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Westin v. McDaniel: An Interesting Twist on Younger Abstention

I. INTRODUCTION

In Westin v. McDaniel,1 the District Court for the Middle District of Georgia granted a preliminary injunction prohibiting the State of Georgia from prosecuting a criminal defense attorney for hindering an undercover police officer.2 Judge Fitzpatrick ruled that the traditional notions of federalism and comity, which normally preclude a federal court from intervening in state criminal proceedings, were inapplicable because no state case was pending against the attorney when the federal action was brought.3 He further ruled that even if those principles were applicable, federal intervention was still appropriate because the prosecuting attorney acted in "bad faith" in seeking an indictment.4 The United States Court of Appeals for the Eleventh Circuit affirmed the district court's ruling without comment.5

This Casenote first examines the principles of abstention espoused in Younger v. Harris6 and refined in subsequent Supreme Court decisions. Next, it provides the facts and procedural history of Westin v. McDaniel followed by a detailed examination of the court's opinion. The Casenote concludes with an analysis of the decision and a brief summary.

II. HISTORICAL BACKGROUND

Generally, federal courts do not interfere in state affairs absent extraordinary circumstances.7 The underlying rationale for this policy of noninterference is federalism—a fundamental doctrine whereby power is shared between the federal and state governments and by which the federal government endeavors to protect federal rights and interests in ways that will not unduly interfere with the states.8

2. Id. at 1564.
3. Id. at 1568.
4. Id. at 1575.
7. 760 F. Supp. at 1566.
8. Id.

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In *Younger v. Harris*, the United States Supreme Court recognized the fundamental tenet of federalism that, subject to a few carefully carved out exceptions, federal courts should not enjoin pending state criminal proceedings. In *Younger* the Supreme Court reversed a district court's granting of an injunction against the enforcement of a California criminal statute which was unconstitutional on its face. The Court identified the following primary sources of this policy of federalism and noninterference: (1) the basic doctrine that courts of equity should not enjoin criminal prosecutions when the moving party has an adequate remedy at law and will not suffer irreparable harm; (2) to prevent erosion of the role of the jury; (3) to avoid duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted; and (4) the notion of "comity," a recognition that the United States is a union of sovereign states which functions best if the states are left free to perform their separate functions in separate ways.

Based on these considerations of equity, comity, and federalism, the Supreme Court has repeatedly held that "the normal thing to do when federal courts are asked to enjoin pending [state] proceedings . . . is not to issue such injunctions." The only exception to this absolute prohibition occurs when intervention is "absolutely necessary for protection of constitutional rights . . . [and] where the danger of irreparable loss is both great and immediate." This requirement of irreparable harm, however, is not satisfied by the mere "cost, anxiety, and inconvenience of having to defend against a single criminal prosecution." Rather, in order to be irreparable, "the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." Because the plaintiff in *Younger* failed to show that his prosecution was brought in bad faith or that it was only one of a series of repeated prosecutions to which he would be subjected, he was not entitled to an injunction. Moreover, the Court held that "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it, and that [the plaintiff] . . . failed to make any showing of bad faith, harassment, or any other unusual circumstances that would call for equitable relief."

9. 401 U.S. at 43.
10. Id. at 54.
11. Id. at 43-44.
12. Id. at 45.
13. Id. (quoting Fenner v. Boykin, 271 U.S. 240, 243-44 (1926)).
14. Id. at 46.
15. Id.
16. Id. at 49.
17. Id. at 54.
Therefore, in order for a party seeking federal enjoinment of a state criminal proceeding to overcome the Younger principle of abstention, he must demonstrate bad faith enforcement of a state law, harassment, or other special circumstances. However, the Supreme Court in Younger did not address whether federal courts can intervene when there is no prosecution “pending” in state court at the time the federal proceeding is begun. Subsequent cases addressed this issue.

In Steffel v. Thompson, the Supreme Court addressed whether or not declaratory relief is appropriate when a state prosecution is threatened, but is not pending, and a showing of bad faith enforcement or other special circumstances is not made. In Steffel the petitioner was threatened by the police with arrest for violating a Georgia criminal trespass law if he did not stop distributing information against America’s involvement in Vietnam on an exterior sidewalk of a shopping center. The petitioner brought an action for declaratory relief in federal court, claiming that the Georgia trespass law, as applied to him, would violate his federal rights under the First and Fourteenth Amendments. In reversing the lower courts’ denial of relief, the Court held that federal declaratory relief is not precluded if there is a genuine threat of enforcement of a disputed state criminal statute (even if there is no “pending” state prosecution). Justice Brennan, writing for the majority, further stated:

> When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court’s ability to enforce constitutional principles.

Thus, Steffel made it clear that federal courts can intervene when state prosecution is threatened, but not pending, and the plaintiff seeks declaratory relief. The question of injunctive relief, however, had yet to be addressed.

