IN THE CIRCUIT COURT OF GARLAND COUNTY, ARKANSAS
FIRST DIVISION

STATE OF ARKANSAS **PLAINTIFF**

VS. **CASE NO.: CR-16-115**

WADE THOMAS NARAMORE **DEFENDANT**

RESPONSE IN OPPOSITION TO STATE'S MOTION FOR CONTINUANCE

The Defendant, Wade Naramore, by and through his attorneys, Erin Cassinelli of Lassiter & Cassinelli and Patrick Benca of Benca & Benca, states in support of his Response in Opposition to State's Motion for Continuance:

1. The State's motion should be denied. The State has had almost a year since this incident to prepare its case and provides no reasonable excuse to justify a continuance. On March 11, 2016, this Court arraigned Mr. Naramore and accepted his plea of not guilty. At arraignment, the parties expressed the necessity of trying the case in a short time frame. The State agreed to the trial date, and it was made clear by all parties, the Defendant in particular, that it was necessary to try the case forthwith. Thus, after checking the Court's calendar and counsels' calendars, the Court scheduled an omnibus hearing for June 3, 2016 and trial for June 14-17, 2016.

2. Within three days of the incident on July 24, 2015, the State began the process to appoint Special Prosecutor Scott Ellington to determine if charges would be filed. By July 27, 2015, the Hot Springs Police Department ("HSPD") knew the essential facts related to the incident. See Exhibit

3. On or about August 3, 2015, prosecutor Scott Ellington told the media he was reviewing the investigative information, continuing to gather information, and evaluating it to make a charging decision. He mentioned that he and his staff had at that point met twice with investigators. See Exhibit On or about December 7, 2015, the prosecutor told the media that he was waiting on additional reports and information from two entities outside of the HSPD. See Exhibit Again, on or about January 7, 2016, the prosecutor said that although the investigation was largely completed, there were a few additional leads for investigators to follow up on. See Exhibit The file produced by the State does not show any following up on investigative leads in January, or even months prior to January. These are but a few examples of comments the prosecutor has made to the media about this case in the previous ten months that have not been borne out by the information provided.

4. Although the warrant was issued February 11, 2016, it was authored on October 28, 2015 and signed by Detective Mark Fallis on January 13, 2016. See Exhibit Mr. Naramore surrendered on the warrant the day it was issued. Very apparently it was not necessary to gather more information in 2016 in order to proceed.

5. The State charged Mr. Naramore by Information filed on February 22, 2016, nearly seven (7) months after the Naramores lost their child. The Information alleges the Defendant committed the offense of negligent homicide on July 24, 2015. Since July 24, 2015, the facts and circumstances of the case have not changed, and, based on a review of the discovery received thus far, it does not appear the State obtained any evidence relevant to the case for many months.

6. During that seventh month period prior to the filing of charges, however, defense counsel regularly contacted Mr. Ellington by phone and in writing to urge him to make a decision – any decision – in the case. During those seven months, several conversations were had with Mr. Ellington and defense counsel. Counsel urged a decision and advised that if charges were to be filed, the defense would be prepared for trial at the first opportunity. Mr. Ellington acknowledged that the reasons for making this request of him were sound. In December of 2016, when rumors swirled about an imminent filling decision, defense counsel offered Mr. Ellington the opportunity to speak with an expert on the central issue in this case; Mr. Ellington declined. Having knowledge, then, that the defense had an expert to speak about the case, it is disingenuous to now claim a lack of notice. In addition to several conversations, defense counsel provided Mr. Ellington an article in the Washington Post pertaining to the occurrence that is the subject of the charge in this case.[1] Mr. Ellington indicated he had received the article from others as well. That article includes a healthy discussion from Dr. Diamond, an expert on the central issue in the article and this case.

7. The State now asserts that defense counsel's identification of Dr. David Diamond as a witness justifies a continuance. The State, however, has never requested any information from the Defendant whatsoever; only on today's date – May 31, 2016 – did the State file a motion for discovery.[2] Even so, on May 23, 2016, despite having not received any request, out of a need and desire to try the case promptly and to negate any asserted delay by the State, defense counsel notified the State of their intent to call Dr. Diamond as a witness. Defense counsel provided notice of Dr. Diamond's status as the Defendant's expert along with a nearly fifty-page curriculum vitae that includes excerpts from and links to research projects, studies, articles, interviews, and journals and presentations. See Exhibit This document provides more to the State regarding this expert's testimony than the law would require any defendant to provide.

