

No. 3-08-1025

IN THE ILLINOIS APPELLATE COURT  
THIRD DISTRICT

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<b>THE PEOPLE OF THE STATE OF ILLINOIS</b>	)	Appeal from the Circuit Court
	)	of the Twelfth Judicial Circuit,
Plaintiff-Appellant/Cross-Appellee	)	Will County, Illinois
	)	
v.	)	No. 08 CF 1169
	)	
<b>DREW PETERSON,</b>	)	The Honorable
	)	Richard C. Schoenstedt,
Defendant-Appellee/Cross-Appellant	)	Lower Court Presiding Judge

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**DEFENDANT – APPELLEE/CROSS – APPELLANT’S**  
**REPLY BRIEF AND ARGUMENT ON APPEAL**

**ORAL ARGUMENT REQUESTED**

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POINTS AND AUTHORITIES

- I. THE TRIAL COURT'S ORDER OF DISMISSAL WITH PREJUDICE IS A FINAL ORDER BECAUSE IT CONCLUSIVELY ADJUDICATES THE RIGHTS OF THE PARTIES IN THIS CASE; THEREFORE, THE CROSS-APPEAL ISSUES ARE COGNIZABLE.
- II. THE STANDARD FOR OBTAINING DISCOVERY FROM THE STATE INTO SELECTIVE PROSECUTION IS "COLORABLE CLAIM," NOT THE "REASONABLNESS" PLEADING STANDARD THE STATE ASSERTS.
- III. THE TRIAL COURT SHOULD HAVE DISMISSED THIS CASE BECAUSE, AS A QUALIFIED LAW ENFORCEMENT OFFICER AUTHORIZED TO CARRY, AND THEREFORE POSSESS, AN "ILLEGAL" FIREARM, DEFENDANT-APPELLEE/CROSS-APPELLANT IS UNDER LEOSA - REGARDLESS OF CONTRARY STATE LAW.
- IV. THE TRIAL COURT SHOULD HAVE ORDERED A VENUE CHANGE UPON DEFENDANT-APPELLEE/CROSS-APPELLANT'S MOTION BECAUSE REASONABLE GROUNDS TO BELIEVE PREJUDICE AND AN INABILITY TO OBTAIN A FAIR TRIAL EXIST UNDER STATE CONSTITUTINAL LAW.

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## I.

### THE TRIAL COURT'S ORDER OF DISMISSAL WITH PREJUDICE IS A FINAL ORDER BECAUSE IT CONCLUSIVELY ADJUDICATES THE RIGHTS OF THE PARTIES IN THIS CASE; THEREFORE, THE CROSS-APPEAL ISSUES ARE COGNIZABLE.

At the outset, as jurisdiction should always be discussed first, the Court should be cognizant to the fact that this appeal follows a circuit court order to dismiss a criminal case with prejudice. (C. 572) That is, as opposed to an interlocutory order, the order appealed from terminated the case. The State did not appeal an interlocutory order under Rule 604(a). The State's own Notice of Appeal states that they are appealing the dismissal of the case, (R. C573-575) but upon the State's request for the case to be dismissed after Defendant brought a Motion to Compel discovery. In other words, the order is a final order.

Final orders are appealable by right. Ill. Const. art. 6 sec. 6. Although the jurisdiction of the Court of Appeals over interlocutory orders, and what constitutes an appealable interlocutory order, are left to the Supreme Court's rulemaking powers, jurisdiction over final orders, and what constitutes a "final order," are matters of constitutional and case law. *Id.*; *See also Santana v. Zipperstein*, 142 Ill. App. 3d 386; 491 N.E.2d 1231 (1<sup>st</sup> Dist. 1986). The courts have defined a "final order" as "one which terminates and disposes of the parties' rights regarding issues in a suit . . . so that if affirmed the trial court has only to proceed with execution of the judgment," *Santana*, 142 Ill. App. 3d at 388, "a determination by the court on the issues presented by the pleadings which ascertains and fixes absolutely the rights of the parties in the lawsuit," *Department of Pub. Aid ex rel. Chipelli v. Viviano*, 195 Ill. App. 3d; 553 N.E. 2d

97 (5<sup>th</sup> Dist. 1990), and “one which terminates the litigation between the parties on the merits, so that if it is affirmed, the trial court has only to proceed with its execution,” Schoen v. Caterpillar Tractor Co., 77 Ill. App. 2d 315; 222 N.E.2d 332 (3<sup>rd</sup> Dist. 1996). Moreover, interlocutory orders not reviewable upon interlocutory appeal are reviewable upon appeal of the case’s final order. *See, e.g.,* People ex rel. Scott v. Silverstein, 87 Ill. 2d. 167; 429 N.E.3d 483 (1981).

