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IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI, ex rel. Matthew Becker, Franklin County Prosecutor, Relator,	)	CASE NO. SC98416
	)	EASTERN DISTRICT
vs.	)	CASE NO. ED108756
THE HONORABLE GAEL D. WOOD, Senior Judge, Respondent.	)	FRANKLIN COUNTY CASE NO. 15AB-CR01083

ORIGINAL WRIT PROCEEDING
FROM THE CIRCUIT COURT OF FRANKLIN COUNTY, MISSOURI
THE HONORABLE GAEL D. WOOD, SENIOR CIRCUIT JUDGE

RESPONDENT'S BRIEF

Respectfully Submitted,

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STATEMENT OF FACTS

This case is before this Court on the state's petition for an original remedial writ which arises out of Franklin County Case No. 15AB-CR01083. (See "Writ Summary" filed with this Court on March 13, 2020). The state is asking this Court to prohibit the trial court judge in that underlying case, the Honorable Gael Wood (Respondent herein), from enforcing an order requiring prosecuting attorneys Matthew Becker and Matthew Houston to appear and provide sworn testimony under oath at a pretrial motion hearing currently pending in that underlying case. (See "Writ Summary filed with this Court on March 13, 2020).

That underlying case, 15AB-CR01083, is a criminal case in which the state filed a Grand Jury Indictment dated June 23, 2015 alleging that the defendant therein, Aaron Hodges, committed two counts of murder in the first degree and two counts of armed criminal action. (Exhibit 1[1] at 258-259). On that same date, June 23, 2015, Respondent issued a warrant for Mr. Hodges's arrest pursuant to that Indictment and Mr. Hodges was served with the warrant. (Exhibit 1 at 255, 256). On July 15, 2015, Respondent arraigned Mr. Hodges on the charges and Mr. Hodges pled not guilty. (Exhibit 1 at 242).

On January 11, 2016, Mr. Hodges filed a pleading entitled "waiver of jury trial" and the case was set for guilty plea on February 23, 2016. (Exhibit 1 at 003, 229). However, on February 8, 2016, Mr. Hodges filed a motion for continuance wherein he

[1] Exhibit 1 was filed by the State on March 13, 2020 and consists of the Court File from the underlying case

requested the case be reset for March 29, 2016. (Exhibit 1 at 228). Respondent then continued the case and set it for March 29, 2016 for "Status." (Exhibit 1 at 003).

Eventually, on August 15, 2016, the matter was reset for guilty plea on November 14, 2016. (Exhibit 1 at 004). However, approximately six weeks before that scheduled plea hearing, on September 29, 2016, the state filed a pleading entitled "state's motion for trial setting," wherein it requested the case be set for jury trial, and on October 18, 2016, the case was actually set for a three day jury trial to begin on May 2, 2017. (Exhibit 1 at 004, 223). Mr. Hodges then filed a motion to withdraw his waiver of jury trial and also filed a motion to raise the security level of the case wherein he claimed that the state had advised various media outlets that the case had been set for guilty plea on November 14, 2016, but the guilty plea hearing was cancelled because the public defender's office had decided to proceed to trial. (Exhibit 1 at 218, 216-217). Subsequently, on October 27, 2016, Respondent granted Mr. Hodges's motion to raise the security level of the case. (Exhibit 1 at 214-215).

Several months later, on April 6, 2017, the trial setting of May 2, 2017 was cancelled and the case was eventually placed on the trial court's docket for May 23, 2017. (Exhibit 1 at 006). However, when May 23, 2017 rolled around, the case was reset for guilty plea on August 7, 2017. (Exhibit 1 at 006-007). And when August 7, 2017 rolled around, the case was continued for guilty plea to October 23, 2017. (Exhibit 1 at 007). And when October 23, 2017 rolled around, the case was continued for guilty plea to November 27, 2017. (Exhibit 1 at 007).

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Thereafter, on November 16, 2017, a new attorney entered her appearance on behalf of Mr. Hodges. (Exhibit 1 at 126). On June 15, 2018, that new attorney filed a notice that Mr. Hodges intended to proceed to trial relying on the defense of not guilty by reason of mental disease or defect. (Exhibit 1 at 116). Then, just six days later, on June 21, 2018, the state filed notice that it was withdrawing all plea offers. (Exhibit 1 at 103).

Subsequently, on February 26, 2019, the case was again set for trial – this time the case was given a trial setting of September 9, 2019. (Exhibit 1 at 011). However, on July 24, 2019, approximately seven weeks before the trial setting of September 9, 2019, the state filed a notice of intent to seek the death penalty. (Exhibit 1 at 064).

After the state filed its notice of intent to seek the death penalty, Undersigned counsel entered his appearance on behalf of Mr. Hodges and filed a motion to strike the state's notice of intent to seek the death penalty. (Exhibit 1 at 062, 055-058). In that motion, Undersigned counsel requested Respondent to strike the state's notice of intent to seek death and made several allegations in support thereof. (Exhibit 1 at 055-058). Those allegations included: a) an allegation that the state's decision to file its notice of intent to seek death more than four years after it filed the Indictment in Mr. Hodges's case and within two months of the date set for Mr. Hodges's jury trial without just cause violates 565.005 RSMo and defendant's constitutionally protected rights to due process, to a fair trial, to the effective assistance of counsel, and to a speedy trial; and b) an allegation that the fact that the state waited more than four years after it indicted Mr. Hodges to file its notice of intent to seek the death penalty should be seen as evidence that the state's real motive in seeking death was not for any reason set forth in its notice of intent but to

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vindictively punish Mr. Hodges for exercising his constitutionally protected right to a jury trial and/or proceeding to trial on the grounds that he was not guilty by reason of insanity. (Exhibit 1 at 055-058). The state then sought and obtained a continuance of the September 9, 2019 trial setting. (Exhibit 1 at 051-053, 048).

Thereafter, Undersigned counsel endorsed prosecutor Matthew Houston as a witness. (Exhibit 1 at 047). On September 19, 2019, the state objected to this endorsement. (Exhibit 1 at 013). Undersigned counsel then filed a memorandum of law in support of that endorsement. (Exhibit 1 at 033-037). The state then filed a motion to strike the endorsement. (Exhibit 1 at 028-032).

Ultimately, Respondent granted Undersigned counsel's request to endorse the prosecutor as a witness and stated his intention to permit Undersigned counsel to call the prosecutor as a witness at any pretrial motion hearing held on the matter. (Exhibit 1 at 018, 021; Exhibit 2[2] at p. 2, ln 17 – p. 3, ln 24; Exhibit 2 at p. 12, ln 11-24). Respondent actually entered two written orders setting forth his rulings on the issue. (Exhibit 1 at 018, 021). The second and final of these two written orders clearly required Franklin County Prosecutor Matthew Becker and Franklin County Assistant Prosecutor Matthew Houston to appear and provide sworn testimony within the scope of Undersigned counsel's motion

[2] Exhibit 2 was filed by the State on March 12, 2020 and consists of the transcript of a court proceeding wherein Respondent took up the issue of whether it would permit Mr. Hodges to call prosecutors as witnesses on his pretrial motion to strike the state's notice of intent to seek the death penalty.

to strike the state's notice of intent to seek the death penalty subject to the Respondent's rulings on any objections made during any hearing held on the motion. (Exhibit 1 at 018). In addition, Respondent orally stated on the record that "the realm of inquiry would be extremely limited" and "[o]bviously, it could not involve work product or trial strategy or that sort of thing." (See State's Exhibit 2 at p. 3, ln 3-8).

