

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

STATE OF MISSOURI)	
)	
Plaintiff,)	
)	
v.)	Case No. 16CR90000348
)	
KENNETH MIDDLETON,)	
)	
Defendant.)	

DEFENDANT’S MOTION TO DISQUALIFY THE JACKSON COUNTY PROSECUTOR’S OFFICE AND FOR APPOINTMENT OF A SPECIAL PROSECUTOR

COMES NOW defendant, Kenneth Middleton, by and through counsel, and moves this Court to issue an order disqualifying the Jackson County Prosecutor’s Office from any further participation in Mr. Middleton’s efforts to secure post-conviction relief from his convictions and sentences and appoint a special prosecutor to review whether this is an appropriate case to invoke the provisions of § 547.031 RSMo Cum. Supp. (2021). This action is necessary because the prosecuting attorney’s office labors under a conflict of interest that creates an appearance of impropriety that necessitates the disqualification of that office from the case to protect the integrity of the post-conviction process in this case. In support of this motion, defendant states as follows:

1. Over thirty years ago, Kenneth Middleton was convicted of first-degree murder and armed criminal action involving the shooting death of his wife and was sentenced to concurrent terms of imprisonment of life without parole and 200 years. Throughout the protracted post-conviction process in this case, Mr. Middleton has steadfastly maintained his innocence.
2. During his post-conviction proceedings, defendant alleged and presented considerable evidence that former Assistant Jackson County Prosecutor Patrick Peters engaged in numerous acts of prosecutorial misconduct, including, but not limited to, freezing defendant's access to his untainted funds in order to prevent him from hiring counsel of his own choosing. Mr. Peters also had a financial conflict of interest involving his referral of a civil wrongful death action brought by the sisters of the victim against Mr. Middleton to a law firm in Blue Springs, Missouri, where his father, former Jackson County Circuit Judge, William Peters, was employed.
3. A distinct conflict of interest issue that also creates an appearance of impropriety involves the fact that former Judge Edith Messina, who presided over defendant's trial and his Rule 29.15 proceedings, is now currently employed as a senior advisor to elected prosecutor Jean Peters Baker.
4. Approximately a year ago, undersigned counsel wrote a detailed letter to Jean Peters Baker laying out the injustices in this case. (*See* Exh. 1). This letter

requested that Ms. Peters Baker invoke the provisions of newly enacted SB 53, codified under § 547.031, because substantial evidence exists that Mr. Middleton is innocent and was wrongly convicted due to, among other things, an uncontroverted finding by Judge Messina during prior 29.15 proceedings that Mr. Middleton received ineffective assistance of trial counsel. Ms. Peters Baker has not responded to this letter in any manner whatsoever. As a result, it must be assumed that she has no intention of considering whether to allow Mr. Middleton the right to prove his entitlement to have his convictions overturned under this new statute.

5. In assessing these conflicts of interest, the disqualification of the entire prosecutor's office is required if a defendant can establish an appearance of impropriety, that the Missouri Supreme Court has defined as whether "a reasonable person with knowledge of the facts would find an appearance of impropriety and doubt the fairness of the trial." *Peters Baker v. Round*, 561 S.W.3d 380, 385 (Mo. banc 2018). The procedural history of this case also raises an appearance of impropriety. Despite the Jackson County Prosecutors relentless opposition to granting him a new trial, the defendant was successful in convincing the 29.15 motion court and trial Judge Edith Messina that he was wrongly convicted. As a result, it is clear that the Jackson County Prosecutors Office cannot objectively evaluate whether to apply this new

statute to Mr. Middleton's case. Any reasonable person would doubt the fairness and integrity of the prosecutor's review of this case under § 547.031.

6. Regarding former Assistant Prosecutor Peters' freezing of defendant's access to funds after he was charged, this act, apart from creating an appearance of impropriety, also violated defendant's Sixth Amendment right to retain counsel of his own choosing. *See Luis v. United States*, 136 S. Ct. 1083 (2016). As Justice Thomas pointed out in *Luis*, the freeze of defendant's assets here was not a mere incidental burden on the right to counsel of choice. Instead, it targeted a defendant's assets that were necessary to exercise this Sixth Amendment right. In such circumstances, the Constitution requires the government to respect the long-standing common law protection for a defendant's untainted assets. *Id.* at 1102-1103 (Thomas J., concurring).
7. The wrongful deprivation of the right to counsel of choice is a "structural" error that so "affec[ts] the framework within which the trial proceeds" that courts may not even ask whether the error harmed the defendant. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 148, 150 (2006). "The Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire." *Id.* Where there right to be assisted by counsel of choice is wrongly denied, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a

Sixth Amendment violation. Deprivation of the right is “complete” when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. *Id.* at 148. As Judge Messina found in her findings of fact and conclusions of law overturning Mr. Middleton’s conviction, “Mr. Peters asked for the bond condition in an effort to preserve the assets, as well as to prevent Mr. Middleton, if convicted of murder, from keeping them.” *Messina order* at 36. Because this act by Mr. Peters constituted a structural error in that violated the Sixth Amendment, any reasonable person would question the impartiality of the prosecutor’s office in assessing the merits of Mr. Middleton’s request for a hearing under § 547.031.

