IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel ADRIAN KINDER,	)	
	)	
Relator	)	
	)	
vs.	)	**Case No. SC84082**
	)	
HON. MAURA B. MC SHANE, Circuit Judge of The St. Louis County Circuit Court,	)	
	)	
Respondent	)	

Original Writ of Prohibition Proceeding

RELATOR'S BRIEF

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ABBREVIATIONS USED

Petition For "Stop Order", Preliminary Writ of Prohibition And Permanent Writ Of Prohibition, Case ..... **Petition**

I(A).
Table Of Cases, Statutes And Authorities

(A) Cases	**Pages**
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(B) Statutes and Other Authorities :

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U.S.Const.Fourteenth Amendment 15

Mo. Const. art. V, §4 4

Missouri Supreme Court Rule 4, Rules of Professional Conduct, Rule 1.7 15,25,26

Missouri Supreme Court Rule 24.035 16,32

II.

Statement of Jurisdiction

This is an original writ of prohibition proceeding in The Supreme Court of Missouri.

Relator Adrian Kinder ("Adrian") is the defendant in State v. Adrian Kinder, Circuit Court of The County of St. Louis, Missouri, Cause No. 00CR-4786 ("Criminal Case"). Petition ¶5; Answer ¶5. Relator is charged as having committed murder 1st degree, armed criminal action and arson 1st degree. Id. The case is pending before Maura B. McShane ("Respondent Judge"), Circuit Judge of The Circuit Court of The County of St. Louis, Missouri. Petition ¶19; Answer ¶19.

By order (Petition Exhibit 1) dated August 30, 2001, Respondent Judge sustained The State's Motion To Disqualify Defense Counsel For Conflict of Interest (Petition Exhibit 4).

The Missouri Court of Appeals, Eastern District, by order dated October 29, 2001 (Plaintiff's Exhibit 1A), denied Relator's Petition For Stop Order, Preliminary Writ of Prohibition And Permanent Writ of Prohibition respecting the issues presented herein.

On November 9, 2001, pursuant to Rule 97 and Rules 84.22-84.26 Adrian filed and served a Petition For Stop Order, Preliminary Writ of Prohibition And Permanent Writ of Prohibition (Petition) in this Court. On December 18, 2001, this Court issued its' Preliminary Writ of Prohibition. Respondent Judge filed her Answer on January 17, 2002 as ordered. This proceeding follows.

The Supreme Court of Missouri has jurisdiction over this proceeding under its supervisory powers at Mo. Const. art. V, §4, hence, the jurisdiction of this Court is invoked.

III.

Statement of Facts

Shortly after 8:00 p.m September 9, 2000, local firefighters and the St. Louis County Police Department responded to a fire at Adrian Kinder's ("Adrian") residence at 5491 Trail Bend Drive, St. Louis County, Missouri. Petition ¶2;Answer¶2. After the fire was suppressed, Adrian's mother Sherri Kinder ("Mother") was found dead by authorities in an upstairs bedroom with three bullet wounds. Petition ¶2;Answer¶2. Adrian's father, Kevin Kinder ("Father"), left the house about 1:30 p.m. that day and spent the day/night at a near-by motel on Lindberg Boulevard to catch up on his work assignments (Petition Exhibit 2, pages 12-17). No person is known to have witnessed or to have first hand personal knowledge either "how" the fire started, "who" started the fire, "when" the fire

started, "when" mother was shot or "who" shot mother. Petition ¶2. Adrian resided at the Trail Bend home with his mother, father and sister. Petition ¶2; Answer ¶2. Adrian was outside the residence when the firefighters and policemen first arrived on the scene. Petition ¶2; Answer ¶2.

Adrian was 16 years of age on September 9, 2000. Petition ¶3; Answer ¶3. He was taken into the custody of the juvenile authorities and was subsequently charged with violation of the Juvenile Code. Petition ¶3; Answer ¶3. Attorney Arthur G. Muegler ("Muegler") represented Adrian in the Juvenile Court proceedings. Petition ¶7.

On November 2, 2000, Adrian was "certified" by the juvenile court as an adult. Petition ¶5. Shortly thereafter Adrian was charged as an adult in State v. Adrian Kinder, Circuit Court of The County of St. Louis, Missouri, Cause No. 00CR-4786 ("Criminal Case") with the following felony crimes in connection with the September 9, 2000 fire and death of Mother, to wit : (a) violation of §565.020, R.S.Mo. [Murder 1st Degree], (b) violation of §571.015, R.S.Mo. [Armed Criminal Action] and (c) violation of §569.040, R.S.Mo. (Arson 1st Degree). Petition ¶5; Answer ¶5. Muegler was retained as Adrian's legal counsel in Criminal Case. Petition ¶7.

Father fully cooperated with law enforcement officials investigating the fire and homicide. Petition ¶8. Shortly after retainer, Attorney interviewed Father and discovered the nature and extent of his testimony in Criminal Case. Petition ¶8.

Muegler consulted with Adrian at least 10 to 12 times respecting the trial strategies and status of Criminal Case (Petition Exhibit 3, page 23). Adrian, after receiving this advice, made the decisions and Muegler implemented those decisions (Petition Exhibit 3, page 23 lines 1-20). Muegler always observed the confidentiality of the Muegler-Adrian attorney-client relationship ... Adrian wants Muegler to continue to represent him in Criminal Case (Petition Exhibit 3, page 13 lines 1-18, page 19

lines 14-15 and lines 16-23, page 20 lines 14-18, 22 lines 5-11, page 29 line 17, page 30 lines 4-7 and page 33 lines 8-15).

