

**IN THE CIRCUIT COURT FOR
NINETEENTH JUDICIAL CIRCUIT
COLE COUNTY, MISSOURI**

ERIC GREITENS,)	
)	
Petitioner,)	
)	Case No.
v.)	
)	Division
STATE OF MISSOURI, ex rel.)	
Attorney General JOSHUA D. HAWLEY,)	
)	
Respondent.)	INJUNCTIVE RELIEF REQUESTED
)	

**VERIFIED PETITION FOR A TEMPORARY RESTRAINING ORDER AND REQUEST
FOR APPOINTMENT OF SPECIAL PROSECUTOR**

COMES NOW Petitioner Eric Greitens, by and through undersigned counsel, and, pursuant to Rule 92.02(a) of the Missouri Rules of Civil Procedure, requests that this Court: (1) grant forthwith a temporary restraining order restraining and enjoining Attorney General Josh Hawley’s investigation into Governor Eric Greitens, the Governor’s office, or any entities with which Gov. Greitens is or has been associated; and (2) appoint a special prosecutor, independent of the Attorney General’s Office, for purposes of conducting any such investigation. Immediate and irreparable injury, loss, or damage will result in the absence of relief. In support of its Motion, Petitioner states as follows:

LEGAL STANDARD

In considering whether to grant preliminary relief, such as Petitioner’s Motion for a TRO, the Court must weigh four factors: (1) the likelihood of success on the merits, (2) the threat of irreparable harm, (3) the balance between the harm the defendant would suffer and the injury that issuance of an injunction would inflict on the opposing party, and (4) the public interest. See State

v. Gabbert, 925 S.W.2d 838, 839 (Mo. 1996) (quoting Dataphase Sys., Inc. v. CL Sys., Inc., 640 F.2d 109 (8th Cir. 1981)). In weighing these factors, “no single factor is determinative.” Dataphase, 640 F.2d at 113. “At base, the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined.” Id. The issuance and terms of an injunction rest within the sound discretion of the trial court to shape and fashion relief . . . based on the facts and equities of the case.” A.B. Chance Comp. v. Schmidt, 719 S.W.2d 854, 857 (Mo. Ct. App. 1986).

Missouri law explicitly provides that where a prosecutor undertakes a case “inconsistent with the duties of his or her office,” the Court may appoint a special prosecutor. § 56.110 RSMo. In addition, Missouri’s rules of professional responsibility make clear that: a public lawyer “has the responsibility of a minister of justice and not simply that of an advocate,” Rule 4-3.8, Comment 1.

FACTS

On March 23, 2018, Attorney General Hawley publicly announced that he had issued multiple subpoenas related to Gov. Greitens, including to the Greitens Group LLC, in an investigation related to The Mission Continues charity.¹ The next day, on March 24, 2018, AG Hawley’s campaign spokeswoman said the Governor himself was “under investigation” by the Attorney General’s Office. (““It would be inappropriate to appear at a political event with an official currently under investigation by the Attorney General’s office,” Kelli Ford, Hawley’s campaign spokeswoman, said in an email.”)²

¹ <https://www.facebook.com/ky3news/videos/10156141169475119/>.

² www.news-leader.com/story/news/politics/2018/03/24/greitens-shadow-keeps-hawley-out-greene-county-republicans-rally-2018-elections/455692002/.

On March 28, 2018, AG Hawley was interviewed on Fox News. When the host asked whether Gov. Greitens should step down, AG Hawley responded, “I don’t want to say anything that would compromise in anyway my investigation, which is ongoing, or the other law enforcement activities, but the situation is very grave.”³ Indeed, the AG Hawley correctly declined to take a position on the subject of an ongoing investigation. Missouri’s ethical rules require this result.

The Fox News interview took place five days after AG Hawley announced publicly that he had subpoenaed the Greitens Group LLC, in an investigation related to The Mission Continues charity, and four days after AG Hawley’s campaign spokeswoman stated that Gov. Greitens himself was “under investigation” by the AGO.

On April 11, 2018, with a publicly active investigation into the Greitens Group LLC (and per his campaign spokesperson, the Governor himself) pending, AG Hawley issued a statement on the official website of the Missouri Attorney General’s Office. In his statement, AG Hawley called on Gov. Greitens to “resign immediately” and called the allegations in the House Investigative Committee’s Report, “certainly impeachable, in my judgment.”⁴

³ <http://insider.foxnews.com/2018/03/28/missouri-senate-race-claire-mccaskill-ripped-josh-hawley-clinton-support-voting-record?page=11&nmsrc=amp>.

HOST: Do you think he [the Governor] should step down?

HAWLEY: Well...this is a tough situation for the state. I don’t want to say anything that would compromise in any way my investigation, which is ongoing, or the other law enforcement activities, but the situation is very grave.

⁴ <https://www.ago.mo.gov/home/breaking-news/ag-hawley-statement-on-house-investigative-committee-report>. The statement read in full: “The House Investigative Committee’s Report contains shocking, substantial, and corroborated evidence of wrongdoing by Governor Greitens. The conduct the Report details is certainly impeachable, in my judgment, and the House is well within its rights to proceed on that front. But the people of Missouri should not be put through that ordeal. Governor Greitens should resign immediately.”

