

**IN THE
MISSOURI SUPREME COURT**

SC86955

STATE OF MISSOURI, EX REL.
MICHAEL SANDERS, Prosecuting Attorney,
Jackson County
Relator,

vs.

THE HONORABLE MARGARET SAUER,
Associate Circuit Judge, Jackson County
Division 29
Respondent

PETITION IN PROHIBITION FROM THE
CIRCUIT COURT OF JACKSON COUNTY,
MISSOURI SIXTEENTH JUDICIAL CIRCUIT,
DIVISION 29
Honorable Margaret Sauer, Associate Circuit Judge

RESPONDENT’S STATEMENT, BRIEF AND ARGUMENT

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TABLE OF CONTENTS

Table of Authorities	3
Statement of Facts	4
Argument	5
Conclusion	7

TABLE OF AUTHORITIES

CASES	Page
<u>State ex rel. Dally v. Copeland</u> , 986 S.W.2d 943 (Mo. App. 1999)	6
<u>State ex rel Division of Family Services v. Guffey</u> , 795 S.W.2d 546 (Mo. App. 1990)	6
<u>State v. Hoy</u> , 742 S.W.2d 206 (Mo. App. 1987)	5
<u>State ex rel. State of Missouri v. Campbell</u> , 936 S.W.2d 585 (Mo. App. 1982)	6
 CONSTITUTIONAL AND STATUTORY PROVISIONS	
Section 210.817 through 210.252 RSMo 2000	6
Section 474.060.2 RSMo 2000	5
Section 568.040.2(1)	5
United States Constitution, 5 th and 14 th Amendments	6
Missouri Constitution, Article 1, Section 10	6

STATEMENT OF FACTS

Relator's statement of facts is correct with the addition of the following: Defendant failed to submit to a blood test for DNA determination in civil paternity case number DR90-9938.

In Defendant's criminal non-support case, 04CR-201731, the natural mother has refused to submit to a blood test for herself and on behalf of her minor child Vanesha D. Rice.

Defendant has provided a DNA sample to the testing lab. Relator did not submit to

Respondent the civil default order as part of its response to Defendant's Motion to Compel Discovery. Respondent does not have jurisdiction over the case at present. The case is set in Division 13 of the 16th Judicial Circuit before the Honorable Circuit Judge Jay Daugherty.

I. RELATOR HAS FAILED TO CARRY ITS BURDEN OF SHOWING THAT THE CHILD HAS BEEN LEGITIMATED BY LEGAL PROCESS, AND THEREBY IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ORDERING THE CHILD AND HER NATURAL MOTHER TO SUBMIT TO DNA TESTING TO DETERMINE PATERNITY.

ARGUMENT

In a criminal prosecution for non-support, the State has the burden of proving beyond a reasonable doubt that the child in question is the natural child of the Defendant unless precluded by a constitutionally valid statute. See State v. Hoy, 742S.W.2d 206 (Mo. App. 1987) read in conjunction with Section 568.040.2(1) RSMo 2000. Section 568.040.2(1) specifically precludes litigating in three instances: where the child has been adopted, where the child has been legitimated by legal process, and where the child has been determined to be that of the Defendant by a Court of law in a dissolution proceeding. The Relator relies on legitimation.

The Relator defines legitimation by way of Section 474.060.2 RSMo 2000 in relevant part by asserting that paternity may be established by an adjudication either before or after the death of the father. Although the statute does not set a standard of proof for an adjudication during the life of the father, it does establish that proof must be by clear and convincing evidence after the putative father's death. A claimant of paternity of a living putative father must meet his burden of proof by a preponderance of the evidence. State ex

rel Division of Family Services v. Guffey, 795 S.W.2d 546 (Mo. App. 1990), rehearing and/or transfer denied.

The order establishing paternity in this case was by default. The State should be made to prove every element of the verdict director beyond a reasonable doubt. The State should not be permitted to use a default judgment to meet its burden of proof in a criminal case where the Defendant's liberty is in jeopardy. This would be bad public policy because it could create criminal liability for the innocent; and such liability would violate the Defendant's right to due process under the 5th Amendment of the United States Constitution, as applied to this State through the 14th Amendment, and Article 1, Section 10 of the Missouri Constitution.

The central issue of this case, paternity, directly impacts the Defendant's liberty interest. In a criminal prosecution the State must prove each element in the verdict director beyond a reasonable doubt. Hoy, supra. The Relator relies on Sections 210.817 through 210.852, RSMo 2000 to support its proposition. These are civil statutes affecting the issue of a property interest, not a liberty interest, with burdens of proof of preponderance of the evidence and clear and convincing evidence. The Relator relies on State ex rel. Dally v. Copeland, 986 S.W.2d 943 (Mo. App. 1999) and State ex rel. State of Missouri v. Campbell, 936 S.W.2d 585 (Mo. App. 1996) to support its proposition. Neither case dealt with legitimation. Both cases dealt with children born in wedlock with the issue of paternity in a criminal prosecution for non-support precluded by Section 568.040.2(1).

The Court should be guided by reading Hoy, supra, in conjunction with Section

568.040. The Western District in Hoy found that there is no question that 568.040 includes the issue of paternity and that discovery on the issue is a due process right. The Legislature subsequently amended Section 568.040 to preclude litigating the issue of paternity in a criminal prosecution where paternity has been determined by a Circuit Court in a dissolution proceeding. The case and statute should be read together to mean that a Defendant in a criminal prosecution has a due process right to discover whether he is the biological father of the child in question unless specifically precluded by a constitutionally valid statute.

CONCLUSION

Relator has failed to show that it is entitled to a Writ of Prohibition. Neither case law nor statute preclude Respondent from issuing her discovery order that the natural mother and her child's DNA be discovered to resolve the issue of paternity. This Court should deny the issuance of a Writ of Prohibition.

Respectfully submitted,

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I hereby certify that two true and correct copies of the foregoing were hand delivered this

_____ day of October, 2005 to:

Raoul Stitt
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Pursuant to Missouri Supreme Court Rule 84.06(c), the undersigned counsel hereby certifies that this brief complies with Rule 55.03 and the type volume limitation, in that this brief was prepared with Microsoft Word 2002 (Times New Roman 13 point font) and contains 1088 words as identified by the word processing software excluding cover page, signature block and certificates of service and of compliance. In addition, the undersigned counsel hereby certifies that the enclosed diskette has been scanned for viruses with Norton Anti-Virus software and found virus free.

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