IN THE SUPREME COURT OF MISSOURI

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| STATE EX REL. JEAN PETERS BAKER,<br>PROSECUTING ATTORNEY<br>OF JACKSON COUNTY, MISSOURI<br><br>Relator,<br><br>v.<br><br>THE HONORABLE BRYAN E. ROUND,<br>CIRCUIT JUDGE,<br>SIXTEENTH JUDICIAL CIRCUIT,<br><br>Respondent. | ) | Cause No. SC96931 |

WRIT OF PROHIBITION

# RELATOR'S REPLY BRIEF

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## JURISDICTIONAL STATEMENT

Relator, Prosecuting Attorney of Jackson County (hereinafter "Prosecuting Attorney") stands on the jurisdictional statement in Relator's initial brief.

## STATEMENT OF FACTS

The Prosecuting Attorney stands on the statement of facts in Relator's initial brief.

## SUMMARY OF ARGUMENT

The Prosecuting Attorney generally stands on the argument made in Relator's initial brief, and makes the following additional argument in reply to Respondent's brief.

In his brief, Respondent continues the pattern that began with Skinner's initial motion seeking to disqualify the Prosecuting Attorney. On the one hand, Skinner and Respondent acknowledge the existence of this Court's opinion in *State v. Lemasters*, 456 S.W.3d 416 (Mo. 2015). On the other hand, Skinner and Respondent deny that the ultimate holding in *Lemasters* applies to this case and seek to apply theories rejected by this Court in *Lemasters*. Because *Lemasters* does apply to this case, Respondent's ruling, which is directly contrary to the holding of *Lemasters,* is not a reasonable application of his limited discretion under the law governing the disqualification of counsel.

Respondent also continues to assert that his ruling is exempt from review unless the Prosecuting Attorney can show concrete prejudice from his ruling disqualifying counsel. As discussed in Relator's initial brief, erroneous rulings on motions to disqualify counsel – both on appeal and in writ proceedings – have generally been treated

as structural errors with no further showing of prejudice required. This type of error fits the classical definition of a structural error – one for which it is difficult to measure prejudice. Additionally, the primary harm is the interference with the proper functioning of another branch of government and the right of the people to choose the officials with the duty to enforce the law. And, as noted previously, a rule that allows judges to freely disqualify prosecuting attorneys without cause will also have long-term impacts on both hiring decisions and the allocation of taxpayer resources.

## ARGUMENT

**Relator is entitled to an order prohibiting Respondent from disqualifying the Prosecuting Attorney in the underlying cause because Respondent abused his discretion in granting the motion to disqualify in that Tyron Skinner failed to establish adequate cause or other legal justification for such a disqualification, the undisputed evidence showed that the Prosecuting Attorney had implemented an adequate screening mechanism, and mere speculation that such a mechanism could theoretically fail is insufficient to demonstrate an appearance of impropriety.**

As discussed in Relator's initial brief and in the briefs filed by amici, the law creates a presumption against disqualification of any party's attorney, including the attorney representing the State. Overcoming that presumption requires a showing of good cause. Until there is such a showing, there is no discretion to disqualify counsel. Respondent has opted not to dispute or challenge the screening implemented by the Prosecuting Attorney to dispel any appearance of impropriety. Instead, Respondent

ignores key parts of this Court's decision in *Lemasters* to support his position that reasonable minds can disagree about his interpretation of *Lemasters* and the appropriateness of his order in this case based on his subjective view of what constitutes an appearance of impropriety and his subjective belief that no screening can ever dispel such an appearance. In the alternative, he suggests that there is no actual harm to the Prosecuting Attorney from his ruling. Because neither of these positions is legally defensible, the writ of prohibition in this case should be made permanent.

I. Respondent's and Skinner's arguments throughout both this and the underlying proceeding that he acted within his discretion in disqualifying Relator fail to give effect to or reasonably apply this Court's holding in *Lemasters.*

The Missouri Court of Appeals has held that the disqualification of a prosecutor's office when the record does not establish a valid ground for that disqualification is an abuse of discretion. *State ex rel. Bennett v Ravens*, 258 S.W.3d 929, 931 (Mo. App. W.D. 2008); *State v. Eckelkamp*, 133 S.W.2d 72, 75 (Mo. App. E.D. 2004). In this Court, Respondent suggests that he acted within his discretion in that his application of this Court's ruling in *Lemasters* was based on an interpretation of *Lemasters* that is reasonably debatable.

Despite this present argument, Skinner and Respondent have, throughout this case, minimized the significance of this Court's ruling in *Lemasters* or made arguments contrary to that holding. For example, the original motion filed by Skinner seeking to disqualify the Prosecuting Attorney included the following statement:

> Movant asserts that Jeanette Wolpink's employment as with the Jackson County Prosecuting Attorney's Office disqualifies the Jackson County Prosecuting Attorney's Office from representing the State of Missouri/Respondent in the above-captioned Rule 29.15 case under Rule 4-1.9(a), which states "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."

