

IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

**IN RE JOEY P. SAN NICOLAS, in his official capacity as Attorney General of the Commonwealth
of the Northern Mariana Islands, and OFFICE OF THE ATTORNEY GENERAL,**
Petitioner.

SUPREME COURT NO. 2013-SCC-0020-PET
SUPERIOR COURT NO. 13-0068
SUPERIOR COURT NO. 13-0073
SUPERIOR COURT NO. 13-0134B

OPINION

Cite as: 2013 MP 8

Decided June 28, 2013

Joey P. San Nicolas, Attorney General, and Charles E. Brasington, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Petitioner Office of the Attorney General
George L. Hasselback, Legal Counsel, Office of the Public Auditor, Saipan, MP, for Respondent
Commonwealth of the Northern Mariana Islands

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; PERRY B. INOS, Associate Justice.

INOS, J.:

¶ 1 In response to a trial court order disqualifying the entire Office of the Attorney General (“OAG”) from any case involving alleged co-conspirators of former Attorney General Edward T. Buckingham (“Buckingham”), the OAG filed a petition for a writ of mandamus or, in the alternative, prohibition. That petition requests that we issue a writ of mandamus staying *Commonwealth v. Nekaifes*, Crim. No. 13-0068; *Commonwealth v. Ogumoro*, Crim. No. 13-0073; *Commonwealth v. Kosam*, Crim. No. 12-01234B; *Commonwealth v. Rebuenog*, Crim. No. 12-0134B; and ordering the trial court to hold a hearing regarding its decision to disqualify the entire OAG from those cases. Or, in the alternative, that we issue a writ of prohibition forbidding the trial court from continuing the aforementioned cases along with any related criminal actions initiated after the OAG’s petition. In support, the OAG argues the trial court denied due process and exceeded its inherent authority to appoint a special prosecutor. For the reasons stated below, we GRANT the OAG’s petition for a writ of mandamus, order the trial court to hold a hearing regarding the OAG’s disqualification, and stay the aforementioned cases as well as any other related cases brought following the OAG’s petition pending the trial court’s resolution of the OAG disqualification question.

I. Factual and Procedural Background

¶ 2 The Office of the Public Auditor (“OPA”), through its legal counsel, George L. Hasselback (“Hasselback”), obtained a penal summons against then-Attorney General Buckingham. Shortly thereafter, Buckingham allegedly fled to the airport accompanied by a law-enforcement escort tasked with blocking delivery of the summons. Despite the escort, Buckingham was served the summons before boarding his plane.

¶ 3 Notwithstanding receipt of the summons, Buckingham failed to attend his arraignment. Instead, the Chief of the OAG’s Civil Division appeared on Buckingham’s behalf. In developing a defense for the arraignment hearing, the Chief of the Civil Division allegedly received help from other unspecified members of the OAG.

¶ 4 Buckingham subsequently resigned as Attorney General on the same day Hasselback, who had been investigating the ongoing claims against Buckingham pursuant to 1 CMC § 7847(b), petitioned the trial court seeking: (1) the disqualification of the OAG from investigating a potential conspiracy surrounding the circumstances of Buckingham’s flight from Saipan, and (2) appointment as a special prosecutor in order to investigate that potential conspiracy.

¶ 5 In an ex parte order, the trial court granted the petition disqualifying the OAG and expanding Hasselback’s special prosecutor status to include Buckingham’s alleged co-conspirators. The court found

the OAG had several conflicts of interest towards Buckingham, including not only personal and professional conflicts, but also conflicts arising from the attorney-client relationship formed when the OAG represented Buckingham at the arraignment hearing. The attorney-client relationship, for instance, barred the OAG from acting adversely to Buckingham's interest, including prosecuting alleged co-conspirators. The order, however, did not explain why the OAG did not receive notice or an opportunity to respond to the petition.

¶ 6 Following the disqualification, the trial court sealed the ex parte order until the conclusion of Hasselback's investigation into the co-conspirators five months later. Soon after, the OAG filed this writ.

