In the

Supreme Court of Missouri

No. SC97026

STATE OF MISSOURI ex rel.
KIMBERLY M. GARDNER
CIRCUIT ATTORNEY OF
THE CITY OF ST. LOUIS,
Relator,

v.

HON. TIMOTHY J. BOYER,
CIRCUIT JUDGE, 22nd CIRCUIT
(City of St. Louis),
Respondent.

On Petition in Prohibition

RELATOR'S BRIEF

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JURISDICTIONAL STATEMENT

This Court has jurisdiction of the petition in prohibition by reason of Mo.Const. art. V, §4.1, which invests this Court with superintending authority over the lower courts and authorizes the issuance and determination of original remedial writs. The exercise of this Court's authority under §4.1 is warranted because respondent herein has disqualified relator—the elected Circuit Attorney of the City of St. Louis—from prosecuting the underlying felony, based on a motion filed by a witness and not a party. Relator has no alternative remedy to seek review of the disqualification order which disables relator from performing her statutory duties. Relator sought and was denied relief in the Missouri Court of Appeals, Eastern District, and so renewed application for prohibition is proper here.

STATEMENT OF FACTS[1]

Relator is the duly elected and acting Circuit Attorney of the City of St. Louis, authorized by law to prosecute criminal causes in the City of St. Louis, 22nd Circuit. Respondent is a circuit judge of the 22nd Circuit presiding over the criminal cause, 22nd Circuit No. 1722-CR03687, in which intervenor Wendell Davis is the defendant. Petition in Prohibition ¶¶1-3.

Mr. Davis, a prior offender, is charged by complaint in the underlying case with various felonies. Petition, Ex. 2, pp. E3-E5. Officer "A.F." (as identified in the complaint) is an endorsed witness and the victim of several of the felonies charged against defendant Davis. The complaint sets forth probable cause to believe that defendant Davis committed the offenses charged. The essential witness and victim in regard to the charges of unlawful use of a weapon/exhibiting and resisting arrest preferred against defendant Davis is Officer "A.F. " Relator is informed and believes that Officer "A.F." was required to use force in

[1] Pursuant to Mo.R.Ct. 84.24(g), the Statement of Facts is drawn from the petition, the exhibits filed therewith, and respondent's return, albeit respondent's return does not directly admit or deny the allegations of the petition in prohibition and seemingly could be deemed to have admitted the facts pleaded in the petition. Cf. Mo.R.Ct. 55.09, 84.24(d).

apprehending defendant Davis, including shooting and wounding defendant Davis. Petition, Ex. 2, p. E6. Without the testimony of Officer "A.F.," the case against defendant Davis cannot proceed. Relator has requested that Officer "A.F." testify in support of the prosecution. See Petition, ¶¶7-9.

As part of any review of the facts in connection with a prosecution involving the use of force by a police officer (or any other victim), relator necessarily reviews the circumstances of such use of force. Relator is reviewing Officer "A.F.'s" use of force against Mr. Davis. Relator is not and never has acted as counsel for "A.F." in any capacity. "A.F." was and is a witness in the case and the victim of the alleged exhibiting. See Petition ¶¶10-11, Ex. 2, pp. E6-E7.

The underlying cause was scheduled for preliminary hearing. Prior to the hearing date, Officer "A.F." filed a "Combined Motion and Memorandum to Disqualify the Office of the St. Louis City Prosecuting Attorney." Counsel for Officer "A.F." requested leave to enter a limited appearance of Officer "A.F." and noticed his motion for a hearing before respondent. Petition, Ex. 3, pp. E8-E14. Relator filed a motion to strike the "Combined Motion," as did defendant Davis. Petition, Ex. 4-5, pp. E18-E23.

On January 24, 2018, respondent conducted a hearing on the motions to strike and the "Combined Motion." Petition, Ex. 8, p. E29-1. On January 25, 2018, respondent entered an order disqualifying relator from prosecuting the

underlying criminal cause. Petition, Ex. 9, p. E30. Respondent later notified the parties of his intention to appoint the Attorney General as special prosecutor in the underlying cause. Respondent has taken no further action in the cause, due to the pendency of writ proceedings in the Court of Appeals and this Court. Petition ¶11-14.

Relator stands ready and willing to proceed in the underlying cause as soon as respondent's order is set aside. The relator has prosecuted and is currently prosecuting a number of additional cases in which a police officer used force in apprehending the defendant.[2]

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[2] Relator recently vigorously prosecuted to a guilty verdict a charge of assault first degree in which an officer fired his weapon in self-defense. No motion to disqualify was asserted in that cause and certainly no "appearance of impropriety" was noted by the trial court. State v. Wolford, 22nd Cir. No. 1522-CR02859-01. Relator likewise vigorously prosecuted and obtained a guilty plea in State v. Clerk, 22nd Cir. No. 1622-CR03791-01, in which the officer used force in apprehending the defendant. No motion to disqualify or "appearance of impropriety" was raised in that cause. In State v. Polk, 22nd Cir. No. 1722-CR03688, the State is prosecuting the co-defendant of Wendell Davis, also involving Officer "A.F." To date, no motion to disqualify has been filed. See Petition ¶16.

