

No. SC 88778

IN THE SUPREME COURT OF MISSOURI

STATE EX REL. JOHN ROGERS,

Relator,

V.

THE HONORABLE ROBERT S. COHEN,

Respondent.

ORIGINAL PROCEEDING IN PROHIBITION
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION 1
THE HONORABLE ROBERT S. COHEN, JUDGE

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

ROBERT P. McCULLOCH
Prosecuting Attorney, St. Louis County

DAVID R. TRUMAN
Assistant Prosecuting Attorney
Missouri Bar No. 44360

St. Louis County Justice Center
100 South Central Avenue, Second Floor
Clayton, Missouri 63105
(314) 615-2600
Attorneys for Respondent

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
JURISDICTIONAL STATEMENT	3
STATEMENT OF FACTS	4
POINT RELIED ON	6
ARGUMENT: Claim that Relator is entitled to an Order prohibiting respondent from enforcing a grand-jury subpoena requiring the production by Relator of a third-party statement	7
CONCLUSION.....	16
CERTIFICATE OF COMPLIANCE AND SERVICE	17

TABLE OF AUTHORITIES

Cases

<u> Foote v. Hart</u> , 728 S.W.2d 295 (Mo.App. E.D. 1987)	8, 9, 15
<u> In re Grand Jury Matters</u> , 751 F.2d 13 (1 st Cir. 1984)	13
<u> State ex rel. Atchison, Topeka & Santa Fe Ry Co. v. O’Malley</u> , 898 S.W.2d 550 (Mo. banc 1995)	8, 9
<u> State ex rel. Friedman v. Provaznik</u> , 668 S.W.2d 76 (Mo. banc 1984)	14, 15
<u> State v. Carter</u> , 641 S.W.2d 54 (Mo. banc 1982), <i>cert. denied</i> , 461 U.S. 932 (1983)	8
<u> State v. Culkin</u> , 791 S.W.2d 803 (Mo.App. E.D. 1990)	8
<u> State v. Hardin</u> , 581 S.W.2d 67 (Mo.App. K.C.D. 1977)	8
<u> United States v. Bergeson</u> , 425 F.3d 1221 (9 th Cir. 2005)	13
<u> United States v. Perry</u> , 857 F.2d 1346 (9 th Cir. 1988)	13

Rules

Supreme Court Rule 25.10(A)	8
Supreme Court Rule 84.23	3

JURISDICTIONAL STATEMENT

This action is an original proceeding in prohibition. This Court has jurisdiction to hear such petitions for original writs pursuant to Supreme Court Rule 84.23. Relator previously filed a petition for a writ of prohibition in the Missouri Court of Appeals, Eastern District. That petition was denied by the Court of Appeals on July 30, 2007.

STATEMENT OF FACTS

In June 2003, Dawan Ferguson reported to the St. Louis Metropolitan Police Department that his SUV had been stolen. He further reported that his disabled son, Christian Ferguson (then 10 years old), was inside the car. Mr. Ferguson's car was recovered shortly thereafter, but Christian was not inside the car, and his whereabouts or fate remains unknown. No charges have been filed against anyone in connection with Christian's disappearance.

On the day the report was filed, police questioned Mr. Ferguson; at some point during the questioning Mr. Ferguson invoked his right to remain silent and the interview was terminated. Mr. Ferguson subsequently retained John Rogers, Relator herein, as counsel.

On March 12, 2007, Relator took a sworn statement from Christian's brother, Connor Ferguson, who was 12 years old at the time of the statement. Although a transcript of the statement was made (and has been filed with this Court under seal), no police agency or prosecuting authority was present for the statement, nor were they notified that the statement was being taken.

On or about May 21, 2007, Relator was subpoenaed to appear before the Grand Jury of St. Louis County on June 6, 2007 at 9 a.m. The subpoena directed Relator to produce "transcript, video, audio or other recording of statement taken from Connor Alexander Ferguson, dob: 10/5/94, taken in March of 2007." (Respondent's Appendix, hereinafter "Resp.App.," A1.) On May 31, 2007, Relator filed a motion to quash the subpoena, on the grounds that the material sought was protected by the work-product

doctrine. The motion was heard by Respondent, sitting in Division 1 of the St. Louis County Circuit Court, who was, as part of his official duties, presiding over the grand jury for the term in question.

