IN THE SUPREME COURT OF IOWA
Supreme Court No. 16-1994

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CARLOS RAMON MULATILLO,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WAPELLO COUNTY
THE HONORABLE ANNETTE J. SCIESZINSKI, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

This case does not warrant retention. The defendant challenges the district court's decision to disqualify his attorney due to the serious potential for a conflict of interest. The Supreme Court has provided sufficient, recent guidance on this issue in cases such as *State v. McKinley*, 860 N.W.2d 874 (Iowa 2015) and *State v. Smith*, 761 N.W.2d 63 (Iowa 2009). Because the case can be resolved with the application of existing legal principles, transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

Defendant Carlos Mulatillo was granted discretionary review of the district court's order disqualifying attorney Steven Gardner from representing him in numerous drug charges.

Course of Proceedings

On July 28, 2015, defendant Carlos Mulatillo was charged with one count of conspiracy to deliver more than five grams of methamphetamine (a class B felony), six counts of delivery of more

than five grams of methamphetamine (each a class B felony), and six counts of failing to affix a drug tax stamp (each a class D felony). Trial Information; App. 14. The minutes alleged Mulatillo sold large quantities of methamphetamine to a confidential informant in January and March 2015. Minutes (7/28/2015); Conf. App. 116–18. Attorney Steven Gardner entered an appearance on Mulatillo's behalf. Appearance (6/23/2015); App. 14.

On September 29, 2016, attorney Ryan Mitchell filed a notice alleging attorney Gardner had a conflict of interest because he previously represented a State's witness. Notice (9/29/2016); App. 27. Following a hearing, the district court determined it would take no further action because attorney Mitchell had no standing to file pleadings in the case. Order (10/3/2016); App. 36.

On October 5, 2016, the prosecutor filed additional minutes of testimony identifying Michael Davidson as the confidential informant who bought methamphetamine from Mulatillo. Add'l Minutes (10/5/2016); Conf. App. 128. Four days later, the prosecutor filed a motion for a "*Watson* hearing" alleging attorney Gardner had a conflict of interest due to his prior representation of Davidson. Motion (10/7/2016); App. 38. Mulatillo resisted disqualification of

attorney Gardner. Resistance to Removal (11/8/2016); App. 43. Following a hearing, the district court determined there was a conflict or serious potential for a conflict, so it disqualified attorney Gardner. Order (11/9/2016); App. 51.

The Supreme Court granted Mulatillo's application for discretionary review. Order (12/16/2016); App. 54.

Facts

In September 2014, attorney Steven Gardner began representing Michael Davidson in a felony drug case. Def. Ex. A (Appearance), Tr. (11/9/2016) p. 17, line 22 – p. 18, line 12; App. 111, 83–84. During that representation, attorney Gardner and the prosecutor discussed the possibility of Davidson working for the drug task force. Tr. (11/9/2016) p. 27, lines 4–17; App. 93. Gardner withdrew from representing Davidson in October 2014. Def. Ex. C (Withdrawal); App. 115.

On five occasions in January and March 2015, defendant Carlos Mulatillo delivered a total of eight ounces of methamphetamine to Davidson. Minutes, Add'l Minutes (10/5/2016); Conf. App. 116–18, 128. During these "controlled buys," Davison was acting as a confidential informant for the drug task force. Add'l Minutes; Conf.

App. 128. Davidson's role as a confidential informant included other meetings with Mulatillo that were monitored by law enforcement. Add'l Minutes; Conf. App. 128.

Attorney Gardner began representing Mulatillo on June 23, 2015. Appearance; App. 14. At that time, the minutes of testimony only referred to a "confidential informant" and did not name Davidson. Minutes; Conf. App. 116–18.

In a February 2016 email, the prosecutor told attorney Gardner, "I also wanted to make sure you were aware that you represented the confidential informant utilized for Carlos' buys prior to that individual becoming a confidential informant." Motion (10/3/2016), attachment; App. 30.

On September 29, 2016, attorney Ryan Mitchell filed his notice that attorney Gardner had previously represented the confidential informant. Notice (9/29/2016); App. 27. Although attorney Gardner said he had "no idea" who the informant was, he insisted "it involves representation in a case totally unrelated to Mr. Carlos Mulatillo's." Tr. (10/3/2016) p. 7, lines 3–25; App. 63.

On October 5, 2016, the prosecutor identified Davidson as the confidential informant. Add'l Minutes (10/5/2016); Conf. App. 128.

She then filed a motion for a *Watson* hearing seeking an opportunity for Mulatillo to waive the potential conflict on the record. Motion (10/7/2016); App. 38.