In Doran v. Salem Inn, Inc., the Supreme Court affirmed the granting of a preliminary injunction on the ground that there was no pending state

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19. 401 U.S. at 41.
21. Id. at 454.
22. Id. at 455-56.
23. Id. at 454-55.
24. Id. at 475.
25. Id. at 462.
prosecution against the plaintiffs. In *Doran* the plaintiffs operated topless bars in North Hampstead, New York. The town enacted an ordinance making it unlawful for bar owners and others to permit topless dancing. The plaintiffs complied with the ordinance (requiring their employees to wear bikini tops) but brought an action in the district court under 42 U.S.C. § 1983 seeking a preliminary injunction and declaratory relief.

Recognizing that injunctive relief of future (not pending) criminal proceedings was a case of first impression, the Court held that the issuance of a preliminary injunction is not subject to *Younger* abstention when there is no pending state prosecution against those seeking relief and the equitable requirements for an injunction are met. Justice Rehnquist, writing for the majority, noted that district courts can generally protect federal interests by granting declaratory relief, but in some situations injunctive relief may be necessary to prevent substantial irreparable harm.

In explaining the Court's rationale, Rehnquist said, "[n]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute." Thus, the void created by the *Younger* decision with respect to injunctive relief was apparently filled.

The principle was carried a step further in *Wooley v. Maynard* when the Court affirmed the granting of a permanent injunction against the prosecution of the plaintiffs under an unconstitutional statute after the state had repeatedly convicted them for the same violation. The Court summarized as follows the holdings which delineated the scope of *Younger* abstention:

In *Younger* the Court recognized that principles of judicial economy, as well as proper state-federal relations, preclude federal courts from exercising equitable jurisdiction to enjoin ongoing state prosecutions. However, when a genuine threat of prosecution exists, a litigant is entitled to resort to a federal forum to seek redress for an alleged deprivation of federal rights.

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27. Id. at 934. There were actually three plaintiffs in *Doran*—one who was subject to a pending prosecution and two who were not. The Supreme Court reversed the Second Circuit's granting of an injunction with regard to the plaintiff against whom the prosecution was pending, holding that *Younger* was applicable to bar such relief. Id. at 922.
28. Id. at 924-25.
29. Id. at 930.
30. Id. at 931.
31. Id.
33. Id. at 717.
34. Id. at 710 (citation omitted).
However, the prosecution does not necessarily have to be pending at the time the federal action is filed. One of the more sweeping constructions of *Younger* took place in *Miranda*,\(^{36}\) in which theater owners filed suit in federal court seeking an injunction for the return of seized copies of an obscene film and against enforcement of the state obscenity statute.\(^{36}\) After the federal suit was filed, the theater owners were added as parties defendant in the state criminal proceeding.\(^{37}\) The Supreme Court held that "where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger v. Harris* should apply in full force."\(^{38}\)

Consequently, as dictated by these decisions, a federal plaintiff who is faced with a threatened, but not pending, state criminal prosecution may obtain preliminary or permanent injunctive relief from a federal court if declaratory relief is not sufficient and he can meet the equitable requirements for such relief.\(^{39}\) Accordingly, when an individual seeks declaratory or injunctive relief in federal court the question of whether or not a criminal case is pending in state court before a proceeding of substance on the merits takes place in federal court becomes crucial.

### III. Statement of the Case

In Wilkinson County, Georgia, Doug Sanders and Alana Fuller, in hopes of receiving lenient treatment on their own pending drug charges, acted as confidential informants for Robin McDaniel, an agent of the Ocmulgee Drug Task Force. On one occasion, they informed a third party that he was the subject of McDaniel's investigation. Consequently, McDaniel had them arrested on additional drug charges. After the arrest, Sanders and Fuller agreed to continue to act in their capacity as McDaniel's informants.\(^{40}\)

Upon their release, Sanders and Fuller changed their minds. On February 6, 1991, they contacted Robert Westin, an attorney in Wilkinson County, and requested that he represent them in the matter. In addition to having a substantial criminal law practice, Westin served as a Judge of the Recorder's Court in Gordon, Georgia and city attorney for the town of McIntyre, Georgia.\(^{41}\)

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35. 422 U.S. 332 (1975).
36. *Id.* at 337-38.
37. *Id.* at 339.
38. *Id.* at 349.
40. *Id.* at 1564.
41. *Id.*
Sanders and Fuller informed Westin that McDaniel was working undercover at a local bar using the name "Natasha Childers." Sanders attempted to contact McDaniel through her beeper to inform her but was unsuccessful in reaching McDaniel. Westin then called the bar, learned that "Natasha" was there and proceeded to the bar to speak with her. Upon entering the bar, Westin saw McDaniel seated at the bar speaking with the bartender. He approached her and said, "Hi, Robin." When McDaniel told him that her name was Natasha, Westin corrected himself. He then identified himself as an attorney and McDaniel requested that they go upstairs to continue their conversation.