Father was one (1) of twenty-four (24) people endorsed by The State as a possible trial witness in The State's Case-In-Chief. Petition ¶10; Answer ¶10. The State subpoenaed and noticed Father for deposition. Petition ¶11; Answer ¶11.

Muegler represented both Father and Adrian at Father's July 18, 2001 deposition. Petition ¶11; Answer ¶11.

Adrian knew Muegler was going to represent both Father and Adrian at Father's deposition (Plaintiff's Exhibit 3, page 13, lines 6-12). Muegler and Adrian discussed the possibility of a conflict of interest with Muegler's dual representation of Adrian and Father at deposition (Plaintiff's Exhibit 3, page 26, lines 1-8). Adrian consented to the dual representation (Plaintiff's Exhibit 3 page 13, lines 13-14) because Adrian did not believe there was a conflict of interest (Plaintiff's Exhibit 3, page 13, lines 15-18; page 15, lines 19-22).

Father testified at deposition he never witnessed a physical altercation between Adrian and his mother Sherri (victim) ... "No. He (Sic: Adrian) wouldn't hurt her like that. No. He wouldn't fight with her." Petition Exhibit 2, page 28 lines 4-7. The only time Father ever heard of Adrian putting a hand on mother Sherri was one time ... "she (Sic: mother Sherri) was going to spite him real good and all he (Sic: Adrian) did was hold her by the wrist and stuff and she said let me go. He wouldn't let her go because he didn't want to get whooped". Petition Exhibit 2, page 28 lines 16-22. Mother Sherri was not afraid of Adrian. Petition Exhibit 2, page 57 lines 1-4. Adrian never had possession of any gun ... and he doesn't know of any instance where Adrian tried to get one of Father's guns. Petition Exhibit 2, page 34 lines 3-11. Father never saw or heard of Adrian having or using a hand gun.

Petition Exhibit 2, page 68 lines 5-24. When Adrian was "grounded" for disciplinary reasons Adrian always obeyed the grounding rules. Petition Exhibit 2, page 54 lines 4-6. And, importantly, Adrian denies knowing who killed mother Sherri and Father believes Adrian is telling the truth. Petition Exhibit 2, page 63 lines 8-13.

After Father's July 18, 2001 deposition, On August 2, 2001, The State filed a Motion To Disqualify Defense Counsel For Conflict of Interest ("Conflict Motion")(Plaintiff's Exhibit 4).

At hearing The State phrased its' disqualification grounds in the following manner :

> "Your Honor, the State's motion is based on the fact that the defendant, Adrian Kinder, is represented in this cause by his attorney of record, Arthur Muegler, and also that a witness in the cause, an endorsed State's witness who is a key witness to this case, Mr. Kevin Kinder, is also represented by Mr. Arthur Muegler, thereby giving rise to a conflict of interest on the part of Mr. Muegler and which requires that the Court disqualify him as attorney of record in this case" (Petition Exhibit 3, page 6 lines 3-12).

Adrian and Father testified briefly at the disqualification hearing. Father testified "There was no conflict of interest" (Petition Exhibit 3, page 29 line 17) created by Muegler's legal representation of Adrian and representation of Father during deposition. Similarly, Adrian did not believe Muegler's representation of Father presented any Muegler conflict of interest interfering with Muegler's continued representation of Adrian. Petition Exhibit 3, page 13 lines 13-18.

Father also testified Muegler never represented him either before or after the one-shot deposition representation in this case. Petition Exhibit 3, page 28 lines 22-24 and page 29 lines 3-5. Father did not, and does not, know Muegler socially. Petition Exhibit 3, page 28 line 25 and page 29 lines 1-2. All of the legal fees paid to Muegler were paid by Adrian out of a custodial trust bank

account in Adrian's name. Petition Exhibit 3, page 30 lines 8-25 and page 31 lines 1-6. Father has not tried to control, direct or participate in formulating Adrian's defense to the criminal charges. Petition Exhibit 3, page 30 lines 4-7. Father never discussed the criminal case against Adrian with Muegler because Muegler always told Father those matters were attorney-client privileged. Petition Exhibit 3, page 33 lines 8-15.

At the conclusion of the hearing, Respondent Judge sustained The State's Conflict Motion and disqualified Muegler from continued representation of Adrian in Criminal Case stating as ground therefor :

> "I'm concerned that there is an appearance of a conflict of interest here" (Petition Exhibit 3, page 38 lines 12-13)(Emphasis supplied) and "I think there is a potential conflict of interest, and I do think that maybe this conflict of interest could also arise during the middle of trial" (Petition Exhibit 3, page 38 lines 21-23)(Emphasis supplied).

Respondent Judge then signed the disqualification order prepared by The State. Plaintiff's Exhibit 1.

The Missouri Court of Appeals, Eastern District, by order dated October 29, 2001 (Plaintiff's Exhibit 1A), denied Relator's Petition For Stop Order, Preliminary Writ of Prohibition And Permanent Writ of Prohibition respecting the issues presented herein.

On November 9, 2001, pursuant to Rule 97 and Rules 84.22-84.26 Adrian filed and served a Petition For Stop Order, Preliminary Writ of Prohibition And Permanent Writ of Prohibition (Petition) in this Court. On December 18, 2001, this Court issued its' Preliminary Writ of Prohibition. Respondent Judge filed her Answer on January 17, 2002 as ordered. This proceeding follows.

IV.

Point Relied On

Point I.

