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IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
OCT 01 2010
PATRICIA PRESLEY, COURT CLERK
by *Marilyn* Deputy

THE STATE OF OKLAHOMA,)
)
 Plaintiff,)
)
 v.)
)
 JEROME JAY ERSLAND,)
)
 Defendant.)

Case No. CF-2009-3199

DEFENDANT'S MOTION TO DISQUALIFY DISTRICT ATTORNEY

COMES NOW, the Defendant, Jerome Ersland, by and through his attorney of record Irven R. Box, and respectfully moves this Honorable Court for an order disqualifying the Oklahoma County District Attorney, and his office, from prosecution of his case, and further requests this Honorable Court appoint a special prosecutor. In support of this Motion, Counsel for Mr. Ersland offers the following:

STATEMENT OF FACTS

1. On May 19, 2009, Jerome Ersland was the victim of an attempted armed robbery at his place of employment. During the course of the robbery, Mr. Ersland defended himself and other employees and as a result, one of the robbers was shot and killed.
2. Subsequent to this incident, and close in time to the filing of the charge against Mr. Ersland, on May 27, 2009, the Oklahoma County District Attorney, Mr. Prater, called a press conference where upon he made certain statements regarding the culpability of

Mr. Ersland and released to the media and ultimately to the public, the videotape of the incident at the pharmacy.

3. The Honorable Tammy Bass-LeSure was assigned to preside over the matter and continued in that capacity until her recusal on August 31, 2010.

4. On or about July 12, 2010, the Oklahoma County District Attorney became aware of the possibility of a conflict between the Honorable Tammy Bass-LeSure and one member of Mr. Ersland's defense team. The possibility of a conflict was confirmed on or about July 22, 2010, where upon the Honorable Tammy Bass-LeSure gave an individual the names of three (3) attorneys, one of which was a member of Mr. Ersland's counsel, for potential representation. During the encounter between Honorable Tammy Bass-LeSure and the individual on July 22, 2010, the individual, assisted by the Oklahoma County District Attorneys' Office and law enforcement, recorded the audio portion of the meeting.

5. The individual had a matter pending before the Honorable Court, and the individual never contacted the member of Mr. Ersland's team for representation.

6. With this knowledge of the potential conflict having occurred as far back as July 12, 2009, the Oklahoma County District Attorney allowed the Honorable Tammy Bass-LeSure to continue to hear and rule upon motions related to the case.

7. On August 30, 2010, the Oklahoma County District Attorney and his first assistant, Scott Rowland, had an ex parte meeting with the Honorable Tammy Bass-LeSure, regarding what is believed to be the above conflict. Defense Counsel, to this time, is unaware of the extent and details of the potential conflict and has never been provided the audio recording or a transcript thereof.

8. Later the same day, the Oklahoma County District Attorney and his first assistant, Scott Rowland, had a second, ex parte meeting with the Honorable Tammy Bass-LeSure and the Honorable Patricia Parrish, regarding what is believed to be the same above conflict. At no time was any member of Defense Counsel for Mr. Ersland allowed to participate in these meetings.

9. The purpose of these meetings, ultimately, was to request the Honorable Tammy Bass-LeSure be recused from any further proceedings in this case. Regardless of the nature of the initial contact with the Honorable Tammy Bass-LeSure, there is the appearance the Oklahoma County District Attorney's motive was to seek recusal.

10. On August 31, 2010 Oklahoma County District Attorney formally sought and achieved the recusal of the Honorable Tammy Bass-LeSure.

11. Between the time the Oklahoma County District Attorney became aware of the possibility of a conflict and the recusal was approximately forty five (45) days. During this time, multiple judges were available for case reassignment.

12. On September 9, 2010, the Oklahoma County District Attorney, by memo to his office, excluded three (3) of Mr. Ersland's Counsel from entering the Oklahoma County District Attorneys' Office. The memo stated "Due to several personal and unprofessional attacks on one of our ADAs in the courthouse, I am baring [sic] three attorneys from our office."

