

IN THE
SUPREME COURT OF MISSOURI

STATE EX REL. KIMBERLY GARDNER,)	
Circuit Attorney for the City of St. Louis)	
Relator,)	
)	
)	No. SC97026
vs.)	
)	
THE HONORABLE TIMOTHY BOYER)	
Circuit Judge for the Twenty-Second Judicial)	
Circuit)	
Respondent.)	

**ON PETITION FOR WRIT OF PROHIBITION FROM
THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
22ND JUDICIAL CIRCUIT
THE HONORABLE TIMOTHY J. BOYER, CIRCUIT JUDGE**

RESPONDENT’S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....3
STANDARD OF REVIEW.....5
ARGUMENT.....6
CONCLUSION.....25

TABLE OF AUTHORITIES

CASES

State of Missouri v. Blanchard, Cause # 1722-CR01420-01.....10

State v. Boyd, 560 S.W.2d 296, 297 (Mo. App. 1977).....6

State v. Burns, 322 S.W.2d 736, 741 (Mo. 1959).....6, 17

State ex rel. Nat. Super Markets, Inc. v. Dowd, 1 S.W.3d 595, 597 (Mo. App. E.D. 1999).....5

State of Missouri ex rel. Jennifer Winkler v. Goldman, 485 S.W.3d 783, 791 (Mo. App. E.D. 2016).....6, 25

State v. Lemasters, 456 S.W.3d 416, 420 (Mo. banc 2015).....5, 7, 17, 25

State ex rel. Horn v. Ray, 138 S.W.3d 729, 731 (Mo. App. E.D. 2002).....5, 16

State v. Ross, 829 S.W.2d 948 (Mo. banc 1992).....6

State v. Taylor, 134 S.W.3d 21, 26 (Mo. banc 2004).....5, 25

Coffelt v. Shell, 577 F.2d 30, 32 (8th Cir. 1978).....6

OTHER AUTHORITIES

The 21st Century Principals of Prosecution: Peace Officer Use of Force Project, (2017)14

Disqualifying a District Attorney when a Government Witness was Once the District Attorney's Client: Law Between the Courts and the State, 85 Denv. U. L. Rev. 369 (2007).....17

Who Shouldn't Prosecute the Police, 101 Iowa L. Rev. 1447 (2016).....14

RULES

Missouri Ethical Rule 4-3.8.....16

STANDARD OF REVIEW

A writ of prohibition, such as the one being pursued in this matter, is not a matter of right, but will only issue where there is an abuse of discretion on the part of the trial court. *State ex rel. Horn v. Ray*, 138 S.W.3d 729, 731 (Mo. App. E.D. 2002), citing *State ex rel. Nat. Super Markets, Inc. v. Dowd*, 1 S.W.3d 595, 597 (Mo. App. E.D. 1999).

A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. ***If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion.***

State v. Lemasters, 456 S.W.3d 416, 420 (Mo. banc 2015), citing *State v. Taylor*, 134 S.W.3d 21, 26 (Mo. banc 2004)(emphasis added).

ARGUMENT

Relator's Petition and Suggestions in Support assert Respondent's Order constitutes a judicial abuse of discretion and exceeds the Court's authority. Relator relies *inter alia* on the following main points: 1) There are no objective facts giving rise to the "appearance of impropriety"; and 2) Respondent acted at the behest of a witness who lacked standing to seek disqualification of Relator. Additionally, Relator incorporates the following separate points within the headings of the two main points: 3) Respondent's Order stripped Relator of her constitutional and statutory authority; 4) Respondent's Order prejudiced Defendant who opposed AF's Motion; 5) There is no ripe controversy; 6) Respondent's Order will have the effect of disqualifying Relator from all cases where victims are cross-charged; and 7) Disqualifying Relator does not resolve the conflict.