II. Jurisdiction

¶ 7 We have original jurisdiction to issue writs of mandamus and prohibition. 1 CMC § 3102(b); *Tenorio v. Superior Court*, 1 NMI 1, 6-7 (1989) (reviewing a petition for writ of mandamus); *Mafnas v. Superior Court*, 1 NMI 277, 283-84 (1990) (reviewing a petition for writ of prohibition).

III. Discussion

¶ 8 In its petition requesting a writ, the OAG challenges the trial court's order disqualifying the OAG from prosecuting Buckingham's co-conspirators. The OAG argues the disqualification order violated the OAG's due process rights, which required the trial court to provide the OAG notice of the motion to disqualify as well as an opportunity to respond to it. Because the trial court did not do that, the OAG requests we issue a writ.

¶ 9 Writs, whether of mandamus or prohibition, are extraordinary relief granted only in the "most dire of instances." *In re Buckingham*, 2012 MP 15 ¶ 7 (quoting *In re Cushnie*, 2012 MP 3 ¶ 6). To determine whether to grant a writ, we weigh five factors:

1. The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief desired;
2. The petitioner will be damaged or prejudiced in a way not correctable on appeal;
3. The lower court's order is clearly erroneous as a matter of law;
4. The lower court's order is an oft-repeated error, or manifests a persistent disregard of applicable rules; and
5. The lower court's order raises new and important problems, or issues of law of first impression.

In re Cushnie, 2012 MP 3 ¶ 7 (citing *Tenorio*, 1 NMI at 9-10). All five factors need not be present, *In re Buckingham*, 2012 MP 15 ¶ 7, but the petition must show, at a minimum, that the trial court's order was clearly erroneous. *Sablan v. Superior Court*, 2 NMI 165, 168 (1991). We will only find clear error if no "rational and substantial legal argument can be made in support of the questioned . . . ruling even though on normal appeal a reviewing court may find reversible error." *In re Buckingham*, 2012 MP 15 ¶ 10 (quoting *Tenorio*, 1 NMI at 8).

¶ 10 Because both parties agree that *Tenorio* factors one, two, and five favor granting a writ while the fourth *Tenorio* factor does not, we will confine our analysis to the single factor on which they disagree: factor three, whether the lower court’s order was clearly erroneous as a matter of law. The third *Tenorio* factor raises three issues. First, whether the trial court had the authority to disqualify the entire OAG. Second, if so, whether the trial court had to provide the OAG notice and an opportunity to be heard prior to issuing the disqualification order. And, third, whether the trial court erroneously disqualified the OAG. We will address each in turn.

A. *Authority to Disqualify*

¶ 11 The trial court granted an ex parte petition by the OPA to appoint Hasselback as a special prosecutor to investigate and prosecute Buckingham and individuals connected to Buckingham’s alleged offenses. In granting the petition, the trial court concluded “that it has the inherent power to appoint a special prosecutor when the OAG is disqualified because of a conflict of interest or by some other means.” *Commonwealth v. Buckingham*, Crim. No. 12-0134 (NMI Super. Ct. Aug. 17, 2013) (Granting Ex Parte Petition for Appointment of Special Prosecutor at 3) (“Disqualification Order”). It then disqualified the entire OAG because of a conflict of interest. In light of that disqualification’s broad sweep, we first consider whether the trial court possesses the authority to disqualify the entire OAG from prosecuting criminal matters involving a defendant who is not the Attorney General or Governor.

¶ 12 We begin with the Commonwealth Constitution, which we construe according to its “plain, commonly understood meaning . . . unless there is evidence that a contrary meaning was intended.” *Camacho v. NMI Retirement Fund*, 1 NMI 362, 368 (1990) (citations omitted) (quotation marks omitted). The Commonwealth Constitution empowers the Attorney General to provide legal advice, represent the Commonwealth in legal matters, and prosecute crimes:

The Attorney General shall be responsible for providing legal advice to the governor and executive departments, representing the Commonwealth in all legal matters, and prosecuting violations of Commonwealth law.

NMI CONST. art. III, § 11.