It is axiomatic that an order dismissing a case with prejudice terminates the litigation, fixes the rights between the parties, and serves as an adjudication on the merits in the case. People v. Creek, 94 Ill. 2d 526; 447 N.E.3d 330 (1983). That the case has not been submitted to the trier of fact is not dispositive. For example, in Creek, the Illinois Supreme Court held that a trial court’s order dismissing a criminal reckless homicide case “with prejudice” upon the State’s motion, having dismissed the information, barred the State from prosecuting the same defendant for the same claim or set of facts later, that is because:

The term “with prejudice” has a well-recognized legal import; it is the converse of the term “without prejudice” and is as conclusive of the rights of the parties as if the suit had been prosecuted to a final prosecution adverse to the complainant.

Id. (citations omitted). That is, the order is a final order.

The State urges this Court to treat the order on appeal as an interlocutory order under Rule 604(a), thereby limiting the Defendant’s right to cross-appeal. That is not what happened in this case. Like Creek, in this case the trial court dismissed the case “with prejudice” upon the State’s request. The only thing left for the trial court to do if the State is unsuccessful on appeal is execute its order, that is, not allow a subsequent prosecution on the same claim or set of facts.

The State requested the order from the bench on November 20, 2008, the

trial court ruled that the State should produce documents. The trial court concluded there was a colorable claim for vindictive prosecution. (R. 229-31) Following the bench ruling on the record, the parties proceeded into chambers to argue other motions. In chambers, the State asserted that it would be "better off" if the trial court dismissed the charges to allow the State to rightaway appeal the case. Not only did State Attorney John O'Connor refuse to comply, he confirmed with his assistant attorneys, in open court, that the entire State's Attorney department refused to comply (R. 270-72) The State reiterated its refusal, again in open court:

THE COURT: . . . . Well, I have ordered you to disclose a very narrow and limited number of documents that I defined already on the record. I'll say it again. Any and all documents or reports used or relied upon by the State in determining that this charge will be brought against this defendant. The State must understand the risk that if I do what you are asking and dismiss these charges, that if the appellate agrees -these charges are dismissed.

MR. CONNOR: The State understands that, your Honor.

THE COURT: . . . . This is an unusual circumstance. Mr. Connor has always presented himself to this Court in a respectful, honorable manner, with a great deal of integrity . . . . However, the State has given me little option here.

(R. 271-72) As the trial court aptly stated, the State left the trial court "with little option here." (R. 272) To say, "Dismiss this case" and then do an about-face and say the dismissal *with prejudice* is an interlocutory order, a Rule 604 order that the defense requested, is illogical and without merit. The State's citations to case law concerning interlocutory orders on appeal are equally illogical and without merit. This case concerns an appeal of a final order of dismissal with prejudice.

Therefore, even if the issues on cross-appeal were not appealable on an interlocutory review, they are reviewable in this appeal because this appeal

concerns a final order -- a dismissal with prejudice "as conclusive of the rights of the parties as if the suit had been prosecuted to a final prosecution adverse to the complainant." Creek, 94 Ill. 2d at 531.

## II.

### THE STANDARD FOR OBTAINING DISCOVERY FROM THE STATE INTO SELECTIVE PROSECUTION IS "COLORABLE CLAIM," NOT THE "REASONABLNESS" PLEADING STANDARD THE STATE ASSERTS.

It is the State's contention that the lower court's refusal to order discovery on Defendant's selective prosecution claim was proper because Defendant did not "allege facts sufficient to raise a reasonable doubt" upon the issue of selective prosecution to overcome a "weighty presumption of legality." (Resp. Br. at 14) Simply put, Defendant does not have to. In United States v. Heidecke, 900 F.2d 1155, 1158-59; 1990 U.S. App. LEXIS 6857, the Court articulated, "This court and other courts have *firmly settled upon a rule that requires the defendant to show a colorable basis* for the claim." *Emphasis Added*. See Wayte v. United States, 470 U.S. 598, 623-24, 84 L. Ed. 2d 547, 105 S. Ct. 1524 (1985) (Marshall, J., dissenting); United States v. Kerley, 787 F.2d 1147, 1150 (7th Cir. 1986); United States v. Mitchell, 778 F.2d 1271, 1277 (7th Cir. 1985); United States v. Kahl, 583 F.2d 1351, 1355 (5th Cir. 1978); United States v. Murdock, 548 F.2d 599, 600 (5th Cir. 1977); United States v. Cammisano, 546 F.2d 238, 241 (8th Cir. 1976); United States v. Berrios, 501 F.2d 1207, 1211-12 (2d Cir. 1974); United States v. Berrigan, 482 F.2d 171, 181 (3d Cir. 1973).

