IN THE MISSOURI SUPREME COURT

SC96601

STATE OF MISSOURI, ex rel., SHAYNE HEALEA

Relator,

v.

THE HONORABLE FREDERICK TUCKER,

Respondent.

RELATOR'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This action follows transfer from the Court of Appeals for the Eastern District of Missouri after that Court granted a Permanent Writ of Mandamus directing Respondent to disqualify the entire Office of the Attorney General as special prosecutor and appoint a new special prosecutor, seal portions of the Special Master's Report containing privileged attorney-client communications, hold a hearing to determine whether the Columbia Police Department should have to purge their servers of the recorded attorney-client conversation and to notify the Columbia Police Department of the hearing, as they are not a "party" to the suit. This Court is vested with jurisdiction through its supervisory authority of Districts of the Missouri Court of Appeals and its power to issue original remedial writs. Mo. Const. art. V, § 4.

STATEMENT OF FACTS

1. Relator, Shayne Healea, is presently charged with five felony counts in the Circuit Court of Shelby County, Missouri, on transfer from the Circuit Court of Boone County Missouri, on four counts of assault second degree and one count of leaving the scene of an accident.

2. Respondent, the Honorable Rick Tucker, is the Circuit Judge of Shelby County assigned the case of ***State v. Shayne Healea***, **Case No. 15SB-CR00046**. (Relator's Ex. A, p. 12)

3. The cause is scheduled for trial commencing January 3-5, 2018 in Shelby County, Missouri.

4. This case results from an automobile accident that occurred in a privately-owned parking lot in Columbia, Missouri on October 25, 2014, which resulted in his arrest by Columbia Police Department (hereafter CPD). (Relator's Ex. H, p.41) Relator has not previously and does not now waive his right to privileged communications with his attorney.

5. Upon arrival at CPD, Relator was read implied consent and requested to speak with counsel. Respondent was provided with his cellular telephone and Relator twice asked to speak somewhere privately with his attorney. (Relator's Ex. H, p. 42) The arresting officer placed Relator in a holding cell. (Relator's Ex. H, p. 42) Without Relator's knowledge, both sides of the entire 15 to 20 minute conversation was recorded

on department audio and video equipment. (Relator's Ex. H, p. 42) The recording was then provided to the Attorney General's Office (AGO). Relator received the recording in discovery from the Office of the Attorney General.

6. On or about July 14, 2016, Relator appeared before respondent to take up Relator's concern that the call he made from his cellular telephone, to his attorney, the night of his arrest was intentionally recorded by CPD officers. (Relator's Ex. A, p. 9 and Relator's Ex. C, p. 17) Assistant Attorney General Julie Tolle advised Relator and the Respondent, she had investigated the complaint and spoken to the arresting officer, as well as the Chief of Police, and assured the trial court no such recording was ever made. (Relator's Ex. C, p. 17)

7. On or about October 3, 2016, Relator appeared before Respondent to take up Relator's Motion to Suppress, previously filed and noticed for hearing on that date. (Relator's Ex. A, pp. 7-8) Relator, prior to taking up the Motion to Suppress, filed with the court, a memorandum of law alleging the Columbia Police Department had violated Relator's 6th Amendment Right to a fair trial and attorney-client privilege by recording the entirety of his conversation with his attorney the night of his arrest, then burning the conversation to disk (audio and video) and ultimately providing that disk to the Office of the Attorney General, the special prosecuting authority in the case against Relator. (Relator's Ex. C, pp. 16-19) The attorney-client privileged material was provided to the Attorney General sometime prior to the Relator being indicted by a grand jury. The Grand Jury indictment was filed November 21, 2014.

8. Upon presentation of the 6th Amendment violation complaint, Respondent

stated he would just listen to the attorney-client recording and if something needed to be suppressed, he would make that decision after hearing the recording. Relator advised the Respondent it would be improper for the trial court to invade the attorney-client privilege and continue to be the judge on the matter and requested a special master to determine the issues presented in the complaint. Respondent, as well as the State, agreed to have the matter reviewed by a special master. (Relator's Ex. C, pp. 7-8) Senior Judge Hadley Grimm was appointed Special Master to hear the matter.

9. On or about December 21, 2016, Relator appeared before the Special Master for a hearing on the 6th Amendment violation. (Relator's Ex. A, pp. 4-5) Assistant Attorney General Darrell Moore appeared on behalf of the State as Assistant Attorney General Tolle was no longer an employee of the Attorney General's Office. (Relator's Ex. H, p. 41) The hearing was closed to the public, due to the nature of the material to be discussed being privileged material. (Relator's Ex. H, p. 41) Evidence was adduced and the Special Master took the matter under advisement.

10. Pursuant to Rule 68.01, the Special Master filed his report and exhibits with the Shelby County Circuit Court on December 29, 2016. The report and exhibits were filed under seal to protect the privileged material. (Relator's Ex. A, p. 4)

11. The sealed report was mailed to counsel for the State and for the Relator. (Relator's Ex. A, p. 4)

12. Upon receiving the Special Master's report, Relator, for the first time, became aware the Special Master was unable to understand the entirety of the conversation between the Relator and his attorney. (Relator's Ex. L, p. 55) Relator also

became aware the Special Master's report contained portions of the actual content of the attorney-client phone call, rather than simply finding whether or not the recording was in fact an attorney-client phone call and whether or not its contents were prejudicial to the Relator, in the hands of the Columbia Police Department and Attorney General. (Relator's Ex. H, p. 43) The Special Master, however, did find a 6th Amendment Violation occurred. (Relator's Ex. H, pp. 44-45) The Special Master did not make a recommendation as to what the remedy should be due to the violation, other than stating some remedy short of dismissal would be adequate. (Relator's Ex. H, p. 45)

13. On January 11, 2017, Relator filed a request with Respondent asking for a recording or transcript of Relator's closed hearing, for the purpose of preparing his objections and assisting in his defense. (Relator's Ex. J, p. 47) On January 12, the State filed a document objecting to releasing the recording to Relator. (Relator's Ex. K, p. 48) No copy of the hearing was ever provided to Relator and it therefore could not be provided by Relator as part of the record.

