "[t]heft constitutes a felony of the third degree . . . if the property stolen is a firearm . . . ." 9 GCA § 43.20(b) (2005).

1. Proof of Operable Firearms was Unnecessary

[15] Tennessen maintains that the trial court should have granted his motions for acquittal because the People failed to prove that the stolen items met the statutory definition of a "firearm" according to 10 GCA § 60100.[4] The plain words of the statute require that a pistol or shotgun be "capable of discharging" or "capable of firing" ammunition respectively. *Id.* Tennessen believes that the People were required to prove that the stolen items were operable, and there was no testimony that the weapons had been fired. In response, the People argue that circumstantial evidence presented at trial sufficed to prove that the guns met the statutory definition of "firearm."

[16] The People cite to *People v. Camacho* for the proposition that the prosecution may be able to provide sufficient circumstantial evidence showing that a weapon is a "firearm" according to 10 GCA § 60100. 1987 WL 109395 (D. Guam. App. Div. 1987). In *Camacho*, an on-duty police officer was accused of "Reckless Conduct" for pointing his service revolver at a fellow officer. *Id.* at *1. Although never directly stated in the opinion, the defendant was

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[4] **§ 60100. Definitions.**

As used in this Chapter:

(a) Firearm means any weapon, the operating force of which is an explosive. This definition includes pistols, revolvers, rifles, shotguns, machine guns, automatic rifles, noxious gas projectors, mortars, bombs, cannon and submachine guns. The specific mention of certain weapons does not exclude from the definition other weapons operated by explosives.

(b) Pistol or revolver means any firearm of any shape whatever and designed to be fired with one hand with a barrel less than twelve inches (12") in length and capable of discharging loaded ammunition or any noxious gas.

. . . .

(d) Shotgun means any firearm designed, made, redesigned or remade and intended to be fired from the shoulder and to fire through a smooth barrel either a number of projectiles (ball shot) or a single projectile, and shall include any such firearm which may be readily restored to fire any of the above, and shall also include any firearm of any age designed and capable of firing the above-mentioned projectiles. . . .

10 GCA § 60100 (2005).

apparently charged under 9 GCA § 19.40, which makes it a crime to "intentionally point[] a firearm at or in the direction of another . . . ." 9 GCA § 90.40 (2005). The defendant argued that the prosecution had failed to show that he had used a "firearm" as defined in 10 GCA § 60100. *Camacho*, 1987 WL 109395 at *3. The court disagreed, and found that "the prosecution provided sufficient circumstantial evidence to prove that Camacho's gun was capable of discharging loaded ammunition." *Id.*

[17] A careful examination of our statutes reveals that the court of *Camacho* may have been too quick to apply the definition of 10 GCA § 60100 to the crimes described in Title 9. Chapter 60 of Title 10 is entitled "Firearms" and sets forth the Guam regulations governing the sale, use, and ownership of firearms. The definitions found in section 60100 apparently apply only to that chapter as indicated by the phrase: "As used in this Chapter . . . ." 10 GCA § 60100. Although the definition of "firearm" found in 10 GCA § 60100 is explicitly incorporated into the Guam Gun-Free School Zone Act of 2004, 9 GCA § 71.20(b), the balance of the criminal code leaves the term undefined. It is not clear therefore, that the Legislature intended to modify the common-law definition of firearm as used elsewhere in the criminal code when it enacted 10 GCA § 60100 and the other provisions of Chapter 60, Title 10.

[18] Even so, there is a rule of statutory construction that indicates "[a] term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). Assuming, *arguendo*, that the rule would be applicable in the instant case, one need only examine 10 GCA § 60117 for evidence that the Legislature meant to include inoperable weapons in the definition of "firearm":

> **§ 60117. Repair.**
>
> No person, other than the owner or possessor of a firearm, may accept any firearm for repair without having first been shown a valid identification card

> showing the person delivering the firearm to such person accepting it for repair to be eligible to possess the firearm in question.

10 GCA § 60117 (2005). It would be absurd to assume that the Legislature intended this statute to govern only the repair of weapons that were already in working condition. The intent of the law could not have been to prevent cosmetic repairs to operable weapons, as such repairs would present no public safety concerns. Rather, the intent of the law was to prevent untraceable, inoperable weapons from becoming untraceable, operable ones. Therefore, the phrase "capable of discharging loaded ammunition" must be read to mean capable *before or after repair* of discharging loaded ammunition. 10 GCA § 60100(b) (2005).

