IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS
THIRD DIVISION

STATE OF ARKANSAS **PLAINTIFF**

VS. **CASE NO: 23-CR-12-1044**

JACK W. GILLEAN **DEFENDANT**

DEFENDANT'S BRIEF IN SUPPORT OF HIS RESPONSE TO THE MOTION TO QUASH SUBPOENA

In its Brief in Support of Motion to Quash Subpoena, the Assistant Attorney General, apparently representing Deputy Prosecuting Attorney Troy Braswell, sets forth the following reasons why the subpoena that was issued to Mr. Braswell for his testimony at the pre-trial hearing on Defendant's Motion to Change Venue should be quashed:

1. An attorney who represents a party to litigation may not be compelled to testify in a case in which he is counsel of record absent extraordinary circumstances.

2. A party may call opposing counsel as a witness only after meeting a three-pronged test designed to prevent parties from using Rule 3.7 as a sword to hinder the opposing party's case by calling opposing counsel as a witness and thereby disqualifying opposing counsel from the case under Rule 3.7.

3. A party who seeks to call the attorney to testify must demonstrate that the attorney's testimony is material to the determination of the issues before the Court, that the evidence is unobtainable elsewhere, and that the evidence is prejudicial to the testifying attorney's client.

First, Movant assumes, without any evidence or substance, that the defendant is seeking to disqualify him as an attorney in the case by subpoenaing him as a witness at the hearing. This conclusion could not be further from the truth. The defense welcomes Mr. Braswell into the trial

of this case and will look forward to doing battle with him. Secondly, Movant misses the mark in his citation of authorities. All but one of the cases cited by Movant are civil cases where disqualification was sought by one of the parties. In the only criminal case, *Chelette v. State*, 308 Ark. 364, 824 S.W.2d 389 (1992), the prosecutor testified and disqualification was denied. Defendant is not seeking disqualification of Mr. Braswell or Mr. Hiland. Furthermore, Mr. Braswell and Mr. Hiland have not been, nor will they be, subpoenaed as trial witnesses. At this point in the proceedings, we are dealing with a pre-trial motion in a criminal case where an accused has the constitutional right to compulsory process.

The media attachments to Defendant's Motion to Change of Venue contain numerous references to unfiled material that was given to the press before and after Defendant was arrested on the current charges against him. In particular, there are numerous comments by members of the Prosecuting Attorney's office, including the Prosecutor himself, about certain "facts" contained within an affidavit, including purported statements of the state's star witness, Cameron Stark. Movant has acknowledged to defense counsel that the affidavit was not filed of record in this case and the defense was only given a copy of the affidavit by the prosecution a few days ago.

The defendant's allegations in his Motion for Change of Venue are clear. Pertinent portions of the change of venue are as follows:

> On October 5, 2012, an arrest warrant was issued for the defendant. The warrant was purportedly issued in conjunction with the filing of a felony information by the Prosecuting Attorney on October 5, 2012. On October 10, 2012, the defendant surrendered to authorities at the Faulkner County Detention Center. This surrender was by agreement after the defendant secured competent counsel to represent him.
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> Prior to the defendant's surrender on the arrest warrant, the Prosecuting Attorney, Cody Hiland, or one of his

deputies/subordinates, released to the press an "affidavit" purportedly containing "facts" providing probable cause to believe that the defendant committed certain criminal offenses. The press, both local and statewide, printed information and excerpts from the "affidavit" as well as numerous statements by the Prosecuting Attorney as to the evidence and strength of his case. Copies of the initial newspaper articles are attached hereto as Exhibit "A." In addition, the Prosecuting Attorney, and/or his deputies/subordinates, initiated contact with the television media to run stories on the charges being made against the defendant. A CD containing a sampling of the television coverage is attached within an envelope marked Exhibit "B" and attached hereto. The CD also contains online video recounting the same material allegedly contained in the "affidavit" as well as the charges contained in the Information.

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Rule 3.8 of the Arkansas Rules of Professional Conduct provides, in relation to statements by prosecutors to the media, as follows:

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'(e) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this rule.'

It can be safely said in this case that the Prosecuting Attorney's Office has engaged in a systematic effort to prejudice the defendant in the media and bias the public against him. This calls into question whether the defendant can obtain a fair trial in Faulkner County, Arkansas. A prosecutor's duty is to see that justice is done in every case. But, in this case, the prosecution and law enforcement have done everything they can to see to it that the defendant does not receive a fair trial. For example, the defendant surrendered on the arrest warrant at the Faulkner County Detention Center and alerted authorities that he would immediately post the $17,500 bond that had been set when the charges were filed. All concerned knew the defendant would be appearing at the detention center with a bondsman and his attorney on the morning of

> October 10, 2012. Nevertheless, the law enforcement officials, with the knowledge of the Prosecuting Attorney's office, had the defendant put on a gray and white striped detention center uniform over his collared button down shirt for his routine mug shot and made it immediately available on the internet by visiting http://www.faulkner countybooked.com. Five minutes after the mug shot was made, the defendant was allowed to remove the gray and white striped uniform. Then, the mug shot was promptly given to local media outlets which aired and printed it. Please see Mr. Gillean's mug shot attached as Exhibit "F."
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> Moreover, the Prosecuting Attorney has continually quoted from his "affidavit" when contacted by the media, or when the Prosecuting Attorney's office solicited media attention, and the "affidavit" is not part of the defendant's file. As a matter of fact, while the media has the "affidavit," or parts thereof, neither the defendant nor his attorneys had laid eyes on it until counsel was gathering exhibits for this motion and stumbled upon a link to the "affidavit" in an internet media report. To date, the Prosecuting Attorney has not provided the defense with a copy of such.
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> The prosecution's interviews with the media and leaking of an "affidavit" to the media has greatly prejudiced the defendant in the eyes of the public and the prejudice has been the direct result of the Prosecuting Attorney's office intentionally inviting the publicity in violation of their ethical responsibilities.

