IN THE CIRCUIT COURT OF LITTLE RIVER COUNTY, ARKANSAS
CRIMINAL DIVISION

STATE OF ARKANSAS PLAINTIFF

v. No. CR 97-105

TIMOTHY LAMONT HOWARD DEFENDANT

SECOND MOTION TO DISMISS

In support, Defendant states:

1. Defendant has previously filed a Motion to Dismiss, which was denied. Defendant hereby incorporates that motion in its entirety by reference into this motion. The allegations and arguments made in this motion bolster and substantiate Defendant's argument in his first Motion to Dismiss; along with adding new arguments, as to why this case must be dismissed.

I. THE STATE HAS ABUSED THE PROSECUTING SUBPOENA POWER OUTLINED IN ARK. CODE ANN. § 16-43-212

2. This matter is currently set for trial on April 23, 2015. The Defendant has become aware that many of the Defense witnesses as outlined in his witness list are being subpoenaed by the State in order to determine what their testimony will be at trial. Also, the State is subjecting some of these witnesses to numerous prosecutor subpoenas to elicit information from them regarding their conversations with the defense team. Lastly, the defense has been notified that the State is using the prosecutor subpoena to put witnesses in a room together, with an investigator and a prosecutor, to compare their testimony and to cajole answers from witnesses. This is an abuse of the prosecutor subpoena power under Ark. Code Ann. § 16-43-212.

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ANDREA BILLINGSLEY
CIRCUIT CLERK

I. Facts and Anticipated Facts in Support

3. The Prosecuting Attorney's Office for Little River County is serving prosecutor subpoenas for witnesses who have been outlined as witnesses that the Defendant anticipates calling at trial. If they are witnesses for both the defense and prosecutor, the subpoena power is used as an attempt to find out what questions are being asked and/or the information that is being given to the defense team.

4. It is anticipated that the witnesses will be placed under oath, advised of perjury charges, and then interviewed. This has occurred with a number of witnesses that both the State and defense plan on calling at trial. In most instances, the prosecutor was joined by Investigator Hays McWhirter, with the Arkansas State Police.

5. The Defendant believes that these witnesses are not advised that they can have counsel present during these interviews nor are they advised that they are free to leave on their own after complying with the appearance requirement of the subpoena itself. For example, Vicki Howard, a witness for both the State and defense, brought an attorney to her prosecutor subpoena, she was not advised of these rights, but was advised that she would be charged with perjury should her testimony be different from that which was presented at Defendant's first trial.

6. The Defendant believes that the issuance of the prosecutor subpoena is to "intimidate" defense witnesses, which accomplished that exact effect. Vicki Howard described this process as "very confrontational." These interviews are not recorded. Ms. Howard has been subjected to three (3) separate interviews. In those instances, inquiries were made about her conversations with defense counsel and/or their investigators.

7. Defense attorneys in other jurisdictions where these power are abused, reported that they decide who to call as witnesses based upon whether they have the stamina to hold up to the intimidating circumstances of the interviews versus the witnesses ability to offer facts that are mitigating to their clients.

8. The State's use of these subpoenas, as outlined below, is an abuse of the that power.

9. Also, the defense has been advised that witnesses are placed in the same room where the investigator and prosecutor ask questions of one witness in front of the other. These witnesses, for example, are Phillip Bush, Dennis Currence, and Debra Bush. A witness reported that he was unaware of many of the facts in the case until he heard it from the other witness who was being asked questions right in front of him. When interviewed by the defense team, Debra Bush indicated that she felt as though the prosecutor was attempting to get her to adopt the version of events that was outlined by Phillip Bush, her ex-husband. Debra Bush further stated that she felt very pressured and uncomfortable with the process and suggested the manner in which this happened was over the line.

10. These practices are (a) contrary to statutory authority, (b) in violation of the constitutional rights of the accused to a fair trial, due process of law, and equal protection of the law, and (c) the Rules of Professional Conduct.

11. Howard further submits that subpoenaing in the defense witnesses when the defendant has no similar power to compel state's witnesses in for interrogation under oath is an abuse of the prosecuting attorney's subpoena power. Moreover, it is inherently unfair and overreaching the defense and the witnesses.