Upstairs and away from the others in the bar, Westin informed McDaniel that Sanders and Fuller no longer wished to work for her, that he represented them, and that in the future any communications between McDaniel and his clients would have to go through him. Westin then tried to learn more about the charges facing his clients and the two discussed the drug problem in Gordon generally. McDaniel expressed her fear that Sanders and Fuller had blown her cover already, but Westin assured her that he had told his clients to say nothing about the case. Westin then departed.

Noting that others in the bar were acting strangely towards her and fearing that Westin had blown her cover, McDaniel left the bar and informed Robert Williams, head of the Ocmulgee Drug Task Force, of what had happened. Williams contacted Joseph Briley, District Attorney for the Ocmulgee Judicial Circuit, and informed him of the circumstances. After the conversation, Briley considered the matter for a few moments, and then called back and directed McDaniel to swear out a warrant for Westin's arrest on charges of hindering a law enforcement officer in violation of O.C.G.A. § 16-10-24. McDaniel did not know whether the charge should be listed as a felony or misdemeanor, so the magistrate issued a

42. Id.
43. Id.
44. O.C.G.A. § 16-10-24 provides:

(a) Except as otherwise provided in subsection (b) of this Code section, a person who knowingly and willfully obstructs or hinders any law enforcement officer in the lawful discharge of his official duties is guilty of a misdemeanor.

(b) Whoever, knowingly and willfully resists, obstructs, or opposes any law enforcement officer, prison guard, correctional officer, probation supervisor, parole supervisor, or conservation ranger in the lawful discharge of his official duties by offering or doing violence to the person of such officer or legally authorized person is guilty of a felony and shall, upon conviction thereof, be punished by imprisonment for not less than one or more than five years.

felony warrant, depending on another judge to downgrade the charge later in the proceedings if he was mistaken.45

The next day Westin was arrested at his office. Several other persons charged with drug offenses were arrested at the same time so both newspaper and television reporters were present at Westin's booking. Both McDaniel and Williams gave interviews to the reporters, and in one of Williams' interviews he mentioned that disbarment was a possibility for Westin.46

Westin was then transported to Baldwin County for a bond hearing before Superior Court Judge John Lee Parrott. Chief Assistant District Attorney Alberto C. Martinez and Hulane E. George, Westin's counsel, were already in Judge Parrott's court on other matters. While the judge and the attorneys conferred, Westin was left handcuffed in a public area of the Baldwin County courthouse. Bond was eventually granted in the sum of $10,000 on the condition that Westin would refrain from practicing criminal law and serving as Recorder's Judge.47

On February 28, 1991, a commitment hearing was held before Senior Judge James B. O'Connor. On March 1, Judge O'Connor issued an order dismissing the felony charge against Westin because there was no evidence that he had broken the law "knowingly and willfully" as required by O.C.G.A. § 16-10-24(b). The order noted that there was no direct proof that anyone in the bar had overheard the conversation, although it was a possibility. The order also stated that Westin's conduct was justified in the legitimate interests of his client and possibly himself, since there was also reason to believe that McDaniel regarded Westin himself as a possible target of her investigation.48

After the order was issued, District Attorney Briley decided to continue to pursue a misdemeanor charge under O.C.G.A. § 16-10-24(a). He reconvened the Wilkinson County grand jury, although he did not need an indictment to prosecute a misdemeanor. The grand jury was scheduled to meet on March 11, 1991, but that morning Westin filed suit in Federal District Court for the Middle District of Georgia seeking a temporary restraining order,49 a preliminary injunction,50 permanent injunctive relief, and damages pursuant to 42 U.S.C. § 1983.51 The court entered a re-

45. 760 F. Supp. at 1565.
46. Id.
47. Id.
48. Id.
51. 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdic-
straining order preventing the grand jury from hearing evidence against Westin pending the outcome of this preliminary injunction hearing and the subsequent federal suit. The Eleventh Circuit Court of Appeals affirmed the district court's order without comment.

IV. THE DISTRICT COURT'S OPINION

A. Inapplicability of Younger v. Harris

Judge Fitzpatrick began his analysis with the basic premise that Younger and its underlying concern of federalism were inapplicable because there was no criminal prosecution pending in the Ocmulgee Superior Court when the request for federal intervention was brought.

When Judge O'Connor issued his order dismissing the charges against Westin . . . [w]hatever case District Attorney Briley had was killed. His decision to seek an indictment from a reconvened grand jury on the misdemeanor charges (an apparently permissible, but suspicious, act) was an attempt to revive the corpse of a dead case. It makes little sense to say that there could still be a pending case . . . after a superior court judge, after an exhaustive hearing . . . found that there was no probable cause to believe that Westin had violated O.C.G.A. § 16-10-24.

Judge Fitzpatrick placed considerable emphasis on the fact that to hold otherwise would allow the District Attorney to do nothing immediately and continue to list the action as pending until the expiration of the statute of limitations. He then noted that a case would not have become pending against Westin until the grand jury returned an indictment, assuming it would have done so.