1) The Cumulative Acts of Relator Give Rise to an Appearance of Impropriety

This Court has stated that the conduct of the prosecution in a criminal case involving conflicts of interest, "like Caesar's wife, ought to be above suspicion". *State v. Burns*, 322 S.W.2d 736, 742 (Mo. 1959); and *State of Missouri v. Ross*, 829 S.W.2d 948 (Mo. banc 1992). In *State v. Boyd*, 560 S.W.2d 296, 297 (Mo. App. 1977), the Court of Appeals stated that as a quasi-judicial officer, the prosecuting attorney must avoid even "the appearance of impropriety". In addition to this well-established standard, courts resolve any doubts in favor of disqualification. *State of Missouri ex rel. Jennifer Winkler v. Goldman*, 485 S.W.3rd 783, 791 (Mo. App. E.D. 2016), citing *Coffelt v. Shell*, 577 F.2d 30, 32 (8th Cir. 1978). In arriving at his decision, Respondent considered the totality

of the following facts and circumstances within the context of these guiding principles. Pursuant to *State v. Lemasters*, this Court should consider these facts as a reasonable person in Respondent's position could have viewed them in determining whether Respondent abused his discretion in issuing his Order.

a. Relator's Simultaneous Prosecution and Investigation of AF

At the hearing on this matter, Relator's counsel admitted the CAO was investigating the conduct of AF in connection with the shooting and arrest of Defendant.¹ However, according to the probable cause statement, Relator affirmed that it believes Defendant pointed a gun at AF in a threatening manner. Moreover, ¶8 of Relator's Petition states "Relator is informed and believes that Officer "AF" was required to use force in approaching defendant Davis, including shooting and wounding Defendant Davis." This being true, Relator effectively concedes that AF was justified in using lethal force against Defendant. Despite this fact, Relator refuses to formally announce AF's actions were justified and insists it is continuing to investigate the conduct of the very

¹ At the January 24, 2018 hearing, Respondent asked Relator's counsel the following: "Mr. Dierker, I think the next logical question for me to ask you is, is the Circuit Attorney investigating the officer's conduct in this case (**Hearing transcript pg. 33 lines 22-25**). Mr. Dieker's response: "We're investigating the case, and we have multiple lawyers looking at the case, and I think that's as far as I care to go in that regard (**Hearing transcript pg. 34, lines 24-25 and pg. 35, line 1**).

officer upon whom her office relied to issue the charges (and continues to rely) and to effectuate the prosecution against Defendant.

Relator's untenable, opposing positions give rise to a potential conflict of interest, and at the very least creates the appearance of impropriety. A reasonable person would question why, based on its reliance on the officer in issuing the case, Relator refuses to inform the officer that he has been cleared in the shooting investigation. Only Relator knows the reason why, but her refusal certainly raises suspicions and questions a reasonable person would ask.

b. Relator's Curious Move From Grand Jury to Preliminary Hearing

As the Complaint noted, the original destination for this case was the grand jury (**Petition Exhibit 2, page E3**). This is the normal destination for cases involving victims in the 22nd Judicial Circuit. As Respondent's Order noted, in the twelve months in Division 25 where preliminary hearings are held, he did not recall one case where Relator's office asked for a preliminary hearing on any victim case. Doing so in this case raised two red flags: First, it condensed the time frame Relator had to complete the shooting investigation before the conflict issue arose;² and second, it unnecessarily and

² AF's counsel stated at the hearing of this matter that he would withdraw the motion to disqualify if the case were sent back to grand jury (**Petitioner's Exhibit 8, Page 49-lines 11-16**). Relator's counsel declined.

prematurely exposed Relator's victim to cross-examination, the very reason Relator does not send all other victim cases to grand jury to begin with.

In attempting to explain this unusual procedural maneuver, Relator states: "she has encountered similar refusals of police officers to testify before the grand jury, and has chosen to bring the matter to public attention by seeking preliminary hearings in such cases" (**Relator's Suggestions in Support of Petition in Prohibition pg. 20, fn 5**).³

This admission in and of itself supports the conclusion that Relator has motivations other than seeking procedural justice for the parties, especially the Defendant. This procedural maneuvering would raise doubt in any reasonable person's mind whether Relator's motives are purely the pursuit of justice for everyone involved. In fact, it would be reasonable for a person to conclude that Relator's action was deliberately designed to force AF to assert his 5th Amendment right against self-incrimination to enhance her public narrative that police officers are refusing to cooperate in officer involved shooting cases to promote Relator's campaign to control all aspects of the investigations and the funding that would accompany it. Alternatively, if AF testified, a reasonable person could also conclude that Relator is using the preliminary hearing process to extract