8. The first and only case in the State of Missouri where a prisoner was freed under § 547.031 was the Kevin Strickland case. As Special Judge James E. Welsh pointed out in *Strickland*: “The legislature enacted § 547.031 in response to this gap in available post-conviction processes. However, even now that the statute is effective, Strickland’s claim can only be pursued through the intercession of the prosecuting attorney. Section 547.031.1 permits a prosecuting attorney to file a motion to set aside a criminal conviction upon information that the person convicted is innocent or was erroneously convicted. The statute further provides that the Court shall sustain

the prosecutor's motion 'where the court finds that there is clear and convincing evidence of actual innocence or constitutional error at the original trial or plea that undermines the confidence in the judgment. § 547.031.3."

Kevin Strickland's case was reviewed by a conflict-free prosecutor and adjudicated by an impartial judge. Kenneth Middleton should have the same opportunity.

9. Judge Messina's current employment with the Jackson County Prosecutor's Office also creates an appearance of impropriety that requires the appointment of a special prosecutor. In similar circumstances, the Jackson County Prosecutor's Office recently filed a motion to appoint a special prosecutor to investigate a shooting incident last year where the KCPD shot and killed Malcolm Johnson. The prosecutor's office took the position in the *Johnson* case that there was an appearance of impropriety because its prior prosecutions of Mr. Johnson raised concerns about the neutrality of the Jackson County Prosecutor's ability to objectively review the facts in order to determine whether or not charges should be brought against the officers who killed him. A similar result is warranted here.
10. After Judge Messina reversed Mr. Middleton's convictions, Assistant Prosecutor Michael Hunt filed a notice of appeal. Mr. Hunt also filed a motion to allow the Jackson County Prosecutor's Office to withdraw due to a conflict

of interest. The appearance of impropriety that led the prosecution to move to withdraw in the appeal of Judge Messina's order is, by any objective measure, far less egregious than the conflict arising from Mr. Peters' conduct in denying Mr. Middleton his Sixth Amendment right to counsel of choice.

SUGGESTIONS IN SUPPORT

THE PROSECUTOR HAD AN IMPROPER, UNDISCLOSED FINANCIAL INTEREST IN THE OUTCOME OF THE CASE ARISING FROM FREEZING MR. MIDDLETON'S ASSETS AND HIS REFERRAL OF KATHERINE MIDDLETON'S FAMILY TO THE PROSECUTOR'S FATHER'S LAW FIRM FOR REPRESENTATION IN WRONGFUL DEATH/PROBATE ACTIONS BROUGHT AGAINST MR. MIDDLETON.

The state had no apparent evidence of motive in this case from the outset. In an attempt to learn more about the Middleton's relationship and finances, and in an effort to controvert Mr. Middleton's assertion that this shooting was accidental, Prosecutor Peters directed Blue Springs Detective Ray Vasquez to investigate the financial resources of Kenneth and Katherine Middleton. (*See* Ray Vasquez' deposition, p. 14). Detective Vasquez learned that Mr. Middleton worked hard all of his life, amassed a fair amount of savings, and owned substantial land in Arkansas. (*Id.* pp. 15, 17). Mr. Peters' actions, after learning this information, were extraordinary.

Mr. Peters referred Katherine Middleton's family to his father's law firm for the purpose of pursuing a wrongful death action against petitioner. Mr. Peters also convinced the court to impose an unprecedented bond condition which prevented

Mr. Middleton from liquidating any of his assets without Peters' prior approval.¹ (See Missouri Civil Case - wrongful death trial transcript). It is apparent that Peters' motive in seeking this extraordinary and unprecedented condition was to financially benefit his father's law firm. This view is bolstered by Mr. Peters' previous statement to the press that "[M]iddleton was not a threat to others, and police were not afraid he would flee." (See THE EXAMINER, February 28, 1990, p. 2).