The effective prosecution of a criminal case in which an officer used force in apprehending the defendant is dependent on the assistance of both the St. Louis Police Department and the officer-victims, so that the prosecution and obtain the necessary information and testimony. Relator has encountered considerable delay in pursuing such cases on account of the slowness of the Police Department in conducting its own investigations of an officer's use of force. Petition ¶17.

At the present time, in cases such as the underlying case--where relator initiates charges against a defendant against whom arresting officers have used force--relator directs that attorneys who are not entrusted with the prosecution of the defendant shall review the police use of force. Such reviewing attorneys were described in the hearing below as part of the public integrity section of relator's office, Petition, Ex. 8, p. E29-30, and they have no role in the prosecution of the defendant.

There was discussion the argument before respondent concerning relator's decision to seek a preliminary hearing in the underlying cause. Petition, Ex. 8, pp. E29-36-E29-37. The respondent questioned that decision, Ex. 8, p. E29-38. However, there was no dispute that similar issues regarding police officer witnesses had also emerged in grand jury proceedings. Ex. 8, p. E29-41.

Respondent granted the motion to disqualify, relying on his "inherent power" to superintend the conduct of attorneys in a cause before him. Petition, Ex.

9, p. E30; see also Appendix. Respondent found no actual or apparent conflict of interest on the part of relator, but nonetheless found a "potential" conflict of interest giving rise to an "appearance of impropriety," and concluded that his "inherent authority" authorized the disqualification order even though defendant, the only other party below, objected. Ex. 9, pp. E33, E37.

POINTS RELIED ON

I. Relator is entitled to a permanent order prohibiting respondent from enforcing his order disqualifying relator from prosecuting the underlying criminal cause, and from acting otherwise than by vacating the order of disqualification, because respondent, as a matter of law, abused his discretion and exceeded his proper authority in disqualifying relator and her office on the basis of a "potential" conflict of interest creating an "appearance of impropriety" in that relator has and had no conflict of interest, nor was there any appearance of impropriety in relator's prosecuting the defendant, while other members of her office reviewed the conduct of the arresting officer in using force against the defendant, as both the prosecution and concurrent review of the use of force were properly undertaken as part of relator's sworn duty as the elected Circuit Attorney to ensure that the prosecution of defendant was meritorious and the arresting officer's use of force was lawful.

State ex rel. Griffin v. Smith, 258 S.W.2d 590, 593 (Mo. 1953).

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

State ex rel. Director of Revenue v. McBeth, 366 S.W.3d 95 (Mo.App.W.D. 2012).

State v. Eckelkamp, 133 S.W.3d 72 (Mo.App.E.D. 2004).

Section 56.110, RSMo.

II. Relator is entitled to a permanent order prohibiting respondent from enforcing his order disqualifying relator from prosecuting the underlying criminal cause, and from acting otherwise than by vacating the order of disqualification, because respondent, as a matter of law, abused his discretion and exceeded his proper authority in disqualifying relator and her office from prosecuting the defendant in the underlying criminal cause, in that respondent deployed his inherent authority on the basis of a "potential" conflict of interest, at the behest of a witness who had and has no attorney-client relationship with relator or her office and so lacked standing to seek disqualification, thereby infringing the interests of relator and the defendant in the underlying case in a speedy trial.

State v. Sonka, 893 S.W.2d 388 (Mo.App.S.D. 1995).

State ex rel. Naes v. Hart, 548 S.W.3d 870, 874 (Mo.App.E.D. 1977).

State v. McWhirter, 935 S.W.2d 778 (Mo.banc 1996).

Mo.R.Ct. 4-1.

Mo.R.Ct. 4-4.4(a).

ARGUMENT

I. Relator is entitled to a permanent order prohibiting respondent from enforcing his order disqualifying relator from prosecuting the underlying criminal cause, and from acting otherwise than by vacating the order of disqualification, because respondent, as a matter of law, abused his discretion and exceeded his proper authority in disqualifying relator and her office on the basis of a "potential" conflict of interest creating an "appearance of impropriety" in that relator has and had no conflict of interest, nor was there any appearance of impropriety in relator's prosecuting the defendant, while other members of her office reviewed the conduct of the arresting officer in using force against the defendant, as both the prosecution and concurrent review of the use of force were properly undertaken as part of relator's sworn duty as the elected Circuit Attorney to ensure that the prosecution of defendant was meritorious and the arresting officer's use of force was lawful.