[19] We reach a similar conclusion by examining how other courts have treated inoperable firearms in the absence of statutory definitions. For example in *People v. Jackson*, a defendant found guilty of armed robbery argued that the penalty enhancement for using a firearm was improper because the weapon was actually inoperable. 155 Cal. Rptr. 305, 305 (Ct. App. 1979). The court rejected the claim and reasoned that "firearm" must be read to include inoperable as well as operable weapons. *Id.* at 306. Thus, the court determined that the weapon "was a firearm because [it was] designed by the manufacturer to shoot [and] gave every appearance of having that capability." *Id.* at 307. More importantly, the same dangers, such as whether the victim or some other party will be injured by his or her reaction, are present whether the gun is operable or not. *Id.*

[20] One can apply the same reasoning to theft of a firearm under 9 GCA § 43.20(b). According to notes made by the Guam Law Revision Commission, which drafted Guam's criminal code, the theft of firearms is treated as a felony because firearms "facilitate the commission of other offenses and aid in flight." Guam Law Revision Commission,

Recommendation Relating to Crimes and Corrections, at 277-78 (May 1975). Certainly an inoperable firearm would aid in flight for the same reason that an inoperable firearm is capable of use in an armed robbery—the pursuer or victim will comply because the weapon's operability is not visibly apparent. Similarly, a stolen but inoperable weapon is capable of use in other offenses, such as armed robbery. Although a thief who stole an inoperable weapon would not be immediately capable of causing injury by firing the weapon, neither would an armed robber be capable of firing a similarly inoperable weapon—a point that never concerned the court of *People v. Jackson*. Finally, one can assume that in most cases a thief who stole a weapon would be unaware of whether the stolen weapon was operable until after he had committed the act of theft. The degree of mental culpability would be the same, therefore, whether the firearm was operable or not. For all of these reasons, we hold that the term "firearm," as used in 9 GCA § 43.20(b), must mean a weapon "designed by the manufacturer to shoot" and with the "appearance of having that capability." *Jackson*, 155 Cal. Rptr. at 307.

[21] The guns at issue in the present case were clearly designed to shoot real ammunition. The weapons themselves are identified by the type of ammunition they use, specifically .38 caliber rounds and 12 gauge shotgun shells. No one argued at trial that the weapons were merely toys or novelty items, or that the weapons were designed for some purpose other than shooting real ammunition. On the contrary, Gerald Duenas appeared to believe that a firearm ID card was necessary to legally possess the weapons. He testified, for example, that part of the reason he would not give the shotgun to his sister was because she did not possess a firearm ID card. Tr., vol. II at 78 (Jury Trial, Oct. 27, 2005). In addition, the police themselves treated the weapons as if they were designed to shoot and appeared capable of doing so. Officer Quintana testified that in responding to the report of a firearm and in executing the search warrant in this case, "SWAT

personnel [were] involved . . . [because] it's a firearm so for officers' safety purposes, we usually generally use SWAT to make entrance." Tr., vol. II at 132 (Jury Trial). Finally, the members of the jury were able to examine the guns themselves, and thus could have reasonably concluded that they were real guns designed to fire real ammunition. The prosecution did not explicitly show that the weapons were operable, but they were not required to do so. Thus, the prosecution presented more than sufficient evidence to show that the weapons were "firearms" for purposes of theft under 9 GCA § 43.20(b).

2. The Ownership Interest of Gerald Duenas is not an Element of Theft

[22] Tennessen also argues that the People failed to prove that the stolen items belonged to Gerald C. Duenas, who is named as the owner in the Amended Indictment, and that the identity of the owner is an essential element of the crime of Theft of a Firearm. Tennessen argues that the testimony adduced at trial showed only that the items belonged to Duenas's deceased father. For the charge to stand, he argues that the People were required to prove that Duenas had a legal or possessory interest in the items. The People contend that the name in the Amended Indictment is provided primarily for description and identification and to show that Tennessen does not own the stolen items.

[23] We first consider whether to prove an essential element of the charge of theft, the People must show that a specific individual named in the indictment had a legal or possessory interest in the stolen item. An examination of the case law reveals that this is not the case. Courts have resoundingly rejected the argument that the identity of the victims is an element of the offense of theft or larceny: "[T]he names of the owners of the stolen property constitute no part of the offense. They are stated in the information primarily as a matter of description for the purpose of identification and to show ownership in a person or persons other than the accused." *Hearn v.*

State, 55 So. 2d 559, 561 (Fla. 1951). *See also State v. Trunfio*, 156 A.2d 486, 487 (N.J. Super. Ct. App. Div. 1959) ("It is plain, therefore, that the essential element of larceny is not that the property belonged to a specific person, but rather that it was the property of someone other than the thief."); *State v. Lee*, 904 P.2d 1143, 1147 (Wash. 1995) ("Other authorities agree that in cases of theft and larceny proof of ownership of the stolen property in the specific person alleged is not essential. The State is required to prove only that it belonged to someone other than the accused.").

[24] Contrary to Tennessen's contention, it is well accepted that, in a theft or larceny statute, the People need only prove that someone other than the defendant has some possessory interest in the stolen property. *State v. Lackey*, 132 S.W. 602 (Mo. 1910) (holding that it must be alleged and proved that the property stolen was the property of another); *People v. Geraci*, 323 N.E.2d 48 (Ill. Ct. App. 1974) (same); *State v. Wilmore*, 459 P.2d 531 (Ariz. Ct. App. 1969) (same). The person need not own the stolen items. *State v. McCray*, 517 So. 2d 474, 477 (La. Ct. App. 1987) ("Proof of the ownership of stolen property is not an essential element of proof of the crime of theft. The state is required only to prove that the property belonged to someone other than the defendant.").