The next logical question is whether and to what extent the wrongful death case affected Peters' prosecutorial decisions and discretion. The most damning evidence of a causal connection was Peters' failure to respond to Mr. Duncan's December 20, 1990, letter requesting the GSR test results on Katherine Middleton's left hand. A positive test result would have not only terminated the criminal prosecution, but also irreparably compromised the wrongful death case.

Mr. Peters, at the very least, had constructive notice of his father's firm's representation of Mrs. Middleton's estate and the wrongful death action some eight months prior to receiving Mr. Duncan's letter, when Peters' father's firm wrote a letter to lead detective Vasquez, notifying him that none of Mrs. Middleton's

¹ It should be noted that the letters of administration were not sought until three days after Peters issued the bond condition to the Court for approval, inhibiting Middleton's ability to use his assets to secure competent defense counsel. And the letters of administration were not approved by the Probate Court, and the Order directing that Ms. Middleton's creditors be notified of the estate's opening was not issued until June 24, 1991, 4 months *after the verdict in the criminal trial*.

personal effects should be distributed to anyone, since *the firm* had initiated the opening of a probate estate court proceeding.² In other words, the April 25, 1990 letter formally announced to the lead detective this firm's representation of Katherine Middleton's family in the unlikely event Mr. Peters did not know this already. (*See* affidavit of Dixie Busby implying Peters all but pressured the family to hire his father's firm).

Peters' father's firm's representation of Katherine Middleton's family gave them a financial stake in the outcome of the criminal trial. The fact that the lead prosecutor's impartiality was compromised was never disclosed to Mr. Middleton or his attorney. (*See* Robert Duncan affidavit regarding this issue). The case Mr. Peters referred to his father's firm was not insubstantial, by any measure. This law firm procured a \$1,350,000.00 "default judgment" against Mr. Middleton. The firm also secured the entirety of Katherine Middleton's probate estate for its clients. Additionally, an Arkansas chancery court judgment resulted in the plaintiffs receiving an additional \$130,000.00 in 2015.

There was undoubtedly a privity of interest between Mr. Peters and his father's firm, which created a conflict of interest between Peters' duty to fairly

² Vasquez was ordered to place an explanatory memo in his personnel file when his supervisor discovered the letter from Peters' father's firm never made it to the police case file. (Vasquez deposition, pp. 28-34). This letter was not disclosed at trial in violation of the *Brady* rule.

prosecute the case with his and his father's pecuniary interests. In this regard, the civil judgments were obtained against Mr. Middleton by using the same evidence Peters presented in the criminal trial. (*See Missouri Civil Case - wrongful death trial transcript*).

Where the government has not revealed all facts and circumstances material to the case, the court defrauded may, on its own motion, vacate the affected judgment. *Demianjuk v. Petrovski*, 10 F.3d 338 (6th Cir. 1993). The United States Supreme Court also established a "categorical rule" against the participation of a conflicted prosecutor in *Young v. ex rel. Vuitton*, 481 U.S. 787 (1987) (holding that participation of an interested prosecutor is so fundamental and pervasive an error that it requires reversal without regard to facts and circumstances of particular case). The Supreme Court also noted that "an actual conflict of interest [exists] if its potential for misconduct is deemed intolerable." *Id.* at 807.

In amplifying its disdain for ethically compromised and conflicted prosecutors, the Court also noted:

"If a Justice Department attorney pursued a contempt prosecution for violation of an injunction benefiting any client of that attorney involved in the underlying civil litigation, that attorney would be open to a charge of committing a felony under § 208(a). Furthermore, such conduct would violate the ABA ethical provisions, since the attorney could not discharge the obligation of undivided loyalty to both clients where both have a direct interest."

Id. at 805.

The Supreme Court was obviously concerned with the broad discretionary power a prosecutor exercises in a criminal case and was sending a clear message that the prosecutor's decisions should not be tainted or compromised by outside influences such as pecuniary gain. A similar concern was noted by the Fourth Circuit in *Ganger v. Peyton*, 379 F.2d 709 (4th Cir. 1967). That court noted: "a prosecuting attorney is a representative of the public in whom is lodged a discretion which is not to be controlled by the courts or by an interested individual." *Id.* at 713. The *Ganger* court held that when a prosecuting attorney attempts "to serve two masters" (i.e., both the public interest for purposes of the criminal case and a private interest involving a related civil case), such conduct "violates the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment." *Id.* at 714. In *Ganger*, the defendant's prosecutor was representing defendant's wife in her divorce from defendant at the time of his criminal trial, which involved a similar situation to Mr. Peters' father's firm's representation of Mrs. Middleton's family against Mr. Middleton. *Id.* at 711-712. The court reversed the conviction, stating: "Because of the prosecuting attorney's own self-interest in the civil litigation (including the possibility that the size of his fee would be determined by what could be extracted from defendant) he was not in a position to exercise fair minded judgment with respect to (1) whether to decline to prosecute; (2) whether to

reduce the charge to a lesser degree of assault, or (3) whether to recommend a suspended sentence or other clemency.” *Id.*

