IN THE SUPREME COURT OF MISSOURI

STATE EX REL. JEAN PETERS BAKER, PROSECUTING ATTORNEY OF JACKSON COUNTY, MISSOURI Relator, v. THE HONORABLE BRYAN E. ROUND, CIRCUIT JUDGE, SIXTEENTH JUDICIAL CIRCUIT, Respondent.	)))))))))))))	Cause No. SC96931

WRIT OF PROHIBITION

RELATOR'S BRIEF

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JURISDICTIONAL STATEMENT

This case is a petition for writ of prohibition under Rule 84.24 and Rule 97. The petition seeks to have this Court bar Respondent, the Honorable Bryan E. Round, from enforcing an order disqualifying Relator, Jean Peters Baker, and the Jackson County Prosecuting Attorney's Office (hereinafter "Prosecuting Attorney") from representing the State of Missouri in a Rule 29.15 post-conviction case captioned *Tyrone Skinner v. State of Missouri*, Circuit Court Case Number 1416-CV16875.

This Court has jurisdiction to enter original remedial writs under Article V, Section 4.1 of the Missouri Constitution.

STATEMENT OF FACTS

On June 13, 2014, after a trial by jury, Respondent sentenced Tyrone Skinner to concurrent terms of fifteen years for unlawful use of a weapon and three years for armed criminal action.[1] Exhibit 4, pages 3-4; Exhibit 10, page 1; Answer, page 2. Skinner then filed a *pro se* motion for post-conviction relief under Rule 29.15 related to those convictions on July 15, 2014. Petition, page 4; Exhibit 1, page 1; Exhibit 2; Answer, page 2.

Later that year, Skinner filed an untimely notice of appeal on the criminal case which was assigned the case number WD78086 by the Missouri Court of Appeals. Petition, page 4; Exhibit 3, page 1; Exhibit 4. The Appellate Division of the Missouri Public Defender System assigned Jeanette Wolpink to handle that direct appeal. Petition, page 4; Exhibit 3, page 1; Answer, page 2. Ms. Wolpink represented Skinner on the direct appeal through its final disposition in August 2016. Petition, page 5; Exhibit 3; Answer, page 2.

Between the disposition of the direct appeal and the filing of an amended post-conviction motion in February 2017, Ms. Wolpink left the Missouri Public Defender

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[1] References to the record in this brief are as follows: "Petition" for Relator's Petition for Writ of Prohibition; "Exhibit ___" for the exhibits filed by Relator as part of the petition for writ of prohibition (by exhibit number); "Suggestions in Support" for Relator's Suggestions in Support of Petition for Writ of Prohibition; and "Answer" for Respondent's Answer and Suggestions in Opposition to the Preliminary Writ.

System and joined the Jackson County Prosecuting Attorney's Office. Petition pages 5-6; Exhibit 10, page 2; Exhibit 12, page 2; Exhibit 14, page 2. The current amended motion[2] does not include any claims against Ms. Wolpink, but it does indicate that she might be a witness on one of the claims relating to the failure to request a transcript from the preliminary hearing. Petition, page 5; Exhibit 7; Answer, pages 2-5.

Upon Ms. Wolpink's joining the Prosecuting Attorney's Office, the Prosecuting Attorney implemented a screening mechanism to assure that Ms. Wolpink would have no involvement in any case connected to the cases that she handled with the Public Defender System. Petition, pages 6-7; Exhibit 14, pages 4-5; Exhibit 16, pages 5-6. Those mechanisms included a directive to the other attorneys in the office to review their cases

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[2] There are some unresolved questions related to which post-conviction motion is actually pending before Respondent. In the underlying case, Respondent allowed Skinner's initial appointed counsel to withdraw and gave new counsel an additional ninety days without making any finding that the original counsel had abandoned Skinner. Exhibit 1, pages 2-3; Exhibit 5; Exhibit 6. Because the amended motion was filed after the expiration of the ninety days granted to the original counsel, it might not be timely in the absence of a finding of abandonment. Additionally, Skinner filed an apparently untimely second *pro se* motion in a new case in which, as of today's date, no amended motion has been filed. Exhibit 3; Exhibit 8; Exhibit 9. Regardless of which pleading is properly before Respondent, none of the motions allege any facts suggesting any claim of ineffective assistance of appellate counsel by Ms. Wolpink. Exhibit 2; Exhibit 7; Exhibit 9.

to determine if Ms. Wolpink had any involvement in them. Petition, page 5; Exhibit 14, page 4. For cases that Ms. Wolpink had handled, an e-mail from the Deputy Prosecuting Attorney directed the attorneys and staff working those cases to have no contact with Ms. Wolpink about those cases. Petition, pages 5-6; Exhibit 14, pages 4-5; Exhibit 16, page 6.

In October 2017, Skinner filed a motion to disqualify the Prosecuting Attorney from representing the State of Missouri in the underlying case. Petition, page 7; Exhibit 1, page 4; Exhibit 10; Answer, pages 5-7. That motion noted that Ms. Wolpink was personally disqualified from Skinner's post-conviction case based on her representation of Skinner on direct appeal. Exhibit 10, pages 2-4; Answer, pages 5-7. That motion also alleged that Ms. Wolpink and Skinner had privileged communications during the course of the direct appeal and that Ms. Wolpink had access to other privileged materials while representing Skinner. Exhibit 10, page 3; Answer, page 6. While noting that, under the comments to the relevant ethical rules and this Court's decision in *State v. Lemasters*, 456 S.W.3d 416 (Mo. 2015), the disqualification of an individual attorney is normally not imputed to the rest of a prosecutor's office, Skinner sought the disqualification of the entire office based on a trial court's inherent power to appoint a special prosecutor, asserting that it should be granted out of an abundance of caution. Exhibit 10, pages 4-5; Answer, page 7.

The Prosecuting Attorney filed a response noting that Ms. Wolpink was not handling Skinner's case and that the attorney who was handling Skinner's case had not and would not have any conversation with her about the case or about any privileged

communications that Skinner had with Ms. Wolpink. Petition, pages 7-8; Exhibit 12, page 2. Because there was no basis alleged in Skinner's motion to impute Ms. Wolpink's disqualification to the rest of the office, the Prosecuting Attorney opposed the granting of Skinner's motion. Exhibit 12.