II. Subpoenaing Defense Witnesses for Trial Preparation is an Abuse of the Prosecuting Attorney's Statutory Subpoena Power Which Must Be Subject to Strict Construction

12. In Arkansas, the Prosecuting Attorney's subpoena power is purely a creature of statute, adopted in 1937 Ark. Act 160, §§ 1-3, to enable Amendment 21 which permits the charging of persons to be accused of crime by information rather than solely by grand jury. These three sections became Ark. Code Ann. § 16-43-212 which provides:

> (a) The prosecuting attorneys and their deputies may issue subpoenas in all criminal matters they are investigating and may administer oaths for the purpose of taking the testimony of witnesses subpoenaed before them. Such oath when administered by the prosecuting attorney or his or her deputy shall have the same effect as if administered by the foreman of the grand jury. The subpoena shall be substantially in the following form:
>
> The State of Arkansas to the Sheriff of __________ County: You are commanded to summon __________ to attend before the Prosecuting Attorney at __________, A.D. 20___.M., and testify in the matter of an investigation then to be conducted by the said Prosecuting Attorney growing out of a representation that __________ has committed the crime of __________ in said County. Witness my hand this __________, A.D. 20___.
>
> ______________________
> Prosecuting Attorney
>
> By __________________
> Deputy Prosecuting Attorney"
>
> (b) The subpoena provided for in subsection (a) of this section shall be served in the manner as provided by law and shall be returned and a record made and kept as provided by law for grand jury subpoenas. The fees and mileage of officers serving the subpoenas and of witnesses in appearances in answer to the subpoenas shall be the same and shall be paid in the same manner as provided by law for grand jury witnesses.
>
> (c) The failure of any officer to serve the subpoena or of a witness to appear on the returned date shall constitute a Class B misdemeanor.

13. Because it is in derogation of the common law, this statute must be strictly

construed to prevent prosecutorial abuse.[1]

14. Subpoenaing defense witnesses or joint witnesses into the Prosecuting Attorney's Office to interrogate them about the case after they have been disclosed as a witness by the defense is inherently coercive and intimidating of witnesses, and it is an abuse of the prosecutor's subpoena power and contrary to the plain language of the statute, no mater what case law says or suggests.[2]

15. First, "[t]he prosecuting attorneys and their deputies may issue subpoenas in all

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[1] *Gill v. State ex. rel. Mobley,* 242 Ark. 797, 799, 416 S.W.2d 269, 271 (1967) (this statute is in derogation of the common law and must be "strictly construed and should not be extended by construction beyond its plain language," quoting *In re Kelly,* 352 S.W.2d 709, 712 (Tenn. 1961)). The *Gill* case also added that a right to counsel during a witness's interrogation could not be denied: "It takes little imagination to foresee the oppression that could result if prosecuting attorneys are given the power here sought by the Respondent." 416 S.W.2d at 271.

Accord: Pollard v. Roberts, 283 F. Supp. 248, 255 (E.D. Ark.), *aff'd per curiam* 393 U.S. 14 (1968):

> We take the Arkansas statute as it has been construed by the Supreme Court of Arkansas, and we are persuaded that the decisions of that Court in this overall controversy demonstrate that the power conferred by Act 160 is not unlimited; that the statute will be strictly construed; and that a person served with a subpoena duces tecum issued under Act 160 has access to the appropriate Circuit Court and thence to the Supreme Court of Arkansas to test the validity of the writ and to obtain protection against enforcement of a subpoena which calls for the production of irrelevant material or which contains an unreasonably broad or unduly burdensome demand for production of documents. Indeed, as we have seen, the Party has already obtained at least a measure of protection against enforcement of the subpoenas calling for the production of its own bank records.

Pollard was a three-judge court case with Circuit Judge (later Supreme Court Justice) Harry Blackmun on the panel, and it was affirmed per curiam by the U.S. Supreme Court, meaning that the U.S. Supreme Court has spoken on the merits and agreed. *See, e.g., Hicks v. Miranda,* 422 U.S. 332, 344 (1975); *Mandel v. Bradley,* 432 U.S. 173, 176 (1977).

[2] And that case law should be limited or even overruled. *See infra.*

criminal matters they are *investigating*."[3] (emphasis added) Howard's case had already been investigated and the charge was filed. The State then used their prosecuting attorneys subpoenas to coerce attendance when failure to attend is a class B misdemeanor, [4] without tendering witness fees, without proper service. Because the statute is subject to strict construction, it cannot be applied to mere preparation for trial once an investigation is complete.