The remedy of prohibition is peculiarly well suited to correcting respondent's extraordinary order of disqualification in this case. Relator's research has disclosed no cases supporting disqualification of a prosecutor on the ground of a "potential" conflict of interest or "appearance of impropriety" arising out of a criminal prosecution of a defendant against whom a police officer victim-witness

used force. Most importantly, the unprecedented nature of respondent's order makes intervention by this Court peculiarly important. This Court, not respondent, has the general superintending power over attorneys and the rules of professional conduct. Mo.Const. art. V, §5; *Hoffmeister v. Tod,* 349 S.W.2d 5 (Mo.banc 1961). The question raised by respondent's order is one of significance not only to Missouri, but nationally, inasmuch as the underlying criminal prosecution differs in critical respects from cases in which no criminal charges are brought against the person who was the target of use of force by police, and instead resembles the many other assault cases in which both parties use force, but only one party is charged.

It is well settled that improvident disqualification of counsel for a party is, almost by definition, an abuse of discretion. E.g., *Polish Roman Cath. St. Stanislaus Parish v. Hettenbach,* 303 S.W.3d 591 (Mo.App.E.D. 2010). Hence, in defending respondent's unprecedented order, it will not do to rely reflexively on the general standard of review for abuse of discretion. Disqualifying a party's counsel is a matter that calls for special judicial care and caution. "[I]f a respondent's actions are wrong as a matter of law, then he or she has abused any discretion he or she may have had," and relief by extraordinary writ is appropriate. See *State ex rel. Winkler v. Goldman,* 485 S.W.3d 783, 789 (Mo.App.E.D. 2016). Here, it is clear that respondent has chosen a path a path improvidently trodden by

other trial judges in criminal cases by disqualifying the prosecutor without authority in law, and it is well established in such cases that prohibition is the appropriate remedy to confine the trial judge within the proper bounds of the law and his discretion, because a disqualification order is effectively unreviewable and not redressable by any other means.[3] See, e.g., *State ex rel. Director of Revenue v. McBeth,* 366 S.W.3d 95 (Mo.App.W.D. 2012)(prohibition granted to preclude enforcement of order disqualifying prosecutor); *State v. Eckelkamp,* 133 S.W.3d 72 (Mo.App.E.D. 2004)(same); cf. *State ex rel. Thompson v. Dueker,* 346 S.W.3d 390 (Mo.App.E.D. 2011)(writ granted in civil case where counsel for party disqualified).

Respondent's error in entering his order is at war with the proper role of the prosecutor in criminal cases involving use of force by an officer against the defendant. A paramount duty of a prosecutor under the Rules of Professional Responsibility is to make sure probable cause exists for a criminal prosecution. The obligation is set out succinctly in Mo.R.Ct. 4-3.8(a): "The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows

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[3] Prohibition is also proper in light of the criminal defendant's interest in a speedy resolution of the charges against him. At least one count may prove to lack merit, but relator cannot address anything in the case due to respondent's order.

is not supported by probable cause." The Comment to that Rule adds: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." A prosecutor's obligation is to do justice and to prosecute only those cases supported by probable cause, and to ascertain probable cause in cases involving defendants against whom officers have used force, the prosecutor must thoroughly examine all available evidence, including the evidence of the officer involved.

In *State ex rel. Griffin v. Smith,* 258 S.W.2d 590, 593 (Mo. 1953), this Court has described the prosecutor's role in some detail, and the Court's observations are especially pertinent here:

> In Missouri it is recognized that a prosecuting attorney is a quasi judicial officer, retained by the public for the prosecution of persons accused of crime, and in the exercise of a sound discretion to distinguish between the guilty and the innocent, between the certainly guilty and the doubtfully guilty. . . .
>
> When the law, in terms or impliedly, commits and entrusts to a public officer the affirmative duty of looking into facts, reaching conclusions therefrom and acting thereon, not in a way specifically directed, [i.e. not merely

> ministerially] but acting as the result of the exercise of an official and personal discretion vested by law in such officer and uncontrolled by the judgment or conscience of any other person, such function is clearly quasi judicial. This court has written much upon the broad discretion vested in a public prosecutor. [Citations omitted.] . . . With every other attorney at law a prosecuting attorney is, of course, an officer of the court in a larger sense; *but he is not a mere lackey of the court nor are his conclusions in the discharge of his official duties and responsibilities, in anywise subservient to the views of the judge as to the handling of the State's cases.* A public prosecutor is a responsible officer chosen for his office by the suffrage of the people. He is accountable to the law, and to the people. He is "vested with personal discretion intrusted to him as a minister of justice, and not as a mere legal attorney. He is disqualified from becoming in any way entangled with private interests or grievances in any way connected with charges of crime. He is expected to be impartial in abstaining from prosecuting as well as in prosecuting, and to guard the real interests of public justice in favor of all concerned." . . . [Emphasis added.]