14. Relator Timely filed his objections to the Special Master's report, pursuant to Rule 68.01(g)(2), on January 26, 2017. (Relator's Ex. A, p. 13)

15. Respondent, on December 28, 2017, ordered a closed hearing to discuss the proposed remedy for the violation. (Relator's Ex. A, p. 4) The hearing was later scheduled for February 9, 2017. (Relator's Ex. A, p. 3) Prior to the hearing, Relator, upon observing press in the courtroom, again asked the Respondent to close the hearing to the public and Respondent declined to do so. Respondent then conducted the hearing on his proposed remedy in an open courtroom that contained members from three or four

press agencies. During the hearing, the Respondent divulged portions of the specific content of Relator's conversation with his attorney on the night of his arrest, in open court. (Respondent's Ex. 2, pp. 3-4, 7) Respondent stated the content of the conversation was no different than the conversation any person arrested would typically have with their attorney, so no harm could come from public disclosure of the same. (Respondent's Ex. 2, p. 19) Respondent further stated the Attorney General needed to listen to the recording, so they could properly argue their case to the Court. (Respondent's Ex. 2, pp. 21-22) Assistant Attorney General Moore declined, as he correctly believed that would be improper. (Respondent's Ex. 2, pp. 24-25) Respondent, at no time took up, or even acknowledged Relator's objections, and ruled the State was not allowed to talk about the refusal at trial as a remedy for the 6th Amendment Violation. (Respondent's Ex. 2, pp. 1-31) Counsel for Relator attempted to argue the object of Relator's objections to the Special Master's report but Respondent advised Relator would have to file a Motion to Reconsider and present further evidence. (Respondent's Ex. 2, p. 15) No Hearing on Relator's objections to the Special Master's report was held. Respondent stated, on the record, he was simply bound by the report findings and could not take any action other than to follow what the report stated. (Respondent's Ex. 2, p. 15)

16. On February 17, 2017, Relator filed a Motion to Reconsider, again stating his objections and basis for the objections to the Special Master's Report. (Relaor's Ex. A, p. 2 and Ex. M, pp. 60-66) Relator requested findings of fact and conclusions of law in his filing. (Relator's Ex. M, p. 66) The motion to reconsider and Motion to Suppress were taken up March 2, 2017. (Relator's Ex. A, p. 1) Respondent advised counsel for

Relator, if he wanted him to reconsider, he would have to tell Respondent what Relator said to him on the phone during the conversation. (Respondent's Ex. 3, pp. 15-18) Present in the Courtroom were the Assistant Attorney General prosecuting the case, his lead investigator on the case, a bailiff and court reporter. Respondent made multiple requests for counsel for Relator to divulge the attorney-client communication between Relator and counsel on the night of his arrest. (Respondent's Ex. 3, pp. 15-18) Counsel for Relator advised Respondent he could not do that, because the privilege was not his to waive and the Prosecutor was sitting in the room. (Respondent's Ex. 3, p. 16) Respondent again stated he believed it was not fair for the Attorney General to have to defend the violation unless he had the chance to listen to the recording so he could properly argue his position. (Respondent's Ex. 3, p. 17) Respondent then declined to take up Relator's objections or Motion to Reconsider because counsel for Relator would not divulge the content of the attorney-client phone call to him in open court. (Respondent's Ex. 3, p. 17-18)

17. The Motion to Suppress was then taken up and the State sought to offer evidence of a blood draw conducted the night of Relator's arrest. (Respondent's Ex. 3, pp. 46-47) The arresting officer testified he lost the original warrant and was unable to find it or file a copy signed by the issuing Judge, Judge Christine Carpenter, with the Court upon filing his return. (Respondent's Ex. 3, p. 50) The State offered a certified court file containing no signed copy of the alleged search warrant. (Respondent's Ex. 3, p. 97) The State also tendered an affidavit by the Judge who was alleged to have issued the warrant. (Respondent's Ex. 3, p. 97) The affidavit stated Judge Carpenter had no

independent recollection of signing a warrant for a blood draw on Relator on the night of Relator's arrest. (Respondent's Ex. 3, pp. 104-105) Relator objected, directing the court to case law and RSMo. 542.296.10(1) and (6), which states when a warrant shall be deemed invalid. (Respondent's Ex. 3, pp. 99-100) Respondent found the blood evidence was admissible, despite the statute which clearly states the unsigned warrant is invalid. (Respondent's Ex. 3, p. 114)

18. Respondent advised the parties he was going to unseal and release the special master's report to the public. (Respondent's Ex. 3, p. 21) Relator objected, due to the report containing attorney-client privileged information. (Respondent's Ex. 3, pp. 22-23) Respondent advised the parties he believed no harm would come of releasing the report. (Respondent's Ex. 3, pp. 22-23) Respondent, at the request of Relator, agreed to not release the report until March 8, 2017, to give Relator time to seek a writ. (Respondent's Ex. 3, p. 26)

19. Relator thereafter timely applied for a Writ of Prohibition or in the alternative Mandamus in the Eastern District Court of Appeals. On March 7, 2017, the Eastern District issued a Preliminary Writ of Mandamus ordering the trial court to take no further actions in the matter.