16. Second, the oath given by the Prosecuting Attorney has the same weight as an oath given by the grand jury,[5] further underscoring that the subpoena can only be used to investigate in place of a grand jury.[6]

17. Third, the subpoena will be administratively served and otherwise recorded like a grand jury subpoena.[7]

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[3] Ark. Code Ann. § 16-43-212(a) (emphasis added).

[4] *Id.*, § 16-43-212(c).

[5] *Id.*, § 16-43-212(a).

[6] *See Weaver v. State,* 66 Ark.App. 249, 252, 990 S.W.2d 572, 574 (1999):

> The subpoena power of the prosecuting attorney was statutorily created by the General Assembly to implement the power of prosecutors to bring criminal charges by information. *Echols v. State,* 326 Ark. 917, 936 S.W.2d 509 (1996). It was designed to take the place of a grand jury. *Id.* The emergency clause of the statute states that it was enacted to enable prosecutors to properly prepare criminal cases. *Id.* Prosecuting attorneys have an affirmative duty to investigate crime. *Streett v. Stell,* 254 Ark. 656, 495 S.W.2d 846 (1973). The prosecutor's power to subpoena must be used only for a prosecutor's investigation. *State v. Hamzy,* 288 Ark. 561, 709 S.W.2d 397 (1986). The police do not have the authority to issue subpoenas. *Id.* The prosecutor's power to subpoena must only be used as an investigatory tool and not as a tool for a police investigation. *Id.* In *Echols v. State, supra,* the prosecutor subpoenaed school records of one of the appellants. The court found that he did so in order to investigate and prepare for trial. Therefore, he did not abuse his subpoena power.

[7] Ark. Code Ann. § 16-43-212(b).

18. Fourth, the witnesses were entitled to fees and mileage - the same as grand jury witnesses.[8]

19. The repeated references to "grand jury" shows that this statute is for investigation of crime *and* preparation for trial, not just mere preparation for trial, and strict construction would limit the use the state seeks.

> [Defendent] contends that the prosecutor used his subpoena power in violation of the authority granted by Ark. Code Ann. § 16-43-212 (Repl.1994). The prosecutor's subpoena power granted under the statute was passed by the General Assembly to implement the power of prosecutors to bring criminal charges by information. *Cook v. State,* 274 Ark. 244, 623 S.W.2d 820 (1981). It was designed to take the place of questioning by a grand jury. *Kaylor v. Fields,* 661 F.2d 1177 (8th Cir. 1981). The emergency clause to the statute states that it was enacted to enable prosecutors to "properly prepare criminal cases." *Cook v. State,* 274 Ark. at 248, 623 S.W.2d at 822. The prosecutor may use the subpoena power to investigate and prepare for trial as long as the power is not abused. *Todd v. State,* 283 Ark. 492, 678 S.W.2d 345 (1984). However, we will reverse a case in which a prosecutor abuses the subpoena power. *Foster v. State,* 285 Ark. 363, 687 S.W.2d 829 (1985); *Cook v. State,* 274 Ark. at 249, 623 S.W.2d at 823. Baldwin has made no showing of abuse. All he proved is that the prosecutor subpoenaed three witnesses, who did not testify at trial, and subpoenaed his school records. The trial court found that the subpoenas were for investigation and preparation and did not amount to an abuse of the power. The finding was not in error.[9]

Todd v. State[10] holds that there was no abuse of the prosecutor's subpoena power when witnesses were brought in for questioning before trial when there was no showing of prejudice

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[8] *Id.*

[9] *Echols v. State,* 326 Ark. 917, 993, 936 S.W.2d 509, 549 (1996).

[10] 283 Ark. 492, 493, 678 S.W.2d 345, 346-47 (1984).

where the witnesses did not testify at trial. *Neal v. State*[11] and *Anderson v. State*[12] follow it.[13] There is no cogent explanation in these cases of "preparation" for trial. The cases all failed on appeal for the inability of the defense to show prejudice or lack of egregiousness in the alleged abuse of the subpoena power. One thing clear from all the authorities is that no defendant has preserved all these issues before, including that the Arkansas Constitution has been violated, and the prior case law is wrong and should be limited.

