Summary of SC98416, *State ex rel. Matthew Becker v. The Honorable Gael D. Wood*
Proceeding originating in the Franklin County circuit court, Judge Gael D. Wood
Argued and submitted September 2, 2020; opinion issued November 3, 2020

Attorneys: The prosecutor was represented by Matthew W. Houston of the Franklin County prosecutor's office in Union, (636) 583-6370, and Christine H. Krug of the attorney general's office in St. Louis, (573) 751-3321. The defendant was represented by Srikant Chigurupati of the public defender's office in St. Louis, (314) 340-7662, and Courtney M. Harness, an attorney in Union.

This summary is not part of the opinion of the Court. It is provided by communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A county prosecutor seeks a permanent writ prohibiting the circuit court from enforcing its order requiring the prosecutor and an assistant prosecutor to testify at a hearing regarding the decision to seek the death penalty in the defendant's case. In a 4-3 decision written by Judge Zel M. Fischer, the Supreme Court of Missouri makes its preliminary writ permanent. The defendant failed to allege facts sufficient to support a presumption of prosecutorial vindictiveness, there is no realistic likelihood vindictiveness exists, and the circuit court's order will cause irreparable harm by requiring the prosecutors to divulge privileged work product.

Judge Mary R. Russell dissents. Because of the belated filing of the notice of intent to seek the death penalty, the circuit court rightly exercised its discretion in ordering the prosecutors to provide sworn testimony about the reason for the delay. The state will not suffer prejudice.

Facts: A grand jury indicted Aaron Hodges for first-degree murder and armed criminal action. The state never waived the death penalty. In January 2016, Hodges waived his right to a jury trial and began plea negotiations with the state. He later withdrew his waiver and, in June 2018, filed notice he intended to proceed to trial on a defense of not guilty by reason of mental disease or defect. Within a week, the state withdrew all outstanding plea offers. The county prosecutor subsequently retired, and county voters elected Matthew Becker, who took office in January 2019. The circuit court set the case for trial in September 2019. Seven weeks before the trial date, the state filed notice of intent to seek the death penalty. Hodges moved to strike the state's notice, alleging prosecutorial vindictiveness, and moved to endorse Becker and an assistant prosecutor as witnesses at the hearing regarding his motion to strike. The circuit court ordered the prosecutors to appear and testify. Becker sought relief from this Court, which issued its preliminary writ prohibiting the circuit court from enforcing its order.

PRELIMINARY WRIT MADE PERMANENT.

Court en banc holds: Hodges failed to allege facts sufficient to support a presumption of prosecutorial vindictiveness, there is no realistic likelihood vindictiveness exists, and the circuit court's order will cause irreparable harm by requiring the prosecutors to divulge privileged work product. A prosecutor has almost unfettered discretion to decide what charge and punishment to seek. Although due process prevents a prosecutor from acting vindictively to punish a criminal

defendant for exercising a constitutional right, a presumption of vindictiveness rarely is found at the pretrial stage. Because first-degree murder and capital murder are not different charges, the prosecutor did not augment or change the charges against Hodges by seeking the death penalty; the state did not act vindictively by rescinding outstanding plea offers the defendant was free to accept or reject; and Hodges failed to explain how the timing of the state's decision to seek the death penalty prejudiced him. If Hodges presents objective evidence supporting prosecutorial vindictiveness, the circuit court properly could require the state to choose between rebutting the claim on the record or permitting the court to sustain the motion to strike.

Dissenting opinion by Judge Russell: The author would hold, because of the belated filing of the notice of intent to seek the death penalty, the circuit court rightly exercised its discretion in ordering the prosecutors to provide sworn testimony about the reason for the delay. Although Hodges has not established a presumption of vindictiveness, objective evidence also can establish vindictiveness. Such a finding would be appropriate if the prosecutor's actual conduct created a realistic likelihood of vindictiveness or if there was objective evidence the state filed notice of intent to seek the death penalty solely because Hodges filed his notice of intent to rely on a defense of mental disease or defect. There is no risk of irreparable harm to the state; the prosecutor already has provided an outline of his rationale for seeking the death penalty, the circuit court has limited the scope of inquiry and this Court should not presume the circuit court would allow impermissible testimony or divulgence of work product.