SC96601

In the Supreme Court of Missouri

State ex rel. Shayne Healea,

Relator,

v.

The Honorable Frederick Tucker,

Respondent.

On Petition for a Writ of Mandamus

Respondent's Substitute Brief

JOSHUA D. HAWLEY
Attorney General

D. John Sauer
First Assistant and Solicitor
Darrell L. Moore
Deputy Attorney General
Gregory M. Goodwin
Assistant Attorney General
Mo. Bar No. 65929
P.O. Box 899
Jefferson City, MO 65102-0899
(573) 751-7017
(573) 751-3825 (Facsimile)
Gregory.Goodwin@ago.mo.gov
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Rules

Other Authorities

STATEMENT OF FACTS

This case presents the question of whether the disqualification of the entire Missouri Attorney General's Office from prosecuting an elected prosecutor on serious felony charges is required because the Office was unknowingly and inadvertently in possession of recorded privileged communications between the defendant and his attorney, which were promptly produced in discovery and which no member of the Missouri Attorney's Office has ever reviewed. The answer to this question is no.

The facts, in the light most favorable to Respondent Tucker and the Special Master are as follows:

Relator Healea is the elected prosecutor of Moniteau County, Missouri. The State, through the Attorney General, has charged that on October 25, 2014, Healea, while intoxicated, drove his truck into a restaurant window, injured four patrons, and then fled the scene of the crime. Record on Appeal, Relator's Exhibit H, p. 41.[1] Later that night Healea was arrested and was taken to the Columbia Police Department. *Id*. Healea was offered a breath test to determine his blood-alcohol content. Healea asked to speak with his

---

[1] Respondent cites the documents transferred from the Missouri Court of Appeals as "Record on Appeal" followed by the exhibit submitted to that Court, followed by the page number.

attorney, and the Columbia Police Department provided Healea with his telephone and Healea was escorted to a holding cell. *Id*. at 42. Unbeknownst to Healea, the holding cell was under audio and video surveillance, and the Columbia Police Department generated a recording of Healea's conversations with counsel. *Id*.

That same night, Healea was taken to a medical facility, where he was given a signed warrant authorizing the seizure of his blood. Supp. L.F. 1; App. A1.[2] Officers from the Columbia Police Department accompanied him to the facility, and their time with Healea was documented on their personal body cameras. While on camera, Healea can been seen inspecting the warrant and asking an officer which judge signed the warrant. *Id*. The officer can be heard to say that the warrant was signed by Judge Christine Carpenter. *Id*.[3] Judge Carpenter's signature is visible on the warrant. *Id*. Thereafter, the Boone County Prosecuting Attorney filed a motion to appoint

---

[2] Filed contemporaneously with this brief is a supplemental legal file, consisting of one disk that contains footage from an officer worn body camera. Respondent cites this disk as "Supp. L.F. 1." The disk is also provided to the Court as Respondent's Appendix, which is cited as "Resp. App. A1."

[3] On August 31, 2017, Judge Carpenter retired from active service on the Boone County Circuit Court.

the Attorney General's Office, and the motion was sustained. The Attorney General was appointed as special prosecutor on October 29, 2014, within four days of the incident. On October 30, 2014, the Attorney General's Office requested case materials from the Columbia Police Department.

During the week of November 17, 2014, the Columbia Police Department provided case materials to the Attorney General's Office for discovery purposes. Record on Appeal, Healea's Exhibit F, p. 2. The discovery materials included a DVD labeled "Building Video Copy #1," along with other recordings. *Id.* Unbeknownst to the arresting officer or the Attorney General's Office, this DVD labeled "Building Video Copy #1" actually contained the recording of Healea's privileged conversation with his counsel at the Columbia Police Department on the night of the incident, October 25, 2014. *Id.*

On December 14, 2014, the Attorney General's Office produced case materials in discovery to the defendant. *Id.* These case materials included a copy of the DVD labeled "Building Video Copy #1." *Id.* Healea has stipulated that "[o]n December 11, 2014, the Missouri Attorney General's Office responded to Relator's request for discovery. In that response, the Missouri Attorney General's Office provided a copy of a disk labeled 'Building Video Copy #1.'" Record on Appeal, Joint Stipulation, at 1. He has also stipulated that "[t]he original disk was labeled by the Columbia Police Department, and

was provided to the Missouri Attorney General's Office by the Columbia Police Department." *Id.*

For the next two years, neither party raised any issue relating to the privileged recording. *Id.* Record on Appeal, Healea's Exhibit F, at 3. Though the DVD had been in his possession since December 4, 2014, Healea did not raise the issue of the privileged recording until October 3, 2016. *Id.* Until this moment, the State was unaware of the existence of the video because the State had not viewed the DVD labeled "Building Video Copy #1." *Id.*

On October 3, 2016, Healea filed a motion alleging that the Columbia Police Department had improperly recorded Healea while in the holding cell, and asserting that the blood evidence should be excluded. Record on Appeal, Healea's Exhibit A, p. 8. Healea asked Respondent Tucker to appoint a Special Master for consideration of Healea's complaints. Senior Judge Hadley Grimm was appointed Special Master and held a hearing on the motion on December 21, 2016. *Id*. at 4. The Special Master took evidence, reviewed the recording of Healea in the holding cell, and took testimony from Columbia Police Department officers as well as Steve Hayden, Chief Investigator from the Missouri Attorney General's Office. *Id*. at 41–43. The Special Master also received statements from Assistant Attorney General Tolle (the first prosecutor appointed to the case) and Deputy Attorney General Darrell Moore that they had not watched the recording of Healea in the holding cell

and that they did not have personal knowledge of the contents of the recording. *Id.* at 44; Healea's Exhibit F, p. 24. It is thus undisputed that no member of the Attorney General's Office has ever reviewed the recording of Healea's privileged conversation with his attorney on the night of the incident. *See id.*; *see also* Record on Appeal, Healea's Exhibit F, at 2.

On December 29, 2016, the Special Master issued his report. The Special Master determined that the Columbia Police Department had violated its policy, Section 600.048, RSMo, and the Sixth Amendment to the United States Constitution by recording Healea while he was in the holding cell speaking with his attorney. *Id.* at 45. The Special Master reported that no matters of trial strategy could be heard on the recording, and that "the audio portion [of the recording] is not of good quality; portions of [Healea's] conversation were able to be understood, but other parts were not; most of the attorney's conversation was unintelligible or completely inaudible on the tape." *Id.* at 42. Based on the Special Master's recommendations and factual findings, there is no evidence that any member of the Missouri Attorney General's Office ever viewed the disk.

