

2017

**State of Utah, Plaintiff/ Respondent v. Ahn Tuam Pham,
Defendant/ Petitioner**

Utah Supreme Court

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Case No. 20160500-SC

IN THE
UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Petitioner,

v.

JAMES CHRISTOPHER MCCALLIE,
Defendant/Respondent.

Supplemental Brief of Petitioner

On Writ of Certiorari to the Utah Court of Appeals

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INTRODUCTION

The Court ordered the parties to show cause why the State's petition should not be dismissed "based on standing and/or mootness." *Order to Show Cause*. The Court is concerned that the State is not asking it to change the outcome – affirming Defendant's conviction.

The court of appeals held that the trial court committed a *Doyle* error. But it affirmed the conviction because the error was not prejudicial. The State asked for, and the Court granted, review on the first holding. The State did not ask to upset the second.

The State has standing and the case is not moot. The State did prevail in the judgment on lack-of-prejudice grounds and does not ask to upset that holding. But the alternative error holding will erroneously impede its ability to present valuable evidence in future trials, and the State will have no meaningful means of

review. The Court consequently should not dismiss the petition. But if it does, it should vacate the alternative holding.

ARGUMENT

I.

AS AN AGGRIEVED PARTY, THE STATE HAS STANDING TO APPEAL AND THE CASE IS NOT MOOT BECAUSE THE COURT CAN GRANT THE STATE RELIEF

Relying on *State v. Sims*, 881 P.2d 840 (Utah 1994), and *Geer v. Kadera*, 671 N.E.2d 692 (Ill. 1996), this Court opined that “it does not appear that a decision by this Court regarding the proper interpretation of *Doyle* will affect the result in this case” and requested that the parties show cause why the petition should thus not be dismissed “based on standing and/or mootness.” *Order to Show Cause*.

This Court should not dismiss the petition. The State has standing to appeal because it is aggrieved by the court of appeals’ holding that the State committed a *Doyle* violation and this Court can grant the State relief from that adverse holding.

A. The State has standing to appeal because it is aggrieved by the court of appeals’ holding that its actions violated the United States Constitution.

To have standing to appeal, a party “must be aggrieved by a judgment or order.” *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 333 (1980). Normally, a prevailing party does not have standing to appeal because he is not aggrieved by a favorable judgment. *Id.* See also *Geer v. Kadera*, 671 N.E.2d 692, 699 (Ill. 1996) (“a party cannot complain of error which does not prejudicially affect it, and one who has obtained by judgment all that has been asked for in the trial court cannot

appeal from the judgment.”). But this is not always true. “In an appropriate case, appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as the party retains a stake in the appeal. . . .” *Roper*, at 445 U.S. at 334. In other words, so long as a prevailing party is “aggrieved” by an adverse holding, it has standing to appeal. *Id.*

Many courts have thus determined that a prevailing party has standing to appeal an adverse holding of a lower court. See *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939) (holding that prevailing party had standing to appeal where ruling on immaterial issue might later be basis for collateral estoppel); *Roper*, 445 U.S. at 333-336 (holding that prevailing party had standing to appeal immaterial class certification ruling); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 930-931 (1983) (holding that government, although it prevailed below, had standing to appeal because it “was sufficiently aggrieved by the Court of Appeals decision prohibiting it from taking action it would otherwise take”); *Viraj Group, Ltd. v. United States*, 343 F.3d 1371, 1375-1376 (Fed. Cir. 2003) (holding that government, even though prevailing party, had standing to appeal lower court’s reasoning where government was forced to adopt it on remand); *Delaware Valley Citizens Council for Clean Air v. Davis*, 932 F.2d 256, 263 n.6 (3rd Cir. 1991) (holding that prevailing party, a federal agency, had standing to appeal because court’s dismissal of count could work a collateral estoppel against it in another case); *Department of Defense, Office of Dependents Schools v. Federal Labor*

Relations Authority, 879 F.2d 1220 (4th Cir. 1989) (holding that agency had standing to appeal favorable dismissal based on adverse legal premise that agency head had no power to review and disapprove of collective bargaining agreements); *Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1275-1276 (10th Cir. 2001) (holding that prevailing party had standing to appeal favorable judgment where lower court dismissed without prejudice alternate state-law claims, leaving prevailing party open to further litigation); *Miami Tribe of Oklahoma v. United States*, 656 F.3d 1129, 1139-1141 (10th Cir. 2011) (holding that government had standing to appeal unfavorable ruling because ruling constrained its discretion on remand even though it prevailed in final judgment).