³ Respondent's counsel represents a majority of officers involved in shooting incidents in Relator's jurisdiction and is not aware of any police officer involved in a lethal force encounter refusing to testify in grand jury proceedings during Relator's tenure as Circuit Attorney.

recorded information out of AF she would otherwise not be privy to and that she could use in a subsequent criminal prosecution of AF.

c. Relator's Lengthy/Protracted Officer Involved Shooting Investigations

Another fact supporting a finding of an appearance of impropriety is the length of the investigations by Relator's office. As noted in Detective Andre Nikolov's affidavit supporting AF's motion (**Petition Exhibit 3, pg. 16-17**), the shooting incident giving rise to his case occurred in May 2015, more than two years prior to Officer Nikolov being confronted with cross-examination in a deposition. Contrast that to the pending case styled *State of Missouri v. John Blanchard*, Cause # 1722-CR01420-01. A review of the docket entries and pleadings in *Blanchard* indicates AF's counsel filed a similar motion to disqualify as he did in the present case. First Assistant Robert Steele filed a written motion to strike based in part on the fact that Relator's office asserted it could not complete the investigation because the police department refused to turn over evidence.

A similar argument was asserted by Relator's counsel in this case. On December 20, 2017, a hearing was held in Division 16 before the Honorable Michael Stelzer in the *Blanchard* case. The matter was taken under submission. The following day, December 21, 2017, Relator's office filed a memorandum stating *inter alia* "no criminal charges will be brought against any Police Officers involved in this incident". To Respondent's knowledge, this is the first and only time Relator has made an official announcement on the more than forty shooting investigations pending in her office. Many of these cases are well over a year old and some are more than three years old.

Based on the rapid turnaround in *Blanchard*, it seems apparent that if made a priority, the investigations of these incidents can be completed expeditiously and the entire conflict issue would be avoided. A reasonable person could certainly conclude that Relator is purposefully choosing not complete these investigations (or at least make official charging decisions) because it is not in her political interest to do so. In any event, whatever the reason, the fact that the investigation into Officer AF has not been completed gives rise to the appearance of impropriety.

d. Relator's Lack of Transparency

Adding to the appearance of impropriety, Relator's office will not provide any information to AF regarding the status of the shooting investigation. On December 27, 2017, prior to filing the Motion to Disqualify, AF's counsel emailed First Assistant Robert Steele inquiring whether the shooting investigation was completed; and if not, when it might be completed (**Petition Exhibit 3, pg. E15**). Mr. Steele did not respond, leaving AF to wonder when or if the shooting investigation would ever be concluded.

This lack of transparency is directly opposite of Relator's explanation for sending the case from grand jury to preliminary hearing. If Relator is truly concerned about the public being fully informed about the nature and facts of officer involved shooting cases, would not she also be interested in informing the parties and the public about the status of shooting investigations, especially those that have been pending for six months or more? Doesn't the public have the right to know whether or not the police officer being investigated was justified in shooting a citizen suspect? If the answer is no, would it not

be in the public interest to at least have that officer relieved of his duty so that no more unjustified shootings occur?

These reasonable, logical questions regarding Relator's secrecy surrounding the status of officer involved shooting cases, including Officer AF's, would lead a reasonable person to question Relator's motives and give rise to the appearance of impropriety.

e. Relator's Punitive Action to Previous Officer Who Asserted his Constitutional Rights in a Similar Case

In a previous case in May 2017, styled *State v. Jennifer Morgan-Tyra*, Detective Andre Nikolov was put in the same position as AF in this case. Detective Nikolov was involved in an officer involved shooting in May 2016, and was subsequently called to testify at a deposition in the underlying criminal case. Despite being over two years old, Relator had not completed the investigation into the shooting nor would her office give any indication when it might be completed. Moreover, Relator declined Nikolov's counsel's request that it seek a continuance in the matter until the shooting investigation could be completed. Not knowing whether he would be charged in the police shooting investigation, Detective Nikolov asserted his 5th Amendment Right to remain silent and refused to answer questions in the deposition. Subsequently, Detective Nikolov was advised by Relator's staff that her office would no longer entertain any warrant applications from him (**Petition Exhibit 3, pg. E17**). Making warrant applications is an important function of a detective's job, and Relator's actions will severely limit Detective Nikolov's ability to investigate and thus help prosecute criminals. Based on this recent action by Relator, Respondent reasonably concluded that if AF asserts his 5th Amendment

Rights and refuses to answer questions in the preliminary hearing, AF would likewise be told Relator's office would no longer entertain warrant applications from him.