In misstating the standard upon which a court is to issue an order compelling discovery for a claim of selective prosecution, the State placed upon the Defendant the burden required to obtain *a hearing* on the on the issue, which

is a heightened burden. With regard to the colorable basis standard, the Heidecke Court noted “the relatively low burden recognizes that ‘most of the relevant proof in selective prosecution cases will normally be in the Government’s hands.” 900 F.2d at 1158 citing Wayte, 470 U.S. 598, 624; 105 S. Ct. 1524 (1985) (Marshall Dissenting). In fact, the argument set forth by the State is specifically declined in Hcidecke.

Some courts have suggested that defendants have to show more than a merely colorable claim before compelling discovery on a selective prosecution charge. See *United States v. Hintzman*, 806 F.2d 840, 846 (8th Cir. 1986) (defendant must establish a prima facie case); *United States v. Greenwood*, 796 F.2d 49, 52 (4th Cir. 1986) (defendant's allegations must raise a legitimate issue of improper government conduct). These cases, however, appear to arise more from misapplication of precedent than from reasoned analysis. See, e.g., *Hintzman*, 806 F.2d at 846 (drawing upon language in *United States v. Catlett*, 584 F.2d 864 (8th Cir. 1978) to require the defendant to establish a prima facie case). Because these heightened standards fail to account for the government's control over the facts relevant to a claim of selective prosecution, we decline to adopt them.

Heideck, 900 F.2d at 1158-59. Although the Heidecke Court’s analysis focused upon the standard required to compel discovery in a vindictive prosecution case, as opposed to selective prosecution at issue here, the Court looked to the established standard used in selective prosecution to extend that into the province of vindictive prosecution for its ultimate conclusion. Id. The Court stated, “The same considerations that support a ‘colorable basis’ standard for discovery in a claim of selective prosecution also support use of this standard in a claim of vindictive prosecution. Proof of vindictive prosecution, like proof of

selective prosecution, is likely to involve a deluge of paper, probing the prosecutors' motives." Id. Here the Court recognizes the importance of allowing Defendant discovery at such an initial stage in the proceeding, and thus the rationale for requiring only a colorable basis burden be met.

At this stage, Defendant has not yet requested a hearing on the issue, but seeks discovery in order to determine the breadth of its selective prosecution claim.

[D]efenses of selective prosecution . . . require the defendant to probe the mental state of the prosecutors. Requiring the defendant to prove more than a colorable claim before compelling discovery might prematurely stifle a legitimate defense of vindictive prosecution for lack of evidence.

Id. Thus, it is clear that although the State would prefer Defendant be required to allege facts sufficient to raise a reasonable doubt on the issue of selective prosecution or Defendant be required to plead a *prima facie* case thereof, especially considering the State has all the discovery necessary to do so, the Court need not reach those issues because the Defendant simply does not have to.

But what Defendant does have to do, and has done, is present a colorable basis for a claim of selective prosecution. That is, Defendant must present "some evidence tending to show the essential elements of the claim." People v. Benson, 941 F.2d 598, 611 (7<sup>th</sup> Cir. 1991). What is interesting, however, is the People's attempt to undermine Defendant's position by stating that "the only thing defendant argues is that there is no conceivable set of facts to justify the State's decision to enforce 720 ILCS 5/25-1(a)(7) only against Mr. Peterson." (Resp. Br. at 14) This is almost the exact same language the Court of Appeals used in People

v. Kail to find the police department's enforcement of a law only against suspected prostitutes "render[ed] the classification arbitrary or irrational." 150 Ill.App.3d 75, 78; 501 N.E.2d 979 (1986). In addition, the State argues that unlike in Kail, other violators of section 5/24-1(a)(7) have been prosecuted. However, none of the cases cited by the State involve a police officer, which only further buttresses Defendant's argument. The State's argument is merely an inverted analysis of that which the Court undertook in Kail. The Court in Kail held that selectively enforcing law against only prostitutes rendered that classification arbitrary or irrational. Id.

