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Creating an Impossible Burden: State ex rel. Becker v. Wood and Prosecutorial Vindictiveness

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NOTE

Creating an Impossible Burden: *State ex rel. Becker v. Wood* and Prosecutorial Vindictiveness

State ex rel. Becker v. Wood, 611 S.W.3d 510 (Mo. 2020) (en banc).

*Rachael Moore**

I. INTRODUCTION

In the American criminal justice system, prosecutors have an enormous amount of discretion and power.[1] With dockets growing more cramped, prosecutors often use threats of harsher charges and sentences to deter defendants from exercising their right to a jury trial or an appeal.[2] Prosecutors can also wield this power for purely vindictive or retaliatory purposes, as one prosecutor noted when reflecting on his career:

> Sometimes a public defender or a defense lawyer will just try and bust your ass all the time. Frankly, you end up busting theirs back. You get irritated, but you try not to take it out on the people they represent… Should you penalize him for that? No. Do we? Probably, sometimes. You try not to, but we're human.[3]

When prosecutors sidestep their ethical obligations in this way, defendants have one possible remedy: striking the enhanced charges by

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[1] Murray R. Garnick, *Two Models of Prosecutorial Vindictiveness*, 17 GA. L. REV. 467, 467–68 (1983).

[2] *Id.* at 474–75.

[3] MARK BAKER, D.A.: PROSECUTORS IN THEIR OWN WORDS 116–17 (1999).

proving prosecutorial vindictiveness.[4] The Supreme Court of the United States has created two tests for a defendant to prove prosecutorial vindictiveness when a prosecutor increases or enhances charges: the presumption of prosecutorial vindictiveness test and the objective evidence test.[5] Missouri courts have adopted both of these tests and applied them to various situations beyond merely an enhancement in charges.[6]

In *State ex rel. Becker v. Wood*, the Supreme Court of Missouri was asked to apply the tests to a case where a newly elected prosecutor filed a notice of intent to seek the death penalty seven weeks before trial, months after the defendant, Aaron Hodges, had withdrawn from plea negotiations.[7] The court was also asked whether a prosecutor can be required to testify before a judge to help a defendant prove prosecutorial vindictiveness.[8] The Supreme Court of Missouri held that a prosecutor's decision making when charging defendants was protected attorney work-product and thus, prosecutors cannot be compelled to testify.[9] The court found that Hodges had not met the presumption of prosecutorial vindictiveness test and remanded to the lower court to determine if Hodges could make a showing under the objective evidence test.[10] In its reasoning, the court seemed to suggest that defendants are foreclosed from creating a presumption of prosecutorial vindictiveness at the pretrial stage and that only an increase in charges, not an increase in penalty, is sufficient to create a presumption.[11]

This Note examines how the majority's reasoning in *State ex rel. Becker v. Wood* creates an almost impossible burden for defendants to prove prosecutorial vindictiveness before trial or when a prosecutor seeks the death penalty. Part II discusses the facts and holding of *State ex rel. Becker v. Wood*. Part III examines the history of the death penalty in Missouri, as well as the history of prosecutorial vindictiveness as developed through the federal courts and Missouri cases. Part IV

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[4] Blackledge v. Perry, 417 U.S. 21, 27–28 (1974).

[5] United States v. Goodwin, 457 U.S. 368, 372, 380–84 (1982).

[6] *See* State v. Cayson, 747 S.W.2d 155, 156–58 (Mo. Ct. App. 1987); State v. Potts, 181 S.W.3d 228, 230–35 (Mo. Ct. App. 2005); State v. Molinett, 876 S.W.2d 806, 808–10 (Mo. Ct. App. 1994); State v. Sapien, 337 S.W.3d 72, 80 (Mo. Ct. App. 2011).

[7] State ex rel. Becker v. Wood, 611 S.W.3d 510, 512 (Mo. 2020) (en banc), *reh'g denied* (Dec. 22, 2020).

[8] *Id.* at 513.

[9] *Id.* at 513–14.

[10] *Id.* at 517.

[11] *Id.* at 515–16.

discusses the majority's reasoning in creating a higher burden in *State ex rel. Becker v. Wood*, including a discussion of Judge Russell's dissent. Part V discusses the flaws in the majority's reasoning regarding both the presumption test and objective evidence test, the impact of the court's analysis of the death penalty as it relates to prosecutorial vindictiveness, and the potential ramifications on defendants' ability to prove prosecutorial vindictiveness in the future.

II. FACTS AND HOLDING

In the early morning of June 22, 2015, police received a call that a burglar had broken into an apartment in Pacific, Missouri and was subsequently detained by the residents of the apartment.[12] Upon arrival, Police found Aaron Hodges, who had broken in and was "making very off the wall statements," including saying that he was being possessed and attacked by demons and killing people.[13] Police contacted the Critical Intervention Team, which concluded that Hodges needed to be transported to the hospital.[14] Hodges was then committed for a ninety-six-hour psychiatric evaluation.[15]

Around 8:30 p.m. that same day, Madeline Dreiling drove to her son Cory's apartment.[16] Cory Dreiling was autistic and living alone for the first time. Ms. Dreiling had not heard from Cory for ten hours and was worried. When she entered the apartment, Ms. Dreiling found her son and his roommate both brutally murdered in their apartment.[17] Cory Dreiling's apartment sat four buildings away from the apartment that Aaron Hodges had attempted to burglarize earlier that morning.[18]

While investigating the murder, police learned that Aaron Hodges lived in the victims' building and that Mr. Hodges would often play video

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[12] Ed Pruneau, *Man Arrested Before Murder Victims Found, Spoke of Demons*, EMISSOURIAN (June 26, 2015), https://www.emissourian.com/local_news/crime/man-arrested-before-murder-victims-found-spoke-of-demons/article_a0fb9a4c-a87e-572d-971d-7087a7dabe5c.html [https://perma.cc/2PBF-AKYS].