The state then indicated its intention to file a writ of prohibition and proceeded to file a writ of prohibition with the Missouri Court of Appeals for the Eastern District. (Exhibit 2 at p. 12, ln 11-20; Exhibit 3[3]). The Eastern District then denied the state's writ petition. (Exhibit 3). The state then refiled its writ petition in this court.

[3] Exhibit 3 was filed by the State on March 13, 2020 and consists of the Eastern District's Order declining the State's Writ Petition in this matter.

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POINTS RELIED ON

I.

Relator's first point relied on which draws the conclusion that "Relator Becker is entitled to an order prohibiting Respondent from enforcing his order requiring Relator Becker and APA Houston to appear and provide sworn testimony…" should be rejected both because it rests on the false premise that "…as a matter of law Hodges cannot prevail in that no finding of vindictiveness can be found because Relator Becker has not issued new or enhanced charges" and because it ignores the fact that Mr. Hodges's motion to strike the state's notice of intent to seek the death penalty is not based solely on a claim of prosecutorial vindictiveness.

Harden v. State, 415 S.W.3d 713 (Mo. App. S.D. 2013)

State v. Molinett, 876 S.W.2d 806 (Mo. App. W.D. 1994)

United States v. Goodwin, 457 U.S. 368 (1982)

Bullington v. Missouri 451 U.S. 430 (1981)

State ex rel. Patterson v. Randall, 637 S.W.2d 16 (Mo. Banc. 1982)

§§565.005, 565.020, 565.030, and 565.032 RSMo

Missouri Constitution, Article V, Section 4

Missouri Constitution, Article I, Sections 10 & 18(a)

United States Constitution, Amendments VI & XIV

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II.

Relator's second point relied on, which concludes that "Relator Becker is entitled to an order prohibiting Respondent Wood from enforcing his order…," should be rejected both because it is based on the false and otherwise purely speculative premise that "…the order violates the work product doctrine in that the testimony Hodges is seeking from Relator Becker involves Relator's Becker's rationale for his legal decision making," and also because it ignores the fact that Mr. Hodges's motion to strike the state's notice of intent to seek the death penalty is not based solely on a claim of prosecutorial vindictiveness.

State ex rel. Douglas Toyota III, Inc. v. Keeter, 804 S.W.2d 750 (Mo. Banc. 1991)

State ex rel. Seals v. Holden, 579 S.W.3d 235 (Mo. App. S.D. 2019)

Missouri Constitution, Article V, Section 4

Missouri Constitution, Article I, Sections 10 & 18(a)

United States Constitution, Amendments VI & XIV

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III.

Relator's third point relied on which claims that "Relator is entitled to an order prohibiting Respondent Wood from enforcing his order because the order is contrary to the test for vindictive prosecution in that Respondent Wood is requiring Relator Becker to rebut a presumption that Hodges has failed to establish" should be rejected because Respondent Wood has not yet heard Mr. Hodges's motion to strike the state's notice of intent to seek the death penalty, has not issued any findings of fact or conclusions of law with respect thereto, and has not yet done anything with respect thereto other than set the motion for hearing and require Relator Becker to testify within the scope of Mr. Hodges's motion.

Harden v. State, 415 S.W.3d 713 (Mo. App. S.D. 2013)

State v. Molinett, 876 S.W.2d 806 (Mo. App. W.D. 1994)

U.S. v. Goodwin, 457 U.S. 368 (1982)

State v. Buchli, 152 S.W.3d 289 (Mo. App. W.D. 2004))

Blackledge v. Perry, 417 U.S. 21 (1974)

Missouri Constitution, Article V, Section 4

Missouri Constitution, Article I, Sections 10 & 18(a)

United States Constitution, Amendments VI & XIV

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ARGUMENT

I.

Relator's first point relied on which draws the conclusion that "Relator Becker is entitled to an order prohibiting Respondent from enforcing his order requiring Relator Becker and APA Houston to appear and provide sworn testimony…" should be rejected both because it rests on the false premise that "…as a matter of law Hodges cannot prevail in that no finding of vindictiveness can be found because Relator Becker has not issued new or enhanced charges" and because it ignores the fact that Mr. Hodges's motion to strike the state's notice of intent to seek the death penalty is not based solely on a claim of prosecutorial vindictiveness.

Standard of Review

This Court has authority to "issue and determine original remedial writs" including writs of prohibition and mandamus. See State ex rel. Richardson v. Green, 465 S.W.3d 60, 62 (Mo. Banc. 2015) and State ex rel. Valentine v. Orr, 366 S.W.3d 534, 538 (Mo. Banc. 2012) (both citing Mo. Const. art. V, § 4). Both mandamus and prohibition are discretionary writs. See State ex rel. Mayes v. Wiggins, 150 S.W.3d 290, 291 (Mo. Banc. 2004) and State ex rel. Chassaing v. Mummert, 887 S.W.2d 573, 576 (Mo. Banc. 1994).

A writ of prohibition is available: (1) to prevent the usurpation of judicial power when the trial court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted. State ex

rel. Richardson v. Green, 465 S.W.3d at 62-63. An abuse of discretion occurs when the trial court's ruling "is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." State ex rel. Kemper v. Vincent, 191 S.W.3d 45, 49 (Mo. Banc. 2006). The writ petitioner has the burden to prove abuse of discretion. State ex rel. Ford Motor Company v. Messina, 71 S.W.3d 602, 607 (Mo. Banc. 2002).

This Court reviews a writ of mandamus for an abuse of discretion. State ex rel. Valentine v. Orr, 366 S.W.3d at 538. A litigant seeking mandamus must allege and prove that he [or she] has a clear, unequivocal, specific right to a thing claimed. Id. Ordinarily, mandamus is the proper remedy to compel the discharge of ministerial functions, but not to control the exercise of discretionary powers. Id. However, if the respondent's actions are wrong as a matter of law, then he or she has abused any discretion he or she may have had, and mandamus is appropriate. Id.

Discussion

In his first point relied on, Relator begins by asserting a conclusion that "Relator Becker is entitled to an order prohibiting Respondent from enforcing his order requiring Relator Becker and APA Houston to appear and provide sworn testimony…" (Relator's Brief at 11). He then goes on to explain why he feels this conclusion is warranted by stating the following premise: "…because as a matter of law Hodges cannot prevail in that no finding of vindictiveness can be found because Relator has not issued new or enhanced charges." (Relator's Brief at 11). There is a major problem with this premise.

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It is a *false* premise. Ultimately, Relator's legal conclusion that he is entitled to the order he seeks rests on the *false* premise that "as a matter of law Hodges cannot prevail in that no finding of vindictiveness can be found because Relator has not issued new or enhanced charges."

Relator is flat out wrong when he says "as a matter of law Hodges cannot prevail in that no finding of vindictiveness can be found because Relator has not issued new or enhanced charges." In saying this, Relator appears to believe that a charge is not "enhanced" when the state does something to increase the range of punishment without adding a new or additional charge and that a claim of prosecutorial vindictiveness is not cognizable in such a situation.[4] This is extremely problematic because these beliefs fly in the face of and are incompatible with prevailing caselaw which clearly holds that a claim of prosecutorial vindictiveness is cognizable when the state does something to increase the range of punishment without adding a new or additional charge. See Harden v. State, 415 S.W.3d 713 (Mo. App. S.D. 2013); State v. Molinett, 876 S.W.2d 806 (Mo. App. W.D. 1994); and U.S. v. Goodwin, 457 U.S. 368 (1982) (discussing Bordenkircher v. Hayes, 434 U.S. 357 (1978) (all of which are discussed more fully below)).

