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IN THE SUPREME COURT OF MISSOURI

STATE EX REL. JEAN PETERS BAKER, Jackson County Prosecuting Attorney, Relator,	)	
vs.	)	**SC96931**
THE HONORABLE BRYAN E., ROUND, Judge, Jackson County Circuit Court/16th Judicial Circuit/Division8 Respondent.	)	

WRIT OF PROHIBITION

RELATOR'S BRIEF

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STANDARD OF REVIEW

A writ of prohibition 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).

In *State v. Lemasters*, 456 S.W.3d 416, 420 (Mo. banc 2015), this Court discussed the exercise of a trial court's discretion in a situation of a motion to disqualify:

> A trial court's ruling on a motion to disqualify is reviewed for abuse of discretion. *See*, *State v. Smith*, 32 S.W.3d 532, 543 (Mo. banc 2000). "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." *State v. Taylor*, 134 S.W.3d 21, 26 (Mo. banc 2004). "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." *Id*.

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ARGUMENT

Respondent has always acknowledged the existence of this Court's opinion in *State v. Lemasters*, 456 S.W.3d 416 (Mo. banc 2015)—a case upon which Relator relied heavily. However, *Lemasters* does *not* spell the proverbial death-knell for Respondent's ruling, as Respondent claims it does.

Respondent Did Not Abuse Respondent's Discretion by Disqualifying the Jackson County Prosecuting Attorney's Office from Representing Respondent/State of Missouri in Skinner's Rule 29.15 Case

In the pleadings and hearing in this matter, much is made of the word discretion. Relator has seemingly forgotten the true meaning of the term. To act in a discretionary manner involves the exercise of judgment and choice, not a hard-and-fast rule. *Black's Law Dictionary* (1996). An adjudicator—such as Respondent—abuses discretion by failing to make sound, reasonable and legal decision making, such that a reviewing appellate court would find the adjudicator's decision to be grossly unsound, unreasonable, or illegal. *Id*. The record is quite clear that Respondent exercised discretion in a reasonable manner, one far from being grossly unsound or unreasonable and shocking to the sense of justice. *State v. Lemasters*, 456 S.W.3d at 420, *quoting State v. Taylor*, 134 S.W.3d at 26.

Relator and Respondent disagree on the propriety of Respondent's ruling disqualifying the Jackson County Prosecuting Attorney's Office from representing the Respondent/State of Missouri in Skinner's Rule 29.15 action. And just because Respondent's reasonable mind differs from that of Relator does *not* mean that Respondent abused Respondent's discretion in issuing the ruling disqualifying the

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Jackson County Prosecuting Attorney's Office from representing the Respondent/State of Missouri in Skinner's Rule 29.15 action. *State v. Lemasters*, 456 S.W.3d at 420, *quoting State v. Taylor*, 134 S.W.3d at 26.

The specific facts of the direct appeal of *State v. Lemasters*, 456 S.W.3d at 418-419, are quite distinguishable from Skinner's postconviction case:

> On August 7, 2012, the trial court appointed the Missouri State Public Defender System ("MSPD") to represent Lemasters on these charges. The following day, the MSPD sent Lemasters an introductory letter stating that an attorney would be assigned to defend him. On August 16, 2012, Ms. Cheney an employee of the MSPD—entered her appearance on behalf of Lemasters.
>
> After receiving telephone calls from members of Lemasters' family, Cheney instructed her secretary to return the calls and inform the family that Cheney could not speak with them about Lemasters' case without his permission. She also instructed her secretary to tell the family that Cheney could not help them obtain a power of attorney from Lemasters because that was a civil matter unrelated to her representation of Lemasters in the criminal case. The language Cheney used in these instructions was derogatory toward Lemasters' family, and the tone of her instructions indicated Cheney's frustration with them.
>
> Cheney had little direct contact with Lemasters. She had one interview with him in August 2012, which lasted approximately 15 minutes. After this visit, Cheney asked one of her investigators to conduct a recorded interview with Lemasters because his extensive use of pronouns made it difficult for Cheney to "keep track of what he's talking about." Cheney also moved for a reduction of Lemasters' bond. She appeared in court to argue that motion, and it was overruled.
>
> In September 2012, Cheney was hired by the [Newton County Prosecuting Attorney's Office ("NCPAO"). Her last day with the MSPD was September 7, 2012. That day, Cheney wrote an interoffice "transfer memorandum" to the public defenders who were preparing for the preliminary hearing in Lemasters' case. Again, the language of Cheney's memo indicated her frustration with the case, and her memo was derogatory regarding the likelihood that Lemasters could mount a successful defense.