Relator Adrian Kinder ("Adrian") is entitled to an absolute order prohibiting Respondent Judge from enforcing the August 30, 2001 order disqualifying attorney Muegler from legal representation of Adrian Kinder in State v. Adrian Kinder, Circuit Court of The County of St. Louis, Missouri, Cause No. 00CR-4786 ("Criminal Case") because Respondent Judge misconstrued and misapplied the law when she concluded in the August 30, 2001 order that a *per se* imputed conflict of interest existed as a result of Muegler's dual legal representation of Adrian and state endorsed witness father Kevin Kinder in that (a) no *unqualified absolute per se* conflict of interest exists when a lawyer represents both a defendant and an endorsed prosecution witness in a pending criminal case, (b) the existence of an actual conflict of interest is required before an attorney is disqualified from representing both a defendant and a state endorsed prosecution witness in a pending criminal case and (c) The State failed to meet its' burden of proof since the evidence received at hearing did not *prima facie* show Muegler had a disqualifying actual conflict of interest as a result of the dual legal representation of Adrian Kinder and Kevin Kinder.

The three most apposite cases are :

Cuyler v. Sullivan, 446 U.S. 335 (1980)

Gordon v. State, 684 S.W.2d 888 (Mo. App. 1985)

State v. Johnson, 549 S.W.2d 348 (Mo. App. 1977)

Other cited authority :

Chassaing v. Mummert, 887 S.W.2d 573 (Mo. banc 1994)

Ciarelli v. State, 441 S.W.2d 695 (Mo. 1961)

Fidelity National v. Snow, 26 S.W.3rd 473 (Mo. App. 2000)

Gideon v. Wainwright, 372 U.S. 335 (1963)

Glasser v. United States, 315 U.S. 60 (1942)

Mason v. State, 468 S.W.2d 617 (Mo. 1971)

Mooring v. State, 501 S.W.2d 7 (Mo. 1973)

Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976)

State v. Cox, 539 S.W. 2d 684 (Mo. App. 1976)

State v. Crockett, 419 S.W.2d 22 (Mo. 1967)

State v. Ervin, 835 S.W.2d 905 (Mo. banc 1992)

State ex rel Fleer v. Conley, 809 S.W.2d 405 (Mo. App. 1991)

State ex rel Wallace v. Munton, 989 S.W.2d 641 (Mo. App. 1999)

State v. Risinger, 546 S.W.2d 563 (Mo. App. 1977)

State v. Weeks, 603 S.W.2d 657 (Mo. App. 1980)

United States v. Cox, 580 F.2d 317 (8th Cir. 1978)

U.S.Const. Sixth Amendment

U.S.Const.Fourteenth Amendment

Missouri Supreme Court Rule 4, Rules of Professional Conduct, Rule 1.7

Missouri Supreme Court Rule 24.035

Point II.

In the alternative to relief under Point I, if The Court finds Muegler had a disqualifying conflict of interest, Relator Adrian Kinder ("Adrian") is entitled to (1) an absolute order prohibiting Respondent Judge from enforcing the August 30, 2001 order disqualifying attorney Muegler from legal representation of Adrian Kinder in State v. Adrian Kinder, Circuit Court of The County of St. Louis, Missouri, Cause No. 00CR-4786 ("Criminal Case") and (2) a supplementary order directing the trial court to conduct a hearing to determine whether Adrian knowingly and voluntarily waives the "ineffective assistance of counsel" issues presented in this case because Respondent Judge committed prejudicial err by not finding or further inquiring whether Adrian knowingly and voluntarily waived the conflict of interest created by Muegler's dual representation of Adrian and state endorsed witness Kevin Kinder at deposition in Criminal case in that no disqualifying constitutionally based or ethics based conflict of interest is implicated if Adrian knowingly and voluntarily waived the conflict of interest.

The three most apposite cases are :

Ciarelli v. State, 441 S.W.2d 695 (Mo. 1969)

Henderson v. Smith, 903 F.2d 534, 537 (8th Cir. 1990)

State ex rel Fleer v. Conley, 809 S.W.2d 405 (Mo. App. 1991)

Other cited authority :

Chassaing v. Mummert, 887 S.W.2d 573 (Mo. banc 1994)

Cuyler v. Sullivan, 446 U.S. 335 (1980)

Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976)

State v. Kretzer, 898 S.W.2d 639 (Mo. App. 1995)

State ex rel Wallace v. Munton, 989 S.W.2d 641 (Mo. App. 1999)

Missouri Supreme Court Rule 4, Rules of Professional Conduct Rule 1.7

Missouri Supreme Court Rule 24.035

V.

Argument

Point I.

Relator Adrian Kinder ("Adrian") is entitled to an absolute order prohibiting Respondent Judge from enforcing the August 30, 2001 order disqualifying attorney Muegler from legal representation of Adrian Kinder in State v. Adrian Kinder, Circuit Court of The County of St. Louis, Missouri, Cause No. 00CR-4786 ("Criminal Case") because Respondent Judge misconstrued and misapplied the law when she concluded in the August 30, 2001 order that a *per se* imputed conflict of interest existed as a result of Muegler's dual legal representation of Adrian and state endorsed witness father Kevin Kinder in that (a) no *unqualified absolute per se* conflict of interest exists when a lawyer represents both a defendant and an endorsed prosecution witness in a pending criminal case, (b) the existence of an actual conflict of interest is required before an attorney is disqualified from representing both a defendant and a state endorsed prosecution witness in a pending criminal case and (c) The State failed to meet its' burden of proof since the

evidence received at hearing did not *prima facie* show Muegler had a disqualifying actual conflict of interest as a result of the dual legal representation of Adrian Kinder and Kevin Kinder.

(A) Standard of Review :

Prohibition will issue in three situations : (1) where there is a usurpation of judicial power because the trial court lacks either personal or subject matter jurisdiction; (2) to remedy a clear excess of jurisdiction or clear abuse of discretion such that the lower court lacks the power to act as contemplated; (c) situations where a litigant has no adequate remedy at law and would be irreparably harmed should the writ not issue. Chassaing v. Mummert, 887 S.W.2d 573, 577 (Mo. banc 1994).