As a "minister of justice" the role of the prosecutor is significantly different from lawyers in private practice, and the system relies on prosecutors knowing that difference, and being fair to all concerned. Thus, it is an essential obligation of the

prosecutor that the facts of each case be adequately reviewed and that the prosecutor use good judgment in deciding whom to charge and whom to try. It does not violate any canon of ethics for a prosecutor's office to do its job by reviewing all the facts surrounding any crime charged—including an officer's use of force in apprehending a felon.

The prosecutor is often required to study accounts given by two opposing sides to a story to decide whether a crime has been committed and the identity of the perpetrator. One of the most common instances is a fight between two people. Assault cases probably make up ten percent of the caseload of every prosecutor's office. Each side may claim the other started the fight. Under the law of self-defense, the initial aggressor is not entitled to use force against the other party. Section 563.031, RSMo. Thus, the prosecutor must study the claims made by each to decide whether a prosecution is warranted, and the proper defendant. In all assault cases, the prosecutor must eventually pick which horse to ride; in other words, the prosecutor must determine which person was using force lawfully and which person was not acting lawfully and proceed accordingly.

When a police officer uses force in trying to arrest or detain a suspect, other legal issues surface. See generally Simeone, "Duty, Power, and Limits of Police Use of Deadly Force in Missouri," 21 St. Louis Pub.L.J. 123 (2002); cf. *Brosseau v. Haugen,* 543 U.S. 194 (2004)(qualified immunity in civil rights context). One is

that an officer is allowed to be the initial aggressor in making an arrest and is not required to retreat from efforts to prevent the arrest. Section 563.046, RSMo. Another is that an officer is not allowed to use deadly force unless he is acting in self-defense or he reasonably believes such use of force is immediately necessary to effect the arrest and also reasonably believes that the person to be arrested (a) has committed a felony involving the infliction of serious physical injury; (b) is attempting to escape by use of a deadly weapon; or (c) may otherwise endanger life or inflict serious physical injury to the officer or others unless arrested without delay.[4] Section 563.046, RSMo. Thus, the prosecutor must gather the facts that pertain to those issues.

It is routine for the prosecutor to review thoroughly all facts in a case before deciding whether or not to take a case to trial. In fact, the prosecutor would not be

[4] Another issue can sometimes arise: while a defendant is not generally entitled to use force to resist an arrest, he may use force to protect himself from the use of excessive force by a law enforcement officer if he reasonably believes that submitting to the arrest will not stop the use of excessive force by the officer, and that force is the only means by which he can protect himself from the excessive force. See MAI-CR 4th 406.22A; cf. Section 575.153.2(2)(disarming officer in certain circumstances).

doing his or her job if that responsibility were shirked. It violates no ethical rule for the prosecutor to gather facts from all witnesses, who are willing to talk to investigators, before deciding whether to seek punishment through the criminal justice system for a perpetrator.

There is likewise no impropriety or appearance of impropriety in establishing special procedures within a prosecutor's office for additional scrutiny of a case when an officer's use of force is involved. Respondent recognized the importance of assuring the public that an officer's use of force is lawful in a given case, but respondent proceeded to substitute his discretion for that of relator in deciding how that is to be done. In doing so, respondent invoked his "inherent power" to supervise the conduct of lawyers in cases before him, but that "inherent power" does not support the order actually entered. Respondent has deployed "inherent power" to supplant the express statutory power conferred on relator.

Respondent's order presents the very real prospect that courts will be called upon to appoint a special prosecutor in every case of mutual combat assault or in every case where a police officer used force in arresting or detaining a suspect, simply because the elected prosecutor could conceivably find out that she charged the wrong person. Respondent's order is therefore neither necessary nor proper. As the Missouri Supreme Court noted in *Griffin*, a prosecutor "is expected to be impartial in abstaining from prosecuting as well as in prosecuting and to guard real

interests of public justice in favor of all concerned." 258 S.W.2d at 593. As a "minister of justice" the role of the prosecutor is different from lawyers in private practice and the system relies on prosecutors recognizing that difference and being fair to all concerned.

Respondent concedes that there is no appellate authority supporting his extraordinary order, and he is certainly correct in that; but he overlooks numerous cases that have flatly rejected judicial efforts to control the discretion of prosecutors in the handling of criminal cases, in the absence of a demonstrable conflict of interest involving a defendant or former client. See *State ex rel. Bennett v. Ravens,* 258 S.W.3d 929 (Mo.App.W.D. 2008)(court tried to disqualify prosecutor to abort plea bargain; writ granted); *State v. Eckelkamp,* 133 S.W.3d 72 (Mo.App.E.D. 2004)(court tried to disqualify prosecutor due to policy of refusing to plea bargain with public defender; writ granted).

