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Office of the District Attorney

County of Dixon

MEMORANDUM

To: Debra Uliana, Chief Deputy District Attorney

From: Applicant

Date: Feb 22, 2022

RE: In re. Price

Upon reviewing your interviews with Deputy District Attorney Mark Price ("**Price**"), Senior Deputy District Attorney Laila Sayed ("**Sayed**") [Price's supervisor], review of the respective rules and regulations, and some legal research I think you might want to focus on the fact that Darryl Howe ("**Defendant**") was not indicted at all throughout this process in review, and the indictment was dismissed at the first trial for indictment on December 8th.

When questioning whether Price's conduct violated Columbia Rule of Professional Conduct Rule 4.2 ("**Rule 4.2**") prohibiting a lawyer from communicating with a person known to be represented by another lawyer without the lawyer's consent: Price recalls having been informed about the application of Rule 4.2 by Sayed during this call, and Sayed told him that the rule permitted a prosecutor to communicate with a defendant represented by counsel, without the counsel's consent, so long as he is conducting an investigation. However, Sayed has no recollection of such a question or information that she had provided to him, and further insists that if such question were raised by Price, she'd have taken in up to Senior Deputy District Attorney Lamar Lewis ("**Lewis**"), as she'd consider this a non-trivial question, and he is the one to go to under such circumstances. Therefore, the exemption from Rule 4.2 application using Rule 5.2 shield doesn't seem like an option for Price here, unless he can prove such correspondence.

However, although, in Rule 4.2 it is clearly stated in the comment [1] that, the rule applies even when the represented person initiates or consents to the communication, comment [8] adds by saying, the law recognizes that prosecutors are authorized to contact represented persons, in the context of investigative activities, as limited by the relevant federal and state constitutions, statutes, rules, and case law. Furthermore, in *State v. Nelson*, court indicated that, comment [8] states that a prosecutor is not prohibited from communicating with a represented defendant if and to the extent that the prosecutor is authorized by law to do so.

And last but not least in *State v. Nelson*, court indicated that, depending on the circumstances, a prosecutor may be allowed to communicate with a defendant known to be represented by counsel, without counsel's consent, *before the defendant is indicted*. Whether the prosecutor knows that the defendant has expressed a willingness to communicate, a fact that would militate in favor of communication, and whether the prosecutor knows that counsel has expressed an unwillingness to consent, a fact that would militate against communications. In *State v. Nelson*, defendants were indicted prior to the communications between the prosecutor and the defendants. Rule 4.2 was not intended to apply to a prosecutor, and that the communication without the counsel's consent should attach after the defendant has been indicted. Indictment gives rise to a 6th Amend right to rely upon a counsel. Therefore, after indictment the same rule should apply to prosecution just like it applies to any other lawyer (*State v. Mann*). Also, to the State's raised issue that listening should not be treated the same as speaking as it can pertain questioning, the court commented that it should be reviewed a little broader than that and the defendant should be protected from the consequences of his or her ignorance.

On Sept. 26, Defendant called the office of Mill Brook Police Detective Donna Daichi ("**Daichi**"), and upon being informed on this contact, Price informed Sayed, who then told him that anything Defendant will volunteer would likely be admissible. Sayed instructed Price, and requested him to instruct Daichi that they should only listen, not ask questions, and accept all volunteered information by the Defendant.

On this note, Price should be able to rely on Columbia Rule of Professional Conduct Rule 5.2 ("**Rule 5.2**"), where a subordinate lawyer is not deemed to have violated any rule of professional conduct if the lawyer was acting in accordance with his supervisor's reasonable resolution of an arguable question of professional duty with regards to the instructions he received from Sayed on how to approach to the calls they were receiving

from the Defendant. Both Price and Sayed agreed on the fact that the correspondence between the two included Sayed's confirmation that any information offered by the Defendant should be admissible, and as long as they don't speak but listen it was okay. Although Sayed does not remember a call between the two about the Rule 4.2 interpretation, that doesn't seem to be a substantive issue to decide on whether 5.2 should be applicable for Price or not as to the "accepting an offered statement by a defendant".

On October 3, 2021, Defendant called Daichi, and Daichi per Price's instructions, listened only, and reported back to Price. Price was not a party to this call. Since there was no indictment prior to this call, it should not be considered to have violated Rule 4.2.

Following this on October 5th, during the preliminary hearing, upon request by Defender Gardner ("**Gardner**") to ask Daichi not to speak with the Defendant, the Judge Gorence ("**Judge**") declined to do so, and he just informed the Defendant that it doesn't seem like a wise choice. However, did not take any judicial issue of it.

On November 18, 2021, Defendant called Price from his cellphone, and although Price informed him that he did not have to talk to him, he choose to talk, and Daichi was on the other line listening as well. Neither asked questions or contributed to the communication, making it anything like an interrogation. Rather they listened and took notes of the voluntarily offered statements by the Defendant. They did not even know if the statement would be incriminating, since they weren't initiating it or dictating it. Price claims that he talked to Sayed on this date, but nothing different than the previous correspondence context as to the application of Rule 4.2. However, Sayad is pretty determined that no such conversation took place, and she is positive that she would have taken it to Lewis, if it did, and since she didn't, she concludes that no such correspondence took place. In my opinion, what is important is the fact that at this point the Defendant is still not indicted, and aside from the Gardner's clear opposition to these calls, nothing was necessarily different than the call on October 3rd. I do not think that, the October 3rd call should be treated the same way November 18th call is being treated, as the only opposition by the Defendant counsel occurred in between the two calls. It is still debatable if this opposing was to satisfy the requirements of Rule 4.2 being enforced or if the fact that the communication was initiated by the Defendant, without any interference by the prosecution, and still in a timeline before indictment would help get Price out of any liability for the November 18th call as well.

After this call, Judge granted the motion by Gardner on the grounds that there was prosecutorial misconduct, although it can be claimed that this was just a mere repetition of the previous calls that Judge declined to take an action on, the result was very different. Previously when brought up by Gardner, the Judge made it seem like his affirmation that these calls were not misconducts but just a "bad" decision on the Defendant's side that the Judge stopped at just highlighting that it might not bring the best consequences for him. Therefore, I do not think that the way the indictment was dismissed, or the way Price's conduct was reviewed was correct in the light of the above-mentioned reasons.

Question #3 Final Word Count = 1323

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