Judge Fitzpatrick dealt next with the holding of Hicks v. Miranda that even if there is no case pending when the federal complaint is filed, Younger abstention still applies and the federal action must be dismissed if state court proceedings start before any substantial proceedings on the merits have taken place in federal court. The preliminary injunction hearing and temporary restraining order issued on March 12, 1991 satis-

52. 760 F. Supp. at 1565.
54. 760 F. Supp. at 1567.
55. Id. at 1567-68.
56. Id. at 1568.
57. Id.
58. 422 U.S. 332, 349 (1975).
fied this requirement of "substantial proceedings" in federal court. In a footnote, Judge Fitzpatrick noted that while his own temporary restraining order was the vehicle which allowed proceedings of substance to occur at the federal level before the state grand jury could hear evidence against Westin, that had no effect on the outcome. "Any concerns about federal courts using temporary restraining orders to establish and preserve injunctive jurisdiction by interfering in state judicial systems can be answered by examining the nature of such orders. They are by definition temporary, extraordinary and require an immediate hearing to protect the opposing party." Thus, according to Judge Fitzpatrick, since the state would not have had a case pending until the filing of an indictment, and a proceeding of substance on the merits had occurred in his court, Younger's concerns of federalism and comity were not implicated and Westin was not denied his right to a federal forum.

In support of his finding that Younger was inapplicable, Judge Fitzpatrick cited Dombrowski v. Pfister and Langley v. Ryder. In Dombrowski, a case decided six years before Younger, the Supreme Court held that where a state grand jury was not convened and indictments were not obtained until after the federal complaint seeking declaratory and injunctive relief was filed, no state proceedings were pending within the intent of the Anti-Injunction Act, 28 U.S.C. § 2283. Accordingly, application of the Younger doctrine to similar facts should yield a similar conclusion.

Such a conclusion did result in Langley. There, plaintiffs who were charged with offenses against state law allegedly committed on federal land sought an injunction prohibiting the state from prosecuting. The court first cited Dombrowski for its conclusion that 28 U.S.C. § 2283 did not apply because state criminal proceedings were not pending at the time the federal complaint was filed because no bill of information or indictment had been filed in state court. It then held that Younger was also inapplicable since the state had not commenced any criminal pro-

59. 760 F. Supp. at 1568.
60. Id. at 1568 n.3.
61. Id. See Fed. R. Civ. P. 65(b).
62. 760 F. Supp. at 1568 n.3.
63. 380 U.S. 479 (1965).
64. 602 F. Supp. 335 (W.D. La. 1985).
65. 380 U.S. at 484 n.2.
66. 760 F. Supp. at 1568.
67. Id.
68. 602 F. Supp. at 337.
69. Id. at 338-39.
ceedings at the time of the federal trial (a proceeding of "substance on the merits" at the federal level). 70

Based on Langley and Dombrowski, Judge Fitzpatrick ruled that "[t]he implication is that the state's case would not have commenced for Younger purposes until the filing of a bill of information or indictment." 71 For Judge Fitzpatrick then, abstention was inappropriate, and he was free to consider Westin's request for a preliminary injunction.

B. Equitable Requirements for Injunctive Relief

In the Eleventh Circuit the following four distinct requirements must be met by the party seeking an injunction before such relief will be granted: (1) a substantial likelihood that the movant will ultimately prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction is issued; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if issued, would not be adverse to the public interest. 72 Judge Fitzpatrick, recognizing that a preliminary injunction is an extraordinary remedy that should not be granted without good cause, considered each factor in turn.

A Substantial Likelihood of Success on the Merits. Judge Fitzpatrick found that there was a substantial likelihood that Westin would succeed on his underlying legal claim. 73 This finding was based on the pleadings, briefs filed by amici curiae, and two hearings, whereby the plaintiff purportedly established that the defendant acted in bad faith and with a retaliatory motive. 74

Irreparable Injury. After noting that this was the single most important factor necessary for an injunction, Judge Fitzpatrick quickly established, based on case law, exactly when irreparable harm exists: "[i]n order to establish the element of irreparable injury, Westin must show that he has no adequate remedy at law, meaning that the injury must be actual and imminent, not remote and speculative, and requires a remedy of more than money damages." 75 While a legal remedy is normally held to be inadequate only where damages are clearly difficult to assess and mea-

70. Id. at 339.
71. 760 F. Supp. at 1568.
73. 760 F. Supp. at 1569.
74. Id. See infra notes 113-20 and accompanying text.
monetary losses can rise to the level of irreparable harm if the party seeking an injunction will be forced out of business without it.77

For Judge Fitzpatrick, the threatened injury to Westin of having to undergo a grand jury investigation despite having a substantial likelihood of prevailing on the merits at the federal level was immediate and not speculative.78 This opinion was based on the finding that without an injunction, District Attorney Briley would again attempt to take his evidence before a reconvened grand jury.79 Judge Fitzpatrick found that both Westin’s law practice and reputation had suffered since his arrest.80 Because Westin’s claims of bad faith prosecution and retaliation had merit, a grand jury investigation would almost certainly ruin Westin’s law practice and money damages would not provide adequate compensation.81

