

FROM THE DESK OF
TROY NEWMAN

President – Operation Rescue

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January 4, 2007

Hon. Paul Morrison
Attorney General – State of Kansas
Memorial Hall – 2nd Floor
120 SW 10th Street
Topeka, KS 66612

Hon. Nola Foulston
District Attorney – Sedgwick County, Kansas
535 N. Main
Wichita, KS 67203

Dear Attorney General Morrison and District Attorney Foulston,

This letter is to request that you abide by the laws of the State of Kansas and the expressed will of seven thousand, five hundred citizens of Sedgwick County and recuse yourselves from any further participation in the below investigation and prosecution of George R. Tiller.

The laws of the State of Kansas and your duty as prosecutors requires you either vigorously prosecute those that violate the laws of the State of Kansas, or recuse yourselves in instances where conflicts of interests exist. In addition to the law, the presently tenuous confidence of your clients – the citizens of the State of Kansas, and of Sedgwick County – in their prosecutorial officials requires that you both recuse yourselves from any further participation in the below matters.

Since Kansas law provides for substitute prosecutors, any further attempt by you to hold on to power and/or control the prosecution of Tiller will only further highlight your conflict of interest and compound the loss of public trust in government. While Tiller desires protection from the law, the law demands his prosecution. Your conflicts of interests and financial and political relationships with Tiller prevent you from serving that function, and it is altogether appropriate that you recuse yourselves and permit unconflicted, dis-interested prosecutors to handle the legal prosecution of George R. Tiller.

Summary of the Argument

As you are aware, the citizens of Sedgwick County acting pursuant to K.S.A. § 22-3001(2) have summoned a grand jury to investigate alleged violations of K.S.A. §§ 65-445, 65-6701 et seq. by Dr. George R. Tiller, and other physicians and providers of

professional services at 5101 and 5107 E. Kellogg in Wichita, Kansas (hereafter "§ 22-3001 Citizen Petition").

The § 22-3001 Citizen Petition expressly recognizes what was then a potential for a "possible conflict of interest or prejudice" by both of you in this matter. Specifically, the § 22-3001 Citizen Petition states:

"Because of possible conflict of interest or prejudice concerning this matter, it is also requested that the District Court of Sedgwick County select a prosecutor who is not, and has not been, employed by the office of the Kansas Attorney General [Paul Morrison], and who is not associated in any way, currently or previously, with District Attorney Nola Foulston."

What was then a "*possible* conflict of interest or prejudice" has developed into a grave, manifest, and substantial conflict of interest in the case of Attorney General Morrison, and a less grave, but still very *real* conflict of interest in the case of District Attorney Nola Foulston. The citizens of Kansas had the foresight and the good sense to express a real concern in their § 22-3001 Citizen Petition. Their prescient concern has been confirmed and vindicated by the facts and allegations surrounding Attorney General Morrison's decision to resign over the allegations of his improper and criminal activity concerning a sexual harassment claim and its improper entanglement in the Tiller prosecution.

The confidence of the citizens of Sedgwick County, and the entire State of Kansas toward their public officials has been substantially damaged, especially with regard to prosecutorial officials that have received political funding and support from Dr. George Tiller and provided him with favorable treatment. The question of whether a conflict of *action* occurred, i.e., whether favorable treatment was provided *in exchange* for the political funding, has yet to be proven in a court of law. However, the fact that the conflict of *interests* existed and continues to exist is now beyond question. Given the recent shocking occurrences and the pending investigations with the Kansas State Bar, the Kansas Ethics Commission, and potentially pending criminal charges including bribery to protect George Tiller, it is imperative that any whiff of impropriety be avoided at all costs.

The law provides for a routine and simple solution to your conflicts of interest: the substitution of others prosecutors who are free of any real or apparent conflicts of interests. *K.S.A. 19-711*; *K.S.A. § 22-2202(17)*; and *State v. Rollins*, 24 Kan App. 2d 15, 23-24 (1997), *rev'd on other grounds*, 264 Kan. 466 (1998). Any additional attempt by you to control the prosecution of Tiller will further erode public confidence in your prosecutorial conduct and ultimately serve as additional evidence of your distinct conflicts of interests.

For the above reasons and those that follow, it is appropriate that you abide by the laws of the State of Kansas and the requests of all seven thousand, five hundred (7,500) citizens of Sedgwick County and recuse yourselves from all participation in the grand

jury proceedings and subsequent prosecution resulting from the § 22-3001 Citizen Petition.

