

SC97026

IN THE SUPREME COURT
STATE OF MISSOURI

State ex rel Kimberly Gardner
Circuit Attorney of the City of St. Louis,

Relator

v.

The Honorable Timothy Boyer,

Respondent

On Petition for Writ of Prohibition

Brief of Intervenor, Defendant Wendell Davis

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JURISDICTIONAL STATEMENT

Relator filed a writ with the Court of Appeals Eastern District cause number ED106325. The Eastern District denied the writ without opinion on March 8, 2018. Relator then filed a writ with this Court on March 14, 2018. This Court has jurisdiction of this petition in prohibition by reason of Mo. Const. art V, §4.1 and §5 which invests this Court with superintending authority over the lower courts and sets the rules of practice and procedure in those courts. Relator has no alternative remedy to seek review of the disqualification order of the Office of the Circuit Attorney.

STATEMENT OF FACTS

Respondent, The Honorable Timothy J. Boyer, is the judicial officer assigned to Division 25 of the 22nd Judicial Circuit. Intervenor Wendell Davis was charged by Relator, Kimberly Gardner, Circuit Attorney of the City of St. Louis, and Davis' criminal case was assigned to Judge Boyer's division. *State v. Davis*, Cause No. 1722-CR03687 has remained in Division 25 throughout the pendency of the case.¹ Judge Boyer signed the warrant authorizing Davis' arrest on September 1, 2017 on the charges of Unlawful Use of a Weapon – Exhibiting, Unlawful Possession of a Firearm, Stealing a Firearm,

¹ Subsequent to Respondent's order he was transferred from Associate Division 25 to Circuit Division 8.

Resisting Arrest and Tampering in the 2nd Degree for incidents alleged to have occurred on August 31, 2017.

The complaint filed against Davis was accompanied by a probable cause statement signed by Detective Robert Jauer, a Force Investigation Unit officer from the St. Louis Metropolitan Police Department, charged with investigating the shooting of Davis by St. Louis Metropolitan Police Officer A.F. (Ex 2, E3-E7). A.F., who alleges that he observed Davis commit the charged crimes, and is the only witness to four of the five charges, did not file an affidavit in support of the complaint nor did he sign the probable cause statement submitted in support of the complaint. Davis is paralyzed as a result of A.F. shooting him in the back on August 31, 2017. He was hospitalized for twelve days immediately following the shooting and then confined in the St. Louis City Justice Center for almost five months until his release on his own recognizance on January 26, 2018.

The complaint served upon Davis stated that the Office of the Circuit Attorney intended to pursue their prosecution of Davis by seeking a grand jury indictment. No grand jury indictment has ever been issued, and no preliminary hearing has been held to determine if there is probable cause to proceed and to hold Davis on these charges. According to case net service information, Davis was served with the warrant in this case on September 12, 2017, the day he was released from the hospital. He first appeared via closed circuit video system on September 15, 2017, at which time his case was continued by the court to October 16, 2017. (Ex A). It is unclear what happened on October 16, 2017, and whether or not Davis was brought to court, but Davis' case was rescheduled at that time for November 20, 2017.

On November 20, 2017, the State of Missouri requested a continuance of Davis' case because the case "was pending in the Grand Jury and the Grand Jury has not yet returned an indictment" (Ex B). It is unclear if Relator ever presented the case to the grand jury, if the grand jury considered the charges and issued a no true bill, if A.F. was subpoenaed to testify before the grand jury, or if the case was in fact never pending before the grand jury. On November 20, 2017, the case was reset by the Court, at the State's request, for December 13, 2017. It is unclear, once again, if Defendant was brought to court on November 20, 2017.

On December 7, 2017, Assistant Public Defender Erika Wurst entered her appearance as counsel for Davis. On December 11, 2017, Wurst filed a Motion to Reduce Bond. (Ex C). Defense Counsel argued in that bond reduction request that the weight of the evidence against Davis was not strong and that the evidence was dependent on A.F.'s credibility. Relator concedes in her petition that the State's case is dependent upon the testimony of A.F. (Relator's petition, para 9). According to the probable cause statement A.F. told Detective Jauer that Davis was pointing a gun at him when he shot Davis. (Ex 2, E-6) Davis, however, was shot in the back. This small amount of information related to A.F.'s testimony and provided to Defendant by Relator to date indicates that A.F. is not a reliable witness. Because no information or indictment has been filed in this case, Relator is not yet obligated to provide discovery to the defense, and has not provided any discovery at this point.