On April 16, 2018, at 9:29 a.m., counsel for Petitioner submitted correspondence to AG Hawley, D. John Sauer (First Assistant and Solicitor), and Michael Martinich-Sauter (Deputy Attorney General for Legal Policy and Special Litigation), asking the AGO to respond in writing by close of business as to whether AG Hawley intends to recuse himself and his office from any investigation of Governor Eric Greitens or any entity to which Gov. Greitens is associated. In that correspondence, counsel for Petitioner advised that if AG Hawley declines to recuse himself as requested, Petitioner intended to explore legal remedies, including immediate action in Cole County Circuit Court.

On April 16, 2018, at 4:46 p.m., Mr. Sauer responded, “Regarding your request for recusal of the Attorney General and the Attorney General’s Office from our ongoing investigation relating to The Mission Continues under the Missouri Merchandising Practices Act, we have reviewed your request, and we have concluded that it has no merit at all.” Thereafter, counsel for Petitioner notified the AGO of its intent to file this Verified Petition and to have it heard before this Court on April 19, 2018.

ARGUMENT

AG Hawley must recuse himself and his entire office from any investigation or prosecution related to Gov. Greitens or the Governor’s Office. If such investigation or prosecution is to be conducted, it must be conducted by a court-appointed special prosecutor independent of the AGO.

By his own published standards, AG Hawley’s official public call for Gov. Greitens to resign compromises the AGO’s own ongoing investigation of Gov. Greitens. AG Hawley’s public statements demonstrate that he understands that by calling for Gov. Greitens to resign, he has predetermined the guilt of his own investigative target and his investigation now is clearly compromised. AG Hawley’s public statements demonstrate that he can no longer continue his

investigation with impartiality. Indeed, the entire Attorney General's Office must be recused due to the appearance of impropriety cast when its official website contains a call for its investigative target to "resign immediately" based on "certainly impeachable" conduct.

In short, based on public comments of AG Hawley seeking the Governor's resignation after admitting that such comments would compromise the integrity of his investigation, there is an actual conflict of interest requiring recusal of the AGO in any investigation of the Governor. The appearance of impropriety is so great as to require recusal of the entire AGO.

In addition, AGO Hawley's office has previously recused itself entirely from litigating a case after it determined doing so would be in conflict with Hawley's prior actions and statements in support of a party to the case, showing where he himself cannot be impartial, he and his office must be recused. There, Hawley himself recognized that where he, individually, cannot be impartial, his entire office must be recused.⁵ It also is common practice for Attorneys General to recuse themselves when their impartiality is in question, or to avoid the appearance of impropriety.

In Missouri, a "prosecutor has the responsibility of a minister of justice and not simply that of an advocate." Mo. R. Bar. Rule 4-3.8, Comment 1. "The general rule is that "[a] prosecuting attorney who has a personal interest in the outcome of a criminal prosecution such as might preclude his according the defendant the fair treatment to which he is entitled should be disqualified from the prosecution of such a case." Vaughan v. State, 614 S.W.2d 718, 724 (Mo.App. W.D. 1981) (quoting State v. Harris, 477 S.W.2d 42, 44 (1, 2) (Mo. banc. 1972).

Moreover, Missouri law explicitly provides that where a prosecutor undertakes a case "inconsistent with the duties of his or her office," the Court may appoint a special prosecutor. §

⁵ See <https://ago.mo.gov/home/missouri-attorney-general-s-office-recuses-from-trinity-lutheran-case> and <https://themissouritimes.com/39598/attorney-generals-office-recused-trinity-lutheran-case-citing-greitens-executive-order/>.

56.110 RSMo. “In applying Section 56.110 the courts have stated that a prosecutor should be disqualified if the prosecutor has a personal interest in the outcome of the criminal prosecution which might preclude affording defendant the fair treatment to which defendant is entitled.” State v. McWhirter, 935 S.W.2d 778, 781 (Mo. App. 1996) (citing State v. Pittman, 731 S.W.2d 43, 46 (Mo. App.1987)). Here, Attorney General Hawley has a personal interest in the outcome of his investigation, namely that the Governor resign or be impeached. Indeed, he has stated such a desire on his own official website. Clearly, and indisputably, this is a conflict of interest which disqualifies AG Hawley from any investigation related to Gov. Greitens.

It is axiomatic that investigators and prosecutors not prejudge any persons they investigate or prosecute. Attorney General Hawley recognized as much in his statements to FoxNews, wherein he stated he did not want to say anything “that would compromise in any way” his investigation. Yet Attorney General Hawley proceeded to make comments that have compromised his investigation, just as he once assured he would not. He and the AGO are now conflicted from this investigation.

