IN THE
SUPREME COURT OF MISSOURI

No. SC88778

STATE OF MISSOURI
Ex rel. John Rogers
Relator

v.
THE HONORABLE ROBERT S. COHEN
Respondent

On Writ from the Circuit Court of Missouri in the County of St. Louis
21st Judicial Circuit
The Honorable Robert S. Cohen, Circuit Judge

BRIEF OF RELATOR JOHN ROGERS

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JURISDICTIONAL STATEMENT

This is a petition for writ of prohibition by John Rogers against the Respondent, the Honorable Judge Cohen, to prevent the order and judgment Cohen issued compelling Rogers to comply with, or order that Respondent sustain Rogers' motion to quash, the subpoena issued by the grand jury in Saint Louis County regarding a transcript of a witness interview conducted by Rogers. Rogers filed a similar petition in the Court of Appeals for the Eastern District of Missouri. It was denied on July 30, 2007. Rogers filed in this Court on September 5, 2007. This Court issued a preliminary writ on October 30, 2007 and this brief follows. This Court has jurisdiction under Missouri Supreme Court Rule 97 and the Missouri Constitution.

STATEMENT OF FACTS

The Relator, John Rogers (Rogers) is a criminal defense attorney who currently represents Dawan Ferguson. While no criminal charges have been filed against Ferguson, Rogers has begun investigating potential witnesses in connection with possible charges arising out of the disappearance of Ferguson's son, C.F., in June of 2003. On March 12, 2007, Rogers interviewed Ferguson's other son in a sworn interview regarding his brother's disappearance. Thereafter, a subpoena was issued by a grand jury in St. Louis County which directed Rogers to turn over any transcript of his interview.

Rogers then moved to quash the subpoena on the grounds that the material was work product and the subpoena was unreasonable or oppressive. Judge Robert S. Cohen, a St. Louis County Circuit Judge and Respondent here, denied the motion to quash after conducting an in camera inspection, finding that the transcript of the interview did not contain protected attorney work product because nothing in the transcript constituted any of Rogers' opinions, theories or conclusions. His order did not address the issue of the unreasonableness or oppressiveness of the subpoena.

Rogers then filed a petition for an original writ of prohibition in the Missouri Court of Appeals, Eastern District. On July 30, 2007, the court denied the writ outright as to the subpoenaed transcript of the interview of C.F. The court of

appeals stated that its ruling applied to the transcript and any foundational testimony. As to other matters, including whether Rogers had to testify about material that fell within the attorney-client privilege rules or the work product doctrine, the court said that it was denying the writ without prejudice. This petition for writ of prohibition follows.

POINTS RELIED ON

I. THE RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING THE SUBPOENA BECAUSE THE INFORMATION SOUGHT IN THE SUBPOENA IS WORK PRODUCT IN THAT IT CONTAINS IMPRESSIONS AND THEORIES OF COUNSEL.

State ex rel. Atchison, Topeka & Santa Fe Ry. Co. v. O'Malley, 898 S.W.2d 550 (Mo. banc. 1995)

Foote v. Hart, 728 S.W.2d 295 (Mo. App. E.D. 1987)

Friedman v. Provaznik, 668 S.W.2d 76 (Mo. banc 1984)

II. THE RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING THE SUBPOENA BECAUSE THE

SUBPOENA IS UNREASONABLE AND OPPRESSIVE IN THAT THE PROSECUTION HAS SHOWN NO NEED FOR THE MATERIAL AND TO DISCLOSE IT WILL SERIOUSLY IMPAIR THE ATTORNEY/CLIENT RELATIONSHIP.

United States v. Perry 857 F.2d 1346 (9th Cir. 1988).

United States v. Bergeson 425 F.3d 1221 (9th Cir. 2005)

In re Grand Jury Matters, 751 F.2d 13 (1st Cir. 1984)

ARGUMENT

I. THE RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING THE SUBPOENA BECAUSE THE INFORMATION SOUGHT IN THE SUBPOENA IS WORK PRODUCT IN THAT IT CONTAINS IMPRESSIONS AND THEORIES OF COUNSEL.

