

IN THE CIRCUIT COURT FOR THE
TWENTY-SECOND JUDICIAL CIRCUIT
CITY OF ST. LOUIS
STATE OF MISSOURI

STATE OF MISSOURI,)	
)	
Plaintiff,)	
)	Cause No. 1822-CR00642
v.)	
)	
ERIC GREITENS,)	
)	
Defendant.)	

DEFENDANT’S MOTION TO DISQUALIFY RONALD S. SULLIVAN

Eric Greitens files this motion to disqualify Ronald S. Sullivan, Jr. for violations of his rights as a defendant and for violations of Missouri law. In support of his motion, Eric Greitens states as follows:

Introduction

Above all, a defendant is entitled to a “fair and impartial trial,” and, as the Missouri Supreme Court explained, that is “always best afforded the accused *when the prosecution is conducted by the state’s accredited representative*, who, no matter how vigorously [s]he may prosecute, does not, or at least should not, under [her] oath, lose sight of the fact that the accused is entitled to a fair trial.” *State v. Harrington*, 534 S.W.2d 44, 50 (Mo. 1976) (emphasis added). This right cannot be “sacrifice[d]” to the prosecutor’s “pride of professional success.” *Id.* at 49 (quoting *Biemel v. State*, 71 Wis. 444, 37 N.W.244, 245-48 (1888)).

Likewise, the United States Constitution’s Fourteenth Amendment prohibits a prosecutor from treating an individual “differently from others similarly situated.” *Village of Willowbrook v.*

Olech, 528 U.S. 562, 564 (2000). “[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” *Id.*

Without justification or explanation, in an unprecedented maneuver, and contrary to multiple state laws, Circuit Attorney Kimberly M. Gardner has attempted to appoint Ronald S. Sullivan, Jr. to prosecute this case. Putting aside the facts that Sullivan is not licensed to practice in Missouri and has no prosecutorial experience, given Ms. Gardner’s position as the highest prosecutor in St. Louis, she must know that her own appointment of Sullivan to prosecute this case violates Missouri law. Sullivan’s well-publicized and active simultaneous criminal defense practice makes his appointment as a “Special Circuit Attorney” a criminal offense under § 56.360, RSMo.^{1,2}

Ms. Gardner similarly should know she possesses no authority to appoint a “Special Prosecutor.” Under Missouri law, appointment of a special prosecutor is made only by the Court—not Ms. Gardner—and only when the Circuit Attorney has a conflict of interest. In those instances where a special prosecutor is appointed by the court, the Circuit Attorney is completely disqualified from prosecuting the case. Notably, under Missouri law, it is also the Court—not the Circuit Attorney—who determines the fee to be paid to a court-appointed special prosecutor. And, even under such court appointment, it is a misdemeanor for a special prosecutor to maintain a simultaneous criminal defense practice such as Sullivan’s.

¹ His appointment to this case is a criminal offense which should be reported to the Missouri Office of Chief Disciplinary Counsel.

² All statutory references are to RSMo, 2017 unless otherwise stated.

Furthermore, Ms. Gardner's "Consultant Agreement" authorizing Sullivan to hire assistant attorneys at his own expense flies in the face of unmistakable precedent from the Supreme Court of Missouri banning the employment of private prosecutors.

As explained in detail below, Ms. Gardner's appointment of Sullivan clearly violates Missouri law, is an overreach of her authority as Circuit Attorney, threatens Governor Greitens's right to a fair and impartial trial, and violates the Governor's Fourteenth Amendment right not to be treated "differently from others similarly situated." For all these reasons, Sullivan must be disqualified.

In order to avoid bringing embarrassment to either Sullivan or Ms. Gardner's office, defense counsel brought these issues, including the violation of criminal law, to the attention of the Circuit Attorney. However, she declined to voluntarily correct the situation.

Factual Background

On February 22, 2018, St. Louis Circuit Attorney Kimberly M. Gardner personally signed and filed an indictment charging Governor Greitens with one count of Invasion of Privacy, a Class D Felony, based on an incident that allegedly occurred on March 21, 2015.

One week later, on March 1, 2018, Ms. Gardner and Ronald S. Sullivan, Jr. (who lives outside Missouri) signed a "Consultant Agreement" agreeing that "Consultant will provide the service of Special Prosecutor for State of Missouri vs. Eric Greitens, Case No. 1822-CR00642, Div 16." at "a pro-rated monthly fee of \$12,000," not to include reimbursement of travel and lodging expenses. *See Consultant Agreement*, available at Joel Currier, *Greitens Prosecutor From Harvard Could Cost Taxpayers Up To \$120,000, Agreement Says*, St. Louis Post Dispatch (March 14, 2018), <http://www.stltoday.com/news/local/crime-and-courts/greitens-prosecutor-from->

harvard-could-cost-taxpayers-up-to-agreement/article_723f258c-7591-5632-bad3-2cf74911f92b.html, attached as Ex. A.