Relator's decision to take punitive action against police officers who invoke their constitutional rights while Relator is investigating them, is yet another fact that would lead a reasonable person to conclude that there is an appearance of impropriety.

Moreover, while not part of the record before Respondent, it is ironic to note that when faced with a similar dilemma to testify or not testify in *State v. Eric Greitens*, Relator avoided the decision by dismissing the case. Unfortunately, police officers do not have that option.

f. Relator's Control Over Officer Involved Shooting Investigations

The issues related to the investigation of police related shootings have been the subject of local, state and national debate in recent years, and much attention has been paid to whether local police and prosecutors should be policing such conduct. The Association of Prosecuting Attorneys's studied the issue and in 2017 issued a report entitled *The 21st Century Principals of Prosecution: Peace Officer Use of Force Project*. ASS'N OF PROSECUTING ATT'YS, 21ST CENTURY PRINCIPLES OF PROSECUTION: PEACE OFFICER USE OF FORCE PROJECT, (2017), available at apain.org/peace-officer-use-of-force. The report suggests that a separate prosecutor should "handle any parallel investigation of the subject for criminal conduct against the involved peace officer." *Id* at 17. Bifurcation is recommended in order to "prevent potential conflicts of interests that can have serious consequences for both cases." *Id*.

This view is shared by other legal scholars who have examined the issue. See *Who Shouldn't Prosecute the Police*, 101 Iowa L. Rev. 1447 (2016). “Conflict-of-interest law---in particular, the Supreme Court’s Fourteenth and Sixth Amendment rulings about other actors in the criminal justice system---asks courts and lawmakers to look at the appearance of fairness, as well as the personal and professional entanglements that may affect a local prosecutor’s ability to fairly review evidence and pursue cases against police.” *Id* at 11.

In addition to the articles cited above, the Ferguson Commission recommends that an official from the Attorney General’s Office serve as special prosecutor in all cases of peace officer use of force resulting in death, officer-involved shootings resulting in injury or death, or in-custody deaths. *The 21st Century Principals of Prosecution: Peace Officer Use of Force Project* at 9.

These articles and reports focus on the close working relationship between a prosecutor and the police suggesting that this relationship precludes a fair investigation into the officer’s conduct. This same argument can also be made when viewed from a police officer’s perspective. This is especially true for those officers working in a jurisdiction in which the prosecutor campaigned and was elected on a “hold police accountable” platform. Police officers like AF wonder whether information obtained in pre-trial preparation meetings or statements given in connection with the criminal case will be used against him/her in a subsequent criminal prosecution. They also reasonably wonder whether political motivations will influence charging decisions. Regardless of

whose perspective it is viewed from, a reasonable person could conclude there is a conflict of interest when the same prosecutor's office elects to both prosecute the defendant and investigate the same officer it is relying on in that prosecution.

This issue was the subject of debate amongst the candidates for Circuit Attorney in 2016. Then candidate for Circuit Attorney Kimberly Gardner agreed with the prevailing national norms and stated during her campaign that there is a need for special prosecutors in cases involving the use of deadly force because of the working relationship between the prosecutor's office and the police department, and to build community trust by having an independent third party address the issues.⁴

Subsequent to Relator's election, Relator changed her position on this issue and actively lobbied the St. Louis Board of Alderman for sole control of and financing for the investigations of police officer involved shooting incidents. At a hearing before the St. Louis Board of Alderman on October 3, 2016, Relator stated "it is no longer acceptable for police to be investigating themselves."⁵ Relator cited officers who have allegedly asserted their 5th Amendment Rights in shooting cases as one of the reasons her office should have sole control over the investigations and legal reviews of these matters.