20. Grand juries manifestly do not have the power to subpoena witnesses after somebody is indicted to help the prosecuting attorney prepare the case for trial; that is a grand jury abuse with serious repercussions.[14]

In *Todd,* the Arkansas Supreme Court said:

> All of these cases, however, recognize the right to use the prosecutor's subpoena to prepare criminal cases. Indeed, the emergency clause of Act 160 of 1937 specifically provides that. See also J. Hall, *The Prosecutor's Subpoena Power,* 33 Ark.L.Rev. 122 (1979). We do not hesitate to hold that, in the absence of an abuse of the power, a prosecutor's subpoena may be used to prepare for trial after charges have been filed. We find no abuse in this case.[15]

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[11] 320 Ark. 489, 494, 898 S.W.2d 440, 444 (1995).

[12] 357 Ark. 180, 208, 163 S.W.3d 333, 349 (2004).

[13] In the one article on the subject, it is mentioned that witnesses can be subpoenaed in for "preparation for trial," citing a Florida case. Florida, however, is a criminal deposition state; Fla. R. Crim. Pro. 3.220(h); and any holding from Florida thus is suspect and cannot be cited for this authority.

[14] *See, e.g., In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985 (Simels),* 767 F.2d 26, 29 (2d Cir. 1985); *In re Grand Jury Proceedings (Fernandez Diamante),* 814 F.2d 61, 70 (1st Cir. 1987); *United States v. Furrow,* 125 F. Supp. 2d 1170 (C.D. Cal. 2000) (serving grand jury subpoenas on defense witnesses was "questionable"); *Bishop v. Caudillo,* 87 S.W.3d 1 (Ky. 2002); *People v. Shariff,* 165 Misc.2d 598, 630 N.Y.S.2d 200 (N.Y. Co. 1995).

[15] 283 Ark. at 493-94, 678 S.W.2d at 346-47.

Todd and cases like it are of doubtful authority because they read too much into Act 160. The emergency clause is 1937 Ark. Act 160, § 7, and it states: "It is found to be a fact that the less frequent meetings of the Grand Jury necessitates vesting authority in the Prosecuting Attorney to subpoena witnesses in order to properly prepare criminal cases."

21. Thus, "prepare" in the emergency clause is directly tied to "less frequent meetings of the Grand Jury" in Arkansas. It says nothing about "preparing for trial," and a grand jury subpoena to prepare for trial is clearly an abuse of a grand jury subpoena. Therefore, *Todd, Anderson,* and other cases are all of doubtful authority and should be limited or overruled.

22. This court may simply say it is constrained to follow those cases, but defense counsel is required by his Sixth Amendment duty to the client to assert all valid motions and preserve them for appeal.

23. Under our common law system, it is the lawyers that make arguments that make it to the appellate courts that make law, not the appellate judges—case law is not created in a vacuum, particularly in a procedural default in extremis state like Arkansas. If not raised now, it is waived. *Todd* must be limited or overruled, aside from the constitutional arguments

24. In the subpoenas used by the State, the subpoena refers to "possible violations of Arkansas law" to get around the "investigation" requirement, without telling the witness what to expect. But, this begs the question: The state has charged the defendant, and the investigation should be over. If they charge and continue to investigate, then they charged prematurely without having their case together.

III. Giving the Prosecuting Attorney the Power to Subpoena Witnesses When the Defense Attorney Has No Equal Power Violates the Equal Protection, Due Process, and Fair Trial Sections of the Arkansas and United States Constitutions

25. Howard submits that denying him equal access to witnesses to prepare for his trial denied him equal protection of the law,[16] due process of law,[17] and the right to a fair trial[18] protected by the Arkansas and U.S. Constitutions.

A. Arkansas Constitution as a Separate Source of Limitation

26. Howard pleads the Arkansas Constitution as a separate source of constitutional protections.

27. In a series of state constitutional decisions, the Arkansas Supreme Court left no doubt that it will decide that, at times, it is appropriate to diverge from federal precedent under the United States Constitution and look to the state constitution, the Supreme Court has the authority to do so when the state constitution is argued to it.[19]

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[16] Ark. Const., art. 2, §§ 3 ("The equality of all persons before the law is recognized . . . ." & 18 ("The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."); U.S. Const., Fourteenth Amendment, § 1 ("[N]or shall any State ... deny to any person within its jurisdiction the equal protection of the laws.").