On March 5, 2018, St. Louis Circuit Attorney Kimberly M. Gardner filed a Motion for Admission *Pro Hac Vice* pursuant to Rule 9.03 seeking the admission of Ronald S. Sullivan, Jr. (who is not licensed as an attorney in Missouri), as a visiting attorney, “to appear in the instant litigation as counsel of record.”³

On March 6, 2018, a document signed by Ms. Gardner and Sullivan was filed with the Circuit Clerk’s office, certifying that Ms. Gardner had appointed Sullivan a “Special Assistant Circuit Attorney for the Twenty-Second Judicial Circuit Court of the City of St. Louis Missouri.” *See Sullivan Appointment*, attached as Ex. B. The document cites no statutory authority for the appointment of “independent contractor” Sullivan as a prosecutor in this case.

On March 12, 2018, the State filed three pleadings in this case “by and through Ronald S. Sullivan Jr., Special Prosecutor,” and submitted by “Ronald S. Sullivan Jr., Special Prosecutor.”

Meanwhile, also on March 12, 2018, “Special Prosecutor” Sullivan appeared in U.S. District Court in Connecticut as a retained criminal defense counsel for defendant David Demos, a former Cantor Fitzgerald trader, to argue multiple motions in a criminal securities fraud case set for jury trial on April 23, 2018. *See U.S. v. Demos*, 3: 16-cr-0220-AWT-1 (D. Conn), ECF No. 241, attached as Ex. C.

³ The Gardner-Sullivan Consultant Agreement requires Sullivan to “comply with the provisions of the Missouri Supreme Court, Rule 9.02. . . .” Rule 9.02 explains that, “A *nonresident attorney who is a member of The Missouri Bar* and maintains an office in Missouri for the practice of law may practice law and do a law business as in the case of a resident attorney.” However, according to an online search, Sullivan is not a member of the Missouri Bar.

On March 14, 2018, two days after Sullivan argued in Connecticut federal court on behalf of a securities fraud defendant, the State filed another pleading in this case, “by and through Ronald S. Sullivan Jr., Special Prosecutor,” and submitted by “Ronald Sullivan, Special Assistant.”

On March 16, 2018, the Circuit Attorney represented to defense counsel that Sullivan would be attending the deposition of Investigator William Tisaby (Enterra) on March 19, 2018.⁴

Demonstrating the dangers to Governor Greitens in this case of the use of a non-prosecutor without a Missouri license, in one of the filings “by and through Ronald S. Sullivan Jr., Special Prosecutor,” Sullivan refused to provide discovery materials relying on the claim that the materials were protected by the attorney work product privilege because Maurice Foxworth was an Assistant Circuit Attorney. It has been well-publicized that Foxworth is not in fact an attorney licensed to practice law. When this glaring error was raised by defense counsel, Chief Assistant Circuit Attorney Robert Dierker readily admitted Foxworth was not an attorney licensed to practice law and not an Assistant Circuit Attorney.

Ms. Gardner’s Appointment Of Sullivan As An Assistant Circuit Attorney Is A Criminal Offense Under RSMo 565.360

The Supreme Court of Missouri, in an *en banc* decision, stated clearly:

The Legislature of this State long ago enacted statutes which spell out the qualifications for public prosecutor (§ 56.010, RSMo 1969) and mandatorily direct that the prosecuting attorney ‘shall commence and prosecute’ the criminal actions in his county (§ 56.060, RSMo 1969). Authority is granted for the appointment of assistant prosecuting attorneys (§ 56.240, RSMo 1969) and further assistance from the state’s attorney general is made available (§ 27.030, RSMo 1969). *Provision is found for the court to appoint an attorney to prosecute if the prosecuting attorney is disqualified (§ 56.110, RSMo 1969) or sick (§ 56.120, RSMo 1969) and to fix the fee of such appointees, taxable as costs (§ 56.130, RSMo 1969). Further, the prosecuting attorney and assistant prosecuting attorney are specifically barred by statute from accepting employment by a defendant in a criminal case ‘during the term of office’ (§ 56.360, RSMo 1969).*

⁴ On March 16, 2018, in an attempt to meet and confer before filing this motion, defense attorneys communicated to the Circuit Attorney’s Office their intent to file this motion. In response, the Circuit Attorney’s Office maintained that the appointment of Sullivan to prosecute this case is appropriate.

