IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. **CARLOS RAMON MULATILLO,** Defendant-Appellant.	**Supreme Ct. No.: 16-1994** Wapello Co. No.: FECR010167 **APPELLANT'S FINAL BRIEF**

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ROUTING STATEMENT

Appellant urges the Supreme Court to retain this appeal for consideration. This appeal presents the substantial constitutional questions concerning a criminally charged defendant's constitutional right to counsel of choice and should be retained by the Supreme Court pursuant to Iowa R. App. P. 6.110(2)(a). This case also presents questions of paramount importance to the judiciary and legal profession concerning court error in disqualifying Appellant's criminal defense counsel and the district finding of ethical violations and should be retained pursuant to Iowa Code § 814.6(2)(e). The Supreme Court should also retain jurisdiction to decide this appeal pursuant to Iowa R. App. P. 6.1101(2)(d) and (e) as this case presents issues fundamental and urgent to a criminal defendant's constitutional rights and lawyer discipline.

STATEMENT OF THE CASE

Nature of the Case. This appeal involves a district court ruling to disqualify the Appellant's privately retained criminal defense attorney who had represented this defendant for over sixteen (16) months. (App. p. 51). The ruling followed the States motion to disqualify counsel claiming his one-month representation of a confidential informant in an unrelated criminal case nine (9) months before the charges against the Defendant and

before the former client's work as a confidential informant were grounds for disqualification. (App. p. 38). This appeal was granted following timely application for discretionary review. (Supp. App. p. 130; App. p. 54).

Course of Proceeding. On June 15, 2015, the State of Iowa charged the Appellant/Defendant, Carlos Ramon Mulatillo, with the crimes of Conspiracy to Deliver more than five (5) grams of methamphetamine (B – Felony), Count I, with the crimes of delivery of more than five (5) grams of methamphetamine (B – Felony), Counts II – VII, and the crimes of failure to affix drug tax stamp (D – Felony), Counts VIII – XIII. Complaints, June 15, 2015.

Attorney Steven Gardner filed his Appearance and Plea of Not Guilty on the charges against Defendant on June 23, 2015. (App. 14). On July 28, 2015, the State of Iowa filed Trial Information charging Counts I – XIII in Wapello County, Iowa. (App. p. 15). Minutes of Testimony filed with the Trial Information listed the names of fourteen (14) law enforcement officers as witnesses for the State along with "other members of law enforcement" and "DEA Spanish language translators". (contents of Minutes of Testimony Redacted as Confidential. (Supp. App. 116). See Iowa R. of Crim. P. 2.4(6)). On August 3, 2015, the State of Iowa Filed Notice of Additional Witness and Minutes of Testimony listing three (3) additional

law enforcement witnesses to be called by the State. (Supp. App. 127). (contents of Minutes Redacted. See Rule 2.4(6)). On August 3, 2015, the Defendant filed Written Arraignment, Plea of Not Guilty, and Waiver of Speedy Trial (Counts I – XIII) which identified Attorney Steven Gardner as his retained attorney of choice. (App. p. 21).

Jury Trial was scheduled in the Wapello County District Court for October 18, 2016. Pretrial Order, May 31, 2016. On September 29, 2016, an Attorney Ryan Mitchell filed a "Notice to Court" alleging that defense attorney Steven Gardner had a conflict of interest by reason of a prior representation of a state witness. (App. p. 27). On October 3, 2016, the Wapello County District Court entered "Order Re: Notice to the Court" finding that attorney Mitchell did not represent a party to the case and had no standing to file pleadings. (App. p. 36). On October 5, 2016, thirteen (13) days before the scheduled trial date of October 18, 2016, the State filed Notice of Additional Witnesses and Minutes of Testimony listing Michael Davidson (hereinafter "DAVIDSON") as a witness. (Supp. App. p. 128). (contents of Minutes of Testimony redacted. See Rule 2.4(6)). On October 11, 2016, the Wapello County District Court issued Order Continuing Trial. (App. p. 45). (late filing of notice of additional witnesses did not allow time for preparation of defense).

