E-Filed Document Oct 17 2017 11:55:16 2017-M-01409-SCT Pages: 24

IN THE SUPREME COURT OF MISSISSIPPI

ROBERT SCHULER SMITH *Petitioner*

V. **No. 2017-M-01409**

STATE OF MISSISSIPPI *Respondent*

ANSWER TO PETITION FOR INTERLOCUTORY APPEAL BY PERMISSION

COMES NOW, the Respondent, State of Mississippi, by and through counsel, and files this Answer to Petition for Interlocutory Appeal by Permission in the above styled and numbered cause.

I.

STATEMENT OF THE CASE

Smith is currently under two multi-count indictments in two causes in the Circuit Court of Rankin County, Mississippi. Specifically, the Petitioner was indicted on May 25, 2017, and is charged in Cause No. 28250 with two counts of Simple Domestic Violence pursuant to Miss. Code Ann. §97-3-7(3), and multi-count Common Plan or Scheme pursuant to Miss. Code Ann. § 99-7-2. In Cause No. 28251, Petitioner is charged with one count of Aggravated Stalking pursuant to Miss. Code Ann. § 97-3-107(1 & 2), one count of Robbery pursuant to Miss. Code Ann. § 97-3-73 and multi-count Common Plan or Scheme pursuant to Miss. Code Ann. § 99-7-2.

On August 30, 2017, Smith sought to dismiss the charges against him arguing, among other things, that the Attorney General lacked the authority to prosecute him. The State, by and through the Attorney General's office, filed a response in due course and the trial court conducted a hearing on the motion to dismiss on October 2, 2017, with trial in the matter currently set to begin the week

of October 23, 2017. Following the hearing, the trial court by written order on October 3, 2017, denied the Petitioner's motion to dismiss. From this decision denying his motion to dismiss the charges against him, Smith filed the present petition for interlocutory appeal on the October 13, 2017.

II.

SUMMARY OF THE ARGUMENT

In this interlocutory appeal, the Petitioner claims error in the trial court's denial of his motion to dismiss the criminal charges against him claiming the Attorney General's office violated the mandate of *Williams v. State*, 184 So.3d 908 (Miss. 2014), in pursuing charges of simple domestic violence, aggravated stalking and robbery. See App. Motion at 3; App. Exhibits 1-A, 1-B. In so doing, the Petitioner avers the Attorney General "exceeded the scope of his authority" in pursuing these charges and that he further "usurped the authority of the district attorney's office when he caused the Petitioner to be indicted. . . ." See Pet. Mot. at 3. Smith is mistaken in both instances.

At the outset, the Petitioner's present motion is not properly before the Court as it does not proceed from a final criminal judgment. Accordingly, this appeal should not be entertained by this Court. Alternatively, the trial court's denial of the Petitioner's motion to dismiss the criminal charges was not violative of this Court's precedent in *Williams* nor any other authority or statute. Petitioner is simply not entitled to relief on these assignments of error.

To be clear, Smith attempts to argue that the district attorney's decision to consent to his prosecution by the Attorney General's office is violative of this Court's precedent as announced in *Williams v. State*, 184 So.3d 908 (Miss. 2014). Again, he is mistaken. This case is clearly distinguishable from *Williams* as here the district attorney did not expressly object to the Attorney

General's prosecution of Smith. See Pet. Exh. 2. at 14-15.

In *Williams*, the district attorney specifically opposed such involvement of the Attorney General, which is not the case here. Further, in the case sub judice there has been no *nolle prosequi* order entered, as was the case in *Williams*. Additionally, at no time did the district attorney state he would not prosecute a felony charge. Id. at 13. For these reasons, all of which will be addressed infra, the trial court correctly denied Smith's motion to dismiss. The Petitioner is entitled to no relief on these assignments of error. Additionally, the Petitioner's claim that the Attorney General lacks the statutory authority to pursue criminal charges against him is contrary to both the precedent of this Court and legislative mandate.

Pursuant to *State ex rel. Allain v. Mississippi Pub. Serv. Comm'n*, 418 So. 2d 779, 781 (Miss. 1982), the Attorney General has both constitutionally-protected common law authority and separately enacted statutory authority to enforce the criminal laws of the State of Mississippi. The Attorney General is the chief law officer who is entrusted with the management of all legal affairs, and prosecution of all suits, criminal and civil, in which the State is a party or in which the State has an interest. He has the authority to institute, conduct, and maintain all suits necessary for the enforcement of the laws of the State, preservation of order, and the protection of public rights.

In the area of criminal law, the Attorney General has concurrent authority with district attorneys to enforce the criminal laws of the State. Concurrent authority means that both have the independent authority, with or without the involvement of the other, to initiate criminal prosecutions. The present interlocutory appeal should be dismissed. This matter, while not properly before Court, alternatively, does not implicate the Court's holding in *Williams*. Further, the Attorney General is entrusted with the authority to enforce the criminal laws of this State which includes initiating

criminal prosecutions. The trial court was correct in denying Smith's motion to dismiss the criminal charges against him.