⁴ [youtube.com/watch?v=PIFL2cUH0bo](https://www.youtube.com/watch?v=PIFL2cUH0bo)

⁵ stltoday.com/news/local/crime-and-courts/prosecutor-wants-independent-team-to-lead-investigations-into-all

Prosecuting Attorneys are subject to all of Missouri's ethical rules, including Rule 4-3.8, which applies specifically to prosecutors, and states in its comments both that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate," which "responsibility carries with it specific obligations to see that the defendant is accorded procedural justice." Respondent was careful to point out he did not find that Relator has engaged in any misconduct in this case. This is because Respondent is unsure exactly what Relator's motives are. However, finding misconduct on the part of Relator is not the standard for disqualification. Considering Relator's prior public statements, a reasonable person could conclude that Relator has a political motive in this case and other cases like it, which in and of itself would give rise to the finding of an appearance of impropriety.

2) Respondent Has the Inherent Authority to Disqualify Relator

Relator argues the Court abused its discretion and exceeded its authority when it disqualified her office based on a motion of a non-party witness who lacked standing. First and foremost, Respondent did not rule on whether AF had standing and did not grant AF's motion. Instead, Respondent relied on the Court's inherent authority to supervise and regulate the conduct of attorneys who appear before it. This inherent authority includes the authority to disqualify counsel. *State ex rel. Horn v. Ray*, 325 S.W.3d 500, 511 (Mo. App. E.D. 2010).⁶ Courts have not only the duty to dispense

⁶ This inherent authority includes the inherent authority to disqualify a prosecuting attorney's office. See, *Disqualifying a District Attorney when a Government Witness was*

justice, but the equally important duty to maintain the integrity of the judicial system. *Id.*

The 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. *Id.*

“Justice must satisfy the appearance of Justice.” *State v. Lemasters* at 422, 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.*

Pursuant to this inherent authority to ensure fairness both in the law’s substance and in its appearance, Respondent had the duty to inquire into, and take appropriate action sua sponte, when it became aware of a conflict of interest, no matter the source of the information.⁷ The question is not who brought the conflict to Respondent’s attention, the question is whether the circumstances of this case rise to the level of an appearance of impropriety. Therefore, regardless of whether AF has standing to request the

Once the District Attorney's Client: Law Between the Courts and the State, 85 Denv. U. L. Rev. 369 (2007).

⁷ This Court stated in *State v. Burns*, 322 S.W.2d 736, 741 (Mo. 1959), that “in matters directly affecting the public interest the courts sometimes raise certain questions 'ex mero motu.'”

disqualification of Relator, Respondent had the authority to consider the issue and take appropriate action.

3) Respondent's Order Does Not, in any Way, Infringe Upon, Encroach or Usurp the Constitutional or Statutory Authority of Relator.

Contrary to Relator's assertions, Respondent's Order disqualifying her office does not infringe upon Relator's authority. Respondent's Order did not command or compel Relator to take any action or order her to proceed in any particular fashion. Respondent's Order clearly sets out he had no authority to make any such demands on Relator. Instead, Respondent's authority and obligation lie in protecting the fairness of the judicial system for everyone involved. In accordance with that duty, Respondent carefully considered of all of the facts and arguments and found that based on Relator's cumulative actions, an appearance of impropriety existed. Once he made that finding, Respondent was duty bound to disqualify Relator.

4) Respondent Was Keenly Aware of and Took Into Account Defendant's Procedural Rights When Entering his Order

At the time of the hearing of AF's Motion, Defendant was incarcerated on a \$50,000 cash only bond. Upon being made aware of a potential conflict, Respondent set a hearing on the matter as soon as was practical. Keeping in mind Defendant's status, Respondent denied Relator's request to continue the hearing for a full week and only agreed to continue the hearing for two additional days. Respondent entered his Order the day after the hearing on January 25, 2018. The following day, January 26, 2018, Respondent granted Defendant's motion to modify the bond conditions and released him

on his own recognizance so that Defendant would not spend additional time in jail as a result of a situation he had no control over.

