



**CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS**

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CJEO Oral Advice Summary No. 2016-017

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**DISQUALIFICATION FOR PRIOR APPEARANCE AS A DEPUTY DISTRICT
ATTORNEY IN ANOTHER PROCEEDING**

I. Question

In light of the recent United States Supreme Court decision in *Williams v. Pennsylvania* (June 9, 2016) __ U.S. __ [195 L.Ed.2d 132] (*Williams*), is a judge disqualified from hearing a criminal arraignment if the judge served as the prosecutor at the preliminary hearing in a prior conviction alleged as a strike for sentencing enhancement in the current matter? The judge will not preside at the current trial, does not recall facts from the preliminary hearing that occurred over 10 years before the judge's appointment to the bench, and was not involved in the guilty plea that led to the prior conviction.

II. Summary of Oral Advice

A judge who actively participated in the prosecution of a case alleged as a prior for purposes of sentencing is disqualified from hearing any proceeding in the matter in which the prior is alleged. *Williams* clarifies that active participation includes, at a minimum, significant personal involvement “as a prosecutor in critical decisions regarding the prior case.” (*Williams, supra*, ___ U.S. at p. ___ [195 L.Ed.2d at p. 141].) Passage of time, a judge’s memory, and the fact that the defendant pled guilty are not relevant factors in determining that there is an appearance of impartiality when a judge served as an advocate in a case that will govern sentencing in the current matter.

III. Analysis

The California disqualification statute prohibits trial judges from hearing a case when the judge previously served as a lawyer in the proceeding, or served as a lawyer for a party in any other proceeding involving the same issues. (Code Civ. Proc., § 170.1, subd. (a)(2)(A).) The Committee on Judicial Ethics Opinions (CJEO) concluded in CJEO Formal Opinion 2015-007 that this statute does not require disqualification of a judge who had previously appeared in the *same case* as a deputy district attorney on a nonsubstantive matter, such as a perfunctory continuance, because a person aware of the fact that the judge did not “actively participate” in the prosecution would not have reason to doubt the judge’s impartiality. (CJEO Formal Opinion 2015-007, pp. 3, 14.) Conversely, the committee also concluded that the statute disqualified a judge who “actively participated” as a prosecutor in the *same case*. (*Id.*, at p. 12.) The United States Supreme Court recently applied a similar “significant, personal involvement” standard to conclude that a former prosecutor was disqualified from hearing a habeas matter in the

same case under the federal due process clause. (*Williams, supra*, __ U.S. at p. __ [195 L.Ed.2d at pp. 144-145] [federal due process demarks the outer boundaries of judicial disqualifications, which states may address with more stringent and detailed ethical rules].)

The *Williams* court held that the outer boundaries of due process require disqualification of a former prosecutor who served as an advocate for the state in a case the judge was later asked to adjudicate. (*Williams, supra*, __ U.S. at p. __ [195 L.Ed.2d at p.142].) *Williams* sets the disqualification standard as the former prosecutor having had significant, personal involvement in making critical decisions in the prosecution of the case. The court explained that a prosecutor may bear responsibility for any number of critical decisions, including what charges to bring, whether to extend a plea bargain, and which witnesses to call. Thus, the involvement of multiple actors and the passage of time, which are the consequences of a complex criminal justice system, do not relieve a former prosecutor of the duty to withdraw in order to ensure the neutrality of the judicial process. (*Ibid.*)

The California statute also provides more detailed disqualification rules for prior service in *another proceeding* involving the same issues. (Code Civ. Proc., § 170.1, subd.(a)(2)(A).) Under that statute, a similar “active participation” standard has been applied to disqualify a former prosecutor who served as an advocate for the state at a preliminary hearing in a prior conviction, later alleged as a “strike” to enhance sentencing in another matter that came before her as a judge. (*Sincavage v. Superior Court* (1996) 42 Cal.App.4th 224, 230 (*Sincavage*) [doubt as to impartiality and fairness arises when the judge was active in the prosecution of priors]; Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii).)