III.

ARGUMENT

A. STANDARD OF REVIEW

"The standard of review for a trial court's grant or denial of a motion to dismiss is de novo." *See Weil v. Bailey*, ___So.3d ___, 2017 WL 1295370 *3 (Miss. 2017)(quoting *Burch v. Illinois Cent. R.R. Co.*, 136 So.3d 1063, 1064-65 (¶ 3) (Miss. 2014). "A Rule 12(b)(6) motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." *Id.* (quoting *Rose v. Tullos*, 994 So.2d 734, 737 (¶ 11) (Miss. 2008). "When considering a motion to dismiss, the allegations in the complaint must be taken as true and the motion should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim." *Id.* (quoting *Scaggs v. GPCH–GP, Inc*., 931 So.2d 1274, 1275 (¶ 6) (Miss. 2006)**.** Statutory interpretation, which is a question of law, is reviewed de novo. *Arceo v. Tolliver*, 19 So.3d 67, 70 (Miss. 2009); *Powe v. Byrd,* 892 So.2d 223, 227 (Miss. 2004).

B. THE INTERLOCUTORY APPEAL SUB JUDICE IS NOT PROPERLY BEFORE THE COURT AND SHOULD BE DENIED ACCORDINGLY

Petitioner seeks relief in this criminal case pursuant to Mississippi Rule of Appellate Procedure (MRAP) 5. However, pursuant to caselaw, rule, and statute, only final judgments may be appealed directly. *See Wigington v. McCalop* 2016 WL 2757918 (Miss. 2016); *Walters v. Walters*, 956 So.2d 1050 (Miss. 2007); *Hill v. Hill*, 942 So.2d 207 (Miss. 2006). Thus, the seminal question to be answered prior to consideration of this interlocutory appeal is whether the matter is

appealable. In other words, has there been a final judgment entered against the Petitioner or does this interlocutory appeal constitute an exception to the rule concerning final judgments in criminal cases. *See Kelly v. State,* 80 So.3d 802 (Miss. 2012) ("Generally, an appeal may be taken in a criminal case only from a final judgment. Miss. Code Ann. § 9–3–9. However, in certain limited circumstances, we may entertain interlocutory appeals."); *see also BellSouth Personal Communications, LLC v. Board of Sup'rs of Hinds County*, 912 So.2d 436 (Miss. 2005).

In the case at bar, the Petitioner seeks review of the trial court's denial of his motion to dismiss the criminal charges against him. To be clear, there is no judgment of conviction. In other words, there is not the requisite final judgment necessary for an interlocutory appeal. In the criminal context, as here, a "final judgment," for purposes of appeal, is one which ends in conviction and sentence. *Smith v. State*, 786 So.2d 423 (Miss. 2001). Appeals to this Court from circuit court proceed only from final judgment. Miss. Code Ann. § 11-51-3; *Cotton v. Veterans Cab. Co., Inc*. 344 So.2d 730 (Miss. 1977). That is certainly not the case here. Furthermore, in a criminal case, the Court has declined the authority on interlocutory appeal to intervene and interpose itself into the circuit court by halting all proceedings and ordering discharge of the defendant to protect an alleged violation of a right which can be addressed, and if violated, fully vindicated on appeal, such as here. Miss. Code Ann. § 99-35-101; *Beckwith v. State* 615 So.2d 1134 (Miss. 1992), certiorari denied 114 S.Ct. 232, 510 U.S. 884, 126 L.Ed.2d 187.

Smith's claim that the Attorney General has improperly proceeded in this case can certainly be vindicated on appeal. Further, there is no "limited circumstance" here such as a double jeopardy claim which was the basis for the exception to the rule concerning the consideration of interlocutory appeals, as announced by the Court in *Beckwith*. 615 So.2d 1134, 1146 (Miss. 1992); *see also Kelly,*

supra. Thus, Petitioner's present petition is not an exception to the Court's rule that an interlocutory appeal "may be taken in a criminal case only from a final judgment." *See Kelly*, 80 So.3d 802, 803 (Miss. 2012); *see also U.S. v. MacDonald*, 435 U.S. 850, 862, 98 S.Ct. 154756 L.Ed.2d 18 (1978)("declin[ing] to exacerbate pretrial delay by intruding upon accepted principles of finality to allow a defendant whose speedy trial motion has been denied before trial to obtain interlocutory appellate review").

The Respondent further submits that should the Petitioner's appeal be considered, the Court will necessarily have to resolve questions of fact regarding the testimony of district attorney Michael Guest given in the hearing on Petitioner's motion to dismiss. See Pet. Exh. 2. In order to either grant or deny relief, the Court will have to make factual determinations with regard to Guest's testimony. This type of factual determination is precisely the type of circumstance in which the Court is loathe to grant an interlocutory appeal, where the Court must settle such disputes of fact. *See American Elec., a Div. of FL Industries v. Singarayar* 530 So.2d 1319 (Miss. 1988).