Prohibition is the appropriate remedy in cases involving lawyer "conflict of interest" disqualification issues. State ex rel Fleer v. Conley, 809 S.W.2d 405 (Mo. App. E.D. 1991); State ex rel Wallace v. Munton, 989 S.W.2d 641 (Mo. App. 1999).

The standard of review is whether the trial court erroneously declared or applied the law in the disqualification proceeding. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). The issue is reviewed *de novo*. Id.

(B) Overview of Contentions :

The State and Respondent Judge content there exists a bright line absolute *per se* rule which *ipso facto* disqualifies a lawyer on a "conflict of interest" ground in every circumstance where a lawyer represents a defendant in a criminal case and also represents or represented (no matter how nominal the legal representation might be) a person endorsed as a state's witness in the criminal case. At the disqualification hearing The State phrased its' position :

"Your Honor, the State's motion is based on the fact that the defendant, Adrian Kinder, is represented in this cause by his attorney of record, Arthur Muegler, and also that a witness in the cause, an endorsed State's witness who is a key witness to this case, Mr. Kevin Kinder, is also represented by Mr. Arthur Muegler, thereby giving rise to a conflict of interest on the part of Mr. Muegler and which requires that the Court disqualify him as attorney of record in this case" (Petition Exhibit 3, page 6 lines 3-12).

Relator Adrian Kinder ("Adrian") argues an "actual conflict of interest" is required before a lawyer is disqualified from dual representation of a criminal defendant and a state's endorsed witness in a criminal case ... that no global *per se* disqualification rule exists or should exist as a matter of Public Policy ... and, that actual conflict of interest determination must be made on a case-by-case basis to protect against erroneous disqualification of a lawyer of a criminal defendant's choice.

Adrian also contends two distinct sources of law come into play when analyzing lawyer conflict of interest issues. In the first instance, a lawyer's professional responsibility to self-assess and self-evaluate his legal representation in juxtaposition with the ethical guidelines set out at Missouri Supreme Court Rule 4, Rules of Professional Conduct, Rule 1.7. And, second, the U.S.Const. Sixth Amendment and Fourteenth Amendment rights of a criminal defendant to the effective assistance of legal counsel at trial. These legal constraints define the boundaries of conflict of interest lawyer disqualification ... and, any *per se* rule, no matter how easy to understand and apply, in conflict with the professional rules and/or constitutional guarantees must be abandoned.

The issue is ripe for this Court to resolve because Respondent Judge, when sustaining the disqualification motion, clearly relied upon the notion that dual representation of a criminal defendant and a state's endorsed witness *ipso facto* resulted in a disqualifying conflict of interest albeit no

evidence *prima facie* showed an "actual conflict of interest" created by the dual representation, to wit :

> "I'm concerned that there is an appearance of a conflict of interest here" (Petition Exhibit 3, page 38 lines 12-13)(Emphasis supplied) and "I think there is a potential conflict of interest, and I do think that maybe this conflict of interest could also arise during the middle of trial" (Petition Exhibit 3, page 38 lines 21-23)(Emphasis supplied).

(C) Sixth Amendment And Fourteenth Amendment Require Actual Conflict :

The presented issue customarily arises in post-conviction appeals and Rule 24.035 type proceedings. The ultimate issue in those cases is usually whether a conviction should be overturned on the ground the defendant did not receive effective assistance of counsel due to legal counsel's conflict of interest.

The Law is a jealous guardian of a person's U.S. Const. Sixth Amendment and Fourteenth Amendment Right to a lawyer of his or her choice, to wit :

> "In general defendants (Sic: criminal case defendants) are free to employ counsel of their own choice and the courts are afforded little leeway in interfering with that choice." United States v. Cox, 580 F.2d 317, 321 (8th Cir. 1978).

One such limitation involves an attorney conflict of interest. The federal constitution guarantees to persons accused in state court of committing a crime the right to representation by counsel. Gideon v. Wainwright, 372 U.S. 335 (1963). This guarantee entitles an accused to a lawyer who can render faithful service and give undivided loyalty. State v. Crockett, 419 S.W.2d 22, 29[14] (Mo. 1967). A lawyer who is forced or who attempts to serve clients with conflicting interests cannot give either the loyalty each deserves. Id. An accused is denied his U.S. Const. Sixth Amendment

right to effective assistance of counsel if his lawyer has a conflict of interest and the accused is neither aware of, or voluntarily consenting to, continued representation by the lawyer having the conflict. State v. Risinger, 546 S.W.2d 563, 565 (Mo. App. 1977); Glasser v. United States, 315 U.S. 60 (1942).

Adrian acknowledges this Court and inferior appellate courts have used a form of the so-called *per se* rule verbiage in dicta, "An attorney who represents both the defendant and a prosecution witness in the case against the defendant is representing conflicting interests." Ciarelli v. State, 441 S.W.2d 695, 697 (Mo. 1961). See, also, Gordon v. State, 684 S.W.2d 888, 890 (Mo. App. WD 1985); State v. Johnson, 549 S.W.2d 348, 350 (Mo. App. StL 1977); State v. Cox, 539 S.W. 2d 684, 687 (Mo. App. StL 1976).

