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Ramona Rita Morales

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE

RAMONA RITA MORALES, on behalf of herself and all others similarly situated,

Plaintiff-Petitioner,

v.

THE CITY OF INDIO, THE CITY OF COACHELLA, and SILVER & WRIGHT LLP, in its official capacity as City Prosecutor for the City of Indio and City Prosecutor for the City of Coachella,

Defendants-Respondents.

Case No. RIC 1803060

CLASS ACTION

UNLIMITED JURISDICTION

Related Case No. INM1505735

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF VERIFIED CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, AND PETITION FOR WRIT OF CORAM NOBIS

INTRODUCTION

Coram nobis is a common law writ that allows a petitioner not in state custody to obtain vacatur of a judgment based on the discovery of new, dispositive evidence that was not available to the petitioner when the judgment was entered. For instance, California courts have granted *coram nobis* relief when it was later discovered that a defendant had an available insanity defense, *People v. Welch* (1964) 61 Cal.2d 786, 791, or when a guilty "plea was procured through extrinsic fraud or mob violence." *People v. Kim* (2009) 45 Cal.4th 1078, 1102. Indeed, as is the case here, *coram nobis* is the appropriate way to challenge a guilty plea induced by fraud, coercion, or mistake. *E.g.*, *People v. Chaklader* (1994) 24 Cal.App.4th 407, 409 (citing *People v. Wadkins* (1965) 63 Cal.2d 110 (reversing summary denial of petition that alleged facts satisfying *coram nobis* standard)).

The modern requirements for *coram nobis* in California are that:

> (1) Petitioner must 'show that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment.' (2) Petitioner must also show that the 'newly discovered evidence ... [does not go] to the merits of issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial.'… (3) Petitioner 'must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ.'…"

People v. Kim (2009) 45 Cal.4th 1078, 1093 (*citing People v. Shipman* (1965) 62 Cal.2d 226, 230). The petition must be filed in the same court that entered the judgment. *See People v. Griggs* (1967) 67 Cal.2d 314, 316 n.1. When a petitioner has made a substantial showing that she is entitled to entry of the writ, the court is required to set the matter for a hearing. *See Ingram v. Justice Ct. for Lake Valley Judicial Dist. of El Dorado Cty.* (1968) 69 Cal.2d 832, 844.

ARGUMENT

Mrs. Morales brings this petition following the discovery of a new fact that provides a complete defense to her prosecution: Indio's prosecutors, Silver & Wright LLP, possessed a direct financial interest in obtaining her conviction. Silver & Wright's prosecution-for-hire

business is premised on the firm obtaining full "cost recovery" from the individuals that it prosecutes. This pecuniary interest violates the Due Process Clauses of the United States and California Constitutions.

Mrs. Morales's petition satisfies the all three elements for *coram nobis* relief. First, the newly discovered fact of the prosecution's financial bias provides a complete defense to her prosecution. Second, this newly discovered evidence does not go to the merits of her prosecution and was not adjudicated at trial—in fact, the absence of this evidence coerced and misled Mrs. Morales into agreeing to a guilty plea, thereby precluding any trial. Third, Mrs. Morales was not aware of the prosecution's financial bias, which Mrs. Morales could not have known without a recent, in-depth newspaper investigation, and she has diligently brought this petition following discovery of that bias.

In addition, Mrs. Morales brings this petition not only on behalf of herself, but also on behalf of all others who were convicted by Silver & Wright's financially interested prosecutions in Riverside County Superior Court. The petition adequately alleges that a writ of *coram nobis* should apply to the entire proposed class.

I. Element 1: Mrs. Morales could not have known that her prosecutor had a pecuniary interest in obtaining her conviction, and that she therefore had a complete defense to her prosecution.

The crucial fact that was unknown to Mrs. Morales was that her prosecuting attorneys had a conflict of interest that violated her due process rights under both the United States and California Constitutions. This conflict of interest is not a mere peripheral factor that might have potentially influenced the course of a trial. If the fact had been known, it would have constituted a "valid defense" such that conviction would have been impossible. *See People v. Roessler* (1963) 217 Cal.App.2d 603, 605; *People v. Goodspeed* (1963) 223 Cal.App.2d 146, 152. Indeed this conflict of interest not only fails to satisfy the requirements of due process applicable in criminal cases; the conflict is so severe that it also fails to satisfy the more relaxed requirements applicable in civil cases.

