IN THE MISSOURI SUPREME COURT

SC96601

STATE OF MISSOURI, ex rel., SHAYNE HEALEA

Relator,

v.

THE HONORABLE FREDERICK TUCKER,

Respondent.

Writ of Mandamus

RELATOR'S REPLY BRIEF

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ARGUMENT

I. THE ATTORNEY GENERAL'S OFFICE SHOULD BE DISQUALIFIED

Respondent asserts, despite the uncontroverted facts, that the Columbia Police Department (hereafter CPD) recorded Relator's privileged twenty-minute telephone call with his attorney, after Relator twice asked to speak with his attorney privately, and then downloaded the recording from their servers and provided it to the Attorney General's Office (hereafter AGO) as evidence, that no appearance of impropriety exists. Relator prays that this Honorable Court recognizes that both actual improprieties, as well as the appearance of the same, are present in this matter. The malfeasance present in this case is not simply limited to the actions of the AGO, but also extends to his agents, the officers of the CPD. We will first address the actions of the AGO.

Respondent argues no impropriety, or appearance thereof, was created when AAG Tolle, the original special prosecutor on this matter, advised the trial court that the recording of the attorney-client phone call had never been made, having confirmed as much through the Chief of Police for the City of Columbia, as well as the arresting officer. In support of his argument, Respondent advises this Honorable Court that her mistaken belief is evidence she never viewed the video. This assertion ignores a very important fact. It was the Columbia Police who made the video and subsequently burned it to disk and provided it to the AGO as evidence in this matter. Clearly, the CPD was aware they had made the recording and secured the same as evidence in this matter. This indicates they thought the captured conversation was important enough that the

prosecuting authority, the AGO, should also have it in support of their case. It was also the only piece of evidence they chose not to log as evidence in the evidence chain of custody. This evidences their knowledge that the recording and duplication thereof was improper. The recording was not mistakenly caught in a dragnet of video made of the entire facility during the entirety of Relator's time in the facility. The CPD only retained and provided certain videos, which began and ended at the discretion of some individual in their facility. For example, the booking area video ended when Relator left that room, despite the fact the cameras there are constantly recording. Additionally, the video of the front desk area where Relator was displayed live on a monitor on said front desk, was not preserved and provided to Relator, so that he could be aware of what individuals conducted real time monitoring of the conversation with his attorney. Relator subpoenaed Evidence Custodian Michelle Heater, to the Special Master's hearing and she testified the evidence unit only preserves the videos the officers specifically request. Relator was not provided with a transcript or sound recording of that hearing, despite his request, for reference to, or supplementing of, the record before this Honorable Court. These facts can only lead to a limited number of conclusions. The first possibility: the CPD (Chief and arresting officer) lied to the person to whom they had provided the video about the video's existence, a scenario that defies all logic. The second being: AAG Tolle was, in fact, ignorant of the video's existence and simply never asked CPD if it existed, but advised the court she had anyway. This scenario assumes AAG Tolle prepared a case, and her witnesses, for grand jury proceedings, depositions, and a motion to suppress, and chose to not review only the single piece of evidence she should not

possess, a scenario which is highly unlikely. The final possibility: all involved were aware of the video, but unwilling to admit their respective roles in the making or reviewing of the video. This scenario, while unthinkable, is supported by the fact that the arresting officer testified in the Special Master hearing that despite Relator's multiple requests to speak with his counsel in private, he placed Relator in a room where he did in fact know Relator would be recorded. This scenario is further supported by the fact Relator, to this day, and despite his request for answers, has never been provided with an explanation of why the recording was made, who requested the evidence technicians to secure the video or who has watched the recording. Relator's request for answers has only been met with denials of responsibility for the video and all parties distancing themselves from any connection or knowledge of the same. The video did not download itself from CPD's video server, nor did it burn itself to disk. Most importantly, the video would not have been secured as evidence unless CPD believed it contained evidentiary value.

Respondent further argues that the Special Master in this case received a statement from AAG Tolle that she had never watched the video of Relator speaking with his attorney. This is a vexing assertion as AAG Tolle and her association as an AAG abruptly ended after the recording was found in her possession, in open court, in her case file pertaining to this matter, prior to the Special Master hearing. The State never called AAG Tolle as a witness at the Special Master's hearing. This Honorable Court need only look to the subpoenas issued for the Special Master hearing to establish this fact. The State presented its case through Deputy AAG Moore at the Special Master hearing and

AAG Tolle was not present either in person, or through affidavit or any other means. While the State had every opportunity to present the evidence they now purport to have presented to the Special Master, they chose not to call AAG Tolle as a witness to provide sworn testimony to the Court that she had never seen the video.