8. In discovery, the State produced a document from DHS that the State had received from DHS on September 11, 2015, although it was not produced to Mr. Naramore until May 17, 2016, following a motion to compel. In that document, an entire page is dedicated to a review of information and data from carsandkids.org, explaining how a parent can unknowingly leave a child in a car and how a child dies in such a situation. That information is cited in the report to Dr. David Diamond, Neuroscientist, University of South Florida. As State's own file cites Dr.

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[1] **Error! Main Document Only.**Fatal Distraction: Forgetting a Child in the Backseat of a Car is a Horrifying Mistake. Is it a Crime? https://www.washingtonpost.com/lifestyle/magazine/fatal-distraction-forgetting-a-child-in-thebackseat-of-a-car-is-a-horrifying-mistake-is-it-a-crime/2014/06/16/8ae0fe3a-f580-11e3-a3a5-42be35962a52_story.html

[2] The State's discovery motion requests a "short plain statement" of each defense witnesses' expected testimony, which is not required by the Arkansas Rules of Criminal Procedure.

Diamond's expertise as it pertains to the circumstances of this case, the State is hardly in a position to claim surprise at the naming of Dr. Diamond as an expert in the case. Indeed, it had been aware of Dr. Diamond since at least September 11, 2015.

9. Because of the State's failure to provide significant information in discovery, defense counsel have been unable to make certain informed decisions in the case – such as whether to call an expert witness – because counsel did not have certain highly relevant materials necessary for an expert to review and provide an opinion. Even so, despite the lack of information, defense counsel disclosed their intent to name Dr. Diamond as an expert witness to avoid the need for any further delay of the resolution of this matter.

10. The State complains that the defense has not disclosed "what they intend to have said expert testify to regarding this case." First, the State may refer to the report it belatedly sent to defense counsel for that information or to Dr. Diamond's curriculum vitae. Second, the State has not requested any additional information from defense counsel pertaining to Dr. Diamond (or anything else) until today, so the State cannot be heard to complain about a lack of information from defense counsel. Third, since Dr. Diamond has not generated a report, there is nothing to provide to the State in this regard.

11. The State also says it "would like an opportunity to speak with the Defendant's expert witness, and, if necessary, consult with an expert witness as well" and that the current trial date does not allow it time to do so. Although the defense offered to do this prior to the charging decision, the State has no right to speak with Dr. Diamond. While Dr. Diamond and defense counsel may or may not permit such a discussion at this point, it is presumptuous to presume such a conversation and odd to claim such a basis for continuance, especially given the State has never requested to speak with Dr. Diamond and in fact declined an offer to do so. Further, since the State's own file relies on Dr. Diamond's expertise, it is difficult to imagine the State could or would identify a counter-expert to testify against him. Furthermore, the State has the burden of proof, and the State has always had a right to call any expert witness it sees fit to prove its case; thus, in preparing its case, that decision should have already been considered.

12. Defense counsel did not receive any material response from the State to any correspondence until Charles Finkenbinder contacted counsel to begin providing discovery on May 16, 2016 (after a motion to compel). Without most of the material discovery and without any meaningful communication from the State about the case, defense counsel were forced to prepare a case without much information, but they did so in order for the case to be tried forthwith, as planned.[3]

13. The State also claims that the medical examiner, Dr. Forsyth, is unavailable to testify "the week this case is currently scheduled for trial." In Dr. Forsyth's original report of August 24, 2015, she determined cause and manner of death were undetermined. In a February 24, 2016 "addendum" to that report, she found cause of death to be "environmental hyperthermia" and manner of death to be "accident" and explained that these findings were based only on

[3] Notably, counsel were only informed last week that some of the information sought by the motion to compel was lost by HSPD some time ago.

investigative information from HSPD and not any specific autopsy findings. Thus, Dr. Forsyth's testimony provides no information to support a conviction in the case; there is simply no medical testimony necessary and any testimony Dr. Forsyth can give will be based on hearsay from HSPD that will be attested to by HSPD. Furthermore, the defense would stipulate to the introduction of her reports if necessary to avoid a continuance due to her absence or would agree to permit the testimony of a supervisor who signed off on the reports if Dr. Forsyth is unavailable.

