SC97026

In the Missouri Supreme Court

State ex rel. Kimberly Gardner,

Relator,

v.

The Honorable Timothy Boyer,

Respondent.

On Petition for a Writ of Prohibition

Brief of *Amicus Curiae* the Missouri Attorney General

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INTEREST OF *AMICUS CURIAE*

The Attorney General is the "chief legal officer of the State." *State v. Todd*, 433 S.W.2d 550, 554 (Mo. 1968). As the State's chief legal officer, the Attorney General is empowered to file an *amicus curiae* brief as a matter of right. Rule 84.05(f)(4).

Although the Attorney General's common-law power is the historical source of the local prosecuting attorney's authority, at present the Attorney General exercises original or concurrent prosecuting authority only in a limited number of criminal matters. *See*, *e.g.*, Section 287.128, RSMo. (violations of the Worker's Compensation Act); *see also* Section 27.105, RSMo. (violations of the Gambling chapter). The Attorney General also serves as the original prosecuting authority when appointed by a trial court under Section 56.110, RSMo. *State v. Steffen*, 647 S.W.2d 146, 153 (Mo. App. W.D. 1982).

Although the Attorney General is not presently involved in the prosecution of the underlying criminal case, the Attorney General nevertheless has a strong interest in promoting an appropriate balance between the necessary exercise of prosecutorial discretion and the effective administration of the criminal justice system. To promote these interests, the Attorney General has also filed an *amicus curiae* brief in *State ex rel. Peters-Baker v. Round*, SC96931.

STATEMENT OF FACTS

On September 1, 2017, the St. Louis Circuit Attorney's Office filed a complaint charging Wendell Davis with unlawful use of a weapon, unlawful possession of a firearm, stealing a firearm, resisting arrest, and tampering with a motor vehicle. (Pet. Ex. at E3–E5).[1] According to the probable cause statement, the charges arose from an altercation between Davis and Officer A.F. that began when Officer A.F. observed a vehicle with a stolen license plate. (Pet. Ex. at E6). Officer A.F. attempted to effectuate a traffic stop when the vehicle sped off. (*Id.*). Davis was a passenger in the vehicle. (*Id.*). Eventually the vehicle came to a stop and both the driver and Davis fled on foot. (*Id.*). Officer A.F., with his gun drawn, pursued Davis. (*Id.*). Davis retrieved a firearm and pointed it at Officer A.F. (*Id.*). In response, Officer A.F. shot Davis, and then took Davis into custody. (*Id.*). The complaint initially indicated that the Circuit Attorney would present the case to the grand jury. (Pet. Ex. at E3). Meanwhile, Relator Gardner undertook a simultaneous investigation into the propriety of Officer A.F.'s actions. (Tr. at 17–18; Tr. at 30; Tr. at 33–34).

[1] The Attorney General cites to the record as follows: citations to the Relator Gardner's exhibits are "Pet. Ex.," except for citations to the hearing transcript, Pet. Ex. 8, which is cited as "Tr." The Attorney General cites to his appendix as "App."

Either because of non-presentation or because of an adverse decision, the grand jury never returned a true bill. (Pet. Ex. at E31; App. at A2). Instead, several continuances were granted until the case was set for a preliminary hearing. (Pet. Ex. at E31; App. at A2).

Because of the Circuit Attorney's request for a preliminary hearing, Officer A.F. sought to appear and ask Respondent Boyer to disqualify Relator Gardner and her office. (Pet. Ex. at E8). Briefing was submitted by Davis (Pet. Ex. at E8), by Relator Gardner (Pet. Ex. at E18), and by Officer A.F. (Pet. Ex. E24; E27). Thereafter, Respondent Boyer heard oral argument from each. (Tr. 1–53).