[4] Examples of what the state can do to increase the range of punishment without filing new or additional charges include charging the defendant as a prior or persistent or habitual offender or filing a notice of intent to seek the death penalty.

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Relator's mistaken beliefs may stem from his misreading of State v. Murray, 925 S.W.2d 492 (Mo. App. E.D. 1996). In the Suggestions in Support he filed with this Court on March 13, 2020, Relator cited to State v. Murray for the notion that "when no new charge is filed, as a matter of law, the allegation of vindictive prosecution is without merit." (See "Relator's Suggestions in Support of Petition for Writ of Prohibition, or in the alternative, Writ of Mandamus" at 7 (citing State v. Murray at 925 S.W.2d at 493)). In addition, in his actual brief, Relator quoted the following passage from State v. Murray presumably because he believed it supported his argument:

> "…as a matter of law, prosecutorial vindictiveness is inapplicable to the present facts. Every case cited by defendant, and our independent research, fail[s] to support a finding of prosecutorial vindictiveness where each filing was substantively identical to the previous charge and there was no enhancement to the charge or addition of charges."

See Relator's Brief at 13 (citing State v. Murray at 925 S.W.2d at 493). Clearly, Relator is relying on his reading of State v. Murray to support his argument that he has not issued "enhanced" charges in Mr. Hodges's case despite having filed a notice of intent to seek the death penalty in that case. At one point in his brief, Relator actually says:

> "Here, Relator Becker did not issue new or enhanced charges against Hodges. In 2015, the State charged Hodges with two counts of First Degree Murder and two counts of Armed Criminal Action. In 2020, those charges remain the same. Because the traditional test for prosecutorial vindictiveness looks at *charges* and not *punishments*, the Court need proceed no further, and the writ should issue."

(Relator's Brief at 14) (Emphasis in Relator's Brief).

These statements clearly hearken back to Relator's misreading of State v. Murray. As previously noted Relator claims that State v. Murray says "when no new charge is filed, as a matter of law, the allegation of vindictive prosecution is without merit." (See "Relator's Suggestions in Support of Petition for Writ of Prohibition, or in the alternative, Writ of Mandamus" at 7 (citing State v. Murray at 925 S.W.2d at 493)). However, this is not what State v. Murray says. In fact, what State v. Murray actually says is as follows:

> "In the present case, the prosecutor twice reinstated the initial charge of unlawful use of a weapon. No additional charges were added, *and* the charge was not enhanced. The charge remained the same on each filing. Therefore, as a matter of law, the allegation of vindictive prosecution is without merit."

State v. Murray, 925 S.W.2d at 493 (emphasis added). This is very different from saying "when no new charge is filed as a matter of law, the allegation of vindictive prosecution is without merit." While it is true that State v. Murray actually says that there were no additional charges added in that case *and* that the charge in that case was not enhanced, State v. Murray does not stand for the notion that "when no new charge is filed, as a matter of law, the allegation of vindictive prosecution is without merit" or the notion that a charge is not "enhanced" when the state does something to increase the range of punishment without adding a new or additional charge. State v. Murray, 925 S.W.2d 493. It is important to note that in State v. Murray the state had not alleged that the defendant therein was any sort of prior or persistent offender or filed a notice of intent to seek the death penalty. State v. Murray, 925 S.W.2d 492-493. This is important because in Mr.

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Hodges's case, the state has filed a notice of intent to seek the death penalty and this fact makes Mr. Hodges's case factually distinguishable from State v. Murray.

A proper reading of State v. Murray cuts against Relator's argument that he has not issued "enhanced" charges in Mr. Hodges's case despite having filed a notice of intent to seek the death penalty. As noted in Respondent's "Return," which was filed on March 27, 2020, State v. Murray actually held as follows:

> "[i]n order to prove prosecutorial vindictiveness in the pretrial context, the defendant must show that the charge against him was *augmented* to penalize him for exercising a legal right and that the charge cannot be justified as a proper exercise of prosecutorial discretion."

See Respondent's Return at 4 (citing State v. Murray, 925 S.W.2d at 493). In addition, in declaring this holding, State v. Murray cited to State v. Molinett which asserted that although a defendant in a criminal case is not entitled to a presumption of vindictiveness when the state does something prior to trial which enhances the range of punishment, such as follow through on an intention stated during plea negotiations to charge a defendant with being a prior drug offender if he does not plead guilty, a claim of prosecutorial vindictiveness is still nevertheless cognizable and can be proven without the benefit of the presumption. See State v. Murray, 925 S.W.2d at 493 and State v. Molinett, 876 S.W.2d at 809 n. 1. It follows that a charge is "augmented" or "enhanced" as those words are used in State v. Molinett and State v. Murray when the state does something to increase the range of punishment without adding a new or additional charge. Id. Respondent submits that all of this, meaning a proper reading of State v.

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Murray and the fact that State v. Murray cites to State v. Molinett and an understanding of the holding in State v. Molinett, flies in the face of the state's reading of State v. Murray as discussed above and also flies in the face of the state's premise that "…as a matter of law Hodges cannot prevail in that no finding of vindictiveness can be found because Relator has not issued new or enhanced charges." Ultimately, Respondent submits that Relator has "augmented" or "enhanced" the charges in Mr. Hodges's case by filing a notice of intent to seek the death penalty and that this Court, in light of the prevailing caselaw as set forth in this Brief, should reject Relator's claim that he has not and in turn, reject Relator's premise as a false and material misstatement of the law.

While on the subject of State v. Molinett, Respondent submits that Relator also seems to have misread State v. Molinett, 876 S.W.2d 806 (Mo. App. W.D. 1994), Bordenkircher v. Hayes, 434 U.S. 357 (1978), and United States v. Goodwin, 457 U.S. 368 (1982). In his brief, Relator cites to State v. Molinett and Bordenkircher v. Hayes to make the following argument:

> "The Court of Appeals has–following Supreme Court guidance—held that enhancing a sentence through prior and persistent status after the failure of plea bargaining does not give rise to the automatic *presumption of vindictiveness*."

(See Relator's Brief at 14-15 (citing State v. Molinett and Bordenkircher v. Hayes)). Unfortunately, Relator, like the rock band Bon Jovi, is only "halfway there." While Relator points out and seems to understand that cases such as State v. Molinett and Bordenkircher v. Hayes hold that the state's act of enhancing the range of punishment prior to trial by charging someone as a prior drug offender or as habitual offender does

not warrant a finding of a *presumption of vindictiveness*, Relator does not acknowledge or seem to understand that State v. Molinett dropped a footnote wherein it went on to say that: "[t]he denial of a presumption of vindictiveness would not prohibit a defendant from presenting objective evidence of prosecutorial vindictiveness." See State v. Molinett, 876 S.W.2d at 809, n. 1. Nor does Relator seem to understand that the discussion in United States v. Goodwin makes it clear that both United States v. Goodwin and Bordenkircher v. Hayes are squarely in line with State v. Molinett in holding that although the state's act of filing new charges or enhancing the range of punishment in some other manner prior to trial does not warrant a finding of a presumption of vindictiveness, this does not prohibit a defendant from presenting objective evidence of prosecutorial vindictiveness. United States v. Goodwin, 457 U.S. 368, 368-370, 380-385, and 380 n. 12 (1982).

