

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

FILED
OCT 15 2021

**MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)**

22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

STATE OF MISSOURI,)
)
 Plaintiff,)
) No. 1622-CR04388
 vs.)
) Division No. 3
 PHILLIP J. CUTLER,)
)
 Defendant.)

ORDER

The Court has before it the State of Missouri's Motion for Appointing Special Prosecuting Attorney. The Court now rules as follows.

On August 2, 2021, the State of Missouri, through the Circuit Attorney, filed a "Motion for Appointing a Special Prosecuting Attorney" in this matter, citing a "potential Conflict of Interest." On August 6, 2021, Defendant filed a "Motion for Court Order Directing St. Louis Circuit Attorney to Disclose 'Potential Conflict of Interest.'" On August 16, 2021, the State filed a "Motion to Strike Defendant's Motion for Court Order Directing the St. Louis Circuit Attorney to Disclose the Potential Conflict of Interest," in which the State argued that the State has the power

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to recuse itself without explanation to the opposing party. The matter was heard by the Court on September 17 and October 8, 2021.

Motions to appoint special prosecutors in this Circuit are typically heard by the Presiding Judge, because they are considered an administration or management issue. Pursuant to Mo. Const. Art. V, § 15, the presiding judge of the circuit court has general administrative authority over the court and its divisions, and § 478.240 RSMo provides that the presiding judge of the circuit shall have general administrative authority over all judicial personnel and court officials in the circuit. This Court's Local Rule 100.1.2 similarly states that the Presiding Judge shall be responsible for the administration and management of the Circuit Court.

In this case, the Presiding Judge Michael Stelzer was disqualified by order dated August 28, 2018, pursuant to a motion for change of judge by the Defendant. Where the Presiding Judge has been disqualified in a particular case, Local Rule 6.5.1 provides that the Assistant Presiding Judge shall be assigned. Accordingly, the undersigned judge has been assigned to hear the Motion for Appointing a Special Prosecuting Attorney.

The Circuit Attorney is statutorily required to "commence and prosecute" the criminal actions in her county, and this duty cannot be delegated to another except in rare circumstances. See §56.060

RSMo; State v. Harrington, 534 S.W.2d 44, 48 (Mo. banc 1976); State ex rel. Dir. of Revenue v. McBeth, 366 S.W.3d 95, 100 (Mo.App. W.D. 2012) (under § 56.060.1, "Prosecuting Attorneys are required to appear and represent the interests of the State" in criminal prosecutions). Provision is found for the court to appoint an attorney to prosecute if the prosecuting attorney is disqualified (§ 56.110 RSMo) or sick (§ 56.120 RSMo). Harrington, 534 S.W.2d at 48. Authority is also granted for the appointment of assistant prosecuting attorneys (§ 56.240 RSMo), and under section 27.030, the Governor may request that the attorney general or an assistant attorney general assist the prosecutor. Id.

The Court is not limited to §56.110 or any other statute in appointing a special prosecutor; the trial court also has the power to appoint a special prosecutor pursuant to its "inherent authority." State ex inf. Fuchs v. Foote, 903 S.W.2d 535, 537 (Mo. banc 1995). An appointment pursuant to the Court's "inherent authority," however, is only available "when for any reason, the regular prosecutor is disqualified." Id.; State ex rel. Gardner v. Carmody, 618 S.W.3d 560, 566 (Mo.App. E.D. 2020).

"Disqualification of a prosecutor is only called for when he has a personal interest of a nature which might preclude his according the defendant the fair treatment to which he is

entitled." State v. Stewart, 869 S.W.2d 86, 90 (Mo.App. W.D. 1993). The Rules of Professional Conduct aid the court in determining whether a conflict exists that would result in disqualification. State ex rel. Peters-Baker v. Round, 561 S.W.3d 380, 385 (Mo. banc 2018). See, e.g., Rule 4-1.7 "Conflict of Interest: Current Clients;" Rule 4-1.8 "Conflict of Interest: Prohibited Transactions;" Rule 4-1.9 "Duties to Former Clients;" and Rule 4-1.18 "Duties to Prospective Client." A prosecutor's professional or familial relationship with a defendant may create a conflict of interest. Adkins v. State, 169 S.W.3d 916, 919 (Mo.App. W.D. 2005). Disqualification is only required where the conflict is actual, and not where it is merely potential. State v. Harris, 939 S.W.2d 915, 921 (Mo.App. W.D. 1996).

The Circuit Attorney's motion did not set forth any factual basis for disqualification. On September 17, 2021, the Circuit Attorney filed a "Memorandum in Support of Motion to Appoint Special Prosecutor" stating that the "conflict" is that the COVID-19 pandemic has caused unprecedented court delays and trial backlogs, resulting in "an untenable backlog of serious cases requiring immediate attention by experienced attorneys."

Disqualification is a "drastic response" to concerns that may be better addressed by case management tools, especially given the

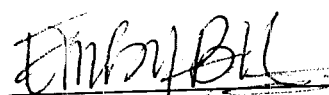
prosecutor's statutory duties to commence and prosecute the case. See State ex rel. Dir. of Revenue v. McBeth, 366 S.W.3d 95, 101-02 (Mo.App. W.D. 2012). The Court finds that the purported "conflict" cited by the Circuit Attorney is not a disqualifying conflict under the Rules of Professional Conduct, and the Court has no authority to appoint a special prosecutor under §56.110 or its inherent authority.

Section 27.030 provides a mechanism for the state's attorney general to assist a prosecuting attorney in the discharge of her duties. This appears to be the proper mechanism to procure assistance for a prosecuting attorney's office that has no conflict of interest but is unable to handle its caseload, due to the pandemic, staff turnover, or any other reason. The statute provides that such assistance shall be directed by the governor, although it has also been held that the circuit attorney may directly request assistance from the attorney general, without an order from the governor. State v. Steffen, 647 S.W.2d 146, 153 (Mo.App. W.D. 1982). To this Court's knowledge, however, the Circuit Attorney has made no request for assistance pursuant to §27.030 to either the governor or to the attorney general. The Court finds that it is without authority to appoint a special prosecutor in this matter.

THEREFORE, it is Ordered and Decreed that the State of Missouri's Motion for Appointing Special Prosecuting Attorney is DENIED.

SO ORDERED:

Dated: 10/15/2021



ELIZABETH B. HOGAN, Judge