No. 18-226

In The Supreme Court of the United States

ERIC G. ZAHND,

Petitioner,

v.

THE CHIEF DISCIPLINARY COUNSEL OF THE MISSOURI SUPREME COURT,

Respondent.

On Petition For A Writ Of Certiorari To The Missouri Supreme Court

BRIEF OF MISSOURI ASSOCIATION OF PROSECUTING ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Missouri Association of Prosecuting Attorneys (MAPA), established in 1969, is a non-profit, voluntary association representing over 500 prosecutors, including elected and assistants, and their investigators statewide. MAPA strives to provide uniformity and efficiency in the discharge of duties and functions of Missouri's prosecutors, to promote high levels of professionalism amongst Missouri's prosecutors, and to continually improve the criminal justice system in Missouri.

This case raises a matter of interest to Missouri's prosecutors as it will greatly impact the way that prosecutors communicate with the public and has a significant chilling effect on prosecutors' free speech rights.

SUMMARY OF ARGUMENT

Prosecutors have a right and a duty to communicate truthful facts about what has happened in court records to the public. The Missouri Supreme Court Office of Chief Disciplinary Counsel's interpretation of

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or part, and that no person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. *Amicus curiae*, in accord with Supreme Court Rule 37.2(a), affirms that it has written consent of all parties to the filing of this brief. *Amicus curiae* gave timely notice to Petitioner and Respondent of its intent to file this brief.

the ethical rules, which was adopted by the Missouri Supreme Court by implication (as there was no opinion accompanying its decision to impose a sanction on Petitioner/Respondent-below), has a chilling effect on prosecutors statewide. It also affects their ability to communicate with the public, as well as offers involving plea agreements and immunity. It also infringes on their First Amendment rights. The fair and transparent administration of the criminal justice system requires that prosecutors have the ability to communicate truthfully with their constituents about cases, particularly after the cases are concluded, when the rights of the accused can no longer be impaired.

This Court has held previously that prosecutors have First Amendment free speech rights that may not be infringed absent a compelling governmental interest. No such interest is present here, and the decision of the Missouri Supreme Court infringes on those rights.

ARGUMENT

Prosecutors are ministers of justice. In *U.S. v. Berger*, 295 U.S. 78 (1935), Justice Sutherland pronounced the obligation of a prosecutor, thus:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest,

> therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger, *supra*, 295 U.S. at 88.

Although the quote is often used in aid of an argument that a prosecutor has overstepped his or her bounds, it is equally applicable to explain and defend actions of a prosecutor to take such actions that will assure convictions of guilty defendants. The prosecutor's position sets him or her apart from the ordinary practitioner, and his or her actions must be considered with that premise in mind.

Missouri Supreme Court Rules of Professional Responsibility Rule 4-3.8 sets out special responsibilities of a prosecutor. Missouri's prosecutors embrace these responsibilities as ministers of justice. Specifically, Rule 4-3.8(f) governs statements that prosecutors may make prior to adjudication in a criminal case:

> *The prosecutor in a criminal case shall:*
>
> *(f) except for statements that are necessary to inform the public of the nature and extent of*

> *the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the* ***accused****, and exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 4-3.6 or this Rule 4-3.8.*

The commentary to this rule is instructive:

> *[5] Rule 4-3.8(f) supplements Rule 4-3.6, which prohibits extrajudicial statements that have a substantial likelihood of* ***prejudicing an adjudicatory proceeding****. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the* ***accused****. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments that have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements that a prosecutor may make which comply with Rule 4-3.6(b) or (c).* (emphasis added)

Both the Rule and the commentary make clear that the restrictions placed upon a prosecutor

regarding extra-judicial statements only apply to an "accused." A criminal defendant who has been found guilty is no longer an "accused." Imposing the standard suggested by Respondent Office of Chief Disciplinary Counsel (OCDC) would have a chilling effect on prosecutors across the state, and would essentially gag them from communicating with the public about the outcome of cases. This invades the province of the public and the people's right to be informed about what has happened in open court. It also infringes on the First Amendment rights of the prosecutor, who upon entry into his or her office, decidedly does not surrender those rights, except in those limited circumstances where they are held to impinge on other rights of **accused** persons. The U.S. Supreme Court held in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S. Ct. 2720 (1991) quoting *Pennekamp v. Florida*, 328 U.S. 331, 66 S. Ct. 1029 (1946):

> We are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the Fourteenth Amendment, protect.

Gentile, *supra*, 510 U.S. at 1038.

Here, the statements complained of (though not even made by Petitioner/Respondent-below), were designed to advise the public about the disposition of a high profile criminal case, after such disposition, and

contained only information that was already in the public record. Holding such statements as violative of the Rules of Professional Conduct, particularly Rule 4-3.8(f) as urged by the OCDC not only infringe on the First Amendment rights of Petitioner/Respondent-below, but has a significant chilling effect on the protected speech of other prosecutors in the state, and would also impair the public's interest in learning about the proceedings of the criminal justice system.

In his argument before the Missouri Supreme Court, The Chief Disciplinary Counsel advised the Court that the complaint may be considered solely as it applied to the press release, and that the release standing alone was sufficient to trigger the complaint and justify the sanction. As the Court issued no opinion accompanying its decision to impose a sanction, the chilling effect is greatly amplified, as no indication of what action or communication formed the basis for the sanction and a broad range of protected speech is made potentially subject to sanction.

