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 Reply Brief

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I. Relator Becker has not enhanced the charge against Defendant Hodges, therefore, no vindictive prosecution can be found as a matter of law.

Respondent has conceded that, under *State v. Murry*, 925 S.W.2d 492, 493 (Mo. App. E.D. 1996), when a prosecutor does not enhance a charge or file a new charge, then there cannot be prosecutorial vindictiveness. (Resp. Br. at 14). Respondent then asserts that Relator has enhanced the charge of murder in the first degree by seeking the death penalty. (Resp. Br. at 14). Respondent's assertion, which is bereft of supporting authority, should be rejected.

Defendant Hodges was charged by indictment with two counts of murder in the first degree and two counts of armed criminal action on June 23, 2015. (Exhibit 1 at 258–9). At the time of his offense, the General Assembly defined murder in the first degree as a class A felony and allowed two punishments: ". . .**either death or imprisonment for life** without eligibility for probation or parole..." Section 565.020 RSMo. (1990) (emphasis added)[1]. Accordingly, Defendant Hodges was potentially subject to the death penalty on the day he was charged. The State has not amended the charging

[1] All citations are to the current version of the Revised Missouri Statutes, unless otherwise noted.

instrument. (Exhibit 1 at 258-9). Neither Relator Becker, nor the previous elected Prosecuting Attorney for Franklin County, ever waived the death penalty as a possible sentence for Defendant Hodges. *Id*.

Due to these facts, Respondent must argue that the act of filing a notice of intent to seek the death penalty "enhances" the charge. (Resp. Br. at 14 n.4). But that argument is not supported by the statute. Section 565.005 merely prescribes the proper pre-trial procedure for the State to announce that it is seeking the death penalty. Nothing about the notice of intent changes the range of punishment. Nor could it, given that the range of punishment is fixed by Section 565.020 RSMo., (1990). Although Respondent contends that the notice of intent "enhances the charge," he cites no authority for that proposition. Respondent suggests that *State v. Murray*, 925 S.W.2d 492 (Mo. App. E.D. 1996) does not apply because in *Murray* there was no effort on the State's part to charge the defendant as a prior and persistent offender nor was there a filing of a notice of intent to seek the death penalty. (Resp. Br. at 15–17). However, Respondent's argument is misplaced. Defendant Hodges has always been charged with murder in the first degree, and there are only two possible punishments for that offense.

Respondent also attempts to bolster his argument by relying on *State v. Molinett* but this does not assist him. 876 S.W.2d 806 (Mo. App. W.D. 1994). In *Molinett*, the State filed an amended information charging the defendant

as a prior drug offender after the defendant requested a trial. *Id.* Charging a defendant as a prior drug offender, at that time, increased the upper range of punishment for an offense to the upper range of punishment for the next-higher offense classification. That is, a class B felony, when enhanced as a prior drug offender, would have its maximum range of punishment enhanced to that of a class A felony. No such change occurred to the charge against Defendant Hodges. The notice of intent to seek the death penalty does not change, increase, or otherwise alter the two possible punishments for murder in the first degree.

On top of this, even if Respondent were correct—which he is not—*Molinett* still does not assist Respondent. The *Molinett* Court held that charging the defendant as a prior drug offender was a proper exercise of prosecutorial discretion and cautioned of the dangers of adopting a "prophylactic rule of a presumption of vindictiveness." *Id.* at 809. "The prosecutor's action in filing under the prior felony statutes enhancing the penalty was an acceptable response in light of the parties' failure to reach a plea agreement." *Id.* at 809, 810.

Respondent concedes that without enhancement there is no presumption of vindictiveness. (Resp. Br. at 16). Relator Becker does not, and has not, argued that Defendant Hodges should be precluded from presenting evidence at the hearing on his Motion to Strike. Relator has merely argued

that Defendant Hodges should not be allowed to circumvent the rules when conducting the hearing. If there is no presumption of prosecutorial vindictiveness, then Defendant Hodges would be required to 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 713, 718 (Mo. App. S.D. 2013). Relator has also argued that there is no need for under-oath testimony from Relator when the case law allows for on-the-record statements, and that Respondent should be prevented from allowing Defendant Hodges to invade the work product privilege.

