

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

MARK WAGNER,

Defendant.

CASE NO. 22-CF-2481

DEFENDANT'S REPLY BRIEF

Defendant Mark Wagner specifically requests that this Court appoint a Special Prosecutor in place of the Dane County District Attorney or his staff under Wis. Stats. Sec. 978.045 as the Defendant believes that there is a conflict of interest with the District Attorney and his staff due to their participation in the ultimate investigation, and prosecution of QLW.

Facts that need to be established by the Dane County District Attorney's conflict of interest are the material events leading to the arrest of QLW:

- 1) That the District Attorney was the person responsible for the initiation of the state's wiretap of XXX and the reasons stated for the need for the wiretap.
- 2) That the District Attorney and his Assistant District Attorney were kept up to date on the activities of the wiretap as well as the extension of the wiretap.

3) That QLW and others were routine customers of XXX who bought large quantities of cocaine and were routinely in possession of firearms in drug transactions and while traveling in vehicles throughout the Madison area.

4) That there was an agreement with the United States Attorney's Office in the Western District of Wisconsin and the Dane County District Attorney's Office that QLW would be charged with two others as customers of XXX in Dane County Circuit Court.

5) That QLW has not been charged by the Dane County District Attorney's Office with drug trafficking and firearm offenses committed during the duration of the wiretap despite indicating he would be within in a short period of time.

6) That on June 6, 2021, the Dane County Narcotics Taskforce, in coordination with the Dane County District Attorney's Office, the FBI, and other City and County officers, decided to arrest QLW for domestic violence and probation violations. On June 8, 2022, when officers attempted to arrest QLW, he fled from officers at a high rate of speed endangering the community. That at the time QLW was known to carry guns.

7) That the District Attorney and his Assistant were well aware of QLW's arrest record, criminal history, involvement in the XXX wiretap investigation, his routine possession of firearms, drug trafficking, involvement in violent homicides, involvement in several uncharged shootings in the City of Madison, and fleeing and eluding arrest from officers, including the fleeing incident from June 8, 2021.

8) That the Dane County District Attorney's Office was advised of the above-referenced events and circumstances leading up to the date of the arrest on February 3, 2022, and the overall plan put in place to arrest QLW.

9) That the District Attorney and his Assistant did not attend the "Ops" plan debrief but was made aware of the arrest plan and the dangerousness of the forthcoming arrest of QLW.

10) That despite the large quantity of drugs found in the automobile that QLW was driving at the time of his arrest on February 3rd, decisions were made to charge QLW with a negotiated issuance for his actions on February 3rd, as well as his conduct for all his illegal activities that were known from the evidence of the wiretap and subsequent criminal referrals.

11) That there are emails, memorandums, correspondence, and conversations between the District Attorney, his Assistant, and the lead investigating officers in this matter that can and will verify the facts contained herein.

12) That testimony from the District Attorney and his Assistant needs to be established to set the background leading up to the arrest of QLW on February 3, 2022.

The Defense needs the testimony from the District Attorney and his Assistant and access to their files, emails, and correspondence on these matters to establish that they provided oversight, review, charging decisions and coordination with Federal

prosecutors and Federal, State and local law enforcement officers in the investigation, ultimate arrest, and prosecution of QLW.

Prosecuting attorneys occupy a special role in our legal system. They alone exercise the power to charge, and by extension, the power to bring the overwhelming might of the State to bear on specific, individual citizens. See *Young v. United States ex rel Vuitton Et File*, 481 U.S. 787, 814 (1987). (Prosecutor “has the power to employ the full machinery of the State in scrutinizing any given individual.”)

For that reason, prosecutors are never *just* adversary counsel: They are the representative of a “sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.” *Berger v. United States*, 295 U.S. 78, 88 (1935).

As such, prosecutors *must* exercise their powers responsibly. As the United States Supreme Court has held, “It is a fundamental premise of our society that the State wield its formidable powers in a *rigorously disinterested fashion*.” *Young*, 481 U.S. at 810 (1987) (emphasis added).

A situation in which there are “opportunities for conflicts to arise” and which creates “at least the appearance of impropriety” is sufficient to call into question whether the prosecutor in question is disinterested. *Young*, 481 U.S. at 806.

The presence of such an *interested* prosecutor is a fundamental error that will result in the automatic reversal of any underlying conviction. *Id.* at 814. At the same time, a defendant’s right to due process of law is imperiled in the absence of a disinterested

prosecutor. See *Young*, 481 U.S. at 815 (Blackmun J., concurring); *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967); cf. *Marshall v. Jerrico Inc.*, 446 U.S. 238, 249-50 (1980).

