
CRIMINAL LAW — PROSECUTORIAL DISQUALIFICATION —
RHODE ISLAND SUPREME COURT HOLDS THAT THREATS BY
DEFENDANTS CANNOT DISQUALIFY PROSECUTORS. — *State v.*
McManus, 941 A.2d 222 (R.I. 2008).

The prosecutor opened the jury room door to find the deputy stabbed and shot, and the defendant brandishing the deputy's gun.¹ As the prosecutor turned to run, he heard a shot ring out and saw a bullet hole in the wall just two feet away.² After the defendant was apprehended, he moved for the prosecutor's disqualification from the original charges.³ The California court struggled to balance the danger of prosecutorial bias against the danger of incentivizing violence. It ultimately denied the defendant's motion,⁴ as have most other courts that have dealt with this issue.⁵ Recently, the Rhode Island Supreme Court did the same, holding in *State v. McManus*⁶ that it was unnecessary for the trial court to disqualify a prosecutor whose life had been threatened by the defendant.⁷ By limiting the defendant's incentive to make threats, the court sought to protect the lives of prosecutors and safeguard the justice system from manipulation by clever defendants. Although the Rhode Island Supreme Court formulated a rule that addressed perverse incentives, the rule did not address the possibility of bias. A better, more comprehensive rule would start with the proposition that threatened prosecutors should never be disqualified in cases where perverse incentives could be created, but would not allow that prosecutor to prosecute any new charges against a defendant or be assigned a defendant's case after being threatened by that defendant, because perverse incentives are absent in these situations.

Joseph McManus stabbed his wife six times with a butcher knife as her fourteen-year-old son desperately tried to stop the attack.⁸ The murder was the tragic culmination of years of domestic abuse.⁹ Police arrested McManus during his attempted suicide an hour later, and he was charged with one count of first-degree murder.¹⁰ While awaiting trial, McManus attempted to hire three different inmates to shoot the

¹ *People v. Conner*, 666 P.2d 5, 6 (Cal. 1983).

² *Id.*

³ *Id.* at 7.

⁴ *Id.*

⁵ See Allan L. Schwartz & Danny R. Veilleux, Annotation, *Disqualification of Prosecuting Attorney in State Criminal Case on Account of Relationship with Accused*, 42 A.L.R.5th 581, § 13 (1996).

⁶ 941 A.2d 222 (R.I. 2008).

⁷ *Id.* at 232.

⁸ *Id.* at 224, 226.

⁹ *Id.* at 224–25.

¹⁰ *Id.* at 225.

lead prosecutor in the head outside of the courthouse and break the limbs of the assistant prosecutor with a baseball bat.¹¹ After these attempts became known, McManus requested the dismissal of the two prosecutors, alleging a conflict of interest.¹² The trial court denied the motion.

A jury convicted McManus of first-degree murder, and he was sentenced to life in prison without parole. McManus appealed on several issues, including the trial court's denial of his motion to disqualify the prosecutor, alleging a conflict due to his attempt to solicit her killing or bodily harm.¹³

The Rhode Island Supreme Court affirmed.¹⁴ Writing for the court, Chief Justice Williams held that trial justices possess sole discretion on motions to disqualify a prosecutor.¹⁵ The court analyzed the trial court's denial of the motion using an abuse of discretion standard.¹⁶ The court observed that other courts had generally required the disqualification of the prosecutor only when there was an *actual* conflict of interest, as opposed to a possible conflict.¹⁷ The only example the court gave of an actual conflict was the situation where a prosecutor is a necessary witness in a case.¹⁸

The *McManus* court then turned to the problem of threats against prosecutors, agreeing with another court that "it is all too commonplace that judges, prosecutors, and lawyers are threatened and their lives are in danger."¹⁹ The *McManus* court refused to create an incentive for defendants to make such threats and expressed its concern over the negative consequences of such a holding.²⁰

¹¹ The court's opinion did not include this information, but details of the threats were reported in the news. See James A. Merolla, *Court Will Decide if Pine Personally Can Try Case*, PROVIDENCE J.-BULL., May 7, 1997, at 1B. The lead prosecutor was Attorney General Jeffrey B. Pine, and the assistant prosecutor was Special Assistant Attorney General Margaret Lynch.

¹² *Id.*

¹³ *McManus*, 941 A.2d at 231. McManus only challenged the refusal to disqualify Lynch, since the Attorney General had left the case before trial.

¹⁴ The sole dissent was by Justice Flaherty, who argued that the murder was not sufficiently heinous to merit life without parole. *Id.* at 239 (Flaherty, J., dissenting).

