

**IN THE FIRST JUDICIAL DISTRICT OF THE CIRCUIT COURT
OF HINDS COUNTY, MISSISSIPPI**

STATE OF MISSISSIPPI

V.

CAUSE NO. 22-68-JHD

TONI JOHNSON

DEFENDANT

**MEMORANDUM IN SUPPORT OF
MOTION TO DISQUALIFY STATE AUDITOR**

COMES NOW, the defendant Toni Johnson, (“Johnson”) by and through undersigned counsel of record, and requests this Court disqualify State Auditor Shadrack White (“White”) and his office from participating in her prosecution for the reasons set forth below:

FACTS

On February 18, 2022, with the media in tow, investigators from the State Auditor’s office and Hinds County deputies arrested Johnson, a Hinds County Election Commissioner, in her Clinton, Mississippi home. <https://www.wlbt.com/2022/02/18/hinds-co-election-commissioner-arrested-by-state-auditor/>. *See also*, Exhibit 1, White’s February 18, 2022 Press Release. Johnson is charged with two counts of conspiracy to commit bribery; seven counts of conspiracy to defraud the State of Mississippi; nine counts of fraudulently obtaining public funds; four counts of making false statements or representations; four counts of bribery; and two counts of embezzlement.¹ Docket Entry No. 1. (Quotations added).

White didn’t stop with his February 18, 2022 press release. Instead, on February 27, 2022, White sent his supporters an email and used the arrests of Johnson, Cedric Cornelius and

¹ Miss. Code Ann. § 7-7-73 provides “[w]hen the state auditor shall have reason to believe that a public officer or employee has embezzled any public funds, he shall notify the governor and the proper district attorney, and shall attend the trial as a witness for the state, if necessary.”

Sudie Jones to solicit donations for his political action committee: “Friends of Shad White.”²

Exhibit 2. White stated in part: “[o]ur arrests show the dangers of private funding of elections. More money means more risk of fraud. But the arrests also how we are committed to putting a stop to this fraud. I know a lot of people have lost faith in government right now, especially in DC. What we’re doing in the Auditor’s office can help restore that faith-that the government can work for the people again. We do that by showing folks that those in government who steal face serious consequences.” Exhibit 2.

White signed the document and wrote” “P.S. Want to lend a helping hand? Forward this email to a friend. Tell them to visit www.shadwhite.com and sign up to receive more emails like this, so they can stay informed on how their tax dollars are spent. DONATE TODAY.” Exhibit 2. Online donors were given the option of making donations of \$25.00, \$50.00, \$100.00, \$250.00, \$500.00, \$1,000.00, \$2,500.00 and \$5,000.00. Exhibit 3. “To donate by mail, please send check, payable to Friends of Shad White, to Friends of Shad White, P.O. box 320275, Flowood, MS 39232. Exhibit 3. The January 31, 2022 Report of Receipts and Disbursements 2021 Annual Report list “Friends of Shad White” as the name of the candidate for the position of State Auditor. Exhibit 6.

² Miss. Code Ann. § 23-15-801(c) provides that a political committee shall mean any committee, party, club, association, political action committee, campaign committee or other groups or persons or affiliated organizations which receives contributions aggregating in excess of Two Hundred Dollars (\$200.00) during a calendar year or which makes expenditures aggregating in excess of Two Hundred Dollars (\$200.00) during a calendar year for the purpose of influencing or attempting to influence the action of voters for or against the nomination for election, or election, of one or more candidates, or balloted measures.”

LAW AND ARGUMENT

**WHITE AND THE STATE AUDITOR'S OFFICE SHOULD BE BARRED
FROM PARTICIPATING IN JOHNSON'S PROSECUTION**

This Court should disqualify White and his office because White acquired and/or attempted to acquire an interest in Johnson's case on February 27, 2022 in violation of Miss. Code Ann. § 25-4-105(1)³ and Mississippi Rules of Professional Conduct 3.6(a)&(b)(6).⁴ Unlike his February 18, 2022 press release, White's February 27, 2022 email did not contain a statement that Johnson is presumed innocent until proven guilty in a court of law as required by Mississippi Rules of Professional Conduct 3.6(a)&(b)(6). *See*, Exhibit 2.