A. Due Process prohibits prosecutors from having a financial stake in the cases they bring.

The Due Process Clauses of both the United States and California Constitutions protect individuals from being prosecuted by attorneys who have a financial interest in their cases. The United States Supreme Court has recognized that "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 249–50; *accord Merck Sharp & Dohme Corp. v. Conway* (E.D. Ky. 2013) 947 F.Supp.2d 733, 739 (defendant "has a due process right to a neutral prosecution, free from any financial arrangement that would tempt the government attorney, or his outside counsel, to tip the scale") (internal quotations omitted). And the California Supreme Court has found it "beyond dispute that due process would not allow for a criminal prosecutor to employ private cocounsel pursuant to a contingent-fee arrangement that conditioned the private attorney's compensation on the outcome of the criminal prosecution." *Cty. of Santa Clara v. Super. Ct.* (2010) 50 Cal.4th 35, 51 n.7; *see also People v. Super. Ct. (Greer)* (1977) 19 Cal.3d 255, 266–69 (discussing due process right to a fair and impartial proceeding, noting critical importance of impartial prosecutor).

Neutrality is crucial in a government lawyer, and above all in a criminal prosecutor, because government lawyers are not ordinary advocates:

> The prosecutor is a public official vested with considerable discretionary power to decide what crimes are to be charged and how they are to be prosecuted. In all his activities, his duties are conditioned by the fact that he is the representative not of any 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. . . . When a government attorney has a personal interest in the litigation, the neutrality so essential to the system is violated.

People ex rel. Clancy v. Super. Ct. (1985) 39 Cal.3d 740, 746 (quoting *Berger v. United States* (1935) 295 U.S. 78, 88); *see also Young v. U.S. ex rel. Vuitton et Fils S.A.* (1987) 481 U.S. 787,

814 ("[W]e must have assurance that those who would wield this power [of criminal prosecution] will be guided solely by their sense of public responsibility for the attainment of justice.").

B. Silver & Wright's business had an unconstitutional conflict of interest.

As detailed in the concurrently filed Class Action Complaint and Petition for Writ of *Coram Nobis*, the law firm of Silver & Wright has a business model that is premised on obtaining "100% cost recovery" in nuisance abatement actions. *See* Compl. Ex. K at 3; Ex. D; Ex. E at 2.1. This for-profit law firm is largely funded by the people it prosecutes. In fact, the firm's utility to cities rests on the premise that the firm will not cost those cities a dime because it will attempt to recover its own costs. One of Silver and Wright's presentations to cities even pictures a woman gleefully grabbing a bundle of cash next to the words "cost recovery." *See* Exhibit K at 14. Thus, Silver & Wright plainly has "an interest extraneous to [their] official function in the actions [they] prosecute[] on behalf of the City." *Clancy*, 39 Cal.3d at 747–48. That violates the due process rights of defendants to be prosecuted only by neutral attorneys without a financial stake in their cases. When Silver & Wright prosecutes a code enforcement case, it stands to recover all of its hourly rates from the very people it prosecutes. This financial interest will necessarily tend to distort the decisionmaking processes so that the firm prioritizes "cost recovery" over a just and fair resolution of a dispute.

Indeed, this case perfectly illustrates what happens when a prosecuting attorney has a stake in his cases. For instance, a neutral attorney, before initiating the criminal process over something as petty as a backyard chicken, would certainly have tried to at least *talk* to Mrs. Morales and her tenant. Had Silver & Wright done so, its attorneys would have learned that Mrs. Morales had repeatedly instructed her tenant to remove the chickens and that the tenant, crucially, had been confused about whether chickens were prohibited in addition to roosters. Compl. ¶ 39. Under those circumstances, it is hard to imagine a neutral attorney deciding that the proper course would be to criminally prosecute Mrs. Morales. A neutral attorney would also, likely, have used administrative fines before resorting to the criminal process. And even after charges had been filed, a neutral attorney would likely have dropped the charges upon learning that the violations

had been cured. If the real objective had been simply to get the chickens removed, and not to run up a legal bill, that could have been accomplished with no more than a phone call to Mrs. Morales and her tenant.

C. Silver & Wright's conflict of interest even fails to satisfy the constitutional standard of neutrality for civil cases.

