

IN THE SUPREME COURT OF THE STATE OF NEVADA

ABDUL HAMED,  
Petitioner,  
vs.  
THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CLARK, AND THE HONORABLE  
MICHAEL L. DOUGLAS, DISTRICT  
JUDGE,  
Respondents,  
and  
THE STATE OF NEVADA,  
Real Party in Interest.

No. 40130

FILED

FEB 04 2003

CLERK OF THE SUPREME COURT  
*J. Richard*

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

This petition for a writ of mandamus seeks to have this court compel the district court to reinstate attorney Ben Bingham as counsel for petitioner, Abdul Hamed. Bingham was disqualified as Hamed's attorney because he became a necessary witness for the State.

In January, 2002, Abdul Hamed was arrested and charged by information with five counts of sexual assault with a minor under fourteen years of age, two counts of attempt sexual assault with a minor under fourteen years of age, three counts of lewdness with a child under the age of fourteen, and one count of open and gross lewdness. The victim alleged that the crimes were committed over a period of five years, beginning when the victim was seven years old.

Prior to the preliminary hearing, the victim, S.Q., went to the district attorney's office, accompanied by an aunt and S.Q.'s father, where S.Q. detailed to Deputy District Attorneys, Lisa Luzaich and Tammy Peterson, the crimes that Hamed allegedly committed.

The preliminary hearing was continued several times. During the time between the initial arraignment, in January 2002, and the preliminary hearing, June 17, 2002, the victim recanted all previous statements and denied that Hamed had ever performed any of the alleged acts.

Two days prior to the scheduled May 28, 2002, preliminary hearing, Hamed's attorney, Ben Bingham, interviewed S.Q. over the telephone regarding the change of story. During the conversation, S.Q. made a general denial of the incidents and then, "specifically denied each and every alleged incident when presented with the acts individually." However, after approximately twenty minutes of questioning S.Q., Bingham asked a final question. "Did the Defendant at any time perform any of these alleged acts?" S.Q. responded, "Yes."

Following his conversation with S.Q., Bingham called Luzaich to discuss the possibility of a plea agreement. Bingham informed Luzaich of his conversation with S.Q., including S.Q.'s reiteration of the original accusations, despite the previous recantation.

At the preliminary hearing on June 17, 2002, twelve-year-old S.Q. testified that the original allegations were fabricated and that Hamed never touched S.Q. The State impeached S.Q. with the prior statements to detectives. Hamed was bound over on the counts as charged in the information.

On July 19, 2002, Luzaich filed a motion to disqualify Bingham as Hamed's attorney on the grounds that Bingham had become a necessary witness. Luzaich claimed the contents of Bingham's telephone conversation with S.Q. were necessary to impeach S.Q. On July 25, the motion was heard and granted. On August 29, 2002, Hamed filed a

petition for a writ of mandate, seeking to compel the district court to reinstate Bingham as his attorney.

This court can issue a writ to compel the performance of a duty<sup>1</sup> or to control an arbitrary or capricious exercise of discretion.<sup>2</sup> “This writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law.”<sup>3</sup> Mandamus is properly used to challenge an order by the district court disqualifying counsel.<sup>4</sup>

“[T]he district courts have broad discretion in determining whether disqualification is required in a particular case, and that determination will not be disturbed by this court absent a showing of abuse of that discretion.”<sup>5</sup> Any doubt should be resolved in favor of disqualification.<sup>6</sup>

SCR 178 provides that a lawyer cannot be a witness and an advocate in the same trial.<sup>7</sup> The relevant inquiry in this case is whether Bingham is a necessary witness.

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<sup>1</sup>See NRS 34.160.

<sup>2</sup>Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981).

<sup>3</sup>NRS 34.170.

<sup>4</sup>Brown v. Dist. Ct., 116 Nev. 1200, 1206, 14 P.3d 1266, 1271 (2000) (citing Cronin v. Dist. Ct., 105 Nev. 635, 639 n.4, 781 P.2d 1150, 1152 n.4 (1989)).

<sup>5</sup>Cronin v. Dist. Ct., 105 Nev. 635, 640, 781 P.2d 1150, 1153 (1989).

<sup>6</sup>Id. (citing Hull v. Celanese Corp., 513 F.2d 568 (2nd Cir. 1975)).

<sup>7</sup>See SCR 178. (One exception to this rule is when disqualification would work substantial hardship on the client. Here, however, Hamed

*continued on next page . . .*

When determining whether a lawyer . . . is “likely to be a necessary witness” courts have required three things to be shown to demonstrate that the “likely to be a necessary witness” factor exists:

1. The attorney will give evidence material to the determination of the issues being litigated;
2. The evidence cannot be obtained elsewhere; and,
3. The testimony is prejudicial or potentially prejudicial to the testifying attorney’s client.<sup>8</sup>

Bingham claims that there are numerous witnesses who can testify that S.Q. has recanted the original testimony, so there is no need for him to testify. Bingham fails to recognize the fact that he is the only party who can testify about S.Q.’s reiteration of the accusations following S.Q.’s recantation. Further, Bingham’s testimony, which would discredit S.Q.’s recantation, would clearly be prejudicial to his client, Hamed. Therefore, Bingham is a necessary witness for the State. Thus, the district court did not abuse its discretion in disqualifying Bingham as Hamed’s attorney.

Bingham argues that Hamed’s Sixth Amendment rights will be violated if he is not reinstated as Hamed’s attorney. “The Sixth

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. . . *continued*


has not set forth any showing of hardship if Bingham is not reinstated as his attorney.)

<sup>8</sup>Michel v. Miller, 1998 WL 42887, \*3 (E.D.La.) (citing Lang v. The Orleans Levee District, 1997 WL 668216, \*3 (E.D.La.) (citing Personalized Mass Media Corp. v. Weather Channel, Inc., 899 F.Supp 239, 243 (E.D.Va. 1995))).

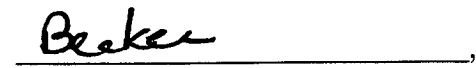
Amendment to the Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the [a]ssistance of [c]ounsel for his defence [sic]."<sup>9</sup> The focus of this right is on assurance of fairness in the adversarial criminal process, not on assuring the defendant representation by his preferred lawyer.<sup>10</sup> The Sixth Amendment right to choose one's counsel is frequently circumscribed in conflict situations.<sup>11</sup> Similarly, where his attorney placed himself in a position to become a necessary witness, Hamed's right to choose his own counsel must be circumscribed.

Having considered this petition, we are not satisfied that this court's intervention by way of extraordinary relief is warranted under the circumstances. Accordingly, we

ORDER the petition DENIED.

  
\_\_\_\_\_, J.  
Shearing

  
\_\_\_\_\_, J.  
Leavitt

  
\_\_\_\_\_, J.  
Becker

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<sup>9</sup>Wheat v. U.S., 486 U.S. 153, 158 (1988).

<sup>10</sup>See Id. at 158-59.

<sup>11</sup>See Id. at 159 (giving examples of situations in which the right to choose one's own counsel is circumscribed, such as when the chosen advocate is not a member of the bar; when the defendant cannot afford a particular attorney; when the chosen attorney has a previous or ongoing relationship with an opposing party; or when the defendant's chosen attorney was disqualified by the fact that the attorney had represented other defendants charged in the same criminal conspiracy.)

cc: Hon. Michael L. Douglas, District Judge  
Moran & Associates  
Clark County District Attorney David J. Roger  
Clark County Clerk