The transcript of the statement was filed under seal with Respondent, who reviewed the transcript *in camera*. On June 14, 2007, Respondent denied Relator's motion to quash (Relator's Appendix, hereinafter "Rel.App.," A1-A2). Respondent found that the third-party statement "does not contain protected 'opinions, theories or conclusions'" of Relator such as would be covered by the work-product doctrine. (Rel.App. A1.) Rather, Respondent noted, "the statement contains the recollection of Conner [*sic*] on what happened the day of Christian's abduction." (Rel.App. A1-A2.)

On or about June 25, 2007, Relator filed a Petition for Writ of Prohibition with the Missouri Court of Appeals, Eastern District. On July 30, 2007, the Court of Appeals issued an Order, which denied the petition as to the transcript of Connor's interview "and any necessary foundational testimony from Relator." (Resp.App. A2.) The Order further stated that "[a]s to other aspects of the subpoena, including commanding Relator to testify to matters involving work-product and attorney-client privilege," the petition was denied without prejudice. (Resp.App. A2.)

On or about September 6, 2007, Relator filed a Petition for Writ of Prohibition with this Court. This Court issued a preliminary writ of prohibition on October 30, 2007. Respondent filed his answer on November 28, 2007.

POINT RELIED ON

RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING THE SUBPOENA REQUIRING RELATOR TO PROVIDE TO THE GRAND JURY A TRANSCRIPT OF HIS INTERVIEW WITH A MATERIAL WITNESS IN A CRIMINAL INVESTIGATION BECAUSE RESPONDENT DID NOT ABUSE HIS DISCRETION IN FINDING THAT THE STATEMENT WAS NOT WORK PRODUCT IN THAT HE DETERMINED AFTER AN *IN CAMERA* REVIEW OF THE TRANSCRIPT THAT IT DID NOT CONTAIN PROTECTED OPINIONS, THEORIES OR CONCLUSIONS OF COUNSEL, AND THE SUBPOENA WAS NOT UNREASONABLE IN THAT THE STATEMENT IS MATERIAL AND RELEVANT TO A GRAND-JURY INVESTIGATION INTO THE DISAPPEARANCE OF A CHILD.

(Responds to Points I and II of Relator's Brief.)

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

State v. Carter, 641 S.W.2d 54 (Mo. banc 1982), *cert. denied*, 461 U.S. 932 (1983);

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

ARGUMENT

RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING THE SUBPOENA REQUIRING RELATOR TO PROVIDE TO THE GRAND JURY A TRANSCRIPT OF HIS INTERVIEW WITH A MATERIAL WITNESS IN A CRIMINAL INVESTIGATION BECAUSE RESPONDENT DID NOT ABUSE HIS DISCRETION IN FINDING THAT THE STATEMENT WAS NOT WORK PRODUCT IN THAT HE DETERMINED AFTER AN *IN CAMERA* REVIEW OF THE TRANSCRIPT THAT IT DID NOT CONTAIN PROTECTED OPINIONS, THEORIES OR CONCLUSIONS OF COUNSEL, AND THE SUBPOENA WAS NOT UNREASONABLE IN THAT THE STATEMENT IS MATERIAL AND RELEVANT TO A GRAND-JURY INVESTIGATION INTO THE DISAPPEARANCE OF A CHILD.

(Responds to Points I and II of Relator’s Brief.)

In this original proceeding in prohibition, Relator seeks an order from this Court prohibiting Respondent from enforcing the subpoena that required Relator to appear before the grand jury and produce the transcript of his interview with Connor (Relator’s Brief, hereinafter “Rel.Br.,” at 7, 10, 16). However, Relator has shown neither that Respondent abused his discretion in ruling that the transcript was not work product, nor has he shown that the subpoena was unreasonable, and thus his request for a writ of prohibition should be denied.

In his first point before this Court, Relator argues that the transcript of his interview is work product in that it contains “impressions of [Relator’s] investigation and

his theory of the case.” (Rel.Br. 10.) He spends the bulk of his argument on this point discussing this Court’s opinion in State ex rel. Atchison, Topeka & Santa Fe Ry. Co. v. O’Malley, 898 S.W.2d 550 (Mo. banc 1995). This is apparently an attempt first to convince this Court that the civil analysis of work product, discussed in O’Malley, should apply to proceedings before a grand jury, and second to convince the Court that the statement at issue here qualifies as intangible work product, held undiscoverable under O’Malley.