On November 9, 2017, Respondent granted the motion to disqualify the Prosecuting Attorney without conducting an evidentiary hearing. Petition, page 8; Exhibit 1, page 5; Exhibit 13; Answer, pages 7-8. Respondent's Order specifically found that Ms. Wolpink was personally disqualified from the case. Petition, page 8; Exhibit 13, page 1; Answer, pages 7-8. Respondent's Order did not contain any findings relating to the Prosecuting Attorney. Petition, page 8; Exhibit 13. Instead, the Order merely noted that it was disqualifying the Prosecuting Attorney in the Court's sound discretion under the authority of Section 56.110.1, RSMo. Petition, page 8; Exhibit 13, page 2; Answer, pages 7-8.

In response, the Prosecuting Attorney filed a motion to set aside seeking to have Respondent reconsider his order. Petition, page 8; Exhibit 1, page 5; Exhibit 14. The motion to set aside alleged that the motion to disqualify failed to plead sufficient facts to impute Ms. Wolpink's personal disqualification to the entire office and, furthermore, that – before disqualifying the Prosecuting Attorney – Respondent should have held an evidentiary hearing to determine the facts related to the motion. Petition, page 8; Exhibit 14, page 7.

On December 8, 2017, Respondent held a hearing on the motion to set aside. Petition, page 9; Exhibit 1, page 5; Exhibit 16. At the hearing, Robert Sauls, the assistant

prosecuting attorney assigned to represent the State in Skinner's case, testified about the screening mechanisms implemented by the Prosecuting Attorney to assure that Ms. Wolpink had no role in Skinner's post-conviction case and to assure that Mr. Sauls would not obtain any privileged information from Ms. Wolpink. Petition, page 9; Exhibit 16, pages 5-7. In particular. Mr. Sauls testified as to the directives received from his supervisors that he (and other attorneys) were not have any contact with Ms. Wolpink regarding any case that she had been involved in while working as a public defender. Exhibit 16, page 6. Mr. Sauls further testified that he had not had, and would not have, any contact with Ms. Wolpink about Skinner's case. Exhibit 16, pages 6-7. He further stated that he had not learned any confidential or privileged information about Skinner's case. Exhibit 16, pages 6-7. During the argument over the motion to set aside, Skinner did not contest the accuracy of the description of the Prosecuting Attorney's screening mechanism or that it had been properly implemented in Skinner's case.[3] Exhibit 16,

[3] During the discussion of the motion to set aside, Respondent raised the question of whether a similar motion had been filed in any other case in Jackson County. Exhibit 16, page 19. Counsels have since determined that there was a similar motion filed in *Sylvester Sisco v. State,* Circuit Court Case Number 1516-CV15206, in which Ms. Wolpink was the movant's attorney on the post-conviction case. According to CaseNet, the court in *Sisco* denied that motion. Answer, page 22. On information and belief, there are still pending post-conviction cases in which the hearing has not yet been held. Potentially, motions similar to Skinner's could be filed in one or more of those cases.

pages 14-26. Skinner did not offer any evidence in support of his motion to disqualify or in opposition to the motion to set aside. Exhibit 16, pages 7-8.

At the end of the hearing, Respondent found that, even though the Prosecuting Attorney had established these screening practices, "[i]t's impossible to say there can't be some way in which there isn't and [sic] inadvertent disclosure, innocent as it may be that could effect the case." Petition, page 9; Exhibit 16, page 28; Answer, page 18. In earlier comments, Respondent had expressed the belief that the mere theoretical possibility of such disclosure, regardless of screening mechanisms established to prevent such disclosure, was enough to create an appearance of impropriety. Exhibit 16, pages 11-12. Respondent then entered his order denying the motion to set aside. Petition, page 9; Exhibit 1, page 5; Exhibit 15.

POINT RELIED ON

Relator is entitled to an order prohibiting Respondent from disqualifying the Prosecuting Attorney in the underlying cause because Respondent abused his discretion in granting the motion to disqualify in that Tyron Skinner failed to establish adequate cause or other legal justification for such a disqualification, the undisputed evidence showed that the Prosecuting Attorney had implemented an adequate screening mechanism, and mere speculation that such a mechanism could theoretically fail is insufficient to demonstrate an appearance of impropriety.

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

State ex rel. Bennett v. Ravens, 258 S.W.3d 929 (Mo. App. W.D. 2008)

State ex rel. Horn v. Ray, 138 S.W.3d 729 (Mo. App. E.D. 2002).

Missouri Rules of Court, Rule 4-1.11

Section 56.010, Revised Statutes of Missouri

Section 56.060, Revised Statutes of Missouri

Section 56.110, Revised Statues of Missouri

SUMMARY OF ARGUMENT

One of the fundamental principles of the adversary system is that each side in a case gets to choose their own attorney. In Missouri, the power to choose the attorney representing the State in a criminal case typically rests initially with the voters in each county who select the elected prosecuting attorney who then hires assistant prosecuting attorneys to aid her in performing her statutory duty of representing the State on criminal cases arising in that county. While the right of a party to choose their own attorney is not absolute, it is also not something that is or should be easily disturbed. While a court has the discretionary authority to disqualify counsel when appropriate, a showing of good cause by the party seeking disqualification is a necessary prerequisite to the exercise of that discretion. In the absence of good cause, disqualification is an abuse of discretion.

One of the ways in which a party can show good cause is the existence of an actual conflict of interest. However, as this Court has previously recognized, for governmental offices, the conflict of interest of an individual attorney is not imputed to the entire office. To disqualify the entire office based on the conflict of one attorney, the opposing party must show an appearance of impropriety.

As established by this Court, the test for an appearance of impropriety is whether a reasonable person with knowledge of all of the relevant facts would perceive an appearance of impropriety. This test is an objective test. Moreover, in looking at the potential for an appearance of impropriety caused by one attorney in a governmental

office having a conflict of interest, this Court has recognized that the appearance can be eliminated by an adequate screening method in most cases.