State v. Harrington, 534 S.W.2d 44, 48 (Mo. 1976) (emphasis added).

Specifically, § 56.360, provides:

It shall be unlawful for *any prosecuting attorney or circuit attorney, or any assistant prosecuting attorney or any assistant circuit attorney*, during the term of office for which he shall have been elected or appointed, to accept employment by any party *other than the state of Missouri in any criminal case or proceeding*; provided, that nothing in this section shall be deemed to preclude the officers specified in this section from engaging in the *civil practice of law*. *Any violation of the provisions of this section shall be deemed a misdemeanor.*

§ 56.360 (emphasis added). Thus, as Ms. Gardner surely knows, Sullivan is precluded from engaging in the criminal practice of law during his term of office as assistant circuit attorney.

Contrary to the requirements of § 56.360, Sullivan is submitting briefs in multiple criminal cases and being of record for criminal defendants at present, including being of record as a criminal defense attorney in filings in criminal cases submitted on the day his appointment in this case was announced, and as recently as March 9, 2018, in a case that is set for jury trial on April 23, 2018. See *U.S. v. Demos*, 3: 16-cr-0220-AWT-1 (D. Conn), ECF Nos. 29, 225-27, 229-30, 236-37, 239-40. Furthermore, the courtroom minutes in *U.S. v. Demos* reflect that Sullivan appeared in court arguing motions as recently as March 12, 2018. Ex. C.

Sullivan is associated with a law firm in Florida that has an active criminal defense practice. *Ronald S. Sullivan, Jr., Litigation Consultant*, <https://www.baezlawfirm.com/our-firm/ronald-s-sullivan-jr/> (last visited March 17, 2018).

Sullivan also is the Director of the Harvard Criminal Justice Institute which defends multiple clients in various criminal proceedings. *Ronald S. Sullivan Jr., Clinical Professor of Law, Director, Criminal Justice Institute*, <http://hls.harvard.edu/faculty/directory/10870/Sullivan> (last visited March 17, 2018); *Criminal Justice Institute, Ronald S. Sullivan Jr., Director*, <http://clinics.law.harvard.edu/cji/staff/> (last visited March 17, 2018).

Ms. Gardner is authorized to appoint assistant circuit attorneys only under § 56.540, which provides that the circuit attorney may appoint “such additional assistant circuit attorneys as the circuit attorney deems necessary for the proper administration of his office.” § 56.540. In the document filed on March 6, 2018, Sullivan signed a sworn statement, tracking the language in § 56.550, and agreeing to “support the Constitution of the United States and the Constitution of Missouri, and to faithfully demean myself in the position of *Special Assistant Circuit Attorney*” (emphasis added). Ms. Gardner’s appointment of Sullivan as a “special” assistant circuit attorney, presumably under § 56.445, does not void the statutory requirement under § 56.360 that Sullivan not be employed by any party other than the state of Missouri in any criminal proceeding. Rather, § 56.445 simply provides that up to seven of the assistants provided for in § 56.540 may be designated as “special assistant circuit attorneys” who “may be allowed to engage in the *civil practice of law*” (emphasis added).⁵ Under § 56.360, “*any assistant circuit attorney*”—which includes those who have been designated as “special” assistant circuit attorneys—are prohibited from engaging in the *criminal practice of law* on behalf of “any party *other than the state of Missouri*.”

Because Sullivan is employed by a party other than the state of Missouri in criminal cases or proceedings—including his employment by defendant Demos and others—Ms. Gardner’s appointment of Sullivan to prosecute this case violates § 56.360. This violation of § 56.360 is a misdemeanor criminal offense.

⁵ § 56.445 also specifies that, “It shall be the duty of the circuit attorney of the City of St. Louis and of his assistants and associates to *devote their entire time and energy to the discharge of their official duties*.” Sullivan is a professor at Harvard Law School, serves as Faculty Dean, and has an active criminal defense practice currently preparing for a high-profile jury trial beginning on April 23, 2018. He cannot possibly devote his “entire time and energy to the discharge of [his] official duties” as a special assistant circuit attorney.