Defense Counsel's Motion to Reduce Bond was heard by Respondent on December 13, 2017 and denied, although Respondent requested that Defense Counsel

provide additional information regarding a placement for Davis outside of the jail where he could receive medical care. Defense Counsel set another hearing to provide this information and again request a bond reduction on December 20, 2017. On January 26, 2018 Respondent ordered Davis to be released on his own recognizance. (Ex D).

In addition to requesting a reduced bond at the first bond reduction hearing on December 13, 2017, Davis requested that his case be dismissed for failure to prosecute. As of December 13, 2017 Davis had been confined in the hospital or in the jail for one hundred and three days with no preliminary hearing or grand jury indictment. Respondent denied that request to dismiss for failure to prosecute. (Ex E).

Relator contends in her petition that she has “probable cause to believe that Davis committed the offenses charged in the complaint in the underlying case.” (Relator’s petition, para 7). Defense Counsel, however, has provided Relator with Department of Corrections records stating that Davis was confined on the date of the allegations in Count 3, Stealing a Firearm. (Ex F). Proof of all the other charges are dependent upon A.F.’s testimony.

On December 13, 2017, Relator requested a continuance of Davis’ case until January 22, 2018, requesting for the first time that the case be set for a preliminary hearing. (Ex G). No explanation was provided to the court as to why Relator had changed her mind and was now requesting a preliminary hearing rather than pursuing a grand jury indictment. It does not appear that Respondent requested an explanation for the change, but Respondent did continue the case to January 22, 2018 for a preliminary

hearing.

On January 8, 2018, A.F. filed a Combined Motion and Memorandum to Disqualify the Office of the St. Louis City Prosecuting Attorney and obtained a hearing date for that motion on the same date as the preliminary hearing, January 22, 2018. Davis filed a Motion to Strike the Police Officer's Pleadings on January 16, 2018, and the State of Missouri filed a request to continue the January 22, 2018 hearing. Relator states in her petition that she requested A.F. to testify at that preliminary hearing to assist in the prosecution of Davis (Relator's petition, para 9), but no subpoena return was filed indicating that Relator subpoenaed A.F. to testify at the scheduled January 22, 2018 hearing.

On January 22, 2018, Respondent continued the Police Officer's motion to January 24, 2018 and continued Davis' preliminary hearing to January 29, 2018. Davis objected to the continuance and again requested that the case against Davis be dismissed for failure of the State of Missouri to move forward in its prosecution of Davis either by obtaining a grand jury indictment or presenting evidence at a preliminary hearing. (Ex H). Prior to the January 24, 2018 hearing, the State of Missouri filed a Motion to Strike and a Memorandum in support. A.F. filed a reply and sur-reply to the Defendant's and State's motions to strike. On January 24, 2018 Judge Boyer heard argument on the Motion to Disqualify the Office of the Circuit Attorney and issued an order disqualifying the Office of the Circuit Attorney from Davis' case on January 25, 2018.

POINTS RELIED ON

POINT I

Relator is entitled to an order prohibiting Respondent from disqualifying the Office of the Circuit Attorney in State v. Wendall Davis because Respondent acted in excess of his judicial authority and abused his discretion in that the request for disqualification came from a witness who did not have standing to make the request.

State ex rel Naes v. Hart, 548 S.W.2d 870 (Mo. App. 1977)

State v. Doehler, 844 N.W. 2d 469 (Iowa Ct. App. 2014)

State v. Gault, 39 A.3d 1105 (Conn 2012)

Harrison v. Monroe County, 716 S.W. 2d 263 (Mo. 1986)

POINT II

Relator is entitled to an order prohibiting Respondent from disqualifying the Office of the Circuit Attorney in State v. Wendall Davis because Respondent acted in excess of his judicial authority and abused his discretion in that no potential conflict of interest or appearance of impropriety exists which requires disqualification of Relator.