14. It is not clear from the State's motion why Dr. Forsyth is unavailable for any day the week of June 14, 2016. If Dr. Forsyth could be available any day between June 14 and 17, 2016, she could testify in this case. Thus, if the State maintains Dr. Forsyth as a basis for continuance, the defense would request the Court order the State to provide more detailed and supported information concerning her inability to testify the week of June 14, 2016. According to information defense counsel obtained from the ASCL, Dr. Forsyth has been summoned for jury duty on June 13, 2016 in Pulaski County. Thus, if she is not selected, she will be free to testify at trial. If she is selected as a juror, she will not necessarily be unable to testify June 14-17, 2016. Further, it is likely that if she is under subpoena, a circuit judge would excuse her from her obligation for that week. The State should issue her a subpoena so that she may request she be excused from jury duty.

15. The State also complains that the lead prosecutor was reassigned to cover a different court late last week and was thus removed from the case. First, Mr. Finkenbinder began calling defense counsel on May 20, 2016 regarding his removal from the case. Second, since Mr. Ellington elected to move Mr. Finkenbinder to a different court, he cannot now use his own decision as a basis for continuance. The defense had no role in that decision. Third, counsel's information is that Mr. Finkenbinder withdrew from the case for reasons that have long been apparent and that do not provide any basis to continue the matter at this late date. If the State maintains Mr. Finkenbinder as a basis for its motion for continuance, the defense would request a more detailed and supported good faith basis for the necessity of his removal from the case and the timing thereof. Lastly, the State had three attorneys at the arraignment of this case, leaving two attorneys who have been assigned and up to speed since it started. Given Mr. Naramore has two attorneys, two attorneys from the State should suffice.

16. Additionally, the State agrees that the Defendant's sealed motion should be granted in whole or in part but complains there will not be sufficient time to proceed as to the motion and conduct the trial in a timely manner. The State is in possession of the Defendant's proposed document at issue in the motion, and defense counsel have asked the State to provide objections and suggestions such that the parties can agree on a document to submit to the Court. If the State agrees the motion should be granted, it should promptly communicate its suggestions to the Defendant, alert the Court of its position, and initiate the process immediately. If done immediately, there is sufficient time to conduct the trial as scheduled.

17. Defense counsel have coordinated with many witnesses concerning the trial date. Many witnesses are professionals who have taken off work or made other arrangements to be available

for the current trial date. At this point, at least ten people are planning to be available for testimony the week of June 14, 2016.

18. Mr. Naramore and his counsel made clear at arraignment that it was necessary to schedule trial of this case as quickly as possible. They have also made it clear that they did not prefer a continuance, despite the State's belated attempts to meet its discovery obligations. See Motion to Compel, May 12, 2016. The Naramore family desperately desires to move forward after the devastating loss of their child. But, more importantly for the Court and both parties, the public has a strong interest in the prompt disposition of this case. The State and County are spending valuable resources due to Mr. Naramore's suspension from his role as a Circuit Judge due to the charge, the legal requirement that he remain on paid leave until the conclusion of the case, and the need for replacement judges to handle his docket. And, while the members of the public remain unclear about the accurate facts and circumstances of the case and the application of Arkansas law to those facts and circumstances, it is clear from the voluminous amount of public statements about the case that providing this clarity is of the utmost importance to the citizens of the State of Arkansas.

19. The State has yet to file to any written response to motions the Defendant has filed, including the Motion to Compel, filed on May 12, 2016 and the Motion for Bill of Particulars, filed on May 16, 2016. The State also refused to provide adequate discovery despite numerous written requests by defense counsel. See Motion to Compel, May 12, 2016. The State has not requested *any* information from the Defendant whatsoever, to include information about Dr. Diamond (or any discovery), or about stipulations or other agreements that could alleviate some of the concerns about Dr. Forsyth. In sum, the State has not made a good faith attempt to prepare for a June 14, 2016 trial date or to alleviate its concerns about its inability to prepare for a June 14, 2016 trial date. The fact is that Mr. Ellington solely controlled the circumstances that give rise to his motion for continuance and should not now be permitted to use circumstances that he created to justify a delay.

20. The defense requests the Court consider evidence and arguments at the June 3, 2016 hearing pertaining to the reasons suggested for requesting a delay and pertaining to the delay of seventh months before charging the case, as each issue raised herein has evidentiary weight in deciding the merits of the State's request to continue the trial.

WHEREFORE, premises considered, the State's motion for continuance should be denied; that the Defendant get an opportunity to have a hearing on the issue; and for all other relief the Court deems just and proper.

Respectfully submitted,

/s/ Erin Cassinelli

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent to the Prosecuting Attorney via fax on May 31, 2016.

/s/ Patrick J. Benca
PATRICK J. BENCA