Although Silver & Wright's financial stake in Mrs. Morales's case flouts the "stringent conflict-of-interest rules governing the conduct of criminal prosecutors," it also falls well below the "heightened standard of ethical conduct applicable to public officials acting in the name of the public" in civil cases. *Cty. Of Santa Clara,* 50 Cal.4th at 57. The California Supreme Court has held that, even in civil cases, the government can be represented by outside counsel who have a financial stake in the case only if certain stringent requirements are met. Outside counsel must be in a "subsidiary role," *id.* at 714, and the government attorneys must "retain[] absolute and total control over all critical decision-making in" the case. *Id.* at 59 (quoting *Rhode Island v. Lead Indus. Assoc.* (R.I. 2008) 951 A.2d 428, 475) (emphasis omitted). The Court held that all critical litigation decisions that must be made by neutral, government attorneys, including all settlement decisions. Indeed, the Court even required that the retainer agreements explicitly state that:

> [1] decisions regarding settlement of the case are reserved exclusively to the discretion of the public entity's own attorneys . . . [2] that any defendant that is the subject of such litigation may contact the lead government attorneys directly, without having to confer with [outside] counsel . . . [3] that the public-entity attorneys will retain complete control over the course and conduct of the case; [4] that government attorneys retain a veto power over any decisions made by outside counsel; and [5] that a government attorney with supervisory authority must be personally involved in overseeing the litigation.

Id. at 63–64. The agreements between Silver & Wright and the cities of Indio and Coachella obviously do not comply with these requirements.

Indio and Coachella, as well as Silver & Wright, may deny that the California Supreme Court's case law regarding conflicts of interest for outside counsel applies to their unique "prosecution fees" scheme. They would be mistaken. *Clancy* flatly prohibits financial incentives

for criminal prosecutions like those at issue in this case. And even in civil cases, *County of Santa Clara* requires all critical decisions to be made by people without any financial conflict of interest. While it is true that those cases arose in the specific context of contingency-fee agreements, the issue in those cases was financial conflicts of interest in general. Nothing in the reasoning of either case suggests that their holdings are limited to contingency-fee agreements, to the exclusion of other arrangements that create equal or greater conflicts. *See id.* at 57–58 ("Because private counsel who are remunerated on a contingent-fee basis have a direct pecuniary interest in the outcome of the case, they have a conflict of interest . . . ."); *Clancy*, 39 Cal.3d at 749 ("Any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated."). A financial interest in a prosecution creates an illegal conflict of interest, and that conflict cannot be cured by superficial changes to the compensation structure.

Silver & Wright's cost-recovery prosecution model actually creates a *greater* conflict of interest than the contingency-fee agreements at issue in *County of Santa Clara* and *Clancy*. Both of those cases involved only partial contingency-fee agreements. *See Cty. of Santa Clara*, 50 Cal. 4th at 44–45 (successful resolution required for payment beyond $150,000); *Clancy*, 39 Cal.3d at 747 (hourly rate doubled for successful resolution). Silver & Wright's business, on the other hand, is largely dependent on cost recovery. Although it is technically true that Silver & Wright's contracts provide that the cities must pay the firm's hourly fees, this liability is entirely theoretical in light of Silver & Wright's promise of full cost recovery—a promise that was central to Silver & Wright signing contracts with so many cities throughout California over the last several years. *See* Exhibit L at 2 (recommending that City of Chowchilla hire Silver & Wright because "it is anticipated that the revenue generated by these service [sic] will cover a significant amount of the costs incurred. It is the goal of the City of Chowchilla's Code Enforcement program to strive to make this a 100% cost recovery program."); Exhibit D at 1 ("Our attorneys have developed unique and cutting edge practices to not only achieve success for their clients, but make those efforts cost neutral or even revenue producing."). Indeed, Silver & Wright's contract with Coachella explicitly states that the objective of the contract is full cost recovery. *See* Exhibit E at

¶ 2.2. The reality is that the cities are not actually paying Silver & Wright (or they are not paying them much); they are merely providing an advance until Silver & Wright is able to collect from defendants.

There is another way in which Silver & Wright's contracts create an even bigger conflict of interest than did the contingency-fee agreements in *County of Santa Clara* and *Clancy*. In neither of those cases was there an incentive to litigate the case inefficiently. A contingency-fee agreement creates an incentive to win a case, but to do so with as minimal an expenditure of resources as possible. By contrast, Silver & Wright is actually rewarded by handling each dispute in the least efficient possible manner. Fortunately for them, they do not have to submit their timesheets to be reviewed by the skeptical eye of a judge who is experienced in dealing with fee awards. Instead, they submit their cost records to a public official from the client city, who knows that failing to rubber-stamp the requested fees could mean that the city is on the hook for the difference.

II. Element Two: The newly discovered evidence of the prosecution's financial bias does not go to the merits of any issue previously decided at trial.