For the reasons stated, the Respondent respectfully submits the Petitioner's interlocutory appeal is not properly before the Court must be denied.

C. THE TRIAL COURT COMMITTED NO ERROR IN DENYING SMITH'S MOTION TO DISMISS THE CRIMINAL CHARGES AGAINST HIM AS THE FACTS OF THIS CASE ARE DISTINGUISHABLE FROM THOSE IN *WILLIAMS V. STATE*

Petitioner claims error by the trial court in denying his motion to dismiss based on this Court's holding in *Williams v. State*, 184 So.3d 908 (Miss. 2014). Specifically, the Petitioner avers that the Attorney General "exceeded the scope of his authority pursuant to [*Williams*] when the Attorney General caused the Petitioner to be indicted despite the fact that the Honorable Michael

Guest, District Attorney. . . declined to prosecute District Attorney Smith." See Pet. at 3. The Respondent respectfully submits that Petitioner's reliance on *Williams* is misplaced and that his characterization of Guest's testimony is incorrect.

In *Williams*, the Court apparently deemed the controlling issue to be a dispute between two constitutional offices - the Attorney General and a District Attorney. There, the Court specifically held that "[t]he Mississippi attorney general is without authority to direct, control, or override the official actions of a local district attorney and has no authority over him or her." *Williams v. State*, 184 So. 3d 908, 913 (Miss. 2014).

In *Williams* the district attorney was involuntarily disqualified. Subsequently, the Attorney General's Office prosecuted *Williams* after the district attorney sought and obtained a nolle prosequi order. The Court considered such actions a usurpation of the district attorney's authority. In this vein, the Court held:

> But neither Mississippi's Constitution . . . nor the common law authorizes the attorney general to usurp or encroach upon the constitutional or the statutory power of the local district attorney in a criminal case where the attorney general's assistance is not requested by the district attorney, and is in fact opposed by the district attorney. Indeed, with regard to district attorneys, the Constitution provides: "[a] district attorney for each circuit court district shall be selected in the manner provided by law, whose term of office shall be four years, whose duties shall be prescribed by law, and whose compensation shall be a fixed salary." Miss. Const. art. 6, § 174 (emphasis added). . . .
>
> *Williams*, 184 So. 3d 908, 912-13 (Miss. 2014).

The Court further stated:

> The Office of the Attorney General cites the case of *Bell v. State*, in which the defendant challenged the authority of the attorney general to call the grand jury and to present charges to it in the absence of a request from the local district attorney to do so, in support of its argument that the common law authorizes the attorney general to prosecute any case it chooses. *Bell v. State*, 678 So.2d 994, 996 (Miss.1996). But

> in that case, unlike in the present one, no evidence was adduced that the local district attorney opposed the involvement of the attorney general.
>
> *Williams*, 184 at 913.

The facts of this case simply bear no resemblance to *Williams*. As District Attorney Guest's testimony shows, he merely met with an FBI Agent and the witness/victim for 30 minutes. He was not presented with any law enforcement investigation report but was limited to the statement of the witness. Based on this limited interaction with the witness, Guest did not take any official action to either prosecute the case or to foreclose any future prosecution. See Pet. Exh. 2. 13-15. Indeed, Guest testified that he would not be surprised if additional facts were found in a law enforcement investigation that he was not aware of at the time. Id. Guest specifically testified that he made no decision to not prosecute a felony and clearly did not "nolle prosequi" the matter. Id. Moreover, he repeatedly testified that he had no objection to the Attorney General's office prosecuting the case. This simply does not square with the facts of *Williams*.

Thus, it is clear that the Court's concerns in *Williams* are not present here. The Attorney General's office is not prosecuting a case from which the District Attorney was removed. The Attorney General's office is not prosecuting a case which the District Attorney affirmatively dismissed. Simply stated, the issues discussed in *Williams* regarding conflict between constitutional officers is not present here. Smith was indicted by a grand jury which removes any question regarding probable cause for commission of a felony. Where, as here, there is no conflict between the Attorney General and the District Attorney over the prosecution of the case, the Petitioner simply has no standing to question by which constitutional officer he is prosecuted.

Certainly, Smith does not have standing to challenge the authority of the Grand Jury. Smith

argues that the Attorney General "exceeded the scope of his authority" in pursuing these charges and that he further "usurped the authority of the district attorney's office when he caused the Petitioner to be indicted. . . ." See Pet. at 3. Thus, Smith frames his argument in terms of the Attorney General exceeding his authority; however, Smith is arguably challenging the authority and jurisdiction of the grand jury itself. In sum, Smith seeks to challenge the authority of the grand jury by focusing on the entity, (i.e. the Attorney General's Office) that presented the matter to the grand jury. There is simply no basis under Mississippi law to support this argument.