State ex rel Dir of Revenue v. McBeth, 66 S.W. 3d 95 (Mo. App. W.D. 2012)

State v. Boyd, 560 S.W. 2d 296 (Mo. App. 1977)

State v. Byrd, 676 S.W. 2d 494 (Mo. 1984)

State v. Salmon, ____S.W. 3d_____, 2018 WL 1058603 (Mo. App. E.D. 2018)

POINT III

Relator is entitled to an order prohibiting Respondent from disqualifying the Office of the Circuit Attorney in State v. Wendall Davis because Respondent acted in excess of his judicial authority and abused his discretion by failing to dismiss the case against Defendant for failure to prosecute.

State v. Thomas, 674 S.W. 2d 131 (Mo. App. E.D. 1984)

State v. Hill, 438 S.W. 2d 246 (Mo. 1969)

Mo. R. Ct. 22.01

Mo. R. Ct. 22.09

ARGUMENT

POINT I

Relator is entitled to an order prohibiting Respondent from disqualifying the Office of the Circuit Attorney in State v. Wendall Davis because Respondent acted in excess of his judicial authority and abused his discretion in that the request for disqualification came from a witness who did not have standing to make the request.

Respondent's order disqualifying the Office of the Circuit Attorney was in response to a motion for disqualification made by the complaining witness in the case, A.F. The motion was filed on January 8, 2018 and after receiving responsive pleadings from Relator and the Defendant the Respondent set a hearing on that Motion to Disqualify for January 24, 2018 and then issued his order on January 25, 2018. Defendant's case had been pending since September 1, 2017, but at no time did Respondent take any action to disqualify Relator until after A.F. filed his motion.

Standing is seldom an issue discussed in the context of a criminal case. The parties to the action are clear, the prosecuting authority and the charged party. A witness, or an attorney for a witness, does not have the right to request relief from the court "generally on the issues of the case" in a criminal prosecution, because they do not have standing. *State ex rel. Naes v. Hart*, 548 S.W.2d 870, 874 (Mo. App. 1977). Criminal prosecutions place an individual citizen against the government and therefore the parties with standing in a criminal case are the defendant and the government. *United States v. Stoerr*, 695 F.3d 271, 277–78 (3d Cir. 2012).

Courts have recognized this principle in a number of areas affecting criminal prosecutions. Witnesses do not have the right to file motions to raise or lower a defendant's bond, even if they would be affected by a defendant's incarceration or release. They do not have the right to file motions regarding restitution, even if that restitution would be dispersed to them. *See id.* at 277–78; *State v. Doehler*, 844 N.W.2d 469 (Iowa Ct. App. 2014).

The State of Missouri has a witness rights statute that entitles victims and witnesses to notice about proceedings in a criminal trial, including the timing of hearings and trials §595.209 *RSMo*. These statutory rights do not include the disqualification of a prosecutor. The Missouri Constitution also addresses victim rights in Article I, Section 32. This constitutional provision infers no right to a victim to choose who shall prosecute a criminal charge. *Mo Const, Art.I, Sec 32*.

Both the State and defendants have an interest in litigating criminal cases in a timely manner with minimal intrusions from non-parties—the State on behalf of the public's interest in an efficient judicial system and defendants pursuant to their speedy trial and due process rights. These interests trump any possible interests of third party witnesses who may want to seek relief within the criminal case. *See State v. Gault*, 39 A.3d 1105, 1115 (Conn. 2012) (discussing the dangers of allowing witnesses the rights of a party in a criminal cases).

Not only is it improper for a witness to seek relief in a criminal case where the witness is not a party, but here, A.F. lacks a “threatened or actual injury resulting from the putatively illegal action” which is required to give a party standing. *Harrison v.*

Monroe County, 716 S.W.2d 263, 266 (Mo. 1986). A.F. relies on a single affidavit, from a single officer, who claims that sometime in 2015, he was told that the Circuit Attorney of the City of St. Louis would no longer hear his warrant applications after he refused to testify about a case in which he shot an individual. (Ex I). In 2015 the Circuit Attorney was Jennifer Joyce, not Relator. The affidavit, which was initially filed in another case, *State v. Blanchard*, does not allege that the officer filing the affidavit was fired. It does not allege that his duties were changed or impacted. The affidavit does not even say if Relator ever actually refused to hear a single one of his warrant applications, or what the impact on the officer's job would be had this been the case. There is no allegation that any other officer has ever suffered a similar hypothetical injury. The affidavit does not indicate who told the officer who signed the affidavit that Relator would refuse his warrant applications and, as such, Defendant is unable to investigate the trustworthiness of the information contained in this affidavit. The affidavit on which A.F. relies entirely, alleges nothing more than a hypothetical injury, which A.F. does not allege has been suffered by A.F.

