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FILED _____

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

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

Action No.07MR535

OPERATION RESCUE, and
MARK S. GIETZEN,

Movants / Intervenors.

BY _____

**MOTION TO INTERVENE AS AN INTERESTED PARTY
FOR THE SOLE AND LIMITED PURPOSE OF RAISING THE ISSUE OF THE
RECUSAL OF INTERESTED PROSECUTORS MORRISON AND FOULSTON**

COME NOW, THE MOVANTS, Operation Rescue and Mark S. Gietzen (hereafter collectively "Movants") and move for leave to intervene in this action for the sole and limited purpose of moving 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); *Berger v. United States*, 295 U.S. 78, 88 (1935); and *Young v. United States*, 481 U.S. 787, 806-12 (1987).

In support of this Motion, Movants rely on the law and the facts together with the *Affidavit of Troy Newman*, President of Operation Rescue, attached as Exhibit A, and the *Affidavit of Mark S. Gietzen*, attached as Exhibit B.

REASONS WHY INTERVENTION SHOULD BE GRANTED

The Motion to Intervene should be granted both as a matter of right and as a matter of permission. Intervention in Kansas is governed pursuant to *K.S.A. §60-224*, which provides:

(a) *Intervention of right.* Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter substantially impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) *Permissive intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) When a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

I. The Motion to Intervene is Due to Be Granted as a Matter of Right Because the Citizens Petition Serves as Prima Facie Evidence of a Conflict of Interest Between the Prosecutor and the Client, the Citizens of Sedgwick County.

The Kansas Supreme Court has held that a motion to intervene is a matter addressed to the court's discretion; *American States Ins. Co v. Hartford Accident & Indemnity Co.*, 218 Kan. 563, 573 (Kan. 1976), and should be granted when (1) a timely application has been made, (2) the movant has a substantial interest in the subject matter, and (3) the movant's interest is not already adequately represented in the action. See *Hukle v. City of Kansas City*, 212 Kan. 627, 630 (Kan. 1973); *Herrmann v. Board of County Commissioners of Butler County*, 246 Kan. 152, 155 (Kan. 1990); *In re Petition of City of Shawnee for Annexation of Land*, 236 Kan. 1 at 11 (1984). All three factors are present in this case.

A. The Movants' Application is Timely.

The Movants have filed their motion for intervention prior to the impaneling of the grand jury. The defendant will not be prejudiced by the granting of the Motion to Intervene because he is not represented by the prosecutor but rather by his own defense counsel.

B. The Intervenors have a Substantial Interest in the Subject Matter.

The Movants have more than a substantial interest in the subject matter of the litigation.

(i) The Movants' Substantial Interest is Evident From the Fact that But For Their "Interest" There Would Not Be a Grand Jury in This Matter.

In short, the grand jury itself is the direct result of the Movants, exercising their interests by choosing to exercise their statutorily guaranteed right to petition the government for the impaneling of a jury to investigate a matter, pursuant to *K.S.A. §22-3001(2)*. See *Affidavit of Troy Newman* at ¶¶ 5-11, and *Affidavit of Mark S. Gietzen* at ¶¶ 5-11.

(ii) The Movants' Substantial Interest is Evident From the Fact that as Citizens of Sedgwick County and the State of Kansas they are the Clients of Morrison and Foulston.

The Movant's are citizens of Sedgwick County, in the State of Kansas. See *Affidavit of Troy Newman* at ¶¶ 1, and *Affidavit of Mark S. Gietzen* at ¶¶ 1. As such they are clients of Attorney General Paul Morrison and District Attorney Nola Foulston. 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.**"); *State v. Crume*, 22 P.3d 1057, 1067-68 (Kan. 2001) (prosecuting attorney's "paramount obligation is to the public trust").

Clearly, the clients in this case have an interest in the outcome of this litigation, and as discussed below and in the contemporaneously filed "Motion to Disqualify Morrison and Foulston and Appoint Dis-interested Prosecutors," the clients are not being presently represented by Morrison and Foulston.

C. The Movants' Interests Are Not Already Adequately Represented in this Action.

The fact that the clients are forced to take this drastic step of filing a motion to intervene is all the evidence that is needed to show that their interests are not being adequately represented by the "prosecutors." The clients have taken substantial steps to ensure that their interests are not represented by lawyers that have a glaring conflict with their interest.