But, in every reported Missouri case utilizing the *per se* language there was an obvious, actual conflict of interest resulting from the dual representation of defendant and endorsed witness shown by the evidence ... the so-called rule did not impute an actual conflict of interest as in the case *sub judice*. See, e.g., Gordon v. State, supra (State's witness stole and gave murder weapon to defendant and received it back from defendant after murder with one shell missing); State v. Cox, supra (State's witness was an eye witness and participant in the stealing incident for which defendant was charged); Ciarelli v. State, supra (State's witness stole the golf equipment defendant was charged with receiving knowing it to be stolen); State v. Risinger, supra (State's witness stole the beer defendant was charged with receiving knowing it to be stolen ... witness also testified defendant admitted he purchased the beer knowing it to be stolen); State ex rel Fleer v. Conley, 809 S.W.2d 405 (Mo. App. E.D. 1991)(witness witnessed defendant's confession of the murder for which he was charged in the instant case).

Adrian does not quarrel with the label "inherent conflict of interest" in the dual representation of a defendant and an endorsed "eye-witness" of the type found in all the so-called *per se* rule cases .... Ciarelli, Gordon, Cox, Risinger and Fleer ... because the evidence in those cases clearly proved an actual conflict of interest between the defendant and the endorsed witness.

But, Adrian does quarrel with the proposition that the so-called "inherent conflict of interest" rule is absolute, universal and applicable without exception and without regard to evidence to the contrary.

Adrian contends the words "An attorney who represents both the defendant and a prosecution witness in the case against the defendant is representing conflicting interests" should be construed in light of the facts in Ciarelli, Gordon, Cox, Risinger and Fleer and not more ... this conclusionary language was appropriate under the evidence and facts in Ciarelli, Gordon, Cox, Risinger and Fleer. However, this language should not be given the status of precedent authorizing the imputation of a conflict of interest when the evidence does not show an actual conflict of interest exists.

This Court should clarify The Court's 1961 Ciarelli decision by explaining Ciarelli is not authority for *per se* imputed lawyer conflict of interest disqualification in dual representation of a criminal defendant and a state's endorsed witness cases in the absence of evidence showing an actual conflict of interest.

The position taken herein that a lawyer should not be involuntarily disqualified (as opposed to a voluntary withdrawal based upon self-assessed ethical grounds) in the dual representation of a defendant and an endorsed state's witness in a criminal case by imputation of a conflict of interest (as opposed to evidence showing an actual conflict of interest) is well based in federal and state constitutional law decisional precedent and Public Policy considerations.

The United States Supreme Court in Cuyler v. Sullivan, 446 U.S. 335 (1980) held :

"In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance ... But, until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance ... The Court of Appeals granted Sullivan relief because he had shown that the multiple representation in this case involved a possible conflict of interest. We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." Id. at 349-350.

In accord : State v. Weeks, 603 S.W.2d 657 (Mo. App. 1980); Mason v. State, 468 S.W.2d 617 (Mo. 1971).

Missouri courts likewise speak of proving an "actual conflict of interest". See, State v. Johnson, 549 S.W.2d 348, 350-351 (Mo. App. 1977)("Here, however, the initial inquiry must be whether a conflict of interest situation actually existed. [citation omitted]. A conflict of interest such as to deny to a defendant the effective assistance of counsel must be shown by the evidence" and "Absent some showing of a conflict of interest the fact that one attorney from a large public defense organization represents a defendant in a criminal trial, after another staff attorney from the same organization represented a prosecution witness in a concluded and unrelated criminal matter, does not create *per se* conflict of interest at defendant's trial."); Gordon v. State, 684 S.W.2d 888, 891 (Mo. App. 1985)("There may be fact situations in which the representation of a witness is, in a temporal sense, so attenuated from the defendant's case that no conflict could exist".)(Note: In Gordon, state's

endorsed witness not only testified as an eye-witness to the crime involved but also had a criminal plea bargain "deal" to protect resulting from the same crime).

Similarly, the imputation of conflict of interest question has been raised in dual representation of codefendant cases. The law is now well settled that no *per se* prohibition founded on "conflict of interest" exists. See, e.g., Mooring v. State, 501 S.W.2d 7, 11 (Mo. 1973)(This Court said "Similarly, Mr. Shaw's [Sic: the lawyer] observations with respect to the now asserted conflict of interest, Point III, provided ample basis for the court to deny relief on that allegation. The record fails to show that anything was done by counsel at defendant's trial, or foregone by counsel and lost to defendant, which was detrimental to him and which was advantageous to a codefendant; and dual representation does not make such representation illegal *per se*."); Mason v. State, 468 S.W.2d 617, 620 (Mo. 1971)("The mere fact that there was a dual representation of appellant and Bernice Smith, who were initially charged jointly, does not make that representation illegal *per se*. [Citation omitted]. The inquiry here must be whether a conflict of interest of counsel, Mr. Kirwin, actually existed as between his two clients. There must have been done something by counsel, or foregone by counsel and lost to appellant, which was detrimental to him and which was advantageous to his codefendant, Bernice Smith.").

From a Public Policy and common sense standpoint, it is difficult to imagine why a more comprehensive *per se* imputed conflict of interest disqualification rule should apply in a dual defendant-witness representation situation than in a dual representation of codefendants. It shouldn't. But, that's what Respondent Judge did ... and, what is sought to be corrected in this prohibition proceeding.

As a matter of Public Policy the rule of law should require a showing of an actual conflict of interest resulting from the dual representation of defendant and a state's endorsed witness based upon evidentiary facts of record before defendant's counsel can be involuntarily disqualified. There is no place in The Law for an imputed disqualification by the mere dual representation of defendant and an endorsed witness ... that's bad Public Policy.