The second *coram nobis* factor is easily satisfied because Mrs. Morales pleaded guilty, so there was no trial. Accordingly, she is not attempting to "contradict or put in issue any fact directly passed upon and affirmed by the judgment itself." *People v. Hyung Joon Kim* (2009) 45 Cal.4th 1078, 1092; *see also People v. Butterfield* (1940) 37 Cal.App.2d 140, 142. It is in these kinds of cases, "where there has been no trial at all," that *coram nobis* is most appropriate. *People v. Mooney* (1918) 178 Cal. 525, 529.

III. Element Three: Indio's prosecutors' financial interest was not known to Mrs. Morales at the time she was prosecuted, and she could not have reasonably discovered the conflict any sooner than she did.

When Mrs. Morales was prosecuted, she had no way of knowing that her prosecutor had a financial interest in her case. Indeed, she was not even told, before pleading guilty, that she might later have to pay prosecution fees. When she paid her $225 fine, she paid it to the court, not to

Silver & Wright or to the City of Indio. *See* Exhibit A at 15. Yet, even if she had been aware that the City of Indio might seek fees from her, that alone would not be sufficient to demonstrate that her prosecuting attorney had an unconstitutional conflict of interest. It was only with the publication of the *Desert Sun* article, in November 2017, that Mrs. Morales understood that a private law firm was profiting off of the criminal justice system. The *Desert Sun* article explained how Silver & Wright had marketed itself to cities as a cost neutral prosecutor and how Silver & Wright had operated without significant oversight by the client cities. *See* Exhibit C. It was these facts that put her on notice that she had a valid due-process defense to her prosecution. If not for the efforts of a determined investigative journalist, it is likely that Mrs. Morales would still have no idea that her due-process rights had been violated by a prosecutor with a conflict of interest. *Cf. Hirabayashi v. United States* (9th Cir. 1987) 828 F.2d 591, 598, 605 (holding that a *coram nobis* petition filed over 40 years after entry of judgment was timely when the crucial evidence was only recently uncovered by an expert historian).

This petition was filed only a few months after the *Desert Sun* article was published. That timeline reflects urgent and diligent preparations by everyone involved with the case. *See People v. Welch* (1964) 61 Cal.2d 786, 792 (holding that a *coram nobis* petition filed over a year after discovery of the relevant facts was timely because of the need to retain counsel and adequately investigate the case before filing). The petition is therefore timely.

IV. If this petition is granted, *coram nobis* relief should apply to the entire proposed class.

Class relief is appropriate if this Court grants this petition. Petitions for writ of *coram nobis* are to be treated procedurally the same as petitions for a writ of *habeas corpus*. *See* Cal. Penal Code § 1473.6.[1] And both federal and California courts have recognized the existence of

[1] In California, petitions for writ of *coram nobis* are a kind of motion to vacate judgment. *People v. Shipman* (1965) 62 Cal.2d 226, 229 n.2. Motions to vacate judgment use the same procedures as petitions for a writ of *habeas corpus*. Cal. Penal Code § 1473.6(c) ("The procedure for bringing and adjudicating a motion [to vacate judgment] under this section, including the burden of producing evidence and the burden of proof, shall be the same as for prosecuting a writ of habeas corpus.").

class petitions for writs of *habeas corpus*. *See Rodriguez v. Hayes* (9th Cir. 2010) 591 F.3d 1105, 1126; *In re Lugo* (2008) 164 Cal.App.4th 1522, 1544. Hence, because "trial court[s] may grant habeas corpus petitioners . . . class relief," *People v. Brewer* (2015) 235 Cal.App.4th 122, 138, trial courts may likewise grant *coram nobis* petitioners class relief.

Here, the petition alleges the existence of a class of petitioners who were all convicted, following guilty pleas, by Silver & Wright's prosecutions in Riverside County Superior Court. Each of these guilty pleas was obtained without the class members knowing about Silver & Wright's profit interest in obtaining their convictions. And each plea was obtained without the class members' knowledge that he or she would be charged "prosecution fees" months after the plea's entry. Therefore, because each member of the proposed class was deprived of the opportunity to present a valid defense—that each conviction was void by virtue of the prosecution's financial interest—each class member's guilty plea should be vacated.

CONCLUSION

Because Mrs. Morales has made a substantial showing of her entitlement to a writ of error *coram nobis*, this Court should set the matter for a hearing. *See Ingram v. Justice Ct. for Lake Valley Judicial Dist. of El Dorado Cty.* (1968) 69 Cal.2d 832, 844.

Dated: February 13, 2018

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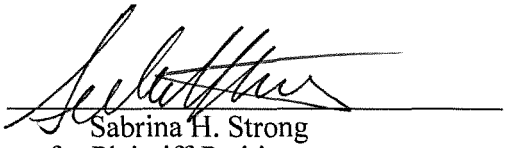
By: 
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