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IN THE CIRCUIT COURT FOR
TWENTY-SECOND JUDICIAL CIRCUIT
CITY OF ST. LOUIS

Cause No. 1822-CR01377

STATE OF MISSOURI,
Plaintiff,
v.
ERIC GREITENS,
Defendant.

**MOTION TO DISQUALIFY KIMBERLY GARDNER AND
THE CITY OF ST. LOUIS CIRCUIT ATTORNEY'S OFFICE**

Defendant Eric Greitens, under RSMo § 56.110, hereby moves this Court to disqualify Ms. Kimberly Gardner and the St. Louis Circuit Attorney's Office ("CAO") from handling the prosecution of Defendant Eric Greitens in this new matter. Defendant further requests this Court appoint a special prosecutor, as under § 56.110. In support of this motion, Defendant states:

1. In the invasion of privacy case also pending in this Court, the Circuit Attorney's office has conceded that its lead investigator has given false testimony under oath. It further appears undisputed that the Circuit Attorney was aware of this false testimony and, in fact, elicited some of it. These matters will be the subject of further investigations. This same investigator appears to also have interviewed witnesses -- as many as 35 -- related to the current charges. It jeopardizes the rights of the individual defendant and presents a threat to the criminal justice system to have such a person in a position to assist in the making of charging or prosecution decisions. A fresh look is required under these circumstances.

2. In addition, significant Brady violations have been revealed by the defense in the invasion of privacy matter. This Court has specifically found, "[c]learly in this case the State has committed sanctionable discovery violations of the Rules of Criminal Procedure." April 19, 2018

Transcript Hearing at 25. In fact, the Court sanctioned the Circuit Attorney and will consider

additional sanctions if appropriate. The prior prosecution has been tainted by Mr. Tisaby's conduct and the sanctions imposed by the Court.

3. As such, the Circuit Attorney has a personal motivation to justify the prior

charges and conduct by bringing new charges, which the defendant believes to be equally unfounded. It is improper for a prosecutor to have a personal interest in creating another

prosecution to distract from the way a prior prosecution was handled. Here, the Circuit Attorney

has stated that Mr. Tisaby remains on the prosecution "team" and the Circuit Attorney has stated

-- despite a prior commitment to investigate the allegations -- that it does not intend to review his

conduct. These circumstances give rise to an appearance that the Circuit Attorney might have a

personal interest in the continued prosecution of this defendant.

4. Mr. Tisaby gave false testimony when he said that he did not speak to the Circuit

Attorney about witness K.S. When Mr. Tisaby gave this false testimony, he explained that he

wanted to make sure that the investigation was independent of the politics that would be assumed

should he have coordinated with the Circuit Attorney. Thus, Mr. Tisaby has acknowledged that

the reason for his false testimony was to give the appearance of impartiality and independence.

When it turns out that he was not telling the truth on these matters, he has essentially admitted

that the investigations have been tainted by politics. Thus, there is a further appearance that the

continued pursuit of this defendant by this prosecution team is based on bias and motivations

other than providing this defendant equal treatment under the law.

LEGAL STANDARD

5. Section 56.110 sets forth Missouri's legal standard for the disqualification of

prosecutors. That section provides that if the prosecuting attorney "be interested...the court

having criminal jurisdiction may appoint some other attorney to prosecute...the cause.” § 56.110 RSMo. “[A]s a quasi-judicial officer, the prosecuting attorney must avoid even the appearance of impropriety.” *State v. Ross*, 829 S.W.2d 948, 951 (Mo. banc 1992).

6. “However, the power to appoint a special prosecutor is not limited by the statutory grounds specified in Section 56.110; rather, it is a power inherent in the court, to be exercised in the court’s sound discretion, when for any reason, the regular prosecutor is disqualified.” *State v. Eckelkamp*, 133 S.W.3d 72, 74 (Mo. App. E.D. 2004). See also *State v. Kroenung*, 188 S.W.3d 89, 92 (Mo. App. 2006). “In applying Section 56.110 the courts have stated that a prosecutor should be disqualified if the prosecutor has a personal interest in the outcome of the criminal prosecution which might preclude affording defendant the fair treatment to which defendant is entitled.” *State v. McWhirter*, 935 S.W.2d 778, 781 (Mo. App. 1996) (citing *State v. Pittman*, 731 S.W.2d 43, 46 (Mo. App. 1987)).