Respondent Boyer then issued his order. (Pet. Ex. at E30; App. at A1). Respondent Boyer declined to rule on whether Officer A.F. had standing to file a motion. (Pet. Ex. at E33; App. at A4). Instead, Respondent Boyer found the court had inherent authority—*ex mero mutu*—to consider whether disqualification was appropriate. (Pet. Ex. at E33; App. at A4). Respondent Boyer then found that disqualification of Relator Gardner and the entire Circuit Attorney's Office was necessary because there was an appearance of impropriety. (Pet. Ex. at E37; App. at A8). Respondent Boyer reached this conclusion because of the potential conflict of interest created by the Circuit Attorney's simultaneous investigation of Officer A.F. and prosecution of Davis (Pet. Ex at E37; App. at A8) and because Relator Gardner's actions in

Davis' case were a departure from her public statements made during her campaign (Pet. Ex. at E34; App. at A5). Respondent Boyer next considered whether Relator Gardner had taken steps to "mitigate" the appearance of impropriety. (Pet. Ex. at E37–E38; App. at A8–A9). After finding that Relator Gardner had not taken steps to "mitigate" the appearance of impropriety, Respondent Boyer concluded that "disqualifying the Circuit Attorney in this specific case and appointing a special prosecutor [was] the only available option to the Court to avoid the appearance of impropriety." (Pet. Ex. at E38; App. at A9).

SUMMARY OF THE ARGUMENT

In this case, Relator Gardner and the Circuit Attorney's Office are simultaneously prosecuting a criminal defendant while investigating the police officer's actions apprehending that defendant. Respondent Boyer disqualified Relator and her office. Relator and Defendant question the propriety of the order.

Relator and Defendant suggest that the Court can resolve the case on the question of whether Officer A.F. had standing to seek disqualification of Relator Gardner and the Circuit Attorney's Office. But the Court need not answer that question because Missouri courts have authority to disqualify the prosecuting attorney *ex mero motu* when a court is aware of information that demonstrates an appearance of impropriety.

Under Missouri law, disqualification of an entire elected prosecuting attorney's office is an invasive remedy because it interferes with the important connection between the People and their elected prosecutor. Respondent Boyer's decision to impose this extraordinary remedy was not an abuse of discretion for two reasons. *First*, a reasonable person with knowledge of all the facts and circumstances could perceive an appearance of impropriety. And *second*, Relator Gardner failed to present "countervailing facts" that would "dispel" the appearance of impropriety.

ARGUMENT

I. The Court need not resolve whether Officer A.F. had standing to move for disqualification of Relator, in that Respondent acted on the court's own motion and entered the disqualification order under the court's inherent authority.

As a threshold issue, the parties have raised the question of whether a non-party, namely, a witness in the criminal case, has standing to file a motion to disqualify the prosecutor. Although the Attorney General agrees that there is substantial reason to question whether a witness has standing to move to disqualify the prosecutor, this Court need not resolve the question because, here, the record establishes that Respondent ultimately acted "*ex mero motu*," or on Respondent's own motion, when Respondent entered his order disqualifying Relator. (App. at A4; Pet. Ex. at E30 ("regardless of whether [Officer] AF has standing to request the disqualification of the Circuit Attorney, the Court has the authority to consider the issue and take appropriate action.")).

So, the initial question is whether it was proper for Respondent to disqualify the prosecutor on its own motion. The answer is yes. This Court has held that courts have an obligation to ensure that trials are fair and that trials *appear* to be fair. As this Court explained, "[s]ociety's confidence in the judicial system—and, in particular, the criminal justice system—depends on society's perception that the system is fair and its results are worthy of

reliance." *State v. Lemasters*, 456 S.W.3d 416, 422 (Mo. 2015). "For that reason, it is essential that trials be fair." *Id.* "But that alone is not sufficient." *Id.* "Instead, 'justice must satisfy the ***appearance*** of justice.'" *Id.* (court's emphasis), quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954). "A procedure that appears to be unfair can jeopardize society's confidence in the judicial system as a whole even if the procedure is—in fact—fair." *Id.* "Accordingly, this Court must pursue fairness both in the law's substance and in its appearance." *Id.* The Missouri Court of Appeals agrees, explaining that a "court has the inherent power to do what is reasonably necessary for the administration of justice, including disqualifying an attorney where a conflict of interest clearly calls into question the fair or efficient administration of justice." *State ex rel. Horn v. Ray*, 325 S.W.3d 500, 511 (Mo. App. E.D. 2010).

Thus, Missouri courts have inherent authority to disqualify a prosecutor if it is "reasonably necessary for the administration of justice" and that the proper administration of justice includes preserving society's confidence in the "appearance of justice."