Respondent argues that Defendant Hodges could prevail at this hearing without a presumption, but he is incorrect. Defendant Hodges cited no objective evidence in his motion to strike. The only evidence mentioned by his motion—the timeline of the case—does not require under oath testimony from any party. Instead of citing or producing objective evidence, Defendant Hodges has obtained permission from Respondent to go on a fishing expedition for evidence, but the only relevant questions Defendant Hodges could ask opposing counsel would require answers that are protected by the work product doctrine. Defendant Hodges has explained his rationale as wanting "to make a record on why they did what they did." (Exhibit 2 at 7). This information could not be obtained without violating the work product doctrine. Since Defendant Hodges has no evidence of prosecutorial

vindictiveness and the work product doctrine precludes him from asking opposing counsel why he made the decision to seek the death penalty, he will lose his motion as a matter of law.

Next, and for the first time in this litigation, Respondent asks this court to find that murder in the first degree is "essentially a lesser included offense of capital murder…." (Resp. Br. at 24). Respondent's argument is premised on a misapprehension of Missouri law. Previously, Missouri had an offense designated as capital murder. Section 565.001 RSMo. (1978) (Reply App'x. at A1). At that time, Missouri also had offenses denominated as first degree murder and second degree murder. Section 565.003 RSMo. (1978) (Reply App'x. at A2); Section 565.004 RSMo. (1978) (Reply App'x. at A3). Those sections have been repealed and replaced with Missouri's current system of murder in the first degree and murder in the second degree. Compounding this error, Respondent points the Court to *State ex. Rel. Patterson v. Randall* and *Bullington v. Missouri*, both of which were retrials in which the state sought the death penalty where it had not at the original trial. *Patterson*, 637 S.W.2d 16 (Mo. banc. 1982); *Bullington,* 451 U.S. 430 (1981). But *Patterson* and *Bullington* both concern Missouri's prior system. Moreover, in both cases the State sought the death penalty *after* a trial where the State had *not* sought the death penalty.

In *Patterson*, the State sought the death penalty after losing an appeal where the defendant had been given a life sentence. *Patterson*, 637 S.W.2d at 17 ([Patterson] successfully appealed a conviction arising from a prior trial in which the State elected not to seek the death penalty."). The *Patterson* court explained that when the State seeks the death penalty after a successful appeal from a trial where the State had *not* sought the death penalty, a defendant may establish vindictive prosecution. *Id*. at 18. This is a special circumstance because of the interplay between the first trial, the successful appeal, and the subsequent effort to seek the death penalty. *Id*. The *Patterson* Court stated that

> "In *Bullington v. Missouri*, 451 U.S. 430, 101 S. Ct. 1852, 68 L.Ed.d 270 (1981), the Supreme Court 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 16, 18 (Mo. banc. 1982) (emphasis added).

Respondent is trying to extend *Patterson* and *Bullington* to an inapplicable case. *Patterson* and *Bullington* apply in a special context not present here: where the State seeks the death penalty *after* a successful appeal from a trial where the State *did not* seek the death penalty. From those special circumstances, the courts held that a life sentence should be considered a lesser included offense in the context of being retried for the same offense after a trial has already occurred. *Id.* This is not the fact pattern currently before the Court and the capital murder statute no longer exists. Therefore, Respondent's analysis is critically flawed.

The flaw in Respondent's analysis persists through his argument given that he has not cited a single case with a finding of prosecutorial vindictiveness in a pre-trial setting. Unlike the cases cited by Respondent, Relator Becker made the decision to seek the death penalty prior to trial. When Relator Becker took office, negotiations had already failed with the previous elected Franklin County Prosecuting Attorney, Robert Parks. (Exhibit 1 at 103).