On October 7, 2016, the Sate filed Motion for Watson Hearing alleging Defendant's counsel had a conflict of interest because of prior representation of the newly listed witness DAVIDSON. (App. p. 38). On November 9, 2016, the Wapello County District Court entered Ruling on Motion to Disqualify, disqualifying defendant's attorney from further representation of Defendant. (App. p. 51). Defendant filed Application for Discretionary Review on November 22, 2016, which was granted by the Supreme Court Order on December 16, 2016. (Supp App. p. 130; App. p. 54).

STATEMENT OF THE FACTS

On June 15, 2015, the State of Iowa charged Defendant/Appellant Carlos Ramon Mulatillo (hereinafter "MULATILLO") with multiple felony crimes. Complaints, June 15, 2015. The complaints alleged he committed criminal offenses on the following dates:

A	Count I	B-Felony Conspiracy	January 5, 2015
B	Count II	B-Felony Delivery	January 9, 2015
C	Count III	B-Felony Delivery	January 20, 2015
D	Count IV	B-Felony Delivery	January 26, 2015
E	Count V	B-Felony Delivery	March 9, 2015
F	Count VI	B-Felony Delivery	March 9, 2015
G	Count VII	B-Felony Delivery	April 16, 2015 "to the present"
H	Count VIII	D-Felony Failure to Affix Tax Stamp	January 5, 2015

I	Count IX	D-Felony Failure to Affix Tax Stamp	January 9, 2015
J	Count X	D-Felony Failure to Affix Tax Stamp	January 20, 2015
K	Count XI	D-Felony Failure to Affix Tax Stamp	January 26, 2015
L	Count XII	D-Felony Failure to Affix Tax Stamp	March 9, 2015
M	Count XIII	D-Felony Failure to Affix Tax Stamp	March 9, 2015

(App. pp. 1-13). Mulatillo privately retained attorney Steven Gardner (hereinafter "Gardner"). Gardner filed his Appearance on these charges on June 23, 2015. (App. p. 14). The State of Iowa filed a Trial Information charging Mulatillo with Counts I – XIII on July 28, 2015. (App. p. 15). Minutes of Testimony filed with the Trial Information listed fourteen (14) law enforcement officers as witness for the State along with "other members of law enforcement" and "DEA Spanish language translators". The Minutes of Testimony **DID NOT LIST DAVIDSON AS A WITNESS TO BE CALLED BY THE STATE OF IOWA.** (Supp. App. p. 116). (contents of Minutes of Testimony redacted as confidential see Iowa R. Crim. P. 2.4(6)). The State then filed Notice of Additional Witnesses and Minutes of Testimony on August 3, 2015, listing three (3) additional law enforcement witnesses. **THE NOTICE OF ADDITIONAL WITNESSES DID NOT LIST DAVIDSON AS A WITNESS FOR THE STATE.** (Supp. App.

127). (contents of Minutes of Testimony redacted as confidential see Iowa R. Crim. P. 2.4(6)).

On August 3, 2015, the Defendant filed Written Arraignment, Plea of Not Guilty, and Waiver of Speedy Trial (Counts I – XIII) which identified Steven Gardner as his retained attorney of choice. (App. p. 21). Jury Trial was scheduled on the charges against the Defendant for October 18, 2016. (App. p. 24). Fourteen (14) months after the State's filing of its list of witnesses and two (2) months before trial a lawyer claiming to represent "one of the State witnesses" filed a Notice to Court and Request for Hearing. (App. p. 27). This pleading alleged that Gardner had a conflict of interest because he "previously represented one of the State's witnesses". Gardner had never previously represented any of the witnesses listed and identified by the State in the minutes at the time of filing this "Notice." At the hearing on this "Notice" the State advised the court that the lawyer who filed the notice represented a confidential informant "CI" and that Gardner had previously represented the "CI" on a criminal case. (App. p. 59). The prosecuting attorney advised that Gardner represented the "CI" in September/October 2014. (App. p. 60).

