

**IN THE MISSOURI SUPREME COURT**

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**CASE NO. SC88709**

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**STATE ex rel. HEIDI PARKER BURNS,  
PETITIONER,**

**v.**

**THE HONORABLE WILLIAM S. RICHARDS,  
RESPONDENT,**

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**BRIEF OF RESPONDENT**

**Syd Weybrew #20345  
Holt County Prosecuting Attorney  
102 W. Nodaway  
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**Attorney for Respondent**

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## ARGUMENT

### STANDARD OF REVIEW

A writ of prohibition is an extraordinary remedy and should be used with “great caution, forbearance, and only in cases of extreme necessity”. *State ex rel. Ag Processing Inc. v. Thompson*, 100 S.W.3d 915, (Mo. App, 2003).

A writ of prohibition may issue if the appellate court determines that the trial court has usurped judicial power because the trial court lacks either personal or subject matter jurisdiction, or that there was a clear excess of jurisdiction or abuse of discretion such that the trial court lacks the power to act as contemplated, or that absolute irreparable harm may come to a litigant, as in a case in which a material question of law is decided erroneously and would escape review or cause a party considerable hardship and expense, or when the writ is appropriate to prevent unnecessary, inconvenient, and expensive litigation. *State ex rel. Linthicum v. Calvin* 57 S.W.3d 855, 857 (Mo banc 2001).

## CONFLICT OF INTEREST

The issue of whether or not there is a conflict of interest on the part of the prosecuting attorney is decided by a determination of whether the Nodaway County case and the Holt County case are the same or substantially related. Rule 4-1.9(a). Neither party argues that the cases are the same case.

The relation of the two cases is that both involve controlled substances and both involve allegations that relator has violated the laws of the State of Missouri regarding controlled substances. The witnesses are not the same, the acts alleged to have committed by the defendant are not the same or similar, the events are geographically separate and five months elapsed between the withdrawal of Syd Weybrew and the filing of the Holt County complaint.

The respondent is the Judge in both cases as trial Judge in the Nodaway County case and as Judge of the Preliminary Hearing in the Holt County case. He is in a unique position to decide if the cases are substantially related. Respondent did not clearly exceed his jurisdiction in making the determination that the cases were not substantially related.

## CONFIDENTIAL INFORMATION

Relator argues that having confided confidential information, in a previous representation, to the person now representing the State of Missouri in a matter adverse to her interest, without more, disqualifies that person from prosecuting the case against her. Unless that information bore upon issues involved in the case being prosecuted, disqualification would not be appropriate. Were it enough to justify disqualification that a client had imparted confidential information to an attorney at some time in the past then it would follow that having represented someone, in any manner, that attorney could not thereafter represent any party in a matter adverse to the interests of the prior client. The realities of practice in rural areas lead to multiple contacts with litigants. The expansion of Rule 4-1.9, as urged by relator, would deny people access to counsel of their choice.

Rule 4-1.9(b) does not apply unless confidential information, obtained from prior representation is used adversely against the relator. Since relator has concluded that the information given is of a defense common to both cases, it would be necessary that the information be used to the detriment of the relator. It would appear that relator is arguing for the ability to surprise

the prosecution with a defense. The purpose of the discovery process is to allow both the defendant and the state to avoid surprise.

Relator argues that *In re Goodman*, 210 S.W.3d 805 (Tex.App. 2006) has substantially the same facts as the instant case. In the *Goodman* case the defendant testified as to the nature of the information imparted to the attorney during the previous representation. In this case the relator has simply plead a common defense exists and asks that respondent accept that without explanation of the nature of the defense. It would not have been necessary for relator to have stated her defense in detail to the respondent but something more than concluding there is a common defense should be required to allow respondent to make a finding of conflict.

In *State v. Wilson*, 195 S.W.3d 23, (Mo.App., 2006) the defendant's motion for new trial did not contain fact-based allegations of what confidential information was used by the prosecutor's office. There was no evidence offered by respondent in *State v. Wilson* Id. regarding the confidential information used by the prosecutor's office. That bare assertion of threatened use of confidential information without more was not sufficient to require respondent to sustain relator's motion. Relator was offered the opportunity to adduce evidence but chose not to and submitted

the Motion to Disqualify without establishing the nature of the defense alleged.

### IRREPARABLE HARM

Rule 84.22 directs that “No original remedial writ shall be issued by an appellate court in any case wherein adequate relief can be afforded by an appeal...”. Appeal of a conviction in the instant case would be allowed.

If there is a common defense that was conveyed to the prosecuting attorney, it can be assumed that the relator would raise that defense in trial. If the defense was utilized, then relator would not be irreparably harmed. Should it be discovered, at trial, that confidential information was used by the prosecutor to the detriment of the relator, appeal would be an available remedy. The necessity to appeal does not raise to the level of suffering considerable hardship and expense. Should appeal be held to constitute considerable hardship and expense then every pretrial motion would be subject to challenge by writ of prohibition.

### CONCLUSION

The Nodaway County and Holt County cases are not substantially related.

The relator did not present to the respondent evidence of substantial relation between the Holt County and Nodaway County cases.

The allegation of common defense was a conclusion without support and did not allow the respondent to find that the prosecuting attorney would use confidential information, if any, to the disadvantage of the relator.

Relator is not threatened with irreparable harm by the ruling of respondent.

The respondent did not exceed his jurisdiction or abuse his discretion in overruling the Motion to Disqualify of the relator.

Respectfully Submitted

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## RULE 4-1.9: DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interest are material adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 4-1.6 and 4-1.9 (c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

## 84.22. Granting Original Writs

(a) No original remedial writ shall be issued by an appellate Court in any case wherein adequate relief can be afforded by an appeal or by application for such writ to a lower Court.

(b) If a judgment has been entered and an appeal of the judgment is pending or the time for filing an appeal has not expired, no original remedial writ shall be issued by an appellate Court, or any district thereof, with respect to any matter collateral to the appeal unless the appeal is pending in the Court and district, if the appeal has been filed, or the Court and district would have jurisdiction of the appeal if one is timely filed. For purposes of this Rule 84.22 (b), a motion filed pursuant to Rule 24.035 or Rule 29.15 is a matter collateral to the appeal.

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CERTIFICATE PURSUANT TO  
MO.R.CIV.PRO.84.06

I, Syd Weybrew, counsel for Respondent certify upon my oath in accordance with Mo.R.Civ.Pro. 84.06 as follows:

1. That to the best of my knowledge, information and belief formed after an inquiry reasonable under the circumstances that

a) The claims, requests, demands, contentions and arguments in Respondent's Brief are not presented or maintained for any improper purpose such as to harass, cause unnecessary delay or needless increase in the cost of litigation;



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---

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY THAT A COPY OF THE ABOVE NOTED BRIEF  
WAS MAILED BY FIRST CLASS MAIL TO:

G. SPENCER MILLER  
ATTORNEY AT LAW  
206 E. THIRD STREET  
MARYVILLE, MO 64468

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SYD WEYBREW #20345  
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