While not directly in point, *State ex rel. Director of Revenue v. McBeth*, 366 S.W.3d 95 (Mo.App.W.D. 2012), is instructive on the limits of a trial court's authority to disqualify a prosecutor. In that case, the trial court disqualified the prosecutor from simultaneously prosecuting a defendant in a criminal case and representing the Director of Revenue in a license suspension review case brought by the defendant, on the ground that the prosecutor could try to put the defendant at a disadvantage in the review case by seeking to compel his testimony in that

case, even though the defendant would have to assert his privilege against self-incrimination to avoid disadvantage in the criminal case. The Court of Appeals rejected the disqualification on the ground of purported conflict and unfairness to the defendant. If there was no impropriety by the prosecutor seeking information from the defendant in the civil case, despite the pending criminal case against him, it is difficult to see how there is impropriety in trying to seek information from a witness in a criminal case, despite the hypothetical possibility that the testimony could disadvantage the witness later. See also *State v. Harris,* 939 S.W.2d 915 (Mo.App.W.D. 1996)(prosecutor not disqualified from prosecuting defendant by reason of prosecutor's defense of county officers sued by defendant).

The cases cited by respondent do not support his conclusions or his order. In *State ex rel. Horn v. Ray,* 325 S.W.3d 500 (Mo.App.S.D. 2010), the trial court disqualified a defense attorney due to simultaneous representation of a witness and the defendant. The issue was dual representation of clients, not the examination of conduct of witnesses, and the court's "inherent power" was properly invoked by reason of the Sixth Amendment guaranty of assistance of conflict-free counsel for defendants. Other cases invoking the "inherent power" to disqualify a prosecutor have rested on actual, subsisting conflicts, as where the prosecutor is either witness or victim in the pending case. *State ex rel. Fuchs v. Foote,* 903 S.W.2d 535 (Mo.banc 1995), overruled on other grounds, 969 S.W.2d 715 (Mo.banc

1998)(prosecutor witness); *State v. Jones,* 268 S.W. 83 (Mo. 1924)(prosecutor victim).

Unfortunately, by relying on his "inherent authority," respondent has allowed himself to be inveigled into superintending relator's discretion in prosecuting cases when an officer's use of force is or could become an issue. Nothing in Mo.Const. art. V or the relevant statutes governing the authority of prosecutors, e.g., Section 56.110, RSMo, authorizes a court to disqualify the elected prosecutor and appoint a special prosecutor merely because a witness (whether a police officer or not) expresses fear that his truthful testimony could somehow be used against him.

Public confidence in the criminal justice system, and the realities of criminal practice in the City of St. Louis, counsel in favor of careful scrutiny of cases involving use of force by officers in apprehending criminals. The City of St. Louis is unique in Missouri in that there is one police department and no readily available independent authority to review police actions, other than the elected Circuit Attorney. In this case, based on such evidence as relator has been given by Officer "A.F." and other members of the St. Louis Police Department, relator has taken action to prosecute defendant Davis, evincing confidence in the truthfulness of the Officer. Nevertheless, it is entirely in keeping with relator's role as a "minister of justice" to subject all of the circumstances of the case to multiple

reviews, including review by attorneys who are part of a section of the relator's office that is separate from the regular felony trial attorneys. There is nothing inconsistent with the ethical rules in doing so, and there is no "appearance of impropriety" in doing so--quite the contrary.[5]

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[5] The record here shows that, to date, relator has commenced no prosecutions against officers in cases of the use of force in apprehending defendants, and instead has vigorously prosecuted those cases against the arrested person. Full cooperation by officer witnesses or victims is the norm; prosecution of such officers is not. The motion to disqualify and respondent's order are the outliers. Further, relator would observe that respondent's own secondary authorities show that the demand for special prosecutors in police use of force cases generally emanates from a perception that elected prosecutors are simply too close to police agencies to fairly investigate an officer's actions. No one argues that the local prosecutor should be disqualified from prosecuting an arrested person against whom force was used. See Levine, "Who Shouldn't Prosecute the Police," 101 Iowa L.Rev. 1447, 1487 (2016); Wald, "Disqualifying a District Attorney When a Government Witness Was Once the District Attorney's Client," 85 Denver L.Rev. 369, 381-82 (2007)(noting that a former client who is only a witness generally cannot seek disqualification of a prosecutor); Report, Ass'n of Prosecuting Attorneys, 21st

