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St. Joseph Superior Court 2
St. Joseph County, Indiana

STATE OF INDIANA | SS: IN THE ST. JOSEPH SUPERIOR COURT

COUNTY OF ST. JOSEPH |

STATE OF INDIANA
v.
JERMAINE DOUSHION MUNN JR.

CAUSE NO.: 71D02-1903-PC-000010

State's Response

Comes now the State of Indiana by Mark A. Kopinski, Deputy Prosecuting Attorney for the 60th Judicial Circuit, St. Joseph County, Indiana, and hereby respectfully responds to Petition for Special Prosecutor and, in support therefor, does aver:

1. That Petitioner filed an Amended Petition for a Special Prosecutor on February 12, 2024.
2. That in the petition, the Petitioner cites IC 33-39-10-2(b).
3. That a court SHALL appoint a special prosecutor only under IC 33-39-20-2(b)(1), which requires a petition for appointment AND the agreement by the prosecuting attorney.
4. That based on the limited information tendered to the State by Petitioner, the prosecuting attorney does not believe an appointment is appropriate and does not agree to the appointment.
5. That under IC 33-39-10-2(b)(2), a court MAY appoint a special prosecutor without an agreement from the prosecuting attorney only if the Court finds (after conducting a hearing) that an appointment is necessary to avoid an actual conflict of interest or there is probable cause to believe that the prosecuting attorney has committed a crime.
6. That in *Kubsch v State*, 866 N.E.2d 726, (Ind. 2007), the Indiana Supreme Court reviewed the appointment of a special prosecutor and established that the question of prosecutorial disqualification is not to be treated in the same manner as in the civil context. Under *Kubsch,* the question to appoint a special prosecutor is whether there is an "actual conflict" that prejudices Petitioner. When a Judge is asked to decide whether a prosecutor should be disqualified, the court must determine whether "the controversy involved in the pending case is substantially related to a matter in which the lawyer previously represented another client" and whether "the prosecutor has received confidential information in the prior representation" and whether "the information may have assisted the prosecution."
7. That under *Kubsch*, there is no "actual conflict" in that Prosecuting Attorney Cotter has never represented Petitioner before.
8. That generally, "a defendant cannot disqualify a prosecuting attorney [merely] by naming him as a witness". *Rhodes v. Miller,* 437 NE2d 978, 982 (Ind. 1982). See also *Rufer v State*, 274 Ind. 643, 649, 413 NE2d 880, 883 (Ind. 1980) ("the rule was not designed to permit a lawyer to call opposing counsel as a witness and thereby disqualify him as counsel").
9. That in *Ingle v. State,* 746 NE2d 927, 933 (Ind. 2001), the defense moved for a special prosecutor, claiming that they intended to call the elected prosecutor as a witness. The Indiana Supreme Court held that there was no right to call the prosecutor as a witness as the "information was easily available from other sources" and there was no showing that the prosecutor "had any personal knowledge."
10. That in *Badelle v State*, 754 N.E.2d 510, (Ind. App. 2001) the Court also addressed the issue of an elected prosecutor called as a witness. Then Marion County Prosecuting Attorney Steven Goldsmith was subpoenaed in a PCR case. The Court determined that if evidence is easily available from other sources and absent extraordinary circumstances or compelling reasons, an attorney who participates in a case should not be called as a witness. The exception is if the attorney is believed to have material information that cannot be disclosed otherwise. In *Badelle,* Prosecutor Goldsmith provided an affidavit.
11. In *Matheny v. State,* 583 NE2d 1202, 1206 (Ind. 1992), the defense unsuccessfully attempted to call the prosecuting attorney as a defense witness to support an insanity plea where the prosecutor had written a letter to the defendant's family calling the defendant a "troubled" and "very sick" man. The Indiana Supreme Court stated that "absent extraordinary circumstances or compelling reasons, an attorney who participates in a case should not be called as a witness."
12. That other jurisdictions have determined that the "advocate-witness" rule should not be adopted *per se* when applying to a bench trial or in hearings before a judge alone. See *United States v. Johnston,* 690 F2d 638 (7th Cir. 1982). *In Scott v. State,* 717 So2d 908, 910-11 (Fla. 1998), the Florida Supreme Court held that it was not error to permit a deputy prosecutor to testify at a post-conviction

hearing on a Brady claim and also serve as an advocate (the defense had subpoenaed him as a witness). In rejecting the defendant's claim, the Court reasoned that "to hold otherwise on this issue would bar many trial level prosecutors - who may be the most qualified and best prepared advocates for the State - from representing the State in a Brady claim in a subsequent post conviction evidentiary hearing."

13. That at this point, the Petitioner has merely made accusations that investigators in the murder may have "placed inmates" near the Petitioner while in custody and fed "information, or papers" to those inmates and "attempted to force false eyewitness testimony on the date of Jermaine's trial". These accusations are without any supporting evidence.
14. That Petitioner has not explained how these allegations require Prosecuting Attorney Cotter to become a "necessary witness".
15. That merely making an assertion that Prosecuting Attorney Cotter has become a necessary witness without any supporting facts is insufficient to appoint a Special Prosecutor.

Wherefore, the State prays the Court to deny the Petition for Special Prosecutor, and for all other just and proper relief in the premises.

Respectfully submitted,

/s/ Mark A. Kopinski

Mark A. Kopinski, 5538-71
Deputy Prosecuting Attorney

Certificate of Service

I hereby certify that a copy of the foregoing has been served upon Mark Koselke, counsel for the Petitioner, by electronic filing, on this 21st day of February 2024.

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/s/ Mark A. Kopinski

Mark A. Kopinski