Ms. Gardner Is Without Authority To Appoint A “Special Prosecutor”

Under Missouri law, only a court is authorized to appoint a “Special Prosecutor,” and only upon a showing—customarily from a defendant, or when self-reported by the prosecutor—that the Circuit Attorney is disqualified from prosecuting the case due to a conflict of interest. *See, e.g., State v. Eckelkamp*, 133 S.W.3d 72, 74 (Mo. App. E.D. 2004) (“[T]he power to appoint a special prosecutor is not limited by the statutory grounds specified in Section 56.110; rather, it is a power inherent in the court, to be exercised in the court’s sound discretion, when for any reason, the regular prosecutor is disqualified.”).

Like an assistant circuit attorney, a court-appointed special prosecutor also must not represent a party other than the state of Missouri in any criminal case, pursuant to § 56.360, the violation of which is deemed a misdemeanor. Specifically, § 56.110 provides:

If the prosecuting attorney and assistant prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his or her office, or shall be related to the defendant in any criminal prosecution, either by blood or by marriage, *the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause. Such special prosecutor shall not otherwise represent a party other than the state of Missouri in any criminal case or proceeding in that circuit for the duration of that appointment and shall be considered an appointed prosecutor for purposes of section 56.360.*

§ 56.110. Thus, even if the Circuit Attorney is relying upon § 56.110 for Sullivan’s appointment to this case—which appointment would be beyond Ms. Gardner’s authority—such appointment of Sullivan to prosecute this case still would violate § 56.360 and constitute a misdemeanor.

Notably, if this court were to appoint a special prosecutor to this case, it is the court that would determine Sullivan’s fee—not a consultant agreement with the Circuit Attorney providing a \$12,000 monthly fee. Under § 56.130, a court-appointed special prosecutor, “shall receive a reasonable fee for each case prosecuted to be fixed by the court and to be taxed and paid as other

costs in criminal cases.” See *Jenkins & Kling, P.C. v. Missouri Ethics Comm’n*, 945 S.W.2d 56, 60 (Mo. App. E.D. 1997) (holding in a case where a special prosecutor was appointed by the circuit court pursuant to § 56.110, as required by statute, to investigate a referral from the MEC regarding possible campaign finance violations, the “sole recourse for compensation” of the special prosecutor’s services, “is under § 56.130. He has no claim for compensation against the Commission under a theory of contract, implied contract, quantum meruit, or other statutory provision.”).

Ms. Gardner’s “Consultant Contract” Allowing The Employment Of Private Prosecutors Violates Missouri Law

In violation of longstanding Missouri law, Ms. Gardner is initiating the employment of private prosecutors in this case. Ms. Gardner’s “Consultant Agreement” allows Sullivan to “employ additional attorneys, with the permission of the Circuit Attorney, and at no expense to the City of St. Louis Circuit Attorney’s Office . . . Any aide or assistant to the Consultant . . . *shall be compensated by Consultant.*” Ex. A. Under Missouri law, Ms. Gardner and Sullivan cannot contractually agree to the employment of privately paid assistant circuit attorneys or assistant special prosecutors. Such a private agreement would enable any such assistant attorney to skirt all statutory requirements governing the Circuit Attorney’s Office including 56.110 (conflict of interest requiring court appointment of special prosecutor), 56.360 (misdemeanor offense for employment in any other criminal case), and 56.540 (authority to appoint assistant circuit attorneys). This means that, with Ms. Gardner’s permission, Sullivan could employ assistant prosecutors who have a conflict of interest or are employed in other criminal cases.⁶

⁶ It is possible that Sullivan could employ assistant prosecutors funded by George Soros, which would be a clear and unchecked conflict of interest. In the first paragraph of his Harvard biography, Sullivan notes that he is “a founding member and Senior Fellow of the Jamestown Project.” Ronald S. Sullivan Jr., *Clinical Professor of Law, Director, Criminal Justice Institute*, <http://hls.harvard.edu/faculty/directory/10870/Sullivan> (last visited March 12, 2018). The Jamestown

For this reason, as the highest prosecutor in St. Louis should know, the Missouri Supreme Court has emphatically forbidden the use of private prosecutors to “assist” the elected public prosecutors because such a practice is “fundamentally unfair.” *Harrington*, 534 S.W.2d at 48 (“We believe, and hold, that the practice of allowing private prosecutors, employed by private persons, to participate in the prosecution of criminal defendants, is inherently and fundamentally unfair, and that it should not be permitted on retrial of this case or in any case tried after publication of this opinion in the Southwestern Reporter.”). Rather, “[o]ur scheme contemplates that an impartial [representative] selected by the electors of the county shall prosecute all criminal actions in the county unbiased” *Id.* at 49 (quoting *State v. Peterson*, 195 Wis. 351, 218 N.W. 367, 369 (1928)). This is because the “modern day prosecutor wields the power of the State’s investigatory force, decides whom to indict and prosecute, decides what evidence to submit to the court, negotiates the State’s position in plea bargaining and recommends punishment to the court.” *Id.* at 50. And, given the prosecutor’s remarkable power and grave responsibilities, the Court concluded: “The entry of a private prosecutor into a criminal prosecution exposes all of these areas to prejudicial influence. We consider such exposure intolerable.” *Id.* at 50.