At least with respect to civil cases, the Missouri Supreme Court has divided work product into "tangible work product" and "intangible work product." Tangible work product includes trial preparation documents such as written statements, briefs and attorney memoranda and intangible work product refers to an attorney's mental impressions, conclusions, opinions, and legal theories. *See State ex rel. Atchison, Topeka & Santa Fe Ry. Co. v. O'Malley*, 898 S.W.2d 550, 552 (Mo. banc. 1995).

In *O'Malley*, the plaintiff sued a railroad for personal injury damages under FELA, and sent the railroad interrogatories asking if the railroad took any statements or reports from anyone regarding the plaintiff's injuries. *Id*. at 553. If so, the plaintiff wanted to know who gave the statement, whether the statement was oral or written, who took the statement, where the statement was taken and what time it was taken. The plaintiff also specifically asked if a court reporter or stenographer took statements from anyone concerning the incident, and if so, what the details were. Finally, the plaintiff asked the railroad if it or any of its agents

asked any of plaintiff's co-workers about the alleged incident, and if so, who asked the questions, whether the co-worker completed a routine personal injury report, and whether the co-workers gave the railroad an oral or written statement. *Id*.

The railroad complied in part with plaintiff's requests by producing copies of medical records and other documents obtained from the plaintiff. The railroad also identified all known fact witnesses and produced all statements from the plaintiff and his physician. The railroad objected, however, to the remainder on the grounds that the requests sought information protected by the work product doctrine. After the plaintiff moved to compel and the trial court overruled the objections, the railroad sought a writ of prohibition from this Court. This Court granted the writ, ruling that the railroad need not answer the interrogatories. *Id*.

The Court noted, however, that to the extent the plaintiff was asking about any information regarding oral interviews of persons contacted, "they seek information that is clearly protected as intangible work product." *Id*. at 553. Furthermore, the Court noted that the plaintiff's interrogatories sought information that, to some degree, revealed the railroad's counsel's mental impressions, conclusions, opinions or legal theories. *Id*. According to the Court, the plaintiff's interrogatories sought a "schematic of the attorney's investigative process." *Id*. This was important to the Court not because the schematic revealed facts relevant to the case, but because it revealed the investigative process and relative weight

attributed to certain witnesses' statements by the opposing side. In addition, this Court noted that questions listed in the form of interrogatories may reveal an attorney's mental impressions about the case from the type of questions asked. *Id*.

Missouri Supreme Court Rule 25.10(A) states that in a criminal case, one is not allowed to discover "legal research, or records, correspondence, reports or memoranda to the extent that they contain the opinions, theories, or conclusions of counsel for the state or members of his legal or investigative staff, or of the defendant, defense counsel, or members of his legal or investigative staff." This rule allows the State to file a motion with the Court asking for disclosure of items not listed in the mandatory disclosure rule, and allows the Court to order disclosure if it finds the request reasonable. *See Foote v. Hart*, 728 S.W.2d 295 (Mo. App. E.D. 1987).

Foote was a pending second-degree murder case where the defense lawyer and her investigator interviewed a 10-year old that had been endorsed by the State as a witness. *Id*. at 296. There was no formal statement recorded, but both the attorney and the investigator took handwritten notes, and refused to produce those notes upon request from the State.

The trial court ordered the portions of the material disclosed that did not constitute work product. *Id*. at 297. On a writ proceeding, the court of appeals said the trial court correctly ordered disclosure but did so for the wrong reason. With respect to the work product doctrine, the court suggested that the only work

product protection attorneys receive in criminal cases is protection from disclosure against materials that constitute "opinions, theories or conclusions of defendant's attorney." *Foote*, 728 S.W.2d at 298. And because those materials were taken out before disclosure, the court said there was no problem with disclosure. *Id*.

Here, the pending case is criminal in nature. The trial court found this to be dispositive and ordered Rogers to produce the transcript of his interview with Connor, despite being cited to the *O'Malley* decision. In doing so, Judge Cohen cited *Foote*. However, this case is not akin to *Foote*.