Respondent's order flies in the face of the Supreme Court's rubric in *State ex rel. Griffin v. Smith,* supra. Respondent has concluded that relator is indeed a "mere lackey of the court" and that relator's conclusions in the discharge of her duties are, in reality, subservient to the views of respondent as to the handling of criminal prosecutions such as this. Respondent's excess of authority is betrayed by his own words, alluding to "motives or interests other than according the defendant in a pending case procedural justice," citing ambiguous and unverified campaign statements about the police investigating themselves, Ex. 9, pp. E36-E38, and faulting relator for "actively prosecuting the defendant while simultaneously reviewing the conduct of the very officer upon whom they are relying to effectuate

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Century Principles of Prosecution: Peace Officer Use of Force Project, pp. 9-10 (2017). Respondent's order reverses this and effectively condemns relator for trying to maintain a careful and objective policy of review of such cases. Respondent's view is not in accord with professional norms. See American Bar Ass'n, Criminal Justice Standards for the Prosecution Function, Standard 3-1.3(4th ed.). Nor is respondent's order supported by anything in Restatement (Third) of the Law Governing Lawyers, Ch. 8, "Conflicts of Interest."

such prosecution."[6] In respondent's opinion, that amounts to an appearance of impropriety, authorizing respondent to assume command of the prosecution of the case before him, and further authorizing him to instruct relator on the manner in which she must exercise her discretion in other cases such as this. Petition, Ex. 9, pp. E37-E38.

An "appearance of impropriety" is not some general warrant for courts to scrutinize the behavior of prosecutors (or other counsel, for that matter) in cases before them, and to disqualify them when the court disagrees with the manner in which the prosecutor exercises her statutory discretion. Circumstances creating an "appearance of impropriety" must be circumstances amounting to an objective basis upon which a reasonable person could base a doubt about the fairness of a trial or criminal proceeding. *State v. Lemasters,* 456 S.W.3d 416 (Mo.banc 2015). Respondent presents no objective basis for believing that the prosecution of defendant herein, relying on the testimony of Officer "A.F.," is or will be unfair to the defendant. Respondent instead relies on solicitude for a witness to find an

[6] The record contains allusions to campaign statements of relator and statements of the St. Louis Police Officers Association. Petition, Ex. 9, p. E36. These statements have no more significance for the proper resolution of this case than do any other extrajudicial comments during public debate.

appearance of impropriety in relator's performance of her sworn duty to assure herself of the merits of the prosecution of defendant.

Respondent has sadly misconceived what constitutes an "appearance of impropriety." Relator can neither prosecute the defendant effectively nor assure herself and the public of the propriety of the Officer's conduct, without the truthful testimony of the Officer. In expecting (and, indeed, beseeching) the Officer to conform to his sworn duty as an officer of the law and assist the prosecution of defendant Davis, relator is seeking no unfair advantage. The choice is that of the Officer: testify truthfully in aid of the prosecution of the defendant, or assert his privilege against self-incrimination, resulting in dismissal of the charges against defendant.

There is no third option of obtaining a special prosecutor through the disqualification of the relator and substituting an unaccountable prosecutor appointed by the court. It is relator, who, in the words of the Supreme Court quoted above, is accountable to the people and endowed with the statutory authority to prosecute the underlying cause. Prohibition must issue to confine respondent within the proper bounds of his authority.

II. Relator is entitled to a permanent order prohibiting respondent from enforcing his order disqualifying relator from prosecuting the underlying criminal cause, and from acting otherwise than by vacating the order of

disqualification, because respondent, as a matter of law, abused his discretion and exceeded his proper authority in disqualifying relator and her office from prosecuting the defendant in the underlying criminal cause, in that respondent deployed his inherent authority on the basis of a "potential" conflict of interest, at the behest of a witness who had and has no attorney-client relationship with relator or her office and so lacked standing to seek disqualification, thereby infringing the interests of relator and the defendant in the underlying case in a speedy trial.

Officer "A.F." alleged and argued a purported "conflict of interest" and "appearance of impropriety" in seeking the extraordinary order disqualifying the Circuit Attorney from prosecuting this case against the defendant. Realizing the perils of allowing a witness to obtain disqualification of the prosecutor in a criminal case, respondent attempted to finesse the standing issue by invoking his "inherent authority." Respondent's reliance on his "inherent authority" in the circumstances of this case, as demonstrated above, was and is an unprecedented action and--despite respondent's implicit rejection of Officer "A.F.'s" standing to seek disqualification--is the functional equivalent of authorizing a witness, who has no standing whatever, to obtain disqualification of a prosecutor in a criminal case. Hence, respondent's order is in excess of his authority and an abuse of discretion.