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Pauline Masson, *Mother Wants Justice For Her Son, Roommate*, EMISSOURIAN (Dec. 6, 2017), https://www.emissourian.com/mother-wants-justice-for-her-son-roommate/article_102d360e-0a78-5c0a-8d21-cefccdb6be1e.html [https://perma.cc/ES5L-9DUX].

[17] *Id.*

[18] Pruneau, *supra* note 12.

games with the victims.[19] Hodges's proximity to the victims, coupled with his bizarre statements when officers found him at the burglary scene led police to go to the St. Louis hospital where Hodges was being evaluated.[20] Police arrested Hodges for the murders and interviewed him under controlled conditions.[21] Growing frustrated with a lack of progress in the interview, the officers took Hodges back to the murder scene.[22] Confronted with both the physical evidence at the scene and the brutality of the murders, Hodges allegedly confessed to the murders, describing the events in detail.[23] Hodges was then served with a grand jury indictment charging him with the murders and was taken back to jail.[24]

On July 15, 2015, Hodges was arraigned and pleaded not guilty.[25] He filed a jury trial waiver in January of 2016, and he and Franklin County elected prosecutor, Robert Parks, began plea negotiations.[26] Hodges's scheduled guilty plea was continued numerous times over the next two and a half years.[27] Finally, on June 15, 2018, Hodges filed notice of his intent to proceed to trial and raise the defense of not guilty by reason of insanity.[28] The State subsequently withdrew all outstanding plea offers.[29] Prosecutor Robert Parks retired during this time, and Matthew Becker was elected Franklin County prosecutor in January 2019.[30] On February 26, 2019, the case was set for a trial starting that September.[31]

On July 24, 2019, five months after setting the trial date and seven weeks before trial, the prosecutor's office filed a notice of intent to seek the death penalty.[32] Hodges filed a motion to strike the State's intention to seek the death penalty, alleging prosecutorial vindictiveness in retaliation for Hodges proceeding to trial.[33] Hodges also filed a motion endorsing both Becker and Associate Prosecuting Attorney Matthew

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[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] Brief for Respondent at 4, State ex rel. Becker v. Wood, 611 S.W.3d 510 (Mo. 2020) (No. SC 98416).

[26] State ex rel. Becker v. Wood, 611 S.W.3d 510, 512 (Mo. 2020) (en banc).

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] Brief for Respondent, *supra* note 25, at 6.

[32] *Becker*, 611 S.W.3d. at 512.

[33] *Id.*

Houston as witnesses to testify at the hearing regarding the motion to strike.[34] The circuit court entered an order requiring Becker and Houston to appear and give sworn testimony at the hearing, leading Becker to petition the Missouri Court of Appeals for a writ of prohibition to prevent him from being required to testify.[35] The Missouri Court of Appeals denied the writ.[36] Becker then sought a writ from the Supreme Court of Missouri, which granted the appeal and issued a preliminary writ of prohibition.[37]

The Supreme Court of Missouri later made permanent the writ of prohibition on the order requiring Becker and Houston to testify, holding that: (1) a prosecutor's choice whether to seek the death penalty is protected attorney-work product, and (2) Hodges had not shown a presumption of prosecutorial vindictiveness to shift the burden to the |State to disprove the alleged vindictiveness.[38] The court remanded the case to the trial court to determine if Hodges met the objective evidence test; however, Hodges would have to prove this without any testimony from the prosecutors.[39]

III. LEGAL BACKGROUND

Prosecutors have "more control and discretion" than any other member of the criminal justice system.[40] They decide the charge, plea bargain, and recommended sentence.[41] When it comes to deciding whether to charge a defendant and what charge to bring, prosecutors have "enormous power."[42] Absent evidence of discrimination, defendants have few, if any, remedies to challenge a prosecutor's charging decisions.[43]

When prosecutors stretch the ethical and legal boundaries of their discretion, however, one potential remedy for defendants is showing prosecutorial vindictiveness.[44] Prosecutorial vindictiveness arises when a prosecutor, in an effort to deter a defendant from exercising constitutional

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[34] *Id.* at 513.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* at 513–14.

[39] *Id.* at 514.

[40] Garnick, *supra* note 1, at 468.

[41] *Id.* at 468–69.

[42] Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1516 (2000).

[43] *Id.* at 1516–17.