At the *Watson* hearing, the prosecutor explained that Davidson was working as a confidential informant for consideration in his own felony drug charges and that attorney Gardner had represented Davidson on those charges. Tr. (11/9/2016) p. 5, lines 1–8; App. 71. The prosecutor also explained that she believed there were discussions between the former prosecutor and attorney Gardner about Davidson becoming a confidential informant: "There's just a lot overlap time-wise over whether or not Mr. Davidson would come in and try to sign up as a confidential informant and work with the Task Force." Tr. p. 5, lines 9–18; App. 71; *see also* Tr. (10/3/2016) p. 5, lines 3–7; App. 61 (". . . he, I believe, the confidential informant, officially signed up after Mr. Mitchell began representing him. However, it had been talked about when Mr. Gardner was representing him – the possibility.").

Contrary to the prosecutor's description, attorney Gardner asserted that Mulatillo's charges had "no relationship whatsoever" to his representation of Davidson. Tr. (11/9/2016) p. 13, lines 18–25;

App. 79. He claimed he only had one "very short conference" with Davidson that resulted in "half a page of notes." Tr. p. 14, lines 10–12; App. 80. He insisted that he did not "negotiate any matters with any Task Force or prosecutors in relationship to any agreements made by Mr. Davidson" and stated his belief that the record was "very clear" that "any agreements Mr. Davidson made, any communications with prosecuting authorities or task force authorities occurred after representation by me." Tr. p. 16, lines 3–7, p. 20, lines 15–19; App. 82, 86. However, attorney Gardner conceded there was no opportunity for an independent review of his notes because Davidson was unwilling to waive attorney-client privilege. Tr. p. 16, line 11 – p. 17, line 21; App. 82–83. When questioned how he planned to impeach Davidson's trial testimony, attorney Gardner said the only impeachment evidence would be "a matter of public record." Tr. p. 19, line 16 – p. 20, line 5; App. 85–86. Attorney Gardner had "no idea" if he would use information from his prior representation to impeach Davidson. Tr. p. 18, line 13 – p. 19, line 15; App. 84–85.

Attorney Mitchell made clear that Davidson was not willing to waive his attorney-client privilege with attorney Gardner. Tr. p. 27, lines 4–6; App. 93. Attorney Mitchell also exposed attorney

Gardner's role negotiating in Davidson's case, explaining, "I had more than one conversation with the former drug task [force] prosecutor, and she informed me she had conversations with Mr. Gardner regarding Mr. Davidson working for them." Tr. p. 27, lines 7–10; App. 93. Attorney Mitchell expressed disagreement with attorney Gardner's recollection: "And Mr. Gardner is saying the opposite, but I know before I took this case, they had had conversations. Mr. Gardner may not recall those, but I believe that it's likely Mr. Gardner had conversations with my client as well regarding working for the task force." Tr. p. 27, lines 10–15; App. 93. Attorney Mitchell reiterated, "I know the former task force attorney informed me Mr. Gardner had had discussions with her and the task force regarding Mr. Davidson potentially working for them." Tr. p. 27, lines 15–17; App. 93.

ARGUMENT

I. The District Court Soundly Exercised Its Discretion to Disqualify Mulatillo's Attorney Who Is Burdened with the Serious Potential for a Conflict of Interest.

Preservation of Error

Mulatillo preserved error by resisting disqualification and receiving an adverse ruling in the district court. Resistance, Order; App. 43, 51.

Standard of Review

"The question of whether a conflict exists is a mixed question of fact and law." *State v. McKinley*, 860 N.W.2d 874, 878 (Iowa 2015) (citation omitted). "When a defendant claims a violation of the constitutional right to counsel, our review is generally de novo." *Id.* "'Whether the facts show an actual conflict of interest or a serious potential for conflict is a matter for trial court discretion," and that decision is reviewed for an abuse of discretion.'" *Id.*

Discussion

The district court did not abuse its discretion when disqualifying Mulatillo's attorney from continued representation. Attorney Gardner personally represented the confidential informant who purchased drugs from Mulatillo. That informant will be an important witness at trial, requiring counsel to cross examine his former client about acts substantially related to the previous representation. Due to the serious potential for a conflict of interest, the district court reasonably required attorney Gardner to step aside.

Mulatillo does not have an absolute right to be represented by attorney Gardner. Generally, "[t]he right to counsel also includes a right to choose that counsel." *State v. McKinley*, 860 N.W.2d 874,

879 (Iowa 2015) (citing *United States v. Gonzalez–Lopez*, 548 U.S. 140, 144 (2006)). But the right to counsel of choice is not absolute. *Id.* at 880 (quoting *Lane v. State*, 80 So. 3d 280, 295 (Ala. Crim. App. 2010)). "The court can still disqualify the defendant's preferred attorney if the circumstances present an actual conflict or a serious potential for conflict." *Id.* (citing *Wheat v. United States*, 486 U.S. 153, 162–63 (1988)). "It cannot be overlooked that 'the essential aim of the Sixth Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.'" *State v. Smith*, 761 N.W.2d 63, 69 (Iowa 2009) (quoting *Wheat* 486 U.S. at 159).

