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CYRUS R. VANCE, JR.
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August 23, 2011

The Honorable Michael J. Obus
Justice of the Supreme Court
New York County, Part 51

Re: People v. DOMINIQUE STRAUSS-KAHN
Indictment No. 02526/2011

Justice Obus:

We write to respond to what appears to be an application for an order to show cause that was submitted to the Court on August 22, 2011 by Kenneth Thompson, an attorney representing [redacted]. The District Attorney's Office received a copy of this application consisting of a proposed order to show cause, an affirmation of Kenneth P. Thompson and an accompanying memorandum of law for the first time on August 22, 2011 at 4:16 pm as an attachment to an email from a paralegal in Kenneth Thompson's firm[1].

Initially, "as a general rule" courts should remove a prosecutor "only to protect a defendant from actual prejudice . . . ." *Matter of Schumer v. Holtzman*, 60 N.Y.2d 46, 55 (1983) (emphasis added). Thus, the complaining witness has no standing to seek disqualification of a District Attorney and appointment of a Special Prosecutor. Specifically, in order to have standing to raise a claim, a party must demonstrate "an injury in fact that falls within the relevant zone of interests sought to be protected by law." *Matter of People v. Christensen*, 77 A.D.3d 174, 185 (2d Dep't 2010) (citation omitted). When the issue is a prosecutor's authority to handle a case, ordinarily only the defendant has standing to raise the issue. *See generally id.* (Town Justice lacks standing to bring an Article 78 action challenging prosecutor's delegation of authority to another agency, since the only person with a cognizable injury in such circumstances would be the defendant).

[1] The email indicated that Mr. Thompson's firm attempted to send a copy of these submissions earlier in the day but that the documents were inadvertently sent to an incorrect email address for Assistant District Attorney Joan Illuzzi-Orbon. The email further indicated that no attempt was made to re-send the documents until late afternoon, well after the documents were successfully provided to the defendant's attorneys, the Court and the media and approximately an hour after Mr. Thompson was present in the District Attorney's Office.

While the disposition of a criminal case is obviously of great importance to the victim, that does not place the victim within "the relevant zone of interests" protected by the rules governing a criminal case. After all, victims are not parties to a criminal proceeding, and thus do not have the right to intervene in or appear in the case. *See, e.g., People v. Smakaj*, 28 Misc. 3d 1201(A) (Sup. Ct. Bronx Co. 2010) (denying motion by legal group to file notice of appearance on behalf of the complaining witness); *People v. Robinson*, 27 Misc.3d 635, 636 (Sup. Ct., Kings Co. 2010) (same, noting that legal group thereby "seeks to allow a private individual to become a party to a criminal prosecution and, in effect, allow her to assert rights and impose obligations on the People, the defendant, and the court"); *see generally People* v. *Combest*, 4 N.Y.3d 859, 860 (2005) ("The Criminal Procedure Law provides no mechanism for a nonparty to intervene or be joined in a criminal case," even when the nonparty "asserts that it had a direct interest in the case."). Indeed, prohibiting complaining witnesses from intervening in a case and playing a role in steering its prosecution and disposition "is sound public policy and prevents much mischief." *People v. Robinson*, 27 Misc.3d at 637. "To allow the entry of a private interest, even the interest of an honest and aggrieved victim" could lead to "intolerable prejudicial interest" and interfere with the prosecutor's duty not just to punish the guilty but also to protect the rights of the innocent. *Id.*

While no case expressly addresses whether a complaining witness has standing to bring a disqualification motion,[2] courts have repeatedly recognized that a complaining witness cannot employ an Article 78 proceeding to compel a District Attorney to prosecute an alleged crime. *See, e.g., Matter of McTootle v. Rice*, 60 A.D.3d 1068 (2d Dep't 2009); *Matter of Mullaney v. Brown*, 300 A.D.2d 307 (2d Dep't 2002); *Matter of Bytner v. Greenberg*, 214 A.D.2d 931 (3d Dep't 1995). It would make no sense to permit a complaining witness to make an end-run around this restriction by applying to remove the District Attorney from the case altogether.

More fundamentally, the complaining witness's request to have the District Attorney's Office disqualified is frivolous. The standard for disqualification is extremely difficult to meet: a prosecutor should be removed only to avoid "actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence . . . ." *Matter of Schumer v. Holtzman*, 60 N.Y.2d at 55; *see also, e.g., People v. Keeton*, 74 N.Y.2d 903, 904 (1989); *Matter of Johnson v. Collins*, 210 A.D.2d 68, 69-70 (1st Dep't 1994). Importantly, a conflict or a risk of abuse of the confidences of the defendant is a "requisite[] for the removal of a public prosecutor." *People v. Esposito*, 225 A.D.2d 928, 929 (3d Dep't 1996). As to the additional requirement of a showing of prejudice, "[t]he objector should demonstrate actual prejudice or so substantial a risk thereof as could not be ignored." *Matter of Schumer v. Holtzman*, 60 N.Y.2d at 55; *see also People v. Keeton*, 74 N.Y.2d at 904 ("defendant has failed to demonstrated that the District Attorney's simultaneous prosecutions actually prejudiced him"); *Matter of Johnson v. Collins*, 210 A.D.2d at 70 (defendant "raised only the inference of impropriety and has not met his burden to establish the likelihood of actual prejudice"). Thus, "the appearance of impropriety, standing alone, might not be grounds for disqualification." *Matter of Schumer v. Holtzman*, 60 N.Y.2d at 55; *see Matter of Soares v. Herrick*, 2011 WL 3338245 at *3 (3d Dep't Aug. 4, 2011).

