APL 2013-00322
Appellate Division, Second Department Docket No. 2013- 02052

Court of Appeals

STATE OF NEW YORK

In the Matter of the WORKING FAMILIES PARTY,

Petitioner-Appellant,

-against-

FERN FISHER, *et al*.,

Respondents-Respondents.

BRIEF FOR AMICUS CURIAE
DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK

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PRELIMINARY STATEMENT

The District Attorneys Association of the State of New York submits this brief as *amicus curiae*. The petitioner, Working Families Party, commenced a proceeding pursuant to CPLR Article 78 in the nature of prohibition, inter alia, to prohibit the enforcement of the order relieving Respondent Daniel M. Donovan, Jr., District Attorney of Richmond County, from acting in a case involving possible violations of Election Law Section 14-126, Local Campaign Finance Law codified at New York City Administrative Code 3-701, et al., and Penal Law Articles 175 and 210 in connection with a 2009 City Council election on Staten Island and appointing Special District Attorney Roger Bennett Adler in his stead; seek quashal of the subpoenas issued by the Special District Attorney to petitioner's assistant secretary and Citizen Action of New York; and obtain unsealing of the heretofore sealed application for the above described relief.

The Appellate Division, Second Department, by unanimous Decision and Judgment entered August 7, 2013, held *inter alia* that because the Special District Attorney was exercising executive, rather than quasi-judicial, authority in issuing subpoenas during the investigative stage of his duties, Article 78 relief in the nature of prohibition was not available to review that executive action. The Court also found petitioner's other claims to be without merit. The Second Department,

accordingly, denied and dismissed the petition in all respects. By leave of this Court granted November 19, 2013, Petitioner-Appellant appeals.

The District Attorneys Association of the State of New York is filing this brief in support of Respondent Donovan. The scope of this brief is limited to the question of whether Article 78 relief is available to review the self-disqualification of a district attorney when approved by a court. In the majority of cases in which a special district attorney is appointed, the district attorney has concluded that he or she has a conflict that disqualifies the district attorney from acting and seeks recusal. In that circumstance, recusal ensures a fair and impartial administration of justice, increases public faith in the criminal justice system, and protects the rights of defendants, all while vindicating the public interest in prosecution of meritorious cases.

In the case of self-disqualification, full deference should be given to the good faith judgment of constitutional officers of the executive branch with regard to the ethical performance of their duties. Permitting Article 78 review of such decisions, when a defendant already has a right to appeal in the event of conviction, would result in needless and undesirable proliferation and duplication of litigation. Where, as here, the Petitioner has not demonstrated a clear legal right to relief, review by way of Article 78 simply does not lie.

Justice is not served when a district attorney is put in a position where he or she believes there is a conflict but recusal is not permitted. Such a situation presents a district attorney with an ethical dilemma: either 1) proceed with a prosecution even though he or she reasonably believes doing so would violate the Rules of Professional Conduct; or 2) decline to prosecute legitimate cases of criminality against the district attorney's oath. Either choice would result in the district attorney being forced to violate the duties of the office, an untenable result. A rule that forces a district attorney between Scylla and Charybdis in that manner does not serve the ends of justice.

For these and other reasons discussed herein, we respectfully submit that the Decision and Judgment of the Appellate Division, Second Department, should be affirmed.

STATEMENT OF FACTS

In response to information that came to the attention of Richmond County District Attorney Daniel M. Donovan, Jr., a preliminary investigation was initiated to look into the possibility of violations of the state election law, New York City's local campaign finance law, and the Penal Law in connection with a 2009 City Council election on Staten Island. On February 22, 2010, after that preliminary investigation had been conducted, Respondent Donovan sought the appointment of a special district attorney and requested that the application be kept under seal. On January 12, 2012, the application was granted and Respondent Adler was appointed Special District Attorney. The order also provided that the application would remain under seal until further order of the Court.

On August 14, 2012, counsel for the petitioner requested that Respondent Fisher furnish a copy of the sealed application filed by Respondent Donovan. There was no response to this request.

On January 31, 2013, Respondent Adler, in his capacity as Special District Attorney, had a grand jury subpoena served upon the Assistant Secretary of Petitioner Working Families Party. On February 5, 2013, he had another grand jury subpoena served upon Citizen Action of New York, a group apparently connected to the Petitioner Working Families Party.