[17] Ark. Const., art. 2, § 8 ("No person shall be . . . be deprived of life, liberty or property, without due process of law."); U.S. Const., Fourteenth Amendment, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law ....").

[18] Ark. Const., art. 2, § 10; U.S. Const., Sixth and Fourteenth Amendments.

[19] *State v. Harmon,* 353 Ark. 568, 574, 113 S.W.3d 75, 78 (2003):

> In both *Griffin* and *Sullivan,* we noted that this court had the authority to do so, when the state constitution is argued to this court. *See Griffin,* 347 Ark. at 792, 67 S.W.3d at 584; *Sullivan,* 348 Ark. at 649-50, 74 S.W.3d at 217 (both citing *Arkansas v. Sullivan,* 532 U.S. 769, 772, 121 S.Ct. 1876, 149 L.Ed.2d 994 (2001) (per curiam)).

See generally Robert L. Brown, *Expanded Rights Through State Law: The United States Supreme Court Shows State Courts the Way,* 4 J. APP. PRAC. & PROCESS 499 (2002).

28. The Arkansas Supreme Court held in *Griffin v. State*[20] and *State v. Sullivan*[21] that Ark. Const., art. 2, § 15 concerning searches and seizures could be interpreted to provide more rights to the accused than the Fourth Amendment.

29. In *Jegley v. Picado,*[22] the Arkansas Supreme Court held, prior to *Lawrence v. Texas,*[23] that a general right of privacy in Arkansas by statute and common law protected same sex private relationships from prosecution.[24]

30. In *Box v. State,*[25] the Arkansas Supreme court held that the due process protection of art. 2, § 8 of the Arkansas Constitution afford's greater protection than *Estelle v. Williams.*[26]

31. This break with the U.S. Supreme Court is not really just from this past decade. In 1975 in *Weston v. State*[27] the Arkansas Supreme Court held the criminal libel statute in Arkansas was unconstitutional under the First Amendment *and* Ark. Const., art. 2, § 6 because it did not provide the speaker an absolute defense in the belief in the truth of the matter spoken. Instead, the statute only provided that truth was admissible. And, The court in *Box* noted that

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[20] 347 Ark. 788, 67 S.W.3d 582 (2002).

[21] 348 Ark. 647, 74 S.W.3d 215 (2002).

[22] 349 Ark. 600, 80 S.W.3d 332 (2002).

[23] 539 U.S. 558 (2003).

[24] *Id.* at 570, even cited and relied on *Jegley v. Picado.*

[25] 348 Ark. 116, 71 S.W.3d 552 (2002).

[26] 425 U.S. 501, 503 (1976) (failure to object to trial in prison garb is waiver; presented as a fair trial/due process claim under Fourteenth Amendment).

[27] 258 Ark. 707, 528 S.W.2d 412 (1975).

the rule it was following pre-dated *Estelle* by six years, 1970.[28]

B. Standing—This is a "Justiciable Matter"

32. The State may argue that Howard has no standing to complain of a witness interview of possible defense witnesses where he is not one of the subpoenaed persons. "Only a claimant who has a personal stake in the outcome of a controversy has standing."[29] All Arkansas requires is a "justiciable matter."[30]

33. Arkansas standing questions are not at all like federal standing questions which are jurisdictional matters,[31] and, in Arkansas, lack of standing is merely a defense.[32]

34. Howard though, has standing. It is *his* right to a fair trial that is at issue. It is *his* witnesses he claims were subjected to intimidation by overreaching by the Prosecuting Attorney's subpoenaing every witness in for interrogation.

C. Equal Protection of the Law

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[28] *Box,* 348 Ark. at 123-24, 71 S.W.3d at 557, pointing out that the Arkansas rule comes from *Miller v. State,* 249 Ark. 3, 457 S.W.2d 848 (1970).

[29] *Pulaski County v. Arkansas Democrat-Gazette, Inc.,* 371 Ark. 217, 220, 264 S.W.3d 465, 467 (2007).

[30] Ark. Const., Amendment 80, § 6(A).

