SC98416

In the Supreme Court of Missouri

State ex rel. Matthew Becker, Franklin County Prosecuting Attorney,

Relator,

vs.

The Honorable Gael D. Wood,

Respondent.

Original Writ Proceeding from the
Circuit Court of Franklin County, Missouri
The Honorable Gael D. Wood, Senior Circuit Judge

Relator's Brief

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under Article V, Section 4 of the Missouri Constitution, which gives this Court authority over lower courts and authorizes the issuance and determination of original remedial writs. Relator has no other remedy available to seek relief. Relator sought and was denied relief in the Missouri Court of Appeals, Eastern District.

STATEMENT OF FACTS

On June 23, 2015, a Grand Jury Indictment was filed against Hodges for two counts of First Degree Murder and two counts of Armed Criminal Action. Exhibit I at 258–259. The State alleges Hodges stabbed two mentally disabled victims to death without provocation. Id. At the time of the murders, Robert Parks was the elected Prosecutor for Franklin County, Missouri. The State never waived the death penalty and all previous plea offers were withdrawn on June 21, 2018. Id. at 103. Six months later, Relator Matthew Becker assumed office as the Prosecuting Attorney in Franklin County, Missouri. Exhibit II at 6.

Upon a detailed review of the case, Relator Becker filed Notice of Intent to Seek the Death Penalty on July 24, 2019. Id. at 5–6. Hodges subsequently filed a Motion to Strike the State's Notice of Intent to Seek the Death Penalty (Motion to Strike) and on the eve of the hearing on his motion, Hodges filed a witness endorsement naming APA Houston, opposing counsel for the State, as a witness he intended to call at the hearing. Exhibit I at 55–55, 47. Relator Becker objected to this endorsement and Respondent Wood entered an order requiring opposing counsel to appear and provide sworn testimony regarding Hodges' Motion to Strike. Id. at 18. This writ action follows.

SUMMARY OF THE ARGUMENT

This Court should issue a permanent writ prohibiting Respondent Wood from enforcing his order for three reasons.

First, it is inappropriate for Hodges to be allowed to examine either Relator Becker or APA Houston under oath because Hodges' claim of prosecutorial vindictiveness is improper as a matter of law. Under Missouri law, a valid claim of prosecutorial vindictiveness requires that a new charge was filed or the existing charge was enhanced. But Hodges was charged with First Degree Murder and Armed Criminal Action in 2015 and remains charged with those same crimes today. Because Hodges is not subject to new or enhanced charges, his claim is meritless and Respondent Wood should not have allowed Hodges to call Relator Becker or APA Houston as a witness.

Second, Respondent Wood's order would cause Relator Becker irreparable harm because the order requires disclosure of his mental impressions and legal theories in violation of the work product doctrine. Hodges has admitted that he wants to question Relator Becker to find out why Relator Becker elected to seek the death penalty. Hodges' questions will violate the work product doctrine. Although Hodges contends he could ask questions that exclude work product and trial strategy, he is mistaken. Relator Becker's decision-making process is inextricably linked with his discretion, his trial strategy, and his work product.

And *third*, Respondent Wood has not followed the proper procedure in this case. Missouri law requires Respondent Wood first determine whether a presumption of vindictiveness exists. Only after making that finding can Respondent Wood then shift the burden to Relator Becker to rebut the presumption. At the first step, Hodges must present Respondent Wood with objective evidence showing vindictive prosecution. Hodges offered Respondent Wood no objective evidence of vindictiveness. It was, therefore, error for Respondent Wood to proceed to the second step and require the State to rebut a presumption that Hodges failed to establish.

POINTS RELIED ON

I. 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, because 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.

- *Harden v. State*, 415 S.W.3d 713 (Mo. App. S.D. 2013).
- *State v. Murray,* 925 S.W.2d 492 (Mo. App. E.D. 1996).
- *United States v. Goodwin*, 457 U.S. 368 (1982).

II. Relator Becker is entitled to an order prohibiting Respondent Wood from enforcing his order because the order violates the work product doctrine in that the testimony Hodges is seeking from Relator Becker involves Relator Becker's rationale for his legal decision making.