"The definition of 'actual conflict' has been expressed in various ways." *McKinley*, 860 N.W.2d at 880. In *State v. Watson*, 620 N.W.2d 233, 239 (Iowa 2000), the Court stated, "a conflict exists when an attorney is placed in a situation conducive to divided loyalties." The Court applied the "divided loyalties" standard again a few years later. *See Pippins v. State*, 661 N.W.2d 544, 548 (Iowa 2003). In the meantime, the United States Supreme Court adopted a different standard: "An 'actual conflict,' for Sixth Amendment

purposes, is a conflict of interest that adversely affects counsel's performance." *Mickens v. Taylor*, 535 U.S. 162, 208 n.5 (2002). After *Mickens*, our Court has followed the adverse-effect test. *See State v. Smitherman*, 733 N.W.2d 341, 347 (Iowa 2007) ("Under the circumstances in this case, we hold Smitherman must show adverse effect in order to prevail under either the Sixth Amendment or article I, section 10 of the Iowa Constitution.").

When a potential conflict is raised before trial, the analysis shifts to a "primarily forward-looking rather than a retrospective assessment." *McKinley*, 860 N.W.2d at 881. This approach prevents the damage that could occur by conflicted counsel's continued representation. *See Scott v. State*, 991 So. 2d 971, 972 (Fla. Dist. Ct. App. 2008) ("Conflicts of interest are best addressed before a lawyer laboring under such a conflict does any harm to his or her client(s)'s interests."). "The forward-looking assessment at the pretrial stage of [a] case require[s] an assessment of the likelihood that a potential conflict might blossom into an actual conflict during either the pretrial stage or the trial stages of [the] case." *McKinley*, 860 N.W.2d at 881. "This type of prospective analysis applies the 'serious

potential for conflict' standard. A serious potential for conflict occurs when the record indicates an actual conflict is likely to arise." *Id.*

A. The circumstances of attorney Gardner's continued representation create a serious potential for an actual conflict of interest.

Attorney Gardner previously represented a significant witness against Mulatillo. In September and October 2014, attorney Gardner represented Michael Davidson in a felony drug case. PCR Ex. A, C; App. 111, 115. Just a few months later—in January and March 2015—defendant Mulatillo made five deliveries of methamphetamine to Davidson. Minutes, Add'l Minutes; App. 116–18, 128. These five interactions constitute five of the class B felony delivery charges as well as the five class D felony tax stamp charges against Mulatillo. Trial Information; App. 15. Even assuming investigators will present their perspective of the five "controlled buys," Davidson's personal testimony of the face-to-face interactions will likely provide some of the most compelling proof against Mulatillo.

The previous representation creates a serious potential to affect attorney Gardner's representation of Mulatillo. Given Davidson's role as a primary witness, unconflicted counsel would likely seek to undermine Davidson's testimony with vigorous cross examination

concerning his cooperation with authorities. But attorney Gardner's successive representation creates two potential conflicts—either he might be tempted to use confidential information gained while representing Davidson, or he might refrain from fully cross-examining Davidson to prevent misusing the confidential information. *See United States v. Johnson*, 131 F. Supp. 2d 1088, 1095 (N.D. Iowa 2001) (quoting *United States v. Agosto*, 675 F.2d 965, 971 (8th Cir. 1982)).

Adequate record demonstrates the serious potential for a conflict of interest. Mulatillo contends the State did not "alleg[e] or present[] any evidence that the prior 2014 charges against potential witness Davidson were related in any way to the 2015 charges filed against Mulatillo." Def. Br. at 18. But the district court did accept a professional statement from Davidson's current attorney, Ryan Mitchell.[1] He explained that attorney Gardner had conversations with the former prosecutor about Davidson working for the drug task force. Tr. (11/9/2016) p. 27, lines 7–17; App. 93. In addition to attorney Mitchell's statement, the circumstances support a

[1] The district court accepted attorney Mitchell's professional statement as the equivalent of sworn testimony and permitted the parties to cross examine him. Tr. p. 27, line 25 – p. 28, line 8; App. 93–94.

connection between the two cases—attorney Gardner represented Davidson in a felony drug case as late as October 2014, and in January 2015 Davidson's work for the drug task force involved buying drugs from Mulatillo. PCR Ex. C, Add'l Minutes; App. 115, Conf. App. 116–18, 128. This record shows attorney Gardner formerly represented, in a substantially related case, a client who is now poised to present damaging testimony against his current client.

Mulatillo's argument relies on a great deal of deference to attorney Gardner's affirmations. Despite the record demonstrating a connection between Davidson's prior drug case and his involvement as an informant in the current case, Mulatillo persists that "substantial weight" should be given to attorney Gardner's statements that the cases were "wholly unrelated." Def. Br. at 20. And although Mulatillo contends attorney Gardner only engaged in a "short office conference" with Davidson (Def. Br. at 18), that conference was enough for attorney Gardner to generate half a page of notes. Tr. p. 14, lines 10–12; App. 80. Moreover, there is no opportunity for an independent review of whether those notes memorialize any confidential communications because they are covered by attorney-client privilege and attorney Gardner's continuing duty of

confidentiality to Davidson. Tr. p. 16, line 11 – p. 17, line 21; App. 82–83. Thus, Mulatillo's position asks the Court to trust attorney Gardner and ignore attorney Mitchell's professional statement.