Upon receiving the Special Master's report, Healea filed various objections to the Special Master's report. *Id.* Respondent Tucker held a hearing on February 9, 2017. *Id*; Record on Appeal, Respondent's Exhibit 2. Over Healea's objections, Respondent Tucker declined to disqualify the

Missouri Attorney General's Office. Healea then filed a motion to reconsider Respondent Tucker's ruling on the Special Master's Report. Record on Appeal, Healea's Exhibit L, p. 49–59. Respondent Tucker held a hearing on that motion on March 2, 2017, and Respondent Tucker denied the motion. Record on Appeal, Respondent's Exhibit 3.

Additional facts necessary to understand Healea's claims are set forth in the argument section, when appropriate.

ARGUMENT I

This Court should not disqualify the entire Missouri Attorney General's Office because a reasonable person with knowledge of the facts and circumstances would not find an appearance of impropriety if the Attorney General's Office continued as prosecutor, in that the Attorney General's Office timely produced the privileged communications in discovery and no member of the Attorney General's Office has ever reviewed them. – Responds to Healea's Point I.

In his first argument for mandamus relief, Healea asserts that the Missouri Attorney General's Office must be disqualified from prosecuting his case. Healea's Br. 20–29. This argument has no merit for at least three reasons.

First, there was no actual wrongdoing by the Missouri Attorney General's Office, and a reasonable person with knowledge of all the facts and circumstances would not find an appearance of impropriety if the case was prosecuted by the Missouri Attorney General's Office. Rather, the undisputed facts show that the Attorney General's Office received a copy of the recorded communications with the vague and misleading label "Building Video Copy #1" and promptly produced the recording to Healea in discovery in late 2014. No member of the Attorney General's Office ever reviewed the recording, and

Healea can cite no evidence to the contrary. In other words, the Office came into possession of the recordings unknowingly and promptly produced them without ever reviewing them. There is no actual or apparent impropriety in the Office's behavior, and thus no objective grounds for disqualification.

Second, even if there are some members of the Missouri Attorney General's Office who this Court believes should not prosecute the case, then an ethical screen, not complete disqualification, would be all that is necessary to dispel any appearance of impropriety. This Court and other courts have frequently endorsed the use of ethical screens in such circumstances.

And *third*, the complete disqualification of the Attorney General's Office would be particularly inappropriate in this case, where the defendant is the elected prosecutor of Moniteau County and was, at the time of the alleged offense, the president-elect of the Missouri Association of Prosecuting Attorneys. The Attorney General functions in effect as a prosecutor of last resort in Missouri, handling cases when elected prosecuting attorneys are conflicted. If the Attorney General's Office is disqualified, Judge Tucker will face a daunting task in identifying a conflict-free prosecutor to proceed with the case. But it is imperative as a matter of public policy that *some* prosecutor be available to prosecute an elected prosecutor accused of serious crimes. Further, an order disqualifying the Attorney General's Office would needlessly complicate any post-conviction proceedings in this case, such as

direct appeal, post-conviction review, habeas proceedings, and/or a quo warranto action, all of which are the responsibility of the Attorney General.

Standard of Review

A trial court's ruling on a motion to disqualify the prosecuting attorney is reviewed for an abuse of discretion. *State v. Lemasters*, 456 S.W.3d 416, 420 (Mo. banc 2015). An abuse of discretion occurs when a trial court's ruling is "clearly against the logic of the circumstances ... and is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration." *Id.*; *see also Nelson v. State,* 521 S.W.3d 229, 234–35 (Mo. banc 2017). If reasonable people can disagree "as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *Id.* (quoting *State v. Taylor*, 134 S.W.3d 21, 26 (Mo. banc 2004). Disqualification of the prosecutor's office requires a finding that a reasonable person with knowledge of all the facts and circumstances would find an appearance of impropriety. *Id.* at 423.

Analysis

A. There is no appearance of impropriety by allowing the Missouri Attorney General's Office to prosecute Healea, the Moniteau County Prosecuting Attorney.

In *State v. Lemasters*, this Court explained that disqualification of a prosecuting attorney is necessary only when a reasonable person with

knowledge of all the facts and circumstances would identify an appearance of impropriety that casts doubt on the fairness of the trial. *Lemasters*, 456 S.W.3d at 425. The Attorney General's continued involvement in this case does not raise an appearance of impropriety.

As this Court emphasized in *Lemasters*, this is an objective test. "[A]n appearance of impropriety judged only from the defendant's perspective cannot be sufficient for relief." 456 S.W.3d at 423. "Instead, the touchstone for claims that present a real threat to the apparent fairness is what knowledge of all the facts and circumstances would suggest to a reasonable person." *Id.* Here, the "facts and circumstances" to be considered by "a reasonable person" must include the facts that an attorney for the Attorney General's Office inadvertently came into possession of privileged communications without knowledge or fault, never reviewed them, and promptly produced a copy of them to the defendant during routine discovery. These facts do not generate an appearance of impropriety that warrants disqualification of the entire Missouri Attorney General's Office. On the contrary, as in *Lemasters*, "there are no facts that—if known to a reasonable person—would create an appearance of impropriety," and there are "facts that precluded any appearance of impropriety that otherwise might have cast doubt on the fairness of [the defendant's] trial." *Id.* at 424.

Healea attempts to argue that an appearance of impropriety is created by a previous attorney's mistaken assertion that the recording did not exist. Healea's Br. 24. Healea is incorrect. There is no evidence that anyone viewed the recording and the attorney's mistaken assertion flowed from her lack of knowledge about the recording. Rather, the fact that "AAG Tolle, as an Officer of the Court, assured the Trial Court no such recording was ever made," *id.*, confirms that AAG Tolle was not aware of and had never reviewed the recording labeled "Building Video Copy #1." And Healea was in possession of the recording for nearly as long as the Attorney General's Office. A person with knowledge of these facts would reasonably assume that neither party knew it was in possession of the recording.

This Court also explained in *Lemasters* that even if an appearance of impropriety is created, subsequent actions can "dispel[] that appearance" and can "remove[]" doubt about the fairness of the trial. *Id.* at 425. Here, there are no facts that create an appearance of impropriety in the first place. But even if there were, the subsequent actions of the Attorney General's Office in this case would dispel any appearance of impropriety. For instance, despite invitations to do so, Deputy Attorney General Moore refused to review the recording. *See* Record on Appeal, Respondent's Exhibit 2, p. 21, 24–25; Record on Appeal, Respondent's Exhibit 1, p. 19. In fact, it was Deputy Attorney General Moore's idea to relinquish the recording. Record on Appeal,

Respondent's Exhibit 2, p. 25. The efforts taken by Deputy Attorney General Moore dispel any potential appearance of impropriety.