The standing doctrine is designed to assure that there is an actual controversy between the parties and that the controversy exists within a case in which those who have the controversy are involved. *Schweich v. Nixon*, 408 S.W.3d 769, 773–75 (Mo. 2013). While the police officer, or even the entire St. Louis Metropolitan Police Department, may be at odds with the Office of the Circuit Attorney; that controversy is not part and parcel of the State's criminal prosecution of Davis.

Respondent claims to address the issue of A.F.'s standing in his order, noting that

he has the inherent authority to disqualify Relator and could even do so *ex mero motu*.

In the case at bar, there is no question that Respondent issued the order disqualifying the Relator in response to A.F.'s motion. Defense counsel filed two motions to reduce Defendant's bond, and Respondent heard extensive hearings on both.

In those hearings, Respondent was fully apprised of the facts of the case, including A.F.'s role as a necessary witness for the State and the fact that he had used force and shot Defendant. That use of force by a law enforcement officer will always result in an investigation to determine if the use of force was reasonable. Respondent saw no conflict of interest at the time of those bond hearings between Relator and A.F. Respondent took no action on this issue until A.F. filed a motion to disqualify Relator and, after which Respondent held a hearing and granted the exact relief A.F. requested. Despite Respondent's claims, it is evident that this relief was not granted *ex mero motu*, but rather was only granted in response to a request from a person who had no standing in the case before Respondent.

Respondent never ruled on Relator's and Defendant's objections to A.F.'s standing, but instead stated that his decision was made *sua sponte*. (Ex 9, E-33). Respondent's entertainment of A.F.'s motion and ruling in support of that motion disqualifying the Office of the Circuit Attorney exceeded the Court's jurisdiction, was an abuse of discretion and requires this Court to intervene and prohibit this action. *State ex rel Director of Revenue v. McBeth*, 66 S.W. 3d 95, 99 (Mo. App. W.D. 2012).

POINT II

Relator is entitled to an order prohibiting Respondent from disqualifying the Office of the Circuit Attorney in State v. Wendall Davis because Respondent acted in excess of his judicial authority and abused his discretion in that no potential conflict of interest or appearance of impropriety exists which requires disqualification of Relator.

Respondent admits in his order that A.F. may very well not have standing to request the disqualification of the Relator, but relies on his inherent authority to move forward in the disqualification of Relator because he has determined that a conflict of interest exists. (Ex 9 p. E-33). Respondent references a prosecutor's responsibility to avoid any conflict of interest or appearance of impropriety. Respondent then contends "that a potential conflict of interest may arise when, during the prosecution of a specific criminal defendant, the prosecutor has motives or interests other than according the defendant in a pending case procedural justice." (Ex 9, E-35).

Respondent identifies the conflict of interest requiring disqualification of Relator: "the Circuit Attorney's Office is actively prosecuting the defendant while simultaneously reviewing the conduct of the very officer upon whom they are relying to effectuate such prosecution. The Court believes these competing interests give rise to a potential conflict of interest, and create the appearance of impropriety on behalf of the Office of the Circuit Attorney." (Ex 9, E-36-37).

Investigating A.F. while prosecuting Defendant is not a conflict of interest for Relator. If Relator's action were denying Defendant procedural justice, Defendant would

bring that issue before the court, but it is his prerogative, and not that of a third party witness, to raise any conflict of interest concerns in Defendant's criminal case.