The individual alleged to be a "CI" was not a person listed as a state witness on the Trial Information or the Notice of Additional Witnesses.

(App. p. 15; Supp. App. p. 127). Neither the County Attorney or Attorney Mitchell would reveal the identity of the "CI". (App. p. 63). The Court entered an order finding Attorney Mitchell had no standing and would take no action on the "Notice". (App. p. 36).

Thirteen (13) days before the scheduled trial date of October 18, 2016, and more than fourteen months following the filing of the Trial Information, the State filed a notice of additional witnesses listing **DAVIDSON** as a prosecution witness. (Supp. App. p. 128). (contents of Minutes of Testimony redacted as confidential, see Iowa R. Crim. P. 2.4(6)). The District Court, Judge Myron Gookin, then issued Order Continuing Trial finding in part as follows:

> "the State did not reveal the identity of these two confidential informants who are proactively working with the State for consideration in their own felony drug cases until less than two weeks before trial. Thus, Defendant did not have any clear notice or right to depose these witnesses until October 5, 2016… The State's notification of these confidential informants as additional witnesses on October 5, 2016, with a trial date of October 18, 2016, is just too late to provide fair preparation and due process to the Defendant…The Court concludes trial must be continued."

(App. p. 45).

On October 7, 2016, the State filed "Motion for Watson Hearing" alleging that Defendant's counsel Gardner had a conflict of interest because of his prior representation of DAVIDSON in 2014. (App. p. 38). Hearing

was held before the District Court on the "Motion for Watson Hearing" on November 9, 2016. Gardner introduced evidence that he had been retained and appeared on behalf of potential witness DAVIDSON on unrelated criminal drug felony offenses. (App. p. 79-84). He filed an Appearance on DAVIDSON'S unrelated charges on September 19, 2014. (App. pp. 80, 111). He filed a Written Arraignment and a Motion to Produce on October 14, 2014. (App. pp. 80-81; 113). At DAVIDSON'S request, Gardner withdrew from further representation of DAVIDSON on October 17, 2014. (App. pp. 81; 115). **Representation of DAVIDSON on the unrelated charges occurred only during the period September 18 to October 17, 2014.** (App. p. 111-115).

The State of Iowa did not allege, or present any evidence, that the prior 2014 charges against potential witness DAVIDSON were related in any way to the 2015 (January – April) charges filed against Defendant Carlos Ramon Mulatillo. (App. p. 71-97). At the October 3, 2016 hearing before Judge DeGeest, the County Attorney admitted they had no knowledge about Gardner's short representation of DAVIDSON in 2014. (App. p. 60). Mulatillo's attorney Gardner informed the district court he represented DAVIDSON for one (1) month in 2014. (App. p. 79). Gardner advised the charges against DAVIDSON in 2014 were unrelated to the charges filed

against MULATILLO in 2015. (App. p. 79). He advised the court there was no concurrent representation. (App. p. 79). Gardner's only personal conference with DAVIDSON occurred on September 18, 2014. The conference was short with half a page of notes. (App. p. 80). He filed an appearance. (App. pp. 80; 111). He filed a written arraignment and a motion to produce. (App. p. 80-81; 113). On October 16, 2014, Gardner received a telephone message advising DAVIDSON had called his office asking that Gardner withdraw. (App. p. 81). Gardner filed his withdrawal on October 17, 2014. (App. pp. 81; 115). He informed the court that any communication with prosecuting authorities or work as a "CI" was after Gardner's representation. (App. p. 86). Gardner informed the court that MULATILLO desired Gardner's continued representation. (App. p. 82). MULATILLO was present at this hearing. (App. p. 69).