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[2] The Memorandum of Law cites no case holding that a complaining witness has standing to make a disqualification motion; all it does is to reference cases rejecting disqualification motions on the merits without addressing the standing issue at all.

As to the "risk of an abuse of confidence," the concern is that the prosecutor might abuse the confidences of the defendant that have been obtained during prior representation of the defendant by someone in the prosecutor's office, thereby violating the defendant's right to counsel. *People v. Herr*, 86 N.Y.2d 417, 420-21 (1980); *see Matter of Schumer v. Holtzman*, 60 N.Y.2d at 55 (prosecutor should be removed only to "protect a defendant" from "actual prejudice" arising from a "substantial risk of an abuse of confidence"); *see generally People* v. *Shinkle*, 51 N.Y.2d 638, 641-42 (1980). Obviously, a prosecutor is not the complaining witness's attorney, and thus cannot obtain "confidences" from the witness in any legally relevant sense. Indeed, pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and statutory discovery obligations (*see, e.g.*, CPL 240.45[1]), prosecutors are often obliged to reveal to the defense statements made to them by complaining witnesses.

Plainly, "the exceptional superceder power of disqualification visited upon the courts" must be "narrowly constrained." *Matter of Soares v. Herrick*, 2011 WL 3338245 at *3. After all, "the District Attorney is a constitutional officer, chosen by the electors of his or her county to prosecute all crimes and offenses, who enjoys wide latitude and discretion to allocate and use both the staff and the resources of the office in a matter believed to be most effective to the discharge of his or her duties." *Id.* In particular, a prosecutor has "broad" discretion to "investigate, initiate, prosecute and discontinue" cases, and "almost invariably it is the prosecutor who decides whether a case is to be pressed or dropped," *People v. Zimmer*, 51 N.Y.2d 390, 394 (1980); *see People v. Di Falco*, 44 N.Y.2d 482, 486 (1978) ("The District Attorney has broad discretion in determining when and in what matter to prosecute a suspected offender").

Nothing about this case comes close to meeting the exceedingly high standard for disqualification. While the moving papers note that the head of this Office's Trial Division is married to one of the attorneys representing the defendant in the criminal case, she is fully recused from this case, and there is no actual conflict warranting disqualification of the District Attorney. On May 14, 2011 – the same day on which the encounter between the complainant and the defendant occurred – the Trial Division head notified the District Attorney and numerous other attorneys in the Office, in writing, including the Chief Assistant District Attorney, the Deputy Chief of the Trial Division (who has served as the Acting Trial Division head for purposes of this case), the Chief of the Special Victims Bureau, and the Chief of the Sex Crimes Unit, of her recusal. From that point until the present, she has had absolutely no involvement in the criminal investigation or prosecution of the defendant. None of the cases cited by the complainant suggest that, despite this complete recusal, disqualification of the District Attorney would still be required.[3]

The motion also makes a number of other allegations, none of which – even if true – would warrant disqualification of the District Attorney. Most of these allegations concern the Office's treatment of the complainant in the course of our investigation of the charged crimes.[4] As with any case in which the elements of a crime can be established only by the testimony of a complaining witness, that investigation was thorough, and was made more difficult by the numerous untruths that the complainant told prosecutors. Nothing about it was inappropriate; to the contrary, it would

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[3] See Mem. at 10-11. None of the cited cases concern a familial relationship between an Assistant District Attorney and a member of the defense team.

[4] The memorandum of law appears to complain about the questioning conducted by New York Police Department ("NYPD") detectives. See Mem. at 5. The NYPD's conduct has been highly professional, and in any event, is irrelevant to this motion.

have been an abdication of our ethical obligations to proceed to trial without sufficiently exploring the complainant's reliability as a witness. The other allegations are equally meritless.[5]

Finally, there is no basis to issue a preliminary injunction or stay further proceedings in this case. First, we note that the complainant's attorney raised this issue in a letter that he wrote on August 8, 2011, 14 days ago, but failed to file this motion for disqualification until yesterday. For that reason alone, the equities weigh in favor of denying it. More importantly, there is no chance that his motion for disqualification will succeed, for the reasons set forth above.[6]

Sincerely,

Joan Illuzzi-Orbon
Assistant District Attorney

John (Artie) McConnell
Assistant District Attorney

[5] The moving papers also claim that the complainant was not provided with sufficient security. See Mem. at 10. Notably, the District Attorney's Office provided the complainant with housing, living expenses, and transportation for an extended period of time. Another allegation concerns a press report regarding a conversation that the complainant had with her incarcerated fiancé. See Mem. at 12-13. Although the characterizations regarding that conversation are highly misleading, they nevertheless have no bearing on this motion and will not be addressed here.

[6] Assuming that the People's motion for dismissal of the indictment is granted, such dismissal would not constitute a "previous prosecution" for purposes of the Penal Law See CPL 40.20(1) (previous prosecution); 40.30(1).