The district court's decision to disqualify attorney Gardner includes an implicit credibility finding. Attorney Gardner insisted that there was "no relationship whatsoever" between the two cases and that he did not negotiate any matters with the drug task force on Davidson's behalf. Tr. p. 13, line 18–25, p. 16, lines 3–7, p. 20, lines 15–19; App. 79, 82, 86. Attorney Mitchell expressed direct disagreement. Tr. p. 27, lines 11–12; App. 93 ("Mr. Gardner is saying the opposite, but I know before I took this case, they had had conversations."). The district court recognized the question of credibility by noting the "unusual circumstance here with contrasting statements of — professional statements of counsel . . ." Tr. p. 32, lines 3–5; App. 98. The court then concluded there was a connection between the cases:

> The Court deems there to be a serious potential for an actual conflict to develop given the necessary defense strategies that would have to be undertaken to represent Mr. Mulatillo's interests here and the relationship that Mr. Gardner's had previously with the confidential informant having involved a similar type of drug prosecution, having been

> related in time to the confidential informant's actual involvement in this case, and being predictably a key part of defense strategy in this case to undermine the credibility of the confidential informant, there's just serious potential for problems developing that an optimistic view would say we can steer clear of it and so forth. The Court's not confident that that could be done in fairness to Mr. Mulatillo.

Tr. p. 32, line 23 – p. 33, line 10; App. 98–99. By finding the facts more consistent with attorney Mitchell's professional statement, the district court must have found him more credible than attorney Gardner's contrasting claims. And that credibility judgment is entitled to deference on appeal because it was not unreasonable for the court to rely on attorney Mitchell's professional statement. *See Smith*, 761 N.W.2d at 68 (stating the Court will find an abuse of discretion "only when a party claiming it shows the discretion was exercised on grounds or for reason clearly untenable or to an extent clearly unreasonable" (quotations omitted)).

Under the facts found by the district court, there is a serious potential for a conflict to arise. These circumstances do not square with the holdings in other conflict-disqualification cases. The lack of waiver leaves Mulatillo's eventual conviction open to attack on appeal. Attorney Gardner's continued representation would violate

the conflict-of-interest provisions in the Rules of Professional Conduct. And other states have not permitted continued representation under similar circumstances. In short, these factors justify the district court's decision to disqualify attorney Gardner.

B. Attorney Gardner's continued representation conflicts with the circumstances allowed in previous cases.

Previous conflict-disqualification cases have identified factors that attenuate the potential for a conflict of interest. But this case is different. Attorney Gardner personally represented a key State's witness in a substantially related matter with no waiver from his current client, so the district court's disqualification order constitutes a reasonable application of existing precedent.

Smith provides a stark contrast to attorney Gardner's representation of Mulatillo. In *Smith*, attorney Montgomery discovered that a foundational witness (Earsery) was represented by another attorney in Montgomery's private law firm. *Smith*, 761 N.W.2d at 66. Attorney Montgomery and his unaffiliated co-counsel (attorney Lanigan) did not anticipate a need to impeach the witness's testimony, the defendant waived the potential conflict, and attorney Montgomery screened himself from his law partner's representation

of the witness. *Id.* at 67. When weighing the serious potential for a conflict, the Court identified several factors that "significantly mitigated" the risk of an actual conflict:

> Among them are: (1) the presence of non-conflicted co-counsel Lanigan who will be able to handle any aspect of Smith's defense that requires involvement with Earsery; (2) Smith's voluntary waiver on the record; (3) Montgomery's careful avoidance of involvement in Earsery's defense through the Parrish Firm so as to avoid disclosure to him of Earsery's client confidences; and (4) the purely speculative nature of the State's claim that Montgomery's representation of Smith will be adversely affected by the conflict.

Id. at 72. After weighing these factors, the Court determined a partial disqualification was the appropriate remedy to limit the effects of attorney Montgomery's conflict. *Id.* at 76.

The Court relied on similar mitigating factors a few years later in *McKinley*. In that case, attorneys Larson and Lauber worked in the same office as other public defenders who previously represented three State's witnesses in unrelated cases. *McKinley*, 860 N.W.2d at 876–77. The Court found no reason to disqualify attorneys Larson and Lauber because their colleagues' past representation of the witnesses on unrelated matters presented no risk of materially limiting their duties to their current client. *Id.* at 882. The Court also

noted that the defendant's charge was "unquestionably not the same matter" and that there was no substantial relationship between the cases. *Id.* at 883–84. Finally, the lack of "temporal overlap or attorney overlap" bolstered the Court's conclusion that disqualification was not necessary. *Id.* at 885.