[44] *See* Garnick, *supra* note 1, at 475.

or statutory rights that delay legal proceedings, uses their discretion in charging and offering sentences to threaten or punish a defendant.[45]

A. Prosecutorial Vindictiveness Nationally

The Supreme Court of the United States first considered the issue of prosecutorial vindictiveness in 1974 in *Blackledge v. Perry*.[46] In *Blackledge*, the defendant was convicted of misdemeanor assault with a deadly weapon in a North Carolina trial court.[47] Under North Carolina law, defendants had a right to a trial de novo in North Carolina Superior Court after a conviction.[48] When the defendant filed his notice of appeal and intention to seek a trial de novo in superior court, the prosecutor charged the defendant with felony assault with a deadly weapon.[49] The Supreme Court held that the State was constitutionally barred from bringing a more serious charge in response to the defendant exercising his statutory right to appeal through a trial de novo in superior court.[50] According to Justice Stewart, "A person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration."[51] In discussing prosecutors' motivations in deterring defendants from exercising their rights, Justice Stewart continued, "[I]f the prosecutor has the means readily at hand to discourage such appeals – by 'upping the ante' through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy – the State can insure that only the most hardy defendants will brave the hazards of a de novo trial."[52]

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[45] *Id.* "Faced with crowded court dockets and a scarcity of resources, the prosecutor's office has an institutional bias against a defendant exercising constitutional or statutory rights that may delay or complicate the proceedings. Using his substantial powers of selective enforcement, the prosecutor can both threaten and punish a defendant exercising these rights by forcing him to risk suffering a greater penalty." *Id.* at 474–75. This Note uses third-person plural pronouns in place of gendered third-person singular pronouns.

[46] 417 U.S. 21 (1974).

[47] *Id.* at 22.

[48] *Id.* (citing N.C. GEN. STAT. § 7A-290 (1969)).

[49] *Id.* at 22–23.

[50] *Id.* at 28–29.

[51] *Id.* at 28.

[52] *Id.* at 27–28.

In *Bordenkircher v. Hayes*, however, the Supreme Court refused to extend the principle of *Blackledge* to plea negotiations.[53] Defendant Hayes was indicted for forgery and offered a plea deal requiring him to serve five years in prison.[54] Prosecutors pressured Hayes to accept the deal by threatening to charge him under the Habitual Criminal Act, which would mandate a life sentence upon conviction.[55] Hayes rejected the plea but was found guilty at trial and subsequently sentenced to mandatory life imprisonment.[56] The Court held that a prosecutor adding charges as punishment for the rejection of a plea deal was constitutional because "the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty."[57] The Court found that the prosecutor in *Hayes* "no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution."[58]

The Supreme Court further curtailed *Blackledge* in the 1982 decision *U.S. v. Goodwin*.[59] There, the Court established both the "presumption of prosecutorial vindictiveness" test and the "objective evidence" test now used by Missouri courts.[60] Under the presumption test, a defendant must first create a presumption of prosecutorial vindictiveness by showing a reasonable likelihood that vindictiveness motivated the prosecutor's action.[61] The presumption test allows courts to infer vindictiveness from the prosecutor's conduct and is "designed to spare courts the 'unseemly task' of probing the actual motives of the prosecutor."[62] To meet the objective evidence test, a defendant must "*prove objectively* that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do."[63] Thus, the objective evidence test requires a defendant to bring some other proof of vindictive motive before the court and such a motive cannot be inferred from conduct like the presumption test.[64]

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[53] 434 U.S. 357, 365 (1978).
[54] *Id.* at 358.
[55] *Id.*
[56] *Id.* at 359.
[57] *Id.* at 364.
[58] *Id.* at 365.
[59] 457 U.S. 368 (1982).
[60] *Id.* at 381.
[61] *Id.* at 373.
[62] *Id.* at 372.
[63] *Id.* at 384 (emphasis added).
[64] *See id.* at 384 n.19.

Justice Stevens also differentiated charging a defendant with an additional or enhanced charge during the pretrial stage from doing so during the trial and post-conviction stages.[65] During the pretrial stage, the prosecutor may still be learning new information. In contrast, during the trial and post-conviction stages, the prosecutor has discovered and assessed all of the information about a case. It is, therefore, more likely at the trial and post-conviction stages that an enhanced charge is improperly motivated.[66] The decision in *Goodwin* created an extremely difficult burden of proving a presumption of vindictiveness for defendants at the pretrial stage.[67]

B. Prosecutorial Vindictiveness in Missouri

The first Missouri appellate case to consider the issue of prosecutorial vindictiveness was *State v. Quimby*, which took a lighter approach to pre-trial prosecutorial vindictiveness than *Goodwin*.[68] The defendant, Quimby, had originally been charged with misdemeanor assault.[69] However, the charges were dropped after Quimby requested a jury trial, and the prosecutor then charged Quimby with felony burglary arising out of the same incident as the original assault charge.[70] Quimby alleged that on the day he informed the prosecutor of his intent to go to trial, the prosecutor said, "If you request a jury trial, I'll file a Class 'B' felony of burglary in the first degree."[71] Applying *Blackledge*, *Bordenkircher*, and *Goodwin*, the Missouri Court of Appeals held that the presence of prosecutorial coercion was "conclusively established" by the evidence, meeting the objective evidence test.[72] The main factors in favor of finding vindictiveness were that the defendant had never engaged in plea negotiations, and the prosecutors had obtained no new information that would warrant an increase in charges.[73] In fashioning this holding, the court implied that a prosecutor enhancing charges *after* a breakdown in plea negotiations might not raise the presumption of prosecutorial vindictiveness, following the logic of *Goodwin*.[74]