In his substitute brief to this Honorable Court, Relator complained AAG Tolle, upon being found in possession of the surreptitiously recorded video chose to retain the video and pass it on to her successor, Deputy Moore, rather than divest herself of the same. In Respondent's response, no authority for, explanation of or justification for the retention and passing of the constitutionally offending video to Deputy Moore was offered. Respondent, also in his response, praises the fact Deputy Moore voluntarily divested himself of the video, but fails to provide any reason or justification of why the video was retained by Deputy Moore for at least two months before he chose to do so. The appearance of the AGO's possession of the video for more than two years, and by two separate prosecutors, cannot be simply ignored and Relator is not in a position to know how it may have been used to his detriment.

The concept of the government unconstitutionally encroaching into the attorney-client privilege, though rare, is neither novel or unprecedented. Fortunately, in Missouri the concept is, for this Honorable Court, a matter of first impression. The citizens and Courts of Washington, however, have been dealing with similar issues dating back as far as 1963 and as recently as 2010, in their Appellate and Supreme Courts. In 1963, the Supreme Court of Washington heard and decided the case of *State v. Cory*, 62 Wn2d 371 (1963). In *Cory*, the Supreme Court faced the issue of what remedy to offer a defendant

who was jailed and his consultations with his attorney eavesdropped upon by officers, through a microphone placed in the conference room where defendant met with his attorney. Upon discovery of this fact, defendant sought dismissal, which was denied. He was convicted and sentenced. The Supreme Court reversed and dismissed the charges. Several of the Supreme Court's statements about that case are directly applicable to the case before this Honorable Court.

"The prosecution is not entitled to have a representative present to hear the conversations of the accused and counsel. We consider it equally true that a defendant and his lawyer have a right to talk together by telephone without their conversations being monitored by the prosecution through a secret mechanical device which they do not know is being used. It would not be an answer to say that the accused cannot complain of the interception of his telephone conversations with his counsel if he had on other occasions ample personal consultation with his lawyer, face to face, which no person overheard. That fact would not erase the blot of unconstitutionality from the act of intercepting other consultations." *Id* at 375.

"A defendant in a criminal case may not legally be found guilty except in a trial in which his constitutional rights are scrupulously observed. No conviction can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the effective assistance of counsel, or any other element of due process of law without which he cannot be deprived of life or liberty." *Id* at 376.

"There is no way to isolate the prejudice resulting from an eavesdropping activity, such as this. If the prosecution gained information which aided it in the preparation of its

case, that information would be as available in the second trial as it was in the first. If the defendant's right to private consultation has been interfered with once, that interference is as applicable to the second trial as the first." *Id* at 377.

"Out of regard for its own dignity as an agency of justice and custodian of liberty the court should not have a hand in such 'dirty business'." Id at 378. (See *MacNabb v. United States*, 318 US 322, 345).

"We think that the court in *Fusco v. Moses, Supra*, made the only disposition of the case which would afford an adequate remedy to the defendants and effectively discourage the odious practice of eavesdropping on privileged communications between attorney and client. There, the court ordered that the charges against defendants should be dismissed and that they should be reinstated in their jobs. It is our conclusion that the defendant is correct when he says that the shocking and unpardonable conduct of the sheriff's officers, in eavesdropping upon the private consultations between the defendant and his attorney, and thus depriving him of his right to effective counsel, vitiates the whole proceeding. The judgment and sentence must be set aside and the charges dismissed." *Id* at 379.

In 1998, the Washington Court of Appeals again dealt with the government intruding into the attorney-client privilege in *State v. Granacki*, 959 P.2d 667 (1998). In *Granacki*, a detective remained in the courtroom during a recess and peered at defense counsel's top page of his legal pad while counsel was out of the room. Like *Cory*, that case too resulted in charges being dismissed against the defendant. Again, the observations of the *Granacki* court are relevant here.

"Even high motives and zeal for law enforcement cannot justify spying upon and intrusion into the relationship between a person accused of [a] crime and his counsel." For that reason the Court held that, where the state intrudes on a defendant's right to effective representation by intercepting privileged communications between an attorney and his client, the only adequate remedy is dismissal. This is because there is no meaningful way to isolate the prejudice resulting from such interference even if a new trial is granted. As the court observed, "…[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Id* at 669.

"There is also more than one purpose for dismissing a case where the State violates a defendant's right to communicate privately with his or her attorney. The dismissal not only affords the defendant an adequate remedy but discourages the odious practice of eavesdropping on privileged communication between attorney and client." *Id* at 670.