- *Harden v. State*, 415 S.W.3d 713 (Mo. App. S.D. 2013).
- *State v. Buchli*, 152 S.W.3d 289 (Mo. App. W.D. 2004).
- *State v. Potts*, 181 S.W.3d 228 (Mo. App. S.D. 2005).
- *Blackledge v. Perry*, 417 U.S. 21 (1974).

III. Relator Becker 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 of vindictiveness that Hodges has failed to establish.

- *Harden v. State*, 415 S.W.3d 713 (Mo. App. S.D. 2013).
- *State v. Buchli*, 152 S.W.3d 289 (Mo. App. W.D. 2004).
- *United States v. Goodwin*, 457 U.S. 368 (1982).
- *State v. Anderson*, 79 S.W.3d 420 (Mo. banc 2002).

ARGUMENT

I. 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, 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.

Respondent Wood exceeded the limits of his power and abused his discretion by granting Hodges' motion to endorse opposing counsel because, as a matter of law, no vindictiveness can be found because Relator Becker has not changed or enhanced the charges. The State charged Hodges with two counts of First Degree Murder and two counts of Armed Criminal Action when he was indicted on June 23, 2015. Exhibit 1 at 258–59. Those charges have remained unchanged since the indictment.

Standard of Review and Statement of Preservation

This Court will issue an extraordinary writ of prohibition in order to remedy an excess of jurisdiction or an abuse of discretion where the lower court lacked the power to act as intended, or when a party may suffer irreparable harm if relief is not made available in response to the trial court's order. *State ex rel. Proctor v. Bryson*, 100 S.W.3d 775, 776 (Mo. banc 2003). Likewise, this Court will issue an extraordinary writ of mandamus when the relator has

proved he has a clear, unequivocal, and specific right to the thing being claimed, and when the relator has no remedy on appeal. *State ex rel. Hawley v. Kerr*, 461 S.W.3d 798, 805 (Mo. banc 2015). If the trial court's actions are wrong as a matter of law, then the trial court has abused its discretion and mandamus is appropriate. *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 538 (Mo. banc 2012). This claim is preserved for review because Relator Becker sought an extraordinary writ from the Missouri Court of Appeals, Eastern District, and such relief was denied.

Analysis

Under Missouri law, similar to the federal standard, a defendant may prove prosecutorial misconduct in two ways. The defendant may introduce evidence sufficient to create a "realistic likelihood" of vindictiveness, which then creates a rebuttable presumption in the defendant's favor. *Harden v. State*, 415 S.W.3d 713, 718 (Mo. App. S.D. 2013). Or the defendant may proceed without the presumption if the defendant can prove "through objective evidence that the sole purpose of the State's action was to penalize him for exercising some right." *Id*. Hodges fails under either prong of the test.

In *State v. Murray*, the Court of Appeals addressed a claim of prosecutorial vindictiveness in the pretrial setting. *State v. Murray,* 925 S.W.2d 492, 493 (Mo. App. E.D. 1996). The *Murray* court noted that although

the prosecutor had dismissed and subsequently refiled a charge, the charge was the same in each instance. *Id*. The *Murray* court explained that

> … as a matter of law, prosecutorial vindictiveness is inapplicable to the present facts. Every case cited by defendant, and our independent research, fail 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 new charges.

Id.

It does not appear that any Missouri case has ever held that prosecutorial vindictiveness can occur in a pretrial setting unless the State issues new or enhanced charges. In *United States v. Goodwin*, the United States Supreme Court observed that in cases where detrimental action to a defendant has been taken after the exercise of a legal right, the presumption of an improper vindictive motive has been applied only where a reasonable likelihood of vindictiveness existed. 457 U.S. 368, 386 (1982). The *Goodwin* Court found that no such reasonable likelihood existed even though a new, more serious charge had been filed because the change occurred in a pretrial setting and a prosecutor should be able to exercise his discretion to determine the extent of societal interest in the prosecution. *Id.* "The mere fact that a defendant refuses to plead guilty and forces the government to prove its case

is insufficient to warrant a presumption that subsequent changes in the charging decision are unwarranted." *Id* at 369.

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.

But even if the Court considers the range of punishment, Hodges still cannot satisfy the test for prosecutorial vindictiveness. First Degree Murder has always had two possible punishments: death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor. Section 565.020 RSMo. The statute gives two options for punishment and does not require the State to enhance the charge in order to seek one of those options. True, Relator Becker has made a different decision than his predecessor by deciding to seek the death penalty, but the exercise of discretion, as explained in *Goodwin*, does not warrant a presumption of vindictiveness. The fact that this case involves a sentencing change does not weigh in Respondent Wood's favor. 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. *State v. Molinett*, 876 S.W.2d 806, 809 (Mo. App. W.D. 1994) (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978)).