On February 21, 2013, counsel for Petitioners again sought release of Respondent Donovan's sealed application. Apparently, this letter also went unanswered.

By order to show cause signed on February 26, 2013, Petitioner commenced a special proceeding in the Appellate Division, Second Department, pursuant to CPLR Article 78, seeking a writ prohibiting the enforcement of the order relieving Respondent Daniel M. Donovan, Jr., District Attorney of Richmond County, from acting in this case and appointing Roger Bennet Adler as Special District Attorney in his stead; quashal of the subpoenas issued by the special district attorney to petitioner's assistant secretary and Citizen Action of New York; and unsealing of the heretofore sealed application for the above.

After the issues were fully briefed and oral argument was had thereon, by Decision and Order dated August 7, 2013, the Appellate Division, Second Department, held that the petitioner failed to establish that Special District Attorney Adler was performing a quasi-judicial act and, therefore, prohibition did not lie. Accordingly, the petition was denied and the proceeding was dismissed. (In the Matter of Working Families Party v Fisher, 109 AD3d 478 [2d Dept. 2013]).

On November 19, 2013, this Court granted Petitioner's motion for leave to appeal.(In the Matter of Working Families Party v Fisher, 22 NY3d 855 [2013]).

QUESTION PRESENTED

When an elected district attorney seeks recusal on a particular case after concluding that a conflict of interest or other ethical consideration forbids his or her investigation and prosecution of that case, and a judge grants such recusal and appoints a special district attorney in compliance with County Law §701, does a proceeding under CPLR Article 78 lie to review that order?

The Answer must be that an Article 78 proceeding does not lie in such circumstances. When a district attorney perceives a conflict of interest or other potential violation of the ethical rules governing his or her conduct in the prosecution of a particular case, that district attorney must be free to take those concerns to a judge and seek recusal, without fear of protracted litigation about the sufficiency of his or her basis for concern. To permit a defendant to challenge such recusal and the judicial appointment of a special district attorney, would force a district attorney either to jeopardize the timely investigation and potential prosecution of the case or act in possible violation of the rules of ethics. Such a rule would not serve the ends of justice. DAASNY therefore supports Respondents' position that Article 78 review should not lie in a case, such as the case at bar, in which a judge has accepted the conclusions of a district attorney who has sought recusal from

prosecuting a case on the basis of potential violations of the Rules of Professional Conduct and has appointed a special district attorney to prosecute in his or her stead.

ARGUMENT

PROHIBITION DOES NOT LIE TO CHALLENGE AN ELECTED DISTRICT ATTORNEY'S DECISION TO SEEK RECUSAL DUE TO A CONFLICT OF INTEREST OR A COURT'S RESULTING APPOINTMENT OF A SPECIAL DISTRICT ATTORNEY.

When the determination of an elected district attorney that he or she is ethically foreclosed from proceeding with the investigation and prosecution of a particular case is accepted by a judge pursuant to County Law § 701, and a special district attorney is appointed, neither that order nor the sufficiency of the reasons supporting the district attorney's decision is reviewable in a proceeding under CPLR Article 78 in the nature of prohibition. As matter of law, Article 78 relief is not available in the absence of a clear legal right or when other methods of redress are available. Furthermore, the district attorney's determination that he or she is precluded by an ethical concern from prosecuting a case is an executive function, not subject to judicial review. As a practical matter, review of the basis of a district attorney's decision to seek recusal would not only put the district attorney in an untenable position, but would undermine the integrity and timeliness of the investigation and potential prosecution. Nevertheless, petitioner argues for the right to attack the basis for the district attorney's self-disqualification before prosecution has even begun and to require a standard of review that is wholly inappropriate in such cases. That argument should be rejected.

A. The Extraordinary Writ of Prohibition Does Not Lie to Challenge an Elected District Attorney's Executive Determinations.

