

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY**

STATE

Plaintiff, et al.,

Case No. 1416-CR03064-01

v.

Division 9

BRANDON B HOWELL

Defendant, et al.

ORDER

Pending before the Court is defense counsels' Motion to Withdraw Due to Excessive Workload. For the following reasons, the Motion is denied, but the case will be continued from the March 2018 trial date.

Background

The State has charged Defendant Brandon Howell with five counts of murder in the first degree. The alleged offenses occurred on September 2, 2014. On July 28, 2015, this Court set a trial date of September 25, 2017 and on August 28, 2015, the State filed a notice of aggravating circumstances, signaling its intent to seek the death penalty. On October 6, 2016, the defense moved to continue the trial, which was granted and a new date of March 26, 2018 was chosen. On October 10, 2017, defense counsel moved to withdraw, citing excessive work load. The hearing on the Motion could not be scheduled until December, due to defense counsel being engaged in the trial of *State v. Wood*, Case No. 1421-CR00658-01, also a capital case.

On December 12, 2017, a hearing was held on the pending Motion. The Court heard testimony from Carol Muller, a former Missouri State Public Defender ("MSPD") Kansas City capital unit ("KC Capital") mitigation specialist; Carie Allen, a former KC Capital attorney; Mark Wolpink, a former KC Capital unit investigator; and Greg Mermelstein, MSPD Deputy

Director, Specialty Practices and Resources. Defense counsel also introduced into evidence fourteen exhibits. After review of the testimony and exhibits, the Court finds as follows.

Decision

During the pendency of this case, one of the three attorney positions in KC Capital has turned over three times. Ex. 1. The position is currently unfilled. The single KC Capital unit mitigation specialist position has turned over twice, with the position most recently being filled on December 4, 2017. Ex. 1. The single investigator position has turned over three times and the clerical staff position has turned over twice. Ex. 1. MSPD salaries have played a significant role in this devastating turnover rate. Attorney Allen testified the motivating factor for her leaving KC Capital for the Federal Public Defender System was the immediate \$20,000.00 salary increase with the opportunity to double her salary. Similarly, Investigator Wolpink was lured away by the Federal Public Defender Systems by the more than doubling of his salary.

Of significant importance is the mitigation specialist position. Mitigation specialists are critical to the preparation of a capital case. *See, e.g.* Exs. 2, 3, and 4. It is the mitigation specialist who obtains and initially assesses defendants' medical, educational, and criminal records and talks to families to build rapport, a family history, and a genogram. Among other things, they initially assess current mental illness and history of mental illness. It is from this time-consuming first step that a capital case is built. Once completed, counsel can begin to formulate a trial strategy and retain experts.¹ Plea negotiations can be instigated and supported. Discovery can be provided to the State. The mitigation specialist position, which requires a vast array of skills and training, a Master's Degree, frequent travel with overnight stays, evening and weekend work, and over a forty-hour workweek, pays only in the mid to upper \$30,000's.² Ex. 6

¹ The mitigation specialist also continues to support the trial team throughout the litigation.

² KC Capital and St. Louis Capital have been fortunate enough to maintain highly qualified and motivated mitigation specialists at this salary, but only because those specialists presented

and Ex. 7. If the mitigation specialist position is vacant or filled with an inexperienced person, the job falls to an already overworked attorney.

Currently, KC Capital has four capital cases set for trial in 2018 – January, March, July, and September. The two attorneys, one newly-hired mitigation specialist, and one investigator one year on the job must prepare and try them all.³ Their time to prepare these four cases has been limited by their preparation for and the trial in *State v. Kennedy*, a juvenile murder in the first degree case; *State v. Gill*, a capital case; *State v. Wood*, a capital case; and the preparation of *State v. Bourne*,⁴ a capital case, all in 2017. Mr. Mermelstein testified that if forced to trial in this case in March, defense counsel would be engaging in unethical conduct and the Defendant's Constitutional rights would be violated. The Court finds his testimony to be credible. The Court finds KC Capital lacks sufficient resources to adequately and timely prepare for this case scheduled for trial in March 2018.⁵ The Court further finds that the other MSPD offices are unable to shift resources to assist in this case at this time.

