

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CR2018-001934-001 DT

01/07/2019

HONORABLE FRANK W. MOSKOWITZ

CLERK OF THE COURT  
N. Pallas  
Deputy

STATE OF ARIZONA

JOSEPH WILLIAM WATERS

v.

LAURA TENISON SMITH (001)

RICHARD GAXIOLA

JUDGE MOSKOWITZ  
VICTIM WITNESS DIV-AG-CCC

**UNDER ADVISEMENT RULING**

The Court has considered Defendant's Motion to Remand and the attached and referenced Exhibits 1 through 19, the State's Response to same, the Defendant's Reply in support of same and the attached and referenced Exhibits 20 and 21, and the Oral Argument held on December 21, 2018.

For the reasons set forth below,

IT IS ORDERED granting the Defendant's Motion to Remand.

**Counts 1 and 2 of the Indictment**

Counts 1 and 2 of the Indictment charge the Defendant with Fraudulent Schemes and Practices. More specifically, that on or about February 24, 2017 and May 3, 2017, respectively, the Defendant, pursuant to a scheme or artifice to defraud or deceive, knowingly falsified, concealed or covered up material fact by any trick, scheme or device or made or used any false writing or document knowing such writing or document contains any false, fictitious or fraudulent statement or entry.

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The Court finds cause to remand Counts 1 and 2 to the Grand Jury. The State failed to present clearly exculpatory evidence. The State also presented false and/or misleading information to the Grand Jury.

The State did not present the Grand Jury with Exhibits 7 and 8 - the Defendant's Employment Application with the Scottsdale Unified School District (hereinafter referred to as "SUSD") of January 28, 2017 and her Disclosure of Outside Employment that she signed on February 15, 2017. This evidence is of such weight that, if presented, it would deter the Grand Jury from finding the existence of probable cause. It is therefore clearly exculpatory evidence.

In Exhibit 7, the Defendant specifically lists Caroline Brackley as a reference. She lists Ms. Brackley's title as "Managing Partner." She provides a physical address, an email address (Caroline@pgpc.org), and a phone number for Ms. Brackley. She also provides a reference letter from Ms. Brackley in .pdf format - "PGPCLetter.pdf."<sup>1</sup> The Defendant also discloses her current employer as "The Professional Group Public Consulting, Inc." and her title as "Director." She goes on to list Ms. Brackley as her supervisor and again provides Ms. Brackley's email address and phone number. She provides a physical address for her employer, which matches the physical address she provides for her reference, Ms. Brackley.

In Exhibit 8, the Defendant discloses having continued outside employment with PGPC - "Consulting to school districts for financial advice, outside of SUSD hours."

The State also presented false and/or misleading information to the Grand Jury. Specifically, the State's investigator, Mr. Hirsch testified as follows:

Q. There were some other employees at the district that had some knowledge about Ms. Smith and Ms. Brackley being sisters, but that, from your investigation, they weren't aware until later in the year; is that accurate?

A. Yes. [Exhibit 3, page 16, lines 4-9]

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Q. So as far as the work that was done by Ms. Smith - or by PGPC, was the information - first off, was that known to the district of the information - that PGPC and

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<sup>1</sup> No mention was made of the contents of this reference letter and whether it made mention about the relationship between the Defendant and Ms. Brackley and/or further mention about their respective roles and interests in PGPC. The same is true about the reference letters from the Defendant's other references - Lana Berry ("Lana Berry Letter.pdf") and Roger Jacks ("KUSD Letter.pdf").

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Ms. Smith were – had some form of ownership interest in that business or her sister have any ownership interest in that business? Was that known to the district?

A. No. [Exhibit 3, pages 22-23, lines 19-2]<sup>2</sup>

Mr. Hirsch’s testimony is false and/or misleading because the Grand Jury was not told that as part of his investigation, he interviewed Mr. Nance, the Assistant Superintendent of Educational Services at SUSD since May of 2016. When asked about when he first learned about the Defendant’s relationship with PGPC, he told Mr. Hirsch “I’ve known that for years and years.... He knew that she was a ‘partner’ in the company.... [He] also knew that [the Defendant] and Brackley were related years ago.” [Exhibit 4]

Nor were they told about Mr. Hirsch’s interview of former SUSD employee Rose Smith, who retired in June of 2017. She told Mr. Hirsch that the “SUSD governing board knows about the relationship between [Defendant] and PGPC” and “knows about [the Defendant’s] conflict of interest with PGPC and other matters however they refuse to address the matter.” [Exhibit 5]

Nor were they told about Mr. Hirsch’s interview of former SUSD CFO and CBO, Dan O’Brien, who worked at SUSD from July 2012 through May 2017. When asked about the Defendant and Ms. Brackley, he told Mr. Hirsch that he “always kinda known that they were related in some way.” He also told Mr. Hirsch that “he knew [the Defendant] worked for PGPC since PGPC was contracted at SUSD in early 2016. He also knew that PGPC was owned by Brackley. He didn’t know that [the Defendant] was an owner in PGPC until after she was hired, possibly after he was put on leave around April 2017. [Exhibit 6]