Relator Becker is seeking a different sentence than his predecessor but that does not create a *per se* vindictive prosecution. The citizens of Franklin County elected Relator to exercise his discretion in all matters within the

ambit of his office. *State ex rel. Peters-Baker v. Round*, 561 S.W.3d 380, 387–88 (Mo. banc 2018); *State ex rel. Gardner v. Boyer*, 561 S.W.3d 389, 398 (Mo. banc 2018). Respondent and Defendant Hodges may disagree with Relator's assessment that the State's interests are best served by seeking the death penalty. However, that disagreement does not empower interference with "the broad, almost unfettered, discretion" given to Relator by virtue of his election. *Gardner*, 561 S.W.3d at 398.

Defendant Hodges' claim that Relator Becker has engaged in prosecutorial vindictiveness because Defendant Hodges has declined to plead guilty and instead requested a trial is unfounded. Further still, it was Parks, not Relator, who revoked all prior plea offers. Respondent has not suggested, and the record does not reflect, that Relator Becker ever extended a plea offer to Defendant Hodges. To the contrary, Relator Becker stated at the hearing on Defendant Hodges' motion to strike that he thoroughly reviewed this case as a team within the office, that he consulted with prosecutors in other jurisdictions, and that he met with the family prior to deciding to seek the death penalty. (Exhibit 2 at 5–6). That is the epitome of "a good faith exercise of sound discretion." *Peters-Baker*, 561 S.W.3d at 388 (quoting *State on inf. McKittrick v. Wallach*, 182 S.W.2d 313, 319 (Mo. banc 1944)).

Relator Becker has not argued that Respondent Wood should not allow Defendant Hodges a hearing and an opportunity to present evidence. All

Relator Becker seeks is an order from the Court preventing the fishing expedition into privileged information that would no doubt result from allowing Defendant Hodges to examine Relator Becker and APA Houston under oath. Such an expedition would be ill advised in normal circumstances, but it would be especially injurious here, where Defendant Hodges has alleged no independent, objective evidence and where vindictiveness cannot be found based on the court file and allegations made by Defendant. Defendant Hodges' motion does not contain facts which, if proven, could provide Respondent with sufficient evidence to grant Defendant Hodges request to strike the State's Notice of Intent to Seek the Death Penalty.

Respondent's claim of a due process violation may also be examined at that hearing but it does not give rise to calling opposing counsel to testify because there are no relevant questions Defendant Hodges could ask which would not violate the work product doctrine. Defendant Hodges failed to produce a single example of a relevant question in his motion, in his argument before Respondent or in his brief to this Court. (Exhibits 1, 2). Defendant Hodges cannot succeed on these claims and therefore, Relator Becker is entitled to an order prohibiting Respondent Wood from forcing Relator Becker and APA Houston to appear and give under-oath testimony.

II. Defendant Hodges intends to seek work product from Relator by means of on-the-record direct examination.

In an effort to save his order, Respondent now argues that this Court's intervention is not warranted because Defendant Hodges has not yet asked questions that would invade the work product privilege, because Respondent suggests that a more proper procedure would be to hold the hearing and allow Relator to object to the questions[2], and because there are other topics that Defendant Hodges' wishes to examine Relator about (Resp. Br. at 31–32). Respondent's efforts are misplaced for four reasons.

First, Respondent's proposed procedure presumes there is authority to compel under-oath testimony from Relator. There is not. Relator pointed out in his opening brief that Missouri cases allow for on-the-record statements from prosecutors. Respondent never disputed the lawfulness of this point. Instead, Respondent contends that the Court should not "coddle" Relator.[3] (Resp. Br. at 43). But Relator "is not a mere lackey of the court nor are [his]

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[2] Respondent appears to argue this procedure would be valid because filing a writ would have some impact on the underlying litigation. Not so under this Court's rules. Rule 84.24(b).