The State, as movant, had the burden to present evidence at hearing to *prima facie* establish a disqualification ground because a motion does not prove itself. State v. Ervin, 835 S.W.2d 905, 917 (Mo. banc 1992); Fidelity National v. Snow, 26 S.W.3rd 473, 475 (Mo. App. 2000). The State wholly failed to meet this burden because no evidence was received at hearing suggesting Muegler had an actual conflict of interest.

(D) Father's Testimony Not Adverse To Adrian's Legal Interest :

Now turning to the facts of this case. The State says father Kevin Kinder ("Father") was endorsed as a state's witness because he will testify as follows and such testimony is alleged to be "adverse" to Adrian, to wit :(a) Father identified the murder weapon as his gun that he kept in a safe in the master bedroom where mother's body was found, (b) the keys to the safe were not always in his possession and sometimes were in a place accessible to members of the household, including Adrian, (c) the car key found in Adrian's possession at time of arrest was the key that operated mother's car, (d) Adrian did not have a driver's license and Adrian did not have parental permission to drive mother's car, (e) Father was present during behavioral disputes between Adrian and his parents, including disputes between Adrian and mother and (f) Father has no alibi evidence to establish his whereabouts at the time of mother's demise.

But ... Adrian does not dispute any of these facts and will not contest them at trial. These facts are also cumulative of facts that will come into evidence at Adrian's trial through other state endorsed witnesses. None of these facts are material to Adrian's defense. In short, none of this testimony is "adverse" to Adrian's interest.

When asked to comment on the alleged conflict issue, Father testified at hearing "There was no conflict of interest" (Petition Exhibit 3, page 29 line 17) created by Muegler's legal representation of Adrian and representation of Father during deposition. Similarly, Adrian does not believe Muegler's representation of Father presented any Muegler conflict of interest interfering with Muegler's continued representation of Adrian. Petition Exhibit 3, page 13 lines 13-18.

Father also testified Muegler never represented him either before or after the one-shot deposition representation in this case. Petition Exhibit 3, page 28 lines 22-24 and page 29 lines 3-5. Father did not, and does not, know Muegler socially. Petition Exhibit 3, page 28 line 25 and page 29 lines 1-2. All of the legal fees paid to Muegler were paid by Adrian out of a custodial trust bank account in Adrian's name. Petition Exhibit 3, page 30 lines 8-25 and page 31 lines 1-6. Father has not tried to control, direct or participate in formulating Adrian's defense to the criminal charges. Petition Exhibit 3, page 30 lines 4-7. Father never discussed the criminal case against Adrian with Muegler because Muegler always told Father those matters were attorney-client privileged. Petition Exhibit 3, page 33 lines 8-15.

On the positive side of Adrian's defense, Father testified at deposition he never witnessed a physical altercation between Adrian and his mother Sherri (victim) ... "No. He (Sic: Adrian) wouldn't hurt her like that. No. He wouldn't fight with her." Petition Exhibit 2, page 28 lines 4-7. The only time Father ever heard of Adrian putting a hand on mother Sherri was one time ... "she (Sic: mother

Sherri) was going to spite him real good and all he (Sic: Adrian) did was hold her by the wrist and stuff and she said let me go. He wouldn't let her go because he didn't want to get whooped". Petition Exhibit 2, page 28 lines 16-22. Mother Sherri was not afraid of Adrian. Petition Exhibit 2, page 57 lines 1-4. Adrian never had possession of any gun ... and he doesn't know of any instance where Adrian tried to get one of Father's guns. Petition Exhibit 2, page 34 lines 3-11. Father never saw or heard of Adrian having or using a hand gun. Petition Exhibit 2, page 68 lines 5-24. When Adrian was "grounded" for disciplinary reasons Adrian always obeyed the grounding rules. Petition Exhibit 2, page 54 lines 4-6. And, importantly, Adrian denies knowing who killed mother Sherri and Father believes Adrian is telling the truth. Petition Exhibit 2, page 63 lines 8-13.

The State alleges there was an argument between Adrian and mother Sherri the morning of September 9, 2000 ... the date the crime was committed. Father testified otherwise. Father said when he and Sherri got up at approximately 7:00 a.m,. September 9, 2000 Adrian was just walking through the door ... he stayed out all night. Petition Exhibit 2, page 10 lines 16-25. Adrian did not have parental permission to be out all night. Petition Exhibit 2, page 11. There was no "argument" as the State contents ... rather, Father testified what ensued was a "normal father and mother talk to a child that did something wrong". Petition Exhibit 2, page 11 lines 23-25 and page 12 lines 1-9.

Mother Sherri's murder and the house fire happened the early evening of September 9, 2000. Petition ¶2; Answer ¶2. Father has no knowledge of what happened ... he wasn't home September 9, 2000 after approximately 1:30 p.m. -2:30 p.m. ... and, he remained away from the house until circa 5:00 a.m. September 10, 2000. Petition Exhibit 2, pages 16-18.

Therefore, all the evidence before Respondent Judge showed Father's testimony, albeit endorsed as state's witness testimony, was not adverse to Adrian's interest ... and, in fact Father's

testimony supports Adrian's defense theories in the criminal case. There was no actual conflict of interest between Adrian's legal interests and Father's legal interest to truthfully testify.

(E) Missouri Rules of Professional Conduct Not Violated :

Missouri Supreme Court Rule 4, Rules of Professional Conduct Rule 1.7 dealing with conflict of interest provides :

"(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless :

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and,

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless :

(1) the lawyer reasonably believes the representation will not be adversely affected;

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved."

Therefore, The Rule requires as a predicate to "conflict of interest" disqualification either (a) legal representation that is "directly adverse to another client" or (b) legal representation that will "materially limit" a lawyer's responsibilities to another client which will "adversely affect" the client . Neither is present in this case.

