Filed: 7/14/2020 3:54 AM
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CAUSE NO.

THE STATE OF TEXAS	IN THE
VS.	JUDICIAL DISTRICT COURT
	COLLIN COUNTY, TEXAS

DEFENDANT'S RESPONSE TO
STATE'S MOTION TO QUASH SUBPOENAS

TO THE HONORABLE JUDGE OF SAID COURT:

The Defendant responds to the Collin County District Attorney's Motion to Quash the subpoenas served on three of its assistant district attorneys (ADAs) and asks the Court to deny the State the relief it seeks and swear in the prosecutors for the July 16, 2020 hearing on Defendant's Motion to Dismiss.

I. INTRODUCTION

"**The prosecutor took the stand last**."[1]

1. Essentially, the State's motion should be denied in full because: (1) under the *Barker v. Wingo* balancing test, the government bears the burden to justify its delay in the underlying matter's prosecution; (2) the prosecutor's testimony is essential to this Court's analysis under the *Barker* factors; (3) the ADAs' testimony will be directed to matters bearing on the second factor of the balancing test rather than to privileged

[1] *Pena v. State*, 353 S.W.3d 797, 805 (Tx.Crim.App. 2011) (after hearing testimony from the prosecutor, the court found that the State violated the defendant's constitutional rights under *Brady* and was therefore remanded for a new trial).

information[2]; and (4) the three ADAs' presence at the Motion to Dismiss cannot be assured otherwise.

2. The subpoenaed ADAs must testify in this matter. Their testimony will inform this Court's analysis of *Barker v. Wingo* factors two and four in the pending hearing on the Motion to Dismiss: (1) the State's reasons for the unreasonable delay in this matter; and (2) whether Defendant contributed to the delay.

II. DISCUSSION AND LEGAL ANALYSIS

3. The Motion to Quash seeks to prevent the three subpoenaed ADAs from testifying to facts which are solely in their possession and knowledge. The State's argument for quashing depends primarily on ignoring its burden under *Barker v. Wingo*, misconstruing the nature of "material and favorable evidence"[3] in the Motion to Dismiss context; claiming the testimony sought will necessarily be privileged;[4] and that the Texas Rules of Disciplinary Conduct can be used as a shield to a duty to testify under oath. These arguments and interpretations are legally deficient or misapplied.

A. Under *Barker v. Wingo*, the State has the burden to justify its delay.

4. This Court will soon "engage in a difficult and sensitive balancing process"[5] under the *Barker v. Wingo* factors at its hearing on Defendant's Motion to Dismiss. In the Speedy Trial context

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[2] *Barker v. Wingo*, 407 U.S. 514 (1972) (Supreme Court opinion stating the balancing test courts must use to analyze a speedy trial claim).

[3] Motion to Quash at pp. 1,

[4] *Id.* at 3.

[5] *Phillips v. State*, 650 SW 2d 396, 398 (Tex.Ct.Crim.App. 1983) (dismissing the prosecution even though the delay appeared to be unintentional because the State could offer no "tenable reason" for the delay and "negligence [is not] a justification").

> [t]he State bears the burden to justify a presumptively unreasonable delay.
>
> A deliberate attempt to delay the trial to hamper the defense should weigh heavily against the government.
>
> A negligent delay should weigh less heavily, but nevertheless should be considered because the ultimate responsibility for such circumstances must rest with the State rather than the defendant.[6]

Ervin v. State, 125 SW 3d 542, 546 (Tex. Ct. App. – Houston 2002) (citing *Phillips v. State*, 650 S.W.2d 396, 400 (Tex.Crim.App.1983) and *Barker v. Wingo*, 407 U.S. 514, 531 (1972) (internal citations omitted).

5. If the ADAs do not testify to the reasons for the presumptively unreasonable and prejudicial delay in this case, this Court cannot properly evaluate whether or not the delay was deliberate or negligent — and each finding is weighted differently. The dictates of *Barker v. Wingo* would be of no effect if the Court permits the State and record to remain silent on whether the government's delay is due to deliberate measures or negligence. The balancing test would be critically affected.

6. Therefore, the State's testimony on the reasons for delay is essential to this Court's balancing test analysis for the Defendant's Motion to Dismiss.