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[65] *Id.* at 381.
[66] *Id.*
[67] *See* Garnick, *supra* note 1, at 509.
[68] 716 S.W.2d 327 (Mo. Ct. App. 1986).
[69] *Id.* at 328.
[70] *Id.*
[71] *Id.*
[72] *Id.* at 332.
[73] *Id.*
[74] *See id.*

After *Quimby*, Missouri appellate courts began applying a rigid distinction between *Quimby's* prosecutorial decision in the plea bargaining phase versus other pretrial, trial, and post-trial phases.[75] In *State v. Cayson*, the Missouri Court of Appeals, Western District, held that there was a presumption of prosecutorial vindictiveness when a prosecutor increased charges from one second-degree robbery charge to two first-degree robbery charges based on the same incident.[76] The increased charges came after the defendant successfully moved for a mistrial due to an instructional error by the prosecutor during voir dire.[77] In an almost identical case, *State v. Potts*, the Missouri Court of Appeals, Southern District, held that there was a presumption of prosecutorial vindictiveness when the prosecutor enhanced charges from possession to possession with intent to distribute after the defendant successfully moved for a mistrial based on the prosecutor's reference during voir dire to the defendant's possible testimony at trial.[78]

In contrast, the Missouri courts of appeals have routinely rejected claims of prosecutorial vindictiveness in the pretrial stage, no matter how severe.[79] In *State v. Molinett*, the Western District held that there was no presumption of prosecutorial vindictiveness when a prosecutor enhanced a distribution of a controlled substance charge to include that the defendant was a prior drug offender after the defendant withdrew his plea offer, which subjected the defendant to a harsher sentence after conviction.[80] In *State v. Sapien*, the Western District held that a defendant did not raise a presumption of prosecutorial vindictiveness when the prosecutor amended two charges of first-degree child molestation to the greater offenses of first-degree statutory sodomy in response to Sapien rejecting a plea offer.[81] The court held that prosecutors are within their rights to influence defendants to plead guilty by either "charging heavily upfront and offering to dismiss charges or amend them to lesser offenses" or "charging lightly at the outset and warning of possible additional charges."[82] The court held

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[75] *Compare* State v. Cayson, 747 S.W.2d 155, 158 (Mo. Ct. App. 1987) (finding prosecutorial vindictiveness for additional charges filed after a mistrial) *with* State v. Molinett, 876 S.W.2d 806, 809 (Mo. Ct. App. 1994) (holding that prosecutor's decision to increase charges after a plea deal fell through was "rather a proper exercise of prosecutorial discretion").

[76] *Id.* at 156–58.

[77] *Id.* at 156.

[78] 181 S.W.3d 228, 231–32, 237 (Mo. Ct. App. 2005).

[79] *See, e.g.*, 876 S.W.2d at 808–10.

[80] *Id.*

[81] 337 S.W.3d 72, 75 (Mo. Ct. App. 2011).

[82] *Id.* at 80.

that neither situation would create a presumption of prosecutorial vindictiveness.[83]

In *State v. Gardner*, the Supreme Court of Missouri considered its first case of prosecutorial vindictiveness.[84] The defendant, Gardner, was living with a married couple, Phillip Hancock and Carol Drummond.[85] Gardner shot and killed Hancock, allegedly while Hancock threatened Drummond with a knife.[86] However, an investigation revealed that Drummond was possibly in a relationship with the defendant, and Drummond had discussed killing her husband with various friends and family members.[87] Four years after the crime, a newly elected prosecutor charged the defendant with voluntary manslaughter.[88] The statute of limitations on voluntary manslaughter was three years, and after the defendant refused to waive his statute of limitations defense, the prosecutor increased the charge to second-degree murder.[89] The court reiterated that a defendant could establish a presumption of prosecutorial vindictiveness by showing a realistic likelihood of vindictiveness in the prosecutor's enhancement of charges.[90] When considering whether a realistic likelihood of vindictiveness exists, the court held that Missouri courts should consider (1) the prosecutor's stake in deterring the exercise of some right and (2) the prosecutor's conduct.[91] The court held that Gardner had not established a presumption of prosecutorial vindictiveness because the prosecutor had acted within his discretion, and the charge of second-degree murder fit the defendant's alleged conduct.[92]

State v. Murray added a restriction on allegations of prosecutorial vindictiveness: there must be an augmentation of charges to establish a presumption of prosecutorial vindictiveness in the pretrial context.[93] Murray was charged with unlawful use of a weapon, but the State dismissed the charge.[94] After Murray filed a civil lawsuit alleging malicious prosecution, the prosecutor reinstated the same charge, and

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[83] *Id.*
[84] 8 S.W.3d 66 (Mo. 1999) (en banc).
[85] *Id.* at 68.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.* at 70.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] 925 S.W.2d 492, 493 (Mo. Ct. App. 1996).
[94] *Id.*

Murray was subsequently convicted after a jury trial.[95] The Eastern District held that there was no presumption of prosecutorial vindictiveness because there was no enhancement of charges during the pretrial stage, merely reinstatement of a charge.[96] However, the augmentation requirement only applies to the presumption test, not the objective evidence test.[97] Because *State v. Murray* involved reinstatement of the same charges and potential penalty, it left open the question of whether an increase in penalty but not charge could satisfy the presumption of prosecutorial vindictiveness in the pretrial stage.