Respondent relies upon *State v. Boyd*, to support his conclusion that he must move forward with disqualification. 560 S.W. 2d 296, 297 (Mo. App. 1977). The defendant Boyd, raised the issue of a conflict of interest in that proceeding, but his request for disqualification of the prosecutor was denied by the trial court. Boyd was represented by the Public Defender Office at trial. He was prosecuted, however, by an Assistant Prosecuting Attorney who had served as a member of that Public Defender Office during the time the Public Defender Office represented Boyd. The ruling in that case, and many others in which disqualification of the prosecutor was proper, was based upon the legal adage that "an attorney, on terminating his employment, cannot thereafter act as counsel against his client in the same general matter even though while acting for his former client he acquired no knowledge which could operate to the client's disadvantage in the subsequent adverse employment." *People v. Gerold*, 107 N.E. 165, 177 (1914) cited by *State v. Boyd*. See also *State ex rel. Winkler v. Goldman*, 485 S.W.3d 783, 790-91 (Mo. App. E.D. 2016) (finding that prosecutors impermissibly breached defendant's due process and fair trial right to attorney-client privilege when they interviewed defendant's husband, who had the same attorney as defendant, requiring disqualification of prosecutor's office); *State v. Ross*, 829 S.W.2d 948, 951 (Mo. 1992) (finding impermissible appearance of impropriety where two attorneys with access to privileged communications through their employment at firm handling defendant's related civil suit were simultaneously employed part-time as prosecutors); *State v. Burns*, 322 S.W.2d 736, 741 (Mo. 1959) (disqualifying

prosecutor's office where defendant's former public defender was employed by prosecutor's office at the time of trial because "the very fact that he had acquired...information as counsel for the defendant, and that he might use it," created an unconstitutional conflict).

In each of the above cases the defendant's right to due process and a fair trial were implicated. The investigation of A.F. by Relator, while Relator is prosecuting Defendant, does not create a conflict of interest that affects the Defendant's due process rights. A prosecution witness in a case can become the subject of an investigation by that same prosecutor's office in the midst of any trial whenever the issue of perjury arises. See *State v. Byrd*, 676 S.W. 2d 494 (Mo. 1984). The prosecution in *Byrd* presented a witness, Sandra Byrd, and in the midst of her testimony the prosecution initiated perjury charges against her. The prosecution then negotiated with Sandra Byrd to testify truthfully and retract her perjured statements in return for the dismissal of the perjury charges. The filing of the charges, the negotiation, and the dismissal of the charges were all found to be proper and ethical. *Byrd* at 504.

A prosecutor often has competing interests in fulfilling his responsibilities. Prosecutors, in addition to prosecuting criminal cases are required to represent parties in civil suits. The courts have found, however, that participation in the criminal and civil litigation arising from the same incident do not require the disqualification of the entire prosecutor's office. *McBeth* at 102. See also *State v. Harris*, 939 S.W. 2d 915 (Mo. App. W.D. 1996) (prosecutor's representation of county sheriff's in civil suit brought by defendant and prosecution of defendant not a conflict of interest); *State v. Sonka*, 893

S.W. 2d 388, 389 (Mo. App. S.D. 1995) (prosecutor not disqualified from prosecuting defendant who filed civil suit against prosecutor); *State v. Salmon*, 2018 WL 1058603 (Mo App. E.D. 2018) (prosecutor who had handled termination of parental rights in juvenile court concerning child who was victim of allegations of endangering the welfare of a child in criminal case need not be disqualified so long as he did not abuse access to confidential juvenile records.)

A.F., in his capacity as a witness, apparently expects to enjoy the same relationship with a prosecutor as a defendant does with his defense attorney. He does not. Attorney client privilege bestows a protection upon information exchanged between an attorney and a client, such as Defendant and Defense Counsel in this case, that does not extend to information exchanged between a witness and prosecutor. The plain fact is that prosecutors do not represent victims or witnesses. Prosecutors may advocate for the interests of victims and witnesses, but they are not their attorneys; the information exchanged between them is not privileged. As a result, conflicts simply do not exist for prosecutors in the same sense that they do for defense attorneys and criminal defendants or civil attorneys and parties to civil matters.