20. On June 6, 2017, the Eastern District issued a permanent Order in Mandamus ordering the trial court to disqualify the Office of the Attorney General and appoint a special prosecutor to replace them as the prosecuting authority, permanently seal portions of the Special Master's Report containing attorney-client privileged information and hold a hearing on whether the Columbia Police Department should be

required to purge their servers of the attorney-client privileged conversation they recorded in violation of Relator's Constitutional rights.

21. On October 5, 2017, this Court granted Respondent's application for transfer.

POINTS RELIED ON

I. Relator is entitled to a writ of mandamus ordering Respondent to disqualify the Attorney General's Office as special prosecutor and appoint a new special prosecutor because the Attorney General's Office violated Relator's rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections Ten and Fifteen of Article I of the Missouri Constitution in that the Columbia Police Department and the Attorney General's Office have possessed an audio and video recording of Relator's privileged communications with his attorney that took place on the night of Relator's arrest in which Relator discussed substantive facts relating to the alleged crimes under the reasonable belief that his communication with his attorney was private and confidential.

Statutes and Supporting Cases:

§ 56.110 RSMo. Supp. 2014

Rule 98.02(b)(2)

State v. Lemasters, 456 S.W.3d 416 (Mo. 2015)

State v. Ross, 829 S.W.2d 948 (Mo. 1992)

State v. Wacaser, 794 S.W.2d 190 (Mo. 1990)

SRI Fuchs v. Foote, Jr., 903 S.W.2d 535 (Mo. 1995)

II. Relator is entitled to a writ of mandamus ordering Respondent to permanently seal portions of the Special Master's report which contain the specific content of privileged attorney-client communications because releasing those portions of the Special Master's report that contain privileged attorney-client communications violates Relator's rights under the Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Sections Ten and Fifteen of Article I of the Missouri Constitution in that the Special Master, in considering the content of an audio and video recording made at the Columbia Police Department of the Relator speaking to his attorney after his request to do so privately, included portions of the content of that privileged communication in his report which the Respondent has ordered be made public.

<u>Statutes and Supporting Cases</u>:

Mo. Const., art. V §4.1

State ex rel. Winkler v. Goldman, 485 S.W.3d 783 (Mo. App. E.D. 2016)

Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1 (1986)

Transit Cas. Co. ex rel. Pulitzer Publ'g Co. v. Transit Cas. Co ex rel. Intervening Emps., 43 S.W.3d 293 (Mo banc 2001)

State ex rel. Pulitzer, Inc. v. Autrey, 19 S.W.3d 710 (Mo. App. E.D. 2000)

III. Relator is entitled to a writ of mandamus ordering Respondent to grant Relator's request to order the Columbia Police Department to purge their server and case files of the video containing Relator's recorded conversation with his attorney because the continued possession of audio and video recordings of Relator's privileged attorney-client communications by the Columbia Police Department constitutes a violation of Relator's rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Sections Ten and Fifteen of the Missouri Constitution in that the Columbia Police Department is an agent of the State that has surreptitiously obtained audio and video recordings of the Relator's privileged communication with his attorney despite Relator's request to speak privately with counsel in an unrecorded area and the Columbia Police Department continues to maintain possession of said recording.

Statutes and Supporting Cases:

§ 600.48, RSMo.

State ex rel. Polytech, Inc. v. Voorhees, 895 S.W.2d 13 (Mo. banc 1995)

State ex rel. Peabody Coal Co. v. Clark, 863 S.W.2d 604 (Mo. banc 1993)

State ex rel. Noranda Aluminum, Inc. v. Rains, 706 S.W.2d 861 (Mo. banc 1986)

IV. Relator is entitled to a writ of mandamus ordering Respondent to hold a hearing on Relator's timely filed objections to the Special Master's report and issue the findings of fact and conclusions of law requested because Respondent violated Supreme Court Rule 68.01(g)(3) requiring that a hearing be held upon the timely filing of objections to a special master's report in that Respondent did not hold a hearing on Relator's objections to the Special Master's report in this case.

Statutes and Supporting Cases:

Rule 68.01(g)(3)

Stewart v. Jones, 58 S.W.3d 926 (Mo. App. S.D. 2001)

V. Relator is entitled to a writ of mandamus ordering the Respondent to adhere to the plain language of Section 542.276, RSMo, because Respondent did not follow the statute stating when a search warrant shall be deemed invalid in that Respondent has applied an exception to the statutory requirements that a valid search warrant be signed by the issuing judge that the legislature did not expressly or impliedly create.

Statutes and Supporting Cases:

§ 542.276, RSMo Supp. 2010

Rule 34.01

State v. Berkwit, 689 S.W.2d 763 (Mo. App. E.D. 1985)

Argument

I. Relator is entitled to a writ of mandamus ordering Respondent to disqualify the Attorney General's Office as special prosecutor and appoint a new special prosecutor because the Attorney General's Office violated Relator's rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections Ten and Fifteen of Article I of the Missouri Constitution in that the Columbia Police Department and the Attorney General's Office have possessed an audio and video recording of Relator's privileged communications with his attorney that took place on the night of Relator's arrest in which Relator discussed substantive facts relating to the alleged crimes under the reasonable belief that his communication with his attorney was private and confidential.

