

DISSENT BY SUBSTITUTE JUSTICE HIFO

I respectfully dissent and would grant the petition for writ of mandamus. The Attorney General (AG) successfully argued to the trial court that he could legally represent the State of Hawai'i (State) in parallel criminal and civil proceedings consistent with HRS § 28-1 (1993) and State v. Klattenhoff, 71 Haw. 598, 801 P.2d 548 (1990), which allowed the representation in parallel civil and criminal proceedings under certain circumstances. However, State v. Klattenhoff, 71 Haw. 598, 600 & n.1, 801 P.2d 548, 549-50 & n.1 (1990), rested on quite different facts, as follows:

The criminal justice division of the AG's office did not know that the separately located litigation and administrative division of the AG's office had been representing appellant in two unrelated civil actions. [FN 1]. The civil representations began July 22, 1987, and continued through November 23, 1988. Thus, the AG's office was concurrently serving as defense counsel for appellant in the civil suits and prosecuting him in the criminal action.

(Emphasis added). The above-cited text and footnote make clear that the three Klattenhoff cases were UNRELATED factually. The first case involved Klattenhoff's alleged prisoner mistreatment; the second case involved an unlawful eviction claim against him, both in Klattenhoff's capacity as a sheriff; and in the third case Klattenhoff was charged in his individual capacity with the crime of theft. Ultimately Klattenhoff was dismissed in one civil case and a dismissal of the second civil case for lack of subject matter jurisdiction was pending on appeal. In contrast, here we have exactly the same facts driving the State prosecution, the defense of State liability, and the potential benefit to the State of entering any conviction against Petitioner as conclusive proof of his liability as a co-defendant with the State in the civil case.

There is no doubt a petition for writ of mandamus is an appropriate vehicle for reviewing an order granting or denying disqualification of counsel. E.g., Straub Clinic & Hospital v. Kochi, 81 Hawaii 410, 414, 917 P.2d 1284, 1287 (1996). The Petitioner herein makes legitimate arguments on behalf of Pflueger including "irreconcilable conflict" for the AG and that the AG cannot provide independent representation because the AG civil case team already has provided the AG criminal case team with information for use in the criminal prosecution. The information included depositions taken in the civil case plus a consultation in which the First Deputy AG (defending in the civil action team) suggested to the prosecuting AG that she/he do a site visit/inspection and take other action.

The majority's denial of the writ appears to rest on no immediate irreparable harm, relying in part on Chuck v. St. Paul Fire & Marine Ins., 61 Haw. 552, 560, 606 P.2d 1320, 1325-26 (1980). In Chuck the Hawai'i Supreme Court issued a writ reversing the trial court's disqualification of the plaintiff's attorney in a civil suit. This result obtained because plaintiff could not find substitute counsel, thus working a "substantial hardship" on Chuck's ability to prosecute his claims (leaving him pro se), "coupled with the death of three material witnesses" since the suit was filed, and "the threatened loss of further evidence due to the delay associated with ordinary appellate procedures." These circumstances constituted "immediate and irreparable harm" justifying the granting of the petition for writ and precluding disqualification of the plaintiff's counsel. Id. at 361, 606 P.2d at 1326.

Here we have a person (Pflueger) charged with seven counts of Class A Manslaughter each punishable by a mandatory twenty-year prison term and one additional count of a lesser felony. The majority's ruling determines it would not be irreparable harm to force

Pflueger to trial (where indeed the AG civil and AG criminal teams might continue to consult, etc.; inasmuch as the AG did not even see the need for "independent representations") and if he is convicted to take an appeal and carry the burden on appeal of showing improper consultation between the AG units.

The harm here is every bit as burdensome as the "immediate and irreparable harm" to Chuck in the civil case if nothing else because in the context of a criminal trial Pflueger would have to litigate or otherwise bring witnesses (deputy AGs or others in the civil case) to prove where the State obtained its evidence, with whom the criminal team consulted on the civil team, what was said among them, and what information was transmitted. Given the Rules of Penal Procedure and limited discovery allowed any defendant, when and how is a criminal defendant going to be allowed to conduct such discovery? Why should the defendant additionally be burdened with such matters at a time when he is defending his liberty on seven manslaughter counts? Moreover, the burden of the criminal trial judge to oversee such discovery, and to the court on appeal from any conviction for the crimes alleged or on lesser included crimes is likely to be highly problematic. On appeal what evidence will the court determine was contaminated and thus must be stricken; how much need be tainted for there to be more than harmless error? Presumably none of that would be admissible at the criminal trial, but then there will be further burdens on the judicial system by spawning a trial about the evidence and where it was obtained, and maybe face arguments that the State "inevitably" would have discovered the same evidence had it not been provided or suggested by the civil team.

In short, it seems to me there are at least as many reasons to grant the writ and guarantee a clean prosecution in this case as there were in allowing Chuck to have his attorney to

pursue his civil claims. Telling a person you have to stand trial, be convicted (which of course includes being sentenced), prove the taint of the evidence resulting from collaboration in the context of an "irreconcilable conflict of interest" for the State that prosecuted you, and if you are convicted and win on appeal, face a new trial (and the costs of that in money for your attorney, time, years of waiting on appeal, etc.) for whatever you were convicted of (and any lesser included offenses) to me meets a common sense and legally sufficient definition of irreparable harm.

For these reasons I dissent and join Justice Acoba's dissent as well.

A handwritten signature in cursive script, reading "Juan Elizabeth Hijo", written over a horizontal line.