From the very start of the §22-3001 Citizen Petition, the signers decided to include in their petition a requirement that their interests in this particular matter not be represented by Morrison and Foulston because of their specific financial and political relationship with the accused. *Affidavit of Troy Newman* at ¶¶ 5-10, and *Affidavit of Mark S. Gietzen* at ¶¶ 4-10.

Accordingly, the §22-3301 Citizen Petition provides:

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**.

(Emphasis added.)

To the knowledge of the clients, their attorneys have not responded to the above request that they recuse. *Affidavit of Troy Newman* at ¶¶ 12-13, and *Affidavit of Mark S. Gietzen* at ¶¶ 11. After having no response from the prosecutors regarding their §22-3301 request that the prosecutors recuse, Troy Newman then sent a letter to Morrison and Foulston again identifying the conflicts of interest in no uncertain terms, supported with legal authority, and again asked the prosecutors to step aside. *Affidavit of Troy Newman* at ¶¶ 12-13. Again, the "prosecutors" failed to respond. *Affidavit of Troy Newman* at ¶¶ 12-13

Sadly, the clients are forced to file this present motion to ask this Court to do what the prosecutors should have already done. The prosecutors' zeal to hang on to this prosecution in the face of their substantial conflicts of interest speaks volumes in support of this motion.

II. The Motion to Intervene Should be Granted Under the Guidelines for Permissive Intervention as Well

Even if the Movants had not satisfied the requirements for Movants as a matter of right, this Court still has the authority to grant permissive intervention in situations where: (1) "an applicant's claim or defense and the main action have a question of law or fact in common [and (2)] intervention will [not] unduly delay or prejudice the adjudication of the rights of the original parties." *K.S.A. §60-224(b)*.

Clearly, the claim of the Movants is the exact same question of law and fact as that occurring pursuant to the §22-3001 Citizen Petition because they are the ones that brought the §22-3001 Citizen Petition. In addition, intervention will [not] unduly delay

or prejudice the adjudication of the rights of the original parties because the grand jury is set to proceed and the accused does not require the counsel of the "prosecutors."

CONCLUSION

As is clear from the contemporaneously filed "Motion to Disqualify Morrison and Foulston and Appoint Dis-interested Prosecutors," Morrison and Foulston have no business being involved in the "prosecution" of their financial and political benefactor, i.e., Tiller, especially given the allegations that led to the resignation of Morrison, i.e., his alleged improper criminal involvement in the prosecution of Tiller.

Movants' do not seek to improperly insert themselves into the grand jury matter. However, Movants do seek to properly and specifically involve themselves in the matter of the §22-3001 Citizen Petition for the sole and limited purpose of asking this Court to disqualify Morrison and Foulston and appointed 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."

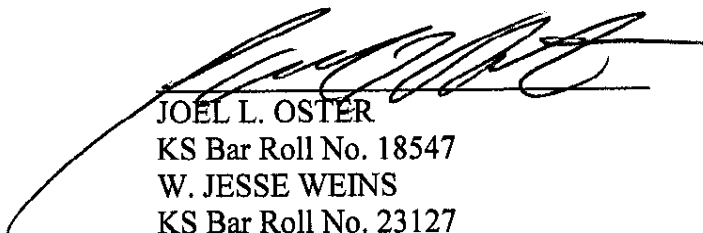
WHEREFORE, PREMISES CONSIDERED, the Movants respectfully request that this Honorable Court:

(1) grant this "Motion to Intervene as an Interested Party for the Sole and Limited Purpose of Raising the Issue of the Recusal of Interested Prosecutors Morrison and Foulston," or in the alternative;

(2) act *sua sponte* pursuant to *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), and

disqualify Morrison and Foulston from all further participation in the grand jury proceedings involving George R. Tiller.