All the evidence shows Muegler's representation of Father was a one-shot legal engagement to counsel Father at his deposition. It is unreasonable to assume Muegler obtained attorney-client privileged confidential information from Father as a result of this limited representation which would be detrimental to either Father or Adrian. Muegler's representation of Father at deposition did not materially limit Muegler's professional responsibilities to Adrian one iota. And, when viewed in its entirety, Father's testimony was favorable ... not detrimental ... to Adrian and Adrian's defense in the criminal case.

The facts and circumstances in the case *sub judice* would suggest to a reasonable attorney that Muegler's dual representation of Adrian and Father (a) was not "directly adverse" to Adrian or Father and (b) would not "materially limit" Muegler's professional responsibilities to either Adrian or Father. Certainly, based upon the arguments made at hearing and in this prohibition proceeding, Muegler self-assessed "no conflict of interest".

Therefore, Adrian contends Missouri Supreme Court Rule 4, Rules of Professional Conduct Rule 1.7 does not provide justification for the Respondent Judge's August 30, 2001 disqualification order.

(F) Per Se Disqualification Rule Is Against Good Public Policy :

A Missouri prosecuting attorney has a duty to seek the truth. But, they are typically elected to office and are subject to public pressures. The Public is impressed with high conviction rates ... and, it is generally understood prosecuting attorneys strive to have a high conviction percentage. In general, there's nothing fundamentally wrong with that.

But, the *per se* rule adopted by Respondent Judge and championed by The State (i.e. disqualification of a lawyer from representation of a criminal defendant if the lawyer currently or in the past represented an endorsed state's witness) allows opportunity for prosecutorial mischief and abuse.

For example, one way to achieve a higher conviction rate is to lessen the competition ... i.e. disqualify an experienced defense lawyer in favor of a less experienced lawyer or overworked public defender. In short, "tilt the playing field". That's exactly what the *per se* rule would allow.

All a prosecutor would have to do is "endorse" a defense lawyer's current or past client as a "state's witness" who could testify in the case on some preliminary, background or trivial matter (even uncontested facts) and the *per se* rule would automatically disqualify and remove the experienced lawyer of choice from the case. At that point the defendant will either have to come up with a second attorney's fee to hire another lawyer or accept public defender service which he/she obviously did not want initially.

Such prosecutorial mischief resulting from a *per se* rule would be most dramatically felt in Missouri's rural county areas where (a) the number of experienced trial lawyers is limited, (b) the experienced lawyers in these communities typically do most of the trial work in the area and (c) the likelihood that the experienced lawyer represents, or has represented, a person who the prosecutor could "endorse" is high.

Legal mechanisms, such as the *per se* rule sought by The State and Respondent Judge, are hostile to good Public Policy. Our judicial system is founded on strong advocacy principles ... these principles should not be diluted and made impotent by rules of law fundamentally tilting the playing field in favor of the prosecution.

(G) <u>Conclusions</u> :

Respondent Judge's August 30, 2001 order disqualifying Muegler as Adrian's legal counsel erroneously declared and applied a *per se* disqualification rule which is neither permitted or allowed under either the Sixth Amendment "ineffective assistance of counsel" law or under The Missouri Rules of Professional Conduct. There was no evidence which would support disqualification of Muegler as Adrian's attorney in that there was no evidence of an "actual conflict of interest".

Adrian has no adequate remedy at law and would be irreparably harmed should the writ of prohibition not be made absolute and permanent.

The Court's December 18, 2001 writ of prohibition should now be made absolute.

Point II.

In the alternative to relief under Point I, if The Court finds Muegler had a disqualifying conflict of interest, Relator Adrian Kinder ("Adrian") is entitled to (1) an absolute order prohibiting Respondent Judge from enforcing the August 30, 2001 order disqualifying attorney Muegler from legal representation of Adrian Kinder in State v. Adrian Kinder, Circuit Court of The County of St. Louis, Missouri, Cause No. 00CR-4786 ("Criminal Case") and (2) a supplementary order directing the trial court to conduct a hearing to determine whether Adrian knowingly and voluntarily waives the "ineffective assistance of counsel" issues presented in this case because Respondent Judge committed prejudicial err by not finding or further inquiring whether Adrian knowingly and voluntarily waived the conflict of interest created by Muegler's dual representation of Adrian and state endorsed witness Kevin Kinder at deposition in Criminal case in that no

disqualifying constitutionally based or ethics based conflict of interest is implicated if Adrian knowingly and voluntarily waived the conflict of interest.

(A) Standard of Review :

Prohibition will issue in three situations : (1) where there is a usurpation of judicial power because the trial court lacks either personal or subject matter jurisdiction; (2) to remedy a clear excess of jurisdiction or clear abuse of discretion such that the lower court lacks the power to act as contemplated; (c) situations where a litigant has no adequate remedy at law and would be irreparably harmed should the writ not issue. Chassaing v. Mummert, 887 S.W.2d 573, 577 (Mo. banc 1994).

Prohibition is the appropriate remedy in cases involving lawyer "conflict of interest" disqualification issues. State ex rel Fleer v. Conley, 809 S.W.2d 405 (Mo. App. E.D. 1991); State ex rel Wallace v. Munton, 989 S.W.2d 641 (Mo. App. 1999).

The standard of review is whether the trial court erroneously declared or applied the law in the disqualification proceeding. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). The issue is reviewed *de novo*. Id.

(B) Adrian Can Waive Conflict of Interest :

If The Court determines a disqualifying conflict of interest did exist in this case, and if The Court further finds there is insufficient evidence of record showing Adrian voluntarily and knowingly waived the attorney conflict of interest, then, in the alternative to relief under Point I Adrian should be afforded opportunity to waive the conflict in order to permit continuation of Muegler's representation of Adrian as Adrian's attorney of choice in Criminal Case.