ARGUMENT AND AUTHORITY

Popular elected officials have the ability to rally public sentiment for positions they espouse. *See* ABA House of Delegates, Report No. 100 (Aug. 1994)("Because of a prosecutor's special powers and responsibility, a prosecutor should use special care to avoid such publicity").

Mr. Prater's actions and comments throughout this matter serve to heighten public condemnation of Mr. Ersland and to further compromise Mr. Ersland's right to a fair and impartial jury that presumes him innocent. Mr. Prater has conducted himself in a manner, over the course of the case, leading to the appearance of a personal stake in the conviction of Mr. Ersland; not the fair administration of justice.

As the Supreme Court recognized in *Wheat v. United States*, 486 U.S. 153 (1988), in disqualifying defense counsel in that case, courts have an independent interest to ensure that criminal trials are conducted within the "ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Id.* at 160. Thus, defense counsel was disqualified in *Wheat* despite the Court's recognition of the significance of the defendant's right to counsel of choice. Numerous decisions recognize that courts have a duty to ferret out potential conflicts of interest and to disqualify counsel upon a showing of an actual conflict or the serious potential for conflict. *See, e.g. In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 250-51 (2d Cir. 1986) (noting that a court in deciding a disqualification motion should consider the public interest in the need to preserve the ethical standards of the legal profession and the integrity of the judicial system); *State v. Miller*, 2000 WL 305509 (W.Va.) (citing numerous cases both state and federal giving court discretion to disqualify counsel).

Admittedly, outrageous prosecutorial misconduct generally does not warrant dismissal of an indictment or suppression of evidence. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 255-56 (1980) (judicial supervisory power should not be invoked to dismiss a case even in the face of outrageous prosecutorial misconduct if only to correct harmless error); *but see United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988) (district court has discretion to suppress evidence gained through unethical action of prosecutor); *United States v. Treadwell*, 445 F. Supp. 959,

964 (N.D. Tex. 1978) (Dismissing indictment, the court noted that "[u]nflinching vigorous enforcement is central to a well ordered society; yet, the normative value of this vigor is dissipated by government conduct, even of lofty purpose, that presents the appearance of injustice.") Nevertheless, courts have the power to use contempt or disqualifications to sanction prosecutors who misbehave. *See, e.g. United States v. Lopez*, 4 F.3d 1455 (9th Cir. 1993) (contempt or referral to state disciplinary authorities appropriate sanction for violation of anti-contact provision of ethics rules); *Massameno v. Statewide Grievance Committee*, 663 A.2d 317 (Conn. 1995) (upholding power of judiciary to discipline prosecutor in the face of separation of powers claim).

Oklahoma law is not inapposite. Neither *Taylor v. State*, 1998 OK CR 64, 972 P.2d 864 (1998), nor any other Oklahoma case stands for the proposition that an Oklahoma judge is without power to enforce the ethical rules of this state or to disqualify a prosecutor if a sufficient showing has been made. In *State ex rel. Macy*, 1997 OK CR 2, 934 P.2d 343, for example, the court agreed that Oklahoma Rule of Professional Conduct Rule 3.7 did not mandate the disqualification of the entire Oklahoma County District Attorney's Office. In so holding, the court did not conclude that the prosecutor's office was not subject to disqualification or to the ethical standards spelled out by the Oklahoma Rules of Professional Conduct. Rather, the plain language of Rule 3.7 (b) allowed assistant district attorneys from Oklahoma County, other than the two lawyers likely to be witnesses, to prosecute the retrial. In other words, there was nothing unethical in the conduct of the members of the district attorney's office such that disqualification was surrendered.