In United States v. Goodwin, the Supreme Court of the United States held that the state's pretrial decision to modify the charges against the Goodwin defendant such that he faced trial on a felony charge whereas he was initially only charged with misdemeanors did not warrant a presumption of vindictiveness even though the charges were modified following the Goodwin defendant's assertion of his right to a jury trial, but also declared that the Goodwin defendant could still have prevailed on a claim of vindictiveness if he had come forward with objective evidence that the prosecutor was motivated by vindictiveness. United States v. Goodwin, 457 U.S. at 368-370, 380-385, and 380 n. 12. In addition, in footnote 12 of its decision in United States v. Goodwin, the Supreme Court of the United States discussed its ruling in Bordenkircher v. Hayes and declared that although it had found no presumption of vindictiveness was warranted based on the

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state's pretrial decision to follow through on a threat stated during pretrial negotiations to reindict the Bordenkircher defendant as a habitual offender if he did not plead guilty, this did not foreclose the possibility that the Bordenkircher defendant could nevertheless have proven a claim of vindictiveness with objective evidence that the prosecutor's actual motive was to penalize him for proceeding to trial. United States v. Goodwin, 457 U.S. at 380 n. 12.

Moreover, Relator fails to appreciate the significance of Harden v. State, 415 S.W.3d 713 (Mo. App. S.D. 2013). In Harden v. State, the Missouri Court of Appeals for the Southern District said the following:

> "There are two ways to prove prosecutorial vindictiveness: 1) if a realistic likelihood of vindictiveness is found, a presumption is erected in [the] defendant's favor[,] which the prosecutor must rebut; or 2) a defendant can make a case for prosecutorial vindictiveness without the aid of the…presumption if he can prove, through objective evidence[,] that the sole purpose of the state's action was to penalize him for exercising some right."

Harden v. State, 415 S.W.3d at 718. Relator correctly acknowledges this in his brief (Relator's Brief at 12, 20). However, Relator fails to recognize that Harden v. State flies in the face of his premise that "…as a matter of law Hodges cannot prevail in that no finding of vindictiveness can be found because Relator has not issued new or enhanced charges."

In Harden v. State, the Missouri Court of Appeals for the Southern District held that, *in light of the particular facts of that case*, the Harden defendant was not entitled to

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relief on his Rule 29.15 claim that his trial attorneys were ineffective for failing to file a motion to dismiss either the charges against him or the state's notice of intent to seek death based on prosecutorial vindictiveness. Harden v. State, 415 S.W.3d at 718-719. In fact, in denying the claim, the Southern District specifically pointed out that the state had filed its notice of intent to seek death in that case two weeks *before* it filed the Information in that case and that the plea offers made by the state in that case were made *after* the state filed its notice of intent to seek death. Id. at 719. It was in light of these particular facts that the Southern District found that the state clearly did not file its notice of intent to seek death to punish the defendant in that case for exercising his right to a jury trial and denied relief. Harden v. State, 415 S.W.3d at 719.

All of this is very significant to Mr. Hodges's case not only because Harden v. State was a case which involved a claim of ineffective assistance of counsel for failing to file a motion to dismiss either the charges against him or the state's notice of intent to seek death based on prosecutorial vindictiveness, but also because the Southern District denied the claim based on the record before the motion court and the particular facts of that case and not because the claim was not cognizable. Harden v. State, 415 S.W.3d at 719. Respondent submits that if Relator's beliefs – that an allegation of prosecutorial vindictiveness can only be meritorious when there is a new charge and that a charge is not "enhanced" when the state does something to increase the range of punishment without adding a new or additional charge – were true, the *Harden* Court would have held that the vindictiveness claim raised in that case was not cognizable. Clearly Respondent has these beliefs as he has said the following in his brief:

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> "Here Relator Becker did not issue new or enhanced charges against Hodges. In 2015, the State charged Hodges with two counts of First Degree Murder and two counts of Armed Criminal Actions. In 2020, those charges remain the same. Because the traditional test for prosecutorial vindictiveness looks at *charges* and not *punishments*, the Court need proceed no further, and the writ should issue."

(Relator's Brief at 14) (Emphasis in Relator's Brief). Respondent submits that in light of the prevailing caselaw as set forth above and the fact that Relator has filed a notice of intent to seek death in Mr. Hodge's case, Relator's beliefs must be rejected as mistaken/erroneous.

Relator does eventually make an alternative argument by saying "but even if the Court considers the range of punishment, Hodges still cannot satisfy the test for prosecutorial vindictiveness." (Relator's Brief at 14). In making this alternative argument, Relator correctly points out that the statute defining first degree murder authorizes two possible punishments for that offense, death or imprisonment for life without eligibility for probation or parole. (See Relator's Brief at 14 and 565.020 RSMo). Relator then asserts the following: "[t]he statute gives two options for punishment and does not require the State to enhance the charge in order to seek one of those options." (Relator's Brief at 14). There is major problem with this assertion and that is that Relator has read 565.020 RSMo in isolation and ignored other statutes and caselaw that do require the state to enhance the charge in order to seek one of those options. (See below).

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Ultimately, this Court should reject Relator's alternative argument wherein he claims "but even if the Court considers the range of punishment, Hodges still cannot satisfy the test for prosecutorial vindictiveness." There are several reasons for this.

First, this argument flies in the face of Harden v. State, 415 S.W.3d at 718-719. That case was discussed above and will not be repeated here, but Respondent submits that Relator's alternative argument should be rejected in light of that case.

Second, while it may be true in a highly, hyper-technical sense to say that the *particular* statute the state is referring to, 565.020 RSMo, "does not require the State to enhance the charge in order to seek one of those options," the simple fact of the matter is that the state cannot seek the death penalty without filing a notice of intention to do so and otherwise enhancing the charge in accordance with the requirements of due process and the provisions of 565.030 and 565.032 RSMo. In State v. Nicklasson, this Court declared: "Of course, due process requires the state to make its punishment decision within a reasonable time prior to trial to give the defendant notice of the charges and aggravating circumstances against which he must prepare a defense." State v. Nicklasson, 967 S.W.2d 596, 605 (Mo. Banc. 1998). And in State v. Strong, this Court declared as follows: "Pursuant to section 565.005.1, the state is required to give to the defendant, '[a]t a reasonable time before the commencement of the first stage of any trial of murder in the first degree,' notice of the statutory aggravating circumstances it intends to submit in the event the defendant is convicted of first degree murder." State v. Strong, 142 S.W.3d 702, 711 (Mo. Banc. 2004); See also State v. Johnson, 207 S.W.3d 24, 48 (Mo. Banc. 2006) and State v. Glass, 136 S.W.3d 496, 513 (Mo. Banc. 2004). Moreover, if the

state does comply with the due process requirement that it give notice of an intention to seek the death penalty and the alleged aggravating circumstances, 565.030 RSMo and 565.032 RSMo operate so as to: a) require the state to make a choice prior to trial as to whether it wants to proceed on a charge of capital murder such that the death penalty would be a sentencing option or waive the death penalty in which case "the submission to the trier and all subsequent proceedings in the case shall proceed as in all other criminal cases," b) set forth a very unique trial procedure full of procedural safeguards that must be followed if the state elects to proceed to trial on the charge of capital murder, and c) in the event the state does elect to proceed to trial on the charge of capital murder, require the finder of fact to find that the state has proven the existence of an aggravating circumstance beyond a reasonable doubt before the death penalty can be imposed. (See 565.030 RSMo and 565.032 RSMo).

Respondent submits that in light of all this, the charge of murder in the first degree is essentially a lesser included offense of capital murder with capital murder essentially having an added element which must be proven beyond a reasonable doubt – that element being the existence of at least one aggravating circumstance. (See 565.030 RSMo and 565.032 RSMo). It is imperative to note that if the state waives the death penalty or fails to prove that added element of an aggravating circumstance beyond a reasonable doubt, then the death penalty is not a sentencing option. (See 565.030 RSMo and 565.032 RSMo). This cuts against any notion that murder in the first degree and capital murder have the same range of punishment. The range of punishment for murder in the first degree is life without the possibility of probation or parole except by act of the governor.