B. The State misconstrues the applicability and availability of Defendant's right to compulsory process.

7. The State misconstrues the standards of materiality and favorability in the motion to dismiss context with its argument that Defendant is not entitled to compulsory process against the ADAs. It appears the State is conflating standards for "reversible error" for excluded evidence with the Sixth Amendment right to compulsory process.

8. First, the determination of whether the delay in this case was either deliberate or negligent on the part of the State can only be favorable to Defendant, or, at

[6] *Ervin v. State*, 125 SW 3d 542, 546 (Tex. Ct. App. – Houston 2002) ((citing *Phillips v. State*, 650 S.W.2d 396, 400 (Tex.Crim.App.1983) and *Barker v. Wingo*, 407 U.S. 514, 531 (1972) (internal citations omitted).

worst, the factor is neutral but not weighted against Defendant. Defendant has sworn to enough facts in its Motion to Dismiss to make a plausible argument that the State, and not Defendant, was the cause of any delay.

9. ADA Singletary's explanation for the delay in an email to the Court on November 14, 2019 makes the prosecution's testimony both material and favorable to the Defendant's claim of the constitutional deprivation of a speedy trial.

10. ADA Singletary inserted herself into this case for the first time known to defense counsel on November 14, 2019 when she penned an email to this Court[7] that laid the blame for delay at Defendant's feet. Therefore, she made her testimony at the pending hearing on Defendant's Motion to Dismiss relevant, material, and favorable to the defense.

From: **Geeta Singletary** gsingletary@co.collin.tx.us
Subject: RE: Donihoo
Date: November 14, 2019 at 3:15 PM
To: Judge Andrea Thompson athompson@co.collin.tx.us, ss@shelliestephens.com, Bobby Huber jhuber@co.collin.tx.us
Cc: Judge John Roach Jr. judgeroach@co.collin.tx.us, Charla Kiser ckiser@co.collin.tx.us, Steven Janway sjanway@co.collin.tx.us

GS

Judge Thompson,

We are waiting on DNA. This case was set for trial this summer and the State was prepared to go forward without the DNA results. Defense counsel wanted the already submitted SANE kit tested, so at that time, the case was taken off of the trial docket and set for a status in November.

We were later told by defense counsel that she would like additional items submitted for DNA testing. We have reset this case for a status in April to accommodate that additional testing.

At this point, we are waiting on the lab results for ALL of the items submitted for DNA testing. We will put this case back on the trial docket as soon as we get the lab results. Hopefully, we receive them before the April status setting.

I hope that helps. Please let me know if you have any additional questions.

Best regards,

GEETA YADAV SINGLETARY
Assistant District Attorney
Crimes Against Children Division Chief
Collin County, Texas
(972) 548-3609

11. In her email, ADA Singletary asserts that defense counsel "later told" the prosecution that she wanted additional items submitted for testing. "Later" would

[7] *See* attached Exhibit 17, numbering continued from the Motion to Dismiss.

indicate post-July 8, 2019 at the very earliest and possibly includes as late as the 296th District Court's order to test issued on November 7, 2019.

12. But ADA Huber knew or should have known that defense counsel sought the testing on the potentially exculpatory additional items on the days listed in the declaration of defense counsel and the affidavit of defense investigator which predate ADA Singletary's email to the Court[8] and particularly on June 24, 2019 when defense counsel filed a Motion Requesting the Prosecution to File a List of Physical Evidence seeking a written list:[9]

Defendant requests that said written list informs Defendant of:

(a) the specific condition of the item of evidence when it was located;

DEFENDANT'S MOTION REQUESTING THE PROSECUTION TO FILE A LIST OF PHYSICAL EVIDENCE AND ALLOWING INSPECTION – Page 1 of 4

(b) where the item of evidence was located;

(c) which items of evidence have been subject to laboratory testing of any kind (forensics, serology, DNA, trace evidence analysis, etc.) whether in-progress, requested, or completed); and

(d) which items of evidence have not been submitted for laboratory testing of any kind.

[8] *See* Exhibits 2 and 3 to Defendant's Motion to Dismiss.

[9] *See* attached Exhibit 18, Defendant's Motion Requesting the Prosecution to File a List of Physical Evidence and Allowing Inspection.