The anticipated “attenuation” argument Mr. Peters provided at the 2004 hearing in defense of his conflict of interest (i.e., “The clients were not mine, but instead, were represented by my father’s firm.”), fails for the reason that Mr. Peters referred the plaintiffs to the firm, and thereafter did not stay uninvolved, but instead provided valuable assistance to the firm and at least one of the plaintiffs, Mildred Anderson. (See Dave Link’s deposition, pp. 22-23, 35-36; Ray Vasquez’ deposition, pp. 15-16, 25-26).

As the facts reveal, Mr. Peters used his position as lead prosecutor to “serve two masters.” Mr. Peters exploited his position as representative of the public interest to secure a more generous sum in the civil suits against Mr. Middleton to benefit his father’s law firm. This misconduct denied Mr. Middleton his right to due process and a fair trial. *See State v. Boyd*, 560 S.W.2d 296, 297 (Mo. App. W.D. 1977) (“A prosecuting attorney is a quasi-judicial officer, an arm of the state, and he has the duty not only to see that the guilty are brought to justice but also that the innocent go free. A vital concomitant in the exercise of either function is to assure a fair trial and avoid impropriety in any prosecution. Equally important is the duty to avoid any *appearance of impropriety*.”) (emphasis added); *see also Vaughan v. State*, 614 S.W.2d 718, 724 (Mo. App. W.D. 1981) (“The general rule is that ‘[a]

prosecuting attorney who has a personal interest in the outcome in 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.”
State v. Harris, 477 S. W.2d 42, 44 (Mo. 1972); Mo. Rev. Stat. Section 56.110 (1978).

This scenario raises the following obvious question: If Mr. Peters and the Blue Springs Police Department were doing nothing wrong in referring Katherine’s family to Peters’ father’s firm, or thereafter providing assistance to the firm in the civil case, why did they never disclose this to Mr. Middleton or Mr. Duncan? (Duncan affidavit; *see also* letter from firm to Vasquez confirming representation).³ As a result, the defense was not aware of this serious conflict of interest. Mr. Middleton was therefore denied the opportunity to seek disqualification of Mr. Peters, pursuant to § 56.110 RSMo, which states that, “[i]f the prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his office...the court having criminal jurisdiction may appoint some other attorney to prosecute...the cause.” In addressing

³ On September 17, 1996, Detective Vasquez admitted he decided not to send the letter to the records unit. The next day, the letter from the law firm and the letter from Vasquez were turned over to defense counsel for the first time. (Vasquez ltr. pp. 2- 3; *see also* Vasquez deposition, pp. 28-34).

a similar issue, the Missouri Supreme Court held in *State v. Ross*, 829 S.W.2d 948 (Mo. banc 1992):

“As stated in *Burns*, 322 S.W.2d at 742, this Court will not require a showing of actual prejudice in a case of this type. *Prejudice is presumed*, subject to rebuttal only upon a showing that the defendant waived the conflict *and* that steps were taken to insulate the actual prosecution from the conflict...*In every case - upon discovery by any party; or counsel of the potential conflict of interest - that person shall disclose the conflict in open court in the presence of the defendant. Absent a waiver of the conflict of interest by the defendant, a special prosecutor shall be appointed...* The judgment below is reversed, and the case is remanded for a new trial in accordance with this opinion.”

Id. at 952 (emphasis added).

Based upon Mr. Peter’s conflict of interest, coupled with the conflict issues surrounding Judge Messina’s current employment with the Jackson County Prosecutor’s Office, it is clear there is an appearance of impropriety that would lead a reasonable person to question the partiality of the Jackson County Prosecutor’s Office. As in the Malcolm Johnson case, the Court should grant defendant a hearing and thereafter disqualify the prosecutor’s office and appoint a special prosecutor to assess whether defendant is eligible for post-conviction relief under § 547.031.

Respectfully submitted,

/s/ Kent E. Gipson
 KENT E. GIPSON #34524
 Law Office of Kent Gipson, LLC
 121 East Gregory Blvd.
 Kansas City, MO 64114
 816-363-2795 • Fax 816-363-2799
 kent.gipson@kentgipsonlaw.com

COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of October, 2022, this motion was filed via case.net.

/s/ Kent E. Gipson
Counsel for Defendant