1. No clear legal right

"It is familiar law that an article 78 proceeding in the nature of prohibition will not lie to correct procedural or substantive errors of law" (Matter of Schumer v Holtzman, 60 NY2d 46, 51 [1983]). "Rather, the extraordinary remedy of prohibition may be obtained only when a clear legal right of a petitioner is threatened by a body or officer acting in a judicial or quasi-judicial capacity without jurisdiction in a matter over which it has no power over the subject matter or where it exceeds its authorized powers in a proceeding of which it has jurisdiction" (Matter of Soares v Herrick, 20 NY3d 139, 145 [2012], (quoting Matter of Morgenthau v Erlbaum, 59 NY2d 143, 147 [1983]). To warrant the extraordinary remedy of prohibition, it is not enough that the court make a mere legal error; rather, the court's error must implicate the court's very powers and thereby give the petitioner a clear legal right to relief (Matter of Pirro v Angiolillo, 89 NY2d 351, 355-356 [1996]; Matter of Holtzman v Goldman, 71 NY2d 564, 569 [1988]; Matter of Rush v Mordue, 68 NY2d 348, 353 [1986]; Matter of Mulvaney v Dubin, 55 NY2d 668 [1981]; La Rocca v Lane, 37 NY2d 575, 577 [1975], cert denied 424 US 968 [1976]).

Here, the decision whether to appoint Special Assistant District Attorney Adler lay within the sound discretion of the court granting recusal, and thus an

Article 78 will not lie. As numerous cases make clear, the court to which the district attorney's application is made is not required to grant recusal. See, e.g., Matter of Rice, 31 Misc3d 838 [N.Y. Sup. Ct. 2011]. Accordingly, there is no clear legal right to Article 78 relief.

2. Another remedy available

When courts have granted petitions for the extraordinary writ of prohibition, they have done so only when no other adequate remedy on appeal or at law was available to the objecting party (Matter of Soares v Herrick, 20 NY3d 139, 145 [2012]) (district attorney seeking to challenge his disqualification and appointment of a special district attorney had no other recourse at law).

The writ will generally not lie where "the harm can be adequately corrected on appeal or by recourse to ordinary proceedings at law or in equity" unless "prohibition would furnish 'a more complete and efficacious remedy . . . even though other methods of redress are technically available'" (Matter of Rush v Mordue, 68 NY2d 348, 354 [1986]; Matter of Dondi v Jones, 40 NY2d 8, 14 [1976]; LaRocca v Lane, 37 NY2d at 579-580; Matter of State of New York v King, 36 NY2d 59, 62 [1975]).

Here, other methods of redress are not merely "technically available"; they are explicitly available as of right upon direct appeal from a resulting judgment. Generally, the ordeal of a criminal trial and the possibility of conviction, standing

alone, are not sufficiently harmful to warrant prohibition (see, Matter of Rush v Mordue, 68 NY2d at 354 (citing Matter of Dondi v Jones, 40 NY2d at 14). Nor does the "harm" of prosecution by a special district attorney justify a special rule. Indeed, "[s]o far as the defendant is concerned, it is not for him to select his prosecutor." (People v Kramer, 33 Misc 209, 220 [General Sessions NY County 1900]; People v Paperno, 54 NY2d 294, 302 n6 [1981]; see also People v Citadel Management Co, Inc., 78 Misc2d 626, 627 [Crim. Ct. N. Y. County 1974]).

3. The District Attorney's Decision to Recuse Himself from a Case is an Executive Decision.

A district attorney is an elected constitutional officer (NY Const. art. XIII, § 13) who is statutorily charged with prosecuting all crimes committed in the county where he or she serves (County Law § 700, subd. 1). As this Court explained in Matter of Haggerty v Himelein, "the essence of a District Attorney's constitutional, statutory and common-law prosecutorial authority is the 'discretionary power to determine whom, whether and how to prosecute [a criminal] matter.'" (89 NY2d 431, 436 [1997] (quoting Matter of Schumer v Holtzman, 60 NY2d 46, 52 [1983])).

The duties of the district attorney fall into two broad categories: quasi-judicial and executive. When a prosecutor is "represent[ing] the public in bringing those accused of crime to justice," he is engaging in a quasi-judicial exercise (Matter of Haggerty v Himelein, 89 NY2d at 435). On the other hand, "public

prosecutors also perform a role 'analogous to that of a police officer,' which entails the investigation of suspicious circumstances with a view toward determining whether a crime has been committed…. Manifestly, when this purely investigative function is involved, the acts of the public prosecutor are to be regarded as 'executive' in nature and, in consequence, cannot legitimately be the object of a writ of prohibition, except, perhaps, in a most unusual and at present unforeseeable circumstance" (Matter of McGinley v Hynes, 51 NY2d 116, 124 [1980] quoting Toker v Pollak, 44 NY2d 211, 220 [1978]; see also Executive Law §63). The duty at issue here falls squarely within the executive category.