For that reason, no provision of Missouri or federal law entitles witnesses to conflict-free prosecutions of another person. If a witness in one case were to be charged as a defendant in a separate criminal case, they would not be entitled to a conflict-free special prosecutor in either case. Respondent certainly does not seek to appoint a special prosecutor for every case where the defendant is a witness in another case also charged by Relator. Indeed, the possibility of a conflict in such cases—where a witness is

actually charged in a separate criminal case—is much higher than exists here, where Relator has not charged A.F. with any offense. Yet to require a State to appoint a special prosecutor every time a witness in one criminal case is also a defendant in a criminal case is an untenable solution. Even if the case in which a witness is charged is related to the case in which they are a witness, the witness is not entitled to a special prosecutor, in either case. Rather, the individual is entitled to plead the Fifth Amendment in either case, as A.F. is entitled to do when and if he is called to testify in this case.

And in fact, the investigation that Relator is attempting to complete—interviewing witnesses, reviewing reports, reviewing evidence—is the same investigation they undertake in every case. It is indeed incumbent upon the State to review the actions of every officer any time the officer makes an arrest—defendants’ due process rights require it. When A.F. became a police officer, he was well-aware he would be required to cooperate with prosecutors, and that his actions while on duty would be subject to review. The investigation Relator is attempting to undertake in this case is no different from the investigation they undertake in every case. (*See State v. Eckelcamp*, 133 S.W.3d 72, 75 (Mo. App. E.D. 2004) (finding that the trial court’s disqualification of the prosecutor’s office for taking action within their discretion was an abuse of discretion.) A.F.’s request effectively asks that the State be prohibited from investigating a police officer’s actions while making an arrest, given the risk that they will be disqualified from the underlying case, even though the State is duty-bound to do just that.

There is unquestionably a political conflict between Relator and the

St. Louis Metropolitan Police Department, but a political conflict is not the same as a legal conflict. Relator is frustrated with the police department's delay in providing police reports to Relator. (Relator's Suggestions in Support p. 23) A.F. is frustrated with Relator's decision to investigate police officers. (T 17). Respondent appears to be frustrated with Relator's decision to uncharacteristically use a preliminary hearing rather than the grand jury in a victim case (Ex 9 E-36). Frustration with Relator and the St. Louis Metropolitan Police Department, either by the officer, Relator or Respondent, is not sufficient to rise to the level of a conflict of interest that should impact Davis' case and his rights to speedy trial and due process.

Respondent voices his concern that "...this Court believes that a potential conflict of interest may arise when, during the prosecution of a specific criminal defendant, the prosecutor has motives or interests other than according the defendant in a pending case procedural justice." (Ex 9, E-35) Respondent's contention that Relator's interest in prosecuting police officers who use force improperly would keep Relator from according the defendant procedural justice is without support. Respondent also suggests in his order that if Relator would take this case to a grand jury for a probable cause finding and an indictment that the issues raised by A.F. would be resolved. (Ex 9, E-37). That suggestion may benefit A.F. in the short run, but does nothing to change A.F.'s need to make a decision to testify or take the Fifth Amendment in the long run. Taking the case to a grand jury would also do nothing to accord Davis procedural justice. A.F.'s counsel indicated to the court that his concerns would be resolved if the case was taken to the grand jury. "Because if a special prosecutor wanted a successful prosecution, he would

take it to the grand jury and not expose his victim to cross-examination prematurely. That's why. And I believe that too -- again, I don't have all the answers, but I've never seen this happen before where we're in this situation at a preliminary hearing. So my only thought is that that special prosecutor would proceed through the grand jury....And if this case went through the grand jury, we would not be here” (T 40).

The probable cause statement submitted to Respondent upon the initiation of Davis' case was created not by A.F., but by an investigating officer. Taking this case to the grand jury, and allowing Relator to seek an indictment without the testimony of A.F., or at least without the recorded testimony of A.F., is concerning to Davis. A.F.'s counsel argued that a preliminary hearing would subject A.F. to cross examination. That cross examination is essential to understanding whether there is probable cause that a felony was committed and that Davis committed that felony.

Respondent may be entitled to rely upon his inherent authority to resolve conflicts of interest that are brought to his attention, but no conflict of interest exists in this case that requires the disqualification of Relator. If A.F. will not testify on the record at a preliminary hearing, the reasonable expectation is that he will not testify on the record at either a pre-trial deposition or a trial. Who is prosecuting the case will not change the decision of whether A.F. is willing to testify truthfully under oath or decides to exercise his Fifth Amendment right to remain silent. To suggest that A.F. should be provided an end around that choice by inserting a new prosecutor who would allow him to testify, off the record, before the grand jury is the ultimate denial of procedural justice for Davis.