Beyond Respondent's concern over Defendant's incarceration, he analyzed the issues presented in the context of Defendant's broader procedural rights, both past and future. When Relator elected to send the case from grand jury to preliminary hearing, she delayed the proceeding thereby negatively affecting Defendant's procedural rights. Had the case remained before the grand jury where it was originally sent, a probable cause finding would have likely been made in October or November, 2017, and if true billed the case would have been given a trial setting. This change in direction has contributed to a delay in Defendant's trial.

Relator's actions could also affect the rights of Defendant in the future. Relator has stated the public integrity section of her office is investigating AF's conduct in this case. Having said that, Relator has refused to advise Defendant or AF of the status of this investigation. This secrecy is prejudicial to Defendant. If the shooting investigation is not completed it will necessarily affect the Defendant's right to a speedy trial. After all, how can this case proceed without knowing whether or not AF was justified in shooting Defendant? It goes to the very heart of the U UW charge. If Relator has information tending to prove the innocence of Defendant, it must turn that information over to Defendant. If the CAO does not complete the shooting investigation prior to Defendant being tried, Defendant will not know whether the shooting investigation revealed any exculpatory evidence.

The incident giving rise to this case occurred on August 31, 2017 – more than five (5) months before the Motion to Disqualify was filed. Considering the rapid turnaround in the *Blanchard* case (24 hours), Relator was certainly capable of making a timely decision based on a review of the evidence it currently has. Relator’s decision to either not complete the shooting investigation or to not release its findings is more prejudicial to the procedural due process rights of Defendant than to any other party involved in this case.

5) The Matter is Ripe for Judicial Review

Relator asserts Respondent relied on “hypothetical unfairness” of a witness as a ground to disqualify Relator and further asserts there is no ripe controversy. In reviewing potential conflicts, courts must consider the circumstances in view of what effect the alleged conflict could have on the individuals involved in the alleged conflict. Therefore the potential effect of a conflict is inherently hypothetical.

Having said that, the effect of the conflict in this case is both real and ripe as to both Defendant and AF. Defendant is currently facing a prosecution without knowing whether or not the essential witness in the case against him was justified in shooting Defendant. If the shooting investigation concludes AF was not justified, it would potentially negate Defendant’s guilt on at least one of the charges against him, UUW – Exhibiting. Moreover, as stated above, there is a perception with some in the public that the close working relationship between the prosecutor and police will preclude the officer’s conduct from being thoroughly scrutinized. Meanwhile, AF is put in the

impossible position of being forced to decide whether to waive his constitutional right against self-incrimination and face cross-examination while the shooting investigation remains pending; or he can assert his constitutional right and face retribution from Relator as her office has done to Officer Nikolov in the recent past.

Even if Respondent believed the controversy was not ripe, the fact that it is distinctly possible that it may be ripe in the future,⁸ gives rise to an appearance of impropriety. Further, as previously discussed, waiting to address the conflict may have disastrous consequences to the rights of the Defendant.

6) Officer Involved Shooting Cases are Simply Different Than Victim on Victim Crimes

Relator asserts 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."

⁸ At the hearing on January 24, 2018, Respondent asked Relator's counsel: "Do you envision that this issue could ever become ripe?" Relator's counsel responded by saying "Yes" (Petitioner's Exhibit 8G, pg 41, lines 13-15). Relator's counsel later clarified stating: "It could become ripe if and only if the officer is not giving truthful testimony and it develops that we've got the wrong defendant" (Petitioner's Exhibit 8, pg 43, lines 9-11). Of course, deciding whether AF's testimony is/was truthful is/will be a subjective decision made solely by Relator in this case.

Relator's assertion overlooks an important distinction between police officers and ordinary victims/witnesses.

First, Relator's counsel previously admitted officer involved shooting cases are different.⁹ Second, Relator overlooks the fact that most "mutual combat assault" cases are not issued to begin with. In those rare cases that are issued, Relator "picks which horse to ride" at the outset. Relator does not, to Respondent's knowledge, have a team of prosecutors and investigators reviewing the actions of the victim Relator has chosen to believe. This fact in and of itself shows that the CAO treats these cases differently.