Camreta v. Greene is particularly relevant here. 563 U.S. 692 (2011). In *Greene*, the United States Supreme Court held that a government official had standing to appeal the circuit court's adverse holding that the official's conduct violated the Constitution even though the official prevailed in the judgment because the circuit court also held that he was entitled to governmental immunity. *Id.* at 699. The Supreme Court explained that the official was sufficiently aggrieved to maintain standing because "only by overturning the ruling on appeal can the official gain clearance to engage in the conduct in the future." *Id.* at 702-703. Standing thus "will often be met when immunized officials seek to challenge a ruling that their conduct violated the Constitution." *Id.* at 703-704.

Greene identified two "policy reaso[ns] . . . of sufficient importance" that further supported standing. *Id.* at 704 (omission in original) (quoting *Roper*, 445

U.S. at 336 n.7). First, the circuit court's holding established "controlling law" that would have a "significant future effect on the conduct of public officials." *Id.* at 704-705. And even though the "Court reviews judgments, not statements in opinions," "a constitutional ruling in a qualified immunity case is a legally consequential decision," "not mere dicta or statements in opinions." *Id.* at 704, 713 (quotation marks and citation omitted). *See also id.* at 708 ("No mere dictum, a constitutional ruling preparatory to a grant of immunity creates law that governs the official's behavior.").

Second, if the Supreme Court had declined to hear the case, the government was limited in seeking review of the circuit court's holding. *Id.* Indeed, it put the official in the "'unenviable choice'" of either acquiescing "in a ruling that he had no opportunity to contest in this Court, or 'defy the views of the lower court, adhere to practices that have been declared illegal, and thus invite new suits.'" *Id.* at 708 (quoting *Pearson v. Callahan*, 555 U.S. 223, 240-241 (2009)).

For these same reasons, the State is aggrieved by the court of appeals' "ruling that [its] conduct violated the Constitution." *Id.* at 703-704. And only by overturning the ruling on appeal can the [State] gain clearance to engage in [constitutional] conduct in the future." *Id.* at 702-703.

Moreover, the same two important reasons that supported standing in *Greene* support the State's standing here. First, the court of appeals' erroneous holding will have binding precedential effect that will bar the State from using evidence that the United States Constitution does not prohibit it from using. As

explained in the State's merits briefs, *Doyle* only prohibits the State from using a defendant's post-*Miranda* silence to impeach the defendant's trial testimony that offers an exculpatory explanation. *Doyle* does not, however, prohibit using post-*Miranda* statements that conflict with the exculpatory trial testimony.

The court of appeals held, however, that certain post-*Miranda* statements are the equivalent of *silence* and cannot be used to impeach the exculpatory trial version. And as explained there, Defendant's post-*Miranda* statements conflicted with his trial testimony. Defendant feigned ignorance of the crime when he spoke to police. At trial, however, he told the jury that he knew all about the crime and asserted that it was an accident. Those two versions cannot be reconciled and Supreme Court precedent allowed the State to explore that conflict. And even though the court affirmed on lack-of-prejudice grounds, its alternative error holding bans the use of constitutionally admissible evidence in future cases.

Second, the State is effectively foreclosed from seeking review of this important constitutional question. Like the government in *Greene*, the State is in the "'unenviable choice'" of either acquiescing "in a ruling that [it] had no opportunity to contest in this Court, or 'defy the views of the lower court, [and] adhere to practices that have been declared illegal.'" *Id.* at 708. Indeed, the only potential avenue of review would arise if (1) a prosecutor violates *McCallie's* rule and uses a defendant's "silence-equivalent" statements against him at trial; (2) either (a) defense counsel does not object and the trial court does not intervene, or (b) defense counsel objects but the trial court overrules the objection contrary to

McCallie; (3) defendant is convicted and appeals; (4) the court of appeals determines that there is both a *McCallie* error and the error is prejudicial; and (5) this Court accepts certiorari review. The State is thus aggrieved by the court of appeals' holding and has standing sufficient to maintain this Court's review.

Geer v. Kadera—the case cited in the Court's *Order to Show Cause*—does not change this conclusion. In *Geer*, an appellate court affirmed dismissal of Geer's suit and, in dicta, invited him to pursue a common law writ of mandamus. 671 N.E.2d at 694-695. Geer did so. *Id.* at 695. Kadera—not Geer—sought certiorari review of the first dismissed case, seeking reversal of the “ruling” that a writ of mandamus may lie. *Id.* The *Geer* court held that Kadera did not have standing to appeal because he had prevailed below, the statement about mandamus was non-binding dicta, and the court had no power to decide whether mandamus may lie in a different pending case involving different parties. *Id.* at 699-700.