White should have stopped with the February 18, 2022 press release, but he dived into uncharted territory when he used Johnson's case to raise money for "Friends of Shad White" while the Johnson's is pending before this court. White's conduct is so unorthodox that there appears to be only one reported case in the United States in which a prosecutor used a criminal proceeding to solicit funds for her political campaign. *See*, Exhibit 4, a copy of the trial court's opinion in *State of Missouri v. Mark McCloskey*, In the Missouri Circuit Court Twenty-Second Judicial District, Cause: 2022-CR1301-01.

The *McCloskey* case arose in Saint Louis, Missouri during the height of the Black Lives Matter movement. In *McCloskey*, the trial court disqualified the Circuit Attorney and her office

³ Miss. Code Ann. § 25-4-105(1) which provides: "[n]o public servant shall use his official position to obtain, or attempt to obtain, pecuniary benefit for himself other than that compensation provided for by law..."

⁴ Miss Rules of Professional Conduct, Rule 3.6(a)&(b)(6) provides that "(a) [a] lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding. (b) a statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to: ... (6) the fact that the defendant has been charged with the crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty."

after she solicited donations for her upcoming election in emails about the cases of McCloskey and his wife, both prominent attorneys, that she was prosecuting after they were accused of pointing guns at Black Lives Matter protesters outside the McCloskey's home.

The *McCloskey* Court held “the emails raise an appearance of impropriety and warrant disqualification.” *State of Missouri v. Mark McCloskey*, Cause: 2022-CR1301-01, page 10. The Court explained: “[a]n short, the Circuit Attorney’s conduct raises the appearance that she initiated a criminal prosecution for political purposes. Immediately before and after charging Defendant, she solicited campaign donations to advance her personal interests.” *Id.* at page 11. The Court disqualified the Circuit Attorney and her office from McCloskey’s case after concluding that “[t]he campaign emails demonstrate the Circuit Attorney’s personal interest in this case, raised appearance of impropriety and jeopardize the Defendant's right to a fair trial. Among other previously described concerns, these email solicitations aim to raise money using the Defendant and the circumstances surrounding the case to rally Ms. Gardner's political base and fuel contributions.” *Id.* at page 21.

In *McCloskey*, the circuit attorney raised \$17,000.00 as a result of emails she sent after she charged McCloskey during her fundraising efforts. The Court concluded: “[t]he contribution amount is less significant than the fact that she did this. She is pursuing political fundraising by using Defendant in a case she is choosing to prosecute...The emails reveal her intention to use him to motivate contributions and generate campaign contributions...The awesome power to prosecute ought never to be manipulated for personal or political profit ... instead, it is the solemn obligation to ensure that justice shall be done.” *Id.* at pages 15-16. Aggrieved Kimberly Gardner filed a Petition for Writ of Prohibition. *Id.* The Missouri Supreme Court denied

Kimberly Gardner’s Petition for Writ of Prohibition. Exhibit 5, Supreme Court of Missouri’s April 6, 2021, hand-down list.

The Mississippi Supreme Court has never addressed the question of whether the State Auditor is a member of the prosecution team. The Court, however, has held the State “is a team consisting of the attorney, the law enforcement officers of the jurisdiction in which the case is brought—municipal, county, state or federal, the prosecution witnesses, and any other persons cooperating in the investigation and prosecution of the case.” *King v. State*, 656 S. 2d 1168, 1175 (Miss. 1995). Although White is not the prosecutor in Johnson’s case, his conduct is clearly proscribed by Miss. Code Ann. § 25-4-105(1).