13. Also in ADA Singletary's email to this Court, she states that the prosecution was "waiting on lab results for ALL of the items submitted for DNA testing."

14. The troubling aspect of this statement is that on November 14, 2019, no additional items had been sent for testing and defense counsel still had no knowledge of whether items had been sent or not.

15. But in fact, it was three days *after* the June 16, 2020 status hearing before this Court that the prosecution realized that their files did not contain a copy of the lab submission form for the additional items.[10] Therefore it is hard to see how anyone — prosecution or defense — could have known whether the items had been submitted for testing. The alternative would be that the prosecution knew the items had not yet been sent but failed to disclose the information to the defense.

16. The lab submission forms show that the additional items were not sent for testing until January 16, 2020[11] even though ADA Huber acknowledged to defense counsel on November 8, 2019 that the government was ordered to test the items at the November 7, 2019 in-chambers conference with Judge Roach, Jr. and that the same procedure for submitting and paying for the testing would be used, *i.e.*, the State would pay for the testing.[12]

17. Simply, the prosecution has suggested to the Court that the delay in this case could be attributable to the defense. In light of the upcoming balancing test which puts both the Defendant and the State's actions on the scale, the insinuation or misleading impression cannot be left unchallenged.

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[10] *See* attached Exhibit 19, email dated June 19, 2020.

[11] *Id.* at 3, upper right corner "Date Submitted: 01/16/2020."

[12] *See* attached Exhibit 20, email and accompanying responsive email dated Nov. 9, 2019.

18. The State cites *Coleman v. State*, 966 S.W.2d 525, 528 (Tex. Crim. App. 1998) for its proposition that the Defendant is not entitled to compulsory process unless the Defendant can prove that the ADAs' testimony will be both material and favorable to the underlying criminal case. However, *Coleman* is inapposite.

19. In *Coleman*, the defendant subpoenaed the testimony of two reporters to testify during the guilt/innocence phase of his trial regarding the "atmosphere" between two rival gangs which he felt would inform the jury and relate to his state of mind.[13] The two reporters who had done extensive investigation on the gangs moved to quash on First Amendment grounds.[14] On appeal, the Court of Criminal Appeals agreed with the Defendant that it was error for the judge to quash the two subpoenas, reversed the appeals court, and remanded the case for a new trial.[15] However, on rehearing, the court reversed itself.

20. Although *Coleman* is unavailing to the State in this case, it presents two points for the Court to consider: (1) the *Coleman* Court quotes without any contrary comment the State's argument that "under the Sixth Amendment Compulsory Process Clause, appellant had the burden of showing in the District Court that the testimony of the witnesses he sought would be both material (i.e., *relevant and important, and not merely cumulative*);"[16] and (2) that the requirements of materiality and favorability are intended to weed out "frivolous and annoying requests."[17] And these requirements can be shown by

[13] *Coleman v. State*, 966 S.W.2d 525, 527 (Tex.Ct.Crim.App.1998).

[14] *Id.* at 526.

[15] *Id.* at 527.

[16] *Id.*

[17] *Id.* at 528.

"a defendant who has not had an opportunity to interview a witness" by "establishing the matters to which the witness might testify and the relevance and importance of those matters to the success of the defense."[18]

21. The dissenting *Coleman* opinion points out the correctness of the Court's original decision to remand, stating that " subpoena "is to get the witness into court so that he can be questioned."[19] Otherwise, "[h]ow does one acquire the information necessary to make the showing of materiality and relevance?"[20]

> Pursuant to the majority's opinion on rehearing, obviously not via compulsory process subpoena. Perhaps via crystal ball or psychic hot-line?"[21]

22. The Defendant has met any burden to show materiality and favorability as well as has supported its assertions with sworn facts. The request for the ADAs' testimony is neither frivolous or annoying and is, in fact, relevant, important, and not merely cumulative.

C. The State's testimony will be directed to the second factor of the balancing test — justification for delay — which does not implicate matters of privilege.

23. The delay in this case involves assurances from the ADA to defense counsel that information about the potentially exculpatory DNA testing of the bedding would be forthcoming as the result of further investigation with the Collin County's Sheriff's Office or the District Attorney's investigators.[22]

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[18] *Id.*

[19] *Coleman* at 529.