On November 9, 2016, District Court entered "Ruling on Motion (To Disqualify)." The Court made a finding that there was "a conflict or a serious potential for conflict that risks an adverse effect on Attorney Gardner's representation of Defendant Mulatillo and sufficient to countermand the Defendant's preference in maintaining Mr. Gardner as his lawyer." (App. p. 51). As part of its Ruling, the Court incorporated all contents of the courtroom record. (App. p. 51). The District Court made an

oral finding during the hearing that, because the charges against the potential witness DAVIDSON and Defendant MULATILLO were both drug related charges, a conflict of interest existed. (App. p. 99). The Court found that Gardner's representation of DAVIDSON prior to becoming a confidential informant "involved a similar type of drug prosecution, having been related in time to the confidential informant's actual involvement in this case", and such representation causes a "serious potential for problems". (App. pp. 99-100). The Court found "that there is a significant danger of divided loyalties occurring and that would impede the defense strategies that could be used for Mr. Mulatillo." (App. pp. 99-100).

The District Court made additional findings in the hearing record that Gardner had committed ethical violations. The court found that Gardner violated Iowa Rule of Professional Responsibility 32:1.7. (See Rule 32:1.7 "Conflict of Interest : Current Clients"). (App. p. 100). The court found that Gardner's continued representation of MULATILLO would be the "Court's complicity" in Gardner's violation of the ethical rules. (App. p. 100). The court found that Gardner's representation of DAVIDSON was involving "THE SAME OR SUBSTANTIALLY-RELATED MATTER." (App. p. 100).

The court disqualified Gardner from continued representation of

MULATILLO. (App. p. 100). This appeal is from these findings and ruling.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISQUALIFYING DEFENDANT'S COUNSEL.

The District Court order disqualifying counsel violates the defendant's constitutional rights to counsel-of-choice and is reversible error. (U.S. Constitution, Amendment 6; Iowa Constitution Art. I, §10; State v. Smith, 761 N.W.2d 63, 69 (Iowa 2009). This appeal implicates substantial constitutional issues in criminal prosecutions in Iowa. MULATILLO requests the district court order disqualifying his attorney be reversed.

Standard of Review. Although review of claims of constitutional rights to counsel are de novo, review of a ruling on an attorney disqualification motion is for abuse of discretion. Bottoms v. Stapleton, 706 N.W.2d 411, 415 (Iowa 2005); Doe v. Perry Community School District, 650 N.W.2d 594, 597 (Iowa 2002); State v. Smith, 761 N.W.2d at 68. A court abuses its discretion when its ruling is based on clearly untenable grounds, such as reliance upon an improper legal standard or error in application of the law. Id. A district court's factual findings in disqualification cases will not be disturbed on appeal if they are supported by **substantial evidence**. Killian

v. Iowa District Ct., 452 N.W.2d 426, 428-29 (Iowa 1990) (emphasis added). The determination whether a conflict exists is a mixed question of fact and law. State v. Smith, 761 N.W.2d at 68.

Argument. The district court's erroneous decision to disqualify Defendant's privately retained counsel of his choice represents a violation of Defendant's Sixth Amendment rights. United States v. Gonzales-Lopez, 548 U.S. 140, 144 (2006). Should this case erroneously proceed without Defendant's chosen counsel, any resulting conviction would be reversible, even absent any prejudice to defendant. Id. at 148. Because Defendant has enjoyed the benefits of an attorney-client relationship with counsel of his choice, Steven Gardner, since June, 2015, Defendant's interest is strong in retaining the trust and communication established over the past eighteen months. This interest far outweighs any minute chance a conflict of interest could arise from counsel's brief, prior representation of a potential state trial witness in a wholly unrelated matter and case.

