

IN THE 210TH JUDICIAL DISTRICT COURT
EL PASO COUNTY, TEXAS

STATE OF TEXAS

§
§
§
§
§

V.

CAUSE NO.: 20210D02909

IVAN GABALDON

DEFENDANT’S MOTION TO DISMISS BASED ON
PROSECUTORIAL VINDICTIVENESS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW IVAN GABALDON, the Defendant in the above entitled and numbered cause, by and through his attorneys of record, DENISE E. BUTTERWORTH and OMAR CARMONA, and requests this Honorable Court to DISMISS BASED ON PROSECUTORIAL VINDICTIVENESS, and in support thereof would show the Court as follows:

I.

The Defendant was arrested on February 28, 2021, and has been incarcerated ever since. On March 5, 2021, a bond hearing occurred where the State of Texas argued Defendant was not entitled to self-defense because he was able to take the knife away from the alleged victim and disarm him and, therefore, was no longer under an immediate threat of deadly force. An indictment was presented and returned on March 10, 2021 alleging MURDER to have occurred on February 22, 2021. The case was originally set for Jury Trial on November 5th, 2021. On September 16, 2021, defense counsel made another official request in writing to ADA Bryan Herrera asking for a copy of the Defendant’s statement. On September 27th, the defense received an email from Mr. Herrera stating “we are waiting to receive the video at our office. We’ll let you know as soon as we do.” On October 4, 2021, the Defense received a forwarded email from DA investigator Anthony Norez that the property was received and given to the media room for uploading. At a

hearing held on October 5th, the Defendant complained to the Court once again that basic discovery was not being turned over, specifically concentrating on the statement made by the Defendant. It was also discovered at that hearing that the State of Texas had not gone through any of the evidence to determine what would be sent to DPS for forensic testing. The trial date was reset by the Court to accommodate jurors being summoned and the case was reset for trial to December 2nd, giving the State of Texas an almost additional month to prepare for trial. It was made very clear at this setting that the Defendant was ready for trial, and there would be no negotiations because the Defendant was claiming self-defense. As of the filing of this motion, there have been zero plea bargaining conversations.

On November 16th, the Court held a hearing on two motions filed by the State of Texas. The first motion filed by the State was an obvious attempt to postpone jury selection based on an argument by the prosecutor that we could not proceed if jurors were wearing masks. Mr. Cox stated there was a “fairly copious set of case law” to justify this request and threatened the Court that it would be reversible error to proceed at the jury trial proceeding on December 2, 2021. When the Court requested the State cite any good case law regarding his argument, the State of Texas filed a memorandum citing a 1996 case where the defendant was not present for jury selection and completely not on point. Next the Court heard the first State’s motion for continuance where the State of Texas admitted it was not ready to proceed on the December 2nd jury trial setting. Then the State requested, on its own accord, that the Court release the defendant on a full PR bond due to the fact that they were not ready for trial. When the Court denied this request, the State then disclosed that they will be taking the Defendant's case to a grand jury to be re-indicted for capital murder. Mr. Carmona then responded that the Defendant will proceed forward and waive his 10 days notice. In direct response to Mr. Carmona, Mr. Cox stated the following: “I do not think you

can do that while we consider whether to seek the death penalty, however.... I will seek the death penalty if that's what becomes necessary.” The State of Texas proceeded to obtain a grand jury indictment for Capital Murder on November 17. Then on November 18, the State filed an amended Motion for Continuance requesting again that there be no jury trial on December 2nd arguing that they now need additional time to determine whether to seek the death penalty on that charge. On November 19th, the Court ruled that the State’s motion for continuance was denied and granted the Defendant's constitutional right to a speedy trial.

On November 22, the State filed its Notice to Seek the Death Penalty along with an untimely Notice of Extraneous Offenses. On November 23, the State filed a demand for individual voir dire where the State is requesting to speak to each juror individually and apart from the entire panel.

II.

Defendant was indicted for Capital Murder and the State elected to seek the death penalty as retribution for the Defendant asserting his speedy trial rights guaranteed to him by the 6th and 14th Amendment of U.S. constitution, article I, section 10 of Texas Constitution, and article 1.05 of the Texas Code of Criminal Procedure when he requested to go to trial on the December 2nd, 2021 setting. This violates his due process rights under the 6th and 14th amendments of the US Constitution and due course of law under Art I secs 13 and 19 of the TX constitution and Art. 1.05 of Texas Code of Criminal Procedure. *Castleberry v. State*, 704 S.W.2d 21, 24 (Tex.Crim.App. 1984) (“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person’s reliance on his legal rights is plainly unconstitutional.”) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)).

A constitutional claim of prosecutorial vindictiveness may be established in either of two distinct ways: 1) proof of circumstances that pose a "realistic likelihood" of such misconduct sufficient to raise a "presumption of prosecutorial vindictiveness," which the State must rebut or face dismissal of the charges; or 2) proof of "actual vindictiveness" — that is, direct evidence that the prosecutor's charging decision is an unjustifiable penalty resulting solely from the defendant's exercise of a protected legal right. *Neal v. State*, 150 S.W.3d 169, 173 (Tex.Crim.App. 2004). Under the latter prong, the defendant must establish vindictiveness by a preponderance of the evidence. *Id.* at 174, n18 (citing *United States v. Moulder*, 141 F.3d 568, 572 (5th Cir. 1998)). “The burden then shifts to the prosecution to come forward with an explanation for the charging increase that is unrelated to the defendant’s exercise of his legal right [to a speedy trial.] The trial court decides the issue based upon all of the evidence, pro and con, and the credibility of the prosecutor’s explanation.” *Id.* at 174.