In *Foote*, the prosecutor filed a case against the defendant and then filed a motion for discovery, seeking the materials from the attorney. Here, the prosecutor used the grand jury to subpoena Rogers' records, and did not file any sort of motion for discovery before the trial judge. The records sought by the subpoena are more similar in nature to those in *O'Malley* in that they are impressions of Rogers' investigation and his theory of the case.

II. THE RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING THE SUBPOENA BECAUSE THE SUBPOENA IS UNREASONABLE AND OPPRESSIVE IN THAT THE PROSECUTION HAS SHOWN NO NEED FOR THE MATERIAL AND TO DISCLOSE IT WILL SERIOUSLY IMPAIR THE ATTORNEY/CLIENT RELATIONSHIP.

The practice of using grand jury subpoenas on a target's counsel "has been almost universally criticized by courts, commentators and the defense bar because it is viewed as a tool of prosecutorial abuse and as an unethical tactical device" used by prosecuting attorneys "to go on a fishing expedition with legal counsel without first pursuing alternative avenues to get the information." *United States v. Perry* 857 F.2d 1346, 1347 (9th Cir. 1988). Although a grand jury's inquiry is not to be limited narrowly, issuing a subpoena to a lawyer to testify against a client is an unusual step that always raises serious concerns, even absent any privilege. *United States v. Bergeson*, 425 F.3d 1221, 1224-1225 (9th Cir. 2005). "The government is not automatically entitled to subpoena a lawyer to testify against his client merely because the Constitution does not prohibit it and the material is not privileged." *Id*. at 1225-1226.

In *Bergeson*, the court upheld the district court's decision to quash the subpoena of the attorney on unreasonable and oppressive grounds. The district court held that for policy reasons, calling the attorney as a grand jury witness "seemed unnecessary under the circumstances." *Id.* at 1223. The court of appeals affirmed, holding that while compelling purpose was not a requirement to enforce the subpoena of an attorney, it is a "legitimate factor" for the court to consider. *Id*. The court concluded by explaining that while the attorney's testimony "might have been the simplest, clearest way" for the prosecution to prove the information

to the grand jury, her testimony was not necessary considering that the grand jury need only probable cause to indict. *Id*. at 1226.

Additionally, the subpoena of an attorney could potentially create a conflict of interest between attorney and client. *In re Grand Jury Matters*, 751 F.2d 13, 17 (1st Cir. 1984). When an attorney is subpoenaed his interest turns to avoiding potential contempt sanctions for failure to comply with such subpoena, whereas the client's interest is reducing the likelihood that he will be indicted. *Id*. at 19. The court also took note that allowing the government unrestricted ability to subpoena attorneys of grand jury targets, would send a chilling message to defense attorneys if they knew that "soon after embarking upon the defense of a case" they themselves could be subpoenaed. *Id*. The court held that these reasons were not absolute rules against the subpoena of an attorney to produce unprivileged information to a grand jury and held that a court shall determine whether the grand jury's right to unprivileged evidence outweighs "the right of the defense bar and its counsel not to be disturbed." *Id.*

This Court upheld a subpoena directed to a law firm in *Friedman v. Provaznik*, 668 S.W.2d 76 (Mo. banc 1984). However, that case involved a law firm that was subpoenaed to produce records because it was the target of a criminal investigation into excessive billing for legal fees to the St. Louis County Special School District. *Id*. at 77. The subpoena called for the firm to produce its

records reflecting billings to the District and also directed one of the partners to produce billing statements for all of his clients. *Id*. at 78.

The firm did not object to turning over records relating to the District, but moved to quash the subpoena for the billing information from the other clients' records on the grounds that it would violate the attorney-client privilege and the work product doctrine. The State's need for the records of the other clients was to compare the billing records for the District against the billing records for the other clients to ascertain whether any unusual billing practices took place.