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(See 565.020, 565.030, and 565.032 RSMo). In contrast, the range of punishment for capital murder is death or life in prison without the possibility of probation or parole except by act of the governor. (See 565.020, 565.030, and 565.032 RSMo).

Respondent further submits that the ruling of the Supreme Court of Missouri in State ex rel. Patterson v. Randall and the ruling of the Supreme Court of the United States in Bullington v. Missouri both support the argument that murder in the first degree is a lesser included offense of capital murder and otherwise weigh in favor of rejecting the state's contention that it has not enhanced the charges against Mr. Hodges by filing a notice of intent to seek death. (See State ex rel. Patterson v. Randall, 637 S.W.2d 16 (Mo. Banc. 1982) and Bullington v. Missouri, 451 U.S. 430 (1981) discussed below).

State ex rel. Patterson v. Randall, was a case in which a criminal defendant sought to prohibit the state from retrying him for "capital murder" after this Court had reversed his conviction for murder in the first degree following an appeal. State ex rel. Patterson v. Randall, 637 S.W.2d at 17. The state had waived the death penalty in the initial trial but sought to pursue the death penalty in the retrial. Id. In his writ, the defendant therein argued that the state should be prohibited from seeking the death penalty in the retrial based on a claim of prosecutorial vindictiveness. Id. This Court found that a presumption of vindictiveness was warranted based on the fact that the state had waived the death penalty at the first trial, but wanted to seek the death penalty following the defendant's successful appeal. Id. at 17-18. In doing so, this Court rejected the state's contention that such a presumption was unwarranted because there was no new charge and only the range of punishment had changed. Id. Moreover, in rejecting that contention, this Court

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specifically noted that it is the increased penalty associated with a new charge that makes it more serious and asserted the following:

> In Bullington v. Missouri, 451 U.S. 430, 101 S. Ct. 1852, 68 L.E.D.2d 270 (1981), the Supreme Court [of the United States] ruled that the life sentence is effectively a 'lesser included' penalty to the death sentence to the extent that the imposition of life imprisonment at the first trial acquits the defendant of the death sentence and the Double Jeopardy Clause thereby bars the State from seeking the death penalty at the second trial. Under this decision, the State cannot persuade that life imprisonment and the death penalty are within a single range of punishment for capital murder.

State ex rel. Patterson v. Randall, 637 S.W.2d at 18 (citing Bullington v. Missouri 451 U.S. 430 (1981)).

Bullington v. Missouri was a case wherein the state of Missouri sought a writ of prohibition to prohibit the trial court judge presiding over a retrial from proceeding with the case as it was not a death penalty case after the defendant, who had received the benefit of a life sentence following his initial trial on capital murder charges, obtained a new trial following his direct appeal. Bullington v. Missouri, 451 U.S. at 430. The Supreme Court of the United States reversed the ruling of the Supreme Court of Missouri which had granted the writ. Id. at 430. In doing so, the Supreme Court of the United States held that in light of the fact that the sentencing phase of the initial capital trial had the same sort of procedural safeguards as the guilt phase of the trial, the defendant in that case was entitled to the protections of the double jeopardy clause, which are normally

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reserved for the guilt phase of the trial, and the state could not retry him on capital murder without violating the double jeopardy clause since the jury had "acquitted" him of capital murder at his first trial. Bullington v. Missouri, 451 U.S. at 430. The Supreme Court of the United States specifically found that the defendant therein had been "acquitted" and not merely given the benefit of a more lenient sentence. Id.

In light of the foregoing, Respondent respectfully requests this Court to hold that Relator, contrary to his claims as set forth in his brief, has essentially issued a new charge by filing a notice of intent to seek the death penalty and otherwise enhanced the charge. Respondent respectfully submits that this Court should follow the precedent set by this Court in State ex rel. Patterson v. Randall and Bullington v. Missouri and otherwise find that the provisions of 565.030 and 565.032 RSMo, as argued above, make it so that murder in the first degree is a lesser included offense of capital murder with capital murder having the added element of the existence of at least one aggravating circumstance and each offense having its own range of punishment. Respondent also respectfully submits that even if this Court is not inclined to recognize capital murder as an offense separate and distinct from murder in the first degree, it should still find that Relator enhanced the charge in Mr. Hodges underlying case when he filed a notice of intent to seek the death penalty. Ultimately, Respondent respectfully submits that this Court should reject Relator's premise that "…as a matter of law Hodges cannot prevail in that no finding of vindictiveness can be found because Relator has not issued new or enhanced charged" as a false premise.

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In arguing his first point, Relator also argues that Respondent Wood cannot find that Relator Becker acted vindictively because Hodges has not alleged any objective evidence of vindictiveness and because Mr. Hodges's motion to strike the state's notice of intent to seek the death penalty does not include sufficient factual allegations to warrant a presumption of vindictiveness. (Relator's Brief at 15-16). This argument should be rejected for two reasons. First, Mr. Hodges has alleged objective evidence of vindictiveness. In his motion to strike the state's notice of intent to seek the death penalty, Mr. Hodges has alleged as follows:

> "The fact that the state waited more than 4 years after the filing of the Indictment and until the defendant was within two months of his trial date of September 9, 2019 to file its "Notice of Intent to Seek the Death Penalty" should be seen as evidence that the state's real motive in seeking the death penalty is not for any reason set forth in its 'Notice of Intent to Seek the Death Penalty,' but to vindictively punish the defendant for exercising his constitutionally protected right to a jury trial and/or proceeding to trial on the grounds that he was not guilty by reason of insanity. In support of this allegation, defendant requests this Court to note that the aggravators set forth in its "Notice of Intent to Seek the Death Penalty" were known to the state since the Indictment was filed on June 23, 2015. In addition, in support of this allegation, defendant requests this Court to note that the state has made plea offers, but rescinded them after it became clear that the defendant wished to proceed to trial and wished to argue that he was not guilty by reason of insanity. In fact, on June 21, 2018, just four days after the defense filed

its notice of intent to rely on the defendant of not guilty by reason of insanity, the state filed that notice that it was rescinding all previous plea offers."

(Exhibit 1 at 057-058). Respondent submits that these allegations are sufficient to warrant a hearing on the matter and that Relator has not cited to a single case holding that these allegations are insufficient to warrant a hearing.

Second, even if this Court agrees with Relator that a presumption of vindictiveness is not warranted, that does not mean Relator is correct in arguing that Respondent cannot find, after the motion hearing, that Relator acted vindictively because as discussed above Mr. Hodges can prove his claim of prosecutorial vindictiveness without the benefit of that presumption. (Respondent's Brief at 17-22). It should be noted that Relator is under the mistaken impression that Respondent has drawn a presumption of vindictiveness as evidenced by the fact that Relator argues that: "Hodges and Respondent Wood have turned this wisdom on its head and instead assumed that any change after the demand for a jury trial must warrant a presumption of vindictiveness." (Relator's Brief at 16). Respondent submits that he has not yet drawn any presumption of vindictiveness, or made any findings of fact with respect to the allegations contained in Mr. Hodges's motion to strike the state's notice of intent to seek the death penalty, and that Relator's claim that Respondent has drawn a presumption of vindictiveness is clearly erroneous. (Exhibit 1, Exhibit 2).