¹⁵ *Id.* at 231 (majority opinion).

¹⁶ *Id.*

¹⁷ *Id.* at 231-32.

¹⁸ *Id.* at 232 (citing *State v. Usenia*, 599 A.2d 1026, 1030 (R.I. 1991)). In *Usenia*, the Rhode Island Supreme Court held that, had the prosecutor been a necessary witness, the Court's rules would have strictly prohibited allowing that prosecutor to try the case. *Usenia*, 599 A.2d at 1030-31.

¹⁹ *McManus*, 941 A.2d at 232 (quoting *Resnover v. Pearson*, 754 F. Supp. 1374, 1388 (N.D. Ind. 1991)). The *Resnover* court bolstered its claim with the fact that three federal judges had been murdered in the previous decade. It concluded that there was not "a shred of authority" for the proposition that the Constitution requires disqualification when the prosecutor has been threatened. *Resnover*, 754 F. Supp. at 1388.

²⁰ *McManus*, 941 A.2d at 232.

To drive home its point, the court listed two cases with which it strongly disagreed. In the first case, *State v. Hottle*,²¹ the prosecutor received a threat from the defendant during trial and discovered mid-trial that the cryptic attack plans in the defendant's notebook were directed at him.²² In contrast to *McManus*, the West Virginia Supreme Court of Appeals stated that "[g]enerally, when a prosecuting attorney and/or his family are among the intended victims, the prosecuting attorney should be disqualified because of personal interest."²³ The *Hottle* court appealed to the duty of a prosecutor to "obtain justice and not simply to convict,"²⁴ and cautioned that a prosecutor should be disqualified when he "has an interest in the outcome . . . beyond ordinary dedication to his duty to see that justice is done."²⁵ However, in spite of these viewpoints, the *Hottle* court held that because the prosecutor had not received or known about the threats at the time of the motion to disqualify, which was made before trial, it would not overturn the trial court's denial of that motion.²⁶

The *McManus* court also rejected the reasoning of *Millsap v. Superior Court*.²⁷ *Millsap* involved two prosecutors trying a defendant for twenty-seven counts, including eight first-degree murder counts and two counts for soliciting the murders of the prosecutors themselves.²⁸ The defendant sought to have the prosecutors and their office taken off the case.²⁹

The *Millsap* court agreed with concerns expressed by the trial judge that if it were possible to disqualify prosecutors or their offices so easily, "defendants bent on delay or other obstruction, or just wanting to be rid of an effective prosecutor, would have the means to accomplish that objective."³⁰ The court examined the specific threat and response, finding that it had not been "so grave as to render it unlikely that the defendant will receive fair treatment during all portions of the criminal proceedings."³¹ However, while the *Millsap* court declined to disqualify the prosecutors on the nonthreat counts, it did sever the two solicitation counts, holding that there was a "real potential for actual prejudice . . . if the [prosecutors] whose murders [the defendant] is al-

²¹ 476 S.E.2d 200 (W. Va. 1996).

²² *Id.* at 211.

²³ *Id.* at 212.

²⁴ *Id.* at 211 (quoting *Nicholas v. Sammons*, 363 S.E.2d 516, 518 (W. Va. 1987)).

²⁵ *Id.* at 212 (quoting *Sammons*, 363 S.E.2d at 517).

²⁶ *Id.* at 212-13.

²⁷ 82 Cal. Rptr. 2d 733 (Ct. App. 1999).

²⁸ *Id.* at 734.

²⁹ *Id.* at 734-35.

³⁰ *Id.* at 738. The court declared it was unwilling to give such a "powerful weapon to disrupt the course of justice" to defendants. *Id.*

³¹ *Id.* at 736 (quoting *People v. Conner*, 666 P.2d 5, 9 (Cal. 1983)) (internal quotation marks omitted).

leged to have solicited were to prosecute him for those crimes.”³² The court held that “expecting that kind of objectivity from the target victims on these counts is to demand too much.”³³

McManus, *Hottle*, and *Millsap* represent three different ways of solving the problem of threats against prosecutors. *McManus* is the “hard line” approach, refusing to disqualify in any situation. *Hottle* is the “timing” approach, refusing to disqualify if the prosecutor is unaware of the threat before the trial begins. *Millsap* is the “severance” approach, refusing to disqualify as long as the threat charges are severed. All three approaches have their flaws. When the merits of each approach are examined, it becomes clear that the best approach would be a combination of the three — a generally “hard line” approach that takes into consideration the “severance” and “timing” concerns in a way that reduces bias without creating perverse incentives. This combination approach is reflected in the following proposed rule: threatened prosecutors should never be disqualified in cases where perverse incentives could be created, but a prosecutor should not be allowed to prosecute any new charges against a defendant, or be assigned a defendant’s case, after being threatened by that defendant, because perverse incentives are absent in these situations, but the potential for bias is present.