Respondent identifies the “competing interests” between investigating the legality of A.F.’s conduct and prosecuting Davis as a potential conflict of interest that creates the appearance of impropriety that caused Respondent to disqualify Relator. (Ex. 9, E-37) Respondent then identifies ways to mitigate the conflict; including asking a special prosecutor to investigate the officer, not charging the defendant, asking a special prosecutor to prosecute the defendant or present the case to the grand jury. (Ex 9, E-37) Those remedies demonstrate why no conflict exists. If a special prosecutor determined the officer’s conduct was improper, the results of that investigation would be provided to Relator. If the case against the defendant was not charged, or was now voluntarily dismissed by Relator or dismissed by the Court; the investigation to determine whether the officer’s conduct was improper would continue and the officer would either assert his Fifth Amendment rights or not in the course of that investigation. If a special prosecutor prosecuted the defendant, the special prosecutor would need to investigate the credibility of A.F.’s testimony and all of the testimony would be accessible to Relator in their investigation of the officer. The final recommendation, presenting the case to the grand jury, was discussed above. That remedy does not change the fact that if the officer’s conduct was not proper he should be prosecuted and the defendant should not. Bringing in a new prosecutor changes nothing.

Respondent’s disqualification of Relator because of a potential conflict of interest was in excess of his judicial authority and an abuse of discretion and requires this Court to intervene and prohibit this action.

POINT III

Relator is entitled to an order prohibiting Respondent from disqualifying the Office of the Circuit Attorney in State v. Wendall Davis because Respondent acted in excess of his judicial authority and abused his discretion by failing to dismiss the case against Defendant for failure to prosecute.

Davis has been denied his procedural justice by the denial of his multiple requests for dismissal of the charges against him. Respondent finds in his order that the disqualification of Relator is the “most prudent way to protect the rights of the defendant....” (Ex 9, E-38). The most prudent way to protect the rights of the defendant is for Respondent to dismiss the charges against Davis because Relator failed to obtain a probable cause finding within a reasonable period of time as required by Rule 22.09(a).

A felony criminal prosecution may begin with either the filing of a complaint or an indictment. Rule 22.01. When the state is proceeding by preliminary hearing, “[a]fter the filing of a felony complaint, a preliminary hearing shall be held within a reasonable time.” Rule 22.09(a). At the preliminary hearing the judge must find probable cause to believe that a felony has been committed and that the defendant committed the felony; if not, the judge is required to discharge the defendant. Rule 22.09(b).

Relator filed a complaint against Davis, but Respondent has failed to conduct a preliminary hearing within a reasonable time after the filing of that complaint. On the date of the last scheduled preliminary hearing on January 22, 2018 Davis had been confined for over one hundred and thirty days before finally being released on his written promise to appear on January 26, 2018.

Relator never requested a preliminary hearing in this matter until December 15, 2017. Relator stated in the complaint that she would proceed with this case by seeking a grand jury indictment and even informed the court on November 20, 2017 that the matter was pending before the grand jury. There was no indication prior to December 15, 2017 that Relator would change her mind and request to proceed by preliminary hearing.

Furthermore, no information has ever been provided to the court or Davis as to why Relator changed her mind to pursue the charges in a preliminary hearing rather than the grand jury after the case had been pending for more than three months. The law is clear that Relator may choose to pursue criminal charges either through a preliminary hearing or a grand jury indictment. *State v. Thomas*, 674 S.W. 2d 131, 136 (Mo. App. E.D. 1984). While Relator may choose her course, she must choose some course, and Respondent cannot hold a defendant on charges when Relator does not move forward in some manner. Relator did not request a preliminary hearing until the case had been pending for more than three months. When Relator did request a preliminary hearing, Respondent did not set the initial preliminary hearing until over a month after Relator's request.