One additional fact should be considered to dispel any appearance of impropriety: the fact that the recording did not contain any matters of trial strategy and that the Special Master determined that Healea was not prejudiced. To be sure, this Court has explained that no actual prejudice is necessary to create an appearance of impropriety. *Lemasters*, 456 S.W.3d at 423 n.6 (citing *State ex rel. Burns v. Richards*, 248 S.W.3d 603 (Mo. banc 2008)). Other jurisdictions will disqualify the prosecutor on an alleged Sixth Amendment violation only on a showing of prejudice. *See, e.g., State v. Lenarz,* 22 A.3d 536, 542 (Conn. 2011) (describing a rebuttable-presumption-of-prejudice test); *State v. Bain*, 872 N.W.2d 777, 790 (Neb. 2016) (applying a rebuttable presumption of prejudice only when the State obtains confidential trial strategy).

Although prejudice is not necessary to demonstrate an appearance of impropriety under Missouri law, the clear absence of prejudice weighs heavily in favor of dispelling any such appearance. In this case, the Special Master indicated that no matters of trial strategy were discussed. Healea's App. at A3. Respondent Tucker—and the Attorney General—agree that the recording should never have been made. But the Special Master's finding that the recording did not contain any maters of trial strategy, coupled with

the fact that no member of the Missouri Attorney General's Office has listened to the recording, weigh in favor of dispelling any potential appearance of impropriety.

So, all the facts and circumstances in the case demonstrate that the Attorney General's continued prosecution of Healea does not create an appearance of impropriety nor cause a reasonable person with knowledge of all the facts and circumstances to doubt the fairness of the trial.

B. Even if there were an appearance of impropriety—which there is not—imposition of an ethical screen on attorney's who have had contact with the case would dispel such an appearance.

Even if this Court were to find that there is an appearance of impropriety in this case—which there is not—then total disqualification of the Missouri Attorney General's Office would not be necessary because this Court can order the imposition of an ethical screen, which would dispel any appearance of impropriety.

In *Lemasters*, this Court explained that "there *may* be cases in which proof of a thorough and effective screening process ... will not be sufficient...." *Lemasters*, 456 S.W.3d at 425. In other words, in most cases, the use of an ethical screen will be sufficient to dispel any appearance of impropriety. *Id.* Here, Healea asserts that an ethical screen will not suffice because the

alleged appearance of impropriety is connected to Deputy Attorney General Moore, who Healea refers to as "the boss." Healea's Br. 23. Healea is mistaken. While Deputy Attorney General Moore supervises attorneys, the Attorney General was duly elected, the Attorney General is the ultimate source of authority, and the Attorney General is "the boss." This portion of Healea's argument is inspired by *Burns*, 248 S.W.3d 603. But *Burns* in not applicable to the facts of this case.

In *Burns*, the newly-elected prosecutor was not allowed to prosecute the defendant because the newly-elected prosecutor had very recently represented the defendant on similar charges. *Burns*, 248 S.W.3d at 605. In *Lemasters*, this Court explained that a *Burns*-type fact pattern could not be cured by the use of an ethical screen. *Lemasters*, 456 S.W.3d at 425. In *Lemasters*, the Court clarified that when the Court referenced the "prosecutor" in *Burns*, the Court was referring to "the elected prosecutor" or "the boss." *Id*. The facts in *Burns* means that the case is not applicable here.

In this case, Deputy Attorney General Moore is not the elected prosecutor—that would be Attorney General Hawley. Further, Attorney General Hawley was not in office until January 2017, well after the conversation was recorded and only shortly before Deputy Attorney General Moore divested himself of the recording. And even if Attorney General Hawley had been in office the entire time, then Healea could still not

demonstrate a similarity to *Burns* because no member of the Attorney General's Office has ever watched the recording. In short, *Burns* does not require disqualification of the entire Attorney General's Office.

Healea also relies on this Court's opinion in *State v. Ross*, 829 S.W.2d 948, 949 (Mo. banc 1992), in an effort to disqualify the entire office. Healea's Br. 23. But *Ross* is not applicable to this case for several reasons.

In *Ross*, two part-time assistant prosecutors also worked together in a private law firm. *Ross*, 829 S.W.2d at 949–50. One part-time assistant prosecutor was prosecuting the defendant while one part-time assistant prosecutor was defending the defendant in a civil action arising from the crime. *Id*. In *Lemasters*, this Court explained that an ethical screen would not have dispelled any appearance of impropriety in the *Ross* case because of the concurrent representation and because of the "interconnectedness" of the prosecuting attorney's office and the civil firm. *Lemasters*, 456 S.W.3d at 423–24. No such factual situation exists here.

Furthermore, this Court found facts in *Lemasters* dispelled any appearance of impropriety, but also found that there were no such facts in *Ross*. *Lemasters*, 456 S.W.3d at 424. In this case, Deputy Attorney General Moore's actions of not watching the video (despite invitations to do so) dispel any appearance of impropriety. *See* Record on Appeal, Respondent's Exhibit 2, p. 21, 24–25; Record on Appeal, Respondent's Exhibit 1, p. 19. In fact, it

was Deputy Attorney General Moore's idea to relinquish the recording. Record on Appeal, Respondent's Exhibit 2, p. 25. Moreover, in *Ross* and *Lemasters*, a member of the office had personal knowledge of privileged facts. Not so here. No person in the Missouri Attorney General's Office has any personal knowledge as to the content of the recording of Healea.

If this Court believes that every member of the Missouri Attorney General's Office who has worked on the original case and these writ proceedings must be disqualified, then an ethical screen could still be imposed. The Attorney General's Office includes numerous other prosecutors who could do an effective job in this case. All the evidence in this case points to the fact that no member of the office has ever viewed the recording. It is undisputed that Deputy Attorney General Moore divested the office of its only copy on February 9, 2017. There are Assistant Attorneys General who were hired after February 9, 2017. These employees could be easily screened from contact with Deputy Attorney General Moore, Assistant Attorney General Goodwin, and other members of the office who have had contact with the case. Like the ethical screen in *Lemasters*, the imposition of such a screen would be sufficient, to a reasonable person with knowledge of all the facts and circumstances, to dispel any appearance of impropriety.

C. Disqualification is particularly inappropriate in this case because the Attorney General's Office is the prosecutor of last resort, and it will be difficult to locate other conflict-free prosecutors to proceed against a fellow elected prosecuting attorney.

Disqualification is particularly inappropriate in this case because the Missouri Attorney General's Office serves as the prosecutor of last resort in the Missouri system, and because Healea is an elected county prosecutor who is charged with serious crimes. The public has a strong interest in the vigorous enforcement of the State's criminal laws against the prosecutors themselves. An order disqualifying the Attorney General's Office would needlessly complicate theability of the State's case to proceed against Healea.