It is undisputed that the grand jury which indicted Smith was duly and lawfully empaneled, and drawn from the citizens of Rankin County. What is "essential to the validity of an indictment [is] that both the court under whose authority the finding is made and the grand jury itself be legally constituted and organized, and that the court have jurisdiction." *Williams v. State*, 156 Miss. 346, 126 So. 40, 41 (1930). Stated differently, "[t]he interest of an accused person under indictment, with the grand jury commences at the time of the finding of the indictment. This is the point of time when, as to him, the legal number of qualified men must exist upon the grand inquest." *Barney v. State*, 20 Miss. 68, 72 (Miss. Err. & App. 1849).

Smith's argument ignores the glaring legal reality that it is the grand jury, not the district attorney, or other prosecuting authority, that issues an indictment. This Court has recognized that "[a] grand jury has broad investigative power and wide latitude in conducting an investigation, and is the decision maker in exercising its powers[.] *Ex parte Jones Cty. Grand Jury, First Judicial Dist.*, 705 So. 2d 1308, 1315 (¶32) (Miss. 1997). Furthermore, "[t]he law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority. It has been held that a mere witness does not have standing to contend that a grand jury is exceeding its

jurisdiction." *Id.*

"The purpose of an indictment is to furnish the defendant with notice and a reasonable description of the charges against him so that he may prepare his defense." *Batiste v. State*, 121 So. 3d 808, 836 (¶42) (Miss. 2013) (quoting *Goff v. State*, 14 So.3d 625, 665 (Miss.2009)). Thus, while there are various grounds upon which the validity of an indictment may be challenged, who presented the matter to the grand jury is not one of those bases. Indeed, nowhere in the relevant constitutional or statutory provisions is there a requirement as to who may present a matter to the grand jury in order to make an indictment valid. In short, who did, or did not, appear before the grand jury and present evidence is not a recognized bases to challenge an indictment. In addition to lacking standing to challenge the issuance of his criminal indictment, as previously noted, the facts of this case are clearly distinguishable from those the Court found determinative in *Williams*.

To be clear, in *Williams* the district attorney sought and was granted an order of nolle prosequi involving a defendant who was previously convicted of murder. The Attorney General's office was subsequently appointed by the trial court as special prosecutor in the case. The Court reversed, holding that the court erred in appointing the Attorney General's office where "a duly elected and serving district attorney" had decided "not to prosecute a criminal case" over the objection of that district attorney. Contrary to *Williams*, as previously stated, here there is no order of nolle prosequi. Further, the district attorney in this case testified he routinely works with the Attorney General's office in prosecuting cases in his district and more importantly, has no objection to that Office's involvement in the prosecution of Petitioner.

Specifically, District Attorney Guest testified at the hearing on the motion to dismiss that he

had at no time "present[ed] an order of nolle prosequi to the Court to dismiss [the] case,"[1] that at "no time did we say that we would not prosecute a felony charge" against the Petitioner.[2] Guest further testified that he had no objection to the Attorney General's office prosecuting the case and that he has "always had a policy to make our office and grand jury available to the attorney general's office. . . ." Pet. Exh. 2. at 14. To the specific question of whether he had any objection to the Attorney General's prosecution of Petitioner in this case, Guest unequivocally responded, "No, sir, not in this case or any other case that you choose to bring in this district." Id. at 14-15.

Thus, the Respondent submits that the concerns the Court had in *Williams* simply do not exist here. Here, there exists no order for nolle prosequi. Here, there is no objection on the part of the District Attorney to the prosecution of the Petitioner by the Attorney General. Here, there is no usurpation of a district attorney's decision not to prosecute an individual, as Guest expressly testified that at no time did he say he would not prosecute a felony charge in this case. Id. at 13. *Williams* simply does not apply to the this case.

For these reasons, the Petitioner's reliance on *Williams* avails him not. Consequently, the Respondent submits he is entitled to no relief on this assignment of error.

D. THE TRIAL COURT COMMITTED NO ERROR IN DENYING PETITIONER'S CLAIM THAT THE ATTORNEY GENERAL'S PROSECUTION OF HIM IS IN CONFLICT WITH THE STATUTORY LAWS OF THIS STATE AND THE COURT'S HOLDING IN *WILLIAMS*

Smith next argues that the Attorney General "usurped the authority of the district attorney's office when he caused the Petitioner to be indicted in conflict with Mississippi Code Section 75-5-

---

[1]Pet. Exh. 2. at 13.

[2]Id.

59" and in conflict with the Court's holding in *Williams*. See Pet. Mot. at 3-4. The Respondent submits the trial court committed no error in denying the Petitioner's motion to dismiss based on this argument.

As argued supra, *Williams* does not apply to this case. Here there was no order of nolle prosequi. There has been no usurpation of the powers of the district attorney as District Attorney Guest testified his office has a long standing policy of working with the Attorney General in prosecuting cases in his district and more specifically, that he had no objection to that office's involvement in this case or any other case for that matter. See Pet. Exh. 2. at 13-14. Thus, contrary to the Petitioner's claim, the District Attorney clearly consented to the Attorney General's prosecution of Smith.