Respondent failed to follow this Court's guidance. Instead, Respondent expressed his personal view of the law, contrary to this Court's express opinion, that no screening mechanism can adequately dispel the appearance of impropriety because there is always a theoretical possibility that the screening mechanism could fail. The screening mechanism that the Prosecuting Attorney established fully complied with the requirements that this Court has set forth. Because Skinner failed to establish any valid reason for disqualifying the Prosecuting Attorney, Respondent abused his discretion and exceeded his authority in disqualifying the Prosecuting Attorney. As such, this Court should make permanent the writ of prohibition and bar Respondent from disqualifying the Prosecuting Attorney from the underlying post-conviction case.

ARGUMENT

Relator is entitled to an order prohibiting Respondent from disqualifying the Prosecuting Attorney in the underlying cause because Respondent abused his discretion in granting the motion to disqualify in that Tyron Skinner failed to establish adequate cause or other legal justification for such a disqualification, the undisputed evidence showed that the Prosecuting Attorney had implemented an adequate screening mechanism, and mere speculation that such a mechanism could theoretically fail is insufficient to demonstrate an appearance of impropriety.

1. Standard for Granting the Writ

A writ of prohibition is appropriate in three general circumstances: "(1) to prevent the usurpation of judicial power when a lower court lacks authority or jurisdiction; (2) remedy an excess of authority, jurisdiction, or abuse of discretion where the lower court lacks the power to act as intended; or (3) a party may suffer irreparable harm if relief is not granted." *State ex rel. Merell v. Carter,* 518 S.W.3d 798, 799 (Mo. 2016) (citations omitted). Additionally, a writ of prohibition is generally appropriate when an appeal is inadequate to remedy the improper order. *State ex rel. Malashock v. Jamison,* 502 S.W.3d 618, 619 (Mo. 2016).

In cases in which a party has challenged the granting or denial of a motion to disqualify counsel, courts have generally described the standard of review as being for abuse of discretion. *State v. Lemasters,* 456 S.W.3d 416, 420 (Mo. 2015); *State v. Beck,* 383 S.W.3d 42, 45 (Mo. App. E.D. 2012). In turn, an abuse of discretion has been

defined as a ruling that "is clearly against the logic of the circumstances . . . and is so arbitrary and unreasonable as to shock the conscience and indicate a lack of careful consideration." *Nelson v. State*, 521 S.W.3d 229, 234-35 (Mo. 2017).

Abuse of discretion, however, is a standard of review. Contrary to any suggestion by Respondent, it is not the legal test that the trial court should have applied to the underlying disputed issue. An abuse of discretion review standard implicitly recognizes three possibilities: a) the party seeking a ruling is entitled to relief under the governing legal test; b) the governing legal test establishes that the party seeking a ruling should not get any relief; and c) a middle ground in which, under the governing legal test, the party does not have a "right" to the relief sought but the trial court can opt to grant it or deny it based on the fact-specific circumstances of the case.[4] When the case falls within this middle ground, the trial court has discretion to weigh the facts to reasonably decide the appropriate ruling. But, if the case falls outside of this middle ground, the trial court abuses its discretion by making the inappropriate ruling.

For example, this Court has stated that the determination of a juror's qualification "is a matter for the trial court in the exercise of sound judicial discretion." *Thomas v.*

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[4] In the Answer filed with this Court, Respondent suggests that the ruling below should stand based on deference to credibility findings on disputed issues. Answer, page 16. Respondent, however, does not identify those disputed factual issues. Answer, page 16. More significantly, as discussed below, Skinner had the burden of proof on any disputed issue; yet presented no evidence on the record. Exhibit 16.

Mercy Hospitals East Communities, 525 S.W.3d 114, 117 (Mo. 2017). However, nobody would seriously contend that a trial court acted within its discretion in granting challenges for cause based solely on a venireperson being an accountant since accountants are not automatically disqualified from serving on a jury. *See* § 494.425, RSMo.; § 494.430, RSMo. Similarly, nobody would seriously contend that a trial court acted within its discretion if it declined to excuse a nineteen year-old venireperson or the first cousin of one of the parties. *See* § 494.425(1); § 494.470.1, RSMo. Even if a judge were to express on the record why he believes that the venireperson should or should not be disqualified in his considered personal judgment, such a recitation would not convert the judge's personal judgment into an appropriate exercise of judicial discretion or protect that ruling from a finding of abuse of discretion.[5] Thus, while the standard of review on juror qualification is abuse of discretion, determining whether there is an abuse of discretion requires the reviewing court to consider the appropriate legal test governing the ground asserted in a challenge for cause – in *Thomas* whether the venireperson's

[5] To use the nineteen-year-old venireperson as an example, there are many nineteen-year-olds who would make fine jurors and are only disqualified by the age requirement in the statute. Faced with an otherwise well-qualified nineteen-year-old, it would not be difficult for a judge to offer a well-reasoned rationale for not removing that venireperson for cause. However, that rationale would be clearly contrary to the controlling law on juror qualifications, and, therefore, would reflect an abuse of discretion.

answers demonstrated a disqualifying bias, specifically a firm opinion on the material facts that would prevent the venireperson from following the law. 525 S.W.3d at 118.

In the trial court, Skinner relied on certain cases in which the appointment of a special prosecutor was deemed to lie within the trial court's discretion. Because discretion merely describes the standard of review and not the legal test for disqualifying a prosecutor, it is important to look beyond the reference to a trial court's discretion to determine the scope of a trial court's ability to disqualify counsel for a party.

2. A trial court should only disqualify counsel for a party upon a showing of good cause.

Some of Skinner's arguments in the trial court could be interpreted as suggesting that the trial court should disqualify the Prosecuting Attorney "out of an abundance of caution" – an invitation apparently accepted by Respondent. Exhibit 10, pages 4-5; Exhibit 16, pages 11, 27. This argument, however, ignores a fundamental principle of the adversary system – that a party gets to choose its own counsel. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006); *In re Cupples*, 952 S.W.2d 226, 234 (Mo. 1997); *Welman v. Parker*, 328 S.W.3d 451, 457 (Mo. App. S.D. 2010). While the power of a party to choose their own representative is not absolute, this basic principle means that there are limits on the power of a court to displace chosen counsel. *See, e.g., State ex rel. Thompson v. Dueker*, 346 S.W.3d 390 (Mo. App. E.D. 2011) (granting writ of prohibition barring disqualification of wife's attorney based on alleged conflict of interest with husband); *cf. Luis v. United States*, 136 S. Ct. 1083 (2016) (court may not freeze untainted assets of defendant and prevent their use to retain counsel).