Standard of Review

"Missouri appellate courts have the authority to issue and determine original remedial writs, including the extraordinary writ of mandamus." *State ex rel. Winkler v. Goldman*, 485 S.W.3d 783, 789 (Mo. App. E.D. 2016) (citing Mo. Const., art. V, § 4.1). A writ of mandamus will only lie when there is a clear, unequivocal, and specific right. *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 805 (Mo. Banc 2015). A writ of mandamus enforces an existing right. *State ex rel. Isselhard v. Dolan*, 465 S.W.3d 496, 498 (Mo. App. E.D. 2015). "Mandamus is appropriate where a party has no remedy through

appeal, and ordinarily does not control the exercise of discretionary powers." *Winkler*, 485 S.W.3d at 789.

The only case in Missouri that addresses the issue of disqualification of a prosecutor's office for a Sixth Amendment violation is *Winkler*. *Id.* at 791. In *Winkler*, the Eastern District Court of Appeals indicated that in such a case, the court deferred to the trial court on factual issues, but reviewed the application of law to those facts *de novo*. *Id*. at 789. The *Winkler* court applied strict scrutiny to the request for disqualification of the prosecutor's office and resolved "any doubts in favor of disqualification." *Id.* at 791.

Discussion

We will begin by discussing this Court's opinion in *State v. Lemasters*, 456 S.W.3d 416 (Mo. 2015), the case on which Respondent relies heavily as its basis for remaining the prosecuting authority in this matter. Respondent frames the holding in *Lemasters* as being contrary to the Eastern District's ruling that the present case warranted disqualification of the entire Attorney General's Office as the Special Prosecutor in this matter. Relator disagrees. *Lemasters* is distinguishable in many respects. First, the *Lemasters'* Court agreed with the notion that disqualification "nevertheless is necessary if the failure to disqualify the entire prosecutor's office creates an appearance of impropriety and casts doubt on the fairness of the trial." *Id.* at 422. The Court further noted the standard for disqualifying the prosecutor was the same standard applied to judicial disqualification. "This Court has held that a trial judge must

disqualify herself when a reasonable person would have factual grounds to find an appearance of impropriety and doubt the impartiality of the court." *Id.* at 423. "The same standard applies here. Accordingly, even if an assistant prosecutor's conflict is not imputed to the remainder of the office under the Rules of Professional Conduct, the remainder of the prosecutor's office must be disqualified if a reasonable person with knowledge of the facts would find an appearance of impropriety and doubt the fairness of the trial." *Id*. In Lemasters, Attorney Cheney, Lemasters' prior public defender, went to work for the Newton County Prosecuting Attorney's Office, who was prosecuting Lemasters. Cheney was screened completely from Lemasters' prosecution. The Court noted that she did not participate in or assist with the prosecution, nor did she divulge any confidential information.

In the case presently before the Court, the AGO has not had such a screening in place for the three years this case has been pending. It is only now that they have been removed by the Eastern District that they offer to erect such a screen, after the fact. While not having a screen in place, the AGO has investigated the matter by approving and directing application to be made for search warrants, presented the facts to a grand jury, obtained an indictment, prepared witnesses for deposition testimony, prepared witnesses for the motion to suppress and prepared witnesses for the Special Master hearing. All of these actions were done by the AGO, while in possession of Relator's privileged attorney-client telephone conversation which the police captured, preserved and provided to the AGO in this case.

Additionally, the *Lemasters*' Court recognized that the screening process is not always sufficient when they stated, "there may be cases in which proof of a thorough and effective screening process (like that used by the NCPAO in this case) will not be sufficient to prevent a reasonable person from concluding, based upon all the facts and circumstances, that an appearance of impropriety casts doubt on the fairness of the trial." *Id.* at 425. Furthermore, and specifically applicable to the case at hand, the Court elaborated when it stated, "Even a thorough and successful screening process may not be sufficient to remove the appearance of impropriety and dispel the resulting doubt when it is the prosecutor herself, i.e., "the boss," who supposedly is being screened from the remainder of her employees, rather than one assistant being screened from the others." *Id.* This is highly relevant to the case at hand. The original Special Prosecutor in this matter was Assistant Attorney General Julie Tolle. As we have learned throughout the litigation of this matter, Assistant Attorney Generals are not vested with the authority to make decisions such as plea offers or even agreeing to an extension of time for Relator to file this brief. Such authority must come down from the boss. Deputy Attorney General Darrell Moore is, as far as front-line Assistant Attorney Generals are concerned, the boss. As Deputy Attorney General, he is the Supervisor of the Public Safety Division which handles all criminal prosecutions. Also assigned to this matter, in the capacity of Investigator, is Steve Hayden of the Attorney General's Office, who has actively assisted in the investigation and prosecution since its inception back in October of 2014. Mr. Hayden is the Chief Investigator for the Office of the Attorney General and supervises the other investigators the office employs. He, too, is effectively the boss. After