Finally, Respondent requests this Court to note that Mr. Hodges's motion to strike the state's notice of intent to seek the death penalty is not based solely on a claim of prosecutorial vindictiveness. There are allegations that the state has violated the

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provisions of 565.005 RSMo by not filing its notice of intent to seek the death penalty at a reasonable time prior to Mr. Hodges's trial, that there has been undue delay in the state's decision to seek the death penalty in Mr. Hodges's underlying case, that this undue delay is without just cause, that the delay has prejudiced Mr. Hodges's ability to appear and defend against a charge of capital murder, and that the undue delay violates Mr. Hodges's right to a speedy trial. (Exhibit 1 at 055-058). Relator's brief fails to say anything with respect to why the prosecutor should not be required to testify with respect to these allegations and this Court should not supply such arguments or entertain them as they have not been set forth in Relator's brief.

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II.

Relator's second point relied on, which concludes that "Relator Becker is entitled to an order prohibiting Respondent Wood from enforcing his order…," should be rejected both because it is based on the false and otherwise purely speculative premise that "…the order violates the work product doctrine in that the testimony Hodges is seeking from Relator Becker involves Relator's Becker's rationale for his legal decision making," and also because it ignores the fact that Mr. Hodges's motion to strike the state's notice of intent to seek the death penalty is not based solely on a claim of prosecutorial vindictiveness.

Standard of Review

The standard of review is the same as it was for the first point relied on. That standard is adopted and incorporated by reference as if set forth fully herein.

Discussion

In arguing the allegations contained in his second point relied on, Relator presumes, assumes, and speculates. That is pretty much all he does. He claims that Respondent "exceeded the limits of his power and abused his discretion by granting Hodges's motion to endorse opposing counsel because, as a matter of law any questions Hodges could ask to try to establish his claim would violate the work product doctrine." (Relator's Brief at 16). Elsewhere, he argues that "[a]ny information which would provide Hodges with the answer to the question of why Relator Becker and his office 'did what they did' would necessarily require the disclosure of work product." (Relator's Brief at 17). Subsequently, he claims that "[b]ecause Hodges cannot ask relevant

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questions that do not run afoul of the work product privilege, Respondent Wood should not have granted permission to call Relator Becker or APA Houston." (Relator's Brief at 17-18).

Respondent submits that Relator presumes, assumes, and speculates way too much and that Relator has filed his writ prematurely. Respondent further submits that Relator should have waited for questions that required responses that violated the work product doctrine, objected to them on the grounds that his responses would violate the work product doctrine, and seen how Respondent would rule on those objections. Then if Respondent had said the objections are overruled and required Relator to answer questions he felt would violate the work product doctrine, Relator could have said ok judge could you show that I'm going to file a writ at the conclusion of this hearing such that I do not have to answer questions I believe are covered by the work product doctrine, even though you've ordered me to do so, until my writ is resolved. Respondent would have permitted that and that there is no reason to think otherwise. This Court could then have determined whether the questions asked for information that violated the work product doctrine and how to properly address the issue. As it is, Relator has presumed, assumed, and speculated way too much and taken up an issue that was not and is not ripe for litigation.

It must be noted that Respondent's Orders themselves do not violate the work product doctrine and that Respondent has made it clear that he will not permit questions that violate the work product doctrine. (Exhibit 1 at 018, 021; Exhibit 2 at p. 2, ln 17 – p. 3, ln 24; Exhibit 2 at p. 12, ln 11-24). Respondent actually entered two written orders

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setting forth his rulings on the issue. (Exhibit 1 at 018, 021). The second and final of these two written orders clearly required Franklin County Prosecutor Matthew Becker and Franklin County Assistant Prosecutor Matthew Houston to appear and provide sworn testimony within the scope of Undersigned counsel's motion to strike the state's notice of intent to seek the death penalty *subject to Respondent's rulings on any objections made during any hearing held on the motion*. (Exhibit 1 at 018). In addition, Respondent orally stated on the record that "the realm of inquiry would be extremely limited" and "[o]bviously, it could not involve work product or trial strategy or that sort of thing" (See State's Exhibit 2 at p. 3, ln 3-8).

In light of the foregoing, Respondent submits that at the very least, the state's arguments that it would be forced to violate the work product by answering questions at a motion hearing on Mr. Hodges's motion to strike the state's notice of intent to seek the death penalty are not ripe for litigation. As such, Respondent respectfully requests this Court to quash its preliminary writ on this basis even if this Court sees no other reason for doing so. In support of this request, Respondent requests this Court to note that: "[p]rohibition is not generally intended as a substitute for correction of alleged or anticipated judicial errors and it cannot be used to adjudicate grievances that may be adequately redressed in the ordinary course of judicial proceedings." State ex rel. Seals v. Holden, 579 S.W.3d 235, 242 (Mo. App. S.D. 2019) (citing State ex rel. Douglas Toyota III, Inc. v. Keeter, 804 S.W.2d 750, 752 (Mo. Banc. 1991)).

Moreover, just as with the argument raised in Relator's first point relied on, Respondent requests this Court to note that Mr. Hodges's motion to strike the state's

notice of intent to seek the death penalty is not based solely on a claim of prosecutorial vindictiveness. There are allegations that the state has violated the provisions of 565.005 RSMo by not filing its notice of intent to seek the death penalty at a reasonable time prior to Mr. Hodges's trial, that there has been undue delay in the state's decision to seek the death penalty in Mr. Hodges's underlying case, that this undue delay is without just cause, that the delay has prejudiced Mr. Hodges's ability to appear and defend against a charge of capital murder, and that the undue delay violates Mr. Hodges's right to a speedy trial. (Exhibit 1 at 055-058). Relator's brief fails to say anything with respect to why the prosecutor should not be required to testify with respect to these allegations and this Court should not supply such arguments or entertain them as they have not been set forth in Relator's brief.

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III.

Relator's third point relied on which claims that "Relator is entitled to an order prohibiting Respondent Wood from enforcing his order because the order is contrary to the test for vindictive prosecution in that Respondent Wood is requiring Relator Becker to rebut a presumption that Hodges has failed to establish" should be rejected because Respondent Wood has not yet heard Mr. Hodges's motion to strike the state's notice of intent to seek the death penalty, has not issued any findings of fact or conclusions of law with respect thereto, and has not yet done anything with respect thereto other than set the motion for hearing and require Relator Becker to testify within the scope of Mr. Hodges's motion.

Standard of Review

The standard of review is the same as it was for the first point relied on. That standard is adopted and incorporated by reference as if set forth fully herein.

Discussion

In his third point relied on, Relator claims that he "…is entitled to an order prohibiting Respondent Wood from enforcing his order because the order is contrary to the test for vindictive prosecution in that Respondent Wood is requiring Relator Becker to rebut a presumption that Hodges has failed to establish." (Relator's Brief at 19). This argument should be rejected because Respondent Wood has not yet heard Mr. Hodges's motion to strike the state's notice of intent to seek the death penalty, has not issued any findings of fact or conclusions of law with respect thereto, and has not yet done anything with respect thereto other than set the motion for hearing and require Relator Becker to

testify within the scope of Mr. Hodges's motion. (Exhibit 1 at 018, 021; Exhibit 2 at p. 2, ln 17 – p. 3, ln 24; Exhibit 2 at p. 12, ln 11-24).

For whatever reason, Relator is clearly under the impression that Respondent has drawn a presumption of vindictiveness. In his third point relied on, Relator actually claims: "Respondent Wood is requiring Relator Becker to rebut a presumption that Hodges has failed to establish." (Relator's Brief at 19). In addition, in his argument with respect to his third point relied on, Relator asserts: "Respondent Wood created an automatic presumption and is now requiring the Prosecuting Attorney to testify in order to rebut the automatic presumption." (Relator's Brief at 22). Later on in his argument with respect to his third point relied on, Relator states: "Under Missouri law, Respondent Wood cannot force the Prosecuting Attorney to testify without first finding a presumption of vindictiveness based on evidence presented by a defendant." (Relator's Brief at 23).