C. The Death Penalty in Missouri and Prosecutorial Vindictiveness

Missouri defines first-degree murder as "knowingly caus[ing] the death of another person after deliberation upon the matter."[98] The only available punishments for first-degree murder are life imprisonment without the possibility for parole and the death penalty.[99] A prosecutor must prove a statutory aggravating factor beyond a reasonable doubt.[100] Then, a jury or judge decides whether the evidence as a whole, taking into account both aggravating and mitigating factors, justifies a death sentence.[101]

In *State ex rel. Patterson v. Randall*, the Supreme Court of Missouri applied the two-part prosecutorial vindictiveness test to a death penalty case.[102] Dale Patterson was convicted of capital murder and sentenced to life imprisonment after the State announced that it would not seek the death penalty.[103] The Supreme Court of Missouri reversed Patterson's conviction based on prosecutorial misconduct and granted Patterson a new trial.[104] On retrial, the State filed a notice of intent to seek the death penalty, to which Patterson responded by moving to strike the notice.[105] The trial court overruled Patterson's motion, but the Supreme Court of Missouri reversed, holding that the prosecutor's act of seeking the death penalty on retrial raised a presumption of prosecutorial vindictiveness in

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[95] *Id.*
[96] *Id.*
[97] *Id.* at 519–20 (Russell, J., dissenting).
[98] MO. REV. STAT. ANN. § 565.020 (2017).
[99] *Id.*
[100] MO. REV. STAT. ANN. § 565.032 (2017).
[101] *Id.* Missouri has seventeen aggravating factors. *Id.*
[102] State ex rel. Patterson v. Randall, 637 S.W.2d 16, 18 (Mo. 1982) (en banc).
[103] *Id.* at 17.
[104] *Id.*
[105] *Id.*

violation of Patterson's right to due process.[106] The court held that both a more serious charge *and a more serious penalty* could sustain an allegation of prosecutorial vindictiveness.[107] Writing for the majority, Judge Higgins reasoned that if due process prohibits the state from increasing charges based on a defendant invoking the right to appeal, "the same is necessarily true of subjecting the defendant to a more serious penalty subsequent to his successful appeal."[108]

Because the court found a presumption of prosecutorial vindictiveness based on an enhanced prospective penalty after a successful appeal, the burden shifted to the State to rebut the presumption. [109] While the State tried to argue that there was no increase in charges, the court rejected that argument, stating that it was the increased penalty that made the charge "more serious."[110]

IV. INSTANT DECISION

In a 4-3 decision, the Supreme Court of Missouri made permanent the writ of prohibition, finding that the defendant had not proved a presumption of prosecutorial vindictiveness and thus could not compel the prosecutor to testify.[111] The court remanded the case to determine if Hodges could meet the objective evidence test without the prosecutor's testimony.[112]

A. Majority Opinion

The Supreme Court of Missouri held that a prosecutor's rationale for seeking a specific punishment is a mental impression that is protected under the work-product doctrine.[113] Defendants cannot compel a prosecutor to testify to attempt to satisfy either the objective evidence test or the presumption test.[114] Instead of allowing a defendant to use a prosecutor's testimony to prove either test, defendants must now prove either test;then, a prosecutor can choose to testify to rebut the defendant's

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[106] *Id.* 17–19.
[107] *Id.* at 18.
[108] *Id.* at 19.
[109] *Id.* at 18.
[110] *Id.*
[111] State ex rel. Becker v. Wood, 611 S.W.3d 510, 513–14 (Mo. 2020) (en banc).
[112] *Id.* at 514.
[113] *Id.* at 513
[114] *Id.* at 514.

presumption.[115] Thus, a writ of prohibition is an appropriate remedy to prevent disclosure of protected work-product.[116] The court also held that while a prosecutor cannot be forced to testify about their decision to seek a specific punishment, if a defendant can show either 1) a presumption of prosecutorial vindictiveness or 2) objective evidence that a prosecutor acted with the sole intention of punishing the defendant, the burden would shift to the State to disprove the prosecutorial vindictiveness charge.[117] The prosecutor could then choose to either testify and disclose their work product to rebut the claim or not attempt to rebut the charge and let the court grant the motion that raised prosecutorial vindictiveness.[118]

In analyzing *Hodges* under the presumption of prosecutorial vindictiveness test, the court refused to find a presumption of prosecutorial vindictiveness because 1) there was no augmentation of charges, and 2) prosecutorial vindictiveness is rarely found in the pretrial stage.[119] The majority, citing three Missouri cases, found that the death penalty was not an augmentation of charges.[120] The court also reasoned that prosecutorial vindictiveness is rarely found at the pretrial stage and usually comes into play after a defendant has successfully won an appeal and is then subject to an enhanced charge on retrial.[121]

Finding that *Hodges* did not meet the presumption of prosecutorial vindictiveness, the Supreme Court of Missouri remanded the case for a hearing on the motion to strike without the prosecutor's testimony.[122] The court left open the possibility that Hodges could still win his motion to strike if he could show objective evidence of prosecutorial vindictiveness.[123] However, without any ability to question the prosecuting attorneys, Hodges would have an extremely hard time meeting the burden of the objective evidence test.