Contrary to assertions made by the parties, Respondent Boyer did not grant the witness's motion to disqualify the prosecutor. The order did not purport to grant the motion; instead, the order indicated that Respondent Boyer was acting "*ex mero motu*." To that end, Respondent Boyer's observation that the trial court "has the duty to inquire into, and take

appropriate action *sua sponte*, when it becomes aware of a conflict of interest, no matter the source of the information" was a restatement of blackletter Missouri law. (App. at A4; Pet. Ex. at E30). As outlined above, this action and explanation was consistent with the trial court's authority and obligation to preserve the administration of justice.[2]

In sum, because the order disqualifying Relator Gardner was issued pursuant to the trial court's inherent authority, the Court need not resolve the question of standing.

[2] As alluded to above, Relator Gardner raises weighty arguments that would be worthy of the Court's consideration in a case where the trial court was not proceeding under its inherent authority. The broader and potentially problematic implications that could arise under different factual situations could be alleviated, if necessary, by an opinion narrowly tailored to the unique facts of this case.

II. Blanket disqualification of a local prosecuting attorney's office is an drastic remedy that should be sought rarely and imposed only in the most unusual circumstances.

While within its authority, a trial court's disqualification of the entire local prosecuting attorney's office is a substantial intrusion on the executive branch. Because it is a drastic remedy, blanket disqualification should be imposed by a trial court only when it is the least restrictive means to protect an individual defendant or to protect society's confidence in the criminal justice system.

Analysis

There are only two reasons for a trial court to grant a motion to disqualify: the protection of an individual defendant or the protection of society's belief in the fairness of the criminal justice system. Disqualification of an individual prosecutor is appropriate, and most often arises, when necessary to protect an individual defendant. *See State v. Jones*, 268 S.W. 83, 85–6 (Mo. 1924); s*ee also State v. Burns*, 322 S.W.2d 736, 741–42 (Mo. 1959). Disqualification of an entire prosecutor's office is appropriate when necessary to protect society's belief in the fairness of the judicial system. *Lemasters*, 456 S.W.3d at 422–23.

A. Disqualification of an individual prosecutor is appropriate, and most often necessary, to protect an individual defendant.

Disqualification of an individual prosecutor is most often appropriate when necessary to protect an individual defendant. A trial court has two sources of authority to enter an order disqualifying an individual prosecutor: the principle that a prosecutor may not participate in a case in which the prosecutor is interested, and the trial court's inherent authority to supervise the proceedings before the court.

It is a long-standing rule that a prosecutor may not participate in a case in which the prosecutor has a personal interest. *See, e.g., State v. Moxley*, 102 Mo. 374 (1890), *citing* R.S. 1889, § 642 (now codified at Section 56.110, RSMo.). This rule is clearly designed for the protection of an individual defendant from an individual prosecutor's conflict. For instance, in *Jones*, a prosecutor charged a defendant with driving while intoxicated for events that included the defendant driving into the prosecutor's car. *Jones*, 268 S.W. at 84. The prosecutor should have been disqualified because he had an interest in the case. *Id*. The purpose of the interest statute is to prevent prosecutors from participating in cases in which they have an interest because it is a "prostitution of the criminal process of the state, and a reproach to the administration of justice" for a prosecutor to institute "criminal proceedings against a citizen in a case in which [the prosecutor] is interested." *Id*. at 86.

The Missouri Court of Appeals has explained that the rule only requires disqualification of the prosecutor "when he has a personal interest of a nature which might preclude his according the defendant the fair treatment to which he is entitled." *State v. Stewart*, 869 S.W.2d 86, 90 (Mo. App. W.D. 1993).

In addition to cases involving a personal interest, a trial court has inherent authority to disqualify a prosecutor who is burdened with other conflicts of interest. This inherent authority derives from a trial court's "duty to maintain the integrity of the judicial system." *State ex rel. Horn v. Ray*, 325 S.W.3d 500, 511 (Mo. App. E.D. 2010). This duty to maintain the integrity of the judicial system is reflected in the Rules of Professional Responsibility, which prohibit a prosecutor from trying a defendant if the prosecutor previously represented the defendant in the same or a similar criminal matter. *See Lemasters*, 456 S.W.3d at 419–20. In such cases, a prosecutor's previous privileged relationship with the defendant endangers the defendant's right to a fair trial, as the prosecutor may have had access to privileged information from the defendant. So, even though the source of the authority to disqualify is different, the general purpose of disqualification is not; disqualification of an individual prosecutor to protect a defendant from that prosecutor's conflict.

