

IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

CLERK SUPERIOR COURT

STATE OF GEORGIA,

*

*

v.

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CRIMINAL ACTION # CR20-0433

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WILLIAM RODERICK BRYAN.

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**MOTION TO QUASH SUBPOENA AND BRIEF IN SUPPORT THEREOF
FILED ON BEHALF OF ATTORNEY GENERAL CHRIS CARR**

COMES NOW the Attorney General of the State of Georgia, CHRIS CARR, and moves this Court to quash Defendant's Witness Subpoena delivered to his office July 14, 2020, and seeking the personal appearance of the Attorney General at the time of a hearing scheduled in the above-referenced matter at 10:00 a.m. on July 17, 2020. In support of this motion, Attorney General Carr shows the following:

I. INTRODUCTION

Attorney General Carr moves to quash the subpoena seeking his appearance on the grounds that the subpoena is unduly burdensome given the nature of his role as a constitutional officer and the issue that is presently before the Court. Defendant presumably seeks the testimony of Attorney General Carr to address his "Motion to Strike Illegal Appointment of Joyette Holmes, as District Attorney, Pro Tempore." Seeking testimony from Attorney General Carr is unduly burdensome as the substance of the pending motion is a legal question; Defendant has no

standing to challenge the prosecutor in his case; and Defendant cannot show that Attorney General Carr has any unique or personal information relevant to any matter before the Court; or that any testimony he may seek is not available through other sources. Moreover, the value of any testimony that might be sought is *de minimus* at best and is substantially outweighed by the burden to the public health and welfare of haling one of the State's constitutional officers to testify about the functions of his office or decisions made by the office given the myriad of duties and responsibilities with which the Attorney General is charged. The subpoena is uniquely improper and burdensome given the Attorney General's weighty public responsibilities and inability to reschedule his public duties on extremely short notice.

II. STATEMENT OF FACTS

This Court scheduled a hearing for July 17, 2020 for the arraignment of Defendant Bryan and consideration of three pending defense motions. *See* Docket of Criminal Action, CR20-0433. On July 14, 2020, Defendant Bryan delivered to the office of Attorney General Chris Carr a subpoena seeking his personal appearance and testimony at the time of the hearing on July 17, 2020. Defendant Bryan presumably seeks the testimony of the Attorney General in support of his "Motion to Strike Illegal Appointment of Joyette Holmes as District Attorney Pro Tempore." *Id.* As asserted in his motion, the power of the Attorney General to

appoint a District Attorney Pro Tempore is statutorily limited to those circumstances where the district attorney of the particular judicial circuit has been disqualified based upon an “interest or relationship.” Defendant Bryan contends as a matter of law that the circumstances here, as set out in the letter from District Attorney Tom Durden attached to his motion, do not come within the terms of this statute allowing appointment.

The Attorney General is an elected constitutional officer who “shall act as the legal advisor of the executive department, shall represent the state in the Supreme Court in all capital felonies and in all civil and criminal cases in any court when required by the Governor, and shall perform such other duties as shall be required by law.” Ga. Const. Art. V, § III, Para. IV. *See also* O.C.G.A. § 45-15-1. The duties and responsibilities of the Attorney General are defined by law and include overseeing an agency of the Executive Branch of state government, the Georgia Department of Law. *See* O.C.G.A. §§ 45-15-3-45-15-18 and O.C.G.A. § 45-15-30.¹ In the case *sub judice*, as noted by Defendant Bryan, the Attorney General acted pursuant to O.C.G.A. § 15-18-5, which provides for the appointment of a district attorney pro tempore by the Attorney General when a district attorney is disqualified by interest or relationship. This is the limited nexus of the Attorney

¹ The Attorney General is responsible for myriad responsibilities pursuant to Georgia Code. *See e.g.* O.C.G.A. §§ 10-1-395, 10-13A-3, 16-5-46, 18-4-6, 18-5-5, 31-7-407, 49-4-168.2, and 53-12-174.

General to the proceeding for which his testimony is presumably sought and for which he has been subpoenaed to appear. There are no factual disputes about the appointment made in this case and there is nothing to show that information about the appointment is uniquely known to the Attorney General. *See* Exhibit 1, Administrative Order.

III. ARGUMENT AND CITATION OF AUTHORITY

Code Section 24-13-23 (b) permits quashing a subpoena that is unreasonable and oppressive. *See Clark v. Bd. of Dental Exm'rs*, 240 Ga. 289, 291 (1977) (applying the statute to quashing of subpoenas for personal attendance in addition to production of documents). The instant subpoena is clearly unreasonable and oppressive because the motion is a legal question; Defendant Bryan has no standing to challenge the prosecutor in his case, and because the subpoena presents an undue burden on the ability of a constitutional officer to fulfill his duties to the State, particularly when weighed against the value of any purported testimony that might be elicited.

- 1. Defendant's motion is based upon a legal question and there is no testimony that might be elicited from the Attorney General that is unique or personal to him or which has a significant bearing on any matter before the Court.**

Defendant Bryan's motion challenging the appointment of the prosecutor in this case is based upon his argument that the appointment exceeds the authority of O.C.G.A. § 15-28-5. From the face of his motion, Defendant's challenge is based

upon the plain language of the statute and is thus entirely a legal question. Defendant does not allege that the facts of the appointment are in dispute. Even if Defendant had made such an allegation, Defendant cannot show that the knowledge of any such facts is unique and personal to the Attorney General and could not otherwise be readily available through alternate means. What *de minimis* information might be elicited, if any, can be supplied by other witnesses without the substantial burden of having the Attorney General testify. (See Section 3 below.)