[20] *Id.*

[21] *Id.*

[22] Akin to the recent email which disclosed the lab submission form dated Jan. 16, 2020 which was only added to the ADA's file on June 19, 2020. *See* attached Exhibit 19.

24. Testimony at the hearing will be sought to authenticate emails and documents as needed, to explain the prosecutors' silence in response to defense counsel's requests for information, reasons for the delays in testing and disclosures regarding the same to defense counsel, and the 69-day[23] delay from the Court's explicit order to test until the items were even sent for testing, and the prosecution's *ex parte* communication with this Court regarding the defense's subpoenaed witness from DPS.[24] The defense plans to probe whether the State has any evidence to back up its suggestion that the defense may be responsible for any delay. These topics are not meant to be exhaustive but are as inclusive as defense counsel can make them at this time. The proposed list of topics is intended to assure the Court that the desired questioning should not impinge on privileged matter.

25. If the State's argument that its testimony on delay will "necessarily cover information protected by the work-product privilege,"[25] were followed to the ground it would lead to the illogical result that there can never be any State testimony regarding reasons for delay, at least until post-conviction when the remedy for a deprivation of a speedy trial is long gone. But case law proves that such testimony exists and is routinely heard and analyzed in the Motion to Dismiss and that *prosecutions have been dismissed*.[26]

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[23] *See* TimeandDate.com, *Days Calculator: Days Between Two Dates*, available at: https://www.timeanddate.com/date/durationresult.html?m1=11&d1=8&y1=2019&m2=01&d2=16&y2=2020

[24] *See* attached Exhibit 23, continuing numbering from the Motion to Dismiss.

[25] Motion to Quash at 3.

[26] *See Phillips v. State*, 650 SW 2d 396, 398 (Tex.Ct.Crim.App. 1983) (dismissing the prosecution even though the delay appeared to be unintentional because the State could offer no "tenable reason" for the delay and "negligence [is not] a justification").

26. Also, it is significant to note that the Collin County District Attorney's Office has a "open file" policy which routinely provides the Defendant "access to their records"[27] which includes notes from the prosecutor's "interviews with parties and non-party witnesses."[28] Defense counsel is not inquiring the ADAs' trial strategy, "preparations for this case," or "mental processes, conclusions, and legal theories."[29] The State's concerns are misplaced.

27. Defense counsel offered two of the ADAs the opportunity to avoid in-person testimony by responding to Requests for Admissions and Stipulations, but the State refused at the July 10, 2020 conference with the Court at which the defense witness was sworn in. The Requests are attached as Exhibit 22, continuing the exhibit numbering from the Motion to Dismiss. The defense, however, must respectfully withdraw its offer to answer the requests and stipulations in light of new evidence and emails which were obtained after the June 16, 2020 conference with this Court.

D. The Texas Disciplinary Rules of Professional Conduct do not provide any barrier to the ADAs testimony at the Motion to Dismiss.

28. The State insists that the three subpoenas should be quashed because (1) the ADAs will be in attendance; (2) they are officers of the court from whom candor toward the tribunal is required; and (3) testifying will disqualify them.

29. First, the ADAs 'appearance at the Motion to Dismiss hearing is hardly secured or assured as discussed below.

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[27] Motion to Quash at 4.

[28] *Id.* at 3.

[29] *Id.*

30. Second, while it is true that Texas Disciplinary Rule of Professional Conduct 3.03 provides an obligation of candor toward the court,[30] it is also true that the issued subpoenas do more than merely secure the three ADAs' appearance. However, only a subpoena can secure the ADAs' appearance in the event of personal time off, unanticipated or previously unannounced meetings, or any reason that could necessitate their absence and substitution of counsel at the July 16, 2020 hearing.

31. Only a subpoena can secure the ADAs' testimony in a question-and-answer format,[31] and provide the means to sequester each from the other's testimony under oath to avoid inadvertent distortion of memory.

32. Next, the State contends that the subpoenas to the three ADAs constitute a violation of Rule 3.08 and cite to Comment 10 to the Rule which "may furnish some guidance" in procedural disqualification disputes.[32]

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[30] *See* Texas Disciplinary Rules of Professional Conduct 3.03 which provides that lawyers may not "knowingly make a false statement of material fact or law to a tribunal." Available online at: https://www.texasbar.com/AM/Template.cfm?Section=Home&ContentID=27271&Template=/CM/ContentDisplay.cfm.

