IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS
THIRD DIVISION

STATE OF ARKANSAS FILED **PLAINTIFF**

VS. **CASE NO: 23-CR-12-1044** 2013 FEB 28 PM 2 33

JACK W. GILLEAN **DEFENDANT**

BY _____ DC

DEFENDANT'S MOTION FOR SEVERANCE AND ELECTION

Comes now the Defendant, Jack W. Gillean, by and through his counsel, pursuant to Rule 22.2 of the Arkansas Rules of Criminal Procedure, and for his motion for severance states:

I. INTRODUCTION

On October 5, 2012, the Prosecuting Attorney for the 20th Judicial District filed a five count felony Information against the defendant charging him with three counts of burglary, one count of fraudulent insurance acts and one count of issuing a false financial statement. Rule 22.2 of the Arkansas Rules of Criminal Procedure provides, in pertinent part, as follows:

> (a) Whenever two (2) or more offenses have been joined for a trial solely on the ground that they are of the same or similar character and they are not part of a single scheme or plan, the defendant shall have a right to a severance of the offenses.
> (b) The court, on application of the...defendant, other than under subsection (a), shall grant a severance of offenses:
> (i) if before trial, it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each offense...

In an obvious attempt to comply with the provisions of Rule 22.2, the prosecutor has alleged that each of the offenses occurred "on or about March 8, 2011 through April 23, 2011." But, that is the only thing that makes the burglary, insurance fraud and false financial statement charges similar on their face. While the Information contains little, if any, allegations from which the Court could discern whether the offenses charged are part of a common scheme or

plan, from the prosecution's statements to the media, the burglary charges concern the alleged use of the defendant's master key to give access to professors' offices for the purposes of stealing final exams. The fraudulent insurance act charge has to do with damage to a motorcycle and the false financial statement charge has to do with a financial application for a vehicle for which Mr. Gillean was allegedly a co-signer. No facts are alleged, nor do they exist, to show that the offenses were part of some type of scheme or plan on behalf of the defendant. Based on the allegations, the burglary charges are the only charges that appear to be part of some type of alleged scheme or plan. The other two charges have nothing to do with the burglary charges or each other.

It would be unfairly prejudicial to try the burglary charges with the fraudulent insurance act and false financial statement charges. Obviously, the evidence on the burglary charges will potentially be more inflammatory than the evidence on the other charges. As a consequence, unfair prejudice will waft over onto the remaining charges and deny the defendant a fair trial.

II. APPLICABLE LAW

In order to survive a challenge of misjoinder of offenses, a prosecutor must do more than show, at a minimum, that the offenses are similar – if not identical. *Bunn v. State*, 320 Ark. 516, 898 S.W.2d 450 (1995). That bare minimum is not even present in this case. Furthermore, while Rule 21.1 of the Arkansas Rules of Criminal Procedure is a broad rule for joinder of offenses, the Arkansas Supreme Court has noted that the severance rule, Rule 22.2, "recognizes the grave risk of prejudice from joint disposition of unrelated charges and, accordingly, provides a defendant with an absolute right to a severance of offenses joined solely on the ground that they are of the same or similar character." *Clay v. State*, 318 Ark. 550, 886 S.W.2d 608 (1994). In *Clay v.*

State, the Arkansas Supreme Court, also made its position clear regarding what constitutes "a single scheme or plan" stating that:

> A single scheme or plan is discussed in the 1987 unofficial Supplementary Commentary to Rule 21.1 as follows: 'One who burglarizes an office on January 1 and a home on February 1 may be charged in the same Information with both offenses, since they are "of similar character." He would be entitled to a severance under Rule 22.2(a), however, unless the offenses were part of a single scheme or plan or criminal episode. Even though roughly the same type of conduct might be argued to be involved in both burglaries, justifying joinder under Rule 21.1(b), the term "same conduct" in Rule 21.1(b) was probably intended to be read literally to refer to contemporaneous events and to permit joinder in a situation where, for example, a defendant robs three persons simultaneously.
>
> *Id.* at 554, 610.

In conformity with that commentary, Justice George Rowe Smith stated in his concurring opinion in *Teas v. State*, 266 Ark. 572, 575, 587 S.W.2d 28, 30 (1979), the following:

> Criminal procedure Rule 22.2 gives the defendant an absolute right to a severance when two or more offenses have been joined for trial solely on the ground that they are of similar character, but they are not part of a single scheme. Here the two offenses, sales of drugs, are unquestionably similar; so the controlling question is whether they were committed as part of a "single scheme or plan."
>
> I think it plain that they were not so committed. The purpose of Rule 22.2 is to give effect to the principle that the State cannot bolster its case against the accused by proving that he has committed other similar offenses in the past. *Alford v. State*, 223 Ark. 330, 266 S.W.2d 804 (1954). There are exceptions to that principle, however, as when two or more crimes are part of the same transaction, *Harris v. State*, 239 Ark. 771, 394 S.W.2d 135 (1965), cert denied, 386 U.S. 964 (1967), or when two or more offenses have been planned in advance, as part of a single scheme. *Ford v. State*, 34 Ark. 649 (1879). The intent of Rule 22.2 must have been to carry into effect the spirit of those exceptions by permitting the charges to be tried together when they are part of a single scheme.

III. DISCUSSION

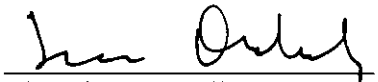
The record in this case will be void of any evidence that the offenses charged in Counts I-III were planned in advance or that Counts IV and V were part of the offenses charged in Counts I-III. Moreover, based on the prosecution's statement to the press, there won't be any evidence that any of the burglaries were planned in advance, much less a part of a common scheme or plan. In any event, it would be unfair to the defendant and would deny him a fair opportunity to defend himself if the prosecution is allowed to prove a charge and then prove a second charge because the defendant allegedly committed the first charge. That was the problem in *Bunn*, *Clay*, and *Teas*, *supra*.

IV. CONCLUSION

Under the circumstances of this case, and based on the charges contained in the Information, the Court should sever the charges against the defendant and direct the prosecution to elect which charge it intends to try first.

WHEREFORE, the Defendant prays for an Order of this Court granting his motion and for any and all other just and proper relief to which he may be entitled.

Respectfully submitted,

By: 

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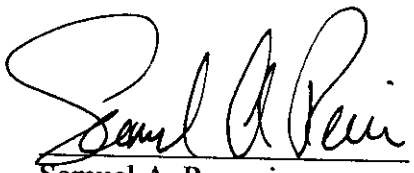
By: 

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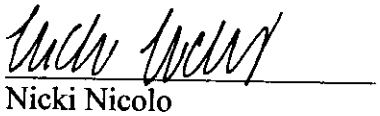
By: 

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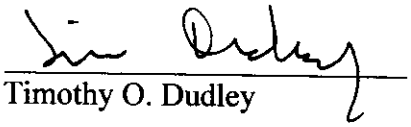
CERTIFICATE OF SERVICE

I, Timothy O. Dudley, do hereby certify that a true and correct copy of the foregoing has been served upon the Prosecuting Attorney, Cody Hiland, via hand delivery this 28th day of February 2013.



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