



**Filed**

Supreme Court of Guam, Clerk of Court

**IN THE SUPREME COURT OF GUAM**

**THE PEOPLE OF GUAM,**  
Plaintiff,

**v.**

**FRANCISCO JUNIOR SANTOS,**  
Defendant.

Supreme Court Case No.: CRQ18-001  
Superior Court Case No.: CM0094-18

**OPINION**

**Cite as: 2018 Guam 12**

Certified Question from the Superior Court of Guam  
Submitted on April 30, 2018  
Hagåtña, Guam

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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; ROBERT J. TORRES, Associate Justice.

**PER CURIAM:**

[1] Superior Court Judge Elyze M. Iriarte submitted five certified questions to this court on the application of 7 GCA § 6105(a) and 7 GCA § 6105(b)(5)(A)-(C), provisions regarding a judge’s disqualification. This court accepted four of the five questions. For the reasons discussed below, we find that absent the agreement of the parties, 7 GCA § 6105(b)(5)(B) requires a Superior Court judge, related in the third degree to the Chief Prosecutor, to disqualify herself in any criminal proceeding brought by the Office of the Attorney General of Guam because the Chief Prosecutor, who is not supervising or involved in the matter, is legally presumed to be “acting as a lawyer in the proceeding” based on his supervisory role as Chief Prosecutor. 7 GCA § 6105 (b)(5)(B).

**I. FACTUAL AND PROCEDURAL BACKGROUND**

[2] Judge Iriarte is related within the third degree to Joseph McDonald, Chief Prosecutor in the Office of the Attorney General (“OAG”). McDonald is Judge Iriarte’s father’s brother. In January 2018, the Public Defender Service Corporation (“PDSC”) began seeking Judge Iriarte’s disqualification in all criminal matters. Judge Iriarte was assigned *People v. Moged*, CM0643-17, and rejected the Public Defender’s request for her disqualification on untimeliness grounds. *People v. Moged*, CM0643-17 (Answer Obj. Competency (Feb. 12, 2018)). Superior Court Judge Michael J. Bordallo, sitting as a recusal judge, issued a Decision and Order holding that the disqualification of Judge Iriarte was not warranted, but on different grounds. Judge Bordallo held that disqualification was not required because McDonald was “not an officer or director of the People of Guam, an active lawyer in the proceedings, [did] not have an interest in the

outcome of the proceedings, and [was] not likely to be a material witness.” *People v. Moged*, CM0643-17 (Dec. & Order at 5 (Mar. 22, 2018)).

[3] The Public Defender also requested Judge Iriarte’s disqualification in *People v. Reyes*, CM0191-17, which she rejected on untimeliness grounds. Superior Court Presiding Judge Alberto C. Lamorena III, sitting as a recusal judge, issued a Decision and Order affirming that Judge Iriarte could preside over the case, but on different grounds. Presiding Judge Lamorena stated that McDonald was “not directly involved in [the] matter, [had] never actively participated in the underlying proceedings, and [did] not supervise the attorney representing the OAG with respect to the matter.” *People v. Reyes*, CM0191-17 (Dec. & Order at 4 (Mar. 26, 2018)). He also held that PDSC’s theory of vertical imputation—that as Chief Prosecutor the court should vertically impute knowledge and acts of all Assistant Attorneys General within the Prosecution Division—was “too rigid of a rule to impose in this jurisdiction.” *Id.* Presiding Judge Lamorena explained that “[s]uch a rule would effectively prevent the assigned judge from hearing any criminal proceeding brought by any attorney of the OAG working within the Prosecution Division, which would be untenable considering the small size of the legal community and the number of judges.” *Id.*

[4] After being assigned *People v. Santos*, CM0094-18, Judge Iriarte filed a Notice Regarding Potential Disqualification. The Public Defender filed a statement requesting judicial disqualification. One reason listed in the request was that the Chief Prosecutor maintained supervision over attorneys appearing before Judge Iriarte. Judge Iriarte was inclined to disqualify herself, but did not do so in light of the decisions in *Moged* and *Reyes*.