"There is ... no deprivation of constitutional right if the defendant knowingly consents to being represented by an attorney who also represents a prosecution witness." Ciarelli v. State, 441 S.W.2d 695, 697 (Mo. 1969); State ex rel Fleer v. Conley, 809 S.W.2d 405 (Mo. App. 1991).

Obviously, Adrian wants Muegler to continue representation of Adrian in Criminal Case. Petition Exhibit 3, page 13 lines 3-5. Adrian knew Muegler represented father Kevin Kinder at deposition. Petition Exhibit 3, page 13 lines 10-14. Adrian does not believe Muegler's representation of Father presented any Muegler conflict of interest interfering with Muegler's continued representation of Adrian. Petition Exhibit 3, page 13 lines 13-18.

Adrian respectfully contends these facts *prima facie* established a voluntary and intelligent waiver of any "conflict of interest" problem that might otherwise have been presented by Muegler's dual representation of Adrian and Father. Accordingly, Respondent Judge was powerless to properly disqualify Muegler on "conflict of interest" grounds because Adrian waived the Sixth Amendment right to assistance of legal counsel unencumbered by a conflict of interest. Ciarelli v. State, supra.

There is no present rule or constitutional obligation imposed upon a trial court to *sua sponte* conduct a conflict of interest waiver hearing. Cuyler v. Sullivan, 446 U.S. 335, 346-347 (1980). But, some federal circuits, including the Eight Circuit, have established a requirement that in every federal case in which there is multiple representation the trial court must question the defendant on the record about whether there has been a knowing and intelligent waiver of any potential conflict of interest resulting from the dual representation. Henderson v. Smith, 903 F.2d 534, 537 (8th Cir. 1990). At least one Missouri appellate decision, State v. Kretzer, 898 S.W.2d 639, 643 (Mo. App. W.D. 1995), observed : "Unlike the Eighth Circuit, the Missouri Supreme Court has not utilized its

supervisory authority to establish a procedural requirement that the trial courts of this state inquire into the waiver issue in every case involving multiple representation."

Relator invites The Court to exercise its' supervisory power by adopting a Henderson v. Smith type rule. Such a rule would be in the interest of judicial economy by expediting appeals and post-conviction Rule 24.035 proceedings involving "ineffective assistance of counsel" issues founded upon alleged attorney conflict of interest.

(C) Conclusion :

If this Court finds (1) Muegler had a conflict of interest (2) which was not knowingly and voluntarily waived by Adrian at hearing, then Adrian respectfully requests The Court to make the writ of prohibition absolute with a supplementary order directing the trial court to make a Henderson v. Smith type inquiry in open court to allow waiver evidence to be presented. This, Adrian contends, would be a proper balancing of Adrian's interest, Sixth Amendment "ineffective assistance of counsel" law and the ethical considerations under Missouri Supreme Court Rule 4, Rules of Professional Conduct Rule 1.7 .

VI.

Conclusions

Based upon the facts, points, authorities and argument contained in this Relator's Brief Point I, the December 18, 2001 preliminary writ of prohibition should now be made absolute preventing and

prohibiting Respondent Judge from enforcing the August 30, 2001 order disqualifying Muegler from serving as Adrian's legal counsel in State v. Adrian Kinder, Circuit Court of The County of St. Louis, Missouri, Cause No. 00CR-4786.

In the alternative to relief under Relator's Brief Point I, based upon the facts, points, authorities and argument contained in this Relator's Brief Point II, if The Court finds a conflict of interest did exist which was not effectively waived by Adrian Kinder, then the December 18, 2001 preliminary writ of prohibition should now be made absolute preventing and prohibiting Respondent Judge from enforcing the August 30, 2001 order disqualifying Muegler from serving as Adrian's legal counsel in State v. Adrian Kinder, Circuit Court of The County of St. Louis, Missouri, Cause No. 00CR-4786 and further ordering the trial court to conduct a hearing on the record inquiring into whether Adrian Kinder knowingly and voluntarily waived his Sixth Amendment right to assistance of legal counsel unencumbered by a conflict of interest.

_____

Arthur G. Muegler, Jr. MoBar #17940

Rule 84.06(c) Certification

Pursuant to Rule 84.06(c) the undersigned hereby certifies this Relator's Brief (a) contains the information required by Rule 55.03, (b) complies with the limitations contained in Rule 84.06[b], (c) contains 8,207 words and 987 lines determined by The Microsoft Office 2000 Word computer program count [program used to prepare this Relator's Brief] and (d) pursuant to Rule 84.06[g] the disks containing this Relator's Brief that are filed with The Court and served on the parties have been scanned for viruses and are virus free.

Dated this 11th day of February, 2002.

_____

Arthur G. Muegler, Jr. MoBar #17940
Attorney for Relator Adrian Kinder

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel	)	
ADRIAN KINDER,	)	
	)	
Relator	)	
	)	
vs.	)	Case No. SC84082
	)	
HON. MAURA B. MC SHANE,	)	
Circuit Judge of The St. Louis County	)	
Circuit Court,	)	
	)	
Respondent	)	

Certificate of Service

The undersigned certifies two (2) true copies of Relator's Brief herein [together with one (1) 3 ½" computer diskette, scanned for virus, containing the same which is virus free] and this Certificate of Service were served February 9, 2002 by First Class U.S. Mail, postage prepaid, addressed to Respondent Judge's legal counsel, S. Bart Calhoun, Assistant St. Louis County Prosecutor, 100 South Central, Clayton, Missouri 63105 and (314)615-2610.

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