

IN THE MISSOURI SUPREME COURT

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STATE OF MISSOURI ex rel.	)	
JEAN PETERS-BAKER,	)	
JACKSON COUNTY PROSECUTING	)	
ATTORNEY,	)	
	)	
Relator,	)	
v.	)	No. SC96931
HON. BRYAN E. ROUND,	)	
Respondent.	)	

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ON PETITION FOR WRIT OF PROHIBITION FROM  
 THE CIRCUIT COURT OF JACKSON COUNTY  
 16<sup>th</sup> JUDICIAL CIRCUIT  
 THE HONORABLE BRYAN E. ROUND, CIRCUIT JUDGE

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BRIEF OF  
 MISSOURI ASSOCIATION OF PROSECUTING ATTORNEYS  
 IN SUPPORT OF RELATOR  
 AS *AMICUS CURIAE*

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....3  
STATEMENT OF INTEREST OF *AMICUS CURIAE*.....4  
ARGUMENT.....5  
CONCLUSION.....9  
CERTIFICATE OF SERVICE AND COMPLIANCE.....10

**TABLE OF AUTHORITIES**

<b><u>CASES</u></b>	<b><u>PAGE</u></b>
1. <i>State v. Boyd</i> , 560S.W.2d 296 (Mo.App. 1977).....	5
2. <i>State v. Ross</i> , 829 S.W.2d 948 (Mo.1992).....	5,7
3. <i>State v. Burns</i> , 322 S.W.2d 736(Mo.1959).....	5
4. <i>State v. Croka</i> , 646 S.W.2d 389(Mo.App.1983).....	5
5. <i>State v. Wacaser</i> , 794S.W.2d190(Mo.banc 1990).....	5
6. <i>State v. Lemasters</i> , 456 S.W.3d 416 (Mo. banc 2015).....	5,6,7,8
7. <i>State ex. inf. Fuchs v. Foote</i> , 903 S.W.2d 535 (Mo. banc 1995).....	6,7
<b><u>STATUTES.</u></b>	
1. Mo Rev. Stat. Section 56.110.....	.6

**STATEMENT OF INTEREST OF AMICUS CURIAE**

The Missouri Association of Prosecuting Attorneys (MAPA), established in 1969, is a non-profit, voluntary association representing over 500 prosecutors, including elected and assistants, and their investigators statewide. MAPA strives to provide uniformity and efficiency in the discharge of duties and functions of Missouri's prosecutors, to promote high levels of professionalism amongst Missouri's prosecutors, and to continually improve the criminal justice system in Missouri.

This case raises a matter of interest to Missouri's prosecutors as it has the potential to have a substantial impact on the criminal justice system and the need for special prosecutors and hiring practices by prosecutors across the state.

## ARGUMENT

**REQUIRING THE BLANKET DISQUALIFICATION OF AN ENTIRE PROSECUTOR'S OFFICE THAT HAS HIRED A FORMER PUBLIC DEFENDER AND WHICH HAS SCREENED THE ATTORNEY FROM CONTACT WITH OTHER ATTORNEYS WILL RESULT IN NUMEROUS SPECIAL PROSECUTOR APPOINTMENTS AND WILL HAVE A CHILLING EFFECT ON FUTURE HIRING PRACTICES BY PROSECUTORS ACROSS THE STATE.**

The proper threshold for determining whether a prosecutor should be disqualified is whether there is “an appearance of impropriety”. *State v. Boyd*, (Mo.App. 1977), at page 297. Courts have held that an appearance of impropriety exists when the prosecutor has a conflict of interest or a potential conflict that has not been or cannot be resolved. See *State v. Ross*, 829 S.W.2d 948 (Mo.1992), *State v. Burns*, 322 S.W.2d 736(Mo.1959),) *State v. Croka*, 646 S.W.2d 389(Mo.App.1983), *State v. Wacaser*, 794 S.W.2d 190 (Mo. banc 1990). In each of these cases, the prosecutor had a clear conflict due to a prior representation or prior relationship with the defendant.

In *State v. Lemasters*, 456 S.W.3d 416 (Mo banc 2015), this Court clarified that the test for whether or not there is an appearance of impropriety is whether a reasonable person with knowledge of all the facts and circumstances in a case could conclude that there is an appearance of impropriety that casts doubt on the fairness of a trial and affirmed that screening procedures could be utilized by a prosecutor's office. *Lemasters, supra*, at page 423.