B. Blanket disqualification of a prosecuting attorney's office is appropriate to protect society's confidence in the criminal justice system.

In most circumstances, a trial court should only disqualify an entire prosecuting attorney's office when blanket disqualification is necessary to protect society's confidence in the criminal justice system. *Lemasters* and its progenitors articulate this concept by their implementation of a burden-shifting analysis. First, a trial court looks to see if there is an appearance of impropriety. *Lemasters*, 456 S.W.3d at 424. It is the movant's burden to show that there are "facts that—if known to a reasonable person—would create an appearance of impropriety and cast doubt on the fairness of the trial...." *Id.* Then the burden shifts back to the State to show that there are "countervailing facts to dispel that appearance and restore confidence in the fairness of the trial." *Id.* If the State demonstrates these countervailing facts—such as a thorough and effective screening process—then blanket disqualification is not appropriate. *Id.* at 424–25.

In some circumstances, it may be necessary for a trial court to disqualify an entire local prosecuting attorney's office in order to effectuate an order to disqualify an individual prosecutor. For instance, if the local prosecutor to be disqualified is the elected prosecutor, then disqualification of the entire office is appropriate. *See, e.g., State ex rel. Burns v. Richards*, 248 S.W.3d 603 (Mo. banc 2008). Similarly, disqualification of the entire

prosecuting attorney's office may[3] be necessary when many of the prosecutors within the office are implicated in the appearance of impropriety.[4] *State v. Ross*, 829 S.W.2d 948, 949–950 (Mo. banc 1992); *State ex rel. Winkler v. Goldman*, 485 S.W.3d 783, 786 (Mo. App. E.D. 2016).

But these exceptions fit within the policy framework described by *Lemasters*. For example, a screening process may not dispel the appearance of impropriety where the conflicted prosecutor is the locally-elected prosecutor—such as in *Ross*—or where many assistant prosecuting attorneys are implicated—such as in *Winkler*. The result in *Ross* and *Winkler* is supported by *Lemasters*' text: "there *may* be cases in which proof of a thorough and effective screening process . . . will not be sufficient to prevent a reasonable person from concluding, based upon all the facts and circumstances, that an appearance of impropriety casts doubt on the fairness of a trial." *Lemasters*, 456 S.W.3d at 425.

[3]Disqualification is not necessary when there is an appearance of impropriety that is "dispelled" by "countervailing facts." *Lemasters*, 456 S.W.3d at 425.

[4]There may be rare an unusual circumstances where disqualification of an individual prosecutor is necessary to protect the public's confidence in the criminal justice system. In such circumstances, other mechanisms—such as disciplinary proceedings under Rule 4—may also be used to restore society's faith in the system.

C. Because blanket disqualification is an invasive remedy, it should be granted only when it is the least restrictive means to protect an individual defendant or to protect society's confidence in the criminal justice system.

Blanket disqualification is a significant judicial intrusion into the executive branch. Elected prosecutors exercise significant discretion and authority, and a check on this power comes from the People of Missouri through direct elections. Disqualification of an individual assistant prosecuting attorney, while intrusive, does not raise the same concerns because the matter ultimately remains within the same office, supervised by the same locally elected prosecuting attorney. But when an entire prosecuting attorney's office is disqualified, then the replacement prosecutor is answerable to a different—or in the Attorney General's case, a larger—group of citizens. This Court has recognized the benefit of a close connection between the electorate and the prosecutor. *See, e.g., State v. Harrington*, 534 S.W.2d 44, 49 (Mo. banc 1976) (banning private prosecutors). Blanket disqualification of a local prosecuting attorney's office is a significant disruption of that close connection. Such substantial interference ought to be limited to only the most serious circumstances.

Out of respect for the unique position that local prosecuting attorneys occupy in the justice system, the Attorney General and the Missouri Office of Prosecution Services have promulgated a policy defining the situations where

it is most appropriate for the Attorney General to serve as special prosecutor. (App. at A13–A15).[5] In addition to promoting comity between the Attorney General and local prosecuting attorneys, the policy also promotes the effective use of the Attorney General's limited resources. Despite the conclusion reached in point III below, it continues to be the Attorney General's view that blanket disqualification of a locally elected prosecutor's office is an invasive remedy that should be employed sparingly.