Under the Sixth Amendment, the right to counsel includes a right to choose that counsel. See United States v. Gonzales-Lopez, 548 U.S. 140, 144 (2006). "The deprivation of [this] right is complete when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received." Id. at 148. When

a defendant's Sixth Amendment right to counsel of choice is violated due to an erroneous disqualification of counsel, "no additional showing of prejudice [is] required." Id. at 145. Rather such a violation results in the reversal of a conviction because such an error is a "'structural error' not subject to review for harmlessness." Id. at 148. Defendant's interest in retaining the attorney of their choice and continuing that relationship throughout the litigation process is strong because "trust and good communication are crucial features of an attorney-client relationship." State v. McKinley, 860 N.W.2d 874, 880 (Iowa 2015). This law on this interest is strong and clear. Courts are afforded little leeway in interfering with a defendant's right to privately retain counsel-of-choice. State v. Smith, 761 N.W2d at 69; (citing United States v. Cox, 580 F.2d 317, 321 (8th Cir. 1978).

In deciding whether or not to disqualify chosen counsel on the grounds of a potential conflict of interest, courts apply a balancing test, weighing the client's Sixth Amendment interest against the likelihood of an actual conflict occurring. State v. McKinley, 860 N.W.2d 874, 881 (Iowa 2015). Any findings of impermissible conflict in attorney disqualification cases must be supported by **substantial evidence** that an **actual conflict** exists. See Bottoms v. Stapleton, 706 N.W.2d 411, 417 (Iowa 2005) (Emphasis added). An actual conflict is defined as "a significant risk that

representation of one client will materially limit the representation of another client." Id. at 416. Trial courts who disqualify attorneys without **substantial evidence** of an **actual conflict** abuse their discretion, and "courts must be vigilant to thwart any misuse of an attorney disqualification motion for strategic reasons." Id. at 415. The moving party bears the burden of proving that such a conflict exists. Id. at 418. "Counsel will not be disqualified simply because the opposing party *alleges* the *possibility* of differing interests." Bottoms, 706 N.W.2d at 415. During this inquiry, "substantial weight is given to defense counsel's representations." United States v. Flynn. 87 F.3d 996, 1001 (8th Cir. 1996). "Substantial weight" means that defense counsel's assertions as to a conflict of interest should normally be accepted. Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173, 1179-80, 55 L.Ed.2d 426 (1978); U.S. v. Cox, 580 F.2d 317, 321 (8th Cir. 1978). This is because an attorney representing a defendant in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial. Id. (citing Holloway v. Arkansas, 98 S. Ct. at 1179-80).

When making a determination regarding conflicts of interest at the pre-trial stage, a "serious potential for conflict" standard is used. United States v. Johnson, 131 F.Supp.2d 1088, 1099 (N.D. Iowa 2001). This

assessment is necessarily forward looking and seeks to evaluate the potential for conflict during either the pretrial stage or the trial stage of the proceeding. State v. Smith, 761 N.W.2d 63, 72 (Iowa 2009). "A serious potential for conflict occurs when the record indicates an actual conflict is likely to arise." McKinley, 860 N.W.2d at 881 (Iowa 2015) (citing Johnson).

In determining what constitutes a conflict of interest, courts start by turning to the Iowa Rules of Professional Conduct. See, e.g., Bottoms, 706 N.W.2d at 415. Rule 32:1.7 states that "a concurrent conflict of interest exists if: there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to… a former client…" The commentary to this rule explains "where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client." Cmt. 4. "The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." Cmt. 8. Iowa Rule of Professional Conduct 32:1.9

delineates duties to former clients and also focuses on the materiality of the interests to each client. The central question presented by this rule is whether or not there exists a "substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Cmt. 3.

Case law supports the standards of practice set forth in the Iowa Rules of Professional Conduct. In Nichol v. State, the court found that the defendant's attorney's prior representation of a key state witness did not preclude the attorney from representing the defendant because the "single isolated representation of [the witness] on a wholly unrelated matter [did] not raise even a remote possibility of conflict. There is no showing of any probability of future business…Neither is there anything about that case which suggests [defense counsel] obtained any privileged information that would inhibit the representation of [Nichol]." 309 N.W.2d 468, 470 (Iowa 1981). In United States v. Johnson, the court also found there was no conflict of interest because there was "no risk that attorney-client privileged information could be implicated in the course of [the attorney]'s cross-examination of [the witness] on Johnson's behalf." 131 F.Supp.2d 1088 (N.D. Iowa 2001); see also United States v. Pippins, 661 N.W.2d 544, 546 (Iowa 2009) (asserting defense counsel's prior representation of an opposing