An Oklahoma judge has the authority to disqualify district attorneys when the court determines the district attorney has a relationship or interest in the subject matter or to the parties

in the case such that disqualification is warranted. *Lattimore v. Vernor*, 288 P. 463 (Okla. 1930). Case law also establishes that this judicial determination is based on the court's review of individual facts of the case and that the court will look to ethical rules as well as state law in making the determination. *Crawford v. State*, 840 P.2d 627 (Okla. Crim. App. 1992). Unquestionably, if the defendant is able to make the requisite showing that Mr. Prater violated professional standards, he is subject to disqualification. The Court has the statutory authority to appoint a special prosecutor upon disqualification of the Oklahoma County District Attorney and his office. *See* 19 O.S. 215.4 (2008).

Oklahoma Rule of Professional Conduct 1.7 (b) demands that a lawyer's personal interest not interfere with a lawyer's representation. Prosecutors in our adversary system have a unique role, beyond that of the usual advocate, which demands a higher degree of impartiality and objectivity. *See Berger v. United States*, 295 U.S. 78 (1935). "The responsibility of a public prosecutor differs from that of a usual advocate; his duty is to seek justice, not merely to convict." Ethical Commission 7-13 of Canon 7 of the ABA Model Code of Professional Responsibility (quoted in *Young v. United States ex rel. Vuitton et fils, S.A.*, 481 U.S. 787, 803 (1987)); Oklahoma Rules of Professional Conduct Rule 3.8, cmt.; ABA Standards for Criminal Justice, Standard 3-1.2 (b) and (c).

Mr. Prater has given the appearance of a personal stake in the conviction of Mr. Ersland. Mr. Prater, called a press conference where upon he made certain statements regarding the culpability of Mr. Ersland and released to the media and ultimately to the public, the videotape of the incident at the pharmacy. There was no legitimate purpose for the release of the video other than to stir public sentiment against Mr. Ersland. The release of the video did nothing to further the administration of justice. Mr. Prater's personal interests in gaining a conviction, at all costs,

is adverse to that of the State; such personal interest is contrary to equal and impartial justice for Mr. Erslund.

As the Supreme Court of Louisiana observed, "[w]hen the district attorney is personally interested in gaining a conviction, his interest is adverse to that of the State, as the State demands no victims seeking equal and impartial justice only, it being just as much the duty of the prosecution to see that no innocent man suffers as it is to see no guilty one escapes." *State v. Cox*, 167 So.2d.352, 358 (1964), citing *State v. Marcotte*, 86 So.2d 186 (1956). As the *Cox* court further noted:

it is commendable for prosecuting attorneys to be deeply interested in enforcing the law and to use their utmost ability and knowledge to see that the state is properly represented, but it is also their duty to keep in mind the fact that the duty of a prosecuting attorney is not that of a partisan advocate, but it is his duty to treat the defendant fairly under all circumstances and to conduct trials on the part of the state in such a way as to leave no room for criticism as to the methods used in trying to secure convictions. It is much more desirable to retain confidence in the purpose of the courts and other officers to enforce the law by fair and just means than to try to secure convictions in all cases at all hazards.

Cox, 167 So.2d at 357, quoting *State v. Nicholson*, 7 S.W.2d 375 (Mo. Ct. App. 1928).

Thus, cases from other jurisdictions reflect the responsibility and authority of a judge to disqualify a prosecutor when that prosecutor has such a personal interest in the case that it interferes with the prosecutor's duties, including "the impartial prosecution of those accused of crime and the duty to see that an accused is accorded a fair trial." *Lux v. Commonwealth*, 484 S.E.2d 145, 148 (Va. Ct. App. 1997). Mr. Prater's course of conduct, throughout this matter, as the facts point out above, indicate a desire for conviction that is opposite to his duties as the elected prosecutor. It is within the sound discretion of the judge to disqualify a prosecutor when that prosecutor has a personal interest in a case of such a nature that it prevents that prosecutor

from according the defendant the fair treatment to which he is entitled. *Cole v. State*, 2 S.W.3d 833 (Mo. Ct. App. 1999); *See also State v. White*, 2000 WL 73143 (Conn. Super. Ct. 2000).