This Court's cases recognize the drastic nature of blanket disqualification, and that remedy is most often applied to circumstances where blanket disqualification is the least restrictive available remedy. This principle is illustrated by *Lemasters*' instruction to consider whether there are "countervailing facts" that would "dispel" any appearance of impropriety. *Lemasters*, 456 S.W.3d at 424. Moreover, this Court has implied that a "thorough and effective screening process" will usually be sufficient to dispel any appearance of impropriety. *Id.* at 425 (". . . There *may* be cases in which proof of a thorough and effective screening process . . . will not be sufficient to prevent a reasonable person from concluding . . . that an appearance of impropriety" exists.) (emphasis added). *Lemasters*' statement that a

[5] Although in this case Respondent Boyer has not yet appointed a special prosecutor, Respondent Boyer and Relator Garner should have been provided a copy of the policy at the time it was adopted. The policy was also provided to the Clerk of this Court. (App. at A13). A copy of the policy has been included in the appendix for the Court's use.

"thorough and effective screening process" will usually be sufficient is an implicit recognition that trial courts should order blanket disqualification only when it is the least restrictive means to protect an individual defendant or to protect society's belief in the justice system.

This Court ought to make *Lemasters*' implicit statement explicit in this case. In the years since *Lemasters*, it has become more common for litigants to request blanket disqualification of the local prosecuting attorney's office. For instance, some defendants have sought blanket disqualification even when *no* prosecutor has been disqualified. *See, e.g., State v. Clemons*, 22911-01758B-01; *State v. Jennings*, 07H6-CR00667-02; *State v. William Henry*, 15BT-CR00680. Some defendants have even begun requesting blanket disqualification based on the fact that other defendants have requested blanket disqualification. *See, e.g., State v. Verba*, 17CF-CR01294 (Mot. filed May 2, 2018). In a few cases—those with rare and extraordinary circumstances—blanket disqualification has been necessary. *See Goldman*, 485 S.W.3d at 786.

As these motions become more common, there is a danger that litigants and courts view motions to disqualify as routine, which in turn could lead to a relaxed standard. This case provides the Court with an opportunity to provide further guidance to litigants and to the lower courts and to reaffirm that blanket disqualification is a significant intrusion that should be

employed only when it is the least restrictive means to protect an individual defendant or maintain society's trust in the justice system.

III. In light of all the facts and circumstances, Respondent did not abuse his discretion when he exercised his inherent authority to disqualify Relator Gardner, because a reasonable person could perceive an appearance of impropriety.

Respondent Boyer did not abuse his discretion because a reasonable person with knowledge of all the facts and circumstances could perceive an appearance of impropriety in this case. Moreover, Relator Gardner presented no countervailing facts that would dispel the appearance of impropriety.

Standard of Review

A trial court's ruling disqualifying a prosecuting attorney is reviewed for an abuse of discretion. *Lemasters*, 456 S.W.3d at 420. A trial court abuses its discretion when the court's ruling is "clearly against the logic of the circumstances . . . and is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration." *Id.*; *see also Nelson v. State*, 521 S.W.3d 229, 234–35 (Mo. 2017). If reasonable people can disagree "as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *Id.*, *quoting State v. Taylor*, 134 S.W.3d 21, 26 (Mo. banc 2004).

Analysis

While reasonable people might disagree whether Respondent Boyer's decision was correct, the court's ruling was not "clearly against the logic of the circumstances" or "so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration" for three reasons. *First*, a reasonable person with knowledge of all the facts and circumstances could perceive an appearance of impropriety in this case. *Second*, the record demonstrates that a reasonable person with knowledge of all the facts and circumstances could find an appearance of impropriety because Relator Gardner's prosecution has diverged from the prevailing professional norms of effective prosecutions, in which prosecutors wall off some members of the office in some circumstances and seek outside prosecutors in others. And *third*, Relator Gardner's arguments underscore the reasonableness of the order and demonstrate why this is the rare and extraordinary case where blanket disqualification is appropriate.

A. Respondent Boyer's finding of an appearance of impropriety was supported by the record and was not an abuse of discretion.