Respondent asserts that he has not drawn any such presumption and that there is nothing in his orders or in any statements he has made to suggest otherwise. (Exhibit 1 at 018, 021; Exhibit 2 at p. 2, ln 17 – p. 3, ln 24; Exhibit 2 at p. 12, ln 11-24). In fact, Respondent urges this Court to recognize that there is nothing anywhere in the record of the underlying case to suggest that Respondent has drawn a presumption of vindictiveness. (Exhibit 1, Exhibit 2).

Respondent further submits that Relator may reasonably have been misguided by what he has read in a particular line of cases. There is one line of cases that correctly hold that a defendant may prove a claim of prosecutorial vindictiveness in two ways and in his brief, Relator actually cites to a case belonging to that line of cases, Harden v.

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State. Relator's Brief at 12, 20 (citing to Harden v. State, 415 S.W.3d at 718). Relator even correctly acknowledges that Harden v. State says that a defendant may prove prosecutorial vindictiveness in two ways, that the first way is for a defendant to introduce evidence sufficient to create a realistic likelihood of vindictiveness which then creates a rebuttable presumption in the defendant's favor, and that the second way is for the defendant to proceed without the benefit of the presumption by proving through objective evidence that the sole purpose of the State's action was to penalize him for exercising some right. Relator's Brief at 12, 20 (citing to Harden v. State, 415 S.W.3d at 718). Respondent submits that there are other cases in this line as well and requests this Court to note that they were discussed in the first point relied on of this Brief. They include the following cases: State v. Molinett, 876 S.W.2d 806 (Mo. App. W.D. 1994), U.S. v. Goodwin, 457 U.S. 368 (1982), and Bordenkircher v. Hayes, 434 U.S. 357 (1978).

There is also a second line of cases. And in fact Relator cites to a case belonging to that line of cases, State v. Buchli. See Relator's Brief at 21 (citing State v. Buchli, 152 S.W.3d 289, 309 (Mo. App. W.D. 2004)). Relator appears to correctly recognize that State v. Buchli holds as follows:

> "The test for prosecutorial vindictiveness is whether the facts show a realistic likelihood of vindictiveness in the prosecutor's augmentation of charges. [Citation omitted]. In making such determination, the courts consider two factors: "(1) the prosecutor's stake in deterring the exercise of some right, and (2) the prosecutor's conduct." [citation omitted]. The defendant bears the burden of showing that a realistic likelihood of vindictiveness exists. [citation omitted]. Only if this is

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shown does the burden shift to the prosecutor to show, by objective on-the-record explanations, the rationale for the [s]tate's actions. [citation omitted]."

State v. Buchli, 152 S.W.3d at 309. This second line of cases fail to acknowledge that under the first line of cases, prosecutorial vindictiveness can be proven without the benefit of the presumption of vindictiveness. Id. Moreover, this second line of cases seems traceable back to Blackledge v. Perry, which was a seminal decision that perhaps gave birth to the claim of vindictive prosecution outside of a purely sentencing context, and held that it was not constitutionally permissible for the state to respond to [the Perry defendant's] successful invocation of his statutory right to appeal by bringing a more serious charge against him than the one he was convicted of prior to winning his appeal and having his case remanded for a new trial. Blackledge v. Perry, 417 U.S. 21, 23 (1974). Respondent submits that this line of cases is traceable back to Blackledge v. Perry based on the following series of facts: Relator cites to State v. Buchli for the notion that "the test for prosecutorial vindictiveness is whether the facts show a realistic likelihood of vindictiveness in the prosecutor's augmentation of charges," State v. Buchli cites to State v. Gardner for this same notion, State v. Gardner cites to State v. Massey for this same notion, State v. Massey cites to United States v. Andrews for this same notion, and United State v. Andrews cites to Blackledge v. Perry for this same notion. (See Relator's Brief at 21 (citing State v. Buchli, 152 S.W.3d at 309) (citing State v. Gardner, 8 S.W.3d 66, 70 Mo. Banc. 1999)(citing State v. Massey, 763 S.W.2d 181, 183 (Mo. Banc. W.D. 1988)) (citing United States v. Andrews, 633 F.2d 449, 453 (6th Cir. 1980)) (citing Blackledge v. Perry, 417 U.S. 21 (1974)).

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Relator may be confused by these two lines of cases. This may be why Relator is claiming that Respondent's "order is contrary to the test for vindictive prosecution in that Respondent Wood is requiring Relator Becker to rebut a presumption that Hodges has failed to establish." (Relator's Brief at 19, point relied on III). Respondent maintains that his order is not contrary to the test for vindictive prosecution, that it is proper to read Blackledge v. Perry and its progeny in light of United States v. Goodwin and its progeny, and that there is a way under United State v. Goodwin and its progeny to prove prosecutorial vindictiveness without the benefit of a presumption of vindictiveness. (see Respondent's Brief at 36-37). Respondent submits that in Blackledge v. Perry, the Supreme Court of the United States recognized that there were cases in which a presumption of vindictiveness was applied in situations where a prosecutor did something to penalize a defendant following a successful appeal and found that a such a presumption was warranted based on the facts of the Blackledge v. Perry case, but did not foreclose the possibility that a claim of vindictive prosecution could be established without the benefit of such a presumption. Blackledge v. Perry, 417 U.S. at 21-29. There is no other way to read Blackledge v. Perry in light of United States v. Goodwin.

Respondent also submits that Relator's confusion may stem from the fact that he is reading and citing a lot of post-conviction cases that are at the appellate or habeas level wherein the courts presiding over those matters analyze a claim of vindictive prosecution based on a record already created and do not have the luxury of holding a hearing where new evidence can be presented. At one point in his third point relied on, Relator argues that Respondent's "order funs afoul of Missouri law because Hodges has not yet

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presented sufficient, objective evidence of vindictiveness" and that "Hodges must first make that showing before the state can be required to respond." (Relator's Brief at 19). Respondent submits that no hearing has yet been held on the matter and that as such, the time for presenting such evidence has not yet taken place.

Regardless, Mr. Hodges's case is still at the trial court level and is not at the appellate level or habeas level. As such, Respondent is not limited to and/or bound by the procedures appellate courts, such as the appellate court that presided over State v. Buchli, use to analyze a claim of prosecutorial vindictiveness. Moreover, if Relator's argument that "Hodges has not yet presented sufficient, objective evidence of vindictiveness" is a claim that the allegations contained in Mr. Hodges's motion are insufficient to warrant a hearing on a claim of prosecutorial vindictiveness, Respondent addressed that claim under Relator's first point relied on. (Respondent's Brief at 28-29).

Ultimately, Respondent submits that he has not abused his discretion by entering an order requiring prosecuting attorneys Matthew Houston and Matthew Becker to appear and provide sworn testimony within the scope of Mr. Hodges's motion to strike the state's notice of intent to seek the death penalty subject to Respondent's rulings on any objections made. (Exhibit 1 at 018). Missouri law clearly says that a prosecutor is not incompetent to be a witness and that trial court judges may exercise their discretion in determining to what extent and as to what matters they should be permitted to testify. State v. Hayes, 473 S.W.2d 688, 691 (Mo. Sup. Ct. Div. 2 1971).