witness, without more, is not sufficient to constitute a conflict). An allegation of a conflict of interest is also insufficient; the conflict "must be actual, not merely theoretical." Simmons v. Lockhart, 915 F.2d 372, 378 (8th Cir. 1990) (adopting standard of "actual conflict" set forth in Cuyler v. Sullivan, 446 U.S. 335 (1980)). Additionally, there is no ethical rule that prevents an attorney from questioning a witness on matters of public record, such as prior criminal charges or convictions. See McKinley, 860 N.W.2d at 883.

A. THE STATE OF IOWA FAILED TO MEET ITS BURDEN OF PROOF.

Because the State of Iowa alleged a conflict of interest on behalf of Defendant's chosen counsel, it was their duty to prove the likelihood of said conflict actually occurring. See Bottoms, 706 N.W.2d at 417. On October 7, 2016, the state filed a motion, alleging Defendant's counsel had a conflict of interest due to his prior representation of DAVIDSON in 2014. Hearing on the motion was held on November 9, 2016, and proceeded without the State of Iowa alleging or presenting any evidence that the prior 2014 charges against potential witness DAVIDSON were related in any way to the 2015 charges filed against MULATILLO. The only evidence presented was offered by Defendant's counsel, Steven Gardner, who produced documentation to support that he was retained by Davidson following a short

office conference on September 18, 2014, filed an Appearance and Plea of Not Guilty on Davidson's behalf on September 19, 2014 and then a Written Arraignment and a Motion to Produce on October 14, 2014. (App. pp. 79-81; 111-115). At DAVIDSON'S request left in a telephone message, Gardner filed a Withdrawal on October 17, 2014. (App. pp. 81;115). The State presented no evidence whatsoever.

The district court ruled that there was "a conflict or serious potential for conflict…sufficient to countermand the Defendant's preference in maintaining Mr. Gardner as his lawyer" without any evidence of said conflict ever being presented by the State and without any factual findings how the prior representation of a potential witness in an unrelated case resulted in such conclusion of law. (App. p. 51; 97-100). The ruling resulted solely from an alleged possibility of a conflict. There was no evidence presented that counsel had an actual conflict, only vague allegations and assumptions. (App. pp. 60-62; 71). This is insufficient for disqualification. See Bottoms, 706 N.W.2d at 415. The court's ruling to disqualify counsel was not supported by **substantial evidence.** Bottoms, 706 N.W.2d at 417; Killian, 452 N.W.2d at 428-29. Defendant's constitutional right to counsel-of-choice should be upheld. The District Court Ruling was in error and should be reversed.

B. THERE IS NO CONFLICT OF INTEREST.

The State of Iowa failed to establish the likelihood of an actual conflict occurring because there is no conflict. As the record reflects, Gardner represented DAVIDSON briefly in 2014 for a period of less than one month, months prior to the dates associated with the charges against defendant Mulatillo. In cases such as this, "substantial weight" should be given to defense counsel's representations. United States v. Flynn 87 F.3d 996, 1001 (8th Cir. 1996). Without revealing any confidential information, Gardner stated on the record during the November 9, 2016 *Watson* hearing that his representation of Davidson was wholly unrelated to the case against Mulatillo and that he communicated with Davidson only briefly, resulting in a "half page of notes." (App. p. 80). He advised the court there was no conflict. (App. p. 83). The State presented no evidence to suggest that the charges against Davidson were in any way related to the charges against Mulatillo and certainly no evidence to suggest that, due to this brief representation of Davidson, Attorney Gardner's loyalties would be divided, rendering him unable to zealously advocate for Mulatillo.