Assistant Attorney General Tolle assured the trial court that she had spoken with the Chief of Police and arresting officer about Relator's concern about being recorded by the Columbia Police Department while talking to his attorney, AAG Tolle, as an Officer of the Court, assured the Trial Court no such recording was ever made. Subsequently, before the Trial Court, AAG Tolle was found to have the recording in her possession, in her case file. AAG Tolle could have chosen to divest herself of the recording, which she had possessed for approximately two years, that day by turning it over to Relator in open court. Instead, she retained the recording. Shortly thereafter, she left her employment with the AGO. Before leaving, she passed the case file, including the recording of Relator's attorney-client telephone call on to her replacement as special prosecutor, Deputy AG Darrell Moore. Deputy Moore entered his appearance December 2, 2016, and ultimately tendered his copy of the conversation to Relator in open court on February 9, 2017. Even if this case was now assigned to a different AAG and a different Investigator, an effective screen could not be erected. This is exactly what the *Lemasters* Court described when addressing how a successful screening process would not remove the appearance of impropriety. Screening employees from the boss is not an effective screen to remove the taint they themselves have created.

This Court's holdings in *State v. Ross*, 829 S.W.2d 948 (Mo. 1992) and *State v. Wacaser*, 794 S.W.2d 190 (Mo. 1990) also support disqualification of the Attorney General's Office from this case because they have had potential, as well as actual, access to privileged information that could have been used to Relator's detriment. In *Ross*, this

Court ordered the entire office of the Clay County Prosecuting Attorney be disqualified from prosecuting the matter. The Ross Court noted, "the conduct of the prosecution in a criminal case involving conflicts of interest "like Caesar's wife, ought to be above suspicion." *Ross,* at 951 (*Quoting State v Burns*, 332 S.W.2d 736, 742 (Mo. 1959). "In this case, the interconnections between the prosecuting attorney's office and the law firm handling appellant's related civil case create such suspicions and appearances of impropriety and show that members of the prosecuting attorney's office had the potential access condemned in *Wacaser*." *Id.* The *Wacaser* Court also recognized the need to disqualify a prosecutor who possesses privileged information. "It goes without saying, however, that a prosecutor should not serve if he has access to privileged information which might be used to the defendant's detriment." *Wacaser,* at 195.

Next, Respondent complains the Eastern District greatly overstated the appearance of impropriety in two separate quotes contained in their Opinion. Respondent takes issue first with the statement "More than two years after receiving the recording, the recording was finally relinquished to Relator." Slip Op., at 10. Next, Respondent complains of the statement "The lengthy delay in surrendering the recording to Relator reflects poorly on the criminal justice system." *Id* at 10-11. In support of his assertion the Eastern District greatly overstated the appearance of impropriety, Respondent asserts the recording of the attorney-client conversation was turned over in discovery. Relator agrees the recording of his conversation with his attorney was turned over in discovery, however, Respondent confuses the meaning of "disclosure", with what it means to "relinquish" or "surrender"

something. Despite Respondent's assertion in his application for transfer to this Court, the Eastern District Opinion never indicated that the AGO failed to disclose the recording to Relator. Rather, the Eastern District Court focused on finding an appearance of impropriety based on the length of time in which the AGO maintained continued possession and access to the recording. In sum, the mere disclosure of something she should not possess is insufficient to remove the taint and appearance of impropriety. Instead, it is incumbent on the State and agents of the State to timely relinquish or surrender such material. That is to say they must divest themselves of possession of the privileged material, not simply copy it, send the copy to defendant and then continue possession of the same. Additionally, the agent of the State, the Columbia Police Department, continues to possess the recording, as it has since before the inception of the case against Relator. The Eastern District clearly did not err when they concluded that a reasonable person would believe an appearance of impropriety exists under these facts.

Finally, the Respondent poses the question to this Court that if they cannot prosecute a prosecutor, who can? The answer to his question is simply most any attorney. This Court addressed the question of the Court's inherent power to appoint a special prosecutor in *SRI Fuchs v. Foote, Jr*. 903 S.W.2d 535 (Mo. 1995). "Furthermore, the power to appoint a special prosecutor to replace Laster is not limited by § 56.110 or any other statute. It is instead, a long-standing power inherent in the court, to be exercised in the court's sound discretion, when for any reason, the regular prosecutor is disqualified. *Id* at 537 (*Quoting State v. Jones*, 306 Mo. 437 (1924) and *State v. Sweeney*,

93 Mo. 38 (1887). It is also noteworthy to recognize the special prosecutor statute found in § 56.110, RSMo, was amended by the legislature in the 2014 Senate Bill 621 to add the following language: "**Such special prosecutor shall not otherwise represent a party other than the state of Missouri in any criminal case or proceeding in that circuit for the duration of that appointment and shall be considered appointed prosecutor for purposes of section 56.360.**" This amendment allows for the appointment of private attorneys as special prosecuting attorneys, provided they do not concurrently engage in criminal defense work in the Circuit in which they are appointed to the special prosecution. Relator is presently being prosecuted in the 41st Judicial Circuit Court. That Circuit Court is comprised of both Shelby and Macon Counties. Consequently, any attorney who is not otherwise prohibited from practicing law in the capacity of a special prosecutor, such as a sitting Judge, who is not presently engaging in defending any criminal case in Shelby or Macon County, would be available to prosecute this case.

