

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: STATE POLICE INVESTIGATION OF ALLEGATIONS AGAINST
KANAWHA COUNTY PROSECUTING ATTORNEY MARK PLANTS, ESQ.

MISCELLANEOUS CRIMINAL ACTION NO. 14-PCR-45

**ORDER APPOINTING SPECIAL PROSECUTOR IN THE ABOVE-REFERENCED
MATTER**

WHEREAS, this Court has received a letter from the West Virginia Prosecuting Attorneys Institute declining to appoint a Special Prosecutor in the above-reference action; and

WHEREAS, the Executive Council of such body has agreed to defer to this Court's authority to appoint a Special Prosecuting Attorney pursuant to W.Va. Code § 7-7-8; and

WHEREAS, W.Va. Code § 7-7-8 states, in relevant part:

If, in any case, the prosecuting attorney and his assistants are unable to act, or if in the opinion of the court it would be improper for him or his assistants to act, the court shall appoint some competent practicing attorney to act in that case. The court shall certify to the county commission the performance of that service when completed and recommend to the county commission a reasonable compensation for the attorney for his service, and the compensation, when allowed by the county commission, shall be paid out of the county treasury;

THEREFORE, it is **ORDERED, ADJUDGED** and **DECREED** as follows:

Sidney H. Bell, Esq., a competent attorney, is appointed to serve as Special Prosecuting Attorney in the above-referenced matter. It is further **ORDERED** that said Special Prosecutor inform the Superintendent of the West Virginia State Police of his appointment. It is further **ORDERED** that Mr. Bell subscribe to an Oath to serve as Special Prosecuting Attorney and file the same in this action and in all other appropriate governmental offices, including the Kanawha County Commission. Said Special Prosecuting Attorney is further **ORDERED** to contact the Kanawha

County Commission to reach an agreement with the Commission concerning the payment of his fees and costs for his services as said Special Prosecuting Attorney. It is further **ORDERED** that the Kanawha County Commission and the Special Prosecuting Attorney shall inform the Court that such agreement has been reached. Such fee and costs are payable from the county treasury, pursuant to W.Va. Code § 7-7-8.

The Clerk of the Circuit Court of Kanawha County, West Virginia is **ORDERED** to file the attached letter from the West Virginia Prosecuting Attorneys Institute in this action with this Order.

It is further **ORDERED** that the Clerk of the Circuit Court of Kanawha County, West Virginia forward a certified copy of this Order to Phillip Morrison, Esq., the Executive Director of the West Virginia Prosecuting Attorneys' Institute, at 90 MacCorkle Avenue, SW, Ste. 202, South Charleston, West Virginia 25303; to Sidney H. Bell, Esq., Special Prosecuting Attorney of Kanawha County, West Virginia, at P.O. Box 190, Welch, WV 24801; to the Kanawha County Commission at its address of P.O. Box 3227, Charleston, West Virginia, 25336; to Colonel C. R. "Jay" Smithers, Superintendent of the West Virginia State Police, at his address of 725 Jefferson Road, South Charleston, West Virginia, 25309-1698; and to Mark Plants, Esq., Prosecuting Attorney of Kanawha County, West Virginia at his address of 301 Virginia Street East, Charleston, West Virginia, 25301.

And, upon receipt of the Oath of Office from said Special Prosecuting Attorney, the Clerk is **ORDERED** to dismiss this Miscellaneous Criminal Action, as future activity, if any, shall be filed by the Special Prosecuting Attorney in the appropriate forum.

Dated this 14th day of March, 2014.

ENTER:


DEREK C. SWOPE, SPECIAL JUDGE



EARL RAY TOMBLIN
GOVERNOR

ROSS TAYLOR
CABINET SECRETARY

PHILIP W. MORRISON, II
EXECUTIVE DIRECTOR

90 MacCorkle Avenue SW
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SOUTH CHARLESTON, WEST VIRGINIA 25303
Telephone: (304) 558-3348
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March 12, 2014

CARL L. HARRIS
CHAIRPERSON

EXECUTIVE COUNCIL
CHRISTOPHER D. CHILES
MARCIA L. ASHDOWN
PATRICK N. WILSON
JIM DAVIS
DEBRA MCLAUGHLIN
VICTORIA A. COLE
JACK DAVID WOODRUM

The Honorable Judge Derek C. Swope
Judge of the 15th Circuit
Mercer County Courthouse
1501 Main Street, Suite 200
Princeton, WV 24740

Re: Order of Disqualification in Miscellaneous Criminal Action No. 14-PCR-15
In Re: *State Police Investigation of Allegations Against Kanawha County Prosecuting Attorney Mark Plants, Esq.*

Dear Judge Swope:

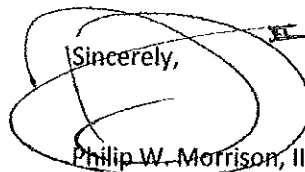
The Institute received your Order of Disqualification of the Kanawha County Prosecuting Attorney's Office in the above styled matter on March 10, 2014. I am writing you this note of explanation regarding the Institute's inability to appoint a special prosecutor in this matter and deferring to your appointment of a special prosecutor in lieu thereof.

West Virginia Code § 7-4-6 (d) (1) & (e) permits me to appoint a special prosecutor in criminal matters with the approval of the Executive Council of the Institute. It also binds the fifty-five elected prosecutors to serve as appointed in criminal cases where a particular prosecutor has been disqualified. We have appointed thousands of special prosecutors in my tenure as Executive Director alone and over 4,300 since the Institute's inception but have never been asked to appoint in a matter where the person being investigated or prosecuted is a voting member of the Institute as is the case here.

I am not permitted to appoint a special prosecutor under circumstances where the Executive Council does not approve such an action. See West Virginia Code § 7-4-6 (e). This is the case here. I contacted personally and sent an email to the Executive Council inquiring as to each of their positions about appointment in the above matter and the overwhelming response was to decline to appoint under these extremely rare circumstances and defer to your appointment authority under West Virginia Code § 7-7-8.

I am sorry that I cannot comply in this situation but would like to emphasize that a significant majority of the Executive Council and I agree that an Institute appointment in this matter raises the specter of impropriety and runs afoul of the public policy concerns espoused in *Nicholas v Sammons*, 178 W.Va. 631, 363 SE2d 516 (1987), a case regarding prosecutorial disqualification, where the Court placed a high value on the public confidence regarding the impartiality of the system.

Until we speak again, I remain

Sincerely,

Philip W. Morrison, II



EARL RAY TOMBLIN
GOVERNOR

ROSS TAYLOR
CABINET SECRETARY

PHILIP W. MORRISON, II
EXECUTIVE DIRECTOR

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JACK DAVID WOODRUM

FAX TRANSMISSION COVER SHEET

Date: 3-12-14
 To: Judge D. Swope
 Fax: 304 ~~487-8392~~ 425 1598
 Re: SPECIAL PROSECUTOR REQUEST
 Sender: Philip Morrison

YOU SHOULD RECEIVE 2 PAGE(S), INCLUDING THIS COVER SHEET. IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL (304) 558-3348

Comments:

Thanks Paul!