"As the *Cory* court noted, there is no way to isolate the prejudice resulting from such an intrusion." *Id*.

Finally, in 2010, the Washington Court of Appeals again addressed the intrusion into the attorney-client privilege, this time by means of search warrant. We note in the matter before this Honorable Court that the privileged communication, still presently in the hands of the state by way of his witnesses, the CPD, were obtained not by means of a valid search warrant, but through surreptitiously recording relator on his cellular telephone without warning, after he requested to speak privately with counsel. The 2010

case referenced above is *State v. Perrow*, 231 P.3d 853 (2010). In *Perrow*, a detective, investigating an allegation of child molestation, conducted a search warrant and seized writings prepared by Perrow and intended for his attorney. The detective communicated or transmitted the content of the privileged information to the prosecuting attorney. Perrow moved for dismissal, which was granted and subsequently affirmed by the Court of Appeals. The findings of the Perrow court are also applicable to the present case.

"Although this Court most assuredly cannot conclude that Det. Sloan consciously undertook to violate defendant's attorney/client privilege, this Court does conclude that the detective's conduct was in violation not only of the constitutional provision assuring the right to counsel but also of RCW 5.60.060(2)(a), which establishes that communication between an attorney and his client shall be privileged and confidential. The Court concludes that since the privileged papers, documents and notebooks were not impounded by Det. Sloan but were, rather, reviewed and analyzed as to specific content and therefore communicated to the prosecutor's office, suppression is not an adequate remedy." *Id* at 857.

Relator, by and through the facts of this case, as well as cited case law from jurisdictions which have previously addressed the issue presently before this Honorable Court, has demonstrated he has a right to counsel and to confer privately with the same. Should this Honorable Court conclude Relator is not entitled to dismissal of the pending charges, relator has demonstrated he, at minimum, is entitled to face a prosecutor who is not privy to the conversations he had with counsel the night of his arrest. Relator further asserts that in addition to the exclusion of the AGO as special prosecutor in this case, this

Honorable Court should issue an order excluding officers from testifying in this matter who have accessed Relator's file on the CPD server where the illegal recording is presently stored. The evidence of which officers have previously accessed Relator's file on the CPD server was made part of the record in the Special Master's hearing as an exhibit (L.F. pp. 67-85).

Respondent, as grounds for his relentless desire to have the AGO remain as the prosecuting authority on this matter, has stated an ethical screen can now be erected to screen the Deputy AGO Moore, and Chief Investigator Steve Hayden, because AG Josh Hawley is the elected official in charge of the entire office. This argument fails as Deputy Moore, although not the elected official, is still effectively the attorney in charge of the Public Safety Division of the AGO. All who work under him, report directly to him and it is he who reports to the AGO Hawley. Line officers who handle day to day prosecution of cases do not report directly to AGO Hawley and as such, Respondent's argument fails. An ethical screen is intended to be erected upon the inception of a matter where an associated attorney is involved. Respondent proposes an ethical screen be erected to screen the Deputy AG's underlings who have had access to and not been screened from the case, for the period that now exceeds three years. The proposal of such a screen not only defies logic, but would undoubtedly fail to satisfy this Honorable Court's requirements for any attorney required to be screened from a case in any other scenario.

Respondent next argues a private prosecutor is somehow illegal, yet cites not statutory prohibition for the same. That is indeed because none exists and the inherent

authority to appoint a special prosecutor rests with this, or any other Court. Respondent cites *State v. Harrington*, 534 S.W.2d 44 (Mo. Banc) as his authority for this assertion, however, *Harrington* is not applicable here. The "private prosecutor" referred to and analyzed by the Court in that matter was employed and paid by private individuals interested in the outcome of the case. Truly, it is the job of a prosecutor not to merely seek conviction but to seek justice. A prosecutor retained by a private party for pay from a private party cannot be described as a prosecutor who is employed to seek justice, but rather a result. Relator has not asked to employ his own prosecutor and pay through any private funds the same. The difference is clear. Relator simply asks this Honorable Court, if it concludes dismissal is not the proper remedy, to appoint a special prosecutor, dispassionate in the matter and unencumbered by the conflict of being in possession of, or having had access to, Relator's privileged communication with his counsel.