Additionally, Respondent Wood cannot find that Relator Becker acted vindictively because Hodges has not alleged any objective evidence of vindictiveness. Hodges' Motion to Strike the State's Notice of Intent to Seek the Death Penalty includes no factual allegations that could create a presumption of vindictiveness. Exhibit I at 55–8. Hodges' only complaint is that Relator Becker took too long to file the notice because the trial was already set. Id. But again, the *Goodwin* court's rationale forecloses that argument. This however, is not sufficient to create a realistic likelihood of vindictive prosecution. *Goodwin*, 457 U.S. at 383 ("[T]he mere fact that a defendant refused to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent changes in the charging decision are unjustified.").. The *Goodwin* Court explained that

> The possibility that a prosecutor would respond to a defendant's pretrial demand for a jury trial by bringing charges not in the public interest that could be explained only as a penalty imposed on the defendant is so unlikely that a presumption of vindictiveness certainly is not warranted.

Id at 384. The Supreme Court further explained that "[a] prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution." *Goodwin*, 457 U.S. at 382. This Court has also affirmed the importance of the prosecutor's discretion. *See, e.g., State ex rel. Peters-Baker v. Round*, 561 S.W.3d 380, 387–88 (Mo. banc 2018). 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. That is not consistent with Missouri law, and this Court should issue the extraordinary writ to correct this error.

II. Relator Becker is entitled to an order prohibiting Respondent Wood from enforcing his order because the order violates the work product doctrine in that the testimony Hodges is seeking from Relator Becker involves Relator Becker's rationale for his legal decision making.

Respondent Wood exceeded the limits of his power and abused his discretion by granting Hodges' 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.

Standard of Review and Statement of Preservation

This Court will issue an extraordinary writ of prohibition in order to remedy an excess of jurisdiction or an abuse of discretion where the lower court lacked the power to act as intended, or when a party may suffer irreparable harm if relief is not made available in response to the trial court's order. *State ex rel. Proctor*, 100 S.W.3d at 776. Likewise, this Court will issue an extraordinary writ of mandamus when the relator has proved he has a clear, unequivocal, and specific right to the thing being claimed, and when the relator has no remedy on appeal. *Kerr*, 461 S.W.3d at 805. If the trial court's actions are wrong as a matter of law, then the trial court has abused its discretion and mandamus is appropriate. *State ex rel. Valentine*, 366 S.W.3d at 538. This claim is preserved for review because Relator Becker sought an extraordinary writ from the Missouri Court of Appeals, Eastern District, and such relief was denied.

Analysis

At the hearing on Hodges' Motion to Strike, Hodges stated that "we need to make a record on why they did what they did." Exhibit 2 at 6. Any 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.

"Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital." *United States v. Nobles,* 422 U.S. 225, 238 (1975). The United States Supreme Court has recognized the work-product doctrine and it is now firmly established in the common law. *State ex rel. Rogers v. Cohen*, 262 S.W.3d 648, 650 (Mo. banc 2008) (citing *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) and *In re Grand Jury Proceedings (Duffy)*, 473 F2d 840 (8th Cir. 1973)). The work-product doctrine does not just apply to the discovery phase of a criminal case but also through trial. "Disclosure of an attorney's efforts at trial, as surely as disclosure during pretrial discovery, could disrupt the orderly development and presentation of his case." *Nobles,* 422 U.S. at 239.

Based on this established protection of work product, as a matter of law, Hodges would not be able to uncover the answers to any question which would add to his claim of prosecutorial vindictiveness. Relator Becker stated on the record that he made his decision after consulting with other prosecutors and conducting a detailed review of the file. Exhibit II at 5–6. The resulting analysis of the underlying case should most certainly fall under the mental impression portion of the work product doctrine.

Because Hodges cannot ask relevant 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. The Court should make its writ permanent to correct this error.