Next, Judge Fitzpatrick refuted the state’s argument that Westin would have an adequate remedy in state court.82 He cited Kugler v. Helfant83 for the proposition that while the mere cost and anxiety of having to defend a state prosecution did not constitute irreparable injury, a federal forum is still appropriate when bad faith and harassment are shown (like that which Judge Fitzpatrick believed to exist in Westin).84 He then distinguished Blalock v. United States85 in which a district court refused to enjoin allegedly tainted grand jury proceedings because the plaintiff had an adequate remedy at law in the form of a motion to quash the indictment if one was issued.86 Blalock was different, and therefore mandated a different result, because the grand jury investigation there was already in progress when the federal action was brought, whereas Westin sought to block a grand jury investigation before it was begun.87

Balance of the Equities. Judge Fitzpatrick next found that the granting of a preliminary injunction would cause little or no harm to the state.88 The threatened injury to Westin’s law practice and reputation far
outweighed any potential harm to the state, and therefore the equities balanced in his favor.\textsuperscript{89}

**The Public Interest.** For Judge Fitzpatrick, the only possible harm to the public, if any existed at all, was the delay caused by the resolution of Westin’s underlying legal claim.\textsuperscript{90} If Westin were to ultimately win, on the other hand, the public interest would be served by the granting of a preliminary injunction that would prevent unjust retaliation against him by state officers.\textsuperscript{91} Thus, Westin met all of the traditional requirements for relief, and a preliminary injunction was granted.\textsuperscript{92}

C. **The Presence of a Federalism Problem**

In Part B of his opinion, Judge Fitzpatrick ruled, in the alternative, that even if there was a case pending against Westin as the state argued, abstention would still be inappropriate because the case was prosecuted in bad faith.\textsuperscript{93} He explained:

“When a state criminal proceeding under a disputed state criminal statute is pending against a federal plaintiff at the time his federal complaint is filed, *Younger v. Harris* . . . held . . . that unless bad-faith enforcement or other special circumstances are demonstrated, principles of equity, comity, and federalism preclude issuance of a federal injunction restraining enforcement of the criminal statute . . . .”\textsuperscript{94}

The requirements of bad faith enforcement of a criminal statute for the Eleventh Circuit were delineated in *Wilson v. Thompson.*\textsuperscript{95} In *Wilson* the state revived misdemeanor charges against two individuals when one of them filed a civil action against the deputies who had made the arrests; prior to being revived, the cases had been on the “dead docket.”\textsuperscript{96} The individuals then filed an action under 42 U.S.C. § 1983 seeking to enjoin the prosecution, alleging that the criminal action was reinstated “for the sole purpose of depriving, attempting to deprive, and otherwise interfer-

\textsuperscript{89} *Id.*
\textsuperscript{90} *Id.*
\textsuperscript{91} *Id.*
\textsuperscript{92} *Id.* at 1575.
\textsuperscript{93} *Id.* at 1570.
\textsuperscript{94} *Id.* at 1570-71 (quoting *Steffel v. Thompson*, 415 U.S. 452, 454 (1974) (citation omitted)). This logic applied to injunctive relief, and was also based on the previously discussed cases.
\textsuperscript{95} 593 F.2d 1375 (5th Cir. 1979). In *Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit issued before October 1, 1981.
\textsuperscript{96} 593 F.2d at 1379.
ing with the rights of plaintiff . . . to seek redress of her grievances.”

The circuit court noted a direct link between the bad faith exception to the Younger doctrine and the “likelihood of success on the merits” and “irreparable injury” requirements necessary for a preliminary injunction. It first held that “irreparable injury [for injunctive purpose] is sufficiently established if the federal plaintiff demonstrates that the state prosecution against him was brought in bad faith for the purposes of retaliating for or deterring the exercise of constitutionally protected rights.” Next, it noted that in order to meet the injunctive requirement of likely success on the merits “the plaintiffs must show the likely applicability of the Younger bad faith exception and . . . the likely existence of a constitutional violation causally related to the result sought to be enjoined.” Thus, bad faith for purposes of overcoming Younger and injunctive relief are integrally related and if such bad faith is established an injunction is appropriate without a showing of the traditional injunction requirements.

The court then articulated the following three part test to determine if bad faith enforcement exists: (1) whether the conduct allegedly retaliated against or sought to be deterred is constitutionally protected; (2) whether the criminal prosecution was at least partially motivated by a purpose to retaliate for that constitutionally protected conduct; and (3) whether the state can establish, by a preponderance of the evidence, that it would have prosecuted even if the impermissible retaliatory purpose did not exist. A retaliatory motive, the second prong of the test, is not satisfied if the prosecution was brought “solely in response to” the constitutionally protected conduct; rather, the plaintiff must establish that it was motivated “by a purpose to retaliate for or deter” such conduct. With regard to the third prong of the test, whether the state would have prosecuted anyway, factors to be considered include whether the prosecution was undertaken with no valid hope of a conviction and the significance of the alleged criminal activity. After an analysis of the Wilson decision and its test for bad faith, Judge Fitzpatrick applied the test to the Westin facts to determine if Westin had established bad faith and

97. Id. at 1380.
98. Id. at 1383-84. See also Fitzgerald v. Peek, 636 F.2d 943 (5th Cir. 1981).
99. 593 F.2d at 1383-84.
100. Id. at 1384-85.
101. Id. at 1387.
102. Id. at 1388.
103. Id. at 1387 n.22.
thus suffered irreparable injury so that the principles underlying *Younger* would not be offended by the granting of an injunction.