Some of the discussion, both in the argument before Respondent and in Respondent's answer to the preliminary writ focused on whether the State or Relator was prejudiced by Respondent's orders. That argument misses the point. In *Gonzalez-Lopez*, dealing with the erroneous disqualification of defense counsel, the United States Supreme Court found that the disqualification of counsel of choice has "consequences that are necessarily unquantifiable and indeterminate." 548 U.S. at 150. As the Supreme Court noted, "different attorneys will pursue different strategies" on multiple aspects of the case including the theory of the case, what witnesses to call, how to cross-examine the other side's witnesses, and other issues related to the presentation of the case. *Id.* As such, the Supreme Court found that the erroneous disqualification of counsel is a structural error because "[h]armless-analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." *Id.* While there are some differences between the situation of the government and that of a private party, the basic principle remains the same. Interference in the right of a party to choose their own counsel is best analyzed as *per se* reversible error rather than under harmless error analysis.[6]

[6] That is not to say that there is no immediate impact from an erroneous disqualification. Just that those impacts are hard to quantify. More significantly, as discussed in the hearing, the more harmful potential impacts are from the cumulative effect of erroneous disqualifications – both in terms of the chilling effect on hiring decisions and in the burdens created by a significant number of erroneous disqualifications.

In Missouri, the people have chosen to establish a system in which the attorney who represents the people's interest in criminal cases is a locally-elected prosecuting attorney. § 56.010, RSMo.; § 56.060, RSMo. In turn, the elected prosecuting attorney can hire one or more assistant prosecuting attorneys. § 56.151, RSMo.; § 56.180, RSMo.; § 56.220, RSMo.; § 56.240, RSMo. However, the authority of the assistants to act on behalf of the State in any case flows through the elected prosecutor, who is ultimately responsible to the voters of her county for the decisions that her office makes in individual cases.

Missouri courts have recognized that the burden is on the party seeking disqualification of the other party's counsel to prove adequate cause supporting that disqualification.[7] *See, e.g., Thompson*, 346 S.W.3d at 394; *Polish Roman Catholic St.*

[7] Generally speaking, the burden of proof in a case involves two separate elements – the burden of production and the burden of persuasion. *White v. Director of Revenue*, 321 S.W.3d 298, 304 (Mo. 2010). The burden of production is the duty to present enough evidence on an issue to persuade the fact-finder to decide the issue. *Id.* at 304-05. On the other hand, the burden of persuasion is the duty of the party to persuade the fact-finder to accept its version of the fact. *Id.* When the same party has both the burden of production and the burden of persuasion, a fact-finder can find for the other party by merely rejecting the evidence presented by the party with those two burdens. *Id.* Even in cases in which the burden of production shifts, once the party with the burden of production has presented sufficient evidence to raise the issue, the party with the burden of persuasion

Stanislaus Parish v. Hettenbach, 303 S.W.3d 591, 600-01 (Mo. App. E.D. 2010); *State ex rel. Bennett v. Ravens,* 258 S.W.3d 929, 930 (Mo. App. W.D. 2008) (writ of prohibition appropriate when reason for removing prosecutor was not an appropriate ground for removal); *State v. Williams,* 643 S.W.2d 639, 641 (Mo. App. W.D. 1982) (mere allegation of ground for disqualification in motion insufficient to warrant the granting of the motion). Notwithstanding these cases, Skinner suggested something different to the trial court.

In the trial court, Skinner suggested that the trial court had unfettered discretion to disqualify the Prosecuting Attorney and could do so out of "an abundance of caution." Exhibit 10, pages 4-5. To support this broad discretion, Skinner cited to *State ex inf. Fuchs v. Foote,* 903 S.W. 2d 535 (Mo. 1995). Ex. 10, pages 3, 4. Skinner, however, takes the language in *Fuchs* out of context. In *Fuchs,* the local prosecutor voluntarily recused himself and sought the appointment of a special prosecutor to investigate the local sheriff and to file a *quo warranto* if warranted. 903 S.W.2d at 537. After the trial court granted that motion, the sheriff contended that the trial court's action was not

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still must present sufficient evidence to permit the fact-finder to find the contested issue in favor of the party with persuasion. *See State v. Latall,* 271 S.W.3d 561, 566-67 (Mo. 2008); *Lake Ozark/Osage Beach Joint Sewer Bd. v. Mo. Dep't of Natural Resources,* 326 S.W.3d 38, 43-45 (Mo. App. W.D. 2010).

authorized by the strict language of Section 56.110, RSMo.[8] 903 S.W.2d at 537. Section 56.110 provides for two circumstances in which a prosecuting attorney and assistant prosecuting attorneys are disqualified – prior employment as counsel and being related to the defendant. *Id.* In *Fuchs,* the reason for the disqualification was that the prosecutor would be a necessary witness for some of the misdeeds of the sheriff. 903 S.W.2d at 537. This Court held that Section 56.110 was not the exclusive source of a court's power to appoint a special prosecutor, and a court had the power to appoint a special prosecutor when "for any reason, the regular prosecutor is disqualified." 903 S.W.2d at 537. Before finding that the appointment of a special prosecutor was permitted, this Court noted that the prosecutor was required to disqualify himself under the Rules of Professional Conduct and the prior rulings of this Court based on his status as a necessary witness. *Id.*

Because there was a valid reason for recusal in *Fuchs, Fuchs* does not support the proposition that a court can disqualify a prosecutor without a valid reason or cause. As support for its holding on the authority of a court to appoint a special prosecutor, *Fuchs* cited to three prior cases. *Id.* Starting with the newest of the three cases, in *State v. Hayes*, 473 S.W.2d 688 (Mo. 1971), this Court found that it was inappropriate for the prosecutor handling the case to act as prosecutor during the trial when that same prosecutor was the primary witness and that, under that circumstance, the prosecutor