II. THE DISTRICT COURT ERRED IN FINDING A VIOLATION OF IOWA RULE OF PROFESSIONAL CONDUCT 32:1.7.

Standard of Review. The appeal involves the unusual, maybe unprecedented, situation in which a district court made a factual finding that an ethical violation of the Rules of Conduct was committed by the attorney representing a criminal defendant. Normally, in appeals from the Grievance Commission, review is **de novo**. Iowa Supreme Court Board of Professional Ethics and Conduct v. Lett, 674 N.W.2d 139, 142 (Iowa 2004). Review of lawyer disciplinary cases is de novo. Iowa Supreme Court Bd. Of Prof'l Ethics and Conduct v. Leon, 602 N.W.2d 336 (Iowa 1999); Iowa Supreme Court Disc. Bd. V. Waterman, __ N.W.2d __, 2017 WL 541068 (Iowa 2017).

In the only cases found on whether the district court should make finding of ethics violation, the Iowa Supreme Court agreed with the district court decision declining to make such determination. See Costello v. McFadden, 553 N.W.2d 607, 612 (Iowa 1996) ("Like the district court, we make no determination whether Brown committed any ethical violations, leaving that question for another forum"); State v. Jefferson, 574 N.W.2d 268, 278-79 (Iowa 1997); ("The colloquy above shows that the judge was in no way attempting to make ethics ruling.") Regardless of the appropriate standard of review, there can be little doubt that to find an ethics violation that serves to disqualify counsel, it must be supported by **substantial**

evidence. Johnson, 131 F.Supp.2d 1100. In addition, proof of attorney misconduct must be made by a convincing preponderance of the evidence, which is less than proof beyond a reasonable doubt but more than the preponderance standard required in the usual civil case. Lett, 674 N.W.2d at 142. For the district court to find an ethical violation, proof must be by a convincing preponderance of the evidence.

Argument. As part of the November 9, 2016 Watson ruling, the district court found Attorney Gardner in violation of Iowa Rule of Professional Conduct 32:1.7 because of his prior representation of DAVIDSON, a wholly unfounded decision. Not only did the district court abuse its discretion in ruling to disqualify Gardner without the requisite level evidence, it abused its discretion in accusing Gardner of an ethical violation for a non-existent conflict.

The record demonstrates the State did not list DAVIDSON as a potential witness until thirteen days before the scheduled trial, omitting his name from lists provided Gardner on July 28, 2015 and August 3, 2015. (App. p. 15, Supp. App. p. 116; 127. In fact, *allegations* of a potential conflict were never brought to Gardner's attention until September 9, 2016 "Notice to Court" filing made by attorney Mitchell, an attorney without standing in the State of Iowa's case against Mulatillo. The notice alleged a

conflict because of a witness who, at that time had not even been listed as a witness by the State. This filing resulted in a hearing on October 3, 2016, in which neither Mitchell nor the State would reveal the identity of DAVIDSON yet alleged his status as a potential witness, leaving Gardner without means to conduct a conflict check. (App. p. 63). Operating on the knowledge he had no conflict, Gardner persisted in his representation of Mulatillo. Two days later and thirteen days before trial, the State filed a Notice of Additional Witnesses and Minutes of Testimony, listing DAVIDSON as a witness. (Supp. App. p. 128). Due to the lack of notice about DAVIDSON and the ability to depose this newly listed witness, MULATILLO'S Motion to Continue Trial was granted. (App. p. 40; 45). There the court said:

> "the State did not reveal the identity of these two confidential informants who are proactively working with the State for consideration in their own felony drug cases until less than two weeks before trial. Thus, Defendant did not have any clear notice or right to depose these witnesses until October 5, 2016… The State's notification of these confidential informants as additional witnesses on October 5, 2016, with a trial date of October 18, 2016, is just too late to provide fair preparation and due process to the Defendant…The Court concludes trial must be continued."