In discharging law enforcement functions, a district attorney possesses broad authority and discretion over all phases of a criminal prosecution (see People v Cajigas, 19 NY3d 697, 703 [2012] [filing of appropriate charges]; People v Di Falco, 44 NY2d 482, 486 [1978] ["what manner to prosecute a suspected offender"]; Matter of Soares v Herrick, 88 AD3d 148 [3d Dept. 2011] [allocation and use of prosecutorial staff and resources], aff'd 20 NY3d 139 [2012]; see also Matter of Cantwell v Ryan, 309 AD2d 1042, 1042–1043 [3d Dept. 2003]).

A determination by a district attorney that the Rules of Professional Responsibility require self-disqualification from acting in a particular case necessarily falls within his or her executive function. Therefore, such self-disqualification cannot be subject to prohibition (Matter of McGinley v Hynes, 51

NY2d at 124). This executive determination is entitled to great deference when an application for appointment of a special district attorney is made to a court pursuant to County Law §701, because it does not implicate separation of powers principles in the same way as when the district attorney is involuntarily supplanted by a court (see generally Johnson v Pataki, 91 NY2d 214, 224 [1997]).

B. Self-disqualification by a district attorney presents a very different legal situation from instances in which a district attorney is involuntarily disqualified at the application of another or the court itself.

It is now settled that a CPLR article 78 proceeding in the nature of prohibition is the proper vehicle to challenge a trial court's disqualification of a district attorney and the appointment of a special district attorney *over the objection* of the district attorney (see Matter of Soares v Herrick, 20 NY3d at 139). The rationale for this result is twofold. First, separation of powers principles are implicated when a member of the judiciary removes an elected district attorney from the performance of his constitutional duties over the latter's objection (Id. at 145; see Matter of Kavanagh v Vogt, 88 AD2d 1049, 1050 [3d Dept. 1982] [Levine, J., dissenting]). Second, "absent substantive review by way of a CPLR article 78 proceeding in the nature of prohibition, a party seeking review of the disqualification of a district attorney and subsequent appointment of a special district attorney pursuant to County Law § 701, *other than a criminal defendant*, has no recourse at law (*see e.g.* CPL 450.20)" (Matter of Soares v Herrick, 88

AD3d 148, 151 [3d Dept. 2011] [emphasis added]). These concerns are absent where, as here, the district attorney has self-disqualified and any potential defendants will have an available remedy via a direct appeal as of right if a judgment of conviction against them should result.

1. Disqualification: "Recusal" vs "Removal"

As a practical matter, the term "disqualified," as it is used in County Law § 701, is properly viewed as a status rather than a finding to be made by a court. A court's determination that a district attorney is disqualified as the result of a conflict of interest is therefore merely a judicial recognition of a pre-existing condition (Cf. Rule 1.7 Comment [3] ["A conflict of interest may exist before representation is undertaken…"]). As a status, the term properly includes both the situation where a district attorney voluntarily recuses himself or herself and the situation where a court involuntarily supplants him or her.

There are two methods by which a district attorney is recognized as disqualified in a particular case. Most frequently, disqualification occurs where, in the course of the investigation or prosecution of a matter, a district attorney concludes that proceeding with the case presents a conflict of interest. Under these circumstances, the district attorney seeks recusal by making an application for an order appointing a special district attorney (County Law §701). If the court agrees that the district attorney is disqualified, then the court proceeds to appoint a special

district attorney to replace him or her. If, on the other hand, the court believes the district attorney is not disqualified, the court will decline to make such an appointment (see Matter of Rice, 31 Misc3d at 838).

Alternatively, in some situations, a court has the power to disqualify a district attorney over the latter's objection and appoint another attorney to proceed in his or her stead. This power is limited, and this Court has cautioned that a lower court should "*remove* a public prosecutor only to protect a defendant from actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence" (Matter of Schumer v Holtzman, 60 NY2d at 55 [emphasis added]) or where there is an appearance of impropriety that "discourage[s] public confidence in our government and the system of law to which it is dedicated" (People v Adams, 20 NY3d 608, 612 [2013] (quoting People v Zimmer, 51 NY2d 390, 396 [1980])). Where the disqualification of a district attorney is ordered over his or her objection, the verbs most commonly used to describe what the court is doing are "remove", "supplant", and "intervene". Each of these words makes clear that the district attorney in question is being separated from a given case, not at his or her own request, but against his or her own judgment or will.

