

**IN THE  
SUPREME COURT OF PENNSYLVANIA  
EASTERN DISTRICT**

**125 EM 2019**

**IN RE: CONFLICT OF INTEREST OF THE OFFICE OF THE  
PHILADELPHIA DISTRICT ATTORNEY, PETITION OF MAUREEN  
FAULKNER, WIDOW OF DECEASED POLICE OFFICER DANIEL  
FAULKNER**

**RESPONSE OF: OFFICE OF THE ATTORNEY GENERAL OF  
PENNSYLVANIA**

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE  
SUPREME COURT OF PENNSYLVANIA:

Josh Shapiro, Attorney General of Pennsylvania, by Michelle A. Henry, First Deputy Attorney General, Jennifer C. Selber, Executive Deputy Attorney General, and Ronald Eisenberg, Chief Deputy Attorney General, respectfully files the following response to the above petition, and thus states:

**Introduction**

The King's Bench petition was served on the Office of Attorney General on November 12, 2019. This response is filed pursuant to the Court's correspondence of November 13, 2019, directing an answer to the petition. The response addresses an important issue raised by the parties in parallel litigation in the Superior Court: whether the family of a crime victim has standing to seek judicial review of a conflict of interest that improperly benefits both the criminal defendant and the prosecutor. Both the defendant and the District Attorney's Office have taken the position in the

underlying litigation that neither a victim's family nor, by extension, anyone else has standing to challenge such a conflict, no matter its nature. Respectfully, that position does not comport with binding precedent, diminishes the legitimate interests of families of crime victims, and disregards this Court's duty to oversee the judicial system of this Commonwealth. The Office of Attorney General therefore believes the question warrants further exploration.

### **Related litigation**

Petitioner Faulkner, the widow of a murder victim, previously filed a petition to intervene in the defendant's appeal of his conviction, which is pending in the Superior Court. The petition was based on the conflict of interest that is raised in the King's Bench petition now before this Court. In response to the intervention petition, the District Attorney's Office argued that if a conflict of interest existed "it would be the defendant Cook, and not petitioner Faulkner, who would be the allegedly aggrieved party. Thus the proper person to raise the alleged conflict would be defendant Cook and not Petitioner Faulkner" (Superior Court response of District Attorney, p. 3, n.2). The defendant likewise argued that Mrs. Faulkner "simply disagrees with" the prosecutor's handling of the case, and that "private citizens, even victims, are never granted standing" for that reason.... [S]he is not a party to this

appeal and it is not appropriate for the Court to address any of the arguments she raises” (Superior Court response of defendant, ¶¶6, 8).<sup>1</sup>

The Superior Court thereafter denied the intervention petition in a one-sentence order. Although the court did not state its reasoning, its ruling is not under review in this Court. The current petition is filed in the Court’s original jurisdiction and does not seek Mrs. Faulkner’s intervention as a party to the appeal.

**Argument: standing of crime victims and judicial oversight**

Unlike the usual conflict of interest challenge, the kind of conflict identified in the King’s Bench petition does not prejudice either party to the underlying litigation. Rather, the justice system itself is adversely affected, along with those it is intended to protect. In a criminal case, it is generally the victim and the victim’s family members who are most directly and immediately affected by such a conflict. If the family does not have standing to raise the matter, then the conflict will likely never be subject to judicial review.

Certainly, if it were claimed that counsel for the prosecution was conflicted by bias *against* the defendant, “the proper person to raise the alleged conflict” would indeed be the defendant. But if the allegation were that counsel for the prosecution was conflicted by bias *in favor of* the defendant, neither counsel nor the defendant would have any interest in raising it. To the contrary, the defendant would wish to

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<sup>1</sup> Both responses are attached as exhibits to the King’s Bench petition.

preserve pro-defense bias for his personal benefit, while counsel for the prosecution would wish to avoid judicial review of his conduct. Only a person aggrieved by the conflict, such as the victim or a family member, would have an interest in raising it.

The defendant and District Attorney's Office have taken a different position, but that view is not consistent with this Court's precedent. On point is the Court's unanimous decision in *In Re Hickson*, 821 A.2d 1238 (Pa. 2003). In that case an attorney unconnected to the case attempted to pursue a private criminal complaint. The Superior Court, in a 2-1 decision, ruled that the attorney lacked standing because he did not represent the victim or the family member of the victim. The dissenting Superior Court judge excoriated that reasoning, contending that "a victim has no greater interest" than "any other member of the public." 821 A.2d at 1242.