[31] Further, Rule 3.03 does not provide that lawyers would not or could not be put under oath to testify. To hold otherwise would mean that prosecutors could never be held accountable for delay, improper withholding of evidence or information, or deprivation of defendants' constitutional rights. The oath in a matter of constitutional dimension such as the Motion to Dismiss serves to impress upon counsel the import of their statements and the need to perform a reasonable inquiry before response. *See* Comment 2 to Rule 3.03, available online at: https://www.texasbar.com/AM/Template.cfm?Section=Home&ContentID=27271&Template=/CM/ContentDisplay.cfm.

[32] *Id.* at 3.08, available online at: https://www.texasbar.com/AM/Template.cfm?Section=Home&ContentID=27271&Template=/CM/ContentDisplay.cfm.

33. Rule 3.08 concerns the lawyer as witness and specifically denies that testimony must result in disqualification.[33] In fact, the Rule advocates against such disqualification when an attorney is called to testify. On this, the parties agree.

34. Rule 3.08(2) contemplates that a dual-role of advocate/witness is possible when the lawyer's "testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony."

35. Finally, the defense does not seek to disqualify the three ADAs, only two of whom can arguably even be said to be serving as prosecutors in this case, nor does she foresee a reason to seek disqualification under the known facts.

E. The ADAs' presence at the Motion to Dismiss cannot otherwise be assured.

36. The State wants the subpoenas quashed because the ADAs claim they will already be at the hearing.[34] But a subpoena isn't just a "be-here" notice — it's an order to testify. And here, this is critical.

37. First, ADA Singletary is the CAC Division Chief yet she has not been present at a single case event in this matter or even been involved in correspondence with the defense until the instant Motion to Dismiss and its concomitant status update on June 16, 2020.

38. Second, the Crimes Against Children Division in Collin County has six felony prosecutors. They rotate cases often and it is common that each is often sent to

[33] Texas Disciplinary Rules of Professional Conduct 3.08 available online at: https://www.texasbar.com/AM/Template.cfm?Section=Home&ContentID=27271&Template=/CM/ContentDisplay.cfm.

[34] State's Motion to Quash at pp. 4–5.

cover hearings, docket, and conferences in the other's place as almost wholly interchangeable until trial — and even sometimes at trial.

39. This case has had three prosecutors. ADA was the first prosecutor on this case. He was replaced by ADA Huber around April 16, 2019.[35] ADA never appeared at another hearing in this matter, as expected, after his caseload was turned over to ADA Huber. He is no longer on the CAC trial team.

40. Now, ADA Huber is also no longer on this matter, having been replaced by ADA Floyd around January 21, 2020, and is no longer is on the CAC trial team.[36] Likewise, ADA Huber has not handled a single case event since this case was turned over to ADA Floyd, as expected.

41. Defense counsel has been counsel in this matter since its inception. ADA Singletary has reached out to the Court on this matter exactly once prior to the recent correspondence regarding the Motion to Dismiss — November 14, 2020 — when she emailed this Court to purportedly explain the delay in this case.[37]

REQUESTED RELIEF

For the above reasons, Defendant requests the Court deny the State's Motion to Quash and swear in the three subpoenaed assistant district attorneys for appearance at the July 16, 2020 hearing on Defendant's Motion to Dismiss.

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[35] *See* attached Exhibit 23, Email alerting defense counsel to change in CAC prosecuting attorney Ganyard to Huber (April 16, 2019).

[36] *See* attached Exhibit 24, Email alerting defense counsel to change in CAC prosecuting attorney from Huber to Floyd (Jan. 21, 2020).

[37] *See* attached Exhibit 25, Email chain including ADA Singletary's communications in this matter from November 14, 2019 through July 9, 2020, unless otherwise separately attached.

Respectfully submitted,

SHELLIE STEPHENS PC

/s/ Shellie Stephens

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CERTIFICATE OF SERVICE

This certifies that on the date of e-filing the above document was served on the attorney for the government (eserveDA@collincountytx.gov) via efiling and courtesy email

/s/ Shellie Stephens