The defendant contends that under both prongs there is sufficient evidence for the Court to hold that the State of Texas engaged in prosecutorial vindictiveness. Starting with the second prong first, proof of “actual vindictiveness,” the Defendant would direct the Court to the hearing that was held on November 16th – moments after attempting to get a continuance by offering the Defendant a PR bond because they were not ready for trial, the State turned around and notified the Court that he was going to re-indict the case to Capital Murder and then would decide whether to seek the death penalty. This is also just moments after the defense notified the Court about a conversation that had taken place on November 4, where Mr. Cox admitted he was only about halfway through the discovery and after he was exposed for being unaware whether 2 of the 3 witnesses cited necessary for the continuance had given written statements. Mr. Carmona then responds that if the State re-indicts the case to Capital Murder, the defendant will still go to trial

on December 2nd and waive his 10 days notice. In direct response, the following statement is made immediately following: "I do not think you can do that while we consider whether to seek the death penalty, however.... I will seek the death penalty if that's what becomes necessary." In other words, "If you attempt to waive your 10 days to push this to trial, I will seek the Death Penalty to ensure that we do not go." This threat made by Mr. Cox is direct evidence that the prosecutor's charging decision is an unjustifiable penalty resulting solely from the defendant's exercise of a protected legal right.

As for the first prong, the Defendant contends that the summary of the procedural history constitutes the proof of circumstances that pose a "realistic likelihood" of such misconduct sufficient to raise a "presumption of prosecutorial vindictiveness." The Court has presided over all pre-trial hearings that have occurred so far and has observed firsthand how this case has been handled. When the State of Texas was responding to the Objection of the Untimely Translation of the Defendant's statement, the Court should note the following statement made by Mr. Cox: "I think for the current trial date, it's certainly not been timely filed so it would certainly be excludable. If for some reason the trial date should get moved then I don't think the same concern applies." This statement clearly shows the State's hand and intent.

Furthermore, the "pro forma" motion filed by the State to object to jurors wearing masks is a huge piece of evidence regarding how desperate the State was to get this case continued. By making this argument, they were willing to jeopardize every other criminal case set for trial in their office. Stating that proceeding forward with jurors wearing masks would be reversible error, they effectively subjected all cases tried to verdict so far during the Pandemic to be challenged on appeal, and then more importantly, gave every single practicing defense attorney the ability to site this same argument made by the State of Texas to ensure a continuance in their case. And the

DA's office has several, SEVERAL cases that are waiting to be tried with horrific facts and sad victims. Yet, that was the level of desperation for a continuance that was clearly evidenced by the State making this argument. To our knowledge, this objection has never been filed by the State of Texas.

Additionally, the defense argues the request filed on November 23rd to take each juror on individual voir dire was the exact reason the State chose to seek the death penalty against this Defendant so they get the continuance they were denied. Individual voir dire will delay the ultimate day that the jury trial will commence and effectively gives them more time to get their results back from DPS, locate their missing witnesses, and pray that all of their untimely notices become timely. Then of course there is the startling, absolutely unjustified turn of events that just speak volumes for themselves. The moment when the State of Texas announced it had actually made good on their threat and re-indicted this young man for Capital Murder and then the literal stomach-turning Notice to Seek Death **that was filed less than a week after a full PR bond was offered to the Defendant**. All of these circumstances, when considered together, prove the "realistic likelihood" that the State of Texas punished the Defendant's request to go to trial when the State was not ready.

The Defendant submits that this Honorable Court, who visually watched and heard these events play out, is in the best position to determine both the credibility of the witnesses and the procedural history leading up to the State's decision to seek death while determining whether the Defendant's due process rights were violated. This fact pattern satisfies either of *Neal's* requirements and this Court should dismiss this case. *See also State v. Hill*, 558 S.W.3d 280 (Tex. App-Dallas 2018), where the Court of Appeals held that the trial court did not abuse its discretion

when it determined the prosecution was unconstitutionally vindictive before trial and dismissed the indictment with prejudice.

III.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Honorable Court grant the Defendant's Motion to Dismiss Based on Prosecutorial Discretion and Dismiss the Indictment with Prejudice.

Respectfully submitted,

Carmona Lozano Meza Law Firm
221 N. Kansas St., Ste. 1200
El Paso, Texas 79901
Tel: (915) 225-1555
Email: office@clmfirm.com

By: 

OMAR CARMONA
State Bar No. 24059543
Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that on this day the 2nd of June, 20 21, a true and correct copy of the foregoing instrument was served on the District Attorney's Office at 500 E. San Antonio, El Paso, Texas 79901 electronic filing.



OMAR CARMONA

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

CLM Law Firm on behalf of Omar Carmona
Bar No. 24059543
office@clmfirm.com
Envelope ID: 59451347
Status as of 11/24/2021 8:40 AM MST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
OMAR CARMONA		OFFICE@CLMFIRM.COM	11/23/2021 10:49:29 PM	SENT
DENISE BUTTERWORTH		DButterworthAttorney@gmail.com	11/23/2021 10:49:29 PM	SENT
CESAR LOZANO		OFFICE@CLMFIRM.COM	11/23/2021 10:49:29 PM	SENT
DISTRICT ATTORNEY		DACRIMINAL@EPCOUNTY.COM	11/23/2021 10:49:29 PM	SENT