B. The Dissent

Judge Mary Russell filed a dissent joined by Judge Laura Denver Stith and Chief Justice George W. Draper III.[124] Judge Russell criticized

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[115] *Id.*
[116] *Id.* at 513.
[117] *Id.* at 515.
[118] *Id.* at 517.
[119] *Id.* at 514.
[120] *Id.* at 515.
[121] *Id.* at 515–16.
[122] *Id.* at 517.
[123] *Id.*
[124] *Id.* (Russell, J., dissenting).

the majority for "downplay[ing] the State's eleventh hour filing of its notice of intent to seek the death penalty."[125] Judge Russell highlighted the odd behavior of the prosecutor, who waited seven months after taking office to file the notice of intent to seek the death penalty.[126]

Judge Russell reiterated the rule that defendants can shift the burden to the state by (1) proving a presumption of prosecutorial vindictiveness or (2) by showing through objective evidence that the sole purpose of the state's action was to penalize the defendant.[127] Judge Russell pushed back against the majority's analysis of "whether the charge here was augmented."[128] Judge Russel argued that while the death penalty may not be an augmentation of charges, *State ex rel. Patterson v. Randall* held that the death penalty as an augmentation of penalty is sufficient to satisfy the presumption of prosecutorial vindictiveness test.[129] While Judge Russell agreed with the majority that Hodges had not yet established a presumption of prosecutorial vindictiveness, "the analysis of the principal opinion categorically forecloses such a conclusion without hearing evidence."[130]

If a defendant cannot meet the presumption test, Judge Russell argued, prosecutors should be compelled to testify under the "objective evidence" test for two reasons.[131] First, "a prosecutor's requisite candor toward the circuit court does not carry the same significance as testimony given directly after an oath or affirmation."[132] Second, "the reason for the delay is not something that can be gleaned from available objective evidence such as referencing a docket sheet."[133] Absent extraordinary circumstances where a prosecutor willfully reveals their malicious intent, compelling the prosecutor to testify is the only way for defendants to uncover the objective evidence needed to establish prosecutorial vindictiveness.[134] Judge Russell further argued that there is no risk of a slippery slope leading to prosecutors always being compelled to testify because circuit court judges could exercise discretion and only require testimony in "peculiar or unusual" circumstances.[135]

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[125] *Id.* (Russell, J., dissenting).
[126] *Id.* (Russell, J., dissenting).
[127] *Id.* at 118 (Russell, J., dissenting).
[128] *Id.* (Russell, J., dissenting).
[129] *Id.* at 520 (Russell, J., dissenting).
[130] *Id.* at 521 (Russell, J., dissenting).
[131] *Id.* at 520–21 (Russell, J., dissenting).
[132] *Id.* at 518 (Russell, J., dissenting).
[133] *Id.* (Russell, J., dissenting).
[134] *Id.* at 520 (Russell, J., dissenting).
[135] *Id.* at 519 (Russell, J., dissenting).

V. COMMENT

While previous federal and Missouri appellate cases created a narrow window for claiming prosecutorial vindictiveness, *State ex rel. Becker v. Wood* has almost shut that window entirely. The court maintains the prosecutorial vindictiveness tests reiterated in past Missouri cases: defendants can either establish a presumption of prosecutorial vindictiveness by showing a realistic likelihood that vindictiveness exists based on the prosecutor's conduct, or they can present objective evidence that the prosecuting attorney acted with the sole intention of punishing a defendant for exercising a constitutional right.[136] However, the majority's analysis of the presumption test is flawed for multiple reasons, including its refusal to recognize the death penalty as an augmentation.[137] While the language of the court seems to leave open the possibility that a defendant could still be successful on their claim of prosecutorial vindictiveness under the objective evidence test, the holdings of *Wood* leave a defendant with no tools to challenge a prosecutor's decision. This effectively creates an impossible standard that bars prosecutorial vindictiveness claims at the pretrial stage and makes it incredibly difficult to prove at later stages.

A. The Presumption of Prosecutorial Vindictiveness Test

The majority held that Hodges had not raised a presumption of prosecutorial vindictiveness because there was no augmentation of charges, and Missouri courts rarely find prosecutorial vindictiveness in the pretrial stage.[138] However, the stark language used in the opinion pushes these concepts to the extreme, creating an almost insurmountable standard that few, if any, defendants like Hodges could satisfy.