[8] Since *Fuchs,* the General Assembly has amended Section 56.110, but the relevant language in the current provision is substantially the same as the language at issue in *Fuchs.*

should have been required to withdraw or should have been barred from testifying. *Id.* at 691-92. In the second case, in *State v. Jones*, 268 S.W. 83 (Mo. 1924), this Court found that it was inappropriate for a prosecutor to sign an information arising out of an automobile collision in which he was the victim. *Id.* at 83-86. Finally, in *State v. Sweeney*, 93 Mo. 38 (Mo. 1887), a case in which – after defense counsel was elected as the new prosecuting attorney – the trial court permitted the former prosecutor to stay on the case, this Court held that the defendant's claim that private persons had employed the former prosecutor to stay on the case did not entitle defendant to a new trial as there was no evidence supporting that claim. *Id.* at 40-42. Taken together, these three cases stand for the proposition that a trial court can disqualify a prosecutor when the record in the case establishes adequate cause but may not do so when the record does not establish adequate cause.

That basic proposition is also recognized in several cases decided by the Missouri Court of Appeals. In *Bennett*, the Western District held that a trial judge acted inappropriately in disqualifying a prosecutor because the judge believed that the prosecutor "was not doing a good job" in the case by offering to reduce the charges against the defendant. 258 S.W.3d at 930-31. In so holding, the Western District rejected arguments asserting an undefined discretionary authority of a judge to appoint a special prosecutor. *Id.* In *State v. Eckelkamp*, 133 S.W.3d 72 (Mo. App. E.D. 2004), the Eastern District held that a trial judge acted inappropriately in disqualifying a prosecutor's office because that office refused to negotiate plea bargains with a particular attorney. *Id.* at 73-75. While recognizing, in light of this Court's precedents, that the

trial court's power to disqualify a prosecutor is broader than the circumstances addressed by Section 56.110, the Eastern District held that the reason for the disqualification in that case was not a permissible grounds for disqualification. 138 S.W.3d at 74-75. In *State ex rel. Horn v. Ray*, 138 S.W.3d 729 (Mo. App. E.D. 2002), the Eastern District found that it was inappropriate to disqualify the entire prosecutor's office when it hired a former public defender. *Id.* at 730-34.

In short, while a trial court does have some authority to disqualify an individual prosecutor or a prosecuting attorney's office, that authority is limited to cases in which the opposing party has demonstrated adequate cause under the appropriate legal test. As Skinner failed to assert or prove adequate cause, the trial court did not have a general discretionary authority to disqualify the Prosecuting Attorney.

3. The trial court was bound to follow this Court's opinion in *State v. Lemasters*, 456 S.W.3d 416 (Mo. 2015).

In his motion to disqualify, the only ground asserted by Skinner was that his direct appeal counsel, Ms. Wolpink, was now an employee of the Prosecuting Attorney. Exhibit 10, pages 2-4. In part, Skinner did acknowledge that Rule 4-1.11(d) and this Court's decision in *Lemasters* do not permit the imputation of Ms. Wolpink's conflict to the rest of the office. Exhibit 10, page 4. However, he then suggested that, under *Fuchs*, the trial court could still "out of an abundance of caution" disqualify the Prosecuting Attorney based on Ms. Wolpink's conflict. Exhibit 10, pages 4-5. During the argument on the motion to set aside, Skinner, to some degree, suggested that *Lemasters* did not limit the trial court's discretion in this circumstance, a position echoed to some degree by

Respondent in these writ proceedings. Exhibit 16, page 21; Answer, page 16. This reasoning by Skinner was flawed for two reasons.[9]

First, as discussed above, there is no power to disqualify a prosecutor without good cause. While a conflict of interest or an appearance of impropriety is not the only ground for disqualifying an attorney from a case, that was the only basis suggested by Skinner's motion to disqualify. Exhibit 10. Any explicit or implicit suggestion that the trial court could disqualify the Prosecuting Attorney without reference to a legal standard

[9] Even though not asserted as a ground in Skinner's motion, in Skinner's argument at the hearing and in Respondent's Answer in this Court, there is a suggestion of a potential alternative reason – that Ms. Wolpink might be called as a witness at the hearing. Exhibit 10; Exhibit 16, pages 14, 23-26; Answer, page 9. While Rule 4-3.7 recognizes that a lawyer should not personally serve as an advocate in a case in which they are a necessary witness, the comments to that rule recognize that another attorney in that lawyer's office can continue to serve as counsel in the case. Rule 4-3.7, Comment [5]. Additionally, if Skinner were to call Ms. Wolpink as a witness, depending on the subject of that testimony and Skinner's testimony at the hearing, Skinner's actions might waive in whole or in part the attorney-client privilege as it relates to any communications with Ms. Wolpink. In short, Ms. Wolpink's status as a witness is not an independent ground for disqualifying the Prosecuting Attorney and may actually weaken any claim of an appearance of impropriety.

governing when disqualification is appropriate was erroneous as Skinner bore the burden of alleging and proving good cause.

Second, a basic principle of law is that lower courts are bound by the last decision of this Court. *State v. Escobar*, 523 S.W.3d 545, 554-55 (Mo. App. W.D. 2017); *State v. Hood*, 521 S.W.3d 680, 685 (Mo. App. S.D. 2017); *State v. Alexander*, 505 S.W.3d 384, 398 n. 10 (Mo. App. E.D. 2016); *cf. State v. Wade*, 421 S.W.3d 429, 433-34 (Mo. 2013) (noting role of *stare decisis* and the presumption against finding that a prior ruling was overruled *sub silentio*). Similarly, Missouri courts are bound by the rules of court as adopted by this Court. *Dorris v. State*, 360 S.W.3d 260, 268 (Mo. 2012). As discussed in *Lemasters*, the Rules of Professional Conduct address when the conflict of a newly-hired attorney can be imputed to the entirety of a governmental office. *See* Rule 4-1.11(d). *Lemasters* specifically addressed when a prosecutor's office should be disqualified based on Rule 4-1.11(d) or an appearance of impropriety created by the conflicts of a newly-hired attorney. As such, any suggestion by Skinner that the trial court should resolve the appearance of impropriety based on something other than this Court's decision in *Lemasters* was wrong. Because *Lemasters* addressed when a conflict of one attorney in the office may be imputed to the entire office – either under the ethical rules or as an appearance of impropriety – Skinner's suggestion that the trial court did not have to analyze his motion under *Lemasters* led the trial court into clear error and an abuse of discretion.