[5] The Public Defender has requested Judge Iriarte’s disqualification in eight other cases currently pending in the Superior Court.<sup>1</sup> Judge Iriarte filed a Submission of Questions for Certification with this court based on the requests for disqualification in these cases. Judge Iriarte submitted five questions. This court accepted four of the five questions and stayed all eleven criminal matters presented in the submission and subsequent motion until further order of this court.

## II. JURISDICTION

[6] This court has jurisdiction over requests to hear certified questions. 7 GCA § 4105 (2005); Guam R. App. P. 20(a)(1); *see also* 48 U.S.C.A. § 1424-1 (Westlaw through Pub. L. 115-223 (2018)). Section 4105 states:

Any judge of the Superior Court of Guam may certify a question of law to the Supreme Court of Guam for its opinion as to the interpretation of any law, federal or local, lying within the jurisdiction of the courts of Guam to decide, and arising in a case or proceeding then pending before the Superior Court.

7 GCA § 4105. Furthermore, Guam Rule of Appellate Procedure (“GRAP”) 20(a)(1) states in part:

Only questions or propositions of law may be certified, and they must be distinct and definite. . . . If the Chief Justice determines that the local law has not been clearly determined, and it is necessary and desirable to ascertain the local law in order to dispose of the Superior Court’s proceeding, then the certificate will be accepted.

Guam R. App. P. 20(a)(1). The four questions over which we granted review meet all of the criteria set forth in 7 GCA § 4105 and GRAP 20.

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<sup>1</sup> People v. Aguiqui, CF0453-18 (Statement Requesting Judicial Disqualification (Aug. 13, 2018)); People v. Joker, CF0339-18 (Statement Requesting Judiciary Disqualification (July 5, 2018)); People v. Tiwmalyoang, Repalpiy, & Togolmai, CF0130-18 (Statement Requesting Judiciary Disqualification (Apr. 10, 2018)); People v. Tenorio, CM0106-18 (Statement Requesting Judiciary Disqualification (Apr. 6, 2018)); People v. Iotaro, CF0094-18 (Statement Requesting Judiciary Disqualification (Mar. 21, 2018)); People v. Aldan, CF0084-18 (Statement Requesting Judiciary Disqualification (Mar. 23, 2018)); People v. Sanchez & Aldan, CF0745-17 (Statement Requesting Judiciary Disqualification (Jan. 24, 2018)); People v. Quichocho, CF0604-17 (Def.’s Mem. Concerning Disqualification (Jan. 9, 2018)).

### III. STANDARD OF REVIEW

[7] “Normal standards of review do not apply when addressing certifications of law; instead, the court addresses the matters in the context in which they arise and as if they were presented to the court in the first instance.” *Levin v. United States*, 2016 Guam 14 ¶ 9 (quoting *Maeda Pac. Corp. v. GMP Haw., Inc.*, 2011 Guam 20 ¶ 21).

### IV. ANALYSIS

[8] The certified questions seek clarification of the interpretation and application of 7 GCA § 6105. In the context presented by the certified questions, we find that 7 GCA § 6105(b)(5)(B) requires a Superior Court judge, related in the third degree to the Chief Prosecutor, to disqualify herself in any criminal proceeding brought by the Office of the Attorney General of Guam and, therefore, need not address the other submitted questions. *See People v. Gay*, 2007 Guam 11 ¶¶ 6-7 (declining to answer a certified question that was unnecessary to the decision).

[9] Under 7 GCA § 6105(b)(5)(B), a judge must disqualify himself or herself, unless all parties agree to have the judge continue to sit in the proceedings, where a person within the third degree of relationship to the judge is “acting as a lawyer in the proceeding.” 7 GCA § 6105(b)(5)(B) (2005). Chief Prosecutor McDonald is within the third degree of relationship to Judge Iriarte, as he is Judge Iriarte’s father’s brother. The question presented by this case is whether McDonald, as Chief Prosecutor, is “acting as a lawyer in the proceeding” even when he does not make a personal appearance.