The trial court denied the motion to quash. When the Missouri Court of Appeals granted a writ of prohibition, this Court accepted transfer, quashed the court of appeals' writ and ordered that the materials be produced. With respect to the attorney-client privilege issue, the Court directed the trial court to conduct an in camera inspection of the materials to assist in its determination of whether the privilege applies. *Id*. at 80. On the work product issue, the Court ruled that the identities of unrelated clients in cases unrelated to the grand jury's investigation fell outside the scope of the doctrine. *Id*. The Court acknowledged, however, that some information sought by the subpoena might fit within the doctrine, and directed the trial judge to inspect those materials as well. *Id*.

If allowed to stand, this subpoena will operate to enforce a policy in which there will be no limitations on a prosecution's access to defense attorney's

investigation, and the State will presume an unfettered right to use a grand jury subpoena on defense attorneys, resulting in fishing expeditions like this one.

Like in *Friedman*, there is no criminal case here yet because Dawan Ferguson has not been charged. Thus, the general work product protection afforded in civil cases should apply, not Missouri Supreme Court Rule 25.10(A). Moreover, the *Friedman* case does not address the central issue raised by this writ proceeding, which is whether it is appropriate to allow the State to use a grand jury investigating someone to subpoena that individual's attorney to provide information the attorney gathered in his investigation. Neither *Friedman* nor any other case thus far has dealt with this issue in Missouri.

Unlike in *Friedman*, this is not a rare situation that justifies an exception to the privacy of professional activities. In *Friedman*, the grand jury had a good reason to request the billing records of the other clients of the firm because it was probably the only way that the grand jury could ascertain whether the firm had used unusual billing practices for the Special School District.

Here, the State has demonstrated absolutely no need for the transcript of the interview. A subpoena directed to an attorney representing a grand jury target drives a chilling wedge between the client and the attorney. This very well could discourage clients from making full and frank disclosure to their attorneys and may limit investigation and preparation when attorneys know that the results may be subpoenaed.

Allowing the government to subpoena an attorney may also have an adverse effect on defense attorneys who work to promptly investigate matters on behalf of their clients. Requiring Rogers to produce his work for the grand jury penalizes him for attempting to record a potential witness' recollection of an incident. Policy would favor an attorney working to investigate and taking appropriate steps in gathering accurate information to prepare his case on behalf of his client. However, knowing that any work done pre-indictment on behalf of one's client may one day be subpoenaed by the government or state would discourage defense attorneys from doing so.

The subpoena at issue is also unreasonable because it presents a conflict of interest between Rogers and his client. The subpoena on its face evidences this conflict. The subpoena reads that Rogers is "commanded to appear...to testify on behalf of the State of Missouri." (emphasis added). The subpoena is asking Rogers to act on behalf of the State of Missouri whereas he has already undertaken representation of his client, Dawan Ferguson, in this matter. Mo. S. Ct. R. 4-1.7(b) reads: "a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests." (emphasis added). As discussed in *In re Grand Jury Matters*, this subpoena replaces what should be Counsel's interest, advocating for his client's interest of avoiding indictment, to

his own personal interest of avoiding a potential contempt sanction for failure to comply with the subpoena. 751 F.2d at 19.

The grand jury's right to unprivileged evidence does not outweigh Rogers' right to zealously represent his client and is thus unreasonable. Even more, the State can interview the witness just like Rogers did. The prosecution has shown no need to use the transcript rather than conduct its own investigation. Permitting the State to use the grand jury to subpoena Rogers to get material it can easily obtain undermines the values exemplified by the attorney-client privilege, the right to counsel and the fair administration of justice.

CONCLUSION

The preliminary writ issued by this Court should be made absolute for the foregoing reasons.

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Certificate of Service

The undersigned hereby certifies that two true and complete copies of the foregoing document was hand-delivered to the below attorneys, on the 31st of December, 2007.

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Certification Pursuant to Rule 84.06(c)

I, John Rogers, counsel for Relator, hereby certify that this brief:
(1) contains the information required pursuant to Rule 55.03;
(2) complies with the limitations of Rule 84.06(b);
(3) contains 2,863 words according to the Word Count function of Microsoft Word.
(4) in diskette form filed with the Court and delivered to counsel was scanned for viruses and was found to be virus free.

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APPENDIX

Order and Judgment