First, an attorney for a witness has a very limited role in a pending criminal case. The attorney for the witness (and the witness himself) has no right to address the court generally on any issues other than the witness's privilege. *State ex rel. Naes v. Hart,* 548 S.W.3d 870, 874 (Mo.App.E.D. 1977). In the case at bar, respondent accepted that Officer "A.F." could evade the standing requirement and secure disqualification of relator, something that cannot be done at the behest of a witness.

Respondent evades the general rule that only current and former *clients* of an attorney may invoke a conflict of interest to disqualify an attorney from representing a party, and then only when such clients themselves are parties to the litigation in which disqualification is sought. E.g., *Hernandez v. Guglielmo,* 796 F.Supp.2d 1285 (D.Nev. 2011); *Black v. State of Missouri,* 492 F.Supp. 848 (E.D.Mo. 1980); cf. *State ex rel. Thompson v. Dueker,* 346 S.W.3d 390 (Mo.App.E.D. 2011). However, respondent's reliance on "inherent power" does not resolve the issue.

The authorities cited by respondent are not pertinent to this case. None of the cases mentioned by respondent involves disqualification of a prosecutor (or other attorney) on motion of a witness. To be sure, in exceptional cases, a special and compelling public interest may warrant a motion to disqualify filed by a non-client, but never a non-party. Every portion of the applicable disciplinary rule,

Mo.R.Ct. 4-1, pertains to the lawyer-client relationship. Nothing whatever in the rules is applicable to Officer "A.F.," who is merely a witness, unconnected to relator or to the defendant below. The relator represents the State of Missouri, not a witness. The State has only one interest: securing justice in accordance with due process of law. The only conflict of interest in this case is that of the witness himself: he apparently wishes to secure the conviction of the defendant, but at the same time he demands a species of immunity from prosecution for himself in so doing. He has no standing to seek to disqualify the relator in order to serve his own interests.

Neither does Mo.R.Ct. 4-4.4(a) authorize respondent to disqualify relator. Respondent cites no cases in which that rule authorizes a witness to seek to disqualify a prosecutor in an action pending against another person. Once again, the rules of court and cases of disqualification of an attorney, such as *State ex rel. Horn v. Ray,* 325 S.W.3d 500 (Mo.App.E.D. 2010), involve situations in which an attorney, acting as a client's counsel, obtained privileged information from the client, and then undertook to represent another client with adverse interests. Obviously, that would entail potential misuse of client confidences. That is not the situation here. Cf. *State v. McWhirter,* 935 S.W.2d 778 (Mo.banc 1996)(prosecutor not disqualified from prosecuting defendant despite prior

representation of defendant's wife in dissolution action; no access to confidential information).

More importantly, respondent expressly declined to find that relator has violated anybody's rights in the prosecution of the case below. Petition, Ex. 9, p. E38. As demonstrated above, Officer "A.F." is in the same position as any other witness: he may choose to testify or he may assert his privilege against self-incrimination. Relator cannot compel his testimony unless the privilege is overcome by a grant of immunity or by the Officer's own choice. Relator has employed no trickery or deceit against the Officer, although apparently respondent is offended by the decision of relator to seek a preliminary hearing in this matter, rather than presenting the case to the grand jury.[7]

[7] Respondent's commentary on the relator's decision to seek a preliminary hearing in the case below, rather than presenting to the grand jury, is reflective of his abuse of discretion. The record shows that relator had encountered similar refusals of police officers to testify before the grand jury, and chose to bring the matter to public attention by seeking preliminary hearings in such cases. The issue has also surfaced in discovery proceedings well after indictment, in cases of which this Court can take judicial notice. See *State v. Flores,* 437 S.W.3d 779 (Mo.App.W.D. 2014). Those cases include State v. Blanchard, 22nd Cir. No. 1722-CR01420-01

The sonorous reference to "appearance of impropriety," as shown in argument above, does not bolster respondent's reliance on hypothetical unfairness to a witness as a ground to disqualify relator. Again, respondent apparently considers that it is improper for the Circuit Attorney to do her job in assuring herself, the public and the Court that the underlying prosecution is meritorious, by securing the Officer's truthful testimony and examining it in light of all the facts of the case. There is no impropriety, nor any appearance, in seeking the cooperation of any witness in a meritorious prosecution. The impropriety would arise if the

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(virtually identical motion to disqualify). Relator has attempted to be solicitous of the (unfounded) fears of police officer witnesses, as attested by her willingness to employ initials instead of naming the Officer in the complaint, but she can hardly be faulted for choosing not to enshroud this issue in complete secrecy. Relator also notes that Officer "A.F.'s" counsel has accused her of "punishing" police officers who refuse to cooperate in prosecuting serious felonies, by declining to entertain applications for warrants by such officers. But "A.F." does not (and cannot) allege that relator has done so in regard to him; nor would such conduct authorize judicial disqualification of the relator. Relator cannot be compelled to bring a prosecution against anyone. Cf. *Molette v. Wilson,* 478 S.W.3d 428 (Mo.App.E.D. 2015).

relator closed her eyes to exculpatory information militating against prosecution of the defendant.