To the contrary, the relevant principles applicable to this case are not set forth in O’Malley but rather appear in a trio of criminal cases cited by Respondent in his order denying Relator’s motion to quash. As the Eastern District of the Missouri Court of Appeals noted over twenty years ago, in civil procedure the work product doctrine “has been more literally treated as applying generally to the results of the efforts of attorneys or investigators.” Foote v. Hart, 728 S.W.2d 295, 298 (Mo.App. E.D. 1987). In criminal cases, by contrast, work product is defined more narrowly, applying only to the opinions, theories or conclusions of counsel and/or communications between client and counsel. Id. (citing State v. Carter, 641 S.W.2d 54, 59 (Mo. banc 1982), *cert. denied*, 461 U.S. 932 (1983), and State v. Hardin, 581 S.W.2d 67, 69 (Mo.App. K.C.D. 1977)). *See also* State v. Culkin, 791 S.W.2d 803, 811 (Mo.App. E.D. 1990); Supreme Court Rule 25.10(A).

It was under this standard that Respondent reviewed, *in camera*, the statement at issue here. Having determined that the transcript (which memorialized a communication not between counsel and client but a third-party communication) contained no opinions, theories or conclusions of counsel, Respondent found that the transcript was not covered

by the work product doctrine and ordered its production (Rel.App. A1-A2). The issue, therefore, is whether Respondent abused his discretion in making that determination. Foote, *supra* at 297-98.

Relator has identified nothing tending to show that Respondent abused his discretion. In fact, reduced to its essence, his entire argument on this point consists of the suggestion that the civil standard, set forth in O'Malley, rather than the criminal standard set forth in Foote, should apply, for the sole reason¹ that the information sought by the subpoena in this case is “more similar in nature to [the records at issue] in O'Malley in that they are impressions of [Relator's] investigation and his theory of the case.” (Rel.Br. 10.) Putting aside Relator's misplaced complaint that Respondent applied the wrong standard of review, Respondent expressly found that the statement at issue does not

¹ In Point II of his brief, Relator does advance an additional argument why the civil work-product standard should apply: “there is no criminal case here yet because Dawan Ferguson has not been charged.” (Rel.Br. 14.) There are a number of problems with this argument, but the two most fundamental are these. First, the absence of a formal criminal charge issued against Relator's client is hardly sufficient, on its face, to convert a grand jury investigation into possible criminal conduct into a civil matter analogous to the type of litigation at issue in O'Malley, *supra*. Second, Relator chooses to ignore the fact that the grand jury is conducting an investigation, one possible result of which is that no charges will be filed at all, thus making the focus of inquiry on whether or not charges have been filed quite misplaced indeed.

contain “opinions, theories or conclusions” of counsel. Relator’s conclusory protests to the contrary are not sufficient to show that Respondent abused his discretion in making such a finding. Absent such a showing, Relator’s first point should be denied.

In his second point before this Court, Relator argues that the subpoena seeking production of the statement is unreasonable, and thus that a writ of prohibition should issue to bar such production. In analyzing this argument, it is helpful to return first to the terms of the subpoena itself, and then to the ruling by Respondent on Relator’s motion to quash the subpoena.

The subpoena, directed to Relator at his place of business, commands him to appear before the grand jury of St. Louis County “to [t]estify on behalf of the State of Missouri and to produce the following: Transcript, video, audio or other recording of statement taken from Connor Alexander Ferguson, dob: 10/5/94, taken in March of 2007.” (Resp.App. A1.) In denying Relator’s motion to quash the subpoena, Respondent (as was discussed above) cited the relevant case law and ruled, following an *in camera* review of the transcript at issue, that the statement did not contain protected opinions, theories or conclusions of counsel (Rel.App. A1-A2). Respondent then ruled as follows: “Accordingly, the Motion to Quash Subpoena is Denied. [Relator] is directed to provide the Grand Jury with a copy of Conner’s [*sic*] statement within ten (10) days hereof.” (Rel.App. A2.) Notably absent from Respondent’s ruling are any directives that Relator,

himself, provide testimony to the grand jury; rather, Respondent merely directed Relator to provide a transcript of the statement to the grand jury.²

Viewed in this light, it suffices to say that much of Relator's argument on his second point can, unfortunately, be summarized as a misrepresentation of Respondent's ruling below in a deliberate attempt to convince this Court that the denial of Relator's petition will set an unfortunate precedent. Relator goes so far as to make this audacious claim:

“If allowed to stand, this subpoena will operate to enforce a policy in which there will be *no limitations* on a prosecution's [*sic*] 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.