Prosecutors are elected by the people. They answer directly to the people. Their client is the State, which is comprised of the people. As such, it is not only the prerogative, but indeed the duty of the prosecutor to inform the people about criminal cases. While this duty is balanced to protect the rights of the accused prior to adjudication, that balance is void once the accused has been found guilty (as in this case, the defendant had pleaded guilty and had been sentenced).

In the instant case, OCDC sought, and the Missouri Supreme Court imposed discipline based upon Petitioner/Respondent-below's comments immediately following the sentencing of the defendant. However, OCDC did not draw a distinction with respect to the immediacy of the remarks, and this lack of distinction is continued by the Court, due to the lack of any opinion setting forth the basis found for the discipline imposed. Should OCDC's interpretation stand, then a prosecutor would be barred from ever making any remarks about a case whether it be one month, one year, five years or twenty years later. This would be an absurd result. Prosecutors would be estopped from providing information not only to the people through news mediums, but also would be prohibited from explaining courses of conduct in re-election campaigns, or in providing information in court filings, documentaries, legislative arenas, all of which could be deemed public.

Ironically, in the instant case, Respondent is not accused of violating Rule 4-4.1 which holds:

> *In the course of representing a client a lawyer shall not knowingly:*
>
> *(a) make a false statement of material fact or law to a third person; or*
>
> *(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 4-1.6.*

Therefore, it must be inferred that OCDC, and by extension, the Court, does not believe that the statements made by Petitioner/Respondent-below were false, but that they were in fact truthful statements. It makes no sense to impose such restraints on prosecutors from communicating the truth. There is a growing consciousness among the public about the need for transparency in government. People have an evolving expectation of communication with their elected officeholders, and from them about significant events. The proliferation of social media bears out this expectation. Social media, including Facebook, is a growing and accepted form of communication from an elected officeholder to their constituents. OCDC interprets these ethics rules within an antiquated mindset of how society does and should operate.

Rule 4-4.4(a) governs lawyers, including prosecutors, from interacting with third parties:

> *(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or use methods of obtaining evidence that violate the legal rights of such a person.*

Allowing this interpretation to stand dramatically changes the way that prosecutors communicate with witnesses and co-defendants. Prosecutors routinely communicate offers to defendants that involve a recommendation of a more lenient sentence in exchange for a guilty plea. The intentional implication is that the defendant should be intimidated to accept the

State's offer because of the likelihood of a harsher recommendation in the absence of a guilty plea.

This is the essence of an adversarial system. To apply the OCDC logic, however, prosecutors would be barred from communicating plea offers contingent upon the waiver of trial and the plea of guilty because the defendant might feel intimidated.

Likewise, OCDC's interpretation of the rule bars prosecutors from broaching the subject of granting immunity to co-defendants in exchange for testimony against a co-defendant because to do so would involve intimidation of the testifying co-defendant.

Moreover, the letter-writers were not "third-parties." In a civil context, there is a first party (the client), a second party (the adverse party), and everyone else (third-parties). OCDC seeks to impose this framework on a criminal case, but misses the distinction. In criminal matters, the prosecutor represents the State, not an individual. There is no first party. While the defendant is certainly an adverse party, witnesses do not meet the definition of a third-party. Nor, in this instance do they meet the definition of witnesses. They had not been disclosed as such by the Defendant. Indeed, the letter-writers themselves are members of the State.

In the case at bar, Petitioner/Respondent-below was responding to an improper *ex parte* communication to the Court by persons at the behest of the defense. Petitioner/Respondent-below, as attorney for the State, had an absolute right to address this. As a

prosecutor, neither Petitioner/Respondent-below nor his employees surrender their First Amendment protection. See, e.g., *In re Hinds*, 90 N.J. 604, 449 A.2d 483 (1982), where the court held, "The Prosecutor does not relinquish free speech rights by virtue of being a prosecutor." *Hinds*, *supra*, 90 N.J. at 614.

Combining these protections with the prosecutor's duty to inform the public of matters occurring in their jurisdiction, there must be a compelling state interest to restrict such rights. In *Matter of Rachmiel*, 90 N.J. 646, 449 A.2d 505 (1982), the New Jersey Supreme Court analyzed the standard against which governmental restrictions must be judged:

> In determining the validity of restrictions upon free speech, the constitutional analysis calls for the application of two demanding tests. The first is whether a substantial governmental interest is furthered by the restriction upon speech. (internal citations omitted) The second requires that the restriction be no greater than is necessary or essential to protect the governmental interest involved. The application of these tests involves a balancing of the gravity and likelihood of the harm that would result from unfettered speech against the degree to which free speech would be inhibited if the restriction is applied. (internal citations omitted)

Matter of Rachmiel, *supra*, 90 N.J. at 654.

The speech here was designed to inform the public, support the victim, and correct misinformation spread

by the Defendant. When balanced against these important functions, the restrictions urged by the OCDC must not be permitted to stand.

CONCLUSION

The decision of the Supreme Court imposing its sanction of Petitioner here must be reversed as it both infringes on the First Amendment rights of Petitioner and is chilling to the exercise of First Amendment rights of prosecutors throughout the state. The ability of prosecutors to inform their constituents of proceedings that are pending or completed, and which are of significant public concern, cannot be restricted unless there is a strong and compelling government interest, which interest is absent here. The rule on which the decision is based just simply cannot apply where the matter is completed and no rights of any accused are implicated by the speech.

Respectfully submitted,

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