This Court should also consider Wisconsin SCR 20:3.7 - Lawyer as witness

Rule 20:3.7 provides that a lawyer “shall not” act as an advocate at a trial in which the lawyer is likely to be a necessary witness. The defense fully anticipates calling the District Attorney and his Assistant as witnesses at trial in order to elicit testimony about QLW and the events leading up to his ultimate arrest, which is critical to Mr. Wagner’s defense.

The ABA comments to Rule 3.7 indicate that the prejudice likely suffered by the opposing party (Wagner) depends on the nature of the case, the importance and probable tenor of the lawyer’s testimony, and the probability that the lawyer’s testimony will conflict with that of other witnesses. Again, the District Attorney’s ultimate oversight of the wiretap and the illegal activities of QLW are essential to the state of mind of Agent Wagner as he approached QLW’s automobile as it was clearly attempting to escape the “SIC” maneuver. Without such evidence, Wagner is clearly prejudiced.

The Rule 3.7 analysis also requires the Court to give due regard to the effect of disqualification on the lawyer’s client (the State). This motion is brought early enough that it will have no effect: another Special Prosecutor can easily step in and adequately represent the State.

The ABA Comment also says that it is relevant that if one or both parties can reasonably foresee that the lawyer will probably be a witness. Here, the motion is made early in the case that it ameliorates the prejudice that the District Attorney's Office might otherwise argue it would suffer in having to get off the case closer to trial. Given the District Attorney's and his Assistant's dealings with QLW and with the Federal prosecutors, as well as the law enforcement officers, he had to have anticipated that the defense would want to present the background of QLW's information during pretrial and trial proceedings, which could only come from the District Attorney's Office and its files.

The need for ultimate trial testimony from the Dane County District Attorney and his Assistant is needed to establish why the arrest was done in the manner and form that it was and that the District Attorney's Office was consulted on the ultimate decisions prior to February 3, 2021.

The State's brief does in fact allege that the Assistant District Attorney did assist on the legal issues of the wiretap and did work with officers collaboratively during the XXX wiretap investigation. Direct contact with Agent Wagner is not needed as the Assistant District Attorney had direct contact with the lead agents who were directing Wagner's actions at the time of the arrest. Although Attorney Powell may not have been involved in "directly planning the February 3rd arrest", he was briefed on the plan and ultimately made decisions in consultation with the agents. He also made all decisions after the arrest concerning charging arising out of the wiretap, other criminal conduct of

QLW, QLW's conduct on the date of the arrest, plea negotiations with QLW, a joint sentencing recommendation, and the dismissal of unrelated charges.

The State cites *State v. Walls*, 149 Wis.2d 534, 439 N.W. 2d 590 (Ct. App. 1989) for their position. However, that case states that the Defense is only required to show a reasonable probability that the District Attorney's testimony would lead to competent, relevant and material evidence. *State v. Walls* at 540. Direct contact with Agent Wagner is not necessary. What is relevant is the background of the District Attorney's ongoing knowledge of QLW, his dangerousness and the oversight review and complete coordination with the agents in the investigation and arrest of QLW.

All of the above actual or potential conflicts create at least the "appearance of impropriety" in relation to the District Attorney's decision to prosecute Agent Wagner for actions that his office had supervision of with the agents overseeing the complete case involving QLW.

The presence of an interested prosecutor in this case is therefore fatal to the overall prosecution: The lack of a disinterested prosecutor is *always* harmful, both to the Defendant and to the community. See *Young*, 481 U.S. at 810-12. The facts and circumstances of this prosecution "call into question the objectivity of those charged with bringing the Defendant to judgment." *Id.* (quoting *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986)). The District Attorney's office *must* be recused from prosecution. Accordingly, this Court should exercise its powers under Wis. Stat. §978.045 to appoint a Special

Prosecutor in this action as a means of ensuring that Agent Wagner's right to due process of law and the public's "faith in the fairness of the criminal justice system" remain intact.

Young, 481 U.S. at 811.

Dated at Milwaukee, Wisconsin, this 21st day of December 2022.

Respectfully submitted,
TERSCHAN, STEINLE, HODAN &
GANZER, LTD.

Electronically Signed By:

MICHAEL J. STEINLE
Attorney for Mark Wagner
State Bar No. 1018859

P.O. ADDRESS:

309 North Water Street, Suite 215
Milwaukee, Wisconsin 53202
Telephone: 414-258-6200

HART & POWELL SC

Electronically Signed By:

DANIEL H. SANDERS
Attorney for Mark Wagner
State Bar No. 1092309

P.O. ADDRESS:

735 North Water Street, Suite 1212
Milwaukee, Wisconsin 53202
Telephone: 414-271-9595