> Cheney started work in the NCPAO on September 10, 2012. On February 7, 2013, Lemasters moved to disqualify the entire prosecutor's office due to Cheney's prior representation of him. The trial court held a hearing on Lemasters' motion the following day. Cheney testified that she did not participate "in the prosecution of any individuals where [she] previously represented them" and that she did not discuss any of those cases with others in the prosecutor's office except to identify the defendants she previously represented. The trial court overruled Lemasters' motion, and, in June 2013, the case was tried to a jury.

This Court found that the *Lemasters* trial court did not abuse its discretion in overruling Lemasters' motion to disqualify the entire prosecuting attorney's office. *Id*., at 425.

Here, Wolpink was Skinner's lead counsel on direct appeal and also engaged in discussions about post-conviction issues. Beyond that assertion, which undersigned counsel makes in good faith as an officer of this Court and Respondent's court, undersigned counsel, based on the unwaived attorney/client privilege between undersigned counsel and Skinner, counsel can go no further than she did before the Respondent: Wolpink's discussion about post-conviction issues was not cursory, as in *Lemasters*; and the discussion were germane to this post-conviction litigation.

Factually, Respondent's careful and thoughtful exercise of discretion is quite clear from the record. At the hearing, Respondent discussed the exercise of discretion:

> …[W]hen I entered the order, I was not making the finding that anybody at [the Jackson County Prosecutor's O]ffice—Ms. Wolpink, Mr. Sauls or anybody else, had done anything inappropriate or unlawful. It was simply an abundance of caution and the belief that—understanding that she had represented this gentleman on his direct appeal, that in exercising my discretion, I could not see a good reason why not to and why the appearance—and there is the appearance, whether the Prosecutor's Office likes it or not, would lead to that decision (Rel. Ex.16, p.11).

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Relator believed that Relator's *Lemasters*-like screening procedure would "fix" the "Wolpink situation" in Skinner's case. Respondent replied:

> Well frankly, I just don't this one's close. If this was—you know, if she had been in the office at the same time, but hadn't handled the direct appeal, you know, I think there's a fair chance that you'd prevail. But in a case where she was the lead attorney on his direct appeal, I've got grave concerns about it (Rel. Ex.16, p.12-13).

As undersigned counsel told Respondent, *Lemasters* did not prevent Respondent's exercise of discretion granted by §56.110.1, RSMo (2000) (Rel. Ex.16, p16). Part of the exercise of that discretion—and something Relator either does not discuss or does not remember—is *the trial court* judging the credibility of witnesses and weighing the evidence, which is a long-standing legal principle in Missouri courts. *State v. Villa-Perez*, 835 S.W.2d 897, 902 (Mo. banc 1992). Appellate courts "defer to the trial court's vantage point…." *Id.*, *citing State v. Beck*, 687 S.W.2d 155, 158 (Mo. banc 1985). Thus, this Court should defer to Respondent's factual findings and credibility determinations. . *State v. Villa-Perez*, 835 S.W.2d at 902; *State v. Beck*, 687 S.W.2d at158.

Undersigned counsel engaged in a further discussion about Respondent's use of discretion in deciding this matter:

> MS. MARTIN: I agree that is what Lemasters say, but Lemasters doesn't make it not your area and not your discretion to exercise and it doesn't circumvent the statute which give you the discretion. And you, yourself said yes, there is the appearance of impropriety and I am representing to you there is as well.
>
> …I think if this Court sees the appearance of impropriety, it has the discretion—
>
> THE COURT: Sees the appearance or can conceive of the appearance arising?