[31] *Hunter v. Runyan,* 2011 Ark. 43, 2011 WL 478594, quoting *Chubb Lloyds Ins. Co. v. Miller County Circuit Court,* 2010 Ark. 119, 2010 WL 841254 ("observing that standing is one of several doctrines, along with mootness, ripeness, and whether the case involves a political question, which has developed into the definition of the case or controversy requirement under federal law, and that Arkansas has not followed the federal analysis and definition of justiciability as a jurisdictional issue"); *Jegley v. Picado, supra,* 80 S.W.2d at 341, quoting *Magruder v. Arkansas Game and Fish Comm.,* 287 Ark. 343, 344, 698 S.W.2d 299, 300 (1985) (granting standing to a fisherman complaining of a fishing regulation on a lake he frequented but did not even allege would effect him).

[32] *Chubb Lloyds Ins. Co., supra.*

35. The State claims a power denied by statute to the defense, and this denies defendant equal protection of the laws. In *Kirk v. State*,[33] the Louisiana Supreme Court held that a statute that gave the power to prosecuting attorneys to record witness interviews regarding alleged crimes but denied that power to the criminal lawyers representing citizens accused of those crime violated those citizens' equal protection rights.[34] The remedy there was that by declaring the statute unconstitutional, it resulted in giving the same power to the defense.

36. Defendant is being denied equal protection of the law by the State asserting a power to coerce defense witnesses to testify before trial and under oath, and the Defendant not having this equal power. This results in the Defendant not being able to have a level playing field and a fair trial. Both sides, of course, have a right to a fair trial.

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[33] 526 So.2d 223 (La. 1988).

[34] *Id.* at 226-27:

> The Legislature, in enacting La.R.S. 14:322.1, preserved the prosecutor's right to obtain and use the "dynamite" evidence of a recorded conversation which the speaker is virtually powerless to deny, but prohibited the accused from obtaining and using a recorded conversation with a witness for the prosecution. Of course, the accused can still present testimonial evidence of the content of such a conversation, but the impact and quality of such testimony pales in comparison to a verbatim recording of the same conversation. Moreover, testimonial evidence is subject to every aspect of human frailty, such as bias, failure of recall and the like.
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> La.R.S. 14:322.1 therefore establishes a classification which discriminates against the accused in a criminal case with regard to the obtaining and use of the best evidence of a conversation. In this respect the statute clearly disserves the quest for truth. However, this is not the test for denial of equal protection. The appropriate inquiry is whether there is an appropriate governmental interest suitably furthered by the classification created by the governmental action in question. *Sibley v. Board of Supervisors of Louisiana State University,* 477 So.2d 1094 (La.1985).
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> There is no apparent governmental interest which is furthered by the classification which permits prosecutors to obtain and use this type of superior evidence that criminal defendants are prohibited from obtaining. ...

37. Howard has and will be prevented, under the current law, to issue subpoenas for state's witnesses to appear at a place in Little River County for defense counsel to take their statements under the same conditions as being used by the State.

D. Due Process and Fair Trial

38. The right to due process of law and the right to a fair trial are often thought of as separate constitutional rights; in the federal system, the Fourteenth Amendment for the former and the Fifth Amendment for the later. Actually, it is still a due process right,[35] but Arkansas does recognize the right to a trial with an "impartial jury" which clearly must include a fair trial.[36]

39. The State Subpoenaing witnesses the way it has - runs a serious risk of witness intimidation because the defense witnesses have to know that they were subpoenaed and because they were listed or indicated as to having some knowledge of the case. Where were these witnesses subpoenaed to? Not some neutral third location, but to the Prosecuting Attorneys Office. Will the Prosecuting Attorney record these witness interviews? Likely not, as

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[35] *See, e.g., Cone v. Bell,* 129 S.Ct. 1769, 1772 (2009):

> The right to a fair trial, guaranteed to state criminal defendants by the Due Process Clause of the Fourteenth Amendment, imposes on States certain duties consistent with their sovereign obligation to ensure "that 'justice shall be done'" in all criminal prosecutions. *United States v. Agurs,* 427 U.S. 97, 111, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) (quoting *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)). In *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), we held that when a State suppresses evidence favorable to an accused that is material to guilt or to punishment, the State violates the defendant's right to due process, "irrespective of the good faith or bad faith of the prosecution." *Id.,* at 87, 83 S.Ct. 1194.