Two fundamental premises support this solution. First, the possibility of creating perverse incentives for all defendants is worse than the possibility of bias against one defendant, and thus eliminating the possibility of creating those incentives must be the primary concern. Second, if the possibility of bias can be avoided without creating perverse incentives, it should be. The first premise is the critical one and is true for three reasons. First, the perverse incentives are severe. An incorrect solution to this problem could put lives at stake. Second, perverse incentives would become systemwide with a disqualification ruling, while potential bias would be limited to the specific case. The systematic problem of perverse incentives would lead to more threats, and ultimately, more possibilities of bias. Third, the potential bias has been caused by the defendant’s own actions. The defendant does not have clean hands, and, by breaking the law, has essentially waived the right to an unthreatened prosecutor.³⁴

³² *Id.* at 738. The court also gave the prosecutor’s office the option of simply removing the two prosecutors completely. *Id.*

³³ *Id.*

³⁴ See *United States v. Gotti*, 782 F. Supp. 737, 745 (E.D.N.Y. 1992) (ruling that if defendant’s own actions have caused animus, it is not a disqualifying factor). It should be noted that the danger of perverse incentives would still outweigh the possibility of bias in a situation where the threats are made by a third party against a prosecutor. Though there would not be a true “waiver” in such situations, if disqualification were allowed, defendants could simply outsource their threats.

The possibility of perverse incentives is a real one, as can be seen by viewing the situation from McManus's perspective.³⁵ Joseph McManus committed a crime that he knew would carry a heavy sentence,³⁶ the evidence against him was overwhelming, and the Attorney General was personally prosecuting his case. McManus had every reason to make a threat. If he had failed to disqualify the prosecutor, or had won disqualification but still been convicted, McManus would have lost nothing — he would spend the rest of his life in prison anyway. But if McManus's threat had disqualified the prosecutor, and if he had won his case against the second prosecutor, he would have gained a great deal and would have served less prison time. Furthermore, if the new prosecutor proved to be undesirable, McManus could issue another threat to game the system yet again and pick another prosecutor.

The incentives problem becomes even more apparent when we consider a defendant who wants to delay trial. What if McManus had faced a likely death sentence,³⁷ and wanted only to push back his conviction and sentence indefinitely? McManus would have an unrestrained incentive to make threats and disqualify prosecutors, pushing the date of trial back and wasting countless hours of preparatory work.³⁸ This tactic would impose substantial costs on the justice system and the state, but no costs would be borne by a defendant who has nothing to lose and time to gain through delays.³⁹

Could this problem be avoided by entrusting courts to classify some threats as irrelevant? Some courts seem to have taken this approach, factoring in the level of the threat and how close the threat came to being carried out.⁴⁰ This is a dangerous approach in two ways. First, if

³⁵ It goes without saying that criminal defendants do not uniformly act in ways that will avoid the possibility of jail time, but for the purpose of this discussion it is assumed that the defendant is a rational actor, weighing the costs and benefits of whether or not to make a threat.

³⁶ Defendants facing less prison time may still find it in their best interest to make threats and trade a few years of prison time for a better chance at avoiding a longer sentence.

³⁷ Although the evidence against McManus was overwhelming, Rhode Island had abolished the death penalty.

³⁸ The *Millsap* opinion noted that the prosecutors on the case had each put in over 1500 hours of work preparing for the trial. *Millsap*, 82 Cal. Rptr. 2d at 738.

³⁹ Even defendants not facing a death sentence could have very good reasons for seeking to delay trial. Over time, the testimony of witnesses can weaken due to fading memories (or disappear completely with their death). See Brian P. Brooks, *A New Speedy Trial Standard for Barker v. Wingo: Reviving a Constitutional Remedy in an Age of Statutes*, 61 U. CHI. L. REV. 587, 600 (1994).