Self-disqualification or recusal, as opposed to removal, is what is at issue in this case. When a court intervenes to remove or supplant a member of another branch of government, it is reasonable that the standard for such action would be

set high. However, when a district attorney voluntarily seeks recusal because he or she has concluded that a conflict of interest or appearance of impropriety disqualifies him or her from acting, such conclusion is entitled to full deference as part of the executive function of the district attorney, and a court's finding that the district attorney presented a satisfactory explanation should not be reviewable by a proceeding pursuant to Article 78, particularly since a defendant always has the right to a direct appeal from any resulting judgment of conviction.

It is well-established that a district attorney has full discretion to decide whom to prosecute or not prosecute and that this discretion is not subject to challenge (People v Di Falco, 44 NY2d at 486; Matter of Holtzman v Hellenbrand, 10 AD2d 749, 750-751 [2d Dept. 1987]). It would be anomalous to grant a district attorney unfettered discretion to choose not to prosecute a case at all, but at the same time permit a challenge, by way of Article 78, to the district attorney's determination that he or she is disqualified from acting in a particular matter after a court has confirmed the correctness of the district attorney's assessment.

A district attorney's decision to seek recusal is analogous to situations where a trial judge determines to recuse himself or herself. There, "[a]bsent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal (People v Moreno, 70 NY2d 403, 405 [1987]). Notably, "recusal is a

matter solely within the discretion and personal conscience of the court," which is not reviewable by way of an Article 78 petition (Matter of Zugibe v Bartlett, 63 AD3d 1165, 1165-1166 [2d Dept. 2009]).

Simply stated, where the district attorney determines that he or she is disqualified from acting and a court agrees with that determination, no challenge can lie.

2. Statutory Construction and Legislative History of § 701

The language of §701 itself, as well as the statute's legislative history, fully support viewing disqualification as a status. Although the current formulation of the special prosecutor statute dates to 1950, the law has ancient roots. In New York, the office of the district attorney was created in 1796, when the State was divided into seven districts, with deputy attorneys general assigned to prosecute all cases in Oyer and Terminer within their respective districts (Temp. State Comm'n to Study and Make Uniform Existing Laws Relating to Counties, Sixth Report 28 [1950] [hereinafter "County Law Commission Report"). In 1801, the New York City, Suffolk, and Westchester Counties were granted their own prosecutors, with the moniker of district attorney, and in 1818 each county was granted a district attorney (Id.). In most counties, the district attorney was appointed by the Governor until 1846, when the office was made elective by the Constitution of 1846 (Id.; see also NY Const. of 1846, art X § 1), although the first elected district

attorneys did not take office until January of 1848 (NY Const. of 1846, art XIV § 3). During this early, formative time of the office of district attorney, special prosecutors were not provided for by statute.

In December 1847, just prior to the first elected district attorneys taking office, the legislature adopted the first statutory provision for a special prosecutor. The statute authorized criminal courts to designate a "suitable person" to act as district attorney whenever the office of district attorney was vacant or when the district attorney was unable to attend the term of that court for any reason (Act of Dec 14, 1847, ch 470, § 33, 1847 NY Laws 644). Although this statute provided for what was essentially a special prosecutor, it did not authorize a special prosecutor in the situation where a district attorney had a conflict of interest.

The statute remained in that form until 1883, when it was codified as section ninety of the Revised Statutes, a precursor to New York's consolidated code. During the recodification, language was added to allow a court to appoint a special district attorney when the elected district attorney "shall not be in attendance at a term of any court of record . . . or shall be unable by sickness, or *by being disqualified* from acting in a particular case, to discharge his duties" (Act of Mar. 22, 1883, ch 123, 1883 NY Laws 131 [emphasis added]). The statute was recodified, without change, as part of New York's consolidation of the County Law in 1909. An Act in Relation to Counties, Constituting Chapter Eleven of the

Consolidated County Law, ch 16, art 11, 1909 NY Laws 410. Importantly, the language of this statute ("by being disqualified") appears to assume that the only way a district attorney is disqualified from a case is by order of a court.