Even cases recognizing that in some rare instances a non-client party can seek to disqualify counsel in a pending case insist that, to have standing, the non-client must be a party and must demonstrate the existence of an injury that is both "concrete and particularized" and also "actual and imminent, not conjectural or hypothetical." *Hernandez v. Guglielmo,* 796 F.Supp.2d at 1290. In this case, respondent acknowledges that any ethical issue is at most "potential," and so his order fails to clear the bar.

Respondent's conclusions amount to nothing more than a hypothetical or, in respondent's own word, "potential" situation in which the Officer's truthful testimony in this case puts him at risk of criminal prosecution. This is not an injury that presents a basis for disqualification. This "potential conflict" rests on a series of "ifs." "If" the Officer testifies, "if" the testimony is false or incriminating, "if" the relator concludes that the testimony alone provides a basis to prosecute him, regardless of all the other facts of the case, then the Officer *could* find his testimony eventually used against him. Respondent overlooks that both the "potential conflict" and, indeed, the so-called "appearance of impropriety," rest on an entirely hypothetical scenario. Unless and until the Officer testifies, and unless and until the relator concludes that she must dismiss the charge against the

defendant, and prosecute the Officer instead, respondent's basis of disqualification is conjectural and hypothetical. Disqualification for "potential" conflicts is not in keeping with principles heretofore applied in Missouri. See *State v. Sonka,* 893 S.W.2d 388 (Mo.App.S.D. 1995); cf. *State v. Harris,* 939 S.W.2d 915 (Mo.App.W.D. 1996).

Furthermore, respondent's remedy for the hypothetical conflict or appearance of impropriety is no remedy at all. Even if relator is disqualified from prosecuting defendant herein, a special prosecutor would have to have full cooperation of Officer "A.F." and complete information from the police investigation in order to proceed. As with relator, the Police Department and the police officer witnesses are effectively in control of the flow of information. Neither relator nor a special prosecutor can obtain all the facts except with the cooperation of the police.[8] When the information is at last obtained, the special prosecutor would have the same obligation as the relator to review all of the facts

[8] Officer "A.F.'s" motion and argument complained about slowness of relator in concluding her review, but relator simply cannot move any faster than the flow of information from the police permits. Frequently, relator must initiate a charge without a complete police report and then await reports that in turn depend on cooperation of police officer victims and witnesses.

of this case in proceeding to trial, and if the Officer provides testimony to a special prosecutor (which he presumably intends to do, although he does not appear to guarantee it), that testimony could still "potentially" be used against him--absent immunity.

Moreover, respondent's determination that appointment of a special prosecutor will resolve any "potential" conflict of interest overlooks another facet of a criminal prosecution: the State's obligation to disclose any information that tends to negate the guilt of the defendant, mitigate the degree of the offense charged, reduce the punishment, or impeach a prosecution witness. *Brady v. Maryland*, 373 U.S. 83 (1963) and Mo.R.Ct. 25.03(A)(9). Neither relator nor a special prosecutor could turn a blind eye to any evidence of misconduct by a police officer or any other witness in a given case involving an assault or other use of force; any such evidence would have to be disclosed to the defense, and would undoubtedly require disclosure to the relator in any case for further inquiry.[9]

[9] It was argued below that relator has failed to maintain a proper "wall" between prosecutors pursuing a criminal charge against a defendant and prosecutors examining the use of force against that defendant. No such "wall" can be impermeable in light of *Brady*. In any event, the construction of such a "wall" is a matter within relator's discretion, not respondent's.

In short, respondent has improvidently deployed his "inherent power" at the behest of one without standing, and has crafted relief that remedies nothing.

CONCLUSION

For the foregoing reasons, relator respectfully prays that the preliminary order herein be made permanent, and that the permanent writ of prohibition forbid respondent from enforcing his order of disqualification and from taking any action other than vacating said order and permitting the underlying cause to proceed with relator and her office as counsel of record.

Respectfully submitted,

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Certificate of Service and Certification under Rule 84.06(c)

The undersigned counsel certifies that the foregoing brief and the accompanying appendix were served on counsel for all parties by e-mail on the 8 day of June, 2018, and counsel further certifies that the brief includes the information required by Rule 55.03, with a signed original in counsel's possession, that the brief complies with the limitations contained in Rule 84.06(b), and that the total number of words is 7714.

/s/Robert H. Dierker 23671