[10] The Court of Appeals of Utah has dealt with a similar set of facts and issue. *See State v. Van Huizen*, 2017 UT App 30, 392 P.3d 933 (Ct. App. 2017). In *Van Huizen*, the court held that recusal was necessary where a judge’s spouse was the Chief Criminal Deputy “responsible to the County Attorney for the performance of the attorneys below him in the supervisory line.” *Id.* ¶

46. The court noted that the judge “would have been obligated to recuse had she been married to the county attorney for the same reason that she would have been required to recuse if she were married to the case attorney—they are both ‘acting as a lawyer in the proceeding.’” *Id.* ¶ 45 (citation omitted). Accordingly, the court “believe[d] that, in a public law office, the command hierarchy itself is material to the appearance of partiality,” and because the spouse was “within the chain of command for this case, [the court] conclude[d] that his marriage to the [judge] created an appearance of partiality.”<sup>2</sup> *Id.* ¶ 46.

[11] Several state ethics opinions have reached the same result. For example, a Michigan ethics panel dealt with the issue of disqualification when a trial judge is related to a prosecutor with supervisory responsibilities but who does not personally participate in the case. *See* State Bar of Mich., Ethics Op. JI-101 (June 6, 1995). In applying a rule substantively identical to 7 GCA § 6105(b)(5)(B), the Michigan panel determined that recusal was necessary where a judge’s spouse served as Chief Trial Attorney supervising the investigation, preparation, and trial of felony cases even though the spouse was barred from directing, participating in, or supervising any case assigned to the judge. *See id.* The panel noted that investigations about or deliberations on the transactions and facts in question would be “conducted before litigation is filed, and thus before the prosecutor knows which judge will be assigned to hear the matter.” *Id.* Therefore, there was “no way to screen the prosecutor spouse for district court matters which might in the future be assigned to the judge spouse.” *Id.*

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<sup>2</sup> We note that Utah has adopted the American Bar Association’s Canon of Judicial Ethics (“Canons”), which differs slightly in structure from 7 GCA § 6105. *Compare* Utah Code of Judicial Conduct r. 2.11 (2016), *and* Model Code of Judicial Conduct r. 2.11 (Am. Bar Ass’n 2011), *with* 7 GCA § 6105. Under rule 2.11, “[a] judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to [a number of circumstances similar to those listed under 7 GCA § 6105(b)].” Model Code of Judicial Conduct r. 2.11 (Am. Bar Ass’n 2011). Unlike rule 2.11, impartiality is a separate provision under 7 GCA § 6105. *See* 7 GCA § 6105(a). However, 7 GCA § 6103 incorporates the Canons into Guam law, and rule 2.11 and 7 GCA § 6105 are sufficiently similar that we find *Van Huizen* and its application of rule 2.11 to inform our interpretation of 7 GCA § 6105(b).

[12] Similarly, a New York ethics committee determined that disqualification was necessary where a judge's spouse was the attorney in charge of the criminal practice of a legal services provider organization. N.Y. Jud. Advisory Comm., Op. 05-87 (Dec. 8, 2005). The spouse was responsible for, in part, "the provision of legal assistance in criminal cases in State criminal trial proceedings" and reported directly to the organization's attorney-in-chief. *Id.* The committee did "not regard the fact that the spouse [was] not the attorney of record as being at all dispositive of the matter in issue." *Id.* Rather, the committee found that the spouse was "more closely connected to the matters before the judge than the attorney-in-chief" because the spouse "[bore] the responsibility of overseeing all criminal practice operations including the very operations involved herein: State criminal trial proceedings." *Id.* In light of this responsibility, the committee was "compelled to conclude that the spouse must be deemed to be 'involved' in the criminal proceedings over which the judge presides" and advised in favor of recusal. *Id.* Ethics committees in Arizona and Florida have similarly advised. *See, e.g.,* Ariz. Ethics Advisory Comm., Op. 95-19 (Oct. 20, 1995); Fla. Jud. Ethics Advisory Comm., Op. 18-13 (June 8, 2018); Fla. Jud. Ethics Advisory Comm., Op. 11-21 (Dec. 20, 2011); *c.f.* Ariz. Jud. Ethics Advisory Comm., Op. 00-01 (Apr. 7, 2000) (advising against disqualification where judge's son was employed in the prosecutor's office as a trial attorney, in part, because the son did not supervise any attorneys that appeared in court before the judge).