In 1950 the statute was amended again, this time at the suggestion of the Uniform County Law Commission, as part of a comprehensive redrafting and revision of the consolidated County Law (Letter from Henry Marble, Assemblyman, to Governor Dewey [Mar. 1950], Bill Jacket, L 1950, ch. 691 at 3-4). Those suggestions were the result of years of study, research, and public hearings (County Law Commission Report at 5-6). As a result of the 1950 amendments, the special prosecutor statute largely took its current form, providing that when a district attorney "shall not be in attendance at a term of any court of record… *or is disqualified* from acting in a particular case," the court may appoint a special prosecutor. An Act in Relation to Counties, Constituting Chapter Eleven of the Consolidated Laws, ch. 691 1951 NY Laws 168 (emphasis added).

Thus, the 1950 recodification changed the prepositional phrase of the 1883 statute ("by being disqualified") to a passive form of the verb to be ("or is disqualified").[1] Whereas the 1883 formulation implies someone doing the disqualification, the 1950 language recognizes that a disqualification exists without any action by a court. And although the Uniform County Law

[1] In 1991, the statute was amended again, pluralizing the prepositional phrase to reference multiple assistants ("are disqualified") but retained the passive form (Chapter 590 of the Laws of 1991).

Commission's brief report does not specifically explain the rationale for the change (or, for that matter, any of the myriad of changes it recommended), fundamental principles of statutory construction require that the change should be given some effect (Rosner v Metropolitan Property and Liability Ins. Co., 96 NY2d 475, 479 [2001], ["[M]eaning and effect should be given to all language of a statute…."}; see also McKinney's Cons. Laws of NY, Book 1, Statutes § 231, at 390).

Ignoring the statutory history of §701, petitioners seek to have this Court interpret the statute as describing only situations in which a court intervenes to supplant an elected district attorney over the latter's objection and appoints a special district attorney – to the exclusion of situations in which the district attorney has voluntarily recused himself. Petitioner's reading is incorrect inasmuch as it fails to acknowledge the history of the statute.

3. The Proper Standard for Self-Disqualification

This Court recently held that "the existence of a conflict of interest between the district attorney and a defendant, by itself, does not warrant the removal of the district attorney; in addition, a defendant 'should demonstrate actual prejudice or so substantial a risk thereof as could not be ignored'" (Matter of Soares v Herrick, 20 NY3d at 146 [quoting Matter of Schumer v Holtzman, 60 NY2d at 55). Thus, it is clear that when a defendant is asking a court to remove a district attorney, the "actual prejudice" standard must be met before that court can justify supplanting a

duly elected constitutional officer of another coequal branch of government against his or her will.

The requirement that a defendant demonstrate actual prejudice or a substantial risk of an abused confidence has been consistently reaffirmed by this Court and echoed by other appellate courts (see, e.g., People v English, 88 NY2d 30 [1996]; People v Keeton, 74 NY2d 903 [1989]; People v Jackson, 60 NY2d 848 [1983]; Matter of Nathalia P., 22 AD3d 496 [2d Dept. 2005]; People v Lasage, 221 AD2d 1006 [4th Dept. 1995], lv. denied, 88 NY2d 849 [1996]; People v Tyler, 209 AD2d 1028 [4th Dept. 1994], lv. denied, 85 NY2d 915 [1995]; People v McCullough, 141 AD2d 856 [2d Dept. 1988], appeal dismissed, 73 NY2d 924 [1989]).

On the other hand, an application by a district attorney for appointment of a special district attorney need only be made in "good faith" and contain "reasonable grounds" for his or her conclusion that he or she is disqualified (People v Martin, 266 AD2d 921 [4th Dept. 1999]; People v Anonymous, 126 Misc2d 673, 677 [NY City Crim. Ct. 1984]; People v Schrager, 74 Misc2d 833 [N.Y. Sup. 1973]). This is because, in the case of self-disqualification, full deference should be given to the good faith judgment of a constitutional officer of the executive branch of government with regard to the performance of his or her duties in an ethical fashion.