The Prosecuting Attorney's office has objected to Defendant's Motion for Change of Venue therefore necessitating a hearing where the defendant will be called upon to carry the burden of proof on the change of venue issues. Of course, a concession by the prosecution that this case should be moved out of Faulkner County would make Defendant's subpoenas to the prosecuting authorities moot and unnecessary. But, at this juncture, no such concession has been made.

As previously stated, Movant's authorities are completely inapposite to the issues in this case. The subpoena is for Mr. Hiland and Mr. Braswell to testify at the hearing. There are other Prosecuting Attorneys in the office that can handle cross-examination of Mr. Braswell during the

hearing and Mr. Braswell can handle the remainder of the hearing before and after he testifies. Movant's testimony will not "disqualify" him from acting as the Deputy Prosecuting Attorney in this case. The defense submits that this motion is a smokescreen to prevent the defendant from getting to the truth about the prosecution's systematic attempt to prejudice him in the eyes of the public, including potential jurors.

Rules of Prof.Conduct, Rule 3.7 specifically states: "(a) A lawyer shall not act as an advocate **at a trial** in which the lawyer is likely to be a necessary witness…" (Emphasis Added.) The Rule was clearly enacted to prevent lawyers from testifying and then advocating the truth of their testimony at trial. Mr. Braswell is not advocating when he testifies pursuant to a defense subpoena relating to prosecutorial misconduct in talking to the press about the "evidence." Furthermore, his appearance in the case cannot be subject to disqualification unless the defendant files an appropriate motion to disqualify. As previously stated, that is not the defendant's intent. See, *Arthur v. Zearley*, 320 Ark. 273, 895 S.W. 2d 928 (1995). The concerns about Movant testifying might be different if he wanted to testify as an advocate advancing the State's cause before a jury. *Arthur*, *supra*. An attorney can testify at a hearing and still continue to represent his client. See, *RLI Insurance Co. v. Coe*, 306 Ark. 337, 813 S.W. 2d 783 (1991). This is particularly true when the attorney has been subpoenaed by a defendant in a criminal case to testify at a pre-trial hearing.

Assuming that Rule 3.7 is applicable in this instance, the comment to Rule 3.7 provides the solution. It provides, in pertinent part:

> Apart from these two exceptions, Paragraph (3) (the hardship exception) recognizes that a balancing is required between the interest of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance, and probable tenor of the lawyer's testimony and the probability that the lawyer's testimony will

> conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness.

There is no doubt from Defendant's Motion for Change of Venue that the Faulkner County Prosecuting Attorney's office would have some, if not all, of its attorneys subpoenaed to the hearing to testify about their communications with the press in the Gillean case. There also is no doubt that the Prosecuting Attorneys should have anticipated this problem when they were holding their press conferences about the "evidence." The defendant assumes that the Prosecuting Attorneys will tell the truth. As a consequence, the State can show no prejudice from its attorneys testifying at a pre-trial hearing about what they know concerning the leak of the affidavit and the comments to the press.

Finally, a criminal defendant has a right to call a prosecuting attorney as a witness where the prosecuting attorney's testimony is material and favorable to the defense. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 1025 S. Ct. 3440, 73 L. Ed 2d 1193 (1982). See also, Article II, Section X of the Arkansas Constitution and the Fifth and Fourteenth Amendments of the United States Constitution; and, by way of example, *State v. Inman*, 395 S.C. 515, 720 S.E. 2d 31 (S.C. 2011). In *Inman*, the Court held, among other things, that:

> Although a prosecuting attorney is competent to testify, his testifying is not approved by the courts **except** where it is made necessary by the circumstances of the case….the propriety of allowing the prosecutor to testify is a matter largely within the trial court's discretion.

(Emphasis Added.)

Irwin S. Barbre, in his annotation, *Prosecuting Attorney as a Witness in a Criminal Case*, 54 A.L.R. 3d 100 (1973 and Supp. 2011), analyzed many cases where the propriety of a

prosecuting attorney's testifying on behalf of the prosecution or on behalf of the defendant was at issue. He recognized that such a decision is dependent upon the facts of the case, is discretionary, and generally does not require the prosecutor to withdraw or be recused from the case when called on behalf of the defendant. See also, 81 *Am Jur. 2d, Witnesses , section 229* (2004 and Supp. 2011) Likewise, the *Inman* court recognized this proposition in holding:

> However, even if a prosecutor is called as a witness by the defense, it is not always necessary for a trial judge to recuse the prosecutor or the prosecuting attorney's office in its entirety. In fact, '[t]here is no inherent right to disqualification when a member of the state attorney's office is called as a witness in a case prosecuted by a state attorney in the same office, unless actual prejudice can be shown.' 81 Am. Jur. 2d Witnesses § 229(204 and Supp. 2011); People v. Superior Court of San Luis Obispo, 84 Cal. App. 3d 491, 148 Cal. Rptr. 704, 710 (Cal. Ct. App. 5th District 1978) ("the general rule is that a district attorney's office should not be recused from a case merely because one or more of his attorneys will be called as witnesses for the defense.")

In conclusion, Movants' angst over being called as witnesses at a criminal pre-trial hearing in which the Prosecuting Attorney's office is accused of ethical misconduct in orchestrating media prejudice against the defendant is misplaced and the motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nicki Nicolo, do hereby certify that a true and correct copy of the foregoing has been served upon the Assistant Attorney General, Colin Jorgensen, via electronic mail this ___ day of April 2013.

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Nicki Nicolo