[13] As Chief Prosecutor, McDonald has substantial supervisory and policy responsibilities in the criminal division, including determining division priorities and supervising investigations and attorneys before any litigation is filed. *See* OAG's Br. at 6-7 (May 20, 2018). Therefore, even if McDonald is barred from directing, participating in, or supervising any case assigned to Judge Iriarte, he may have participated in the case before the litigation was filed and the matter

assigned to Judge Iriarte. While we do not question her impartiality, Judge Iriarte must disqualify herself from cases involving the Criminal Division of the Office of the Attorney General. However, this disqualification is not absolute. Guam's disqualification statute allows a judge to continue to preside if, after full disclosure, all parties agree to having the judge sit in the proceedings. 7 GCA § 6105(b) (2005) (as renumbered in 2012).

[14] Both PDSC and the People appear to suggest that it may be possible to effectively screen McDonald from criminal cases assigned to Judge Iriarte. *See* OAG's Br. at 6-7, 18; PDSC's Br. at 21 (May 25, 2018). While we do not preclude the use of an ethical wall to screen McDonald, we have some concerns about the effectiveness of such a wall. It is possible that McDonald would be involved in a case prior to its assignment to Judge Iriarte. In such a case, an ethical wall erected after the assignment would not be effective and recusal would still be necessary, absent her disclosure and agreement by the parties. *See* State Bar of Mich., Ethics Op. JI-101 (June 6, 1995). Moreover, an ethical wall may not be effective if, for example, McDonald: (1) is required to evaluate the attorneys in their performance before Judge Iriarte, *see* Ariz. Jud. Ethics Advisory Comm., Op. 95-19, at 2 (Oct. 20, 1995), or (2) has responsibility in allocating resources in the office, *see* Fla. Jud. Ethics Advisory Comm., Op. 90-23 (Oct. 22, 1990). We leave these matters for the trial court to consider, as the record is not sufficiently developed to determine whether the Chief Prosecutor was effectively screened in the case at hand.

[15] We also have concerns about Judge Iriarte's procedure for disqualification. Judge Iriarte's Notice Regarding Potential Disqualification correctly recognizes that 7 GCA § 6105 "allows a judge to continue to preside over proceedings following disclosure of the disqualifying circumstances and upon agreement of the parties." Record on Appeal ("RA"), tab 12 (Notice

Regarding Potential Disqualification, Mar. 19, 2018). However, the notice later reads, in pertinent part, as follows:

Should any party disagree with my continuing to sit in these proceedings, such party may invoke the procedure under 7 GCA § 6107, objecting to my competency to preside over this matter. **Such objections must be filed: (1) for asserted speedy trial cases, within seven days of the filing of this Notice, or within seven days after the Criminal Trial Setting, whichever is later; or (2) for cases with speedy trial waivers, within fourteen days of the filing of this Notice, or within fourteen days after the Criminal Trial Setting, whichever is later.** However, should either party request resolution of any substantive matter before the Court prior to the expiration of time to file an Objection to Competency, the Court will consider any objections to be waived for the purposes of that decision. Also, failure to timely invoke section 6107 will amount to waiver of any objections.

*Id.*

[16] This notice appears to be improper because it places the onus on the parties to *object* to Judge Iriarte sitting in the proceedings. Title 7 GCA § 6105(b) is explicit in its requirement that a judge disqualify himself or herself unless, “following complete disclosure to all parties in the proceeding of the reasons for his or her disqualification, all parties *agree* to having the Judge continue to sit in the proceedings.” 7 GCA § 6105(b) (emphasis added). In other words, a judge must disqualify herself and seek the agreement of the parties in order to sit in the proceedings. Therefore, Judge Iriarte’s form disqualification notice appears to be improper as it requires parties to *object* to Judge Iriarte sitting rather than first recusing herself and then seeking the *agreement* of the parties.

## V. CONCLUSION

[17] We hold that absent the agreement of the parties, 7 GCA § 6105(b)(5)(B) requires a Superior Court judge, related in the third degree to the Chief Prosecutor, to disqualify herself in any criminal proceeding brought by the Office of the Attorney General because the Chief Prosecutor, even if not supervising or involved in the matter, is legally presumed to be “acting as

a lawyer in the proceeding” based on his supervisory role. In light of this holding, we decline to address the other three certified questions at this time.

/s/

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F. PHILIP CARBULLIDO  
Associate Justice

/s/

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ROBERT J. TORRES  
Associate Justice

/s/

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KATHERINE A. MARAMAN  
Chief Justice