[25] Based on the above case authority, the People were not required to show that Gerald Duenas owned the firearms at issue here. There was more than sufficient evidence introduced at trial to convince a reasonable trier of fact that someone other than Tennessen has a possessory interest in the firearms. Therefore, the trial court did not err in denying the motions for judgment of acquittal.

B. Motion in Arrest of Judgment

[26] Tennessen challenged the indictment in his Motion in Arrest of Judgment. Specifically, Tennessen argues that the indictment failed to allege that he was a public official and that he knew his actions were unauthorized.[5] The People counter that the indictment as written was sufficient to apprise Tennessen of the crimes with which he was being charged. Because this opinion vacates Tennessen's conviction on other grounds, we need not decide the issue here. However, as explained below, there is one scenario whereby Tennessen might be acquitted as a result of his Motion in Arrest of Judgment, and we must therefore consider whether there was sufficient evidence presented at trial to prove that Tennessen was a public official who knew that his actions were unauthorized.

[27] "The effect of an order arresting the judgment is to place the defendant in the same situation he was before the indictment was found. . . ." 8 GCA § 115.20 (2005). The specific remedy resulting from a successful motion in arrest of judgment depends ultimately on whether sufficient evidence was offered at trial to prove the elements omitted from the indictment:

> **§ 115.30. Defendant; When to be Held or Discharged.**
>
> If, from the evidence on the trial, there is reason to believe the defendant guilty, and a new indictment . . . can be framed upon which he may be convicted, the court may order him to be held . . . pending the filing of a new indictment . . . . *If no evidence appears sufficient to charge him with any offense, . . . the arrest*

[5] By way of illustration, the Amended Indictment read to the jury at trial included the following allegation regarding the .38 caliber handgun:

> On or about the period between November 1st, 1999 through January 15th, 2000, inclusive, in Guam, Gene A. Tennessen, with the intent to benefit himself, did commit an act relating to his office but constituting an unauthorized exercise of his official function, that is, Gene A. Tennessen did knowingly prevent Guam Police Department Officer David Q. Manila, a subordinate officer, from properly confiscating a .38 caliber Rossi revolver, serial number W204054, in violation of 9 G.C.A. Section 49.90(a).

Tr., vol. II, at 10-11. Under the statutory language, "[a] public servant commits a misdemeanor if, with intent to benefit himself[,] . . . he commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized . . . ." 9 GCA § 40.90 (2005).

> *of judgment shall operate as an acquittal of the charge upon which the indictment . . . was founded.*

8 GCA § 115.30 (2005) (emphasis added). *See also People v. Morgan*, 141 Cal. Rptr. 863, 869 (Ct. App. 1977) (interpreting a substantially similar statute). Thus, if there was insufficient evidence presented at trial to prove the elements allegedly omitted from the indictment, Tennessen must be acquitted. *Id.*

[28] Tennessen argues that the indictment did not allege that he was a public official or that he knew preventing a subordinate officer from confiscating a weapon was unauthorized. However, there was testimony from his fellow officers that Tennessen was a lieutenant with the Guam Police Department at the time of the alleged crime. In addition, there was testimony that Tennessen observed a subordinate officer attempting to inventory the weapons, that Tennessen offered to "take care of it," that the weapons were never inventoried, and that it was police procedure to inventory confiscated weapons. Tr., vol. II at 40-42 (Testimony of Officer Manila). Based on the testimony of his fellow officer, a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Cruz*, 1998 Guam 18 ¶ 9. The overwhelming evidence introduced at trial reveals that Tennessen was a public official and knew that his actions in acquiring the weapons were contrary to police procedure. Therefore, we need not determine whether the wording of the indictment was defective, as even a defective indictment would not result in Tennessen's acquittal, and turn instead to the question of whether the AG's Office should have been disqualified.

C. Disqualification

[29] 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; 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.").[6] 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.*

[30] 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. 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)).

[6] 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.*, 2008 Guam 7 ¶ 32 (quoting *Dizon v. Super. Ct.*, 1998 Guam 3 ¶ 10 n.3).

[31] 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.

[32] 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.

1. Disqualification of the AG's Office

[33] The case law discussing the disqualification of prosecutors generally falls 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*, 557 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.

[34] 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 county 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.").

[35] We therefore look to cases that have considered whether a conflict wall may be used in place of the 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*."[7] *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.

[36] 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 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.*

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[7] 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).

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)).

[37] 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.

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

[38] While Judge Unpingco had the discretion to order erection of a conflict wall rather than disqualifying the entire office, 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.

[39] 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.[8] We assume that no such authority exists.

[40] 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 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.

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[8] 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).

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

[41] 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.*

[42] 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.

[43] *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.

[44] 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.*

[45] 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).

[46] 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 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).

[47] 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.

[48] 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.

[49] 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.

[50] 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 Attorney General of Guam. Because the only available remedy at this point is vacate

Tennessen's judgment of conviction, we need not reach any of the remaining issues raised by Tennessen on appeal.

IV. CONCLUSION

[51] The trial court properly denied Tennessen's motion for acquittal and motion in arrest of judgment. However, the 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. This Amended Opinion supersedes our earlier opinion in *People v. Tennessen*, 2008 Guam 21.

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