Exhibit 10 (sic), page 4.[1] However, in *Lemasters*, this Court stated that Rule 4-1.9(a) "does not apply to prior representations by current or former 'public officers' or employees." 456 S.W.3d at 421.

In that same motion, Skinner asserted that the individual disqualification of Ms. Wolpink should be imputed to the entire Prosecuting Attorney's Officer under Rule 4-1.10 and Rule 4-1.11(b). Exhibit 10, page 4. While, in the same paragraph of the motion in which he raised these two rules, Skinner acknowledged the comments to Rule 4-1.11(d) and this Court's reliance on those comments in *Lemasters*, Skinner – in the following paragraph – asserted that Rule 4-1.11(d) does not "eliminate" the trial court's inherent authority appoint a special prosecutor. Exhibit 10, page 4. While the motion to disqualify raised the "imputation" theory rejected in *Lemasters*, the motion to disqualify did not allege an "appearance of impropriety" or assert that disqualification was warranted under *Lemasters*. Exhibit 10. In granting the motion to disqualify, Respondent did not mention the appearance of impropriety and merely imputed Ms.

[1] Citations in this brief to "Exhibit" are to the exhibits filed by Relator as part of the petition for writ of prohibition.

Wolpink's personal disqualification to the Prosecuting Attorney contrary to the holding in *Lemasters*. Exhibit 13.

After the Prosecuting Attorney argued in its motion to set aside that the only potential proper basis for disqualification would be an appearance of impropriety under the standard set forth in *Lemasters*, Skinner and Respondent first addressed when disqualification is permitted under *Lemasters* at the hearing on the motion to set aside. Exhibit 14, pages 3-7; Exhibit 16, pages 15-28. Even then, Skinner continued to insist that *Lemasters* did not apply in a case in which – in the opinion of the defendant/movant and current counsel – former counsel learned some critical confidential information and the trial court could imagine the possibility of an appearance of impropriety. Exhibit 16, pages 21-23.

This approach of giving lip service to *Lemasters* continues through Respondent's Brief to this Court. While quoting from selected portions of *Lemasters*, Respondent ignores the part of *Lemasters* in which this Court applied its test for the appearance of impropriety to the facts in that case, facts which are substantially similar to the facts here.

In *Lemasters,* in applying the reasonable person test, this Court found that the evidence regarding the screening process employed by the Newton County Prosecutor compelled the finding that there were no facts that would support a reasonable person concluding that there was an appearance of impropriety and that the screening was adequate to assure any person that there were no disclosures of any confidential information. 456 S.W.3d at 424-25. As this Court stated in describing the situation

involving the Newton County Prosecuting Attorney's Office and Lemasters's former attorney and why disqualification was not warranted in *Lemasters*:

> First, there are no facts that – if known to a reasonable person – would create an appearance of impropriety and cast doubt on the fairness of his trial. Second, the evidence showed – and the trial court found – facts that precluded any appearance of impropriety that otherwise might have cast doubt on the fairness of the Lemasters' trial. The evidence was undisputed that the [prosecutor's office] followed the reasonable course and screened [former counsel] completely from Lemasters' prosecution. [Former counsel] did not participate in – or assist with – the state's case against Lemasters in any way. Not only did she not divulge any of Lemasters' confidential information to the prosecutors working on his case, but Lemasters also knew nearly five months before his trial that [former counsel] had been screened from his case.

*Id.*

In contrast to this Court's discussion of and confidence in an adequate screening process in *Lemasters*, Respondent took the position in denying the motion to set aside his order disqualifying the Prosecuting Attorney that it is impossible to have an adequate screening process:

> It's just impossible to know what could happen and even though these screening practices are set up, it's impossible to say that there can't be some way in which there isn't and inadvertent disclosure, innocent as it may be, that could effect the case.

Exhibit 16, page 28 (sic). It is simply not possible to reconcile this Court's holding in *Lemasters* that an adequate screening process is normally sufficient to defeat a motion to disqualify an entire office with Respondent's personal opinion that there is no such thing as an adequate screening process.

In *Lemasters*, this Court recognized one possible exception in which screening might not be adequate – when the attorney with the conflict was the elected prosecutor

(or potentially a supervisor). 456 S.W.3d at 425. There is no dispute in this case that Ms. Wolpink is not the elected prosecutor or even a supervisor to the attorney assigned to handle Skinner's post-conviction case. The sole suggestion made by Respondent for why this case should be treated as an exceptional case is that Ms. Wolpink substantially represented Skinner on appeal. However, as that is a necessary fact before Ms. Wolpink herself would be disqualified under Rule 4-1.9 and Rule 4-1.11, Respondent's proposed exceptional case is actually the normal case in which a defendant's former attorney goes to work for the prosecuting attorney, and *Lemasters* rejected the argument that disqualification is required or appropriate in such a case when there is adequate screening.