Additionally, Respondent argues that because Relator was elected by the body of elected prosecuting attorneys to be President of the Missouri Prosecutor's Association, no prosecutor's office in the State of Missouri could handle the case because of Relator's close personal ties with every prosecutor in the state. First, this baseless assertion is not supported by any evidence, statute, rule or case law. Second, the assertion assumes that every prosecutor in the State of Missouri lacks the ability, if appointed in this case, to determine whether he or she personally has a conflict that would prevent them from

prosecuting the matter. While some of Missouri's prosecutors may not be suitable to handle the prosecution, the assertion that every single prosecutor in the State has a conflict, other than those located in the Office of the Attorney General's Office, lacks merit.

Finally, Respondent argues the disqualification of their office as special prosecutor complicates the appeal process as well as civil proceedings in the form of a quo warranto action to remove Relator from office. First and foremost, it is important to recognize that Respondent has put the cart before the horse. Relator has not been convicted of any felony offense and Relator is not presently accused of usurping the Office of the Prosecuting Attorney in Moniteau County, therefore the issue Respondent has raised is not yet ripe and amounts to a request for this Court to issue an advisory opinion. Furthermore, Relator is highly aware of his duty to vacate the Office of the Prosecuting Attorney of Moniteau County, should a final judgement of conviction of any felony offense be rendered against him. Relator acknowledged this duty in his original writ petition to the Eastern District Court of Appeals.

Assuming this Court believes an advisory opinion on this matter is prudent, Respondent would direct the Court back to its own holding in the *Fuchs* case. *Fuchs* is squarely on point, as one of the issues presented was that of the appointment of a special prosecutor in a quo warranto against the Cass County Sheriff. In *Fuchs*, the appellant complained of the appointment of a special prosecutor to proceed in a civil proceeding in quo warranto. This Court responded to that complaint stating "Finally, Foote claims that

§ 56.110 authorizes the appointment of special prosecutors only in criminal cases, not in civil cases such as the quo warranto proceeding at hand. As stated, however, the appointments were not based on § 56.110, but on the trial court's inherent power. Because the prosecution of a civil action in the nature of a quo warranto is a proper function of prosecuting attorneys, Rule 98.02(b)(2), we find no reason to disallow the appointment of special prosecutors for that purpose." *Fuchs*, at 537-538. Simply stated, Respondent's assertions that disqualification of the AGO in the matter at hand would present a situation where a prosecutor would not be available for purposes of the post-conviction appeal process and quo warranto proceedings is also without merit. The Missouri Courts, through their inherent authority to do so, have the ability to appoint a special prosecutor in those matters should the need arise.

II. **Relator is entitled to a writ of mandamus ordering Respondent to permanently seal portions of the Special Master's report which contain the specific content of privileged attorney-client communications because releasing those portions of the Special Master's report that contain privileged attorney-client communications violates Relator's rights under the Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Sections Ten and Fifteen of Article I of the Missouri Constitution in that the Special Master, in considering the content of an audio and video recording made at the Columbia Police Department of the Relator speaking to his attorney after his request to do so privately, included portions of the content of that privileged communication in his report which the Respondent has ordered be made public.**

Standard of Review

A writ of prohibition should only issue in one of three circumstances: "(1) to prevent the usurpation of judicial power when the trial court lacks jurisdiction; (2) to prevent the court from acting in excess of jurisdiction or to remedy an abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not made available in response to the trial court's order." *State ex rel. Dep't of Soc. Servs., Div. of Children Servs. v. Tucker*, 413 S.W.3d 646, 647 (Mo. Banc 2013).

In this case, Respondent announced his intention to make public a Special Master's Report that contained privileged attorney-client communications. "Application of the attorney-client privilege is a matter of law, not judicial discretion, and is properly a matter for prohibition." *State ex rel. Chase Resorts, Inc. v. Campbell*, 913 S.W.2d 832, 838 (Mo. App. E.D. 1995). "Where disclosure of 'privileged material' is alleged, prohibition is available, since an erroneous disclosure cannot be repaired on appeal." *State ex rel. Polytech, Inc. v. Voorhees*, 895 S.W.2d 13, 14 (Mo. banc 1995). A disclosure of privileged attorney-client communications exceeds the authority of the Respondent and would result in irreparable harm to Relator, so that the issuance of a writ of prohibition is appropriate in this case.

Discussion

Generally, there is a presumption that court proceedings and records are open to the public. *Winkler*, at 788. However, this presumption can be rebutted if there is a "compelling justification" for sealing court records. *Id.* (citing *Transit Cas. Co. ex rel. Pulitzer Publ'g Co. v. Transit Cas. Co. ex rel. Intervening Emps.*, 43 S.W.3d 293, 301 (Mo. Banc 2001)). The public's right to access court proceedings and records is "qualified and must be carefully balanced with the defendant's absolute Sixth Amendment right to a fair trial[.]" *State ex rel. Pulitzer, Inc. v. Autrey*, 19 S.W.3d 710, 713 (Mo. App. E.D. 2000) (citing *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 9 (1986).

In this case, Relator is involved in an ongoing criminal case. The privileged communications revealed in the Special Master's Report would, if made public, impact his Sixth Amendment rights and his due process rights relating to his pending trial. Relator could not hope to remedy this violation through any appeal. Therefore, a writ of prohibition ordering Respondent to seal that portion of the Special Master's Report disclosing the content of any privileged attorney-client communications is necessary.