The district attorney has an independent, ethical duty to avoid conflicts of interest and is responsible for disqualifying himself or herself just as other attorneys must turn down employment that presents a conflict under the New York Rules of Professional Conduct (Rules 1.7 and 1.8). The ability to self-disqualify and apply for the appointment of a special district attorney is necessary because a district attorney's status as a constitutional officer "does not render him immune from the Rules of Professional Conduct" (Czajka v Koweek, 100 AD3d 1136, 1139 [3d Dept. 2012]).

As a matter of judicial policy, the adoption of a good faith standard for self-disqualification best advances the societal interests at stake by encouraging the district attorney to recognize and report conflicts that could undermine public faith in the justice system. At the same time, a good faith requirement assures that a district attorney may not simply avoid difficult or unpopular cases by claiming a conflict where no reasonable grounds exist to support his or her determination. Finally, the deferential good faith requirement also guarantees that a defendant cannot use disqualification as a procedural tactic to stall or gain advantage. The good faith standard thus forwards the People's interest in prosecution of criminal conduct, their interest in fair and impartial justice, and their interest in an efficient criminal justice system. For all those reasons, a good faith standard strikes the proper balance.

Petitioner, on the other hand, reads County Law § 701 as imposing the more rigorous "actual prejudice" standard upon the district attorney's good faith determination. That interpretation is untenable. To begin with, petitioner's reading of the statute violates the canon of statutory construction known as constitutional avoidance. "Where the language of a statute is susceptible of two constructions, the courts will adopt that which avoids injustice, hardship, constitutional doubts or other objectionable results" (People v Correa, 15 NY3d 213, 232 [2010], [quoting Matter of Jacob, 86 NY2d 651, 667 [1995]; see also McKinney's Cons. Laws of N.Y., Book 1, Statutes § 150). To the extent that petitioner's reading would raise constitutional issues (see B(4), infra), it should be rejected, and a deferential standard should be adopted.

More important, a statute should be read in light of its purpose (Statutes § 95 ["[I]n construing a statute [courts] should consider the mischief sought to be remedied by the new legislation, and they should construe the act in question so as to suppress the evil and advance the remedy."]). The mischief sought to be prevented by County Law § 701 is the situation where an elected district attorney, who is presented with a conflict of interest or other ethical concern, must choose between proceeding to act in violation of the Rules of Professional Conduct or abstaining from investigating or prosecuting a legitimate crime. Moreover, the protracted litigation that may well ensue while reviewing courts determine which

path must be taken, would surely undermine the legitimate process of investigation and prosecution. Section 701 provides a safety valve, by which the district attorney may inform a court that he or she is disqualified from acting and request that a special district attorney be appointed, allowing the prosecution to continue with a disinterested prosecutor.

Petitioner's construction of the statute seeks to leave the conflict in place, which defeats the purpose of the statute and perpetuates the mischief sought to be avoided. The Petitioner seeks to place Respondent Donovan between a proverbial rock and a hard place because that result serves that organization's purpose of evading an investigation of their activities by an impartial prosecutor lacking any conflict. For these reasons, the "actual prejudice" standard advocated by the petitioner should not be applied to situations where the district attorney has self-disqualified. Accordingly, prohibition is not available.

4. Separation of Powers

The aim of the New York Constitution is to regulate, define, and limit the powers of government by assigning to the executive, legislative, and judicial branches distinct and independent powers, thereby ensuring an even balance of power among the three (see, Matter of Maron v Silver, 14 NY3d 230, 258 [2010]; McKinney's Const. Art. 3, § 1; McKinney's Const. Art. 4, § 1; McKinney's Const. Art. 6, § 1). "The concept of the separation of powers is the bedrock of the system

of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with performing particular functions" (Matter of Maron v Silver, 14 NY3d at 258). It is "a fundamental principle of the organic law that each department should be free from interference, in the discharge of its peculiar duties, by either of the others" (Id. [quoted sources omitted]).

Under this system, the exceptional power of the judicial branch to disqualify a district attorney and supersede him or her by appointing a special prosecutor is limited, as removal of a constitutional officer by a court implicates separation of powers considerations (Matter of Schumer v Holtzman, 60 NY2d at 55). Thus, the power of the judiciary to involuntarily supplant a duly-elected district attorney is not interpreted expansively (People v Leahy, 72 NY2d 510, 514 [1988]). "The courts, as a general rule, should *remove* a public prosecutor only to protect a defendant from actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence" (Matter of Schumer v Holtzman, 60 NY2d at 55 [emphasis added]).