7. Missouri’s rules of professional responsibility also make clear that a “prosecutor has the responsibility of a minister of justice and not simply that of an advocate.” Mo. R. Bar. Rule 4-3.8, Comment 1. “The general rule is that ‘[a] prosecuting attorney who has a personal interest in the outcome of a criminal prosecution such as might preclude his according the defendant the fair treatment to which he is entitled should be disqualified from the prosecution of such a case.’” *Vaughan v. State*, 614 S.W.2d 718, 724 (Mo. App. 1981) (quoting *State v. Harris*, 477 S.W.2d 42, 44 (1, 2) (Mo. banc. 1972)).

BACKGROUND

8. A brief factual recitation may assist the Court in understanding why the Circuit Attorney appears to have a personal interest in creating another investigation or prosecution of the Defendant, or that the investigations and prosecutions have a political component to them:

a. There are numerous documented instances in which Investigator William

Tisaby gave false testimony under oath. The Circuit Attorney was present during an initial interview of K.S. and at her deposition. As such, she had reason to know Mr. Tisaby was giving false testimony. The Circuit Attorney also elicited false testimony from Mr. Tisaby.

b. The Court has noted a "prima facie showing here there may have been criminal perjury." April 12, 2018 Transcript Hearing (In Chambers) at 3. The Court called these "severe allegations of criminal perjury," and "very, very severe allegations." April 12, 2018 Transcript Hearing at 28. On April 12, 2018, the Court stated, "I feel it's incumbent upon me,

before the State puts anything on the record, to advise Ms. Gardner and that any further reference is going to be under oath and that, Ms. Gardner, unfortunately, I need to advise you that you have the right to have an attorney, to consider the advice of an attorney." April 12, 2018 Transcript Hearing (In Chambers) at 2.

c. On April 19th, the Court noted that "[i]t was announced in chambers

earlier this week that your [Ms. Gardner's] office was going to make the complaint [regarding the perjury allegations.]" April 19, 2018 Transcript Hearing (In Chambers) at 3-4. Confirming that the Circuit Attorney's Office was going to refer the perjury matter for investigation, Mr. Dierker stated, "I did make that statement. So, Mr. Martin's pleading is not inaccurate." *Id.* at 4.

The Court then explained to Ms. Gardner, "the point still remains is that the is allegations that someone has to investigate." *Id.* Without explaining the basis for her conclusions and

acknowledging that other members of her staff had stated that Mr. Tisaby would be investigated, the Circuit Attorney responded: "[t]hese are allegations that are unfounded." *Id.* It is very difficult to understand how any person could conclude that Mr. Tisaby told the truth in his depositions. Thus, the Circuit Attorney's support for Mr. Tisaby is difficult to understand.

9. The Circuit Attorney has a "personal interest in the outcome of a [new] criminal prosecution such as might preclude [her] according the defendant the fair treatment to which he is entitled" and thus she "should be disqualified from the prosecution of such a case." Vaughn, 614 S.W.2d at 724. The Circuit Attorney's interest in the outcome of any subsequent

DISCUSSION

appearance of it) supports appointment of a special prosecutor. office does have a political component to it. This personal motivation (or even just the conclusion to reach from his false statements is that the prosecution of this defendant by this in order to avoid the appearance of political bias or a lack of independence. Thus, the reasonable statements he made (that later turned out to be false) were that certain procedures were adopted evidence he did not tell the truth is overwhelming. Mr. Tisaby acknowledged that some of the in this investigation. The Circuit Attorney appears to be fully supporting him even if the signed his contract, approved paying him thousands of dollars, and was to supervise his conduct

e. The Circuit Attorney personally made the decision to hire Mr. Tisaby, only thing exculpatory is a sentence that K.S. thought E.G. cared about her."). that the excised information was exculpatory. April 16, 2018 Transcript Hearing at 28 ("[T]he being made in this case. On April 16, 2018, the First Assistant Circuit Attorney acknowledged over. It was core Brady material that goes to the heart of the defense to many of the allegations that was included in multiple drafts of the witness statement and excised from what was turned withholding exculpatory evidence, clear Brady material was deleted from a witness statement includes a videotaped interview of the key witness and notes of that interview. Beyond

d. Clear Brady material was not provided to the defense in this case. This

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investigation or prosecution of Defendant is palpable, and seriously jeopardizes "the fair treatment to which [D]efendant is entitled." McWhirter, 935 S.W.2d at 781.