III. 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.

At Hodge's request, Respondent Wood has issued an order directing Relator Becker or APA Hodges to testify under oath. That order runs afoul of Missouri law because Hodges has not yet presented sufficient, objective evidence of vindictiveness. Hodges must first make that showing before the State can be required to respond. On top of that, Respondent Wood has required Relator Hodges or APA Houston to provide sworn statements under cross-examination by Hodges. But Missouri law requires "on-the-record *explanations*" not "on-the-record *testimony*."

Standard of Review and Statement of Preservation

This Court will issue an extraordinary writ of prohibition in order to remedy an excess of jurisdiction or an abuse of discretion where the lower court lacked the power to act as intended, or when a party may suffer irreparable harm if relief is not made available in response to the trial court's order. *State ex rel. Proctor*, 100 S.W.3d at 776. Likewise, this Court will issue an

extraordinary writ of mandamus when the relator has proved he has a clear, unequivocal, and specific right to the thing being claimed, and when the relator has no remedy on appeal. *Kerr*, 461 S.W.3d at 805. If the trial court's actions are wrong as a matter of law, then the trial court has abused its discretion and mandamus is appropriate. *State ex rel. Valentine*, 366 S.W.3d at 538. This claim is preserved for review because Relator Becker sought an extraordinary writ from the Missouri Court of Appeals, Eastern District, and such relief was denied.

Analysis

Even if prosecutorial vindictiveness could be found in the underlying case, Respondent Wood's order does not follow the established legal procedure. Assuming that a court may only adjudicate claims of vindictive prosecution with sworn statements, Respondent Wood's order requiring the Prosecuting Attorney to testify is an abuse of discretion. Under Missouri law, a defendant may prove prosecutorial misconduct in two ways. *First*, defendant may introduce evidence sufficient to create a "realistic likelihood" of vindictiveness, which then creates a rebuttable presumption in the defendant's favor. *Harden v. State*, 415 S.W.3d 713, 718 (Mo. App. S.D. 2013). *Second*, the defendant may proceed without the presumption if the defendant can prove "through objective evidence that the sole purpose of the State's action was to penalize him for exercising some right." *Id*. Defendant fails under either prong of the test.

Under the first prong, "[t]he defendant bears the burden of showing that a realistic likelihood of vindictiveness exists." *State v. Buchli*, 152 S.W.3d 289, 309 (Mo. App. W.D. 2004) (citing *State v. Juarez*, 26 S.W.3d 346, 354 (Mo. App. W.D. 2000)). "Only if this is shown does the burden shift to the prosecutor to show, by objective on-the-record explanations, the rationale for the [s]tate's actions." *Id*. In *Buchli*, the defendant presented evidence that he had pursued a motion to suppress evidence and filed a motion to dismiss for violation of his right to a speedy trial. *Id*. The *Buchli* Court found this showing insufficient to establish even the presumption because the pretrial exercise of a procedural right does not raise a presumption of prosecutorial vindictiveness. So, because the defendant did not meet his burden, "the state did not have to come forward with objective evidence justifying the prosecutorial action." *Id*.

Respondent Wood should have reached the same conclusion as the *Buchli* court. Unlike the prosecutor in *Buchli*, Relator Becker has never changed the charges against Hodges. Hodges was charged with First Degree Murder and Armed Criminal Action on June 23, 2015. Exhibit 1 at 258–59. Hodges remains charged with those offenses. The only change that has occurred is the sentence recommendation by Relator Becker's office. Following the *Buchli* court's rationale, Relator Becker should not have to testify in order to present evidence justifying his decision because no presumption of prosecutorial vindictiveness was found by Respondent Wood. But even if

Hodges had made his showing, Relator Becker made on-the-record explanations. Exhibit 2, at 4-6. *Buchli* only requires "on-the-record *explanations*" not "on-the-record *testimony*."

Missouri courts have consistently refused to find a presumption of vindictiveness in a pretrial setting. *State v. Potts*, 181 S.W.3d 228, 235 (Mo. App. S.D. 2005). "A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution." *Goodwin*, 457 U.S. at 382. Missouri courts have consistently refused to apply an automatic presumption of prosecutorial vindictiveness in a pretrial setting. *See, e.g., Potts*, 181 S.W.3d at 235 (discussing *Blackledge v. Perry*, 417 U.S. 21, 94 (1974)). "The possibility that a prosecutor would respond to a defendant's pretrial demand for a jury trial by bringing charges not in the public interest that could be explained only as a penalty imposed on the defendant is so unlikely that a presumption of vindictiveness certainly is not warranted." *Goodwin*, 457 U.S. at 384. But, contrary to this guidance from the Court of Appeals and the United States Supreme Court, Respondent Wood created an automatic presumption and is now requiring the Prosecuting Attorney to testify in order to rebut the automatic presumption.

