

**IN THE DISTRICT COURT FOR
THE COUNTY OF SEDGWICK
EIGHTEEN JUDICIAL CIRCUIT
STATE OF KANSAS**

FILED _____

2008 JAN 7 PM 4 45

CLERK OF DIST. COURT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KS

IN RE GRAND JURY
PROCEEDINGS CONCERNING
GEORGE R. TILLER, MD

BY _____

Action No.07MR535

OPERATION RESCUE, and
MARK S. GIETZEN,

Movants / Intervenors.

**MOTION TO DISQUALIFY MORRISON AND FOULSTON
AND APPOINT DIS-INTERESTED PROSECUTORS**

COME NOW, THE MOVANTS, Operation Rescue and Mark S. Gietzen (hereafter collectively "Movants") and move this honorable court to disqualify Morrison and Foulston due to their conflicts of interest and perform the routine function of appointing disinterested prosecutors capable of fulfilling the duty of a prosecutor which is to conduct the grand jury investigation with "earnestness and vigor" while using "every available power to secure the defendant's conviction." *State v. Crume*, 22 P.3d 1057, 1067-68 (Kan. 2001); *State v. Manning*, 19 P.3d 84, 100 (Kan. 2001); and *Berger v. United States*, 295 U.S 78, 88 (1935) *Young v. United States*, 481 U.S. 787, 806-12 (1987).

In support of this Motion, Movants state the following:

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. Morrison and Foulston have sought and/or procured the dismissal and/or nullification of criminal charges against George R. Tiller. *Affidavit of Troy Newman*, ¶¶ 15.

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. *Affidavit of Troy Newman*, ¶¶ 10-17.

4. Morrison has resigned amid allegations that he used his office improperly to meddle in the investigation of George R. Tiller, the same George R. Tiller, that is the subject of the instant grand jury.

5. 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. *Affidavit of Troy Newman*, ¶¶ 10-13.

6. 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**.").

7. 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 whose 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.)

15. 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.

16. 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.

17. 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").

18. 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).

19. 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.)

20. The *Young* 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).

21. The *Young* 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 Morrison and Foulston to "prosecute" nor "protect" him. Presumably, Tiller has defense counsel that will continue to represent his interests. Morrison and Foulston both have received financial and political support from Tiller. It is in the interest of justice that Morrison and Foulston both step aside and permit an un-conflicted, dis-interested prosecutor to handle the matters provided for by the § 22-3001 Citizen Petition.

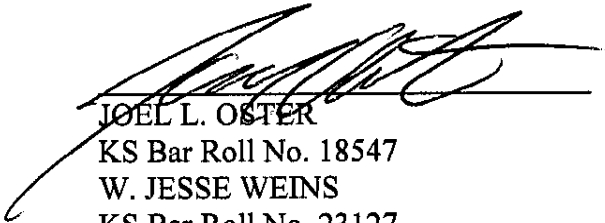
WHEREFORE, PREMISES CONSIDERED, the Movants respectfully request that this Honorable Court:

(1) pursuant to this Motion, disqualify Morrison and Foulston due to their conflicts of interest and perform the routine function of appointing disinterested prosecutors capable of fulfilling the duty of a prosecutor which is to conduct the grand

jury investigation with "earnestness and vigor" while using "every available power to secure the defendant's conviction;" or in the alternative;

(2) *sua sponte*, disqualify Morrison and Foulston due to their conflicts of interest and perform the routine function of appointing disinterested prosecutors capable of fulfilling the duty of a prosecutor which is to conduct the grand jury investigation with "earnestness and vigor" while using "every available power to secure the defendant's conviction;"

Respectfully submitted,



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CERTIFICATE OF SERVICES

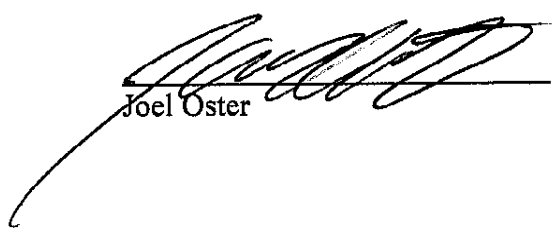
8th I hereby certify that a true and correct copy of the foregoing was sent this the day of January, 2008 via U.S. mail to the following:

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