10. The Court specifically noted that it was "troubling" that the Circuit Attorney tried to claim that the defense's motion for sanctions was frivolous. April 19, 2018 Transcript Hearing at 25. It is even more troubling that Ms. Gardner claims the claims of perjury are false and unfounded. The evidence of false testimony is overwhelming: Mr. Tisaby gave false testimony about taking notes during the two interviews—the video shows it, and the notes have now been produced. Moreover, Mr. Tisaby's testimony that he did not ask witnesses any questions and that he did not talk to the Circuit Attorney in advance is also refuted by the tape and the notes. An unwavering defense of Mr. Tisaby seems to suggest that Mr. Tisaby and the investigation are being protected when they should not.

11. "The test for prosecutorial vindictiveness is whether the facts show a realistic likelihood of vindictiveness in the prosecutor's augmentation of charges." State v. Gardner, 8 S.W.3d 66, 70 (Mo. banc 1999). When a charging "decision comes after an accused has exercised a constitutional or statutory right, those principles conflict with the premise that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." State v. Potts, 181 S.W.3d 228, 232 (Mo. App. 2005) (quoting Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978). The Circuit Attorney's personal interest in prosecuting Defendant "demonstrate[s] a realistic likelihood of vindictiveness" in any potential filing of charges against Defendant. Chrisman v. State, 297 S.W.3d 145, 148 (Mo. App. 2009). This realistic likelihood creates a "presumption of vindictiveness." Id.

12. This Court is not constrained by any factor in § 56.110, RSMo. Instead, this Court's power to disqualify The Circuit Attorney and the CAO "is a power inherent in the court,

to be exercised in the court's sound discretion, when for any reason, the regular prosecutor is disqualified." Beckelkamp, 133 S.W.3d at 74. That is, "the power to appoint a special prosecutor is not limited by the statutory grounds specified in Section 56.110." Id.

13. The Circuit Attorney's own personal interest necessarily extends to the entire CAO, given that the Circuit Attorney has been personally involved in this matter and the entire office is no doubt well aware of her views. The defense has respect and admiration for other members of the Circuit Attorney's office, including Mr. Dierker, but, unfortunately, he has been called upon to speak for the office. "[T]he 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." State v. Lemasters, 456 S.W.3d 416, 423 (Mo. banc 2015). This standard is met here.

14. "[A]s a quasi-judicial officer, the prosecuting attorney must avoid even the appearance of impropriety." State v. Ross, 829 S.W.2d 948, 951 (Mo. banc 1992). This is an "overarching principle." State ex rel. Burns v. Richards, 248 S.W.3d 603, 605 (Mo. banc 2008). In other words, it is axiomatic that "prosecutorial conduct be beyond reproach and the integrity of judicial proceedings remain beyond reproach, criticism or appearance of impropriety." State v. Boyd, 560 S.W.2d 296, 297 (Mo. App. 1977). To protect the public confidence, the Circuit Attorney's office should be disqualified from further investigation of this defendant.

15. If the court determines that any investigation into and/or prosecution of Gov. Greitens is worthy of a special prosecutor, such special prosecutor must be outside and independent of the Missouri Attorney General's Office. On March 28, 2018, when asked by Fox News whether Gov. Greitens should step down, the Attorney General responded, "I don't want to say anything that would compromise in anyway my investigation, which is ongoing, or the other law

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enforcement activities." Then on April 11, 2018, the Attorney General called on Gov. Greitens to "resign immediately." It would be inappropriate to appoint a person whose office has already determined the outcome and who has announced a political decision regarding the defendant. A prosecutor must be independent of these political matters, meaning that the Attorney General's Office should be recused.

CONCLUSION

For the above stated reasons, defendant requests that this Court disqualify the Circuit Attorney and her office from any such investigation or prosecution.

Dated: April 23, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the City of St. Louis Circuit Attorney's Office this 23rd day of April, 2018.

/s/ James F. Bennett