While Respondent may want to contend that his ruling in this case is a reasonable application of *Lemasters*, such an argument simply disregards key portions of *Lemasters* emphasizing the importance of putting a screening process in place when an individual assistant prosecuting attorney has a conflict due to past representation of a defendant. Beyond Respondent's rejection of the very concept of an adequate screening process, there is nothing in the record disputing the fact that the Prosecuting Attorney did establish an adequate screening process that fully complied with *Lemasters.* Further, there were no unusual facts in this case that would not apply to every case in which an assistant prosecutor had previously represented a defendant in a case. In light of this Court's unambiguous holding in *Lemasters*, Respondent's ruling disqualify the Prosecuting Attorney was an abuse of discretion.

II. Respondent's claim that Relator has suffered no actual prejudice is not a basis for denying a writ of prohibition.

Both in the argument and in his brief to this Court, Respondent appears concerned with the issue of what is the prejudice to the Prosecuting Attorney from his erroneous ruling on the motion to disqualify the Prosecuting Attorney. This focus on prejudice is inconsistent with the law governing such motions.

First, none of the prior cases involving the disqualification of an attorney (or the failure to disqualify an attorney) has required a showing of prejudice by the party challenging the ruling. Instead, either expressly or implicitly, they have treated the matter as structural error. *See, e.g., United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (structural error to wrongfully disqualify criminal defendant's counsel); *State v. Ross*, 829 S.W.2d 948, 952 (Mo. 1992) (prejudice presumed failure to disqualify prosecutor's office, rebuttable only if adequate screening and waiver of conflict); *State ex rel. Thompson v. Dueker*, 346 S.W.3d 390, 393 (Mo. App. E.D. 2011) (finding as matter of law that erroneous disqualification causes hardship to party in civil case); *State ex rel. Horn v. Ray*, 138 S.W.3d 729, 731 (Mo. App. E.D. 2002) (finding prosecutor entitled to writ upon showing of erroneous disqualification of office).

Second, the primary type of prejudice suffered by the State from an erroneous disqualification in an individual case is the type that is usually classified as structural error. As the United States Supreme Court has noted, the consequences of an erroneous disqualification of counsel "are necessarily unquantifiable and indeterminate." *Gonzalez-Lopez*, 548 U.S. at 150. Because different attorneys will not handle the case in the same

manner, it is difficult if not impossible to determine how the change in attorneys will impact the result in the case. *Id.* Such considerations support treating the alleged error as structural error. *Id.*

Third, because prejudice is presumed under *Ross* from the erroneous denial of a motion to disqualify, requiring prosecutors to show prejudice from the erroneous grant of such a motion will create an incentive for trial courts to grant such motions routinely out of "an abundance of caution." Skinner in his motion requested that Respondent disqualify the Prosecuting Attorney out of an abundance of caution. Exhibit 10, pages 4-5. Furthermore, Respondent indicated that he granted the motion out of an abundance of caution. Exhibit 13, page 2; Exhibit 16, page 11. If an erroneous grant of such motions are effectively unreviewable as Respondent contends, while the erroneous denial is structural error, then the cautious course for a trial court facing such a motion will be to grant it. However, if granting such motions become routine, then the potential for systematic harms will increase.

Fourth, as briefly discussed in Relator's initial brief, the General Assembly has generally assigned the responsibility to represent the State at the trial level to locally-elected prosecutors who are responsive to the voters in their respective counties. § 56.010, RSMo.; § 56.060, RSMo. The grant of a motion to disqualify, particularly when not justified by good cause, is an intrusion by the judiciary into the operation of local government and the executive function of government. There will be times when trial judges who disagree with the decisions of local prosecutors will be tempted to disqualify that office to remedy those disfavored decisions, and sometimes trial judges

have been unable to resist that temptation. *See, e.g., Bennett*, 258 S.W.3d at 929-31; *Eckelkamp*, 133 S.W.3d at 73-75. If there were a requirement of actual prejudice, such unwarranted intrusions into the operations of a separate branch of government would be immune from review.