This Court rejected the dissenting analysis of the Superior Court, explaining that crimes in Pennsylvania have historically been viewed "as an offense against the individual victim," and indeed, that victims at one time were relied upon to apprehend and prosecute offenders. Although "the role of the government in prosecuting criminal matters began to grow..., a citizen's right to pursue his victimizer in criminal courts" was never entirely abolished. *Id.* at 1244-45. The present-day provision for private criminal complaints is animated by "the recognition that a crime has caused an individual a substantial, direct and immediate injury." *Id.* at 1245.

While the present matter does not involve private criminal complaints specifically, *Hickson* is one of this Court's leading precedents governing standing. See, e.g., *Pittsburgh Palisades v. Commonwealth*, 888 A.2d 655, 659-60 (Pa. 2005). And, as this Court explained in *Hickson*, a "substantial, direct and immediate interest in the outcome of the litigation" is the essence of standing. *Id.*, 1243. Far from crime victims being without standing, therefore, this Court in *Hickson* found it "axiomatic that those most likely to be affected by a crime will be the victim himself or his relatives." *Id.*, 1245.

Of course, *Hickson*'s recognition of this substantial, direct and immediate interest does not entitle crime victims to litigate mere policy differences with elected prosecutors. Instead, standing is essential in limited circumstances like those here because it is the only way to protect the integrity of the judicial process against conflicts of interest that would otherwise go unexposed. A prosecutor may properly offer lenient treatment because he believes the defendant deserves it; but the same treatment may be deemed improper if, for example, the prosecutor was previously the defendant's advocate. The averments in this case are not about "simply disagreeing" with the handling of the appeal: they are about actual impropriety or its appearance. That is when victims need standing.

And such standing is indispensable not only to address a private interest, but to vindicate a public one: the authority of the judiciary and the need for judicial

oversight. This Court has cautioned against allowing important issues to “escape judicial review entirely” where the erstwhile parties “would be disinclined to file a complaint” about questionable conduct that “impacted them in a positive, rather than a negative, fashion.” *Hickson*, 1245 n.6. Official public acts should not be immunized from judicial review solely because “those directly and immediately affected by the complained of conduct were beneficially affected as opposed to adversely affected.” *Sprague v. Casey*, 550 A.2d 184, 187 (Pa. 1988) (citations omitted); *accord Stilp v. Commonwealth*, 905 A.2d 918, 950-51 (Pa. 2006).

For standing purposes, both public and private interests are even more compelling in cases like this one than in *Sprague* or *Stilp*. The governmental activity at issue here is uniquely within the role of the judiciary. Only this Court has the power to police attorney conflicts of interest so that they do not distort judicial proceedings. No other channels are available for redress; even the Disciplinary Board, which might in theory eventually review a claim of attorney misconduct, has no authority to remedy any damage to the underlying case.<sup>2</sup> And no party other than

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<sup>2</sup> Nor is the Commonwealth Attorneys Act a solution. The Act authorizes the Attorney General to assume a local prosecution based on the “potential for an actual or apparent conflict of interest on the part of the district attorney or his office” – but only “upon the request” of the district attorney. 71 P.S. § 732-205(a)(3). In cases involving conflicts that mutually benefit both the defendant and the prosecutor, there will likely be no such request.

Under a different provision of the Act, the Attorney General may petition for supersession if “the district attorney has failed or refused to prosecute.” § 732-205(a)(4). Conflicts such as that averred  
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the aggrieved victim or victim's family is better situated to identify and assert apparent conflicts of interests that would improperly benefit both defense and prosecution. Victims are not just "taxpayers"; as this Court's precedent indicates, they have a substantial, direct and immediate interest in the conflict-free conduct of the criminal proceedings.<sup>3</sup>

Petitioner and similarly situated crime victims are therefore entitled to standing to raise such conflict of interest claims. They may, of course, not always prevail. But they should at least have the right to be heard.

Respectfully submitted,

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here, however, will not often manifest themselves as "failures or refusals to prosecute." The effect of an improper conflict of interest will generally be less blatant.

<sup>3</sup> *Contrast Stilp v. Commonwealth, General Assembly*, 940 A.2d 1227, 1234-35 (Pa. 2007) (taxpayer with no unique personal interest lacked standing to argue that Auditor General had power to audit legislature, because Auditor General had ability to assert that authority for himself).

**CERTIFICATE OF COMPLIANCE  
WITH RULE 127**

This filing complies with Pa. R. App. P. 127(a) and the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Ronald Eisenberg  
RONALD EISENBERG  
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**CERTIFICATE OF SERVICE**

I, RONALD EISENBERG, hereby certify that on December 2, 2019, a copy of the foregoing motion was served via the Court’s electronic filing system on the following attorneys:

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