Last but not least, the Grand Jury was not told about Exhibits 7 and 8. As noted above, Exhibit 7, which is the Defendant’s Employment Application, made known to SUSD that Ms. Brackley was the Managing Partner of PGPC and the Defendant was a Director of PGPC. Exhibit 8, the Defendant’s Disclosure of Outside Employment, made known to SUSD that the Defendant intended to continue working for PGPC “outside of SUSD hours.” While the Grand Jury was informed that the attorney for SUSD reviewed the Defendant’s personnel file in April of 2017, no mention was made of Exhibits 7 and 8. [Exhibit 3, pp. 14-15, lines 6-24]

**Counts 3 through 11 of the Indictment**

Counts 3 through 11 of the Indictment charge the Defendant with Conflicts of Interest. More specifically, that on or about March 30, 2017, April 13, 2017, May 16, 2017, between May

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<sup>2</sup> This question and answer were the result of a grand juror asking the State – “Well, now that you brought it up, I’m wondering what is the fraud.” [Exhibit 3, p. 21, lines 22-23]

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16 and May 25, 2017, September 15, 2017, September 28, 2017, October 4, 2017, and October 30, 2017, the Defendant, as the CFO of SUSD, knowingly had, or whose relative had, a substantial interest in any decision of SUSD, and failed to make known such interest in the official records of SUSD and failed to refrain from participating in any manner as CFO in such decisions, to wit the referenced Purchase Orders.

For the reasons set forth below, the Court finds cause to remand Counts 3 through 11 as currently indicted. To be clear, the Court does not find cause to remand the part of the charges that the Defendant failed to refrain from participating in any manner as SUSD's CFO regarding the referenced Purchase Orders. The current charges in Counts 3 through 11, however, are not in the disjunctive. The current charges are that the Defendant (1) failed to make her or her sister's substantial interest in any decision of SUSD known in SUSD's official records and (2) failed to refrain from participating in any manner as SUSD's CFO in such decisions.

The Court's concern is twofold. One, the State did not properly instruct the Grand Jury on what constitutes SUSD's official records. Two, the State did not present clearly exculpatory evidence.

The State did not instruct the Grand Jury about A.R.S. section 38-509,<sup>3</sup> which requires SUSD to "maintain for public inspection in a special file *all documents necessary to memorialize all disclosures of substantial interest* made known pursuant to this article." (emphasis added). After the Grand Juror's question about "what is the fraud," all the Grand Jury was told was that "information should be posted within a file, in a sense, that's easily accessible to the members of the public about that information that there is a relationship between [the Defendant] and her sister, ownership of PGPC, and [the Defendant] and her ownership of PGPC" and that certain referenced written disclosures were deficient in that regard. [Exhibit 3, p. 23, lines 6-20] Although the Grand Jury was informed that the attorney for SUSD reviewed the Defendant's personnel file in April of 2017, no mention was made of Exhibits 7 and 8. [Exhibit 3, pp. 14-15, lines 6-24]

The State failed to present clearly exculpatory evidence – Exhibits 7 and 8.<sup>4</sup> These Exhibits made known in SUSD's official records that Defendant was a Director at PGPC and

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<sup>3</sup> The State specifically addressed and brought this statute to the Court's attention in its Response on page 8. The State, however, did not read, offer to clarify, provide copies, or otherwise inform the Grand Jury about this specific statute. [Exhibit 3, page 3, lines 11-18]

<sup>4</sup> The charges in Counts 3 through 11 that involve SUSD's official records are narrower in scope than the charges in Counts 1 and 2 that involve a scheme or artifice to defraud. Thus, unlike in Counts 1 and 2, what others at SUSD may have known about the relationship between the Defendant or her sister and PGPC is not clearly exculpatory to Counts 3 through 11 unless the knowledge was made known in SUSD's official records. This of course begs the question whether Exhibit 10, Defendant's March 16, 2017 email to Mr. O'Brien and Ms. Hagen, both with SUSD,

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intended to continue working for PGPC “outside of SUSD hours.” They also made known that Ms. Brackley was the Managing Partner at PGPC, the Defendant’s supervisor, and one of her references.<sup>5</sup>

Therefore, the Court concludes that the Grand Jury could not have fairly and impartially indicted the Defendant on Counts 3 through 11 for her failure to make something known in SUSD’s official records, when as here, the Grand Jury was not properly instructed on what constitutes SUSD’s official records, and not presented with clearly exculpatory evidence.

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was made known in SUSD’s official records. The Court notes that the State made quick mention of the email in its presentation to the Grand Jury, [Exhibit 3, pp. 24-25, lines 20-4] While the email may support Defendant’s disclosure and understanding that she had “documented and signed a conflict of interest regarding [PGPC]” in February of 2017, it also confirms her continued participation in decisions involving PGPC as SUSD’s CFO notwithstanding her disclosure of a conflict of interest.

<sup>5</sup> Any mention about the Defendant’s relationship with Ms. Brackley in any of the letters of reference in Exhibit 7 would simply bolster the clearly exculpatory nature of the Exhibit.