[36] Ark. Const., art. 2, § 10.

most of witnesses report that no recording is taking place. If the State is recording these interviews, hopefully they will transcribe them and turn them and/or notes over[37] but we have no guarantee. Indeed, the facts indicate that this in not the case. The implication for the witness is clear—say something that does not fit our version and you might just get charged with perjury. If you decide to exercise your right to leave, then you face a misdemeanor charge for not complying.

40. The Arkansas Supreme Court held in *Alford v. State*[38] that the defendant there did not make a showing of a due process violation of the obtaining of one particular statement. Alford also argued that due process required that he have the same right to compel witnesses. But, he made no showing of anything, so there was not much of a due process argument to make.

39. That is not the case here. The State issued these subpoenas to most of Howard's witnesses.

40. Moreover, some of those witnesses have indicated that they were presented with facts through another witness who was also present during their interview because of the prosecutor subpoena. One witness suggested that they felt that the prosecutor was attempting to get one to adopt the facts and/or memories of the other. Another witness felt that same way and was "very uncomfortable," by what she felt was an attempt to get her to commit to the other witnesses version of the events, even though they were in conflict with what she believed to be the facts. Putting witnesses in the same room who were there by way of prosecutor

[37] *See* Point III on *Brady*.

[38] 291 Ark. 243, 724 S.W.2d 151 (1987).

subpoena was found by the Arkansas Supreme Court to be a violation of the prosecutor subpoena power. *Cook v. State,* 274 Ark. 244, 623 S.W.2d 820 (1981).

41. In *Cook,* the prosecutor used the subpoena power to call in the witnesses, where he ended up eliciting their testimony in front of other witnesses which resulted in those witnesses hearing the likely testimony of other witnesses who would be called to trial. *Id.* Defense counsel nor was the trial judge present. The Court found that this was an abuse of the prosecutor subpoena power. It stated:

> This procedure, without cross-examination, could be utilized to lead a recalcitrant witness to a desired answer in front of others. Each would have heard the cajoled answers and each would understand the answer which the prosecuting attorney expected him or her to give. The pressure to conform would be great. The prospective witness would then give the desired answer under oath and in front of all the other witnesses. Each could then be warned of the penalty of perjury... The result could well be that the witness would not have time to evaluate the process and then, at trial, the witness would parrot the cajoled answer. The abuse of the prosecutor's subpoena power in this manner could result in denying a defendant a fair and impartial trial. *Id.* at 249-250; 623 S.W. 2d at 824.

E. Ethical Concerns

1. Prosecutor's Special Role Not to Overreach

42. Arkansas Prosecuting Attorneys are ministers of justice under both settled

Arkansas case law[39] and ethics rules.[40]

"Public prosecutors have the duty to seek justice, not merely to convict."[41]

> The [Prosecuting] Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. (bracketed material added)[42]

2. Respecting the Rights of Third Persons

44. All lawyers, prosecutors included, have a duty to respect the rights of third

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[39] *Doran v. State,* 141 Ark. 442, 217 S.W. 485, 487 (1920) ("Under our Constitution and laws every person accused of crime is guaranteed an impartial trial. Article 2, § 10, Const. 1874; *Polk v. State,* 45 Ark. 165, 169. This is one of the purposes for which courts are created. To this end all their functionaries are pledged by solemn oath."; *Sims v. State,* 252 Ark. 147, 156, 477 S.W.2d 825, 831 (1972) ("We have long recognized that a prosecuting attorney has a duty to see that trials are fair and impartial and that the innocent are protected from a conviction based on prejudice and caprice."); *Adams v. State,* 263 Ark. 536, 566 S.W.2d 387 (1978) (Fogelman, J., dissenting); *Logan v. State,* 299 Ark. 266, 277, 773 S.W.2d 413, 418 (1989) (concurring opinion).

[40] Arkansas Rules of Professional Conduct, Rule 3.8 Comment ¶ 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.").

[41] *Ford v. State,* 4 Ark. App. 135, 140, 628 S.W.2d 340, 343 (1982).