1. The Missouri Attorney General is the prosecutor of last resort in the Missouri System.

The Missouri Attorney General and his office are unique within the structure of Missouri's government and within the Missouri criminal justice system. The Attorney General's position is created by the Missouri Constitution but the Attorney General is the "only constitutional officer whose powers and duties are not specifically provided for or limited by the constitution." *Dunivan v. State*, 466 S.W.3d 514, 518 (Mo. banc 2015) (quoting *State ex rel. Nixon v. Am. Tobacco Co., Inc.,* 34 S.W.3d 122, 135–36 (Mo. banc

2000)); *see also* Mo. Const. art. IV, §12. This Court has explained that the powers of the Missouri Attorney General can only be limited by a statute passed by the General Assembly for that purpose. *Dunivan*, 466 S.W.3d at 518. Although the Attorney General retains much of his common law authority to participate in criminal prosecutions, this Court has recognized that the offices of circuit and prosecuting attorneys have been "carved out" of the Attorney General's common law power, "with local implications." *State v. Todd*, 433 S.W.2d 550, 554 (Mo. 1968); *see also State ex rel. Barnett v. Boeckeler Lumber Co.*, 257 S.W. 453 (Mo. banc 1924).

Our General Assembly has enacted provisions in Chapter 27 that allow the Attorney General to provide assistance to local prosecutors when requested by the Governor. Section 27.030. But that provision does not prevent the Attorney General from otherwise exercising his common-law powers as the "chief legal officer of the State." *Todd*, 433 S.W.2d at 554.

The Attorney General continues to exercise authority in criminal cases under different scenarios. Many times, local prosecuting authorities will request the Attorney General's office to provide assistance, either directly or through the Governor. *See, e.g., State v. Griffin,* 848 S.W.2d 464, 467 n.3 (Mo. banc 1993); *State v. Naylor*, 40 S.W.2d 1079, 1085 (Mo. 1931). Other times, the Attorney General will serve as the original prosecuting authority in specialized cases as determined by the General Assembly. *See, e.g.,* Section

287.128, RSMo. (prosecution of Worker's Compensation Act violations); Section 27.105, RSMo. (prosecution of violations of Gambling provisions). And, most notably, the Attorney General will also serve as the original prosecuting authority when appointed by a trial court under Section 56.110, RSMo, due to the local prosecuting attorney's conflict of interest. *State v. Steffen*, 647 S.W.2d 146, 153 (Mo. App. W.D. 1982).

Moreover, the Attorney General has extensive involvement in representing the State in proceedings after a defendant is convicted. For example, Missouri law requires the Attorney General's Office to represent the State's interests on direct appeal from a felony conviction. Section 27.050, RSMo. The same statute charges the Attorney General's Office with representing the state in appeals during post-conviction litigation brought by a convicted defendant. *Id.* In addition, the Missouri Attorney General's Office handles both state and federal habeas litigation brought by those convicted of state crimes.

Finally, if Healea is convicted but refuses to vacate his office, the Attorney General is authorized to file a petition in quo warranto to remove an elected official who refuses to vacate office after receiving a felony conviction. *See* Mo. Sup. Ct. Rule 98.02(b). The only parties authorized to bring such an action are "the attorney general of this state," or "the prosecuting attorney or county counselor." *Id.* An order disqualifying the entire Attorney General's

Office from this case would needlessly complicate the representation of the State's interests in any such post-conviction proceedings against Healea.

2. Healea's status as an elected prosecuting attorney means the Missouri Attorney General is the appropriate prosecuting authority.

This Court's cases make clear that the selection of a prosecuting attorney must satisfy the appearance of impropriety. *Lemasters*, 456 S.W.3d at 422–23. One reason is that society must perceive that the criminal justice system "is fair and its results are worthy of reliance." *Id.* When the criminal defendant is an elected prosecuting attorney, the perception of fairness requires that the Missouri Attorney General, and not a local prosecuting attorney, handle the case. At very least, the appearance of impropriety in assigning Healea's case to a fellow prosecuting attorney is far greater than any impropriety that Healea could possibly identify on the part of the Attorney General's Office.

In his brief, Healea asserts that other prosecuting attorneys ought to be able to determine in the first instance if they could serve as the prosecuting authority. Healea's Br. 27–28. But Healea does not, and cannot, explain how the appearance-of-impropriety standard would be satisfied by the appointment of a local prosecutor. Here, Healea was the president-elect of the Missouri Association of Prosecuting Attorneys at the time of the alleged

offenses. Healea remains an elected prosecutor to this day, and undoubtedly he maintains close personal ties with his fellow elected prosecutors as a matter of course.

Healea also suggests that Respondent Tucker could simply appoint any member of the Bar that is not currently engaged in criminal defense work in Shelby and Macon County. Healea's Br. 27. The legality of such a proposal is very questionable, because Missouri has prohibited private prosecutors, and for good reason. *See State v. Harrington*, 534 S.W.2d 44, 50 (Mo. 1976). Prosecutors wield enormous authority, and that is why all prosecutors in Missouri are answerable to elected officials, who are accountable to the People. Appointing a special prosecutor who did not answer to any elected official would be deeply problematic and likely illegal.

Moreover, Assistant Attorneys General historically have possessed a special level of knowledge and professionalism that makes them particularly well suited to representing the State's interests in a criminal proceeding. *See, e.g., Steffen*, 647 S.W.2d at 153 (recognizing that preventing Assistant Attorneys General from being appointed as special prosecutors would "eliminate a ready, available source of counsel to represent the public interest. The result in narrowing this source of counsel casts upon other members of the Bar that responsibility and includes all of the practical ramifications attending such responsibility."); *see also Ewing v. Denney*, 360

S.W.3d 325, 329 n.7 (Mo. App. W.D. 2012) (noting that the Assistant Attorney General's "candor in the face of obviously egregious circumstances like those in this case fosters confidence in our system of justice"); *State ex rel. Koster v. Green*, 388 S.W.3d 603, 606 n.5 (Mo. App. W.D. 2012) ("We echo the habeas court's commendations of the Attorney General, and note with respect and appreciation the honorable and appropriately balanced attention the Attorney General's office has afforded to both its duties to prosecute violations of Missouri law and its duties to Missouri citizens to operate the office with character, integrity, and a commitment to ethical advocacy").

Conclusion

For the above reasons, Respondent Tucker did not abuse his discretion when he denied Healea's motion to disqualify the Attorney General's Office. This Court should quash the preliminary writ of mandamus.