4. *Lemasters* established an objective test for an appearance of impropriety.

In *Lemasters,* this Court examined whether the conflict of a single attorney within the office based on past employment should be imputed to the entire office.

First, this Court examined the conflict under the ethical rules. *Lemasters,* 456 S.W.3d at 420-22. This Court noted that Rule 4-1.11(a) barred a former governmental attorney (there and here, a former public defender) from representing the State on any case that was the same or substantially related to any case that she had worked on in her prior employment. 456 S.W.3d at 420. This Court further noted that, under Rule 4-1.9(c), such an attorney was barred from revealing any information related to her representation of any defendant. 456 S.W.3d at 420. In terms of imputing those restrictions on the former public defender to the rest of the office, however, this Court found that the controlling rule was Rule 4-1.11(d). 456 S.W.3d at 421-22. Under that rule and the comments to it, this Court found that the disqualification of the former public defender was not imputed by the ethical rules to the rest of the office. *Id.* at 422.

While not specifically noted by this Court in *Lemasters,* the Comments to Rule 4-1.11 explain the reason for the rules that apply to government attorneys. "[T]he rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards." Rule 4-1.11, Comment [4]. As that comment reflects, the rules regarding disqualification of individual attorneys, governmental offices, and firms can

play a role in the hiring decision – both from the point of view of the office doing the hiring and from the point of view of the attorney being hired.

Particularly in large counties or for larger agencies, the rules regarding imputing conflicts of interest can have a substantial impact. In larger counties, an office will have a significant number of assistants. For example, at the present time, the Prosecuting Attorney has over seventy assistants. Suggestions in Support, page 11. Each of these attorneys (and, to some extent, the support staff) brings to the office potential circumstances in which he might have to recuse himself from involvement in a particular case. If a new hire automatically disqualified a prosecuting attorney's office from every case on which that new hire had worked or every case handled by the office in which the new hire had worked, a prosecutor's office would have a significant disincentive to hiring experienced attorneys.

However, by limiting any disqualification to the individual attorney and, then, only for the cases that the attorney individually handled, Rule 4-1.11 allows attorneys to move freely between governmental and private practice (and between different governmental offices) subject only to a screening requirement. This rule makes it possible for a governmental office to hire well-qualified attorneys like Ms. Wolpink who have a conflict of interest in some cases while not requiring the office to recuse from those cases as long as the office maintains an appropriate screening process.

The importance of an appropriate screening process was the subject of the second part of *Lemasters.* While recognizing that Rule 4-1.11 did not require the disqualification of an entire prosecutor's office due to the conflicts of a single newly hired attorney, this

Court noted that, in some cases, the appearance of impropriety created by the conflict could require such disqualification. *Lemasters*, 456 S.W.3d at 422-25. However, according to this Court, whether there is an appearance of impropriety is based on how things would appear to a reasonable person with knowledge of all of the relevant facts. *Id.* at 423.

In some of the argument at the motion to set aside, Skinner suggested that the reasonable person test is not an objective test. Exhibit 16, page 16. While most reasonable person tests take into account the facts and circumstances known to or facing a person, courts usually describe such tests as objective tests. For example, in *Mantia v. Missouri Dep't of Transportation*, 529 S.W.3d 804 (Mo. 2017), this Court described the "reasonable worker" test for compensation for stress-related injuries in worker's compensation cases as an objective standard. *Id.* at 810. Applying the appearance of impropriety standard to a motion to disqualify a judge, the Western District stated that standard involved what a "'reasonable person[,]'on the basis of objective facts, 'would find. . . .'" *Huston v. State*, 532 S.W.3d 218, 225 (Mo. App. W.D. 2017). In applying the test for whether a suspect was "in custody" for the purposes of *Miranda*, the Eastern District described the test's reasonable person standard as "an objective test." *State v. Schneider*, 483 S.W.3d 495, 501 (Mo. App. E.D. 2016). Other Missouri cases equating a reasonable person standard with an objective test include *State v. Coleman*, 463 S.W.3d 353, 355 (Mo. 2015); *Morris v. Glenridge Children's Ctr., Inc.*, 436 S.W.3d 732, 737 (Mo. App. E.D. 2014); *Stander v. Szabados*, 407 S.W.3d 73, 82 (Mo. App. W.D. 2013); and *Nace v. Director of Revenue*, 123 S.W.3d 252, 259 (Mo. App. W.D. 2003). Perhaps,

most famously in *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court, in discussing the "reasonable probability" test for prejudice contrasted a reasonable decision-maker from the actual decision-maker who can be idiosyncratic and act contrary to the law. *Id.* at 695.

The objective nature of the test is further shown by the discussion in *Lemasters.* In explaining the application of the test for an appearance of impropriety, this Court compared the relevant facts in *Lemasters* to the facts in *State v. Ross*, 829 S.W.2d 948 (Mo. 1992), to demonstrate why a reasonable person would find no appearance of impropriety in *Lemasters*, but would have found an appearance of impropriety in *Ross*. 456 S.W.3d at 423-25. As noted by this Court, *Ross* involved a criminal defendant who was being represented on a civil case arising out of the same incident by a firm that included members of the prosecuting attorney's office. 829 S.W.2d at 949-50 (discussed at *Lemasters*, 456 S.W.3d at 423). This Court found that the on-going interconnections between the prosecutor's office and the firm representing the defendant in a civil case in *Ross* was a fact that would lead a reasonable person to perceive an appearance of impropriety in the absence of contrary evidence. *Lemasters*, 456 S.W.3d at 424. By contrast, the situation in *Lemasters*, with no on-going connections and a formal screening mechanism, demonstrated facts that would leave a reasonable person to conclude that there was no appearance of impropriety. *Id.* at 424-25. In particular, in light of the screening mechanism, any fear or belief that former counsel might have disclosed confidences to her new employers were dispelled. *Id.*

In short, a reasonable person test requires the trial court to determine what the objective facts are and then determine what conclusions a reasonable person would draw from those objective facts.