Respectfully submitted,



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Attorneys for the Operation Rescue and Mark S. Gietzen, Movants

*Of Counsel, not admitted in the jurisdiction

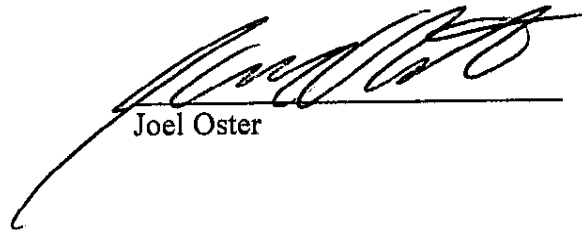
CERTIFICATE OF SERVICES

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:

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

Nola Foulston
Sedgwick County District Attorney
535 N. Main, 2nd Floor
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Joel Oster

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MARK S. GIETZEN,

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**AFFIDAVIT OF TROY NEWMAN
IN SUPPORT OF
MOTION TO INTERVENE**

Under penalty of perjury, the Affiant states as follows:

1. I, Troy Newman, am a resident of Towanda, Kansas.
2. I have personal knowledge of the facts contained in this Affidavit,
3. I am the President of Operation Rescue.
4. I am acting in my official capacity as President of Operation Rescue and not in my individual capacity.
5. Operation Rescue participated along with Kansas for Life in a Petition drive pursuant to K.S.A. §22-3001 to gather signatures in Sedgwick County for the purpose of impaneling a grand jury to investigate potential violations of Kansas law by the George R. Tiller, MD, the Petitioner in the above action.
6. Operation Rescue gathered signatures from a number of individuals including Mark S. Gietzen.

E* A

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OPERATION RESCUE, and
MARK S. GIETZEN,

Movants / Intervenors.

**AFFIDAVIT OF MARK GIETZEN
IN SUPPORT OF
MOTION TO INTERVENE**

Under penalty of perjury, the Affiant states as follows:

1. I, Mark Gietzen, am a resident of Wichita, Kansas.
2. I have personal knowledge of the facts contained in this Affidavit,
3. Operation Rescue participated along with Kansas for Life in a Petition Drive pursuant to K.S.A. §22-3001 to gather signatures in Sedgwick County for the purpose of impaneling a grand jury to investigate potential violations of Kansas law by the George R. Tiller, MD, the Petitioner in the above action.

4. I participated in the said petition drive by signing my name as, Mark S. Gietzen, to said petition.

5. I participated in the said petition drive and personally witnessed the signatures of at least forty (40) persons who signed their names to the said petition, as displayed in. *MM*

Ex B

6. I signed the petition because I believe that it is proper to investigate the question of whether Tiller has engaged in violations of the laws of the State of Kansas.

7. I believe that other signers signed the petition because they believe that it is proper to investigate the question of whether Tiller has engaged in violations of the laws of the State of Kansas.

8. I signed the petition in accordance with what I believe, is an exercise of my rights under color of Kansas law, namely § K.S.A. §22-3001.

9. Pursuant to the requirements of K.S.A. §22-3001, the Commissioner of Elections for Sedgwick County, William "Bill" Gale III, has certified that the legal requirements of the petition for the impaneling of a grand jury have been satisfied.

10. The Citizen Petition stated that neither Attorney General Paul Morrison nor Nola Foulston should serve as the prosecutor in this matter.

11. One of the reasons for this request is that both Morrison and Foulston have received campaign contributions from George R. Tiller and/or his wife.

11. Neither Morrison nor Foulston have responded to the request of the Petition that they not serve as prosecutor in this matter.

12. I seek to defend my right to petition as is guaranteed under the laws of the State of Kansas and of the Constitution and laws of the United States.

13. I seek to defend my right as a citizen of Sedgwick County, Kansas to have a dis-interested prosecutor that represent the interests of the public.

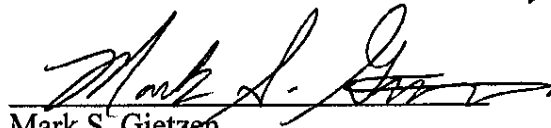
14. I have a strong desire to protect my interests and the interests of other similarly situated citizens who circulated and signed the K.S.A. §22-3001 petition impaneling a grand jury.

END OF AFFIDAVIT

DECLARATION

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this the 7 day of JANUARY, 2008.

A handwritten signature in black ink, appearing to read "Mark S. Gietzen", written over a horizontal line.

Mark S. Gietzen
Movant / Intervenor