**Constitutionally Protected Conduct.** Judge Fitzpatrick cited *Houston v. Hill* for the proposition that Westin's conduct was constitutionally protected by the First Amendment as free speech. In *Houston* the plaintiff brought an action in district court under 42 U.S.C. § 1983 after being arrested for violating a city ordinance which made it illegal to oppose or interrupt an officer in the execution of his duty. The Supreme Court struck down the ordinance as overbroad, and pointed out that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." The Court recognized the exception for "fighting words that 'by their very utterance inflict injury or tend to incite an immediate breach of the peace.'"

In applying these guidelines to Westin's words, Judge Fitzpatrick found them to be constitutionally protected. He stated: "[i]f the constitution protects speech which publicly and intentionally hinders or interrupts an officer, then Westin's identification of McDaniel by her true name, which has all the markings of an innocent mistake, and the subsequent conversation are certainly protected speech also." Judge Fitzpatrick recognized that words alone could possibly rise to the level of obstructing an officer as prohibited by O.C.G.A. § 16-10-24, but did not believe that Westin's words put McDaniel in any danger or were overheard by anyone else in the bar, and therefore their utterance inflicted no injury and did not tend to incite an immediate breach of the peace.

In finding Westin's conduct to be constitutionally protected, Judge Fitzpatrick also noted that Westin was an attorney representing his client, and therefore in exercising his own First Amendment right of free speech he was attempting to protect his client's Sixth Amendment rights. While Westin's mere status as an attorney did not excuse the commission of a crime, Judge Fitzpatrick recognized "that the attorney-client relationship is a privileged one in our society, and that the exis-
tence of such a relationship requires an attorney to sometimes take affirmative steps to guard the interests of his client."  

A Retaliatory Prosecution. Relying solely on the facts and no supporting case law, Judge Fitzpatrick found that the decision to prosecute Westin was motivated, at least in part, by District Attorney Briley's desire to retaliate for Westin's exercise of constitutionally protected conduct.  

First, Judge Fitzpatrick noted that Briley neither attempted to contact Westin nor made any other type of investigation (even though he purportedly held Westin in high regard) before ordering Westin's arrest.  

Second, the assistant district attorney who had represented the state at the commitment hearing had admitted at the end of that proceeding that the charges amounted only to a misdemeanor. Finally, Judge Fitzpatrick reached the conclusion that the grand jury was recalled solely to hear the charges against Westin. Although Briley testified that he had cases other than Westin's to present, he completely dismissed the grand jury when the district court's temporary restraining order, prohibiting him from presenting evidence against Westin, was issued.  

Briley testified that he recalled the grand jury to give Westin the benefit of an additional tribunal on the misdemeanor charge; he apparently felt that Judge O'Connor's order contained a mistake and reconvened the grand jury without seeing a transcript of the commitment hearing. However, Judge Fitzpatrick emphasized that the reconvening of the grand jury would receive much publicity and would give the state a second chance to establish probable cause in a more favorable atmosphere. Based on these facts, Judge Fitzpatrick ruled that Westin had met his burden of establishing that the decision to prosecute him was made, at least in part, in retaliation for his encounter with McDaniel.  

Whether the State Would Have Prosecuted Anyway. Under the final prong of the Wilson test, Judge Fitzpatrick ruled that the State had failed to carry its burden of proving that it would have prosecuted  

112. Id.  
113. Id.  
114. Id. at 1573.  
115. Id.  
116. Id.  
117. Id. at 1573-74.  
118. Id. at 1573.  
119. Id. Judge Fitzpatrick pointed out in a footnote that there was an unproven suggestion that Briley recalled the grand jury in an attempt to get a finding of probable cause in order to insulate himself from a suit for false arrest and malicious prosecution. Id. at 1573 n.8.  
120. Id.
without the retaliatory motive. In reaching this decision, he considered the relevant factors espoused in Wilson.

First, Judge Fitzpatrick found that the prosecution was undertaken with no hope for a valid conviction because the state could not prove that Westin had acted "knowingly and willfully" as required by O.C.G.A. § 16-10-24. He noted that while Westin's conduct was not beyond reproach, if Westin had really desired to expose McDaniel an anonymous phone call to the bar would have better served that purpose. Further, there was an absence of any solid evidence, such as testimony from a patron of the bar, that the conversation exposing McDaniel's true identity was overheard.