Unlike *Smith* and *McKinley*, attorney Gardner personally represented the witness against Mulatillo. The *Smith* Court stressed that attorney Montgomery had "carefully avoided direct engagement" with his firm's representation of the adverse witness. *Smith*, 761 N.W.2d at 72. Similarly, the *McKinley* Court noted that "neither Larson nor Lauber had ever personally represented these witnesses . . ." *McKinley*, 860 N.W.2d at 877. Attorney Gardner, however, individually represented Davidson before becoming Mulatillo's sole representative.

Unlike *Smith* and *McKinley*, attorney Gardner cannot screen himself from the previous representation. *Smith* relied on a double-screening effort—attorney Montgomery took steps within his own firm to avoid all contact with the adverse witness's defense, and attorney Montgomery enlisted his unaffiliated and unconflicted co-counsel to handle the adverse witness in the defendant's case. *Smith*,

761 N.W.2d at 67, 73. And in *McKinley*, attorneys Larson and Lauber instituted measures to prevent them from accessing any of the public defender's files concerning the office's former representation of the witnesses. *McKinley*, 860 N.W.2d at 877. But attorney Gardner cannot erect a similar screen because he is the same individual who both formerly represented Davidson and currently represents Mulatillo.

Unlike *Smith* and *McKinley*, Mulatillo's case has a substantial relationship to Davidson's case. In *Smith*, attorney Montgomery's law partner represented the adverse witness "on an unrelated charge." *Smith*, 761 N.W.2d at 66. In *McKinley*, "[t]he prior representations were all unrelated to the murder charge against McKinley and had all concluded months or years before McKinley was arrested for the crime charged in this case." *McKinley*, 860 N.W.2d at 877. In contrast, there exists a direct causal link between attorney Gardner's two cases—former client Davidson became an informant for consideration in his drug case, and ten of current client Mulatillo's charges resulted from sales to Davidson acting as a confidential informant.

Unlike *Smith* and *McKinley*, Mulatillo has never waived attorney Gardner's conflict of interest. "Smith voiced an informed, unequivocal, voluntary waiver of the potential conflict on the record." *Smith*, 761 N.W.2d at 72–73. And "McKinley filed a document confirming his acquiescence in any potential conflict and reaffirming his wish for continued representation by Larson and Lauber." *McKinley*, 860 N.W.2d at 877. As discussed below, Mulatillo has not waived the potential conflict arising from attorney Gardner's continued representation.

C. Mulatillo has not waived attorney Gardner's conflict, leaving his conviction vulnerable to subsequent appeals.

The county attorney's *Watson* motion sought an opportunity for Mulatillo to waive attorney Gardner's conflict. *See* Motion (10/7/2016); App. 38 ("Wherefore the State requests a hearing on this matter for the Court to make a determination if all of the necessary waivers have been made and are on file . . ."). Such a waiver can insulate a conviction against the defendant's subsequent claims that the court did not protect the defendant's Sixth Amendment right to conflict-free counsel. *See Smith*, 761 N.W.2d at 73 ("[A] waiver of a conflict does not vitiate the court's duty to ensure

a defendant receives zealous representation when the facts suggest an actual conflict of interest or a serious potential for conflict of interest. . . . However, a defendant's informed, voluntary, and express waiver of counsel's conflict is a significant factor in our determination of whether the defendant's right to counsel has been violated.").

Previous cases leave some ambiguity about what type of waiver suffices. In *Smitherman*, the Court "express[ed] no opinion as to whether Smitherman's acquiescence in his representation amounted to a valid waiver of his right to conflict-free counsel." *Smitherman*, 733 N.W.2d at 348 n.7 (citing *United States v. Brekke*, 152 F.3d 1042, 1045 (8th Cir. 1998)). The Court suggested such a waiver might be subjected to "the same exacting standards we have required in order to waive the right to counsel." *Id.* Similarly, the *McKinley* Court did not decide "whether the in-court colloquy and the written document McKinley filed after the hearing effected a valid waiver of the right to conflict-free counsel." *McKinley*, 860 N.W.2d at 877 n.1. But in *Smith*, the Court emphasized the defendant's "informed, unequivocal, and voluntary waiver of the potential conflict on the record." *Smith*, 761 N.W.2d at 72–73.

The record does not demonstrate that Mulatillo has knowingly and voluntarily waived attorney Gardner's conflict. At the *Watson* hearing, Mulatillo was not engaged in a colloquy to determine whether he knew of his constitutional right to conflict-free counsel, whether he was informed of the potential limitations of proceeding with conflicted counsel, or whether he was willing to accept the risk of attorney Gardner's continued representation. Likewise, the record contains no written waiver suggesting Mulatillo has made a knowing and voluntary choice to proceed. Instead, attorney Gardner only stated that "Mr. Mulatillo desires my representation . . ." Tr. (11/9/2016) p. 16, lines 7–8; App. 82.