III. Relator is entitled to a writ of mandamus ordering Respondent to grant Relator's request to order the Columbia Police Department to purge their server and case file of the video containing Relator's recorded conversation with his attorney because the continued possession of audio and video recordings of Relator's privileged attorney-client communications by the Columbia Police Department constitutes a violation of Relator's rights under the Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Sections Ten and Fifteen of the Missouri Constitution in that the Columbia Police Department is an agent of the State that has surreptitiously obtained audio and video recordings of the Relator's privileged communication with his attorney despite Relator's request to speak privately with counsel in an unrecorded area and the Columbia Police Department Continues to maintain possession of said recording.

Discussion

The Eastern District Court of Appeals has ordered Respondent to hold a hearing on the issue of the propriety of the Columbia Police Department's continued possession of the privileged recording in question and issue a ruling pertaining to Relator's request to purge their computer servers and files of the same.

Contemporaneous with Relator's arrest and transport to the Columbia Police Department on October 25, 2014, an intentional invasion of his attorney-client privilege was conducted by agents of the Columbia Police Department. Relator was initially told he would have to conduct his cellular call to his attorney, upon requesting counsel in response to being read implied consent, in the presence of three officers. Relator declined and requested twice to speak privately with counsel. Relator was eventually placed in a holding cell to make his call. Relator, in the holding cell, engaged his attorney in a telephone call that lasted approximately twenty minutes. Unknown to Relator, police used a surveillance camera and microphone in the holding cell to capture audio and video of Relator's call. The microphone was of a high enough quality it was able to capture both Relator and his attorney's sides of the telephone call. Police downloaded the captured conversation to CPD servers and burned it to disk and gave that disk to the special prosecutor in this matter, the Missouri Attorney General. The disk was the only piece of evidence that was not logged as evidence. The office of the Attorney General possessed the same for over two years. During that time, they obtained a grand jury indictment against Relator, prepared witnesses for grand jury testimony, prepared witnesses for deposition testimony, motion to suppress testimony and presumably trial. The attorney-client privileged conversation remains on CPD servers as of the filing of this writ application, despite Relator's request that Respondent order CPD to purge their servers of the same.

The right to counsel is a clearly established right. "Where disclosure of privileged material is alleged, prohibition is available, since an erroneous disclosure cannot be repaired on appeal". *Polytech, Inc.*, at 13, quoting *State ex rel. Peabody Coal Co. v. Clark*, 863 S.W.2d 604, 608-09 (Mo. Banc 1993). The *Peabody* Court also acknowledged the irreparably harmful nature of the disclosure of privileged material against one who seeks to protect it. "Prohibition is an extreme remedy. It is appropriate in this case because the trial court exceeded its authority by ordering discovery of privileged material. Once the privilege is discarded and the privileged material produced, the damage to the party against whom discovery is sought is both severe and irreparable. The damage cannot be repaired on appeal." *Id.* See *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861, 862-3 (Mo. Banc 1986) (Writ is appropriate where issue is wrongly decided by trial court, aggrieved party "may suffer considerable hardship" and there is no adequate remedy by appeal).

The Eastern District's Opinion in this matter noted, "In sum, The Special Master, found the CPD violated (1) Relator's sixth Amendment rights, (2) the CPD's own policies, and (3) Missouri law (§ 600.048.3). Relator clearly has a right to keep his privileged conversations with his attorney confidential." Slip Op., at 12. Additionally, the Court stated "We see no justification for the CPD retaining access to the surreptitiously recorded conversations between Relator and his attorney." *Id*. Relator's ability to receive a fair trial, under the present circumstances, is severely compromised as the State's primary witnesses have invaded the attorney-client privileged communication

to which they have retained access since before this case was filed. As a result, they have received confidential information they did not otherwise possess. Relator presented evidence at the Special Master's hearing of the numerous officers of the CPD who have accessed Relator's file and potentially also invaded the privileged communication and received information they should not possess. Relator again asserts that the protected conversation involved much more than a discussion of whether or not to submit to a breath test in the 15 to 20-minute conversation with Counsel. As such, this Court should issue an order which fully insulates Relator's Constitutional protections to due process, a fair trial and effective assistance of counsel.

IV. **Relator is entitled to a writ of Mandamus ordering Respondent to hold a hearing on Relator's timely filed objections to the Special Master's report and issue the findings of fact and conclusions of law requested because Respondent violated Supreme Court Rule 68.01(g)(3) requiring that a hearing be held upon the timely filing of objections to a special master's report in that Respondent did not hold a hearing on Relator's objections to the Special Master's report in this case.**

Discussion

In what the Southern District Court of Appeals described as a case of first impression, they found a trial courts adoption of a special master's report, without first taking up objections to the report, filed pursuant to Supreme Court Rule 68.01(g)(3), constitutes reversible error. That decision was rendered in *Stewart v. Jones*, 58 S.W.3d 926 (Mo. App. S.D. 2001).

Relator timely filed his objections to the Special Master's report in this matter. Respondent did not take up those objections and hold a hearing on the matter prior to adopting the Special Master's Report. The report failed to address all the issues presented by Relator and was not based on the complete conversation between Relator and his counsel because the Special Master was unable to personally understand a large portion of the conversation between Relator and his attorney. Additionally, the report failed to establish to what burden the State was being held or determine whether they met

that burden and whether the Columbia Police Department acted intentionally in invading the attorney-client privilege. These failures prevented the Trial Court or any reviewing Appellate Court from properly tailoring a remedy for the violations because the report was not based on the complete content of the attorney-client phone call the police surreptitiously obtained and failed to establish the State's burden so that an Appellate Court could review the Trial Court's decision on what remedy to tailor. The case should be remanded to the Trial Court or Special Master so that those objections can be taken up and ruled on for the purpose preserving an accurate complete record for review. Relator requested the sound recording of the Special Master's hearing but it was never provided, therefore, it is not present in the record before this Court.