(Rel.Br. 13) (emphasis added).

Perhaps only in the imagination of a defense attorney, engaged in the zealous representation of his client, can a subpoena requesting production of a specific item of evidence be converted into a “fishing expedition” and raise the specter of unlimited access to defense investigations by prosecutors, quite regardless of the actual limitations placed on that access, first by Respondent and later by the Court of Appeals. Likewise, Relator spends much of this point bemoaning the evils of compelling an attorney to testify

²It should be noted that the Court of Appeals, in its Order denying Relator's petition for writ of prohibition, specified that its ruling “applies to the discoverability of the transcript and any necessary foundational testimony from Relator.” (Resp.App. A2.)

against his client, in spite of the fact that the rulings by Respondent and the Court of Appeals required, respectively, no testimony at all by Relator or only that testimony necessary to establish the foundation for the transcript.

Respondent places great emphasis on the language in the subpoena in which he is “commanded to appear ... to testify on behalf of the State of Missouri.” (Resp.App. A1.) The subpoena, Relator submits, “is asking [Relator] to act on behalf of the State of Missouri” contrary to his representation of Mr. Ferguson, thus producing a conflict of interest (Rel.Br. 15). Relator, in his long career as a criminal defense attorney, has undoubtedly seen enough subpoenas issued by the State to know that the language commanding a witness to appear on behalf of the State of Missouri is standard in any subpoena issued by the State, and certainly knows that there is no such thing as a grand jury subpoena that directs a witness to appear to testify on behalf of a defendant. More to the point, however, Relator once again ignores the fact that the subpoena in question was issued as part of a grand jury investigation rather than as part of an ongoing criminal case against his own client, and that Relator has been subpoenaed, in essence, as a custodian of records to provide the transcript of a third-party statement pertinent to that investigation. Relator’s apparent concern that the transcript might incriminate his client is understandable; his apparent lack of concern that this position might protect his client at the expense of learning Christian Ferguson’s whereabouts or fate since June 2003 is harder to understand. In any event, the statement memorialized in the transcript is material and relevant to the grand jury’s investigation into Christian’s disappearance, and it is not unreasonable for Respondent to order its disclosure.

It should be noted, in this context, that all of the cases cited by Relator on this point address grand-jury subpoenas requiring an attorney to provide direct testimony against his client. *See* United States v. Perry, 857 F.2d 1346, 1348 (9th Cir. 1988) (subpoena requested counsel to appear before grand jury and produce all documentation regarding client's fee arrangement); United States v. Bergeson, 425 F.3d 1221, 1223 (9th Cir. 2005) (counsel subpoenaed to testify before grand jury to establish client's knowledge of trial date as required to show that he knowingly failed to appear for trial); In re Grand Jury Matters, 751 F.2d 13, 15 (1st Cir. 1984) (subpoenas sought testimony by counsel, representing several men being investigated by grand jury for possible drug and tax offenses, regarding fees, expenses and other funds received by the attorneys and, as to one attorney, the dates, times, and places of any meetings or conversations between the attorney and the client). These cases are inapplicable to the present subpoena, which (as limited by Respondent and the Court of Appeals) will require on Relator's part either no testimony at all or only the limited testimony necessary to establish the proper foundation for the third-party statement.

As was the case with his first point, Relator's argument here is nearly completely devoid of any reason why, in this case, enforcement of the subpoena is unreasonable. Relator's contention that "the State can interview the witness just like [Relator] did," and that the State has shown "no need to use the transcript rather than conduct its own investigation" (Rel.Br. 16) is at odds with his claim, a page earlier, that to require Relator "to produce his work for the grand jury penalizes him for attempting to record a potential witness' recollection of an incident." (Rel.Br. 15.) It is now nearly a year since the

statement in question was taken, and some five and one-half years since the day Christian Ferguson disappeared. Each day that passes can potentially reduce important details in the memory of witnesses; Relator understands this principle, or else he would not have memorialized his interview with Connor in a transcript. It was not unreasonable under these circumstances to require Relator to produce this transcript, rather than requiring the State to attempt to re-interview a boy (12 years old at the time of Respondent's ruling) about the terrible day when his brother disappeared, not to be seen or heard from since.³ Moreover, the evidentiary value of the transcript does not depend on whether or not the witness in question has been previously interviewed, in that multiple statements may differ in material respects, or one statement may contain details or information that another does not.