[3] Respondent only asserts that prosecutors should not be "coddled" or "shielded" from testifying under oath. But as the Missouri Court of Appeals has recently recognized, prosecutors—like public defenders—"are officers of the court whose statements would presumably not change based on whether they were sworn or not." *In re Area 16 Public Defender Office III*, WD82962, 2020WL 3067596, slip op. at *3 n.10 (June 9, 2020). Because the time for filing an application for transfer in this Court has not yet passed, the case is not yet final.

conclusions in the discharge of [his] official duties and responsibilities, in anywise subservient to the views of the judge as to the handling of the State's case." *Gardner*, 561 S.W.3d at 398 (quoting *State ex rel. Griffin v. Smith*, 258 S.W.2d 590, 593 (Mo. banc 1953), overruled on other grounds by *State v. Honeycutt*, 96 S.W.3d 85 (Mo. banc 2003)). In conjunction with this, Respondent's Brief also admits a desire to attack the credibility of Relator and APA Houston. (Resp. Br. at 43). Respondent and Defendant Hodges may disagree with Relator's decisions, and they may even believe that such decisions are made in bad faith. Nonetheless, such beliefs do not empower an attorney to force opposing counsel to provide under-oath testimony—especially when Missouri courts have been clear that on-the-record statements are permissible.

Second, and relatedly, Respondent's newly proffered procedure does not abrogate all of the harm that would result from his order. Respondent has misapprehended the nature and extent of his order's harm. Relator will experience irreparable harm if he is forced to abrogate the work-product privilege. Relator is also harmed by being forced to submit to under-oath examination by opposing counsel. That harm should not be visited upon an elected prosecuting attorney, and certainly not on this thin record. That harm is certainly ripe for this Court's review.

Third, Defendant Hodges cannot ask any relevant questions of Relator that fall outside of the work product privilege. Relator Becker voiced his concerns regarding work product to Respondent and Respondent still ordered Relator Becker and APA Houston to testify. Although Respondent points to his oral pronouncement that Defendant Hodges will not be permitted to involve "work product or trial strategy or that sort of thing," Respondent's written orders do not contain such a limitation. (Resp. Br. at 33). Defendant Hodges intends to ask "why they did what they did." (Exhibit 2 at 7). The only relevant answers to that question involve work product. Once Defendant Hodges is made aware of Relator Becker's mental impressions and trial strategy there is no suitable remedy.

And *Fourth*, Respondent's contention that Relator should be forced to testify under oath regarding an alleged undue delay in filing the notice is without merit. Respondent's new contention is a post hoc justification for his order. If Defendant Hodges was really intending to present testimony on this topic, then he would be forced to present former Prosecuting Attorney Parks' testimony given that former Prosecuting Attorney Parks initiated the case and that the case was pending under his authority for some time. Yet, Defendant Hodges has given no such indication. Further still, Respondent cites no authority for the proposition that sworn testimony—especially that of the prosecutor—is necessary to adjudicate a claim of undue delay. Such

testimony is not required. And on top of all of this, Defendant Hodges' undue delay claim is meritless. In *State ex rel. Davis v. Shinn*, 874 S.W.2d 403 (Mo. App. W.D. 1994), the court addressed a similar issue when the state's notice of intent to seek the death penalty was filed less than two months prior to trial. In that case, the court noted that most of the defendant's arguments relied on a due process violation because of the short time between the notice and trial. *Id.* at 408. The court held that the since the case was stayed during the consideration of the writ, the issue of timeliness was moot. Similarly, in the instant case, there is no due process violation because the case is not set for trial and the defendant will have time to prepare. Defendant Hodges has not cited any particular harm other than a lapse in time. He has not specified any evidence that is not able to be obtained or witness he cannot produce at the sentencing phase of the trial. There is no longer a trial pending and Defendant Hodges may have as much time as Respondent wishes to grant him in order to prepare.

III. Respondent has incorrectly applied the prosecutorial vindictiveness test and placed the burden on Relator to rebut a presumption Defendant Hodges has failed to establish.

Respondent argues that this Court should allow Defendant Hodges to present Relator's under oath testimony before Defendant Hodges establishes

a presumption of vindictive prosecution. However, the fact that Respondent has not made a determination regarding a presumption of vindictiveness is just one way that Respondent has failed to correctly apply the standard. Respondent has decided to allow Defendant Hodges to call Relator Becker and APA Houston to testify without that presumption.