When determining whether the same issues are involved, the critical factor is whether there are overlapping issues of law or fact between the prior matter and the current matter, which occurs when an alleged prior governs the punishment in the current

matter. (*Sincavage, supra*, 12 Cal.App.4th at p. 231 [distinguishing *In re Arthur S.* (1991) 228 Cal.App.3d 814, 817, in which a subsequent juvenile matter did not allege the previous conduct or involve a violation of probation].) The question is not whether the prior conviction is contested or a plea of guilty was entered, it is whether the prior conviction will be an issue at sentencing. (*Sincavage*, at p. 231; *People v. Oaxaca* (1974) 39 Cal.App.3d 153, 158 [the contested nature of a criminal proceeding does not end with a guilty plea; sentencing retains the elements of a contested action even to the extremes of probation and life imprisonment].)

The length of time since prior service in a matter involving similar issues is also not a question relevant to disqualification. The Legislature did not include a time limitation in subdivision (a)(2)(A), as it did in subdivision (a)(2)(B), which applies to service as a lawyer in private practice, so the number of years since the judge's active participation in an alleged prior is not a determining factor. (Compare Code Civ. Proc., § 170.1, subd. (a)(2)(A) & (B); accord, *Williams, supra*, ___ U.S. at p. ___ [195 L.Ed.2d at p.142] [passage of time does not relieve the duty of disqualification or ensure the neutrality of the judicial process].) Nor is a judge's memory of the prior proceedings relevant to the question of disqualification or whether a person aware of the facts might reasonably doubt impartiality. (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii); *Sincavage, supra*, 42 Cal.App.4th at pp. 228-229 [judge disqualified who did not remember acting as a prosecutor at the preliminary hearing and had no recollection of the defendant or the proceeding alleged as a prior]; accord, *Williams, supra*, pp. 143, 151 [disqualification required despite doubt that the judge remembered the contents of the charging memo almost 30 years later].)

Finally, the nature of the hearing to be adjudicated is not a relevant factor in determining whether disqualification for prior service on similar issues is required. The statutory disqualification scheme requires that a judge who is disqualified may not participate in any aspect of the case, except for specified ministerial matters, such as

default matters. (Code Civ. Proc., §§ 170.3, subd. (a)(1) [disqualified judge shall not participate further in the proceedings except as provided in § 170.4], 170.4, subd. (a)(3) [disqualified judge may hear purely default matters], 170.5, subd. (f) [proceeding defined as “the action, case, cause, motion, or special proceeding to be tried or heard by the judge”]; *Muller v. Muller* (1965) 235 Cal.App.2d 341, 345 [disqualification not required where the defendant in a civil action allowed default to be entered and put nothing into controversy].) Thus, a judge who is disqualified for active participation in the prosecution of an alleged prior conviction may not preside at the pretrial arraignment even if the prior will not be disputed at the arraignment. (*People v. Freeman* (2010) 47 Cal.4th 993, 1001 [the disqualification statutes do not permit limited, partial or conditional recusal].)

IV. Conclusions

A judge is disqualified from hearing a criminal arraignment if the judge served as the prosecuting district attorney at the preliminary hearing in a prior conviction alleged as a strike for sentencing enhancement in the current matter. An appearance at a preliminary hearing necessarily involves direct, personal involvement in the prosecution of a prior conviction that will govern punishment in the current matter and a person aware of this active participation would reasonably doubt impartiality. Conversely, if the judge appeared at a nonsubstantive hearing, such as a continuance or other ministerial matter, and did not actively participate in the prosecution of the alleged prior, reasonable doubt as to impartiality would not be likely and disqualification would not be required. (CJEO Formal Opinion 2015-007, pp. 2, 14.)



This oral advice summary is advisory only (Cal. Rules of Court, rule 9.80(a), (e); Cal. Com. Jud. Ethics Opns., Internal Operating Rules & Proc. (CJEO), rule 1(a), (b)).

It is based on facts and issues, or topics of interest, presented to the California Supreme Court Committee on Judicial Ethics Opinions in a request for an opinion (Cal. Rules of Court, rule 9.80(i)(3); CJEO rules 2(f), 6(c)), or on subjects deemed appropriate by the committee (Cal. Rules of Court, rule 9.80(i)(1); CJEO rule 6(a)).