The authority to choose between a preliminary hearing and grand jury does not entitle Relator to delay the prosecution of Davis. No subpoena return was ever filed indicating that Relator subpoenaed A.F. to the preliminary hearing initially set for January 22, 2018 and reset to January 29, 2018. It therefore appears that Relator was not prepared to proceed with the preliminary hearing on January 22, 2018 or January 29,

2018, even had Respondent not entered the order disqualifying Relator from this case. The preliminary hearing is a balancing mechanism to prevent prosecutorial abuse of power while at the same time allowing for the arrest and detention of the accused for a short period of time. *State v. Hill*, 438 S.W. 2d, 246 (Mo. 1969). The failure to move forward in either the grand jury or preliminary hearing is an abuse of prosecutorial power which should have resulted in Respondent dismissing the case against Davis for failure of Relator to proceed with the prosecution. To allow this case to now be prosecuted by a special prosecutor so that it will be presented to a grand jury would only further delay the prosecution. The Supreme Court Rules do not anticipate that a case begun with a complaint should linger for any extended period of time.

Relator contends in her Petition that she believes A.F. used lawful force in his apprehension of Davis when he shot and paralyzed him. (Relator's Petition, para 8) Relator then contends in her suggestions in support of her petition that it is a prosecutor's prerogative to choose "which horse to ride" when a witness' credibility impacts whether or not a crime occurred. (Relator's Suggestions in Support page 7). Relator ignores the fact that the choice of "which horse to ride," should have been made prior to the issuance of charges. If Relator has chosen not to believe that A.F. is telling the truth, then Relator should not have issued charges in this case, as Relator contends "without the testimony of A.F., the case against defendant Davis cannot proceed." (Relator's Petition, para 9). If Relator has not yet reached a determination that A.F. is credible, then again, Relator should not have issued charges in this case.

Relator has charged Davis with four felony charges and one misdemeanor

charge. Relator states in her petition that she believes “that defendant Davis committed the offenses charged in the complaint in the underlying case. 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 A.F.” (Relator’s Petition, para 7).

Relator admits that she requires the testimony of A.F. to go forward on these charges, but has also demonstrated an unwillingness to subpoena A.F. to testify in this case. Relator cannot persist in charging Davis with crimes when she has no good faith belief that the necessary witnesses will give credible testimony regarding those charges and when she is unwilling to call those witnesses to give the testimony that would be required for the case to go forward.

A.F.’s testimony is not the only problem with the pending charges in this case. Davis is charged in the complaint in Count III with Stealing a Firearm. The complaint alleges that crime occurred on August 31, 2017, but the probable cause statement alleges it occurred on December 2, 2016. Counsel for Davis has provided information to Relator that Davis was confined in the Department of Corrections on December 2, 2016.

Finally, Davis is charged in the complaint in Count IV with Resisting Arrest, a felony, for resisting arrest for Tampering. Davis is charged in Count V with Tampering in the second degree, a misdemeanor. The felony Resisting Arrest charge, therefore, should be charged as a misdemeanor, not a felony. Despite all of these obvious defects in her complaint, Relator has taken no action to amend or dismiss the complaint. Davis has been stranded in the limbo of associate circuit court while the only

witness to the allegations may intend to invoke his Fifth Amendment rights and the complaint against Davis is facially defective. Relator has failed to move forward in her prosecution and yet Respondent has failed to grant Davis' multiple requests for dismissal of the charges against him for failure to prosecute. These actions by Relator and Respondent are in violation of Davis' right to due process and a speedy trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution and the failure of Respondent to grant Defendant's multiple motions to dismiss was an abuse of discretion and requires this Court to intervene and prohibit this action.

CONCLUSION

Wherefore, Intervenor Defendant Davis joins Relator in requesting this court to issue a Writ of Prohibition prohibiting Respondent from disqualifying the Office of the Circuit Attorney and requests this court issue an order directing Respondent to dismiss this cause for failure to prosecute or to conduct the preliminary hearing in Davis' case immediately.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 6842 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2010 software and that on this 9th day of June, 2018 an electronic copy was sent to all counsel of record through the Missouri e-filing system and an electronic copy was sent to the Honorable Timothy Boyer at timothy.boyer@courts.mo.gov.

/s/ Mary Fox

Mary Fox
Attorney for Intervenor Defendant