Argument

The following facts and legal citations are provided in support of this request that you recuse yourselves in the above matter:

1. It is a matter of public record that the accused George R. Tiller has provided political funding and support to Attorney General Paul Morrison (hereafter "Morrison") and District Attorney Nola Foulston (hereafter "Foulston").

2. It is a matter of public record that both Morrison and Foulston have sought and/or procured the dismissal and/or nullification of criminal charges against George R. Tiller.

3. The requests of the seven thousand, five hundred (7,500) citizens in the §22-3001 Citizen Petition that Morrison and Foulston recuse themselves serves as prima facie evidence of the conflicts of interests because the interests of the prosecutor conflicts with the interests of the clients, i.e., the citizens of Sedgwick, as is expressed by all seven thousand, five hundred of them in the § 22-3001 Citizen Petition.

4. The conflict of interest articulated by these seven thousand, five hundred (7,500) citizens occurred before the revelations regarding Morrison's conduct that confirmed the conflict of interest. Clearly, the conflict of interest has increased.

5. Morrison and Foulston are responsible for the prosecution of Tiller. *See, Alpha Medical Clinic v. Anderson*, 128 P.3d 364 (Kan. 2006); and *State v. Board of Education of City of Beloit*, 280 P.2d 929, 931 (Kan. 1955) ("Where the public suffers a wrong, it is the **duty** of the attorney general or the county attorney, officers specifically charged with the duty of **representing the public**, to see that **such wrongs are righted**.").

6. The Kansas Rules of Professional Conduct ("K.R.P.C.") govern the conduct of attorneys, including public prosecutors. These rules prohibit prosecutors from representing clients who interests conflict with their own. Rule 1.7(b) K.R.P.C.

8. Morrison and Foulston are subject to the laws of the State of Kansas, including the jurisdiction of the Kansas Governmental Ethics Commission.

9. Morrison and Foulston are sworn to protect the interests of their clients, respectively the citizens of the State of Kansas and the County of Sedgwick, as well as the civil rights of the same citizens and to not deprive them of their civil rights under color of state law.

10. It is well settled law throughout the United States that a prosecutor must vigorously defend the law and prosecute violators:

"The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. *As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.* He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.

Berger v. United States, 295 U.S. 78, 88 (1935) (emphasis added).

11. Kansas law affirms this same prosecutorial role for county attorneys as well as attorneys general, and further explains the duty of the prosecutor to represent the interest of the citizens, to prosecute with zeal, integrity and vigor, and to use all available and legitimate means to bring about proper convictions. *State v. Crume*, 22 P.3d 1057, 1067-68 (Kan. 2001) (prosecuting attorney's "paramount obligation is to the public trust") ("**accused must be prosecuted with earnestness and vigor**" and "the prosecutor is the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer") ("zeal in the prosecution of criminal cases is to be commended" and in cases of guilt **the prosecuting attorney should "use every available power to secure the defendant's conviction."**) (emphasis added). See also, *State v. McCray*, 979 P.2d 134, 139 (Kan. 1999) (duty to prosecute with earnest and vigor and use every legitimate means for just conviction), *State v. Manning*, 19 P.3d 84, 100 (Kan. 2001); *State v. Pabst*, 996 P.2d 321, 328 (Kan. 2000), and *State v. Wilson*, 360 P.2d 1092, 1097 (Kan. 1961).

12. Kansas law contemplates that there will be times when prosecutors will have community, political, familial, and other circumstantial limitations on their ability to abide by the above vigorous prosecutorial standard, and provides for the recusal of such prosecutors. *K.S.A. §22A-106(d)*.

13. In *State v. Dimaplas*, 267 Kan. 65, 68 (1999), the Kansas Supreme Court provided that the relevant test for determining attorney disqualification questions is whether the attorney or prosecutors interests are "adverse to the client." Again, in this case, the overwhelming evidence shows that the client, i.e., the citizens of Sedgwick County, do not trust Attorney General Morrison and District Attorney Foulston to fulfill their duty to the client by prosecuting Tiller with the legally required zeal and vigor, while using all available and legitimate means to bring about proper convictions.

14. Three years after its ruling in *Dimaplas*, the Kansas Supreme Court again reiterating the standard for prosecutorial removal and stated the policy reasons supporting its holding. In *State v. Cope*, 50 P.3d 513, 515 (Kan. 2002), a case involving Morrison in his former role as county attorney, the Court stated:

"It is important to the public, as well as to the individuals suspected or accused of crimes, that these discretionary functions of the prosecutor be exercised with *the highest degree of integrity and impartiality, and with the appearance of the same.*"

(Emphasis added.)