¶ 13 The power to prosecute, however, is not absolute. If it were, the OAG would be required to prosecute attorneys within its office as well as the Governor, who currently has the authority to appoint and remove the Attorney General. To minimize the pernicious effect that might arise from requiring the OAG to prosecute its own members, the Attorney General, or the Governor, the Commonwealth Constitution established a system of checks and balances, which included the creation of the OPA to serve as a sentinel against government malfeasance. *See* NMI CONST. art. III, § 12 (requiring the OPA to

audit the executive, legislature, and judiciary). One of the OPA’s duties is to investigate and prosecute the Attorney General or Governor. 1 CMC § 7847(b).¹

¶ 14 The Commonwealth Constitution’s system of checks and balances is further reinforced by Article IV, Section 2. That provision explicitly recognizes the trial court’s inherent authority. NMI CONST. art. IV, § 2 (“The superior court shall have all inherent powers . . . necessary to the complete exercise of its duties and jurisdiction . . .”). A court’s inherent authority, in turn, is comprised of those powers neither provided for nor excluded by the constitution or other laws that nonetheless flow to the judiciary as a separate branch of government because their exercise is essential to the performance of the court’s duties. *Boston v. Buchanan*, 89 P.3d 1034, 1047 (Okla. 2003); FELIX F. STUMPF, INHERENT POWERS OF THE COURT 9-10 (2008); *see also O’Coin’s, Inc. v. Treasurer of Cnty. of Worcester*, 287 N.E.2d 608, 613-14 (Mass. 1972); *State v. Superior Court*, 275 P.2d 887, 889 (Ariz. 1954).

¶ 15 Those powers fall within three categories. The first, and most rare, are those powers “involving activity so fundamental to the essence of a court as a constitutional tribunal that to divest the court of absolute command within this sphere” would render the terms “court” and “judicial power” meaningless. *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 562 (3d Cir. 1985). The second, and most common, are those powers arising from the nature of the court: “powers implied from strict functional necessity.” *Id.* And, third, are those powers necessary in the pursuit of a just result. *Id.* at 563. The third category is implicated here.

¶ 16 That third category, we have implicitly held, empowers trial courts to both disqualify the OAG and appoint a special prosecutor. *Commonwealth v. Oden*, 3 NMI 186, 204-05 (1992) (affirming a trial court’s decision to disqualify the Criminal Division of the OAG and appoint a private attorney as a special prosecutor). In *Oden*, we upheld a trial court’s disqualification of the entire criminal division of the OAG, *id.* at 204, and subsequent appointment of a private attorney as special prosecutor. *Id.* at 205. We did so because of an office-wide conflict of interest: the Chief of the Office of Public Defender, who was representing Oden, became the Chief of the OAG’s Criminal Division, which was prosecuting Oden. *Id.* at 204. To allow the attorney formerly defending Oden to later oversee Oden’s prosecution would have offended the pursuit of justice.

¶ 17 Other courts have likewise held that the judiciary is vested with the inherent authority to disqualify prosecutors and appoint special prosecutors in their place under limited circumstances. In

¹ The statute reads in full:

If the Public Auditor has reasonable grounds to believe the Governor or Attorney General has violated federal or Commonwealth criminal law, the Public Auditor may use the legal counsel for the office of the Public Auditor or retain special counsel who shall serve as an assistant attorney general for purposes of investigating and prosecuting, if necessary, the criminal law violations.

Weems v. Anderson, for example, a trial court appointed a special prosecutor to aid an investigation into a prosecutor even though the relevant statute did not expressly provide for it. 516 S.W.2d 895, 898 (Ark. 1974). Despite an absence of constitutional or statutory authority for the appointment, the Arkansas Supreme Court upheld it, concluding that the trial court had the inherent “authority to do what justice, reason and common sense dictate[d] must be done.” *Id.* In so holding, the court noted that other courts confronted with the same situation had consistently held that the judiciary has the inherent power to make such appointments. *Id.*