The absence of an express waiver supports attorney Gardner's disqualification. If Mulatillo is convicted at trial under attorney Gardner's representation, he could complain that Gardner's representation violated his Sixth Amendment right to conflict-free counsel. Such a claim would enjoy the relaxed prejudice standard that does not require proof of a reasonable probability of a different outcome. *See Strickland v. Washington*, 466 U.S. 668, 692 (1984) (discussing the presumed prejudice standard for conflict-of-interest claims). Mulatillo could have eliminated the risk of future conflict

claims by offering a knowing and voluntary waiver on the record. The current lack of waiver, however, leaves an opening for him to seek a do-over if he loses at trial with attorney Gardner. Thus, the district court's disqualification order reasonably protects against the possibility of a future conflict-of-interest challenge.

D. The Rules of Professional Conduct indicate attorney Gardner's continued representation would be improper.

The Iowa Rules of Professional Conduct "provide guidelines aiding us in determining whether an actual conflict is likely to arise." *McKinley*, 860 N.W.2d at 881. "The guidelines supplied by the rules are relevant, but are not alone dispositive." *Id.* (citing *Smith*, 761 N.W.2d at 75; *Smitherman*, 733 N.W.2d at 348–49). Application of these guidelines in Mulatillo's case counsels against attorney Gardner's continued representation.

1. Attorney Gardner has a conflict affecting his current client under Rule 32:1.7.

Generally, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Iowa R. Prof'l Conduct 32:1.7(a). A concurrent conflict exists when "the representation of one client will be directly adverse to another client" or when "there is a significant risk that the representation of one or

more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer." *Id.* Under the first alternative, "another client" means "another *current* client." *McKinley*, 860 N.W.2d at 882. Attorney Gardner no longer represents Davison, so there is no conflict between current clients.

Because this case does not involve simultaneous representation, the question is whether there is a significant risk that attorney Gardner's responsibilities to Davidson materially limit his ability to represent Mulatillo. "The comments to the rules suggest a material limitation occurs when a 'lawyer's ability to consider, recommend, or carry out an appropriate course of action' is hampered." *Id.* (quoting Iowa R. Prof'l Conduct 32:1.7 cmt.8). "Put another way, the conflict formulation under rule 32:1.7(a)(2) is consistent with the definition we applied in *Watson*: a conflict arises when a danger of divided loyalties burdens or impedes the attorneys' defense strategy." *Id.* (citing *Watson*, 620 N.W.2d at 240–41).

Providing Mulatillo a zealous defense against the State's allegations will require attorney Gardner to confront his former client. Davidson is expected to provide powerful testimony—he was

the other party to five of Mulatillo's methamphetamine deliveries that resulted in ten felony charges. Add'l Minutes; Conf. App. 128. Cross examination of Davidson will likely center on probing the details of his cooperation agreement and exploring the circumstances leading to his decision to cooperate in exchange for leniency.

Attorney Gardner's continuing duty to maintain his former client's confidences could materially limit his ability to cross examine Davidson. Even though Davidson is no longer a client, attorney Gardner cannot delve into confidential matters for impeachment at Mulatillo's trial. *See* Iowa R. Prof'l Conduct 32:1.7 cmt. 5 ("The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn."). Attorney Mitchell's professional statement indicates attorney Gardner was involved in discussions with the prosecutor about Davidson becoming an informant. Tr. p. 27, lines 7–17; App. 93. Although Mulatillo insists "there was no connection" between the two cases (Def. Br. at 25), the district court's findings of fact placed more credibility in the proof connecting Mulatillo's current charges to Davidson's previous charges. *See* Tr. p. 32, line 23 – p. 33, line 10; App. 98–99 (referencing "the relationship that Mr. Gardner's had previously with

the confidential informant having involved a similar type of drug prosecution, having been related in time to the confidential informant's actual involvement in this case . . ."). Thus, attorney Gardner had a role in the very decision that will likely form the crux of Davidson's cross examination.

Attorney Gardner's diverging duties to his current and former clients create a significant risk of materially limiting his representation. In *Johnson*, the court explained that an attorney in this situation may be tempted to use the former client's confidential information to impeach him or may fail to fully cross examine the former client to prevent misusing that confidential information. *Johnson*, 131 F. Supp. 2d at 1095 (quoting *Agosto*, 675 F.2d at 971). While *Johnson* identifies the dangers at play, Mulatillo erroneously argues that "Attorney Gardner's situation is very similar to that of the attorney in *Johnson*." Def. Br. at 26. In *Johnson*, the attorney and former client "disagree[d] on whether any such confidences were imparted" during their initial consultation, and the district court chose to adopt the attorney's characterization of the interaction. *Johnson*, 131 F. Supp. 2d at 1096. Mulatillo's case is different. First, unlike *Johnson* that involved an attorney's word against a convict, the

court heard conflicting stories from two attorneys, so attorney Gardner's claims should not receive any special deference over attorney Mitchell's professional statement. Second, unlike *Johnson* in which the court found the attorney's denial credible, the adoption of attorney Mitchell's facts indicate the court disbelieved attorney Gardner's denial of any connection between the two cases. Third, attorney Gardner's continuing duty to maintain Davidson's confidences contrasts with *Johnson* in which the former client had already revealed to the government the facts underlying the previous representation. *See id.* at 1099 ("Thus, attorney Willett is in no worse position, even assuming he is in possession of privileged information, than any other defense counsel would be, in terms of conducting an effective cross-examination of McNeese, because he has access to an independent source of factual information upon which he can draw to conduct an effective cross-examination of McNeese without any fear or temptation to draw upon privileged communications.").