It is important in all times that the public have confidence in prosecutors that are free from not only conflicts of *action*, but conflicts of *interests*. Clearly, the test for "conflicts of interests" does not require that a prosecutor actually act upon the temptation posed by a "conflict of interest," but rather recognizes that when a conflict of interest exists, the temptation for the prosecutor and the appearance to the public requires that the prosecutor step aside, and allow an un-conflicted prosecutor to take over.

The distinction between a conflict of interest and a conflict of action can be seen perfectly in this case. Both Morrison and Foulston have a conflict of interest because both have received funding and political support from the accused, Tiller. According to the present allegations in the matters leading to Morrison's announced resignation, Morrison acted upon the temptation posed by his conflict of interest, and created a conflict of *action*. It is unknown whether Foulston has likewise created a conflict of action. However, the conflict of *interest* does not require proof on conflicting action but rather the mere existence of the conflict of *interest*. Clearly, Morrison and Foulston both possess such conflicts and, accordingly, must recuse themselves.

15. Recusal of prosecutors is a routine and administrative matter. *State v. Heck*, 661 P.2d 798 (Kan. 1983) (prosecutor recused due to remote conflict, and "authorization of a special prosecutor is routine and purely an administrative function").

16. The United States Supreme Court has ruled that the mere appearance of an interested prosecutor requires strict recusal because it leads to fundamental and pervasive error. *Young v. United States*, 481 U.S. 787 (1987).

In *Young*, the Court provided that the presence of an interested prosecutor "at a minimum created *opportunities* for conflicts to arise, and created at the least the *appearance* of impropriety." *Id* at 806 (Emphasis original.)

The Court also held that: "We have held that some errors 'are so fundamentally pervasive that they require reversal without regard to the facts or circumstances of the particular case.' [A]n interested prosecutor is such an error." *Id* at 809-10 (internal citations omitted).

The Court continued: "[p]rosecution by someone with conflicting loyalties calls into question the objectivity of those charged with bringing a defendant to judgment," *Id* at 810 (internal citations omitted); "undermine[s] confidence that a prosecution can be conducted in [a] disinterested fashion," *Id* at 811; destroys "confidence in a proceeding in which this officer plays the critical role of preparing and presenting the case for the

defendant's guilt," *Id.*; "creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general," *Id.*; and "is an error whose effects are pervasive ... and therefore requires scrutiny of, the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision." *Id.* at 812.

Conclusion

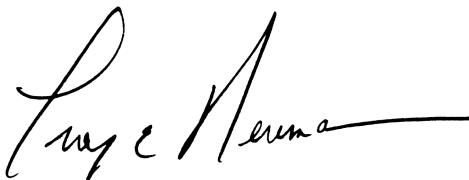
As the United States Supreme Court and the laws of the State of Kansas have made clear, the notion of an interested prosecutor is repugnant to the American system of justice and should be avoided at all costs. In this present case there is no reason – no **legitimate** reason – why Morrison and Foulston should continue with their "prosecution" of Tiller.

The laws of the State of Kansas anticipate that there will be times when prosecutors will have conflicts of interests and provides for substitute prosecutors to be appointed. Conflicts are a part of life and **if addressed** do not pose a threat to the prosecutor, and far more importantly do not pose a threat to the system of justice and the interests of the client that the prosecutor is sworn to protect.

However, when prosecutors are faced with a conflict of interest and when those prosecutors dig their heels in and insist on "prosecuting" through a conflict, such prosecutors cease to represent the interests of their clients and violate not only the rules governing their recusal, but the Kansas Rules of Professional Conduct, the rules of the Kansas Ethics Commission, and under color of state law violate the federally guaranteed civil rights of citizens of the State of Kansas, and the County of Sedgwick.

Tiller is alleged to have violated the laws of State of Kansas. It is neither necessary for you to "prosecute" nor "protect" him. Presumably, Tiller has defense counsel that will continue to represent his interests. You both have received financial and political support from Tiller. It is in the interest of justice that you both step aside and permit an un-conflicted, dis-interested prosecutor to handle the matters provided for by the § 22-3001 Citizen Petition.

Sincerely,

A handwritten signature in black ink, appearing to read "Troy Newman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Troy Newman

CC: Judge Paul Buchanan