In circumstances where the disqualification or recusal of a district attorney is a result of executive action taken by the district attorney or Governor, as opposed to *removal* by a court, no such separation of powers concern exists. This is why when a court removes a prosecutor actual prejudice must be shown, but when the district attorney self-disqualifies, an application for appointment of a special

district attorney is sufficient when it is made in good faith and it sets forth "reasonable grounds supporting the position of the district attorney that he is disqualified from prosecuting defendant based upon" the Rules of Professional Conduct (People v Martin, 266 AD2d at 921; see People v Anonymous, 126 Misc2d at 677; People v Schrager, 74 Misc2d 833 [NY Sup. Ct. 1973]; see also Application of Kelley, 83 Misc2d 776 [NY County Ct. 1975]; Costello v Norton, 1998 WL 743710, *7 [NDNY 1998]).

A district attorney is subject to the Rules of Professional Conduct and is responsible for the ethical position of his office and, therefore, "recusal or an application for same is within his sole discretion" (People v Anonymous, 126 Misc2d at 677). Even the Petitioner agrees that the district attorney may "recuse himself from a particular matter"; they contend, however, that such recusal should be made in conjunction with County Law § 702 (Petitioner's Brief at p. 24). While this acknowledgment includes a complete misreading of the purpose of County Law § 702[2], the recognition that a district attorney may recuse himself or herself is very significant. Additionally, the Petitioner contends that the district attorney could recuse himself or herself and have other assistant district attorneys in the

[2] County Law §702 governs the appointment of assistant district attorneys. It contains no language pertaining to circumstances where the district attorney is disqualified from acting in a particular case. The district attorney may not cede his or her authority to another who has not been appointed as specified in County Law § 701 (see Matter of Schumer v Holtzman, 60 NY2d at 46). Assistant district attorneys operate under the supervision of the district attorney. A special district attorney replaces the district attorney and answers to no one but the court.

office pursue the case in his or her stead, because this procedure would continue to hold the district attorney accountable for the result (Petitioner's Brief at pp. 24, 30). This is a self-defeating argument. If the district attorney remains accountable for the handling of a particular case in which he has recused himself, then his recusal is effectively meaningless.

This Court has recognized that there is a distinction to be made between situations where the district attorney recuses himself or herself, and where a court "'displace[s] a duly elected [d]istrict [a]ttorney'" because the latter situation "raises separation of powers concerns" (Matter of Soares v Herrick, 20 NY3d at 145 [quoting Leahy 72 NY2d at 513-514) but the former does not. Because there are no separation of powers concerns under the facts of this case, application of the "actual prejudice" standard is not warranted.

C. Even if the Writ is an Available Remedy, it was Properly Denied Here.

Even where it is an available remedy, prohibition under CPLR article 78 "'is not mandatory, but may issue in the sound discretion of the court'" (Matter of Soares v Herrick, 20 NY3d at 145, [quoting La Rocca v Lane, 37 NY2d at 579). Because the remedy is discretionary, a court that is asked to impose prohibition "must weigh a number of factors: the gravity of the harm caused by the act sought to be performed by the official; whether the harm can be adequately corrected on appeal or by recourse to ordinary proceedings at law or in equity; and whether

prohibition would furnish a more complete and efficacious remedy even though other methods of redress are technically available" (Matter of Rush v Mordue, 68 NY2d at 354 [internal quotation marks and ellipses omitted]). To warrant the extraordinary remedy of prohibition, it is not enough that the court make a mere legal error; rather, the court's error must implicate the court's very powers and thereby give the petitioner a clear legal right to relief (Matter of Pirro v Angiolillo, 89 NY2d at 355-356; Matter of Holtzman v Goldman, 71 NY2d at 569; Matter of Rush v Mordue, 68 NY2d at 353; Matter of Mulvaney v Dubin, 55 NY2d at 668; La Rocca v Lane, 37 NY2d at 577). Under all of the foregoing factors, it is clear that under the facts of this case, the Second Department did not abuse its discretion in denying the petition.

CONCLUSION

THE OPINION AND ORDER OF THE SECOND DEPARTMENT WHICH DENIED AND DISMISSED THE PETITION SHOULD BE AFFIRMED.

RESPECTFULLY SUBMITTED,

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