The Court has explained that if a reasonable person with knowledge of all the facts and circumstances would perceive an appearance of impropriety, then an order of disqualification may be proper. *Lemasters*, 456 S.W.3d at 422. Respondent Boyer found that there was an appearance of impropriety

and that disqualification was necessary to "protect the rights of the defendant and ensure that the public maintains faith and trust in our system of criminal justice." (App. at A9; Pet. Ex. at E31–E32, E35). Respondent Boyer relied on multiple circumstances to reach that conclusion.

For instance, Respondent Boyer noted that there is increased public interest in how prosecutors investigate and charge conduct in cases that involve "police-related shootings." (App. at A4–A5 Pet. Ex. at E30–E31). Respondent Boyer also took notice of Relator Gardner's public statements that special prosecutors are necessary when there is a question about whether a police officer has properly used deadly force. (App. at A5; Pet. Ex. at E31). Respondent Boyer further noted that Relator Gardner had stated that public confidence would be increased by the use of special prosecutors. (App. at A5; Pet. Ex. at E31). And Respondent Boyer identified Relator Gardner's simultaneous, ongoing investigation of the witness and prosecution of Defendant Davis. (App. at A8; Pet. Ex. at E33).

In light of these facts and circumstances, it was not an abuse of discretion for Respondent Boyer to find that a reasonable person could perceive an appearance of impropriety. A reasonable person might have concerns about the fairness and reliability of the criminal justice system based on Relator Gardner's decision to charge Defendant Davis where Relator Gardner continues to question the legality of the officer's conduct. A

reasonable person might also be concerned by Relator Gardner's decision to depart from her prior public statements supporting the use of special prosecutors in use-of-force cases. These concerns are amplified by society's heightened scrutiny in use-of-force cases involving police officers. Respondent Boyer's finding that Relator Gardner's actions in this case created an appearance of impropriety was reasonable and, therefore, not an abuse of discretion.

Relator Gardner contends that there is no appearance of impropriety because she has complied with the Rules of Professional Conduct for Prosecutors. But while adherence to the rules is necessary, it is not "sufficient" to allay all concerns. *Lemasters*, 456 S.W.3d at 422. The trial court had an obligation to do what was "reasonably necessary" to protect the "appearance of justice." *See id.*; *State ex rel. Horn v. Ray*, 325 S.W.3d at 511. Even though reasonable people could disagree about the propriety of his decision, that does not mean that Respondent Boyer abused his discretion. *Taylor*, 134 S.W.3d at 26.

B. Prevailing professional norms support the conclusion that a reasonable person could perceive an appearance of impropriety in this case.

In 2017, the Association of Prosecuting Attorneys released *The 21st Century Principles of Prosecution: Peace Officer Use of Force Project* report. ASS'N OF PROSECUTING ATT'YS, 21ST CENTRY PRINCIPLES OF PROSECUTION:

PEACE OFFICER USE OF FORCE PROJECT, (2017), *available at* http://www.apainc.org/peace-officer-use-of-force/ (last accessed Feb. 28, 2018). The report suggests that a separate prosecutor should "handle any parallel investigation of the subject for criminal conduct against the involved peace officer." PEACE OFFICER USE OF FORCE PROJECT, at 17. "Bifurcation" is recommended in order to "prevent potential conflicts of interests that can have serious consequences for both cases." *Id*. The report further recognizes that there is "no one-size-fits-all solution," *id*. at 22, but explains that "prosecutors should ensure that all use of force investigations and prosecutions are . . . geographically separated from . . . other prosecutor offices to the extent possible . . . ." *Id*. at 13. The report demonstrates that the prevailing professional norm is for larger prosecuting attorney's offices to impose an ethical screen between the use-of-force prosecutors and the traditional prosecutors. For smaller prosecutor's offices, and for cases where there is a clear conflict of interest, the prevailing professional norm is to obtain a special prosecutor.[6]

[6] This prevailing norm is less than the suggestion sought by the Ferguson Commission, which recommended a special prosecutor be appointed in every use-of-force case. *Id*. at 9. The St. Louis City Board of Alderman enacted an ordinance directing the St. Louis City Director of Public Safety to seek the involvement of the Attorney General in all fatal use-of-force cases. *See* City of St. Louis Ordinance 69984 § 6, Paragraph 14.C. The General Assembly has not enacted a statute specifically granting the Attorney General authority in use-of-force cases.