¶ 18 Similarly, despite no express constitutional or statutory authority to do so, in *State ex rel. Thomas v. Henderson*, 175 N.E. 865 (Ohio 1931), a judge appointed three special prosecutors to assist a special grand jury investigating a prosecutor. *Id.* at 865-66. In reviewing the appointment, the Supreme Court of Ohio held that the trial court has “certain powers inherent in courts of justice, created by the Constitution, which the [legislature] has no power to abridge” *Id.* at 867. Those inherent powers included appointing special prosecutors when “necessary to the exercise of judicial functions and the conservation of the peace.” *Id.*

¶ 19 Finally, in *People v. Moretti*, 109 N.E.2d 915 (Ill. App. Ct. 1952) (*aff’d*, 114 N.E.2d 337), the Illinois Court of Appeals, First District, considered a case in which Michael Moretti, a police officer on the attorney general’s staff, was arrested for killing two people following a tavern brawl. *Id.* at 915-16. The attorney general disqualified himself from the case because he expected to testify as a witness. *Id.* at 916. Following the disqualification, the trial court appointed a special prosecutor. *Id.* The special prosecutor later notified the trial court that Moretti’s brothers allegedly had attempted to bribe and threaten witnesses in the case. *Id.* In response, the trial court directed the special prosecutor to prosecute the Moretti brothers for bribery. *Id.* On appeal from the subsequent bribery convictions, the Moretti brothers argued the special prosecutor did not have the authority to prosecute them because it exceeded the initial special prosecutorial mandate. *Id.* at 918-19. The appellate court disagreed, calling the Moretti brothers’ request to ignore the connection between the two cases “a rigidly legalistic approach.” *Id.* at 919. Those connections, the Court ruled, were enough to uphold the trial court’s expansion of the special prosecutor’s initial mandate. *Id.*

¶ 20 In light of the Constitution’s prosecutorial exception, the court’s inherent authority and duty to safeguard justice, and persuasively uniform precedent among other jurisdictions, it follows that the trial court has the power to disqualify the OAG under limited circumstances – a power we implicitly found in *Oden*. Therefore, we reaffirm *Oden* and hold that the trial court possesses the inherent authority to disqualify the entire OAG under narrow circumstances.²

² We do not address whether the trial court could disqualify the OAG sua sponte, which would raise separation of power issues regarding prosecutorial discretion. Neal Devins & Steven J. Mulroy, *Judicial*

B. Validity of the Disqualification Order

¶ 21 The next question is what process, if any, the OAG is entitled to before a trial court disqualifies it from a prosecution not involving either the Governor or the Attorney General. Both parties agree (so we do not decide) that under this case’s circumstances, the Due Process Clauses of both the federal and Commonwealth constitutions require notice and a hearing.

¶ 22 But while the parties agree due process was violated, they disagree about whether that violation was harmless. That is important because reversible error is not necessarily sufficient to grant a writ. *In re Buckingham*, 2012 MP 15 ¶ 10 (“We will not find error where ‘a rational and substantial legal argument can be made in support of the questioned . . . ruling even though on normal appeal a reviewing court may find reversible error.’”) (quoting *Tenorio*, 1 NMI at 8). As a result, we would normally proceed to consider whether the trial court’s order disqualifying the OAG was supported by a rational and substantial legal argument.

¶ 23 We, however, do not do so here. Because no disqualification hearing was held, we have an inadequate record to examine. For example, the record sheds no light on what, if any, steps the OAG took to screen attorneys representing or consulting on Buckingham’s case from those not involved. Because deciding the validity of the disqualification requires many facts left unanswered by the undeveloped record, as well as the parties’ agreement that the matter should return to the trial court for further development, we leave the validity of the disqualification for another day.

IV. Conclusion

¶ 24 For the foregoing reasons, we GRANT the Attorney General’s petition for a writ of mandamus, order the trial court to hold a hearing regarding the OAG’s disqualification, and stay *Nekaiyes*, Crim. No. 13-0068; *Ogumoro*, Crim. No. 13-0073; *Kosam*, Crim. No. 12-01234B; *Commonwealth v. Rebueng*, Crim. No. 12-0134B; and any other related cases brought by the OPA pending the trial court’s resolution of the OAG disqualification issue.

SO ORDERED this 28th day of June, 2013.

/s/
ALEXANDRO C. CASTRO
Chief Justice