Attorney Gardner's continued representation implicates Rule 32:1.7's prohibition of concurrent representation. His former role representing Davidson in discussions to become an informant could materially limit his ability to cross examine Davidson at Mulatillo's

trial. Accordingly, the court reasonably stated "its concern that to permit Mr. Gardner to go forward as counsel for Mr. Mulatillo really implicates the Court's complicity in Mr. Gardner's violation of the Iowa Rules of Professional Conduct for Attorneys and specifically rule 32:1.7 . . ." Tr. (11/9/2016) p. 34, lines 9–18; App. 100.

2. Attorney Gardner has a conflict affecting his former client under Rule 32:1.9.

Absent a written waiver from the former client, "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client." Iowa R. Prof'l Conduct 32:1.9(a). Davidson is unwilling to waive his attorney-client privilege with attorney Gardner. Tr. p. 27, lines 4–6; App. 93. Consequently, attorney Gardner cannot represent Mulatillo in a "substantially related matter" with materially adverse interests.

Mulatillo's charges are substantially related to Davidson's case. On a fundamental level, the two cases are different chapters of the same story—attorney Gardner's role discussing a cooperation agreement for Davidson in the fall of 2014 (Tr. p. 27, lines 7–17; App. 93) led to Davidson working as a confidential informant and buying

methamphetamine from Mulatillo in January and March 2015. Add'l Minutes; Conf. App. 128. Thus, the two cases are close enough to be "substantially related" under Rule 32:1.9.

Additionally, the current and former cases are substantially related due to the risk of invading Davidson's attorney-client confidences. Matters are "substantially related" when there is "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." Iowa R. Prof'l Conduct 32:1.9 cmt.3 (emphasis added). This objective "as would normally have been obtained" standard avoids the necessity of invading the former client's privileged communication to determine if there is a conflict. *See* Tr. p. 16, line 11 – p. 17, line 21; App. 82–83 (discussing how there was no opportunity for independent review of attorney Gardner's notes because Davidson was unwilling to waive privilege); *cf. Keefe v. Bernard*, 774 N.W.2d 663, 670 n.5 (Iowa 2009) ("The proper remedy for a conflict of interest between two current clients is attorney disqualification from one or both representations, not forced disclosure of the attorney's privileged conversations with either client."). An attorney like

Gardner who discussed a cooperation agreement for his client is likely to have first consulted with the client about the client's desires and motivations, which is exactly the type of confidential communication that could be materially beneficial to exploit during cross examination in the subsequent client's trial.

Attorney Gardner's continued representation risks violating Rule 32:1.9. He has a continuing duty to protect Davidson's attorney-client confidences. Rather than attorney Gardner merely impeaching a former client with a matter-of-public-record past conviction (*see* Def. Br. at 18), the record supports that attorney Gardner discussed with the prosecutor the possibility of Davidson working for the drug task force. Tr. p. 27, lines 7–17; App. 93. Rule 32:1.9 aims to prevent an attorney from using any confidential information gained during a prior representation to his current client's material advantage. Therefore, attorney Gardner's continuing duty toward his former client favors the district court's disqualification order.

E. Other states have required disqualification under similar circumstances.

Although Iowa has never decided a conflicts case involving an attorney's former representation of a confidential informant, other states have confronted such circumstances. Some of those cases fall

in line with *Smith* and *McKinley* in that they did not find a conflict when the informant was previously represented by a *different* attorney in the same law office or when the cases were *unrelated* to one another. *See State v. Bailey*, No. S10-03-0680, 2011 WL 2991974, at *1 (Del. Super. Ct. July 19, 2011) (lawyer previously represented informant in an unrelated matter); *Dill v. State*, 387 S.E.2d 424 (Ga. Ct. App. 1989) (lawyer previously represented informant in unrelated civil and criminal matters); *Gallegos v. State*, 820 So. 2d 903 (Fla. Ct. App. 2001) (informant was previously represented by another attorney in the same law firm); *People v. Smith*, 706 N.Y.S.2d 737 (A.D. 2000) (informant was currently represented on unrelated charges by a different attorney in the same public defender's office); *People v. Spencer*, 420 N.Y.S.2d 868 (Sup. Ct. 1979) (informant was previously represented by another attorney in the legal aid society).