ARGUMENT II

Mandamus is not the appropriate vehicle for Healea to raise his complaints because he could receive relief on direct appeal – Responds to Healea's Points I, IV, and V.

Throughout his brief, Healea seeks mandamus relief on a variety of issues. But mandamus relief is extraordinary. Mandamus is not the appropriate avenue to raise claims that could be raised on direct appeal, such as Healea's request to disqualify the Attorney General's Office. And mandamus is not the appropriate avenue to raise questions of first impression that require this Court to adjudicate, not enforce rights, such as Healea's complaints about Respondent Tucker's handling of the Special Master's report. Likewise, mandamus is not the appropriate avenue to raise pre-trial evidentiary issues, like Healea's request to exclude the blood evidence.

Standard of Review

Writs of mandamus and prohibition are extraordinary remedies and are not appropriate to correct every alleged trial court error. *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 576–77 (Mo. banc 1994). A defendant in a criminal case cannot challenge a pretrial evidentiary ruling by appeal, or by seeking an extraordinary writ. *State ex rel. Tipler v. Gardner*, 506 S.W.3d 922, 92–24 (Mo. banc 2017).

Likewise, mandamus will not issue to compel the performance of a discretionary duty—a duty that requires "the exercise of reason in determining how or whether the act should be done." *Jones v. Carnahan*, 965 S.W.2d 209, 213 (Mo. App. W.D. 1998). The purpose of mandamus is to execute, not adjudicate. *State ex rel. Sprague v. City of St. Joseph*, 549 S.W.2d 873, 879 (Mo. banc 1977). Mandamus cannot be used to establish a legal right. *Chassaing*, 887 S.W.2d at 576.

Analysis

A. Mandamus is not the appropriate vehicle to seek review of a circuit court's refusal to disqualify the prosecutor. – Responds to Healea's Point I

In his first point, Healea argues that he is entitled to extraordinary relief from this Court disqualifying the Missouri Attorney General's Office from serving as the prosecuting attorney. Healea's Br. 20–29; 41. Respondent Tucker demonstrates that Healea is not entitled to relief on the merits of his claim in point I, *supra*. And Healea is also not entitled to a writ of mandamus because he can receive relief on direct appeal.

This Court has been clear and consistent: extraordinary writs are not appropriate and will not issue when the party seeking an extraordinary writ has an alternative avenue for relief. *Williams v. Cooper Court of Common Pleas Judge*, 27 Mo. 225, 227 (1858) ("It is a general rule that a mandamus

will not issue unless the party asking it has a clear right and no other specific legal remedy. It will not be granted ... where the party can be redressed by appeal."); *see also State ex rel. Smith v. Tillman*, 623 S.W.2d 242, 243–44 (Mo. banc 1981) ("Because the issue can be adequately decided on the appeal, the petition for writ of mandamus is dismissed").

Healea can raise his complaints about Respondent Tucker's ruling on his motion to disqualify the Attorney General's Office on direct appeal. In fact, this Court has frequently considered claims on direct appeal that the prosecutor should have been disqualified. For instance, the defendant in *Lemasters*, 456 S.W.3d 416, raised his claim on direct appeal. So did the defendant in *State v. Ross*, 829 S.W.2d 948 (Mo. banc 1992), as well as the defendant in *State v. Wacaser*, 794 S.W.2d 190 (Mo. banc 1990). The availably of direct appeal as an avenue to raise such a claim is long established. *See, e.g., State v. Jones*, 306 Mo. 437 (1924); *State v. Sweeney,* 5 S.W. 614 (Mo. 1887).

Only two cases appear to authorize the use of an extraordinary writ to challenge a trial court's ruling on a motion to disqualify a prosecuting attorney: *State ex rel. Winkler v. Goldman*, 485 S.W.3d 783 (Mo. App. E.D. 2016), and *State ex rel. Burns v. Richards*, 248 S.W.3d 603 (Mo. banc 2008). In *Winkler*, the Missouri Court of Appeals acknowledged that mandamus is not appropriate when the petitioner has a remedy through direct appeal, but

the Missouri Court of Appeals did not explain why an appeal was not available in that case. *Winkler*, 485 S.W.3d at 789. *Winkler* was decided without full briefing by the parties, and neither party sought transfer in *Winkler*.

In *Burns*, this Court granted a writ of prohibition to prohibit the trial court from proceeding until the trial court sustained the defendant's motion disqualifying the prosecuting attorney from prosecuting the defendant, his former client. *Burns*, 248 S.W.3d at 604. *Burns* thus involved a very serious conflict of interest between the prosecutor and his former client; no such extraordinary facts are present in this case. Moreover, *Burns* did not consider or address the availability of direct appeal as an alternate avenue to raise conflict issues, so *Burns* did not cast doubt on the long line of cases cited above holding that such issues can be raised on direct appeal. *See id.*

Because Healea has an adequate remedy on appeal, extraordinary writ review is not appropriate.

B. Mandamus is not the appropriate vehicle to seek review of a criminal court's alleged failure to comply with Rule 68. – Responds to Healea's Point IV

In his fourth argument for extraordinary relief, Healea complains that Respondent Tucker failed to hold a hearing on Healea's objections to the Special Master's report. Healea's Br. 37–38; 42. Respondent Tucker

demonstrates that Healea is not entitled to relief on the merits of this claim in point V, *supra*. But Healea is also not entitled to a writ of mandamus because he can receive relief on direct appeal; because Healea has not demonstrated that he has a clear, unequivocal right to the procedures of Rule 68 in a criminal case; and because Healea is asking the Court to adjudicate, not enforce, rights.

1. Healea can raise his complaints about the Special Master procedure on direct appeal.

As explained in point II.A, *supra*, this Court has been clear that mandamus is not appropriate when there is another avenue for relief. *Williams*, 27 Mo. at 227; *see also Smith*, 623 S.W.2d at 243–44. As Healea admits in his brief, the Missouri Court of Appeals has found that claims that the trial court erred by not holding a hearing on a party's objections to a special master's report are reviewable on direct appeal. Healea's Br. 37. In *Stewart v. Jones*, 58 S.W.3d 926 (Mo. App. S.D. 2001), the Missouri Court of Appeals heard an appeal from a civil case and determined that the trial court erred by not holding a hearing on the objections to the special master's report. *Id*. at 929–30.

Stewart's holding that such claims are reviewable on direct appeal is enough to demonstrate that Healea's complaint that Respondent Tucker

failed to hold a hearing on Healea's objections is not appropriate in an extraordinary writ proceeding.