First, while it is rare for Missouri courts of appeals to find prosecutorial vindictiveness at the pretrial stage, it has happened before in *State v. Quimby*.[139] *Quimby* was the first Missouri appellate case to consider prosecutorial vindictiveness after the Supreme Court of the United States' decisions of *Blackledge* and *Goodwin*.[140] The court in *Quimby* found prosecutorial vindictiveness in the pretrial stage after the prosecutor said to the defendant, "If you request a jury trial, I'll file a Class 'B' felony of burglary in the first degree."[141] While *Quimby* can be

[136] *Id.* at 514.
[137] *Id.*
[138] *Id.*
[139] State v. Quimby, 716 S.W.2d 327, 331 (Mo. Ct. App. 1986).
[140] *Id.* at 329.
[141] *Id.* at 328.

differentiated from other cases in that the defendant did not engage in any plea bargaining, the court did not explicitly make that distinction.[142] The majority cited seven cases where prosecutorial vindictiveness was not found at the pretrial stage while failing to mention even one case where it was, including *Quimby*.[143] Judge Fisher concluded that there was no reasonable likelihood of vindictiveness because "there has been no successful appeal or grant of retrial in this case."[144] This language seems to indicate that the court will not find prosecutorial vindictiveness in future cases at the pretrial stage regardless of whether there was plea bargaining, potentially going against its own precedent.

Second, the majority's analysis of the presumption test fails to satisfactorily analyze the prosecutor's conduct. After reiterating that a prosecutor's conduct must be weighed when analyzing a presumption of prosecutorial vindictiveness, the majority found that the State's conduct in Hodges' case "fails to establish a reasonable likelihood of vindictiveness."[145] The majority only mentions the timing of the notice of intent once, noting, "A prosecuting attorney certainly possesses the discretion to seek any statutorily authorized sentence seven weeks before trial is set to begin."[146]

However, this offhand statement by the majority severely undercuts the amount of time it takes to prepare for a capital murder case compared to a first-degree murder case. In *Hodges*, the new prosecutor waited a year after Hodges filed a notice of intent to proceed to trial and seven months after he had taken office to file the notice of intent to seek the death penalty.[147] Becker therefore had seven months to prepare arguments for proving the aggravating factors beyond a reasonable doubt, while defense counsel had only seven weeks not only to craft arguments to rebut the aggravating factors but also prepare mitigation evidence.[148] This would put any prosecutor at a substantial advantage.[149] By refusing to acknowledge the suspicious amount of time that the prosecutor waited in filing the notice of intent, the Court adopts willful blindness to conduct that would point to a presumption of prosecutorial vindictiveness.

Third, the majority's application of the presumption test does not categorize the death penalty as an augmentation. The majority argues that

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[142] *Id.* at 330.

[143] State ex rel. Becker v. Wood, 611 S.W.3d 510, 515–18 (Mo. 2020) (en banc).

[144] *Id.* at 515–16.

[145] *Id.* at 515.

[146] *Id.* at 516.

[147] *Id.* at 512.

[148] *Id.* at 516.

[149] *Id.* at 517 (Russell, J. dissenting).

"Hodges was subject to death the day he was indicted for first-degree murder… importantly, the State did not waive the death penalty at any point."[150] However, the fact that a defendant was "subject" to a more severe charge or penalty the day they were indicted is not a bar to a claim for prosecutorial vindictiveness.[151] Indeed, this is what happens in every successful claim of prosecutorial vindictiveness, such as *State v. Cayson* and *State v. Potts*.[152] As discussed in Part III, the prosecutor in *Cayson* increased charges from one second-degree robbery charge to two first-degree robbery charges based on the same incident, charges to which the defendant was certainly subject. Yet, the Western District nevertheless found prosecutorial vindictiveness.[153] In *State v. Potts*, the fact that the prosecutor enhanced charges from possession alone to possession with intent to distribute, to which the defendant was certainly "subject" on the day he was indicted for possession, did not stop the Southern District from finding prosecutorial vindictiveness.[154] Under the majority's logic, increases in penalty, but not charges, are acceptable so long as the defendant was subject to that penalty at the time of their indictment.

Fourth, the majority also erred in failing to mention or distinguish *State ex rel. Patterson v. Randall*.[155] As Judge Russell noted in her dissent,[156] *Patterson* was a prior Supreme Court of Missouri opinion that explicitly held that either augmentation of charges *or penalty* could support a presumption of prosecutorial vindictiveness.[157] *Patterson* also contains nearly identical facts to *Hodges*: a prior prosecutor opted not to seek the death penalty, but a newly elected prosecutor chose to seek it.[158] The only difference between the two cases is that *Patterson* alleged prosecutorial vindictiveness after a successful appeal, whereas Hodges alleged it at the pretrial stage.[159] Curiously, the majority did cite *Patterson* once for establishing the burden shift to the prosecutor once a presumption of prosecutorial vindictiveness arises.[160] However, any mention of the

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[150] *Id.* at 516.

[151] State v. Cayson, 747 S.W.2d 155, 156–58 (Mo. Ct. App. 1987); State v. Potts, 181 S.W.3d 228, 230–35 (Mo. Ct. App. 2005).

[152] *Potts*, 181 S.W.3d at 230–35; *Cayson*, 747 S.W.2d at 156–58.

[153] *Crayson*, 747 S.W.2d at 156.

[154] *Potts*, 181 S.W.3d at 231–32.

[155] State ex rel. Becker v. Wood, 611 S.W.3d 510, 520 (Mo. 2020) (en banc).

[156] *Id.*

[157] State ex rel. Patterson v. Randall, 637 S.W.2d 16, 18 (Mo. 1982) (en banc).

[158] *Id.*; *State ex rel. Becker*, 611 S.W.3d at 512.

[159] *State ex rel. Patterson*, 637 S.W.2d at 17; *State ex rel. Becker*, 611 S.W.3d at 512.