The Petitioner attempts to minimize the charges against him claiming charges of robbery, aggravated stalking and simple domestic violence are not matters of statewide interest.[3] However, the Respondent submits that an elected official, such as Smith, crossing county lines to terrorize a young female in another county and brandishing a firearm while doing so, is certainly a matter of statewide public interest. Even were it not, the Attorney General is by no means prohibited from pursuing criminal charges against the Petitioner where there is no objection to do so by a district attorney and where there has been no order of nolle prosequi. *See Williams, supra*.

Although unclear in so doing, the Petitioner attempts to argue that Miss. Code Ann. § 25-31-21 somehow prohibits the Attorney General from pursuing these charges against him[4] yet he failed to raise this statutory provision in his motion to dismiss. Thus, he is barred from asserting it here

---

[3]See Pet. Mot. at 5., ¶ 11.

[4]See Pet. Mot. at 5. ¶12.

on appeal. *See Speedee Cash of Mississippi, Inc. v. Williams*, 915 So.2d 1061 (Miss. 2005). Without waiving the bar to consideration, Petitioner's assertion is alternatively devoid of legal merit.

First of all, the purpose of this statutory provision is to address cases where the district attorney or his/her office is unavailable or is disqualified and has nothing at all to do with the Attorney General's authority to prosecute criminal cases in the state of Mississippi with or without consent of a district attorney. *See Wilson v. State* 234 So.2d 303 (Miss. 1970).

Second, Smith's assertion that the Attorney General "overreached"[5] when he indicted him suggests that district attorneys somehow have the authority to effectively limit the operation of the Attorney General. Such a notion is contrary to the overall statutory structure imposed on district attorneys by the legislature. Indeed, there are numerous statutes providing that district attorneys cannot undertake certain actions unless they have the approval of the Attorney General. *See, e.g.,* Miss. Code Ann. § 25-31-27 ("No district attorney of this state, without the consent in writing of the attorney general, shall institute or prosecute any civil suit for a violation of the anti-trust statutes of this state; and no court shall take cognizance of any such suit without such written consent of the attorney general."); Miss. Code Ann. § 25-31-25 ("the district attorney with the approval of the attorney general" may file suits related to the collection of state debt); Miss. Code Ann. § 25-31-17 ("with the approval of the attorney general" a district attorney may pursue actions against "all persons indebted to the state or any county within his district"); *cf.* Miss. Code Ann. § 25-31-41 (the Attorney General administers the "District Attorneys Operation Fund"). In contrast, the legislature has not explicitly provided that the Attorney General's prosecutorial authority is limited by, or subject to, approval from a district attorney. Rather, the legislature has recognized the broad

[5]See Pet. Mot. at 5. ¶12.

and general authority of the Attorney General to prosecute crimes by designating the Attorney General as the "chief legal officer and advisor for the state, both civil and criminal." Miss. Code Ann. § 7-5-1.

Even so, here District Attorney Guest certainly consented to the Attorney General's prosecution of the Petitioner. Further, Guest clearly testified that he had no objection to the Attorney General's involvement. Thus, there has been no overreaching, as the Petitioner calls it.[6] Petitioner also seems to suggest that simply because the victim in this case did not seek prosecution vis a vis the county prosecutor this too is somehow error.[7] Petitioner cites to no authority for this claim. Indeed, the Petitioner makes no argument of any kind in that regard. The Respondent submits that failure to cite to relevant authority obviates this Court's need to consider the matter. *See Martin v. State,* 214 So.3d 217, 223 (Miss. 2017); *Byrom v. State*, 863 So.2d 836, 853 (¶ 35) (Miss. 2003) (citing *Simmons v. State*, 805 So.2d 452, 487 (Miss. 2001)).

The gist of Petitioner's argument, aside from his misplaced reliance on *Williams,* is that only district attorneys have the sole authority to prosecute criminal cases within the counties of their respective districts, absent a conflict of interest or a specific request to the Attorney General by the district attorney or the Governor. To be clear, the Attorney General, as the state's chief legal officer for criminal matters, has both constitutional and statutory authority to enforce the criminal laws of the State and to prosecute criminal cases brought in the name of the State. The office of Attorney General was created by Article 6, Section 173 of the Mississippi Constitution, which provides:

There shall be an attorney-general elected at the same time and in the same manner

---

[6]Id. at ¶ 12.

[7]Id. at ¶ 13.

> as the governor is elected, whose term of office shall be four years and whose compensation shall be fixed by law. The qualifications for the attorney-general shall be the same as herein prescribed for judges of the circuit and chancery courts.