5. Because the Prosecuting Attorney had established an adequate screening procedure in compliance with *Lemasters*, there was no appearance of impropriety and, therefore, no basis for Respondent to grant Skinner's motion to disqualify.

In *Lemasters*, this Court found that the prosecuting attorney's office in that case had established an adequate screening mechanism sufficient to dispel any appearance of impropriety. 456 S.W.3d at 422-25. In discussing the screening mechanism, this Court noted that, under that mechanism, the former public defender did not participate in the prosecution of any case in which she had represented the defendant and did not discuss those cases with others in the office beyond identifying the cases in which she had a conflict. *Id.* at 419. As this Court noted in *Lemasters*, the comments to the Rules of Professional Conduct, while not requiring such a screening mechanism, suggest that it is "prudent" to have such a screening mechanism. Rule 4-1.11, Comment [2]; *Lemasters*, 456 S.W.3d at 422.

In comparing the facts in *Lemasters* to the facts in *Ross*, this Court identified several potentially key factors in evaluating whether there was an appearance of impropriety. First, this Court looked at whether the representation is concurrent (as in *Ross*) or successive (as in *Lemasters* and the present case). 456 S.W.3d at 423. Second, this Court considered whether there were on-going connections between the prosecutor's office and the other office that gave members of the prosecutor's office potential access

to confidential information. *Id.* at 424. Third, the Court examined whether defendant knew about the screening of the conflicted attorney from his criminal case. *Id.* at 424-25. In all of these factors, the facts in the present case are the same as in *Lemasters.*

Of particular relevance, in light of the reason given by Respondent that he personally believes that it is impossible for any screening mechanism to absolutely insure that no confidential information is disclosed, is the third factor. In *Lemaster,* this Court found any claim that the defendant was chilled from testifying or presenting evidence based on the potential for confidential information being disclosed was rebutted by the evidence demonstrating that his former counsel had not disclosed any evidence to the prosecutor trying the case. *Id.* at 424-25. In the present case, the only evidence was that there has been no communication between counsel assigned to the case and Ms. Wolpink about this case and that the counsel assigned to the post-conviction case knows that he is not supposed to talk with Ms. Wolpink about this case. Exhibit 16, pages 5-7. Ms. Wolpink, as an attorney, is generally forbidden by the Rules of Professional Conduct from disclosing any information about the case. Rule 4-1.6; Rule 4-1.9. In ruling on the motion to set aside, Respondent acknowledged that he believed that the Prosecuting Attorney, the assigned attorney, and Ms. Wolpink had acted and would continue to act properly. Exhibit 16, pages 10-11.

Respondent's musings about possible future inadvertent disclosures does not support his ruling. Given this Court's analysis in *Lemasters,* Respondent's reasoning is speculative or, at the very least, not ripe. Generally speaking, a court is only permitted to make reasonable inferences from the evidence and is not permitted to engage in

speculation. *See State v. Gilmore*, 537 S.W.3d 342, 346 (Mo. 2018); *Johnson v. Auto Handling Corp.*, 523 S.W.3d 452, 459-61 (Mo. 2017). Even when dealing with future events, there must be some evidence establishing the reasonable certainty that an event will occur, not mere speculation on what might occur. *Dodson v. Ferrar*, 491 S.W.3d 542, 566-67 (Mo. 2016) (damages for future damages should be based on substantial evidence showing with reasonable certainty expected earnings rather than speculation). Similarly, a court may not avoid acting on the present facts based on speculation that those facts might change in the future. *City of DeSoto v. Nixon*, 476 S.W.3d 282, 288-90 & n. 9 (Mo. 2016) (determining whether class in statute created special law, court considered only reasonably foreseeable changes to class membership as shown by current evidence, not speculation that different evidence might support different conclusion in the future); *Bateman v. Rinehart*, 391 S.W.3d 441, 451-52 (Mo. 2013) (classification of property for property taxes could not speculate on potential that city might rezone property in the future); *Mo. Soybean Association v. Mo. Clean Water Commission*, 102 S.W.3d 10, (Mo. 2003) (plaintiff could not challenge validity of action identifying deficient waters based on speculation as to the regulations which might follow to correct those deficiencies).

While Respondent points to the discussion of the merits by Respondent during the hearing as proof that the decision was the product of reasoned judgment, that discussion demonstrates that Respondent's reasoning was inconsistent with the law in Missouri. Respondent indicated that, if Ms. Wolpink had merely been in the office handling the direct appeal with another attorney actually representing Skinner, there was a "fair

chance" that he would not have granted Skinner's motion. Exhibit 16, page 12. The case law makes it clear, however, that under such a circumstance, the issue would not be a close call, and granting the motion would be an abuse of discretion. *Horn*, 138 S.W.3d at 732-35.

Moving to a circumstance, like the present case, in which counsel had represented the party moving for disqualification, Respondent opined that no screening mechanism could ever be adequate. Exhibit 16, pages 11-12, 28. For the reasons discussed above, the holding that a screening mechanism never dispels the appearance of impropriety does not accurately reflect Missouri law and is contrary to *Lemasters.* As this Court stated in *Lemasters*, "the evidence showing that [the prosecuting attorney] and Cheney took adequate and effective measures to prevent any communication between Cheney and the other prosecutor dispels that appearance [of impropriety] and removes that doubt [about the fairness of the proceeding]." 456 S.W.3d at 425. Because of that screening mechanism, this Court concluded that "no reasonable person with knowledge of the facts in this case would believe they create an appearance of impropriety or cast doubt on the fairness of Lemasters' trial." *Id.* In short, Respondent's comments at the time of the hearing reflect that he substituted his personal evaluation of when it is appropriate to disqualify counsel for the objective test adopted in *Lemasters.*

In this Court, Respondent offers other reasons to distinguish the facts in this case from *Lemasters.* None of those reasons, however, go to the key point in *Lemasters* – that, in the typical case, an adequate screening mechanism is usually enough to dispel the appearance of impropriety. In particular, Respondent emphasizes two facts as potentially

significant: 1) Ms. Wolpink was Skinner's counsel on direct appeal; and 2) Skinner allegedly discussed the post-conviction case with Ms. Wolpink. Answer, page 15. While these are differences with the facts in *Lemasters*, they do not by themselves support disqualification.