Fair treatment for Mr. Ersland demands not only that Mr. Prater and his staff utilize their discretion fairly and evenhandedly, but also that they refrain from making improper statements, turn over all exculpatory evidence, argue the case within ethical bounds, and comply with all of the other special duties imposed on a public prosecutor. Mr. Prater's public statements and the release of the videotape, as well as the other incidents occurring in this case, especially the issues surrounding the ex parte communications and the timing of the ultimate recusal of the Honorable Tammy Bass-LeSure, reveal a man driven by a desire to have a conviction at any cost; not justice. The issue of the barring of three (3) of Mr. Ersland's Counsel from the Oklahoma County District Attorney's Office exemplifies the nature and extent of emotional and personal interests of Mr. Prater. Both Mr. Ersland and the public have a right to a prosecutor who is guided by principles of justice and an appropriate ethical compass, not one blinded by the media spotlight and his own animosity. *See State v. Snyder*, 237 So.2d 392, 395 (La. 1970); *People v. Choi*, 80 Cal. App. 4th 476, 94 Cal. Rptr.2d 922 (2000).

If the Court does determine that Mr. Prater should be disqualified based on violations of the Oklahoma Rules of Professional Conduct and the appearance of his personal interests in prosecution toward Mr. Ersland, then the court has the discretion to disqualify the entire Oklahoma County District Attorney's Office. *See People v. Choi*, 80 Cal. App. 4th 476., 94 Cal. Rptr. 2d 922 (2000). As the *Choi* court observed, assistant district attorneys serve at the pleasure of the District Attorney who can hire, promote, and fire them. If, as in *Choi*, the District Attorney's personal animosity toward the defendant based on the death of his friend constituted a conflict requiring his disqualification, his bias could easily influence those who work for him.

Therefore, the court was justified in disqualifying the entire office. *See also People v. Lepe*, 164 Cal. App. 3d 685, 689, 211 Cal. Rptr. 432 (1985); *People v. Doyle*, 406 N.W.2d 893 (Mich. Ct. App. 1987). *State ex rel. Macy v. Owens*, 1997 OK CR 2, 934 P.2d 343, implicitly recognizes the possibility of disqualifying the entire District Attorney's Office noting that "the imputed disqualification provision in Rule 1.10 is also only applicable under rules which the parties agree do not apply to Case No. CF-89-4717." *Id.* at 345.

Unlike the ethical provision at issue in *Macy*, however, Rule 1.10 is applicable to a violation of Rule 1.7. Accordingly, Oklahoma law does provide for the disqualification of an entire office when the head of that office is disqualified, especially in a case such as this where the District Attorney's personal stake renders him unfit to act in a manner consistent with his responsibility to ensure that Mr. Ersland receives a fair trial.

Mr. Prater made statements and published evidence to the press and the public in violation of the Oklahoma Rule of Professional Conduct 3.6(a), "Trial Publicity," which provides:

A lawyer who is participating or has participated in the investigation or litigation of a matter *shall not make an extrajudicial statement that a reasonable lawyer would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have an imminent and materially prejudicial effect on the fact finding process in an adjudicatory proceeding* relating to the matter and involving lay fact-finders or the possibility of incarceration.

(emphasis added). Paragraph [6] of the Comments to that Rule notes that "a lawyer should aspire to refrain from making statements that pose a substantial likelihood of prejudicing the fairness of a proceeding." The Comments to that Rule further state "[a] lawyer should be especially mindful of the likelihood of such effects when the lawyer's statement is reasonably likely to be disseminated by means of public communication."

The videotape of the scene of the shooting was disseminated to the press and the public at the time Mr. Prater filed a charge against Mr. Ersland. The release of the videotape was certainly "reasonably likely to be disseminated by means of public communication" and was not released to further any legitimate law enforcement goal.

Mr. Prater's statements and the release of the videotape to the public were made in direct violation of the Oklahoma Rule of Professional Conduct 3.8, "Special Responsibilities of a Prosecutor," which states:

The prosecutor in a criminal case shall: ... (f) except for statements that are necessary to inform the public of the nature and extent of prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused...