Due to the current state of the MSPD, the Court is forced to consider only bad choices: 1) grant the request to withdraw and attempt to find private counsel who is somewhat “death qualified” and is willing to litigate the case for free, but who will have to start from scratch, further delaying the trial; 2) force the case to trial in March, risking violations of the Defendant's Constitutional rights and increasing the chance the case would be overturned and remanded for the process to start over again while also forcing experienced counsel to risk their bar licenses, face contempt of court, or quit; or 3) continue the case, causing harm to the State and the victim's families and risk future continuance requests and uncertainty.

unique personal circumstances. For example, Ms. Muller was retired from the federal government and drawing her full retirement. *See also* Ex. 14.

³ Even when the attorney position is filled, it is likely that person will bring cases with them and it will take time for them to get up to speed on the pending capital cases.

⁴ This case was continued when defense counsel had to undergo emergency surgery.

⁵ Even setting aside the ABA guidelines and standards, common sense dictates all four cases, under these circumstances, cannot be tried in a single year.

While the Court acknowledges funding services to assist indigent citizens accused of crimes is less politically palatable than funding public schools or state health-care systems, a failure to consider the problem beyond the optics would ignore the impact on the entire community. For example, since October 2016, this Court has had this matter scheduled for the entire month of March 2018,⁶ thus preventing the scheduling of thirty-six criminal trials and fifteen domestic trials. Fifty-one cases were delayed, which impacted numerous victims, defendants, attorneys, and families seeking resolution of divorce and child custody issues. Also, the Court will have to push off another month's worth of trials, impacting countless citizens, when this case is rescheduled. Delay can erode the strength of the State's case, and the State has been forced to waste resources getting new attorneys prepared to prosecute because experienced attorneys have also departed over the last three years. Significantly, the impact to the families of the victims in this case is immeasurable. The repeated continuances and uncertainty are cruel.

The judicial branch of government has no power of the purse. It cannot order more funding for the MSPD so adequate staff can timely prepare these cases, avoiding this harmful delay of justice. Instead, the Court must balance the bad choices before it implicating our most carefully protected and personal rights—the Constitution, victim's rights, the pursuit of truth and justice—with the resources the judicial system has been given. Therefore, the Court must continue this case from its March 2018 trial setting. To best avoid these bad choices in the future, the Court will employ the options available to it where financial solutions are not.

The Court is in the process of coordinating with the three other Circuits where KC Capital cases are pending so that all four cases may be globally scheduled. This effort could result in providing the Court, the victims' families, and the State with a secure trial date while protecting the Defendant's constitutional rights. Retired Circuit Court Judge and Mediator Jay Daugherty has agreed to mediate the case pro bono. And, the Court is currently considering the

⁶ The jury selection process and trial necessitate a four week setting.

appointment of private counsel to second chair the case, providing defense counsel additional litigation support.

Therefore, it is hereby

ORDERED Defense counsels' Motion to Withdraw Due to Excessive Caseload is denied.

It is further

ORDERED the trial of this matter is continued from the March 2018 setting.⁷ The Court will contact the parties to reschedule the trial once discussions with the other Circuits conclude.

IT IS SO ORDERED

20 December 2017

DATE



JOEL P FAHNESTOCK, JUDGE

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand delivered/faxed/emailed/mailed and/or sent through the eFiling system to the following on 20th day of December, 2017:

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Judicial Administrative Assistant in Division 9

⁷ During the hearing, defense counsel acknowledged the options proffered by the Court would alleviate the challenges currently faced by KC Capital in 2018 and help counsel to remain on this case. Thus, the Court will treat defense counsels' pending motion as a motion for continuance and it will be counted against the Defendant for speedy trial purposes. It should be noted the State opposes this continuance and indicated it was prepared to go to trial in March 2018.