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Prosecutors must testify; justice refuses to quash subpoenas in death penalty case

By: Heather Nann Collins , Journal Inquirer

Chief State's Attorney Kevin Kane and 12 state's attorneys - who were subpoenaed by defense lawyers for a convicted double murderer - must take the witness stand in Hartford Superior Court next month to face questions about how they decide when to seek the death penalty.

That's because state Supreme Court Acting Chief Justice David M. Borden on Friday rejected an appeal by lawyers for the prosecutors, who are members of the executive branch, asking the high court to quash the subpoenas, which were issued by the judicial branch.

Kane said late Friday that his office hasn't decided what its next step will be. Advertisement

"We will look at it to see what, if any, recourse we have available to us at this point," he said.

A court clerk said Borden issued a single-sentence denial of the state's request asking for certification to leapfrog over the Appellate Court and have the Supreme Court decide whether a lower court judge erred when he upheld the subpoenas.

"A conflict between two coequal branches of our government is, by definition, a matter of substantial public interest," prosecutors wrote in their appeal.

The appeal was filed Thursday after Hartford Superior Court Judge Edward J. Mullarkey refused to nullify the subpoenas issued by public defenders Ronald S. Gold and David G.E. Smith of the Capital Defense Unit.

Mullarkey ordered testimony to begin in his courtroom Feb. 23.

Gold and Smith represent Jessie Campbell III, a former Bloomfield man convicted in 2004 of killing two women - his former girlfriend LaTaysha Logan, 20, and her friend, Desiree Privette, 18, - outside Privette's Hartford apartment.

The jury that convicted Campbell of capital felony was unable to decide what penalty he should receive; by law it can only be either life in prison without release or the death penalty.

Mullarkey ordered a new penalty phase after the jury deadlocked and last summer, after months of selection, a new panel was seated.

However, before the jury could hear evidence, Gold and Smith filed a motion asking Mullarkey to impose a life sentence "because there are no standards to guide state's attorneys' discretion when deciding whether to seek a death sentence."

In their motion, the public defenders argued that there "are no uniform standards" guiding state's attorneys. Such a "standardless system" means that the death penalty in Connecticut "is imposed arbitrarily and capriciously," they wrote.

Further, Smith and Gold claimed, such "unbridled prosecutorial discretion" violates defendants' constitutional rights of due process and equal protection, and constitutes prohibited "cruel and unusual punishment because the lack of standards eliminates any rationality or consistency in sentencing."

To substantiate their claims, Gold and Smith asked Mullarkey in July to allow them to subpoena the state's attorneys and the chief state's attorney to question them about how they decide when to seek execution. Mullarkey agreed, but the state filed an appeal.

Gold and Smith filed an opposition to that appeal, arguing that it was "premature" because the hearing wouldn't be necessary if the new jury were unable to come to a conclusion, or recommended a life sentence.

Supreme Court Justice Joette Katz in August denied the state's application.

Rather than go forward with the hearing, Smith and Gold agreed with prosecutors in the Campbell case, Senior Assistant State's Attorneys Dennis J. O'Connor and Vicki Melchiorre, to wait to see if the then-newly picked penalty phase jury would come to a conclusion.

On Oct. 12, those jurors condemned Campbell to death, triggering the revival of the motion to question the state's attorneys.

New subpoenas were issued in late December.

In a hearing Thursday, Melchiorre strenuously objected to what she said would be "completely impermissible" inquiries into prosecutors' thought processes.

In their motion to quash the subpoenas, the prosecutors said the trial court "violated the doctrine of separation of powers the moment it ordered Connecticut's prosecutorial officials to testify ... absent any claim of selective prosecution or invidious discrimination."

Mullarkey, however, said in the hearing that Campbell is entitled to have his questions asked on the record.

Even with the state's attorneys being compelled to take the witness stand, they - or their lawyers - will be able to object to questions they feel are improper, Mullarkey said. He refused to quash the subpoenas with the exception of one issued to Hartford State's Attorney James E. Thomas. Thomas was exempted because he has been directly involved in Campbell's prosecution.

Hours after Mullarkey ruled, the state filed the expedited appeal rejected by Borden.

In their appeal, prosecutors caution that the Supreme Court's refusal to consider the appeal could set precedent for future showdowns between different branches of government.

"If the state is correct that its constitutional officers cannot be compelled to explain the basis for their capital-charging decisions without violating the doctrine of separation of powers, it is essential that our Supreme Court resolve this now; otherwise, the state will forever be deprived of a remedy, because it cannot be returned to the status quo once the state's attorneys have been forced to testify."

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