[160] *State ex rel. Becker*, 611 S.W.3d at 515.

substance of *Patterson* or its nearly identical fact pattern is omitted. The majority essentially ignores *Patterson's* finding that augmentation of penalty, specifically the death penalty, is sufficient to meet the *Gardner* augmentation requirement.[161] By ignoring this precedent, the court leaves open questions about the continued validity of *Patterson*. Judge Fischer wrote, "because the State did not augment or change the initial charge of first-degree murder, Hodges' allegations do not create a presumption of prosecutorial vindictiveness."[162] This language indicates that the Court does not endorse the view of *Patterson* that an increase in penalty can also create a presumption of prosecutorial vindictiveness.[163] This confusion could have a chilling effect on defendants moving for appeal.[164] Under *Wood*, prosecutors can also now threaten defendants with the death penalty, at least at the pretrial stage, due to the majority's ruling that the death penalty does not satisfy the *Gardner* augmentation requirement for the presumption test.[165] In holding this, the majority goes against Missouri precedent in *State ex rel. Patterson v. Randall*.[166] By turning away from *Patterson*, prosecutors can now use the death penalty as a threat to prevent defendants from exercising their constitutional rights to a jury trial or to appeal. The majority's failure to consider the prosecutor's conduct in *State ex rel. Becker v. Wood* also signals to prosecutors that they will face no consequences if they wait until the last minute to file a notice of intent to seek the death penalty or increase charges in general. Prosecutors can gain a massive advantage in building their case while surprising defense lawyers with charges at the last minute with no ramifications.

B. The Objective Evidence Test

The court declined to rule on whether Hodges had met the objective evidence test, holding that:

> this Court does not foreclose the possibility that prosecutorial vindictiveness may still be found after a hearing on Hodges' motion to strike. If Hodges, during the hearing on his motion, presents objective evidence supporting prosecutorial vindictiveness, the circuit court could properly require the State to choose between rebutting the claim

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[161] *See id.*
[162] *Id.*
[163] *See id.*
[164] *Id.* at 520.
[165] *Id.* at 515.
[166] State ex rel. Patterson v. Randall, 637 S.W.2d 16, 19 (Mo. 1982) (en banc).

> of prosecutorial vindictiveness on the record or permitting the court to sustain the motion to strike in this case.[167]

While on their face, these words seem to indicate that Hodges still has a chance, refusing to require the prosecution to testify has eliminated any possibility that Hodges can still succeed on his motion. The standard in Missouri under the objective evidence test is that the defendant must give "persuasive objective evidence that the attorney acted with the *sole intention* of punishing the defendant for exercising a constitutional right."[168] The courts have already created a nearly impossible hill to climb with the sole-intention caveat, as a prosecutor could easily create post hoc arguments that satisfy this standard. By allowing prosecutors to refuse a court's order to testify in extreme cases, the Supreme Court of Missouri has effectively made the objective evidence test impossible for any defendant to meet. Barring a prosecutor uttering the words, "I am increasing your charge with the sole intention of punishing you for exercising your constitutional rights," no defendant will be able to meet the objective evidence test. Judge Russell proposed one persuasive solution to this problem in her dissent, which would allow circuit judges to exercise their discretion and, in unusual circumstances, allow defendants to compel prosecutors to testify so that they can meet the objective evidence test.[169]

While the majority in *State ex rel. Becker v. Wood* acts as though Hodges can still use the objective evidence test, the court has created an unassailable burden for Hodges and other defendants. Defendants must show objective evidence that a prosecutor's sole intention was to punish a defendant, which is already an incredibly high standard.[170] Not allowing defendants to compel prosecutors to testify leaves defendants with no means to meet the objective evidence test, thus completely negating the test altogether.

VI. CONCLUSION

Since *Blackledge* and *Quimby*, federal and Missouri state courts have eroded the ability of defendants to prevail on claims of prosecutorial vindictiveness. *State ex rel. Becker v. Wood* continues this tradition and sets the bar even higher. First, under the presumption test, *State ex rel. Becker v. Wood* essentially precludes any prosecutorial vindictiveness

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[167] *State ex rel. Becker*, 611 S.W.3d at 517.

[168] *Id.* at 514 (emphasis added).

[169] *Id.* at 519 (Russell, J., dissenting).

[170] *Id.*

claims at the pretrial stage. Prosecutors can commit egregious conduct at the pretrial stage and remain immune to claims of prosecutorial vindictiveness. Second, prosecutors can also now use the death penalty to threaten and coerce defendants at the pretrial stage and possibly the post-trial stages, due to the finding in *Wood* that augmentation of charges is not enough to satisfy *Gardner*. Third, defendants must now provide objective evidence under the second test without the ability to examine prosecutors in a hearing.

Overall, *State ex rel. Becker v. Wood* represents the most rigid of rules for prosecutorial vindictiveness, giving prosecutors even more power than they already have. Prosecutors now have unprecedented freedom at the pretrial stage and during first-degree murder proceedings when deciding the penalty. *State ex rel. Becker v. Wood* has stripped defendants of the ability to prove a case of prosecutorial vindictiveness in these situations, leaving defendants no way to check prosecutors when they overstep.