However, other states would not permit an attorney in Gardner's situation to continue representing Mulatillo. These states disapprove of an attorney's representation of a current client when the attorney previously represented the testifying confidential informant. In fact, these states have addressed the precise situation

of the attorney's involvement in the informant's prior case that led to the informant buying drugs from the attorney's current client.

In *Rael v. Blair*, 153 P.3d 657, 659 (N.M. 2007), the same attorney who represented the defendant on racketeering and trafficking charges also represented the confidential informant who introduced the defendant to an undercover officer. The court found that although the attorney's representation of the informant had ended before assuming the defendant's representation, "the duties an attorney owes to a client can extend beyond the termination of representation." *Id.* at 663. In particular, the court concluded that "defense counsel could not effectively cross-examine [the informant] because of his confidential relationship resulting from counsel's prior representation." *Id.* Due to the actual conflict of interest, the court reversed the defendant's convictions for retrial with unconflicted counsel. *Id.* at 664.

Rael relied on *People v. Daly*, 792 N.E.2d 446 (Ill. Ct. App. 2003). The attorney in *Daly* represented a client who became a confidential informant and purchased drugs from the defendant, which led the attorney to representing the defendant on the resulting charges. *Id.* at 448–49. The court recognized a "per se conflict"

exists when "the professional relationship between counsel and the witness is contemporaneous with counsel's representation of defendant." *Id.* at 450. The court determined the attorney's previous representation of the confidential informant concerned "a matter of significant relevance to the defendant's trial" and concluded the attorney could not properly cross examine the informant about any matters that occurred during the previous attorney-client relationship. *Id.* at 451. "A professional relationship is ongoing, even if formal representation has ended, if circumstances exist such that the attorney-client privilege may be violated." *Id.* The court concluded a per se conflict existed and reversed the defendant's convictions. *Id.* at 451–52.

The court reached a similar conclusion in *Brooks v. State*, 686 So. 2d 1285 (Ala. Crim. App. 1996). In that case, the defendant's attorney previously represented the confidential informant in the case that led to the defendant's arrest on drug distribution charges. *Id.* at 1286. But counsel claimed "he did not know if any agreement had been worked out between the confidential informant and the district attorney's office in return for the informant's testimony in this case." *Id.* The court found a "clear" conflict of interest existed because the

attorney "could not very well seek to fully represent the [defendant], when that representation would of necessity involve an attack upon the credibility of the [informant]. . . ." *Id.* 1287 (citing *Pinkerton v. State*, 395 So. 2d 1080, 1089 (Ala. Crim. App. 1980)). The court, therefore, presumed prejudice flowing from the actual conflict of interest and reversed the defendant's convictions. *Id.*

Under substantially different facts, the court reached a different conclusion in *Samuels v. Commonwealth*, No. 2849-09-3, 2010 WL 4823021 (Va. Ct. App. Nov. 10, 2010). In *Samuels*, the defendant's attorney realized he had previously represented the confidential informant on an unrelated charge for driving with a suspended license. *Id.* at *2. The court recognized that if the attorney possesses confidential information from the previous representation, then "there is a significant risk that the attorney's representation of the current client will be materially affected, and therefore, a conflict of interest exists." *Id.* at *5. The court found no conflict of interest because the attorney could not recall anything about his previous representation of the informant and because the informant confirmed that she did not reveal any personal confidences during their five-minute consultation. *Id.* at *6.

Mulatillo's case more closely resembles the situations disapproved in *Rael*, *Daly*, and *Brooks*. The record proves attorney Gardner not only represented Davidson in the case that led to him becoming an informant, but also that attorney Gardner himself had discussions with the prosecutor about Davidson working for the drug task force. Tr. p. 27, lines 7–17; App. 93. The courts in *Rael*, *Daly*, and *Brooks* would not permit an attorney to participate in a cooperation agreement for one client and then cross examine that client on behalf of a subsequent client ensnared by the cooperation agreement. Meanwhile, Mulatillo's case differs from *Samuels* in two important respects. First, Mulatillo's drug charges have a direct relationship to Davidson's drugs charges, unlike *Samuels* in which the attorney previously represented the informant on an unrelated driving charge. Second, unlike *Samuels* in which the attorney and the former client agreed no personal confidences were shared, attorneys Gardner and Mitchell provided conflicting information about Gardner's personal involvement speaking with the prosecutor about Davidson becoming an informant.

Cases like *Rael*, *Daly*, and *Brooks* counsel against attorney Gardner's continued representation. To zealously represent

Mulatillo, attorney Gardner will have to cross examine his former client about the very deal he helped create. Because this situation creates too much risk of divided loyalties, the district court reasonably chose to disqualify attorney Gardner from Mulatillo's defense.

CONCLUSION

The Court should affirm the ruling disqualifying Carlos Mulatillo's attorney and remand for trial with unconflicted counsel.

REQUEST FOR ORAL SUBMISSION

Oral submission could assist the Court's consideration of the conflict-of-interest questions presented in this appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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