This Court has repeatedly held that this constitutional provision confers upon the Attorney General all powers vested in the attorney general at common law. *See, e.g., Pursue Energy Corp. v. Miss. State Tax Comm'n*, 816 So.2d 385, 389 (Miss. 2002); *Bell v. State*, 678 So.2d 994, 996 (Miss. 1996); *Gandy v. Reserve Life Ins. Co.*, 279 So.2d 648, 649 (Miss. 1973); *State ex rel. Paterson v. Warren*, 180 So.2d 293, 299 (Miss. 1965); *Kennington-Saenger Theaters v. State ex rel. Dist. Atty.*, 18 So. 2d 483, 486 (Miss. 1944); *Dunn Const. Co. v. Craig*, 2 So.2d 166, 175 (Miss. 1941); *Capitol Stages, Inc. v. State ex rel. Hewitt*, 157 Miss. 576, 128 So. 759, 762-63 (1930); *see also Wade v. Miss. Coop. Extension Serv.*, 392 F. Supp. 229, 232-33 (N.D. Miss. 1975).

> The duties of the Attorney General were not prescribed by the Constitution, nor did it provide that they would necessarily have to be prescribed by the legislature. They existed at common law . . . . The creation of the office of Attorney General by the Constitution vested him with these common law duties, which he had previously exercised as chief law officer of the realm.

Kennington-Saenger Theaters, 18 So.2d at 486 (internal citations omitted).

This Court described the Attorney General's common law duties in *State ex rel. Allain v. Mississippi Pub. Serv. Comm'n* as follows:

> At common law the duties of the attorney general, as chief law officer of a realm, were numerous and varied. He was chief legal adviser of the crown, was entrusted with the management of all legal affairs, and **prosecution of all suits, criminal and civil**, in which the crown was interested. He had authority to institute proceedings to abate public nuisances, **affecting public safety** and convenience, to control and manage **all litigation on behalf of the state**, and to intervene in all actions which were of concern to the general public.
>
> * * *
>
> The Attorney General is a constitutional officer possessed of all the power and

> authority inherited from the common law as well as that specifically conferred upon him by statute. This includes the right to institute, conduct and maintain all suits necessary for the **enforcement of the laws of the state**, **preservation of order and the protection of public rights**.

State ex rel. Allain, 418 So. 2d 779, 781 (Miss. 1982) (emphasis supplied) (quoting *State v. Warren*, 180 So.2d 293, 299 (1965) and *Gandy v. Reserve Life Insurance Company*, 279 So.2d 648, 649 (Miss.1973)); *see also State ex rel. Rice v. Stewart*, 184 So. 44, 46 (1938) ("attorney general is vested with both statutory and common law authority to represent the sovereign in the enforcement of its laws and protection of public rights.").

The Attorney General's broad prosecutorial authority is further supported by the fact that crimes are prosecuted in the name of, and on behalf of, the State of Mississippi and it is the Attorney General who serves as chief legal counsel to the State. *See Smith v. State*, 121 So. 282, 282 (Miss. 1929) ("The prosecution is not conducted in the name of the owner, nor for his benefit; but it is conducted in the name of the state, and the state alone, insofar as the prosecution is concerned, is the aggrieved party."); *State ex rel. Patterson*, 180 So.2d at 299 (Attorney General has authority to prosecute all criminal suits "in which the crown was interested").

A prosecution in the name of the State for the crimes of aggravated stalking, robbery and simple domestic violence, etc., committed by an elected sitting district attorney is certainly well within the Attorney General's authority as the "chief law officer" who manages the "prosecution of all suits, criminal and civil." Further, such a prosecution brought by the Attorney General is a matter in which "the crown" (*i.e.,* the State) is interested, is brought "on behalf of the state," and affects "public safety," and it is a "concern to the general public," and a suit for the "enforcement of the laws of the state, preservation of order and the protection of public rights."

The legislature has defined the Attorney General as "the chief legal officer and advisor for the state, both civil and criminal, . . . charged with managing all litigation on behalf of the state," and having "the powers of the Attorney General at common law." Miss. Code Ann. § 7-5-1; *see also* Miss. Code Ann. § 7-5-59 (recognizing the Attorney General's broad prosecutorial authority by noting that statutory authority relating to white collar prosecutions, such as the authority to issue subpoenas, was "in addition to the powers and authority previously granted the Attorney General by common, constitutional, statutory or case law"). Also evidencing the Attorney General's authority to prosecute violations of state criminal law, the legislature has further "authorized and empowered" the Attorney General to appoint special prosecutors "to assist the Attorney General" in the "prosecution" of "any litigation in the state . . . in which the state is a party or has an interest." Miss. Code Ann. § 7-5-7(2)(a); *see also* Miss. Code Ann. § 7-5-7(3). Because all criminal prosecutions are brought in the name of the state, the "state is a party or has an interest" in all such prosecutions. Consistent with the Attorney General's broad authority to prosecute violations of criminal law, the legislature has also authorized the Attorney General to employ investigators with statewide authority to enforce "the criminal laws of this state." Miss. Code Ann. § 7-5-67. In sum, the Attorney General's broad common law authority conferred by the Constitution and endorsed by statute authorizes him to enforce the criminal laws of the State by prosecuting criminal defendants.