See Dillon v. State, 311 Ark. 529, 539, 844 S.W.2d 944, 948 (1993), quoting *State v. Soares,* 815 P.2d 428, 430 (Hawai'i 1991) ("We have repeatedly stated that '[t]he duty of the prosecution is to seek justice, to exercise the highest good faith in the interest of the public and to avoid even the appearance of unfair advantage over the accused.'").

[42] *Berger v. United States,* 295 U.S. 78, 88 (1935), reaffirmed in *Kyles v. Whitley,* 514 U.S. 419, 439 (1995), and *Strickler v. Greene,* 527 U.S. 263, 281 (1999).

persons.

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.[43]

This is even recognized in the A.R.E. 611(a)(3): "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to ... (3) protect witnesses from harassment or undue embarrassment."

45. The prosecutors here impose upon the witnesses and compel them to appear at the prosecutor's convenience, without tendering a witness fee, in a subpoena written in such a way that the recipient does not even know whether he or she is a target. And, the prosecutor fails to advise the witness of the right to counsel.

46. Subpoenaing defense witnesses is virtual harassment and reeks of witness intimidation, because the witness has to appear or be charged with a crime. They just can't use a telephone and call the witness like normal people? No. They think they have a power, and they intend to wield it.

III. *Brady* Implications from these Witness Interviews; If The "Investigation" is Still Ongoing, Then More Full Discovery Needs to be Provided And the Defense Cannot be Ready for Trial

47. There are serious *Brady*[44] and ongoing discovery implications in taking these

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[43] Arkansas Rules of Professional Conduct, Rule 4.4(a):

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

[44] The *Brady* doctrine is nearly fifty years old. When we use "*Brady*," we mean all that it implies for disclosure of impeachment evidence to anything exculpatory that the Prosecuting Attorney or the police or investigators learn in the course of the case. *Brady v. Maryland,* 373

statements. We call it trial preparation; they might call it "investigation" so it might be more likely to be proper under § 16-43-212. For *Brady* purposes, whether it is right or wrong doesn't matter to the prosecutor, but it does mean that they are gathering information which they have to expect highly likely to be discoverable and exculpatory. How is the prosecutor going to comply with their discovery obligation when they take these statements? Sending a copy of the "recorded" version of the statement after a trouncing "off the record," doesn't satisfy *Brady.* Providing a detailed version of their interrogation prior to turning on the recorder sets in motion the State's obligation to turn over what took place "off the record." If that version is different than the recorded version, the discovery rules and *Brady* are triggered.

48. It is axiomatic that every statement uttered by any prosecution and/or defense witness that is the slightest bit exculpatory; discoverable under Arkansas discovery rules; or tends to show that the "victim's" statement is made up needs to be separately disclosed to the defense by the prosecuting attorney under *Brady* and Rule 17.1.

49. Therefore, the prosecuting attorney has a duty to disclose that information under both the discovery rule,[45] the ethics rules,[46] and the due process clause of the Fourteenth Amendment, the genesis of *Brady.*

50. Since, the Prosecuting Attorney chose to take these statements, the defense

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U.S. 83 (1963); *Kyles v. Whitley,* 514 U.S. 419 (1995); *Strickler v. Greene,* 527 U.S. 263 (1999); Ark. R. Crim. P. 17.1(d); Arkansas Rules of Professional Conduct, Rule 3.8(d).

And, when a *Brady* demand is reiterated before trial, the standard of appellate review for failure to turn it over is far lower. In addition, "*Brady*" is so fundamental to criminal jurisprudence it is now a discovery rule and an ethics rule.

[45] Ark. R. Crim. P. 17.1(d).

[46] Arkansas Rules of Professional Conduct, Rule 3.8(d)

requires, and the court should order, production of all the statements forthwith that occurred "off the record." However, it is not likely that the defense will get these statements, as the State will have to claim they do not have any notes.

CONCLUSION

Under the strict construction that must be accorded § 16-43-212, the State cannot statutorily or constitutionally use the defense witness list as a vehicle to compel attendance by subpoena of all defense witnesses. To do so violates the core protection of rights that make a trial "fair." Howard would be entitled to a new trial for the State's abuse of its subpoena powers. This is another instance, along with the others outlined via motion and/or at hearing, regarding the State's conduct in prosecuting the Defendant in this matter. The Defendant is requesting that the case be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy was emailed to the Prosecuting Attorney's Office on April 15, 2015.

Patrick J. Benca