2. Healea has not demonstrated that he has a clear, unequivocal right to the procedures of Rule 68.

The basis of Healea's fourth claim for mandamus relief is that Respondent Tucker allegedly failed to properly follow the dictates of Rule 68, which require a court to hold a hearing on objections to a special master's report. Healea's Br. 37–38. But Healea has not demonstrated that he has a clear, unequivocal right to a special master in a criminal case, let alone the procedures of Rule 68.

In *State ex rel. Merrell v. Carter*, 518 S.W.3d 798 (Mo. banc 2017), this Court granted a writ of prohibition to prevent a trial court from ordering the State to pay the costs of a special master that was appointed in a criminal case. *Id.* at 799. One of the attendant issues was the State's claim that the trial court lacked authority to appoint a special master because this Court's Rule authorizing such appointments is a rule of civil, not criminal, procedure. *See* Mo. Sup. Ct. Rule 68 (appointment of special master); *see also* Mo. Sup. Ct. Rule 41 (providing that Rules 41 through 101 govern civil cases); Mo. Sup. Ct. Rule 19.01 (providing that Rules 19 through 36 govern criminal cases). But this Court found an alternative basis for deciding *Merrell* and did not

need to answer the question of whether a trial court could appoint a special master in a criminal case. *Id*. at 800 n.2.

Implicit in this Court's holding in *Merrell* is that no Missouri court has recognized a right to a special master in a criminal proceeding. Because the purpose of mandamus is to "execute, not adjudicate," mandamus proceedings. like this one, cannot be used to establish a legal right. *Sprague*, 549 S.W.2d at 879; *Chassaing*, 887 S.W.2d at 576.

In short, because Healea cannot establish a clear and unequivocal right to a special master in a criminal proceeding, he cannot establish a clear and unequivocal right to the procedures in Rule 68, such as a hearing before Respondent Tucker on his objections to the special master's report. Accordingly, Healea is not entitled to a writ of mandamus on his fourth point.

C. Mandamus is not the appropriate vehicle to seek review of a pretrial evidentiary ruling. – Responds to Healea's Point V

In his fifth point, Healea requests that this Court issue an extraordinary writ of mandamus directing Respondent Tucker to exclude the blood evidence taken in this case. Healea's Br. 39–41; 42. Respondent Tucker demonstrates that Healea is not entitled to relief on the merits of this claim in point VI, *infra*, including for the reason that Healea was in possession of

the "missing" warrant.[4] But even Healea "acknowledges" that "neither mandamus nor prohibition are the proper form of relief...." Healea's Br. 39. Healea attempts to argue that his evidentiary complaints are really questions of statutory interpretation. Healea's Br. 39–40. Yet that does not justify this Court's extraordinary review because all rulings on the admissibility of evidence involve the interpretation of laws. *See*, *e.g.*, *Tipler*, 506 S.W.3d at 923–24.

Healea is really arguing that this Court should issue an extraordinary writ of mandamus directing Respondent Tucker to exclude the results of the testing performed on Healea's blood because Healea believes that Section 542.276 was violated in this case. Healea's Br. 40–41. But those sorts of complaints are quintessential challenges to the admissibility of evidence that must be raised on direct appeal and not on an interlocutory basis. *Tipler*, 506 S.W.3d at 923–24.

---

[4] Supp. L.F. at 1, AXON_Body_Video_2014-10-25_2234 at 9:00 (Healea handed the warrant); *id.* at 29:19 (Healea asking which Judge signed warrant); *id.* at 29:22 (Healea handing warrant to officer); *id.* at 29:27 (Healea being told that Judge Carpenter signed warrant); *id.* at 29:29 (Healea having warrant returned to him); Resp. App. A1.

Conclusion

An extraordinary writ of mandamus is only appropriate in limited circumstances. The writ will not lie for Healea's complaint that the Missouri Attorney General's Office should be disqualified because Healea can raise that point on appeal. The writ will not lie for Healea's complaint that Respondent Tucker did not hold a hearing on Healea's objections to the special master's report because there is no clear, unequivocal right to a special master in a criminal case and because even if there is, then Healea can raise that claim on direct appeal. Finally, the writ also will not lie for Healea's complaint about the blood evidence in this case because pre-trial evidentiary rulings cannot be raised in a petition for mandamus relief.

ARGUMENT III

Healea is not entitled to an order sealing portions of the Special Master's report for an indeterminate time because such an order would violate the First Amendment. – Responds to Healea's Point II.

In his second request for mandamus relief, Healea asserts that his Sixth Amendment right to a fair trial entitles him to a permanent order sealing portions of the Special Master's report. Healea's Br. 41. Healea believes the Special Master's report should be permanently sealed because publishing attorney-client information allegedly in the report would harm his right to a fair trial. Healea's Br. 32. Healea's argument fails for two reasons. *First*, the report does not contain any attorney-client privileged information. *Second*, Healea's request for an order permanently sealing the entire report violates the First Amendment.

Standard of Review

On review of a lower court's order granting or denying access to court records, this Court reviews the lower court's order for an abuse of discretion. *Transit Cas. Co. ex rel. Pulitzer Publishing Co. v. Transit Cas. Co. ex rel. Intervening Employees*, 43 S.W.3d 293, 300 (Mo. banc 2001).

The First Amendment provides a right of access to court proceedings and documents filed with the court in a criminal trial. *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 604 (1982). Before a court

may seal a record, it must consider whether the party seeking closure has overcome the presumption that the record is open. *Id.* In addition, any order to seal documents must be narrowly tailored to achieve a compelling state interest. *Id.* at 606–07. Because the United States Supreme Court has required courts to utilize strict scrutiny's "narrowly tailored" analysis, other courts have required consideration of "less restrictive means" such as redacting portions of court documents. *See, e.g., In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 574 (8th Cir. 1988).

Analysis

A. There is no need to seal the Special Master's Report because it does not contain attorney-client information.

The long-established rule in Missouri is that the attorney-client privilege attaches to information passed between client and attorney when that information is passed for the purpose of exploring whether the client wishes to retain the attorney. *See, e.g. Cross v. Riggins*, 50 Mo. 335, 337 (1872). The general rule is that the mere existence of a relationship between an attorney and a client is not privileged. *State ex rel. Koster v. Cain*, 383 S.W.3d 105, 119 (Mo. App. W.D. 2012); *see also* § 502:1, Missouri practice: attorney-client privilege, 22 Mo. Prac., Missouri Evidence § 502:1 (4th ed.).

In his brief, Healea does not identify what portions of the Special Master's report contain communications that are protected by attorney-client

privilege. Healea's Br. 32. That is because the report does not contain any privileged information. Instead, the report indicates merely that Healea spoke with his attorney about matters concerning a potential breath test. Healea's App. A2–A3. The existence of such a telephone conversation is unremarkable given that Missouri statue provides all persons with the right to contact their attorney for twenty minutes in such a situation. Section 577.041.3, RSMo. The mere existence of such telephone conversation is not privileged, and it seems unlikely that such a telephone conversation would relate to anything other than a potential breath test for alcohol.

