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Hollywood Lesson on Cooperation vs. Conflict of Interest

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In a case involving a defendant named Hollywood, the California Court of Appeal recently delivered a stern message to prosecutors that they need to stay out of show business. In *Hollywood v. Superior Court (The People)*, 49 Cal. Rptr. 598 (2006), the defendant, Jesse James Hollywood, was charged by the Santa Barbara District Attorney with the kidnaping and murder of 15-year-old Nicholas Markowitz. Nick Markowitz was the half-brother of Ben Markowitz, who allegedly had worked as a drug dealer for Hollywood for several years. The two apparently had a falling out over Ben Markowitz's unpaid debt for a certain quantity of drugs. As payback, Hollywood allegedly had four of his cronies kidnap and then murder Nick Markowitz in the mountains separating Santa Barbara and the Santa Ynez Valley.

Hollywood's four cronies were caught within 48 hours of the discovery of Nick Markowitz's body. However, Hollywood was able to escape the country. The case was assigned to prosecutor Ronald Zonen, who successfully obtained convictions against the four codefendants

Shortly thereafter, Zonen was contacted by Nick Cassavetes, who wanted to make a film, "Alpha Dog," based on the murder. Zonen said that he agreed to cooperate with Cassavetes because he believed the film might be the last chance to generate enough publicity about the case to apprehend Hollywood. However, witnesses later described Zonen as "star struck," "enthusiastic," and "eager to assist the filmmakers." Indeed, Zonen admitted that he turned over his entire case file to Cassavetes, including police reports, tapes, photos, names of witnesses, and, inadvertently, the defendants' rap sheets.

After nearly five years on the lam, Hollywood was finally captured in Brazil in March 2005 and deported to the United States. In September 2005, Hollywood moved to recuse Zonen and the entire district attorney's office. In support of the motion, Hollywood's counsel declared that he had attended a screening of "Alpha Dog," which he said depicted Hollywood in an extremely inflammatory manner, [as] extremely manipulative, vicious, selfish, and without any redeeming character traits whatsoever." Hollywood argued that the prosecutor's cooperation with the filmmakers had created a conflict of interest warranting disqualification. Hollywood's counsel also alleged that Zonen had intentionally interfered with his attempts to interview one of the filmmakers.

The trial court denied the motion to recuse. The court of appeal initially refused Hollywood's

petition for a writ of mandate but then granted the petition as to Zonen after the California Supreme Court granted review and issued an order to show cause. *Hollywood*, 49 Cal. Rptr. at 600.

The court of appeal's analysis began by observing that "this is a death penalty case" and in balancing the interests of the state and defendant, "it is generally necessary to protect more carefully the rights of a defendant who is charged with a capital crime." *Id.* At 606. According to the court, "We thus give rulings in death penalty cases strict scrutiny."

The court of appeal's statement of the standard of review is notable because it indicates that not only should prosecutors be held to a higher standard of ethical conduct in death penalty cases but that appellate courts should pay closer attention to rulings in death penalty cases. Justice Gilbert disagreed with this assertion in his concurring opinion: "I hope it is not naive to suggest that a case in which a defendant is charged with a low level misdemeanor should receive as careful attention and scrutiny as the defendant charged with a serious felony or one facing the death penalty." *Id.* at 608-09. But given the limited resources of the criminal justice system, do we really want the same attention and scrutiny to be paid to low level misdemeanors as death penalty cases? Probably not. The majority was correct to state that cases involving the ultimate penalty should receive more of the criminal justice system's limited resources.

The court of appeal next heavily criticized Zonen's cooperation with the filmmakers, which the court claimed may have potentially infected the jury pool. *Id.* at 606-07. According to the court, "Prosecutors should try their cases in the courtroom, not in the newspapers, television, or in the movies." *Id.* at 607. The court was especially critical of the unfettered access that Zonen gave the filmmakers to his file: "To say that Zonen went too far in his attempt to apprehend petitioner is an understatement. In his zeal to apprehend petitioner so that he could be brought to justice, Zonen virtually gave the entire file, owned by the public, to the filmmakers." *Id.* The court concluded that "there is a likelihood that petitioner will not receive fair treatment if Zonen remains as the trial prosecutor." *Hollywood*, 49 Cal. Rptr. at 607.

Although the court of appeal criticized Zonen for giving the filmmakers access to his entire file, it still gave him "high marks for his zeal in attempting to bring Petitioner to justice." *Id.* The court found such zeal to be "consistent with his oath as a prosecutor." *Id.* However, "the manner in which he went about achieving his goal...is quite another matter." *Id.*

The lesson of *Hollywood* is that prosecutors probably should refrain from cooperating with filmmakers who intend to make fictionalized accounts of pending cases. In those situations, the risk is too great that such cooperation will create the appearance of a conflict of interest that may unfairly impact the accused's fair trial rights.

¹ This is not to say that prosecutors cannot make any public statements about pending cases. Rule 5-120 of the California Rules of Professional Conduct provides a list of information that a prosecutor can publicly state about a pending case, including "information necessary to aid in apprehension" of an accused that is on the run. Indeed, in a footnote, the court of appeal pointed out that Zonen also had cooperated with the television program, "America's Most Wanted," which featured several stories about *Hollywood*. The court did not criticize Zonen for his cooperation with this program.