The Supreme Court of Missouri has emphasized the appearance of impropriety standard when ruling on the disqualification of prosecutors. See State v. Lemasters, 456 S.W.3d 416, 420-25 (Mo. 2015) (noting that “even if an assistant prosecutor’s conflict is not imputed to the remainder of the office under the Rules of Professional Conduct, the remainder of the prosecutor’s office must be disqualified if a reasonable person with knowledge of the facts would find an appearance of impropriety and doubt the fairness“ of the proceeding, and discussing how “there may be cases in which proof of a thorough and effective screening process (like that used by the [prosecution] in this case) will not be sufficient to prevent a reasonable person from concluding,

based upon all the facts and circumstances, that an appearance of impropriety casts doubt [about] the fairness.”)

Although a prosecutor necessarily stands as an adversary to the accused, “[r]ecusal is ... appropriate where the prosecuting attorney has a personal interest in convicting the accused, since the state’s interest is in attaining impartial justice, not merely a conviction.” People v. Doyle, 406 N.W.2d 893, 899 (Mich.Ct.App.1987); see also Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 803 (1987) (“The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”).

As one Court has noted:

Courts around the country recognize two policy considerations underlying the disqualification of prosecuting attorneys for a conflict of interest. The first policy served by the rule is fairness to the accused. It is universally recognized that a prosecutor’s duty is to obtain justice, not merely to convict. While the prosecutor must prosecute vigorously, he must also prosecute impartially....The second policy served by disqualification of a prosecuting attorney for conflict of interest is the preservation of public confidence in the impartiality and integrity of the criminal justice system. American courts have consistently held that the appearance of impropriety is sufficient to justify disqualification of a prosecuting attorney.

People v. Doyle, 159 Mich. App. 632, 643–44, 406 N.W.2d 893, 898–99, on reh’g, 161 Mich. App. 743, 411 N.W.2d 730 (1987).

An examination of the TRO factors weighs in favor of granting a TRO. Petitioner is likely to succeed on the merits—the AGO’s bias and conflict of interest are apparent, at the very least, from AG Hawley’s own public statements. The threat of irreparable harm to Petitioner of being investigated by a biased prosecutor also is apparent. The issuance of an injunction (and appointment of special prosecutor) would inflict no injury on the AGO, whereas on balance, the harm Gov. Greitens would suffer if no TRO is issued is great. It is in the public’s interest for tax dollars to be expended on an unbiased prosecution. Here, the balance of equities so favors the

Petitioner that justice requires the court to intervene to preserve the status quo until the merits are determined. See Dataphase Sys., Inc., 640 F.2d at 113.

Counsel for Petitioner has informed the AGO of its intent to explore legal remedies, including immediate action in Cole County Circuit Court. Counsel for Petitioner also informed the AGO of this Verified Petition and request for hearing. Immediate and irreparable injury, loss, or damage will result in the absence of relief.

CONCLUSION

It is very surprising that an elected public official who is a lawyer and a law enforcement official would not respect the presumption of innocence and wait until the case is concluded before leaping to conclusions. What makes it less surprising is the transparent fact that AG Hawley clearly has a personal interest in the resignation, impeachment, and prosecution of Gov. Greitens. AG Hawley has announced as much by using the official website of the AGO as a venue to call for Gov. Greitens to “resign immediately” for conduct AG Hawley has prejudged as “certainly impeachable.” AG Hawley clearly cannot be impartial in any investigation related to Gov. Greitens.

WHEREFORE, Petitioner prays for judgment against Respondent and that:

a. Defendant be temporarily, preliminarily, and permanently enjoined and restrained from investigating Governor Eric Greitens, the Governor’s office, or any entities with which Gov. Greitens is or has been associated; and

b. This Court appoint a special prosecutor, independent of the Missouri Attorney General’s Office, for purposes of conducting any such investigation, in the event any such investigation is deemed worthy; and

c. Such other and further relief as this Court deems fair and reasonable.

Dated: April 16, 2018

Respectfully submitted,

DOWD BENNETT LLP

By: /s/ Michelle Nasser

James F. Bennett, #46826

James G. Martin, #33586

Michelle Nasser, #68952

7733 Forsyth Blvd., Suite 1900

St. Louis, MO 63105

Phone: (314) 889-7300

Fax: (314) 863-2111

jbennett@dowdbennett.com

jmartin@dowdbennett.com

mnasser@dowdbennett.com

John F. Garvey, #35879

Carey Danis & Lowe

8235 Forsyth, Suite 1100

St. Louis, MO 63105

Phone: (314) 725-7700

Fax: (314) 678-3401

jgarvey@careydanis.com

Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of April 2018, a true and correct copy of the foregoing was filed with the Court via the Court's electronic filing system, and was served electronically upon counsel for the Missouri Attorney General's Office.

/s/ Michelle Nasser _____

VERIFICATION

State of Missouri)
) SS
County of Cole)

I, Eric R. Greitens, being first duly sworn upon my oath, deposes and says that I am authorized to make this verification on my behalf, and that I have read the foregoing Verified Petition and the facts stated therein are true to the best of my knowledge, information, and belief based on my own personal knowledge, information provided to me.

Dated: April 16, 2018


Eric Greitens

Subscribed and sworn to before me this 16th day of April 2018


Notary Public

My Commission Expires: 11/19/20

MICHELLE HALLFORD
Notary Public - Notary Seal
State of Missouri
Commissioned for Cole County
My Commission Expires: November 19, 2020
Commission Number: 12686046