Judge Fitzpatrick refuted the state's argument that because the purpose of the commitment hearing was to determine probable cause to detain, not to prosecute, the state had not put its best case forward, and therefore the record could not be read as establishing no hope for a valid conviction. He noted that the testimony of the witnesses at the commitment hearing, including McDaniel's testimony, was substantially the same as that presented to the district court. It was inconceivable to Judge Fitzpatrick that the same evidence presented to the grand jury could produce additional facts that would establish the element of intent that was lacking at the hearing. Additionally, contrary to the state's assertions, he found that a judge at a commitment hearing in Georgia is empowered to determine whether there is probable cause to believe that a defendant is guilty, a finding which authorizes the judge to detain the accused. Based on these circumstances, Judge Fitzpatrick ruled that "the State almost certainly was presenting its best case at the commitment hearing and would have made the same effort before the grand jury, so that the earlier determination that probable cause was absent is a good indication that there was no hope for a valid conviction."

With regard to the second factor relevant to whether the state would have prosecuted, Judge Fitzpatrick concluded that the insignificance of the misdemeanor charges could only justify the state's efforts to prosecute

121. Id.
122. Id. See supra note 103 and accompanying text.
123. 760 F. Supp. at 1574 n.9.
124. Id. at 1574 & n.10.
125. Id. at 1574.
126. Id.
127. Id.
128. Id. O.C.G.A. § 17-7-23(a) provides: "The duty of a court of inquiry is simply to determine whether there is sufficient reason to suspect the guilt of the accused and to require him to appear and answer before the court competent to try him. Whenever such probable cause exists, it is the duty of the court to commit." O.C.G.A. § 17-7-23(a) (1990).
129. 760 F. Supp. at 1574.
if the retaliatory and deterrent motives were present. The time and effort expended by high-ranking officials and the fact that a grand jury was reconvened to hear a misdemeanor charge after a judge specifically found no probable cause to turn the case over to that body, taken together with the fact that there was no hope for a valid conviction, led Judge Fitzpatrick to the conclusion that the state would not have prosecuted absent the purpose of retaliation.

Thus, Judge Fitzpatrick was satisfied that the decision to prosecute Westin was motivated by bad faith as espoused in Wilson, and even if there were a case pending against Westin in state court, the Younger doctrine did not preclude injunctive relief. Moreover, since Westin overcame Younger by a showing of bad faith, he would be entitled to injunctive relief even without a showing that the traditional injunction requirements were satisfied.

V. Analysis

The crux of Judge Fitzpatrick's opinion is centered upon his finding that there was no case "pending" against Westin in state court at the time he brought his action for an injunction. Consequently, Younger and its companion cases were inapplicable, and the district court was not precluded from granting injunctive relief.

It is a well settled tenet of Georgia criminal procedure that "dismissal of charges [at a commitment hearing] based upon lack of probable cause does not bar the subsequent indictment and trial of a defendant of the same charges." This hiatus between the dismissal of charges and the return of an indictment by a reconvened grand jury certainly presents a gray area with regard to whether an action remains "pending" for Younger purposes. Clearly, as Judge Fitzpatrick found, there was no warrant to present to the grand jury on March 12. But such a finding is not necessarily dispositive. Indeed, if the court of inquiry's mere dismissal of charges unqualifiedly terminates a case, permitting a criminal defendant to seek refuge in federal court, then Younger's underlying purposes—to prevent duplicative legal proceedings and disruption of the state criminal justice system—are circumvented. Circumvention of Younger is especially true in a case like Westin where the district attorney reconvened

130. Id.
131. Id.
132. Id.
133. Id. at 1574 n.11. See supra note 74 and accompanying text.
135. 760 F. Supp. at 1567-68.
the grand jury a mere ten days after the conclusion of the court of inquiry's dismissal of charges.\textsuperscript{137} To rule that this brief interlude is a decisive break in the chain of events sufficient to permit federal intervention undermines the principles of equity, comity, and federalism that \textit{Younger} and its progeny were designed to protect.

Additionally, the holding of \textit{Hicks v. Miranda} makes clear that the application of \textit{Younger} is not merely formalistic, nor does the outcome of the civil proceeding depend on "a race to the courthouse."\textsuperscript{138} Even when state criminal proceedings are commenced after the federal complaint is filed, \textit{Younger} principles are still applicable so long as no "proceedings of substance on the merits" have taken place at the federal level.\textsuperscript{139} Judge Fitzpatrick's ruling that his own temporary restraining order was such a proceeding of substance on the merits so as to overcome \textit{Younger} is a misapplication of \textit{Hicks}.\textsuperscript{140} The restraining order was issued after an \textit{ex parte} conference on the very day the grand jury was about to hear evidence on the matter.\textsuperscript{141} Surely the Supreme Court did not intend for \textit{Younger} and its underlying, fundamental notions of comity and federalism to be so easily overcome. Indeed, \textit{Hicks} seemingly mandates the opposite ruling. In reaching its holding in \textit{Hicks}, the Court expressed concerns about "trivializing" the principles of \textit{Younger} and noted that those principles were particularly appropriate "where the party to the federal case may fully litigate his claim before the state court."\textsuperscript{142} In finding that its own temporary restraining order was a proceeding of substance, the district court not only trivialized \textit{Younger}, but also sanctioned the race to the courthouse that the Supreme Court had previously condemned.\textsuperscript{143}