After listing DAVIDSON as a witness two weeks before trial, the State filed a Motion for Watson Hearing. (App. p. 38). MULATILLO, with

Gardner, participated in the Watson Hearing. (App. p. 69). The State did not present evidence. MULATILLO presented evidence rebutting the allegation of a conflict of interest. Gardner advised the court that there was no conflict. (App. p. 83). Counsel's determination on this issue should normally be accepted. U.S. v. Cox, 580 F.2d at 321.

In order for an attorney to have violated Rule 32:1.7, there needs to be an actual conflict of interest, of which there is none in this case. This rule deals specifically with concurrent conflicts which can exist with regard to past clients if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to...a former client..." There needs to be both a "difference in interests" as well as a material interference with the "lawyer's independent professional judgment" with regard to their current client. See Cmt. 8. There is no evidence to suggest that Attorney Gardner has a difference in interests at all due to the brief nature of his attorney-client relationship with DAVIDSON in an unrelated case and certainly no evidence to suggest that Gardner would be less able to zealously advocate for MULATILLO as a result of this prior representation. The State provided no evidence to suggest that there exists a "substantial risk that confidential factual information...would materially advance the [current] client's position" because they failed to provide any

evidence at all regarding the nature of Gardner's relationship with or representation of Davidson. See Cmt. 3. Furthermore, the State established no connection between Davidson's 2014 criminal charges and those Mulatillo was charged with in 2015. In fact, there was no connection. The MULATILLO and DAVIDSON cases and charges were totally unrelated in terms of time or circumstances.

Case law supports the position that Attorney Gardner did not violate Iowa Rule of Professional Conduct 32:1.7. In Johnson, the court considered an allegation of a defense attorney's conflict of interest due to a prior attorney-client relationship with a prosecution witness. Id. at 1088. In that case, the attorney had previously had a one-hour consultation with a witness who decided not to retain the attorney. Id. at 1096. While there was a disagreement over whether or not confidences were shared during this meeting, following Flynn, the court chose to give "substantial weight" to defense counsel's representations. Id. Subsequently the attorney represented a defendant in which the witness was called, and the court ultimately concluded that even if confidences were imparted by the witness to the defense attorney, there was at most only a very remote possibility of conflict. Id. at 1099. This remote possibility alone was insufficient to support the disqualification of defendant's attorney. Id. Attorney Gardner's

situation is very similar to that of the attorney in Johnson. He briefly spoke with a potential new client, filed a couple of routine documents on his behalf, and was subsequently dismissed a month later. No confidences were exchanged that are not publically available, and even if DAVIDSON were to allege that confidences were shared, the court's precedent is to give "substantial weight" to the representations made by Gardner. Any possibility of a conflict is remote at best, and a remote chance cannot be said to outweigh the interest to MULATILLO in exercising his Sixth Amendment right to counsel-of-choice.

An ethical violation must be proved by a convincing preponderance of the evidence. There was no evidence of an ethical violation. In fact, the evidence established no ethical violation. Gardner represented DAVIDSON for one month on an unrelated charge months before the investigation of MULATILLO even began. Gardner's representation of DAVIDSON ended before he became a "CI." The district court erred in finding Gardner violated Rule of Professional Conduct 32:1.7. The district court ruling should be reversed.

CONCLUSION

MULATILLO'S counsel did not have a conflict. There was not substantial evidence to support a conclusion that Gardner did have a conflict.

There is certainly not proof by a convincing preponderance of the evidence that Gardner violated the Iowa Rules of Professional Conduct. The District Court erred in finding Gardner violated 32:1.7. The ruling and findings of the district court should be reversed.

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REQUEST FOR ORAL ARGUMENTS

Appellant requests Oral Argument.

Dated, July 10, 2017.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 5,557 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in font size 14 point, Times New Roman type style.

Dated July 10, 2017

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CERTIFICATE OF SERVICE

The undersigned certifies a copy of the Petitioner/Appellee's Proof Brief was served on the 10 day of July, 2017, electronically upon the clerk of the Supreme Court pursuant to Iowa R. Civ. P. 1.442(2) and that all parties in this case are electronic filers.

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