Finally, Respondent laments the "daunting task" he will face in finding a prosecutor not loyal to Relator because Relator was elected by his fellow elected prosecutors to be President of the Missouri Prosecutor's Association. Respondent has offered no direct evidence that any particular prosecutor is in fact conflicted. Nor has he offered any direct evidence any assistant prosecutor employed by the 115 elected prosecutors is individually conflicted. Even if every elected prosecutor and his or her assistants were conflicted, Respondent has offered no direct evidence of any private attorney, who is eligible for appointment under RSMo. 56.110 or this Honorable Court's inherent authority to appoint the same, is conflicted. Furthermore, neither Respondent, nor the AGO will suffer any prejudice if a special prosecutor is appointed. On the other

hand, Relator will be afforded due process and a fair trial by appointment of a special prosecutor if this Court finds Relator still enjoys the possibility of a fair trial and dismissal is not warranted by the State's intentional intrusion into the attorney-client privilege.

Weighing in favor of dismissal is the looming issue of how to deal with a special prosecutor whose primary witnesses are in possession of, privy to, and almost certainly have accessed the conversation they captured between Relator and his counsel. Merely appointing a special prosecutor is not an adequate remedy when the special prosecutor's witnesses stand ready and willing to apprise the special prosecutor of their thoughts, opinions and testimony based on information which they should not possess. For that reason, the strongest medicine, dismissal, is clearly warranted. Should this Honorable Court disagree, those officers who accessed Relator's file on the CPD servers should be excluded from testifying at any future matters involving this case.

In his final point on the issue of disqualification, Respondent argues that should the AGO be relieved of their prosecutorial duties relating to this matter, that action would result in their inability to engage in representing the State of Missouri's interest in post-conviction appellate matters, as well as litigation in the civil nature of a Quo Warranto, should Relator be convicted of a felony offense and refuse to vacate office. Relator has more than once acknowledged his requirement to vacate his office in the event of final judgment of a felony conviction against him. Still, Respondent persists in this argument. As such, Relator hereby waives any objection to the AGO, under the Hawley administration or his successor, from engaging Relator in an action derived in Quo

Warranto to oust Relator from office should he choose to usurp the same, as well as their involvement in handling any and all post-conviction appeals related to this matter. Relator hereby adopts all statements contained in this paragraph as his own and authorizes their use against him in any subsequent litigation the office of the AGO should wish to use against him, in the event he is convicted of any felony offense. Relator only asks this Honorable Court to either dismiss the now pending criminal charges or order a special prosecutor to handle the matter moving forward. Relator asks not to exclude the AGO for any matters that would result after any felony conviction, be they criminal or civil in nature.

II. A PORTION OF THE SPECIAL MASTER'S REPORT SHOULD BE SEALED

Respondent argues the Special Master's report, in its entirety should be released to the public. His argument is based on First Amendment grounds. Respondent further argues, in his brief, the information contained in the Special Master's report does not contain privileged information. Relator is without the ability to explain how Respondent has reached this conclusion with respect to the Special Master's inclusion of the limited information he heard on the recording, which he memorialized in his report paragraph 10. That information is a direct reflection of what he heard Relator say to his attorney and there is no other way to characterize that information, other than being within the purview of the attorney-client privilege. The Eastern District Court of Appeals unanimously agreed and redacted that portion of the report, sealing it from public view.

Relator does not object to the release of the Special Master Report, provided the previously sealed portions which contain attorney-client privileged information remain sealed from public view. Relator is not, and has never, asked this Honorable Court to seal the entire report, despite Respondent's misleading assertion.

III. OBJECTIONS TO THE SPECIAL MASTER'S REPORT SHOULD BE HEARD

Relator timely filed his objections to the Special Master's Report. As noted by Respondent in his response, 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.ed 60, 75-76 (Mo. banc 2015). The Special Master, in his report, and for the first time, advised the parties he was unable to understand the majority of the conversation between Relator and Counsel. He only noted two subjects of conversation, which he was able to understand from the 20-minute conversation, in his report. They are contained in paragraph 10. It would defy all reason and logic to assume Relator and his counsel spent 20 minutes repeating and rehashing the two sentences contained in paragraph 10 of the Special Master's report, especially in the face of Relator's repeated assertions that the conversation contained much more substantive information. Information the CPD did not possess until they recorded Relator, without his knowledge, and in violation of his constitutional rights when they had no warrant to do so. Relator also complained this action was in direct violation of the Missouri Wire

Tap Act contained in *RSMo. 542.400, et seq.*, a statutory violation that the legislature thought important enough to qualify as a felony offense, both for the acquisition of the recording as well as the distribution of the same. The Special Master's report not only was based on a limited understanding of the conversation between Relator and his counsel, but failed to address all of the violations of which he then and now complains. If a Special Master's report is to be accepted only if it is supported by substantial evidence, it could not be said the Special Master's report was supported by the same when he only heard a limited portion of the evidence and failed to issue rulings on the entirety of Relator's complaints lodged in his original filing, as well as his objections to the report. As such, the findings of the Special Master can only be characterized as being against the weight of the evidence, in that his conclusions were wrong because they were not based on even a majority of the evidence presented, but rather a limited minority of what he himself was able to hear.