Equally important is the fact that police officers take an oath to enforce the laws of the State of Missouri and City of St. Louis. Applying on warrant applications and testifying in court to assist in the prosecution of the suspects they arrest is an important function of their job. Relator's choice to refuse to entertain warrant applications from officers who refuse to testify while a shooting investigation remains pending creates a chilling effect on an officer's freedom to assert their basic constitutional right against self-incrimination. Meanwhile cross-charged victims can assert their rights with impunity. They are free to assert their right against self-incrimination without that

⁹ In the January 24, 2018 hearing on this matter, Respondent stated "in the eyes of an outside observer, it makes it look like these cases are being treated differently." In response, Relator's counsel stated "Well, I'm not going to stand here and deny they're different. They certainly are" (Petitioner's Exhibit 8, pg 38, lines 11-13 and 15-18).

decision negatively affecting their occupation or profession. If this were the case for AF, he likely would not have filed his Motion to Disqualify to begin with.

7) Disqualifying Relator was the Only Reasonable Option Available to Respondent to Avoid an Appearance of Impropriety

Due diligence by Relator's staff in preparing for preliminary hearing, depositions and trial would likely require numerous contacts (including interviews and/or conversations) between AF and Relator's staff. As a result, Relator's office will be privy to privileged information from the same officer it is simultaneously investigating for criminal conduct related to the shooting. In addition to the facts set out earlier herein, Respondent believes these competing interests give rise to a potential conflict of interest, and create the appearance of impropriety on behalf of the Relator.

Relator has ways to mitigate conflicts in cases like this: 1) Relator could ask that a special prosecutor investigate police conduct in officer involved shooting cases; 2) Relator could wait to charge defendant until a full investigation into the conduct of the police officers involved is complete; 3) Relator could ask for the appointment of a special prosecutor to continue with the prosecution of the defendant to free up resources to enable her office to timely investigate the police conduct; or 4) Relator could choose to present such cases to the Grand Jury, as has been the normal practice in the past and make a charging decision in the shooting investigation prior to the officer facing cross-examination in pre-trial depositions or trial.

Respondent recognizes that he does not have the authority to direct Relator as to which of these options her office chooses. Consequently, Respondent saw disqualifying Relator and the CAO in this specific case, and appointing a special prosecutor, to be the only available, reasonable option to avoid the appearance of impropriety.

While this option may not be the most ideal solution among Relator's choices, it does at least create separation between the prosecutors handling the simultaneous matters.¹⁰ This separation will avoid the informal contacts and conversations between AF and Relator's staff in which privileged information could be divulged. It also frees up Relator's resources allowing her office to conduct a timely investigation into AF's conduct. Once that decision is made, many of the issues presented become moot.

¹⁰ Relator's counsel claims the CAO now has separate attorneys working on the shooting investigations and prosecutions of the defendants. This was not always the case. Respondent's counsel has personal knowledge of a number of situations where the attorneys (including lead attorney Robert Steele) from the "Public Integrity Section" have attempted to participate in the questioning of police officers in prosecutions of defendants. At the time of the hearing, Relator's counsel did not state any such separation existed.

CONCLUSION

As stated in *State of Missouri ex rel. Jennifer Winkler v. Goldman supra*, the Court resolves any doubts in favor of disqualification. Considering all of the above described facts, there can be little doubt that when viewed cumulatively, they give rise to reasonable persons believing that there is the appearance of impropriety on behalf of Relator. This is especially true considering the numerous options Relator had to avoid this conflict, yet chose to proceed in the fashion she did. For these reasons, Respondent's Order must stand. For this Court to issue a writ in prohibition would violate Defendant's rights to due process and AF's right to a fair and balanced process.

Finally, the inescapable reality for Relator in this specific matter is this – Relator has failed to show that Respondent's January 25, 2018 Order is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Lemasters*, 456 S.W.3d 416, 420 (Mo. banc 2015), *citing State v. Taylor*, 134 S.W.3d 21, 26 (Mo. banc 2004).

WHEREFORE, Respondent respectfully requests that this Court deny Relator's request for a writ in prohibition prohibiting enforcement of Respondent's January 25, 2018 Order. Additionally, Respondent requests that Respondent's Order be given immediate and full force and effect.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 5,596 words; and
2. That a true and correct copy of the foregoing was served upon all counsel of record by operation of the Court's ECF/CM system on June 28, 2018.

Respectfully Submitted,

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