Respondent Tucker would agree that closure of the Special Master's report would be necessary if the Special Master had discussed the contents of any attorney-client communication, rather than providing a generalized description of the telephone conversation between Healea and his attorney. But such information is not in the report. As such, the information contained in the Special Master's report is not protected by attorney-client privilege.

Because there is no attorney-client information in the Special Master's report, Healea cannot demonstrate that indefinite closure of the report is narrowly tailored to achieve a compelling state interest.

B. An order permanently sealing the Special Master's report is not narrowly tailored to achieve a compelling interest.

Even if this Court determines that a portion of the Special Master's report contains information protected by the attorney-client privilege, then Healea is still not entitled to his requested relief because *permanently* sealing the *entire* report is not narrowly tailored to achieve a compelling state interest.

Before a court may order the complete closure of records in a criminal case, it must determine that closure is narrowly tailored to achieve a compelling state interest. *Globe Newspaper Co.*, 457 U.S.at 607. The United States Supreme Court has also explained that a court must consider lesser alternatives before it orders complete closure of the records. *Press-Enterprise. Co. v. Superior Court of California, Riverside Cty.*, 464 U.S. 501, 513 (1984). In his concurrence, Justice Marshall articulated this concept as a requirement that the "trial court should be obliged to show that the order in question constitutes *the least restrictive means available* for protecting compelling state interests." *Id.* at 520 (Marshall, J., concurring) (emphasis in original).

In this case, Healea has asked this Court to issue extraordinary relief directing Respondent Tucker to close the entire Special Master's report indefinitely without explaining why, in Healea's view, there is no less

restrictive means to protect his Sixth Amendment rights. Healea's Br. 32. Redaction of the alleged privileged information would be a less restrictive means of protecting Healea's Sixth Amendment rights. If this Court believes that the Special Master's report contains information protected by the attorney-client privilege and that public release of that information would hamper Healea's Sixth Amendment rights, then it should order Respondent Tucker to consider which portions of the report must be redacted.

Conclusion

Healea is not entitled to mandamus relief indefinitely sealing the entire Special Master's report because the report does not contain any attorney-client privileged material. In the alternative, Healea is not entitled to an order sealing the entire report on an indefinite basis because less restrictive means exist, such as redacting a portion of the report.

ARGUMENT IV

Healea is not entitled to a writ of mandamus directing Respondent Tucker to order the Columbia Police Department to delete records without first giving the Columbia Police Department notice and an opportunity to be heard. – Responds to Healea's Point III.

In his third argument for mandamus relief, Healea asks this Court to issue a writ of mandamus directing Respondent Tucker to order the Columbia Police Department to immediately delete any remaining copies of the conversation between Healea and his attorney. Healea's Br. at 42. Respondent Tucker agrees that the Columbia Police Department should not retain any copies of a recorded conversation between Healea and his attorney.

But Healea is not yet entitled to such an order because the Columbia Police Department has not received notice or opportunity to be heard on this issue. Basic procedural due process requires notice and an opportunity to be heard. *State v. Elliott*, 225 S.W.3d 423, 424 (Mo. banc 2007). Nothing in the record indicates that the Columbia Police Department was given notice of Healea's request at this Court, at the Court of Appeals, or at the hearing before Respondent. If the Columbia Police Department had been given notice and the opportunity to appear, then the record in this case would have

provided more certainty regarding this claim. For instance, the record is unclear as to whether the Columbia Police Department is still in possession of a physical or digital copy of the recording. The proper remedy on this point is to deny the request for a writ of mandamus, but to allow Respondent to hold a hearing on this question, to invite the presence of the Columbia Police Department, and then to issue whatever ruling is necessary to prevent further retention or dissemination of the recorded telephone call between Healea and his attorney.

ARGUMENT V

Healea is not entitled to mandamus relief on his claim that Respondent Tucker violated Rule 68.01 because Respondent Tucker did hold a hearing and because Healea is really complaining about the Special Master's fact finding. – Responds to Healea's Point IV

In his fourth argument for mandamus relief, Healea asks this Court to issue a permanent writ of mandamus directing Respondent Tucker to hold a hearing on Healea's objections to the Special Master's report. Healea's Br. 42. Healea argues that no hearing was held on his objections and that, in Healea's view, the Special Master's report contained erroneous findings. Healea's Br. 37–38. Healea is not entitled to relief because Respondent Tucker did hold a hearing and because Healea's dissatisfaction with the Special Master's fact findings does not entitle him to a writ of mandamus.

Standard of Review

A court should accept the factual findings and conclusions of a special master "unless there is no substantial evidence to support them, they are against the weight of the evidence, or they erroneously declare or apply the law." *State ex rel. Clemons v. Larkins*, 475 S.W.3d 60, 75–76 (Mo. banc 2015). Moreover, "findings by a special master should receive the 'weight and deference which would be given to a court-tried case by a reviewing court' due to 'the master's unique ability to view and judge the credibility of witnesses.'"

Id. at 76 (quoting *State ex rel. Woodworth v. Denny*, 396 S.W.3d 330, 336–37 (Mo. banc 2013)). Therefore, reviewing courts will only set aside the findings of a special master "on the ground that they are against the weight of the evidence with caution and with a firm belief that the conclusions are wrong." *Id*.

Analysis

A. Respondent Tucker did hold a hearing before adopting the Special Master's Report.

Healea's argument for mandamus relief centers on his allegation that Respondent Tucker did not hold a hearing on Healea's objections to the Special Master's report. Healea's Br. 37–38. But the record before this Court shows that Respondent Tucker *did* hold a hearing. The Special Master's report was filed on December 29, 2016. Healea's App. A1. Healea's objections to the Special Master's report were filed and then Respondent Tucker held a hearing on February 9, 2017. Healea's App. A17. The transcript of that hearing is on file with this Court. Record on Appeal, Respondent's Exhibit 2. At that hearing, Respondent Tucker began the hearing by announcing:

> So our situation is that a Special Master was appointed, a Special Master did his job, filed a report and then I set today for hearing the attorneys on what the Court should do with the Special

Master's report. Who wants to go first? I'll tell you where I'm starting from.

Id. at 3. The docket sheet for the hearing, and the transcript, indicate that both counsel for the State and counsel for Healea were present. Healea's App. A17. Respondent Tucker heard argument from both attorneys and then adopted the findings of the Special Master. Record on Appeal, Respondent's Exhibit 2, p. 23. Respondent Tucker then offered Healea an additional opportunity to have a hearing on a motion to reconsider the Special Master's report. *Id*. at 28.