IV. A HEARING ON PURGING COLUMBIA POLICE DEPARTMENT'S SERVERS SHOULD BE HELD

Respondent asserts Relator is not entitled to an order entitling him to have CPD divest their servers of the recording in question without first giving notice of a hearing and an opportunity to respond to CPD. The Eastern District Court of Appeals ordered Respondent to hold such a hearing. Relator does not disagree with the Eastern District's ruling. In fact, Relator would welcome such a hearing, so that he might finally be provided with the answers he has been seeking for the last two years. Relator hereby

agrees to Respondent's request, that said hearing be held, before an order be issued for CPD to divest themselves of the recording, despite their opportunity to do so at the Special Master's hearing. The State, having both the burden of production and persuasion, should have offered the explanation they claim that CPD is now entitled to offer at the Special Master hearing; however, they failed to do so and instead offered no explanation as to who was responsible, how or why the recording was made. The evidence department blamed the officers, the officers blamed the evidence techs and the AGO feigned ignorance. Relator has no objection to this Honorable Court ordering the hearing Respondent requests, so that the AGO and CPD may once again attempt to explain the constitutional violation of Relator's right to counsel and to consult privately with the same. Relator does request and believe this hearing, should it be held, should be conducted by the newly appointed special prosecutor, who would be free to subpoena any and every member of the AGO, as well as the CPD in order to defend the recording. This would eliminate any appearance of impropriety on behalf of the special prosecutor.

V. THE SEARCH WARRANT SHOULD BE HELD INVALID

In this matter, the Respondent has issued a ruling in direct contravention of *RSMo. 542.276*, which states when a search warrant **shall** be deemed invalid. "The standard for a writ of mandamus is abuse of discretion, and an abuse of discretion occurs where the circuit court fails to follow applicable statutes. *State ex rel. Unnerstall v. Berkemeyer*, 298 S.W.3d 513, 517 (Mo. banc 2009). In the case presently before this Honorable Court, Relator has complained Respondent has relied upon the good faith exception, a

court made rule, propounded to save the government from the Court's use of the exclusionary rule, to save a statutory violation. Respondent argues Relator is not entitled to a writ because Relator is asking for a pre-trial evidentiary ruling. However, Relator is entitled to seek a writ to direct Respondent to follow statutes that are applicable to the case at hand. Relator asserts it is not necessary for this Honorable Court to make a direct evidentiary ruling to state the plain meaning of *RSMo. 542.276.10(6).* That statute states a warrant is invalid if it is not signed by the judge who issued it. There are seven statutory elements which render a warrant invalid. The use of "is" clearly indicates that the warrant offered by the state at the time they seek to offer evidence seized pursuant to said warrant be signed when presented to the Court. The warrant offered by the State in this matter was unsigned. The alleged issuing Judge, Christine Carpenter, signed an affidavit stating she had no recollection of signing the warrant in question. It is without question that the warrant offered by the State at the Motion to Suppress did not comport with the requirement that it "is" signed by the issuing Judge. No video evidence has ever been offered in relation to this matter at the trial court. This Court need not rule directly on the evidence, or admissibility thereof in this matter. Relator simply asks this Honorable Court construe the plain meaning of the statute in question and advise whether or not a good faith exception, not included in the statute, can be applied, where the legislature clearly did not include such an exception. That guidance can then be used by both the State as well as Relator, should a subsequent trial be held and the matter be presented and argued. This concept has managed to escape review by this or any other appellate court and is a matter that is highly relevant to the administration of justice in

future cases where the validity of an alleged search warrant is at issue. Relator prays this Honorable Court will construe what the legislature intended when it clearly stated what is required for a search warrant to be considered valid by a reviewing court.

CONCLUSION

Relator requests that this Honorable 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 have a hearing on whether the Columbia Police Department still possesses audio and video recordings of Relator's privileged attorney-client communications and whether those communications should be purged from their records;

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 5,058 words as directed by Rule 84.06(c). The word count was derived from Microsoft Word.

Brief was prepared using Norton Anti-Virus and was 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 December 14, 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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