In fact, Defendant presented more than that argument in this case. Here, there is a group, police officers, who have been uniformly excluded, as evidenced by the absence of case law, from prosecution under section 5/24-1(a)(7). To demonstrate, as the State did in their Response, that non police officers have been so charged makes clear that as a group police officers have been excluded. Thus, to bring this charge against Defendant, only after choosing to exercise his constitutional rights clearly establishes "some evidence tending to show the essential elements of the claim." Benson, 941 F.2d at 611. Defendant has also presented to this Court the timeline of events leading up to Defendant being charged, a timeline so crucial to the to the issue of selective prosecution that it be divulged again in detail.

- 11/30/07: Defendant files Motion for return of property
- 12/11/07: State files Response objecting to return of property.
- 12/12/07: First Court appearance on Motion for return of property.
- 12/17/07: Second Court appearance on Motion; State allowed to give judge ex parte evidence; Court entered Order returning Defendant's two Ipods and 23 CDs.

- 12/25/08: Third Court appearance on Motion.
- 2/1/08: Fourth Court appearance on Motion.
- 2/27/08: Fifth Court appearance on Motion. Judge rules and orders return of Defendant's property, specifically his weapons. Defendant's FOID card is revoked that same day.
- 3/17/08: Sixth Court appearance. Defendant orally requests that the weapons be turned over to Stephen Peterson.
- 3/25/08: Government files Motion for Leave to present additional ex parte evidence to the Court.
- 4/17/08: Seventh Court appearance, Stephen Peterson appears in Court, Court requires formal Motion regarding Defendant's weapons.
- 5/13/08: Eighth Court appearance, Defendant files formal Motion for eight guns to be turned over to Stephen Peterson (Colt AR-15 not among them). Judge strongly indicates favorable ruling, but continues case to 5/22/08 for formal ruling on the Motion.
- 5/21/08: The day before the formal ruling set on 5/13/08, the Defendant is arrested on gun charge. Chuck Pelkie of Will County State's Attorney's Office states that "We've known it was an illegal weapon shortly after the gun was taken into possession by the Illinois State Police. Initially, the determination was made not to file a charge in that case . . . but now we're faced with the potential that an illegal weapon may be put back onto the streets and we can't allow that to happen."

In United States v. Falk, 479 F.2d 616 (7<sup>th</sup> Cir. 1973) a similar timeline was set forth. In essence, the Court was concerned with the timing of bringing the indictment, which was only after the defendant exercised his First Amendment rights. Id. at 622. In Falk, the Government waited three years from the time it received notice of the defendant's violation to bring the indictment. Id. In this case, the Government had notice of the Defendant's alleged violation at least since September of 2001, because Defendant, as a member of the REACT team,

has documented use and qualification on the AR-15 as part of the Bolingbrook Police Department. (C. 452-58) It was only after Defendant asserted his 4<sup>th</sup> Amendment rights that this charge was brought. As the Court found in Falk, in remanding the case for an evidentiary hearing, such curious timing “adds forceful weight to defendant’s contention that the prosecution in this case was for the purpose of punishing Falk for his exercise of First Amendment rights.” Id. What is most important for the Court to note about Falk, however, is that the correct standard was reasonable doubt about the prosecutor’s purpose because it was procedurally after the discovery phase.

Thus, Defendant need only meet the lower colorable basis burden, which based on the aforementioned law and argument, Defendant has clearly done.

### III.

**THE TRIAL COURT SHOULD HAVE DISMISSED THIS CASE BECAUSE, AS A QUALIFIED LAW ENFORCEMENT OFFICER AUTHORIZED TO CARRY, AND THEREFORE POSSESS, AN “ILLEGAL” FIREARM, DEFENDANT-APPELLEE/CROSS-APPELLANT IS UNDER LEOSA - REGARDLESS OF CONTRARY STATE LAW.**

As a duly authorized law enforcement officer, complying with the requirements under the Federal exemption, 18 U.S.C. 926B, Defendant was authorized to carry, and therefore possess, his AR-15, and is thus immune from prosecution under 720 ILCS 5/24-1(a)(7)(ii). What is interesting about the State’s argument, beside that it wholly bypassed Defendant’s reasoned argument based on law, legislative intent, and rules of statutory construction with a simple “defendant never really explains,” (Resp. Br. at 16) is its’ argument that “[t]he