⁴⁰ See *People v. Conner*, 666 P.2d 5 (Cal. 1983), where the defendant managed to stab a deputy sheriff and shoot at the prosecutor. *Id.* at 6. Since the threat was "so grave," the court upheld the trial court's disqualification of the prosecutor (and the entire office) from prosecuting the escape charges. *Id.* at 9. In *Millsap*, where the defendant had hired a hitman to kill the prosecutors, the court distinguished the case from *Conner*, ruling that the threat was not severe enough to disqualify the office, but was severe enough to sever the charges. *Millsap*, 82 Cal. Rptr. 2d at 737.

defendants know that some threats will disqualify prosecutors, more threats will be made. With the new influx of strategic threats, courts might have more difficulty identifying the truly serious threats, and legitimate threats could be written off as mere strategic moves. Second, such a rule would incentivize more severe threats against prosecutors. If a hastily scribbled note were an insufficiently grave death threat but firing a shot at a prosecutor were sufficiently grave, then defendants would be rewarded directly according to the level of threat they were able to muster — certainly a perverse incentive.⁴¹ While a more severe attack could merit greater prison time, the tradeoff could still be a profitable one for certain defendants.

The *McManus* court succeeded in eliminating these perverse incentives. Defendants have fewer reasons to make threats under the *McManus* ruling and may be less likely to make threats when those threats can be prosecuted by the threatened prosecutor. The ruling also recognized that while prosecutors will naturally be bothered by threats, mere feelings do not constitute an actual conflict of interest.⁴² Nevertheless, it failed to chart ways to avoid bias as well as perverse incentives, and disagreed with *Millsap*'s sensible statement that if a threatened prosecutor prosecuted the defendant, there was a "real potential for actual prejudice."⁴³

The potential for prejudice against defendants by threatened prosecutors is real, and it is significant. *Hottle*'s generalization that prosecutors should be disqualified in the face of threats is intuitively powerful, and its reasoning deserves to be thoroughly addressed. How can a prosecutor *not* have a special interest in convicting a defendant that has threatened the prosecutor or her family? The defendant in *Hottle* claimed that the prosecutor wanted to take the case personally, to "make sure Billy Hottle went to prison forever, so as to ensure the safety of himself and his family."⁴⁴ But despite the rhetoric, the court did not disqualify the prosecutor because he was not aware of the threats at the time of the initial motion. This conclusion runs counter to the opinion's reasoning. If a prosecutor cannot be trusted to remain true to her obligation to "obtain justice"⁴⁵ at the outset of a trial against a threatening defendant, why should it matter if the prosecutor

⁴¹ See *People v. Hall*, 499 N.E.2d 1335, 1347 (Ill. 1986) ("To hold that the law requires a substitution of judges [when a defendant has physically attacked the judge] would invite misconduct toward judges and lawyers, and a practice would develop that the grosser the misconduct the better the chances to avoid trial with an undesired judge or lawyer.")

⁴² See *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980) (citing *Ward v. Monroeville*, 409 U.S. 57, 62 (1972)) (ruling that prosecutors are not held to the same standard of neutrality and detachment as judges).

⁴³ *McManus*, 941 A.2d at 232 (quoting *Millsap*, 82 Cal. Rptr. 2d at 738).

⁴⁴ *State v. Hottle*, 476 S.E.2d 200, 211 (W. Va. 1996).

⁴⁵ *Id.* (quoting *Nicholas v. Sammons*, 363 S.E.2d 516, 518 (W. Va. 1987)).

discovers the threat before or after a disqualification motion?⁴⁶ For *Hottle* to be internally consistent, prosecutors would need to be disqualified as soon as a threat is discovered.

Hottle's rule — that only a threat made before the disqualification motion can disqualify a prosecutor — fails to solve the nettlesome problem of incentives. *Hottle* contended that his prosecutor had a personal interest in seeing him convicted,⁴⁷ so he presumably would have preferred an alternative prosecutor. Had he known that he simply needed to make a threat (or make his prior threats clear) *before* his motion, *Hottle* might well have done so. The *Hottle* “timing” approach opens up a Pandora’s box of perverse incentives.

At first glance, *Millsap*'s “severance” approach seems to have solved one problem of *Hottle*. Instead of disqualifying the prosecutors, a court can simply sever the threat charges and allow the threatened prosecutors to continue with the other charges.⁴⁸ A defendant seeking to delay trial will only create another trial and will not postpone punishment.

However, the *Millsap* court’s solution does not fit with its reasoning either. If there truly is a “real potential for actual prejudice” and if it is “too much” to ask a prosecutor to maintain objectivity when a threat has been made, then why do those concerns diminish when the prosecutor simply does not try the charge for which he himself was the victim?⁴⁹ Can a prosecutor have a special interest in convicting a threatening defendant of some charges but not others?⁵⁰ Perhaps the most puzzling aspect of this reasoning is the solution — disqualify the biased prosecutor from the threat charges, but allow that same prosecutor to remain on the *most* serious charges!⁵¹ The *Millsap* court’s initially attractive “severance” approach, by its own logic, ends up splitting the baby.