Respondent's brief concedes that he has not found a presumption of prosecutorial vindictiveness. Relator Becker does not argue that Defendant Hodges cannot make an argument or present evidence of prosecutorial vindictiveness at a hearing on his motion to strike but Missouri law requires Defendant Hodges to present evidence before the burden shifts to the State to rebut that evidence with on-the-record statements. Without the presumption, Defendant bears the burden of presenting evidence of prosecutorial vindictiveness. *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)). Here, Defendant Hodges has yet to present such evidence, and has no such evidence to present which can be seen from the absence of specifics in his motion and on the record. (Exhibit 1 at 39–42, 55–58; Exhibit 2).

Moreover, Respondent's brief is devoid of any case law supporting under oath examination of opposing counsel in a criminal case. The few cases cited by Respondent to support his position deal with a prosecuting attorney

being called as a fact witness. Neither Relator Becker nor APA Houston are fact witnesses in the underlying criminal matter.

Additionally, allowing Respondent to enforce his order would have a chilling effect on both charging decisions and the pre-trial negotiation process that occurs in criminal cases. The result would encourage prosecutors to seek the highest charge and sentence for fear that doing so at a later date would be perceived as vindictive and that they would subject themselves to being called as witnesses at the whim of a defense attorney. Respondent has not directed this Court to any supporting authority to bolster his assertion of prosecutorial vindictiveness in this pretrial setting. On the contrary, Respondent's arguments are exactly those the Supreme Court cautioned against, because

"[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. An initial decision should not freeze future conduct." *United States v. Goodwin*, 457 U.S. 368, 383 (1982). Similarly to *Goodwin*, Defendant Hodges claims that Relator Becker has engaged in prosecutorial vindictiveness because he set his case for trial. The *Goodwin* Court disagreed: "[t]his Court in *Bordenkircher* made clear that the 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." *Id.* at 382–3. Defendant Hodges knows he cannot obtain relevant information by calling opposing counsel as a witness but he endorsed them anyway which is why Respondent should not have entered his order.

Respondent advances one final argument in support of his order: that there are actually two lines of prosecutorial vindictiveness cases, and one line of cases does not require a finding of a presumption of vindictiveness. (Resp. Br. at 36–38). Respondent identifies *State v. Molinett*, 876 S.W.2d 806 (Mo. App. W.D. 1994) as one case in a line of cases that does not require the defendant to prove a presumption of vindictiveness. (Resp. Br. at 37). There is in fact only one test for prosecutorial vindictiveness. All *Molinett* stands for is the proposition that a presumption of vindictiveness is not warranted in the pre-trial setting, and that a defendant may proceed by presenting "objective evidence of prosecutorial vindictiveness. *Molinett*, 876 S.W.3d at 809. A review of the other cases illustrates what happens next: if a defendant has adduced sufficient evidence, then the burden shifts to the State to rebut the presumption established by defendant's objective evidence. *Buchli*, 152 S.W.3d at 309. It is here that the State may do so through "on the record statements." *Id.* Respondent's effort to create two tests starts from the belief that Defendant Hodges should be allowed to force Relator to provide under-oath testimony. But that belief has dangerous consequences: it would allow

any defendant to force any prosecutor to testify under oath about the circumstances of the prosecution with nothing more than threadbare allegations. That is not, and cannot be, the law.

Such a procedure also turns precedent on its head. In all the cases previously discussed, the defendant attempted to establish a presumption of vindictive prosecution. That is done either by circumstances that give rise to a presumption, or by the presentation of objective evidence. At that point—and only at that point—is the state required to rebut the presumption by on-the-record statements. Respondent's order does not follow this procedure and is, therefore, an abuse of his discretion.

CONCLUSION

For the foregoing reasons, as well as the reasons in the opening brief, 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 August 10, 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 3896 words.

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