Unlike here, Kadera was not aggrieved. *Id.* And the policy reasons supporting standing were not present—there was no binding adverse holding of constitutional dimensions of which he likely could not seek judicial review. *Id.* Indeed, as *Greene* explained, “a constitutional ruling”—even if “immaterial” given the ultimate resolution of the case—“is a legally consequential decision,” “not mere dicta.” 563 U.S. at 704, 713. *See also Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 (1992) (explaining that “[h]armless-error analysis is triggered only after the reviewing court discovers that an error has been committed”); *State v. Hummel*, 2017 UT 19, ¶38, __ P.3d __ (“[T]he principle of *stare decisis* is focused on *holdings*

of our prior decisions.”). Kadera was not subject to a constitutional ruling. The State is. And Kadera could have challenged whether mandamus was appropriate in the mandamus proceeding. As shown, the State has no realistic avenue to review the court of appeals’ holding.

In sum, the State has standing to appeal the court of appeals’ erroneous constitutional holding. This Court should not dismiss the petition.

B. This case is not moot because the Court can grant the State relief.

A case becomes moot when a petitioner “no longer suffers actual injury that can be redressed by a favorable judicial decision.” *Keller Tank Servs. II, Inc. v. Comm’r of Internal Revenue*, ___ F.3d ___, 2017 WL 1424973 (10th Cir. 2017) (quoting *Brown v. Buhman*, 822 F.3d 1151, 1166) (10th Cir. 2016)). See also *Chafin v. Chafin*, 133 S.Ct. 1017, 1023 (2013) (“To say that an appeal is moot means that the court cannot provide the prevailing party with any relief.”). “This is ordinarily a low bar, [so] ‘when a court can fashion some form of meaningful relief, even if it only partially redresses the grievances of the prevailing party, the appeal is not moot.’” *Constand v. Cosby*, 833 F.3d 405, 409 (3d Cir. 2016) (quoting *In re Continental Airlines*, 91 F.3d 553, 558 (3d Cir. 1996)).

Here, the Court can grant the State relief by reversing the court of appeals’ holding that prohibits it from using constitutionally admissible evidence. Cf. *Chadha*, 462 U.S. at 930-931 (1983) (holding that government could obtain relief from “Court of Appeals decision prohibiting it from taking action it would otherwise take”).

State v. Sims does not hold otherwise. 881 P.2d 840 (Utah 1994). Unlike here, in that case, this Court determined that the writ of certiorari was improvidently granted because the petitioner challenged only the lower court's state constitutional holding, but not its separate federal constitution holding. As a result, any decision the Court made could not grant the petitioner relief. *Id.* at 841. But as shown in Point A, a favorable ruling here can grant the State relief.

Even if this case were technically moot, it still should not be dismissed because it meets the public interest exception to the mootness rule. The court of appeals' holding (1) affects the public interest, (2) is likely to recur, and (3) is likely to evade review. *See State v. Steed*, 2015 UT 76, ¶7, 357 P.3d 547. As explained above, *McCallie* bars the State from using constitutionally admissible evidence in every criminal trial. Yet, the State is unlikely to be able to get review unless it and the trial court abandon their professional, legal, and moral duty to follow the law. For these reasons as well, this Court should not dismiss the petition as moot.

C. If the Court dismisses the petition, it should also vacate the court of appeals' holding.

If this Court, however, determines that the State lacks standing or that the case is otherwise moot, the State asks this Court to vacate the portion of the court of appeals' opinion that holds that the trial court violated *Doyle*. *Cf.* Utah R. App. P. 30(a) (granting appellate court right to "reverse, affirm, modify, or otherwise dispose of any order or judgment appealed from").

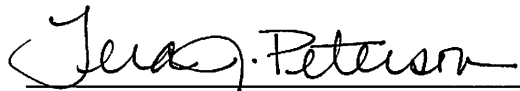
In *Greene*, the United States Supreme Court held that while the petitioner who prevailed below had standing to appeal an adverse holding, the case had become moot on appeal. See *Greene*, 563 U.S. at 713-714. Nonetheless, the Court vacated the portion of the circuit court's decision of which the petitioner sought review. *Id.* This prevented "an unreviewable decision 'from spawning any legal consequences,' so that no party is harmed." *Id.* at 713 (quoting *United States v. Munsingwear*, 340 U.S. 36, 40-41 (1950)). A "'party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, . . . ought not in fairness be forced to acquiesce in' that ruling." *Id.* at 712. See also *Delaware Valley Citizens Council for Clean Air v. Davis*, 932 F.2d 256, 263 & n.6 (3d Cir. 1991) (vacating lower court's ruling on immaterial count to "eradicate[] any preclusive effect" on prevailing party).

CONCLUSION

For the foregoing reasons, the Court should not dismiss the petition.

Respectfully submitted on April 28, 2017.

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CERTIFICATE OF SERVICE

I certify that on April 28, 2017, two copies of the Brief of Respondent were ☒ mailed ☐ hand-delivered to:

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Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf):

☒ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.

Lee Nakamura