⁴⁶ As trial proceeds, there are fewer opportunities for a biased prosecutor to fail to “obtain justice,” but the opportunities still exist in closing arguments, use of evidence, and sentencing.

⁴⁷ *Hottle* contended that since the prosecutor had known him since he was a boy and had prosecuted him several times before, there were “strong and bitter feelings” between the two. *Hottle*, 476 S.E.2d at 211.

⁴⁸ *Millsap*, 82 Cal. Rptr. 2d at 738. This approach is very similar to that employed in another recent case, *State v. Robinson*. See 179 P.3d 1254, 1260 (N.M. Ct. App. 2008). In *Robinson*, the court refused to disqualify prosecutors after the defendant solicited the murder of one of them largely because neither prosecuted the separate solicitation charge. *Id.*

⁴⁹ *Millsap*, 82 Cal. Rptr. 2d at 738.

⁵⁰ See *State v. Cox*, 167 So. 2d 352 (La. 1964). In *Cox*, the district attorney recused himself from prosecuting a defendant for making defamatory statements against him, but not from a trial against the same defendant for defamatory statements against a judge. The court reasoned that the district attorney would “naturally . . . have a great personal interest in seeing that the accused was convicted.” *Id.* at 357.

⁵¹ Under California law, the maximum sentence for a solicitation of murder is nine years. CAL. PENAL CODE § 653f(b) (West 2008). In contrast, *Millsap* faced the death penalty for each of eight counts of first degree murder. *Millsap*, 82 Cal. Rptr. 2d at 734.

The best and most complete solution would be as follows: threatened prosecutors should never be disqualified in cases where perverse incentives could be created, but a prosecutor should not be allowed to prosecute any new charges against a defendant or be assigned a defendant's case after being threatened by that defendant. This solution recognizes that *McManus* is right — the threat of perverse incentives to the system outweighs the threat of bias. But this rule goes further by incorporating the insights of the *Hottle* and *Millsap* courts.

Hottle's emphasis on timing is important because threats made before the assignment of a prosecutor typically do not create perverse incentives. If a case, at initial charging,⁵² involves threats against a particular prosecutor or her family, that case should be assigned to another prosecutor, if possible.⁵³ This situation would not create perverse incentives since the defendant cannot threaten a particular prosecutor if he is unaware of which prosecutor will be assigned to his case. *McManus* would likely allow the threatened prosecutor to be assigned to the case,⁵⁴ but in so doing would needlessly introduce the threat of bias.

Millsap's severance approach is also incorporated into this proposed rule. If threats occur *after* the initial charging, those threats should be charged separately and tried by a different prosecutor. This is not because of *Millsap*'s concern that the prosecutor simply cannot be objective, but instead because if the possibility of bias (actual or imagined) can be avoided without creating perverse incentives, then it should be avoided. The additional trial does not benefit a defendant seeking delay or disqualification of a particular prosecutor.

This proposed solution prevents perverse incentives and reduces bias in situations where those incentives do not exist. By using this approach, courts could continue to protect the integrity of the justice system and the safety of prosecutors, but, where possible, still recognize the concerns of bias toward defendants.

⁵² Initial charging is the best place to make the determination, because at the time of charging a particular prosecutor has typically not yet been assigned to the case and even if one has been assigned, defendants often do not yet know who it is. Setting the initial charging as the last time a prosecutor could be forcibly disqualified because of threats by the defendant serves two purposes. First, it prevents a prosecutor from being disqualified after putting substantial time and energy into the case, eliminating the perverse incentive of delaying trial. Second, it makes it nearly impossible for the defendant to pick a target. If a defendant already has threatened a prosecutor at this point, the state can simply assign the case to a different prosecutor and suffer virtually no costs.

⁵³ If a defendant has made threats that make it difficult or impossible to assign the case to an unthreatened prosecutor (for example, if he has threatened the entire prosecutor's office), then the possibility of bias cannot be avoided without great cost or the creation of a perverse incentive, and a prosecutor should be assigned irrespective of the potential bias.

⁵⁴ See *McManus*, 941 A.2d at 232. The *McManus* court explicitly disagreed with the *Millsap* court, which only required disqualification from the threat counts. *Id.*