Prevailing professional norms can be a useful guide in evaluating whether an attorney has a constitutional obligation. *See generally Padilla v. Kentucky*, 559 U.S. 356, 366–67 (2010). Similarly, a prosecutor's failure to comply with prevailing professional norms in a use-of-force case is a reasonable basis for finding an appearance of impropriety. The PEACE OFFICER USE OF FORCE PROJECT report makes its recommendations specifically because of a public perception that these cases are often not handled in a fair manner. PEACE OFFICER USE OF FORCE PROJECT, at 2, 9 ("practices and policies governing use of force investigations are the subject of unprecedented scrutiny"). The report notes, "[m]any in the community are concerned that this close working relationship [between local police and local prosecutors] makes it difficult for those same prosecutors to fairly evaluate police as potential criminal suspects." *Id.* at 9.

The record supported a finding that Relator Gardner is not following this professional norm. At the hearing, the parties discussed how Relator Gardner's office should handle use-of-force cases. During argument, counsel for the witness stated:

> under the previous administration there was a wall built, basically, you know, a wall between the prosecutors who were handling the shooting investigation and the prosecutors and the investigators that were handling the criminal defendant's prosecution. That wall has been effectively torn down. Now what we have are the same attorneys who are handling the shooting investigation and the investigation of that to determine whether

> the officer was justified in shooting, those same attorneys are coming in and handling preliminary hearings, they're trying to handle grand jury proceedings, and they're having contacts with the same officers that they're investigating.

(Tr. 19–20). In response, counsel for Relator Gardner stated, "I prefer to allude to a review by the public integrity section of our office which is superimposed upon the ordinary review that the trial attorneys are obligated to exercise. But it's still, you know, whether we have a wall or whether we don't, the obligation is the same." (Tr. at 30). Relator Gardner, in the briefing before the Missouri Court of Appeals, implied that there is a wall between the prosecutors that review the use of force cases and the ordinary prosecutors. Relator Gardner makes that implication again in her brief to this Court. Gardner Br. at 24, 35.[7] Respondent Boyer did not have the benefit of that statement at the time he was charged with deciding whether to disqualify Relator Gardner. Respondent Boyer cannot be faulted for not relying on a statement not presented to him.

A reasonable person with knowledge of all the facts and circumstances could perceive an appearance of impropriety after a review of the record before Respondent Boyer and after consulting with the prevailing professional norms. The PEACE OFFICER USE OF FORCE PROJECT REPORT is

[7] Relator Gardner also appears to take the position that consideration of an ethical wall is irrelevant because "no such 'wall' can be impermeable in light of" *Brady v. Maryland*, 373 U.S. 83 (1963). Gardner Br. at 35.

one indication that society's expectation is that, in some circumstances, a prosecuting attorney will wall off prosecutors who are handling use-of-force cases. The report also indicates society's expectation that prosecutors will seek the appointment of a special prosecutor when necessary under the circumstances. The record before Respondent Boyer supported a finding that Relator Gardner failed to impose an ethical screen between use-of-force prosecutors and the remainder of the office. As a result, a reasonable jurist could have reached the same conclusion that Respondent Boyer did: a reasonable person with knowledge of all the facts and circumstances would perceive an appearance of impropriety.

Respondent Boyer's order is reasonable because it recognizes that society has encouraged prosecutors to reflect on their unique role in the unique situation where an officer has used force against a person charged with an offense. Prosecutors should be encouraged to consider best practices, such as walling off members of the office, when appropriate. Furthermore, such reflection by prosecutors is necessary. "Society's confidence in the judicial system—and, in particular, the criminal justice system—depends on society's perception that the system is fair and its results are worthy of reliance." *Lemasters*, 456 S.W.3d at 422. To preserve confidence in the criminal justice system, prosecutors should consider society's expectations in implementing their policies, procedures, and office structure.

C. Relator Gardner presented no countervailing facts that would dispel an appearance of impropriety.

Under *Lemasters*, blanket disqualification would not be necessary if Relator Gardner had presented "countervailing" facts that "dispel" the appearance of impropriety. *Lemasters*, 546 S.W.3 at 423. Relator Gardner presented no such facts to Respondent Boyer. Moreover, her arguments to this Court underscore the reasonableness of Respondent Boyer's order and demonstrate why this is the rare and extraordinary case where blanket disqualification is appropriate.