Perhaps in recognition of the fallacies in his finding that there was no "pending" state prosecution, Judge Fitzpatrick alternatively ruled that even if a state proceeding were pending, the principles of \textit{Younger} were inapplicable because of the presence of bad faith.\textsuperscript{144} This finding, however, must also be subjected to closer scrutiny. In applying the \textit{Wilson} test of bad faith, Judge Fitzpatrick ruled that Westin's actions were constitutionally protected, that the state prosecuted Westin in retaliation for that constitutionally protected conduct, and that it would not have prosecuted without the retaliatory motive.\textsuperscript{145} Assuming that Westin's words to

\begin{itemize}
\item \textsuperscript{137} 760 F. Supp. at 1565.
\item \textsuperscript{138} 422 U.S. 332, 354 (1975) (Stewart, J., dissenting).
\item \textsuperscript{139} \textit{Id.} at 349.
\item \textsuperscript{140} See 760 F. Supp. at 1568 n.3.
\item \textsuperscript{141} \textit{Id.} at 1565.
\item \textsuperscript{142} 422 U.S. at 349.
\item \textsuperscript{143} \textit{Id.} at 354 (Stewart, J., dissenting).
\item \textsuperscript{144} 760 F. Supp. at 1572.
\item \textsuperscript{145} \textit{Id.} at 1572-74.
\end{itemize}
McDaniel were protected under the First Amendment as free speech, the subsequent finding of retaliation was improper and therefore the question of whether the state would have prosecuted without a retaliatory motive need not have been addressed.

The finding that District Attorney Briley's decision to prosecute was based on retaliatory motives is not supported by the facts or supporting case law. Judge Fitzpatrick based his ruling on Briley's failure to contact Westin or conduct an investigation, and his conclusion that the grand jury was reconvened solely to hear the charges against Westin. This ruling was supported by no probative evidence, however. A plaintiff alleging bad faith under Wilson must support his contentions by specific evidence, not conclusory allegations. In Hicks v. Miranda, the Supreme Court expressly overruled the district court's finding of bad faith on the part of state officials because "the findings of the district court were vague and conclusory." The Court placed particular emphasis on the fact that the prosecuting officials had relied on repeated judicial authorization for their conduct, and the district court made no attempt to impeach that authorization.

Likewise, in Westin, Briley's decision to reconvene the grand jury was completely within his authority and discretion as district attorney. So long as a prosecutor has probable cause to believe that the accused has committed a criminal offense, the decision whether or not to prosecute, and what charges to bring, rests entirely within the prosecutor's discretion. Further, the Supreme Court has recognized that this decision to prosecute "is particularly ill-suited to judicial review." Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All of these are substantial concerns that make the courts properly hesitant to examine the decision to prosecute.

Thus, the district court's finding of bad faith, based solely on conclusory and unsupported allegations, impermissibly interfered with the district attorney's discretion and certainly chilled law enforcement in the Ocmulgee Circuit.

146. Id. at 1573.
148. 422 U.S. 332, 350-51.
149. Id. at 351.
151. Id.
153. Id. at 607-08.
The Eleventh Circuit's affirmation without comment is somewhat perplexing because it is impossible to tell whether it was based on the district court's finding that there was no action pending in state court or the alternative finding that the district attorney sought the indictment in bad faith.\textsuperscript{154} The standard of review to be applied with regard to injunctive relief provides the most likely explanation. As the Supreme Court noted in \textit{Doran v. Salem Inn, Inc.}: "while the standard to be applied by the district court in deciding whether a plaintiff is entitled to a preliminary injunction is stringent, the standard of appellate review is simply whether the issuance of the injunction, in the light of the applicable standard, constituted an abuse of discretion."\textsuperscript{155} Thus, the Eleventh Circuit simply found that Judge Fitzpatrick did not abuse his discretion in providing Westin with injunctive relief.

In conclusion, \textit{Westin v. McDaniel} offers an insightful look at the pragmatism of the concerns of federalism and comity espoused in \textit{Younger} and companion cases. As evidenced by this Casenote, the decision of a district judge to intervene in a state criminal proceeding or refrain from intervening requires a careful analysis of case law and is not always an uncomplicated task. The Supreme Court and various appellate decisions have provided sufficient instruction, however. As noted by Judge Fitzpatrick, "a District Judge can, if he is careful, be guided through this legal minefield and reach a decision that respects both the time honored doctrine of federalism and the equally time honored rights of a citizen whose first amendment guarantees are in peril."\textsuperscript{156}

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\textsuperscript{154} Westin v. McDaniel, 949 F.2d 1163 (11th Cir. 1991).
\textsuperscript{155} 422 U.S. 922, 931-32 (1975).
\textsuperscript{156} 760 F. Supp. at 1575.