The Attorney General and district attorneys have concurrent authority to prosecute crimes, with neither office able to direct the operation of the other.[8] While the legislature has authorized district attorneys to prosecute violations of state criminal law, that authority did not come at the

[8]The people through the State Constitution established this concurrent jurisdiction and deserve a system of checks for the Attorney General to address scenarios such as this involving an elected official.

expense of the Attorney General's authority as the chief law officer outlined above.[9]

Such coexistent authority is not unusual given that at "common law the duties of the attorney general, as chief law officer of a realm, were numerous and varied." *See State ex rel. Patterson*, 180 So.2d at 299. When two entities have independent but overlapping authority to enforce state laws, either entity may act, with or without the other. This Court addressed a similar situation in *Gandy v. Reserve Life Ins. Co.*, and noted:

> We are of the opinion the Attorney General and the Commissioner of Insurance, both separately and conjunctively, have the lawful authority to maintain this suit. The Attorney General is a constitutional officer possessed of all the power and authority inherited from the common law as well as that specifically conferred upon him by statute. This includes the right to institute, conduct and maintain all suits necessary for the enforcement of the laws of the state, preservation of order and the protection of public rights. Since the nature of the present bill is to maintain and preserve the lawfully enacted statutes of the state relating to insurance by restraining violations thereof, we conclude that the Attorney General is vested with the authority and, indeed, has the duty so to do.
>
> The Insurance Commissioner similarly has the authority to enforce the statutory provisions relating to insurance by the institution of suit. Section 5624, Miss. Code 1942 (1956). Since each of these officials is empowered to bring suit, certainly there is no prohibition in their joining in a bill of complaint for the enforcement of the insurance statutes.

279 So.2d at 649; *Miller v. State*, 12 So. 265, 266 (Miss. 1891) (suit on a state treasurer's bond may be prosecuted by the attorney general without the assent of the district attorney); *cf State ex rel. Patterson*, 180 So.2d at 300 ("there is no statute prohibiting the attorney general from bringing a suit of this nature. The fact that the district attorney, with the consent of the attorney general, may bring a suit of this type, does not limit or exclude the latter's general authority."). As was the case with

---

[9] A district attorney's authority exists solely as a matter of statutory grace. District attorneys possess no common law authority or independent constitutional authority. *See* Miss. Const. art. 6, § 174 (creating the office of district attorney but noting that its duties are to be prescribed by statute).

the Commissioner of Insurance and the Attorney General in *Gandy*, in this matter the Attorney General and the Rankin County District Attorney may prosecute this matter "separately" or "conjunctively."

In *Bell v. State*, 678 So.2d 994 (Miss. 1996), the criminal defendant challenged the Attorney General's authority to empanel and specially call the grand jury and present charges to the grand jury without the request for assistance by the local district attorney and without the direction of the governor. *Id.* at 996. Although the Court found that the trial judge, and not the Attorney General, recalled the grand jury, albeit at the Attorney General's request, the Court held:

> . . . the Attorney General is "a constitutional officer possessed of all the power and authority inherited from the common law as well as that specially conferred upon him by statute. This includes the right to institute, conduct and maintain all suits necessary for the enforcement of the laws of the state, preservation of order and the protection of public rights." *Gandy v. Reserve Life Ins. Co.,* 279 So.2d 648, 649 (Miss.1973). Therefore, the Attorney General did not act improperly when he requested that the trial judge recall the grand jury in this case. Such action was necessary to "institute" a criminal prosecution against Bell. For these reasons, Bell's contention on this point is without merit.

Id. In other words, the Attorney General has the authority to present criminal charges before a local grand jury, without request for assistance by a district attorney or the governor, pursuant to his common law authority. To hold otherwise would make the Attorney General's broad constitutional and statutory authority inappropriately subject to, and subordinate to, the limited statutory authority of district attorneys. That the district attorney might also prosecute this case does not limit or exclude the Attorney General's general authority to do so pursuant to his common law powers and duties as chief law officer of the state. *See Warren*, 180 So.2d at 300 (overlapping authority of district attorney to pursue action against county supervisors for illegal appropriations and expenditures did not limit attorney general's authority to do so).

Additionally, Smith's citation[10] to Section 7-5-53 avails him not. Section 7-5-53 provides in part that the "Attorney General shall, when required by the public service or when directed by the Governor, in writing, repair in person, or by any regular or specially designated assistant, to any county or district in the state and assist the district attorney there in the discharge of his duties and in any prosecution against a state officer. . . ." Miss. Code Ann. § 7-5-53. In this matter, the Attorney General is clearly not forcibly assisting the district attorney in the prosecution of a criminal case. Here, District Attorney Guest has welcomed assistance by the Attorney General and definitively testified that he has no objection to the Attorney General's office prosecuting this case and has a long standing policy of working with the Attorney General's office.[11] Therefore, were the consent of a district attorney required, such has been given in the case sub judice. What's more, the District Attorney clearly supports the multiple and various prosecutions the Attorney General's office brings and has brought in his district as evidenced by Guest's testimony that:

> . . . traditionally, since I've been in the district attorney's office, which has now been 20 plus years, it's been common practice for the attorney general's office to prosecute cases in this district. I would say that 90 plus percent of the cases that your office prosecutes are cases in which you conduct an investigations and those cases are presented without any knowledge of the district attorney's office and we have routinely worked very closely with the attorney general's office to make sure that y'all are aware of the grand jury dates, grand jury proceedings, so that y'all can bring the cases forward, and only a very limited number of cases, which are cases in which there is a - - needs to be recusal by my office because of some conflict of interest do we ask the AG's office to come in.
>
> And so, again, I would say the large majority, 90 percent plus, of the cases that your office prosecutes are cases prosecuted by your investigation and they're done so without our request or consent.

---

[10]See Pet. at 4.

[11]Pet. Exh. 2 at 13.

> But we've always had a policy to make our office and our grand jury available to the attorney general's office because I believe that statutorily your office has the ability to prosecute felonies in this judicial district.
>
> Pet. Exh. 2. at 13-14.

Even were such consent a requirement, which the Respondent respectfully submits it is not, in this case, the district attorney's office has had a twenty (20) year long policy of such consent, as a matter of course. At any rate, such cooperation is clearly the rule and not the exception.

Even were Miss. Code Ann. § 7-5-53 determined to apply in this circumstance, it is the Attorney General's discretionary decision as the chief law officer as to whether "the public service" requires him to prosecute the Petitioner. Clearly, the Attorney General has the right to pursue the prosecution in the current case, "if in his judgment the public interest should so require, since he is a constitutional officer possessed of all the power and authority vested in such an official at common law, and, in addition, such as have been conferred on him by statute, including the right to institute, conduct, and maintain all suits necessary for the enforcement of the laws of the state, the preservation of order, and protection of the public rights." *Dunn Const.*, 2 So.2d at 174 (quotations omitted).

Smith reads Section 7-5-53 to require either direction from the Governor or the approval of the district attorney before the Attorney General may assist in a criminal prosecution. However, the Attorney General may assist "when required by the public service or when directed by the Governor." Section 7-5-53 is not dependent on the acquiescence of the district attorney. Moreover, as Section 7-5-53 does not authorize a district attorney to refuse the assistance of the Attorney General when in the public service, it would be incorrect to conclude that Section 7-5-53 authorizes a district attorney to refuse to permit the Attorney General to prosecute a matter without the

involvement of the district attorney.

Simply stated, Smith's position that the Attorney General may only prosecute crimes when invited or approved by a district attorney is manifestly incorrect. Smith would seek to remove the Attorney General as the chief law enforcement officer, entrusted by Constitutional and legislative authority to prosecute all criminal suits brought in the name of the State, including suits "for the enforcement of the laws of the state, preservation of order, and the protection of public rights." The Petitioner would relegate the Attorney General to the position of an assistant to the district attorneys who must receive the permission of that district attorney before enforcing the state's criminal laws. Such a notion is contrary to the both the law and pure common sense. While the Respondents would certainly like the Court to reconsider *Williams* in the future, the State is not desirous of any delay in justice and certainly does not endorse such reconsideration in this interlocutory appeal, which is not properly before the Court and which bears no resemblance to the facts in *Williams*. That said, and to reiterate, the Attorney General and district attorneys have concurrent criminal authority in this matter, neither office is subservient to the other, and neither office must seek the permission of the other before enforcing the criminal law through prosecution of criminals in this state.

IV.

CONCLUSION

For the reasons stated, the Respondent, the State of Mississippi, respectfully requests that the Court deny Smith's present Petition and in so doing, decline as the Court held in *Beckwith*, "to abort a criminal trial in progress, and by interlocutory appeal address rights which can be fully vindicated upon appeal from a final judgment of conviction, and order the termination of all criminal prosecution and discharge [Smith]." *Beckwith*, 615 So.2d 1134, 1145.

Respectfully submitted,

JIM HOOD,
ATTORNEY GENERAL
STATE OF MISSISSIPPI

STANLEY ALEXANDER
ASSISTANT ATTORNEY GENERAL
Miss. Bar No. 9922

JASON L. DAVIS
SPECIAL ASSISTANT ATTORNEY GENERAL
Miss. Bar No. 102157

S/ *Jason L. Davis*

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205-0220
Telephone No. (601) 359-3680
Facsimile No. (601) 359-3796
jdavi@ago.state.ms.us

CERTIFICATE OF SERVICE

I, Jason L. Davis, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day electronically filed the foregoing ANSWER TO PETITION FOR INTERLOCUTORY APPEAL BY PERMISSION with the Clerk of the Court using the MECF system which sent notification of such filing to the following:

Honorable John H. Emfinger
Circuit Judge
P.O. Box 1885
Brandon, MS 39043

John R. Reeves
355 South State Street
Jackson, MS 39201

This the 17th day of October, 2017.

S/ *Jason L. Davis*