As to the first point, Ms. Cheney (the attorney in *Lemasters* who left the public defender's office to become a prosecutor) was the client's appointed trial counsel until she left to become a prosecutor. 456 S.W.3d at 419. In that role, Ms. Cheney would have been responsible for beginning to formulate a defense based on the discovery received from the State and the information received from defendant. Before leaving the office, Ms. Cheney prepared a transfer memorandum discussing her opinion on possible defenses and the merits of the case. *Id.*

By contrast, Ms. Wolpink's representation of Skinner occurred at a different stage of the proceedings – direct appeal. Generally speaking, the scope of a direct appeal is limited to those matters occurring on the record. *K.L.M. v. B.A.G.*, 532 S.W.3d 706, 710-11 (Mo. App. E.D. 2017). While it is possible that a client could make comments about his trial counsel or potential defenses to his appellate counsel that might become relevant in a post-conviction hearing or a new trial, such comments are not directly related to the representation of the client on direct appeal. Because an appeal is primarily concerned with whether the record shows legal error by the trial court rather than whether the findings are factually correct or the client is actually factually guilty, direct appeal counsel is typically less likely to possess critical confidential information than trial counsel.

Furthermore, while Rule 25.05 requires the disclosure of defense witnesses, it generally does not require the disclosure of the defense theory of the case except for defenses of alibi and mental disease. In particular, there is no requirement that trial counsel disclose defendant's potential testimony. By contrast, in a post-conviction proceedings, a defendant must set forth his claims for relief in an amended motion and plead the facts supporting that claim. *Johnson v. State*, 406 S.W.3d 892, 898 (Mo. 2013). While not completely waiving attorney-client privilege, the pleadings and the claims raised in the amended motion can substantially waive attorney-client privilege. In other words, the risk of the disclosure of confidential information by former trial counsel in connection with the trial itself would usually pose a greater risk to a fair and impartial proceeding than would the risk of disclosure of confidential information by former appellate counsel in a post-conviction proceeding.

The second point involves the information actually disclosed. The problem is that neither the opinion in *Lemasters* nor the record in this case involves any details about the information disclosed. In *Lemasters*, Ms. Cheney did have an interview with the defendant that lasted for fifteen minutes. 456 S.W.3d at 419. Ms. Cheney also had an investigator conduct a recorded interview of the defendant. *Id.* This Court did not discuss in its opinion (and it may not have been disclosed in the hearing) the substance of the information gained by Ms. Cheney. As such, it is unclear to what extent Ms. Cheney may have been in possession of significant confidential information that might have been relevant to the defense. Similarly, here, there is nothing in the record beyond Skinner's representation that there was relevant confidential information disclosed. However, it is

impossible to compare the significance of the information here to the information in *Lemasters*.

Regardless of the significance of that information, this Court's comparison, in *Lemasters*, of the differences between *Ross* and *Lemasters* holds true in this case. Unlike the situation in *Ross* in which no record was made until after the trial and like the situation in *Lemasters*, the record in the present case demonstrates that any objective observer should know based on the evidence presented at the hearing: 1) that Ms. Wolpink has not divulged any of Skinner's confidential information; and 2) that Ms. Wolpink has been effectively screened from his case. 456 S.W.3d at 424-25. As such, any claim that Skinner fears that Ms. Wolpink might disclose confidential information has no more objective validity in this case than it did in *Lemasters*. In the absence of any factual reason to believe that Skinner's confidential information has been disclosed to the assistant prosecuting attorney handling the case, there is no objective reason for any person – including Skinner or Respondent – to believe that any impropriety has or will occur if the Prosecuting Attorney is permitted to resume their statutory obligation to represent the State in Skinner's post-conviction case.

Through this point in time, the only potential impropriety identified is Respondent's personal belief that it is always wrong for a prosecutor's office to handle a case when any member of the office has personally represented a defendant or movant at any stage of the proceeding. That belief, however, is contrary to the Rules of Professional Conduct. Rule 4-1.10(d); Rule 4-1.10, Comment [7]; Rule 4-1.11(d); *Lemasters*, 456 S.W.3d at 420-22. Similarly, Respondent's personal belief that there is

always an appearance of impropriety in such a circumstance regardless of attempts by a prosecutor to screen out the former defense counsel is contrary to *Lemasters* which provides that safeguards can sufficiently assure that confidential information will not be disclosed. *Id.* at 424-25.

As the Prosecuting Attorney has complied with the requirements of *Lemasters*, Respondent's finding that there remained an objective appearance of impropriety was contrary to the law in this State. In the absence of a valid appearance of impropriety, there was no good cause alleged by Skinner that would have justified the removal of the Prosecuting Attorney from Skinner's post-conviction case. As such, Respondent acted in excess of his authority and abused his discretion in granting Skinner's motion to disqualify the Prosecuting Attorney. This Court should grant a writ of prohibition to preclude Respondent from enforcing the order disqualifying the Prosecuting Attorney.

CONCLUSION

For the reasons set forth above, Relator, Jackson County Prosecuting Attorney, requests that this Court make permanent its preliminary writ of prohibition barring Respondent, the Honorable Bryan E. Round from enforcing his order disqualifying the Jackson County Prosecuting Attorney from fulfilling its statutory duty to represent the State of Missouri in the underlying case – *Tyron Skinner v. State of Missouri*, Case Number 1416-CV16875.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Rule 84.06(b) and Rule 55.03. The brief contains 9,781 words.

I further certify that this brief will be electronically served by the e-filing system on all participants in this case, and that a copy has been sent to the Honorable Bryan E. Round, Respondent, on this 4th day of June, 2018, by e-mail (to matthew.klose@courts.mo.gov, law clerk).

/s/ Terrence M. Messonnier
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