V. Relator is entitled to a writ of mandamus ordering the Respondent to adhere to the plain language of Section 542.276, RSMo., because Respondent did not follow the statute stating when a search warrant shall be deemed invalid in that Respondent has applied an exception to the statutory requirements that a valid search warrant be signed by the issuing judge that the legislature did not expressly or impliedly create.

Discussion

Relator acknowledges the line of case law which states neither mandamus nor prohibition are the proper form of relief for pre-trial evidentiary rulings in criminal proceedings. However, those cases involve the Trial Court's application of broad discretion in determining search and seizure issues pursuant to the Fourth Amendment to the United States Constitution which prevents unreasonable searches and seizures, as well as a Trial Court's application of the court-created exclusionary rule and good-faith doctrines. That is not the case Relator presents here. Relator appeals to this Court's ability to issue a writ pursuant to Respondent's failure to adhere to Missouri Statute 542.276. "The standard of review for writs of mandamus and prohibition … is abuse of discretion, and an abuse of discretion occurs where the Circuit Court fails to follow applicable statutes." *State ex rel. SGI Hotels, L.L.C. v. City of Clayton*, 326 S.W.3d 484 (Mo. App. E.D. 2010). "The standard of review for a writ of mandamus is an abuse of discretion. *State ex rel. Unnerstall v. Berkemeyer*, 298 S.W.3d 513, 517 n.5 (Mo. banc 2009). Where, however, the foundation of the writ is based upon interpretation of a

statute, we review the statute's meaning *de novo*. *Id*." Pitts v. Williams, 315 S.W.3d 755 (Mo. App. W.D. 2010).

The issue presented by Relator is one that has escaped review by this Court. Equally, the interpretation of the Missouri statute in question is important to the administration of justice in the criminal courts of this state. This Court need not engage in any pre-trial evidentiary ruling in order to square the present issue of first impression. Relator asks this Court to provide guidance and instruction to all courts of whether or not the plain language of § 542.276, RSMo, means what it says in the plain language contained therein, or if the language is subject to exceptions which are not contained in the statute.

The only case on point referencing this matter is presented in *State v. Berkwit*, 689 S.W.2d 763 (Mo. App. E.D. 1985). In *Berkwit*, the Court held "good faith exception did not apply wherein validity of warrant was based on statute, rather than Fourth Amendment." *Id*. Additonally, the *Berkwit* Court correctly stated "We may not ignore the legislative provisions defining an invalid search warrant. The legislature and not this court must add the exception to the statutes if it is to be applied." *Id*. at 766. The case has not been overruled and this Court has never addressed the issue.

Additionally, recognizing a writ is not the proper remedy for pre-trial evidentiary rulings, Relator asserts that in the context of the issues present in the case presently before this Court, matters of evidence are so closely akin and intertwined to the Court's

duty to preserved Relator's right to due process, a fair trial and a remedy for the invasion into Relator's attorney-client privilege in violation of the Sixth Amendment right to counsel and to confer privately with the same, that the general rule regarding the unavailability of evidence-related writ requests should not apply as this is not a request based on Fourth Amendment jurisprudence. Missouri Supreme Court Rule 34.01 supplies this Court's rules pertaining to search and seizure. That rule states that the provisions of chapter 542, RSMo, shall govern procedure in searches and seizures. The statute at issue is contained in Chapter 542, RSMo and by extension Missouri Supreme Court Rule 34.01. Relator asks this Court to take up this matter and construe the meaning of § 542.276, RSMo.

Conclusion

Wherefore, Relator prays that this Court enter the following writs:

(1) A Writ of Mandamus ordering Respondent to disqualify the Attorney General's Office as special prosecutor and to appoint a new special prosecutor;

(2) A Writ of Mandamus ordering Respondent to permanently seal those portions of the Special Master's Report containing privileged attorney-client communications between Relator and his attorney;

(3) A Writ of Mandamus ordering Respondent to grant Relator's request to order the Columbia Police Department to purge its records of any and all copies of the audio and video recording of Relator's privileged communications with his attorney;

(4) A Writ of Mandamus ordering Respondent to hold a hearing on Relator's timely filed objections to the Special Master's Report and issue the findings of fact and conclusions of law requested by Relator;

(5) A Writ of Mandamus ordering the Respondent to follow the plain language of Section 542.276, RSMo, in considering the admissibility of evidence obtained as a result of the search warrant allegedly issued in this case.

Respectfully submitted,

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Certificate of Compliance with Rule 84.06(c)

Undersigned counsel hereby certifies that this brief complies with the requirements of Missouri Rule 84.06(c) in that the brief contains 8,503 words as directed by Rule 84.06(c). The word count was derived from Microsoft Word.

Brief was prepared using Norton Anti-Virus and were scanned and certified as virus free.

/s/ Shane L. Farrow
Shane L. Farrow

CERTIFICATE OF SERVICE

The undersigned hereby certified that a true and correct copy of the Substitute Brief of Relator and Appendix was served on Respondent via the Missouri Courts E-filing System on November 6, 2017 and the undersigned further certifies that he has signed the original and is maintaining the same pursuant to Rule 55.03(a).

Respectfully submitted,

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