Finally, while perhaps the actual consequences of one erroneous ruling would be confined to the difficult to define impact on one case, the potential consequences of a rule that allows such decisions to be unreviewable will be significant. If trial courts have to follow *Lemasters*, prosecutors can hire qualified attorneys knowing that, as long as those new hires are appropriately screened from involvement with their former cases, such hiring decisions will not require the disqualification of the entire office. If trial courts can evade and circumvent *Lemasters* like Respondent did without the potential for review, prosecutors will have to worry that hiring attorneys who were criminal defense attorneys could result in the removal of their office from a significant number of cases.[2] Given that voters in a county have a right to expect that their elected prosecutor will actually be the prosecutor on the cases arising in that county and to take appropriate steps if a prosecutor is unable to handle a large number of cases, prosecutors will have to decide if the number of potential disqualifications outweigh the merits of hiring a particular attorney. As this Court recognized in *Lemasters*, the Rules of Professional Conduct treat governmental attorneys different than private attorneys in terms of imputed disqualification for the very purpose of removing barriers to governmental officers being able to hire the best

[2] This potential increases if the only check on disqualification of the prosecutor is the assessment of the potential conflict by defense counsel.

qualified attorneys. Rule 4-1.11, Comment [4]. Trial courts should not be able to disregard these rules and misuse the appearance of impropriety standard to create a barrier to hiring such attorneys where none is supposed to exist.

Even if a prosecutor would decide to accept the risk of unwarranted disqualifications, such unwarranted disqualifications require other offices to handle cases which should be handled by the original prosecutor's office. And the burden for that ultimately falls on the taxpayer. While the record in this case indicates that the Attorney General's Office does currently have the spare capacity to handle this case, that spare capacity depends on the current resources of the Attorney General's Office. But each year, the Attorney General's Office has to go to the General Assembly for appropriations and seeking the budgetary authority necessary to hire enough attorneys in the Public Safety Division and to cover travel expenses for those attorneys to go to court in every county of Missouri in which the Attorney General is handling a case in which they are appointed as special prosecutor or are asked to assist an inexperienced prosecutor under Section 27.030, RSMo. What appropriation is necessary to permit the Attorney General to be available to handle all such cases in all counties depends on what the rules are for removing the elected prosecutor and appointing the Attorney General and how strictly those rules are enforced. While in each individual case, the amount of travel expenses and the fraction of an attorney needed to handle that case might be relatively small,[3] the

[3] According to the "Blue Book," most assistant attorney generals have a salary in the $40,000.00 to $60,000.00 range. Missouri Secretary of State, *Official Manual State of Missouri 2017-18* at 962-64. Assuming a typical salary, the attorney time for a half-day proceeding including the time spent driving from Jefferson City to Kansas City or St.

total numbers quickly add up. And that money ultimately comes from the taxpayers of the State and requires shifting funds away from other functions of state government. Even if some other prosecutor's office is appointed or private counsel, those appointments will still cause the expenditure of public resources – either by the other county which has to step in to fill the shoes of the disqualified prosecutor or by the prosecutor's county to pay the fees and expenses of private counsel.

In short, there are inherent harms from the erroneous grant of a motion to disqualify a local prosecutor. While it may be difficult to quantify those harms in the individual case, particularly in terms of the impact on the case, those harms do exist and would be aggravated if Respondent's interpretation of the breadth of discretion given to trial judges replaces the much narrower rule adopted by this Court in *Lemasters.* In prior cases, the Missouri Court of Appeals has held that the unwarranted disqualification of a prosecuting attorney creates the type of burden on prosecutors that qualifies as irreparable harm justifying the issuance of a writ of prohibition. *State ex rel. Dir. of Revenue v. McBeth,* 366 S.W.3d 95, 99 (Mo. App. W.D. 2012); *Horn,* 138 S.W.3d at 735. This Court should reject Respondent's attempt to change the law governing the granting of writs of prohibitions in cases involving the erroneous disqualification of attorneys and find that these harms, both tangible and intangible, are sufficient to justify the issuance of writs of prohibition in such cases.

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Louis and then returning back to Jefferson City is approximately $200.00. Add in mileage of approximately $80.00 per trip and a minimal amount of prep time, even the simplest case is likely to represent a more than *de minimis* sum.

## CONCLUSION

For the reasons set forth above, Relator, the Jackson County Prosecuting Attorney, requests that this Court make permanent its preliminary writ of prohibition barring Respondent, the Honorable Bryan E. Round from enforcing his order disqualifying the Jackson County Prosecuting Attorney from fulfilling its statutory duty to represent the State of Missouri in the underlying case – *Tyron Skinner v. State of Missouri*, Case Number 1416-CV16875.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Rule 84.06(b) and Rule 55.03. The brief contains 3,811 words.

I further certify that this brief will be electronically served by the e-filing system on all participants in this case, and that a copy has been sent to the Honorable Bryan E. Round, Respondent, on this 10th day of August, 2018, by e-mail (to matthew.klose@courts.mo.gov, law clerk.

/s/ *Terrence M. Messonnier*
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