Respondent Wood reached this conclusion at Defendant's urging. Defendant's conclusory argument of "a realistic likelihood of vindictive

prosecution" was unsupported by objective evidence and was unsupported by Missouri law. Exhibit 1 at 55–58. The only thing that Hodges' has pointed to in order to meet his burden is the testimony of Relator Becker and APA Houston. That is the opposite of the procedure under Missouri law.

Moreover, when Hodges had the opportunity to ask Relator Becker for an on-the-record explanation, he demurred. Exhibit 2 at 6. Respondent Wood has not yet found that Hodges has shown a reasonable likelihood of vindictiveness exists. 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. Unless and until Respondent Wood does so, Relator Becker, or anyone in his office, cannot be compelled to provide testimony regarding the topic of vindictiveness.[1]

Missouri courts have advised that trial courts should proceed cautiously when allowing an attorney to call opposing counsel as a witness. "Any attempt to depose an opposing counsel calls for special scrutiny because such depositions inherently constitute an invitation to harass the attorney and

[1] Of course, testimony from Relator Becker or APA Houston would not be necessary even if Hodges had made the threshold showing of vindictiveness. Instead, all that is required is "on-the-record explanations" not testimony. *Buchli*, 152 S.W.3d at 309.

parties." *State v. Anderson*, 79 S.W.3d 420, 438 (Mo. banc 2002) (citing *State ex rel. Chaney v. Franklin*, 941 S.W.2d. 790, 792–93 (Mo. App. S.D. 1997)).

The State does not dispute that some rare circumstance may allow for a Prosecuting Attorney to be called as a witness. "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." *State v. Hayes*, 473 S.W.2d 688, 691 (Mo. banc 1971). But this is not that case. Hodges has not shown, or even alleged, such peculiar or unusual circumstances, and Respondent Wood's order neither finds nor relies on such circumstances.

This Court's recent cases militate even further against testimony by the Prosecution Attorney. In *State ex rel. Baker v. Round*, this Court explained that it "is no small intrusion" when a court order prevents the Prosecuting Attorney "from exercising [his] statutorily authorized duties as the elected prosecuting attorney . . . ." *Round*, 561 S.W.3d at 387. The order in this case prevents Relator Becker from exercising his discretion and interferes with the will of the People of Franklin County that elected him.

In *Round*, the impermissible interference was the disqualification of the elected prosecutor and her office from the case. *Id.* This is because a disqualification order "infringe[s] upon [Prosecuting Attorney's] ability to carry

out her duties 'as a public officer.'" *Id.* (quoting *State ex rel. Griffin v. Smith*, 182 S.W.2d 590, 593 (Mo. banc 1953)).

Although less immediate, Respondent Wood's order is no less of an impermissible interference. At bottom, Respondent Wood's order allows Hodges to examine Relator Becker and APA Houston under oath about the exercise of their discretion. But the exercise of the prosecutor's discretion is implicated in "most, if not all," of the Prosecuting Attorney's duties. *Id.* at 388 (quoting *State on inf. McKittrick v. Wallach*, 182 S.W.2d 313, 319 (Mo. banc 1944)). Because the scope of this discretion, the People of Franklin County, by selecting Relator Becker as Prosecuting Attorney, "decided Relator's decision making-skills – i.e., [his] discretion – best represent their interests." *Id.*

In sum, Respondent Wood's has allowed Hodges to circumvent Missouri precedent by requiring Relator Becker, in the first instance, to defend his decision to seek the death penalty. If Respondent Wood is allowed to enforce his order, then the two-pronged test for prosecutorial vindictiveness will have been eliminated. Our legal system would be thrust into chaos as every would have an opportunity to call the Prosecuting Attorney as a witness and force an under-oath explanation of how he has exercised his discretion.

CONCLUSION

For the foregoing reasons, this Court should make its preliminary writ permanent and allow the criminal trial to proceed in the ordinary course.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed and served electronically via Missouri CaseNet on May 18, 2020 to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 4,940 words.

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