In the instant case, the trial court entered its order disqualifying the Relator's entire office "out of an abundance of caution" because an attorney who previously represented the defendant now worked as an assistant prosecuting attorney in the office. This trial court made this disqualification despite finding that screening procedures had been set up pursuant to *Lemasters*, and that there was no evidence of communication by the attorney about privileged information concerning the defendant. In *Lemasters*, the prosecutor's office in question was Newton County, which was a much smaller prosecutor's office than Jackson County. If the *Lemasters* screening procedures were sufficient for a smaller office, they most certainly are sufficient for a metropolitan sized office. Further, the representation of the defendant by the newly hired assistant prosecutor in LeMasters was for the same case that he was being prosecuted for by the Newton County Prosecutor's Office. In the instant case, it was a prior matter. Nowhere has the standard for assessing whether a potential conflict rises to the level requiring disqualification been held to be "an abundance of caution."

Section 56.110, RSMo, provides the sole statutory authority for disqualification of a prosecutor, and states:

If the prosecuting attorney and assistant prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his or her office, or shall be related to the defendant in any criminal prosecution, either by blood or by marriage, the court having criminal jurisdiction may appoint some other attorney to

prosecute or defend the cause. Such special prosecutor shall not otherwise represent a party other than the state of Missouri in any criminal case or proceeding in that circuit for the duration of that appointment and shall be considered an appointed prosecutor for purposes of section 56.360.

To be sure, this provision does not constitute an exclusive or exhaustive list of reasons for disqualification of a prosecutor. Of course, the Rules of Professional Conduct govern all attorneys regarding conflicts of interest and occasionally will mandate that a prosecutor recuse himself or herself in a specific case. For example, in *State ex. inf. Fuchs v. Foote*, 903 S.W.2d 535 (Mo banc 1995), the Supreme Court of Missouri upheld the appointment of a special prosecutor where the elected prosecutor was disqualified pursuant to Rule 4-3.7, as a necessary witness in the case. However, this is an example of representation that was a clear conflict situation, and not merely the court invading the discretion of the elected prosecutor and is distinguishable from the case at bar.

The holding of this Court in *State v. Ross*, 829 S.W.2d 948 (Mo banc 1992) would, at first glance, appear to give some support to Respondent's position, but it can easily be distinguished, and when read together with *LeMasters, supra*, becomes inapposite. In *Ross, supra*, the prosecutor's office had two part-time assistant prosecutors who were members of a firm currently representing the defendant in a civil matter. No steps had been taken to wall off those assistants from the criminal prosecution. Like *LeMasters* and unlike *Ross*, the office of the Jackson County Prosecuting Attorney had taken steps to insure no contact between the attorney with a prior relationship with the defendant and the office employees

handling the prosecution. In addition, like *LeMasters* and unlike *Ross*, the relationship was not a concurrent one, but rather from a prior unrelated matter. Finally, like *LeMasters*, and unlike *Ross*, the employee in question was a former employee of another public governmental agency with only a prior relationship with the defendant, not ones who were also concurrently in a private firm that was representing the defendant. Given the prophylactic measures taken, a reasonable person would not find an appearance of impropriety arising solely from the employment of the assistant who had an individual conflict, particularly when steps were taken to insulate that employee from the pending prosecution. Absent such an true appearance of impropriety, the disqualification of the entire office of the Jackson County Prosecuting Attorney would have far reaching implications for all prosecutors and will have a chilling effect on the hiring of qualified attorneys by both prosecutors and public defenders alike.



## CONCLUSION

If the trial court's action stands, it will create chaos throughout the state's criminal justice system and preclude prosecuting attorneys from hiring qualified and competent public defenders and private defense attorneys.

The trial court's order of disqualification of Relator's entire office is an abuse of discretion and should be overruled and vacated.

Respectfully submitted

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## CERTIFICATE OF SERVICE AND COMPLIANCE

I, the undersigned, hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 1417 words, excluding the cover, certification and appendix, as determined by Microsoft Word and;
2. That the electronic file has been scanned and found to be virus-free; and
3. That a true and correct copy of the foregoing was sent through the e-filing system this 1st day of June, 2018 to all counsel of record.

Respectfully submitted,

s/Stephen P. Sokoloff

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