The Committee Comment [5] to that Rule makes clear that Mr. Prater's statements and the release of the videotape are precisely the type of extrajudicial comments the Rule was designed to prevent.

In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused.

Paragraph (f) prohibits such comments. Not only has Mr. Prater engaged in unethical conduct which mandates his disqualification as well as that of any attorneys under his supervision, but he has demonstrated such an emotionally personal stake in the outcome of this case that his disqualification is warranted for that reason as well. Courts around the country universally recognize that a prosecutor's duty is to obtain justice, not merely convict.

While the prosecutor must prosecute vigorously, he must also prosecute impartially and exercise his discretion in an evenhanded manner. In those instances in which a prosecutor has

had such an intense emotional involvement in the case or such an emotional stake in the prosecution that there is a reasonable possibility that the prosecutor will not exercise his discretion even-handedly, then the court may disqualify that prosecutor and his entire office. See *People v. Eubanks*, 14 Cal. 4th 580, 927 P.2d 310, 314-15 (1997) ("[A] public prosecutor must be free of special interests that might compete with the obligation to seek justice in an impartial manner."); *People v. Conner*, 34 Cal. 3d 141, 666 P.2d 5 (1983) (in banc) (finding a conflict exists whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an even-handed manner because of emotional bias; entire district attorney's office disqualified); *People v. Superior Court (Greer)*, 19 Cal. 3d 255, 561 P.2d 1164 (1977) (prosecutorial bias against a defendant may serve as grounds for disqualification); *People v. Doyle*, 406 N.W.2d 893 (Mich. Ct. App. 1987) (prosecutor and entire staff disqualified from case); *People v. Mayhew*, 600 NW2d 370 (Mich. Ct. App. 1999) (disqualification may be appropriate where prosecutor has a personal, financial or emotional interest in the litigation).

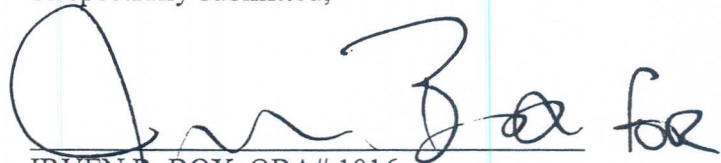
Unlike the Honorable Tammy Bass-LeSure, who disqualified herself to ensure her own personal feelings and involvement did not create the appearance of impropriety or interfere with the fair administration of justice, Mr. Prater has chosen to go forward with a personal agenda in his prosecution of Mr. Ersland. Mr. Prater's intense desire to 'prosecute' Mr. Ersland violates the requirements demanded by the Oklahoma Rules of Professional Conduct and the U.S. Constitution. Thus, Mr. Prater's disqualification is warranted. Moreover, when the District Attorney himself is disqualified because of his stake in the prosecution, case law demands that his assistants also be disqualified. See, e.g., *People v. Conner*, 34 Cal. 3d 141, 666 P.2d 5 (1983)

(in bane); *People v. Doyle*, 406 NW2d 893 (Mich. Ct. App. 1987); *People v. Garcia*, 698 P2d 801 (Col. 1985).

CONCLUSION

For the reasons set forth above and in Mr. Ersland's motion, this Court should disqualify the Oklahoma County District Attorney, and his office, from prosecution of this case. This Court has the power and should appoint a special prosecutor for all further proceedings.

Respectfully submitted,

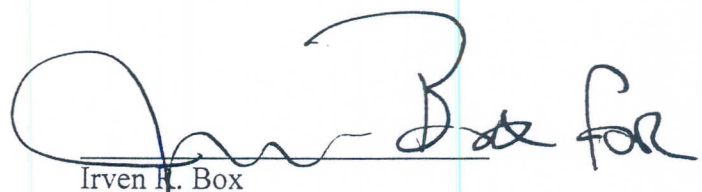


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CERTIFICATE OF SERVICE

This is to certify that on this 1st day of October, 2010, a true and correct copy of the above and foregoing document was hand delivered to:

David W. Prater
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