One such argument is Relator Gardner's contention that her previous statements are of no consequence to this action. Gardner Br. at 25 ("ambiguous and unverified campaign statements"); *id.* at 26 ("These [campaign] statements have no more significance for the proper resolution of this case than do any other extrajudicial comments during public debate."). These statements were presented to Respondent Boyer for consideration and Relator Gardner did nothing to distinguish or explain them.

Aspirational statements during a campaign will rarely confine the discretion of a prosecutor who must make decisions after election based on the facts and circumstances of a specific case. However, a court is not prohibited from inquiring into the application of campaign statements to a specific case before the court. A prosecutor should not be penalized for

aspirational statements. But here the prosecutor's departure from previous statements raised concerns and it was not error for Respondent Boyer to provide Relator Gardner with an opportunity to explain or distinguish her conduct in this case from her prior statements. But Relator Gardner failed to do so. So it was not error for Respondent Boyer to consider those prior statements along with "all the facts and circumstances" of the case.

Within the disqualification policy framework, the unique role of the directly-elected local prosecutor means that blanket disqualification is disfavored because it separates the People from their locally-elected prosecutor. Relator Gardner is trying to invoke her status as a locally-elected prosecutor as a shield against disqualification while simultaneously trying to remove her campaign statements from the realm of consideration. In the ordinary case, such statements may not be relevant. In this case, it was not an abuse of discretion for Respondent Boyer to find her statements were relevant because her statements describe Relator Gardner's previous view of a structural design for the investigation and prosecution of officer-involved shootings. Relator Gardner made these statements during the course of her campaign, and it is these statements that she has departed from in this case. It was not an abuse of discretion for Respondent Boyer to consider such statements.

Relator Gardner's argument concerning the imposition of an ethical screen also underscores the reasonableness of Respondent Boyer's order. In her brief to this Court, Relator Gardner implies that she has erected an ethical wall between the prosecutors that review the use of force cases and the ordinary prosecutors. Gardner Br. at 24, 35. This position is a departure from the argument presented to Respondent Boyer at the hearing. (*See* Tr. at 30). Relator Gardner cannot fault Respondent Boyer for failing to find a countervailing fact that Relator Gardner did not present.

Elsewhere in her brief, Relator Gardner contends that the imposition of an ethical screen is unnecessary because "no such 'wall' can be impermeable in light of *Brady*." (*Id.* at 35). But this argument misses the mark for three reasons.

First, the State's obligation to disclosure exculpatory evidence to a defendant under *Brady* is not in conflict with the imposition of a *Lemasters*-style ethical screen.

Second, the imposition of an ethical screen, as contemplated by *Lemasters*, does not prohibit only the flow of information to and from a conflicted prosecutor. The ethical screen also separates the decision-making power between prosecutors. This separation is critically important to dispelling any appearance of impropriety that has been created in the case. And, as *Lemasters* discusses, when the conflict lies with the locally-elected

prosecutor—the ultimate decision maker—then blanket disqualification is required.

Third, Relator Gardner's argument that Respondent Boyer's order is impermissible commandeering represents a misapprehension of *Lemasters*. Relator Gardner is correct that the courts do not have authority to "instruct" prosecutors "on the manner in which [they] must exercise [their] discretion...." Gardner Br. at 26. But that is not what happened here. Instead, Respondent Boyer's order observed that there were methods to mitigate the appearance of impropriety and that Relator Gardner chose not to employ these methods. (App. at A9; Pet. Ex. at E38). That is consistent with this Court's cases. *Lemasters* does not require the imposition of ethical screens; *Lemasters* provides the ethical screen as an illustration of the type of "countervailing fact" that would "dispel" an appearance of impropriety. *Lemasters*, 456 S.W.3d at 422. Any prosecutor may refuse to impose ethical screens or to employ other countervailing measures; prosecutors have discretion to employ whatever measures they deem necessary. However, in an appropriate case where there is an appearance of impropriety, the consequence of refusing to employ any remedial measure may be blanket disqualification.

CONCLUSION

The Court should not make permanent its preliminary writ.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 6,590 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2010 software.

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