The Circuit Attorney’s hiring of a private attorney to prosecute Governor Greitens presents all the issues identified as important by the Supreme Court: the private attorney has been hired specifically to prosecute one defendant; the private attorney has no apparent prosecutorial experience; the private attorney has a unique compensation arrangement which produces a

Project was funded with a \$100,000 grant from George Soros's Open Society Foundations, according to Soros's own website at www.opensocietyfoundations.org. Soros is a person of immense wealth, a primary supporter of the Circuit Attorney, and a primary political opponent of the defendant and his political party. The employment of assistant prosecutors paid by defendant’s political adversary is a clear conflict of interest, and it serves as an example of why the Missouri Supreme Court has banned private prosecutors as “fundamentally unfair” because the exposure to “areas of prejudicial influence” is “intolerable.” *Harrington*, 534 S.W.2d at 48, 50.

perceived incentive to push the case to trial regardless of the evidence (or lack thereof); the private attorney has a financial alignment with an adversary of the defendant (he is a Senior Fellow of an organization funded by the defendant's political enemy) and there are no protections against the private attorney's bias or prejudice against the defendant resulting from personal financial connections and other ties. And in this case, the private attorney is authorized to hire other private attorneys to assist him at his private expense. *See Harrington*, 534 S.W.2d at 48 (prohibiting private prosecutors and explaining that, in contrast to public prosecutors, "the private prosecutor need not be a resident of the county, his compensation comes from private sources rather than public funds, he is not subject to disqualification, and he is free to represent the defendant in the next criminal case on the docket.").

Both the United States Supreme Court and the Missouri Supreme Court have long highlighted the public prosecutor's distinct and necessary role. The United States Supreme Court relied on this unique responsibility in *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987):

The United States Attorney 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 *nor innocence suffer*.

Id. at 803 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935) (emphasis added)). Likewise, the Missouri Supreme Court focused on the vast differences between a private attorney and public prosecutor in prohibiting the use of private prosecutors. In particular, the Court explained that the prosecutor "is the people's representative, and *his primary duty is not to convict but to see that justice is done*. The prosecutor is an officer of the state who should have *no private interest in the prosecution* and who is charged with seeing that the criminal laws of the state are honestly and

impartially administered, *unprejudiced by any motives of private gain.*” *Harrington*, 534 S.W.2d at 49 (emphasis added).

The Circuit Attorney’s attempt to privatize this prosecution is a blatant departure from the role of public prosecutor and the established procedures and protections. Above all, the defendant is entitled to a “fair and impartial trial,” and, as the Missouri Supreme Court explained, that is “always best afforded the accused *when the prosecution is conducted by the state’s accredited representative*, who, no matter how vigorously he may prosecute, does not, or at least should not, under his oath, lose sight of the fact that the accused is entitled to a fair trial.” *Id.* at 50 (emphasis added). This right cannot be “sacrifice[d]” to the prosecutor’s “pride of professional success.” *Id.* at 49 (quoting *Biemel v. State*, 71 Wis. 444, 37 N.W.244, 245-48 (1888)). Allowing Sullivan to participate in this targeted prosecution violates Governor Greitens due process right to an impartial prosecutor. *See, e.g., Crowe v. Smith*, 151 F.3d 217, 227-28 (5th Cir. 1998) (appointment of interested private attorney to prosecute criminal contempt violated defendants’ “right to due process by denying them an independent and impartial prosecutor”); *cf. Young*, 481 U.S. at 814 (“Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.”).

Conclusion

The Circuit Attorney has grossly exceeded her statutory authority and violated the law by contractually agreeing that an active criminal defense attorney, openly funded by defendant’s

political opponent, may not only prosecute the defendant, but may hire private prosecutors to aid him in their endeavor. At the very least, this appointment is a clear misdemeanor offense and a threat to the Governor's Constitutional rights. Sullivan must be disqualified.

For the foregoing reasons, Defendant's Motion to Disqualify Ronald Sullivan should be granted.

Dated: March 18, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the City of St. Louis Circuit Attorney's Office this 18th day of March, 2018.

/s/ James F. Bennett