On March 2, 2017, Respondent Tucker held a hearing on Healea's motion to reconsider the Special Master's report. Healea's App. at A18. At the hearing, Healea provided argument as to why Healea believes that Respondent Tucker should not have adopted the Special Master's Report. Record on Appeal, Respondent's Exhibit 3, p. 13–30.

Assuming that Rule 68 governs criminal cases, Respondent Tucker complied with the procedural requirements of the rule. Rule 68(g) provides that a party may file objections to the Special Master's report. Mo. Sup. Ct. Rule 68(g)(2). Respondent Tucker allowed Healea to file objections. Rule 68(g) provides that a circuit court must hold a hearing on the report if objections are filed. Mo. Sup. Ct. Rule 68(g)(3). Respondent Tucker held *two* hearings on

the Special Master's report. In other words, Respondent Tucker provided Healea with all the process that Rule 68 requires.

B. Healea's dissatisfaction with the Special Master's report does not entitle him to a writ of mandamus.

What Healea is really doing in his fourth point for mandamus relief is complaining about the outcome of the Special Master's report. Healea complains that the Special Master's report did not "address all the issues presented by" Healea. Healea's Br. at 37. But Healea fails to indicate what additional issues he wanted the Special Master to consider, and how those issues should have been resolved in his favor. Healea's failure to fully set forth his argument leaves this Court with nothing to review. *State v. Nunley*, 341 S.W.3d 611, 623 (Mo. banc 2011).

Next, Healea complains that the Special Master was "unable to personally understand a large portion of the conversation between [Healea] and his attorney." Healea's Br. at 37. Healea's complaint here is really a challenge that the Special Master's factual conclusions are either not supported by substantial evidence or are against the weight of the evidence. But Healea did not allow Respondent Tucker to review the recording of the conversation between himself and his attorney. Moreover, Healea has not provided that recording to this Court. Respondent Tucker acknowledges that limiting disclosure of the recording was the purpose of appointing the Special

Master. Nevertheless, Healea has not, and cannot, demonstrate that the Special Master's finding is against the weight of the evidence or is unsupported by substantial evidence. *Clemons*, 475 S.W.3d at 75–76. Accordingly, because this Court must exercise "caution" and because this Court cannot set aside the findings of the Special Master without a "firm belief" that they are wrong, Healea is not entitled to the extraordinary writ of mandamus.

Conclusion

Healea is not entitled to mandamus relief on his complaints about Respondent Tucker's handling of the Special Master's report because the claims are meritless, in that Respondent Tucker did hold a hearing on Healea's objections and in that Healea has failed to demonstrate that the Special Master's report is not supported by substantial evidence.

ARGUMENT VI

Healea is not entitled to mandamus relief to exclude the blood evidence. – Responds to Healea's Point V

In his final request for mandamus relief, Healea asks this Court to issue a writ of mandamus directing Respondent Tucker to "follow the plain language of Section 542.276...." Healea's Br. 42. Healea's argument is that because the officers misplaced the signed copy of the search warrant authorizing the State to obtain Healea's blood, then Respondent Tucker should enter an order excluding the result of testing performed on Healea's blood. Healea's Br. 39–41. Healea's claim is meritless because video evidence provides that Healea was in possession of the signed warrant.

Standard of Review

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Nelson,* 521 S.W.3d at 234. An abuse of discretion occurs when a trial court's ruling is "clearly against the logic of the circumstances ... and is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration." *Id.* at 234–35. Moreover, this Court may affirm the decision of the trial court for any reason in the record. *Swallow v. State*, 398 S.W.3d 1, 3 (Mo. banc 2013).

Analysis

A. Healea was in possession of the signed warrant.

Healea's argument to Respondent Tucker was that the testing results of his blood needed to be excluded because the State was unable to locate the signed copy of the search warrant authorizing the blood draw. Now, Healea has asked this Court to "provide guidance and instruction to all courts" on the meaning of Section 542.276, RSMo. Healea's Br. 40. Healea's argument amounts to a request for this Court to rule that evidence must always be excluded if the State cannot locate the signed copy of the warrant. This Court need not answer that question in this case because the trial court's decision not to exclude the evidence is supported by the record, in that Healea was in possession of the signed warrant.

The Supplemental Legal File, which was filed contemporaneously with this brief, contains a compact disk with a video file named "AXON_Body_Video_2014-10-25_2234". Supp. L.F. at 1; Resp. App. A1. This video file, which was provided to Healea in discovery, is a portion of a recording from the body camera worn by a Columbia Police Department officer. On the video, the officer can be seen handing a document to Healea. *Id.* at 9:00. Thereafter, Healea can be seen taking the warrant from his pocket and reading the warrant. *Id.* at 28:23. At 29 minutes and 19 seconds into the video, Healea can be seen handing the signature page of the warrant

to the officer and asking which judge's signature appears on the page. *Id.* at 29:19–29:26. During that time, Judge Carpenter's signature can clearly been seen on the warrant. *See, e.g., id.* at 29:21. The officer then reads the warrant and informs Healea that Judge Carpenter signed the warrant. *Id.* at 29:27 Thereafter, the officer returns the warrant to Healea. *Id.* at 29:29.

Healea cannot credibly argue that the State failed to comply with Section 542.276's requirement that a warrant be signed by a judge. The video demonstrates that the warrant was signed by Judge Carpenter. The video demonstrates that Healea was aware of that fact because he was in possession of the warrant and asked the officer whose signature appeared on the warrant. Even if Healea is correct that this Court should issue "guidance and instruction" to the lower courts about the requirements of Section 542.276, then this is still not the correct case to consider that question given that there is video evidence that a judge signed the search warrant at issue.

Conclusion

Healea is not entitled to mandamus relief on his claim that his blood evidence should be excluded because video evidence clearly demonstrates that Healea was in possession of a signed copy of the warrant.

CONCLUSION

This Court should quash its preliminary writ of mandamus.

Respectfully submitted,

JOSHUA D. HAWLEY
Attorney General

D. John Sauer
First Assistant and Solicitor
Missouri Bar No. 58721
Darrell L. Moore
Missouri Bar No. 30444
Deputy Attorney General

/s/ *Gregory M. Goodwin*
Gregory M. Goodwin
Assistant Attorney General
Missouri Bar No. 65929
P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-7017
Fax (573) 751-3825
gregory.goodwin@ago.mo.gov

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 10,830 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2010 software.

/s/ *Gregory M. Goodwin*
Gregory M. Goodwin
Assistant Attorney General