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> MS. MARTIN: Both.
>
> THE COURT: Okay.
>
> MS. MARTIN: …I think we have the appearance of impropriety right now….Lemasters says on the specific facts and circumstances of the case. It does have to do with screening, but it also has to do with my representation to you….
>
> …[Wolpink] and Mr. Skinner had communications that are very germane to…the litigation of this case (Rel. Ex.16, p.21-22).

In denying Relator's motion to reconsider, Respondent stated:

> …Well, perhaps I'm overly cautious. If you guys decide to take it across the street, maybe [the Court of Appeals] will call me a sissy, but I just don't see that—I just don't see that there is a risk worth taking. Especially in light of the fact that this is the only case that this issue has been brought up in and it's not a burden to the Attorney General's Office and they have already entered their appearance.
>
> …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 [an] inadvertent disclosure, innocent as it may be, that could [affect] the case. And that's going to be my ruling, I'm going to deny your motion (Rel. Ex.16, p.27-28).

Respondent is obviously very concerned with the fairness of proceedings *for both sides* and the appearance to the reasonable person in society that said proceedings are indeed conducted in a fair, unbiased manner, *free from the appearance* ***to a reasonable person*** *of impropriety*. This principle is something Relator seems to have forgotten and which, in fact, is included in Relator's seminal case: *State v. Lemasters*, 456 S.W.3d at 422-423, 425:

> Society's confidence in the judicial system—and, in particular, the criminal justice system—depends on society's perception that the system is fair and its results are worthy of reliance. For that reason, it is essential that

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> trials be fair. *See*, *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). But that alone is not sufficient. Instead, "justice must satisfy the ***appearance*** of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954) (emphasis added). 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. Accordingly, this Court must pursue fairness both in the law's substance and in its appearance.
>
> That said, an appearance of impropriety judged only from the defendant's perspective cannot be sufficient for relief. Instead, the touchstone for claims that present a real threat to the apparent fairness of the system is what knowledge of all the facts and circumstances would suggest to a reasonable person. When reviewing similar claims concerning judicial disqualification, therefore, this Court has held that the trial judge must disqualify herself when "a reasonable person would have factual grounds to find an appearance of impropriety and doubt the impartiality of the court." *Anderson v. State*, 402 S.W.3d 86, 91 (Mo. banc 2013). The same standard applies here. *State v. Ross*, 829 S.W.2d 948, 949 (Mo. banc 1992). Accordingly, even if an assistant prosecutor's conflict is not imputed to the remainder of the office under the Rules of Professional Conduct, the remainder of the prosecutor's office must be disqualified if a reasonable person with knowledge of the facts would find an appearance of impropriety and doubt the fairness of the trial.
>
> -----------
>
> The reasonable person standard applicable to Lemasters' motion should not be confused with a requirement that actual prejudice be shown. *See*, *State v. Smulls*, 935 S.W.2d 9, 25 (Mo. banc 1995) (the "standard by which we determine the question [of judicial disqualification] is not whether the trial judge is actually prejudiced...[but] whether there is an objective basis upon which a reasonable person could base a doubt about the racial impartiality of the trial court"). This is because there may be cases in which proof of a thorough and effective screening process…will not be sufficient to prevent a reasonable person from concluding, based upon all the facts and circumstances, that an appearance of impropriety casts doubt on the fairness of a trial.

Respondent did *exactly* what *Lemasters* and the foregoing case law preaches: conduct court proceedings in a fair, unbiased manner, *free from the appearance **to a reasonable person** of impropriety*. *State v. Lemasters*, 456 S.W.3d at 422-423, 425; *Anderson v.*

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State, 402 S.W.3d at 91.

Respondent Did Not Abuse Respondent's Discretion by
Failing to Find that Disqualifying the Jackson County Prosecuting Attorney's Office
From Representing Respondent/State of Missouri in Skinner's Rule 29.15 Case
Created an Undue Burden for
Not Only the Jackson County Prosecuting Attorney's Office
But Also the Office of the Missouri Attorney General

Relator is quite concerned how Respondent's actions will impact Relator's hiring practices and lead to events that will be unduly burdensome for the state and/or the Attorney General's Office. It is clear from the hearing record that Respondent did not find the evidence and argument on these sub-issues to be either credible or persuasive:

> THE COURT: What's the big deal? Why are you guy so adamant about who represents the State on this case?
>
> MR. MESSONNIER: Your Honor, it's not just one case. We've hired Ms. Wolpink—
>
> THE COURT: But this is the only case that I'm concerned about. I mean, I understand she probably has this same issue in other courts, but this is the only one that I have and I'm just curious.
>
> MR. MESSONNIER: And it's just that if Ms. Wolpink—and who knows who we'll hire next week for another vacancy, and if we have to defend this in every case every time the Public defender thinks they can disqualify the Prosecutor's Office, at some point it drives up the number of cases and that's going to be a problem for the State of Missouri and for this office and for other offices that we ask to step in as Special Prosecutors.
>
> THE COURT: And what is that problem?
>
> MR. MESSONNIER: Just the number of cases that we're putting on—in this case, we would have to come out to Kansas City or—
>
> THE COURT: Are you prejudiced somehow by this?
>
> MR. MESSONNIER: I wouldn't say prejudiced. At some point that becomes unduly burdensome if it's—

THE COURT: But is that burdensome on you or is it burdensome on the Attorney General's Office?[1]

Burdensome on them because it would be burdensome on people that we'd ask to step into these cases. And at some point—there's a limited number that we can ask people to step in on because you're asking them to do too many cases.

THE COURT: But we're not there yet, I assume?

MR. MESSONNIER: In these cases, a lot of them are—

THE COURT: Because, I mean, the reality is the Attorney General's Office has already entered their appearance on this case.

MR. MESSONNIER: Yes.

THE COURT: So apparently we're not to the tipping point yet.

MR. MESSONNIER: We're not to the tipping point, but as in each case, basically that's the position we're taking with these (Rel. Ex.16, p.8-10).

This hiring-Wolpink-situation has not, despite Relator's prediction, turned into an avalanche of motions to disqualify the Jackson County Prosecutor and her Office from representing the state in postconviction cases. As Realtor correctly pointed out, there was one other case—that of Sylvester Sisco—in addition to Skinner's case in which this issue arose. That is all as of this date. Two hardly makes an avalanche.

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[1]Assistant Attorney General Erin Kirsch entered her appearance as special prosecutor in Skinner's case on November 27, 2017 (Rel. Ex.1, p.5). Since Respondent's initial order (Rel. Ex.13), there has been no formal objection lodged by the Attorney General that the appointment *in this specific* case is unduly burdensome (Rel. Ex.1; *see also*, Rel. Ex.16, p. 17). Skinner acknowledges that the Assistant Attorney General Gregory Goodwin entered his appearance as co-counsel for Relator in this writ case on April 16, 2018.

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CONCLUSION

WHEREFORE, Respondent respectfully requests that this Court: 1) deny Relator's request for a writ of prohibition barring enforcement of Respondent's Order prohibiting the Office of the Jackson County Prosecuting Attorney from representing Respondent/State of Missouri in *Skinner v. State*, 1416-CV16875; and 2) order that Respondent's Order be given immediate and full force and effect.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Laura Grether Martin, hereby certify as follows:

1. This brief was completed in compliance with Mo. S.Ct. Rule 84.06 and using Microsoft Word, Office 2003, in Times New Roman size 13 point font. Excluding the cover page, the signature block, and the certificate of compliance, the brief contains 2,976 words, which does not exceed the 27,900 words allowed for a respondent's brief under Mo. S.Ct. Rules 55.03 and 84.06(b).

2. On July 31, 2018, this brief will be electronically served by the e-filing system on all entered attorneys participating in this case and will be served by e-mail on: a) Jean Peters Baker, Relator/Jackson County Prosecuting Attorney, Office of the Prosecuting Attorney, Jackson County Courthouse, 415 E. 12th St., 11th Fl., Kansas City, MO 64106, 816/881-3555, jpetersbaker@jacksongov.org; and b) The Honorable Bryan E. Round, Respondent/Judge for the Circuit Court of Jackson County/Division 8, in care of Matthew R. Klose, Law Clerk for Respondent, Jackson County Courthouse, 415 E. 12th St., 6th Fl., Kansas City, MO 64106, 816/881-3608, matthew.klose@courts.mo.gov.

/S/ Laura Grether Martin
Laura Grether Martin