White’s solicitation of contributions for “Friends of Shad White” violates Miss. Code Ann. § 25-4-105(1). The penalty for violating Miss. Code Ann. § 25-4-105(1) is found in Miss. Code Ann. § 25-4-105(7) provides “[a]ny person violating the provisions of this section shall be punished as provided for in Sections 25-4-109 and 25-4-111.” Miss. Code Ann. § 25-4-109 provides that “[u]pon a finding by clear and convincing evidence that any elected public servant or other person has violated any provisions of this article, the Commission may censure the elected public servant or impose a civil fine of not more than Ten Thousand Dollars (\$10,000.00) or both. The commission may further recommend to the Circuit Court for Hinds County that the elected public servant be removed from office.”

Moreover, White’s conduct in Johnson’s case is tantamount to the misconduct of the Circuit Attorney’s conduct in *McCloskey*. It is undisputed White solicited funds for “Friends of Shad White.” White’s email solicitation demonstrates his personal interest in Johnson’s case, raises the appearance of impropriety and jeopardizes Johnson’s right to a fair trial. More disgusting, White used Johnson and the circumstances surrounding her case to rally his political

base and fuel contributions like Kimberly Gardner. Clearly, White has exploited “the awesome power to prosecute” for personal and/or political profit and engaged in conduct that undermines confidence in the integrity of the criminal proceeding. Consequently, this Court should remove White and his office from Johnson’s case because White’s conduct clearly collides with Miss. Code Ann. § 25-4-105(1) and Miss. Rules of Professional Conduct, Rule 3.6 (a) & (b)(6).

JOHNSON IS ENTITLED TO A FAIR AND IMPARTIAL PROCESS

“Stated succinctly, the cornerstone of the American judicial system is the right to a fair and impartial process.” *Bigby v. Dretke*, 402 F.3d 551, 558 (5th Cir. 2005) quoting *Bracy v. Gramley*, 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997). In fact, “[n]o right ranks higher than the right of the accused to a fair trial.” *Gannett River States Pub. Co. v. Hand*, 571 So.2d 941, 942 (Miss. 1990), quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508, 104 S.Ct. 819, 823, 78 L.Ed.2d 629, 637 (1984). In addition, “[o]ne of the fundamental rights of the accused is a fair trial by an impartial tribunal.” *United States v. Cassiagnol*, 420 F.2d 868, 878 (4th Cir.), cert denied, 397 U.S. 1044, 90 S.Ct. 1364, 25 L.Ed.2d 654 (1970). In *Bigby v. Dretke*, 402 F.3d 551, 558-559 (5th Cir. 2005), the Court noted that “[t]he United States Supreme Court has consistently enforced the basic rights of due process and found that decision makers are constitutionally unacceptable when: (1) the decision maker has a direct personal, substantial, and pecuniary interest in the outcome of the case....”

White’s continued presence in Johnson’s case undermines confidence in the integrity of the criminal proceeding against Johnson. White has manipulated “the awesome power to prosecute” for his pecuniary, personal and political gain. For the reasons outlined above, this Court should not permit White’s conduct to go unchecked and should remove White and his office immediately from Johnson’s case.

WHEREFORE PREMISES CONSIDERED, Johnson prays that this Court will set a hearing on her Motion to Disqualify Shad White, allow her to present evidence of the number of emails White sent to his supporters referencing Johnson's case while soliciting donations as well as the amount of money collected by "Friends of Shad White" after White sent the email solicitation on February 27, 2022. After receiving all of the evidence in this case, this Court should grant Johnson's Motion to Disqualify State Auditor Shad White and his office from Johnson's prosecution.

RESPECTFULLY SUBMITTED, this the 3rd day of June 2022.

/s/ Lisa M. Ross
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CERTIFICATE OF SERVICE

I, Lisa M. Ross, attorney for Plaintiff, do hereby certify that I have this date filed the foregoing with the Clerk of the Court using the MEC system which sent notification of such filing to all attorneys of record.

This the 3rd day of June 2022.

/s/ Lisa M. Ross
Lisa M. Ross