This Court's opinion in State ex rel. Friedman v. Provaznik, 668 S.W.2d 76 (Mo. banc 1984), is instructive. The grand-jury investigation at issue in Friedman addressed allegedly excessive fees charged to the St. Louis County Special School District by a law firm. Id. at 77. This Court held that a subpoena directed at the law firm and requesting billing records not only of the school district but of all clients (for comparison of the billing practices) was reasonable. Id. at 77-80. In so holding, this Court noted that the case at issue presented "a 'rare situation' that justifies an exception to the privacy of professional activities," and noted that "adequate protection of private interests can be

³ Presumably Relator's position in this matter would not change if the police or other investigating authorities had attempted to interview Connor but had been rebuffed.

accomplished while permitting the public's interest in a thorough investigation to be served." Id. at 80.

The public's interest in the fate of Christian Ferguson, and its interest in punishing any criminal conduct connected to his disappearance (to say nothing of the private interest on the part of his family, friends and loved ones) is certainly no less important than the public's interest in assuring that government funds have been spent properly. Accordingly, this Court should reject Relator's dire warnings of prosecutorial abuse, and recognize that this case again presents a rare situation justifying the production of material information obtained by an attorney in the course of his representation of his client.

In conclusion, Relator has shown neither that Respondent abused his discretion in ordering the production of the transcript nor that the subpoena (or the enforcement thereof by Respondent) was unreasonable. As the Court of Appeals noted in Footte, "[i]t is not our function in considering a petition for writ of prohibition to second-guess the exercise of discretion by the trial court." Footte v. Hart, *supra* at 298. This Court should likewise decline Relator's request to second-guess Respondent's exercise of discretion and deny Relator's petition for writ of prohibition.

CONCLUSION

In view of the foregoing, respondent submits that this Court's preliminary writ of prohibition should be dissolved and Relator's petition for writ of prohibition should be denied.

Respectfully submitted,

ROBERT P. McCULLOCH
St. Louis County Prosecuting Attorney

DAVID R. TRUMAN
Missouri Bar No. 44360
Assistant Prosecuting Attorney
St. Louis County Justice Center
100 South Central Avenue
Clayton, Missouri 63105
(314) 615-2600
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 3,349 words, excluding the cover and this certification, as determined by Microsoft Word software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses, using McAfee Anti-virus software, and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 18th day of January, 2008, to:

John Rogers
Brocca Smith
Rosenblum, Schwartz, Rogers & Glass
120 South Central Avenue, Suite 130
Clayton, Missouri 63105
Attorneys for Relator

Hon. Robert S. Cohen
21st Judicial Circuit, Division 1
7900 Carondelet Avenue
Clayton, Missouri 63105

DAVID R. TRUMAN
Assistant Prosecuting Attorney
Missouri Bar No. 44360
100 South Central Avenue
Clayton, Missouri 63105
(314) 615-2600
Attorney for Respondent

No. SC 88778

IN THE SUPREME COURT OF MISSOURI

STATE EX REL. JOHN ROGERS,

Relator,

V.

THE HONORABLE ROBERT S. COHEN,

Respondent.

ORIGINAL PROCEEDING IN PROHIBITION
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION 1
THE HONORABLE ROBERT S. COHEN, JUDGE

RESPONDENT'S APPENDIX

ROBERT P. McCULLOCH
Prosecuting Attorney, St. Louis County

DAVID R. TRUMAN
Assistant Prosecuting Attorney
Missouri Bar No. 44360

St. Louis County Justice Center
100 South Central Avenue, Second Floor
Clayton, Missouri 63105
(314) 615-2600
Attorneys for Respondent

TABLE OF CONTENTS

	PAGE
SUBPOENA	A1
ORDER FROM COURT OF APPEALS	A2