In State v. Hayes, the Missouri Supreme Court made it clear that a prosecutor can be a witness when his testimony is necessary. State v. Hayes, 473 S.W.2d at 691-692. In

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that case, on appeal, Mr. Hayes alleged error in that he was denied a fair trial by an impartial jury because the trial court, over his timely objections at trial, permitted the prosecuting attorney to participate as prosecutor and chief witness for the state. State v. Hayes, 473 S.W.2d at 691-692. In addressing this allegation of error, the Missouri Supreme Court made it clear that a prosecutor is not incompetent to be a witness and should be permitted to testify when such testimony is necessary. Id. In doing so, it looked to the prevailing caselaw from other jurisdictions, cited them with approval, and adopted the following general rule of law:

> "A prosecuting attorney is not incompetent to be a witness, and the trial court may exercise discretion in determining to what extent and as to what matters he may be permitted to testify. However, the general and uniform rule is that the right of a prosecuting attorney to testify in a criminal case 'is strictly limited to those instances where his testimony is made necessary by the peculiar and unusual circumstances of the case. Even then, his functions as a prosecuting attorney and as a witness should be disassociated. If he is aware, prior to trial, that he will be a necessary witness, or, if he discovers this fact in the course of the trial, he should withdraw and have other counsel prosecute the case.'"

(See State v. Hayes, 473 S.W.2d at 691-692).

Other Missouri cases also support the notion that a prosecutor is a competent witness. In State v. Werneke, the Missouri Supreme Court found that the defense could compel the prosecutor to testify but found no reversible error based on a failure to disqualify the prosecutor so he could testify where the defense merely advised the trial

court that the prosecutor had a conflict of interest and was a witness, but failed to call the prosecutor as a witness, failed to show why the prosecutor's testimony was necessary despite the fact that there were two other witnesses who could have testified to the same conversation, and failed to file a formal motion to disqualify the prosecutor. State v. Werneke, 958 S.W.2d 314, 320-321 (Mo. Banc. 1997).

As such, Respondent's actions in permitting Mr. Hodges to endorse the prosecutor as a witness and ordering him "to appear and provide sworn testimony within the scope of [Mr. Hodges's] Motion to Strike the State's 'Notice of Intent to seek the Death Penalty'" are within his discretion under Missouri law and cannot be considered an abuse of discretion or a violation of Missouri law. (Exhibit 1 at pp. 018 and 033-037). Mr. Hodges filed "Defendant's Motion to Strike the State's 'Notice of Intent to Seek the Death Penalty,'" a motion to endorse the prosecutor as a witness, and a memorandum of law in Support of his endorsement of the prosecutor as a witness. (Exhibit 1 at pp. 055-058, 047, and 033-037). After reviewing these pleadings and the state's responses and in light of the issues raised therein and the prevailing caselaw, Respondent determined that the prosecutor's testimony was necessary to the proper adjudication of the issues raised and in accordance therewith, allowed Mr. Hodges to endorse the prosecutor(s) and ordered him/them to testify within the scope of "Defendant's Motion to Strike the State's 'Notice of Intent to Seek the Death Penalty." (Exhibit 2).

Respondent was well within his discretion to do so. In Mr. Hodges's underlying case, the prosecutors' testimony is necessary to the proper adjudication of the issues raised in his "Motion to Strike the State's 'Notice of Intent to Seek the Death Penalty.'"

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Those issues include: a) an allegation that the state's decision to file its notice of intent to seek death more than four years after it filed the Indictment in Mr. Hodges's case and within two months of the date set for Mr. Hodges's jury trial without just cause violates 565.005 RSMo and defendant's constitutionally protected rights to due process, to a fair trial, to the effective assistance of counsel, and to a speedy trial; and b) an allegation that the fact that the state waited more than four years after it indicted Mr. Hodges to file its notice of intent to seek the death penalty should be seen as evidence that the state's real motive in seeking death was not for any reason set forth in its notice of intent but to vindictively punish Mr. Hodges for exercising his constitutionally protected right to a jury trial and/or proceeding to trial on the grounds that he was not guilty by reason of insanity. (Exhibit 1 at 055-058).

The prosecutors assigned to the case are the best people to shed light on the issues raised by these allegations such as the reason(s) for the delay in filing the notice of intent to seek death, whether there was any reasonable justification for the delay, and whether there was any improper motivation to seek the death penalty. Moreover, their credibility is at issue. As such, Mr. Hodges should be given the opportunity to question the prosecutors regarding these issues. Allowing the prosecutor(s) to simply make a statement on the record without being subject to any questioning would hinder Mr. Hodges's ability to prove the allegations contained in his motion by shielding the prosecutor from the truth-seeking process courts are designed for. Respondent submits that the prosecutors should not be coddled and protected from the truth-seeking process in this manner.

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In addition, the state's concerns that Respondent's order prevents Relator Becker from exercising his discretion and interferes with the will of the people of Franklin County that elected him should not be well taken. (See Relator's Brief at 24 (asserting that Respondent's order prevents Relator Becker from exercising his discretion and interferes with the will of the people of Franklin County that elected him)). The prosecutor does not have an unfettered right to exercise discretion even if doing so violates a defendant's constitutionally protected rights such as the right to a speedy trial or the right to proceed to trial without fear of vindictive prosecution. Moreover, the motion that has been filed must be litigated regardless of whether the prosecutors testify. The state's concerns regarding the exercise of its discretion show that it is more concerned with the motions being granted than having to testify. The mere fact that they are required to testify does not affect their discretion. It's the motion to strike being granted that would affect the prosecutor's discretion.

Moreover, the state's concerns that it would be forced to violate the work product doctrine if subjected to questioning regarding the issues raised in Mr. Hodges's motion to strike the state's notice of intent to seek the death penalty are unfounded. Respondent's orders requiring Franklin County Prosecutor Matthew Becker and Franklin County Assistant Prosecutor Matthew Houston to appear and provide sworn testimony within the scope of Undersigned counsel's motion to strike the state's notice of intent to seek the death penalty are *subject to Respondent's rulings on any objections made during any hearing held on the motion*. (Exhibit 1 at 018). In addition, Respondent has orally stated on the record that "the realm of inquiry would be extremely limited" and "[o]bviously, it

could not involve work product or trial strategy or that sort of thing" (See State's Exhibit 2 at p. 3, ln 3-8).

Finally, Respondent requests this Court to note that his orders merely require the prosecutor to testify at a pretrial motion hearing outside the hearing of any jurors. As such, Respondent's orders will not affect the ability of the prosecutors to try the case.

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CONCLUSION

WHEREFORE, for the reasons set forth above, Respondent prays this Honorable Court not to issue a permanent writ and to deny Relator's Petition for a writ of prohibition on the grounds that Respondent did not violate the laws of the State of Missouri or exceed his authority or abuse his discretion or do anything that would cause irreparable harm by finding that the prosecutor was a necessary witness, permitting Mr. Hodges to endorse the prosecutors as witnesses, and issuing his order of February 27, 2020 requiring prosecuting attorneys Matthew Becker and Matthew Houston to testify within the scope of Mr. Hodges's "Motion to Strike the State's 'Notice of Intent to Seek the Death Penalty,'" (and/or for such other relief as this Court deems just and proper).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July, 2020, a true and complete electronic copy of the foregoing was submitted to the state's counsel of record, Matthew Houston, by sending him a copy through the Missouri E-Filing System.

/s/Srikant Chigurupati
Srikant Chigurupati

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify I signed the original copy of this brief, that this brief conforms with Rule 84.04, that this brief contains all the information required by Rule 55.03, and that this brief complies with the limitations contained in Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed 31,000 words. The word-processing software identified this brief as containing 12,169 words and 48 pages including the cover page, signature block, and certificates of service and of compliance.

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