2. Defendant Bryan has no standing to challenge the appointment of a district attorney pro tempore.

In this case, Defendant Bryan has no standing to challenge the recusal of the District Attorney to seek the vacation of the Attorney General's appointment of a prosecuting attorney pro tempore. *State v Mantooth*, 337 Ga. App. 698, 698 (2016). The Georgia Court of Appeals has specifically held that a defendant "does not have a substantive right to have his case tried by a specific prosecutor so as to make notice necessary in order to oppose the [solicitor-general]'s disqualification." *Nel v. State*, 252 Ga. App. 761, 762 (1) (a) (2001). Because Defendant may not legally challenge the appointment, compliance with any subpoena seeking some limited testimony in support of a motion is unduly burdensome and should not be enforced.

3. The burden on calling on the Attorney General to testify far outweighs any possible probative value of his testimony.

While any subpoena should be quashed if it is “unreasonable and oppressive,” a subpoena on the Attorney General is exceptionally burdensome given his role as a constitutional officer whose duties include overseeing an agency of the executive branch, particularly given the unique public health and safety issues existent during the COVID 19 pandemic. The Attorney General should not be able to be compelled to appear about every matter that falls within the broad jurisdiction of his office, regardless of whether the underlying proceeding is a civil or criminal matter. This premise is particularly compelling where the issue about which he may be asked to testify is tangential – at best – to the proceeding and where the notice to the Attorney General is particularly short.

Courts have routinely refused subpoenas on even lower-ranking state officials in lesser circumstances. For instance, in the case *Irene Stephens v. Georgia Dept. of Transportation*, 1:02-CV-1608-RWS in the United States District Court for the Northern District of Georgia, the plaintiff tried to subpoena the Chief Administrative Law Judge of the Office of State Administrative Hearings. The court rejected the subpoena, quoting prior decisions:

[i]n general, high ranking government officials enjoy limited immunity from being deposed in matters about which they have no personal knowledge. The immunity is warranted because such officials must be allowed the freedom to perform their tasks without the constant interference of the discovery process. [Cits.

omitted] Before the involuntary depositions of high ranking government officials will be permitted, the parties seeking the depositions must demonstrate that the particular official's testimony will likely lead to the discovery of admissible evidence and is *essential to that party's case*. [Cits. omitted] In addition, the evidence must not be *available through an alternative source or via less burdensome means*." *Warzon v. Drew*, 155 F.R.D. 183 (E.D. Wis. 1994). *See also In re: United States of America*, 985 F.2d 510 (11th Cir. 1993).

(emphasis added) (Order at p. 3 quoting *Smith v. State of Ga. Dept. of Children & Youth Svcs*, 179 F.R.D. 644, 645-46 (N.D. Ga. 1998)).

The *Smith* decision, quoted by the court in the *Stephens* matter, involved a subpoena on the head of the Georgia Department of Juvenile Justice. 179 F.R.D. at 645. The *Warzon* case, which both *Smith* and *Stephens* cite, involved subpoenas on the Governor of Wisconsin and the Secretary of the Department of Administration of Wisconsin. 155 F.R.d. at 184. *In re: United States of America*, again relied upon by *Smith* and *Stephens*, 985 F.2d, involved a subpoena on Dr. David Kessler, Commissioner of the FDA. 985 F.2d at 511. In all of these cases, the subpoenas were quashed due to the immunity of high ranking governmental officials from such subpoenas and the recognition that their public responsibilities outweigh the need for testimony in the underlying proceeding.

The Attorney General is no less immune from such an improper subpoena. Nothing in the background of this case – particularly at this stage and for this purpose - suggests that the extraordinary step of calling the Attorney General to

testify must be exercised. The Eleventh Circuit has recognized that “[t]he practice of calling high ranking officials as a witness should be discouraged.” *In re: United States*, 985 F.2d 510, 512 (11th Cir. 1993). Indeed, the burden presented by the subpoena in the present case, particularly in light of the greater duties and time constraints of a constitutional officer far outweigh any probative value of testimony for facts which do not appear to be in dispute and for information and knowledge that is not uniquely known to the Attorney General.

IV. CONCLUSION

For the foregoing reasons the subpoena for the testimony of the Attorney General should be quashed and a protective order should issue.

Respectfully submitted,

CHRISTOPHER M. CARR 112505
Attorney General

BETH BURTON 027500
Deputy Attorney General

/s/Tina M. Piper
TINA M. PIPER 142469
Sr. Assistant Attorney General

Please send all correspondence to:

TINA M. PIPER
Senior Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300

Direct line: (404) 656-3355

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served counsel of record with the foregoing MOTION TO QUASH SUBPOENA TO ATTORNEY GENERAL CHRIS CARR AND BRIEF IN SUPPORT THEREOF filed by electronic transmission addressed to the following:

Kevin Gough (kevingough.firm@gmail.com)
dcarney@chathamcounty.org
Jesse Evans (jesseevans@cobbcounty.org)
Linda Dunikowski (lindadunikowski@cobbcounty.org)

This 15th day of July, 2020.

/s/ Tina M. Piper
Senior Assistant Attorney General

Exhibit 1



GEORGIA DEPARTMENT OF LAW

40 Capitol Square SW
Atlanta, Georgia 30334-1300

CHRISTOPHER M. CARR
ATTORNEY GENERAL

www.law.ga.gov
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May 11, 2020

Honorable Joyette M. Holmes
District Attorney, Cobb Judicial Circuit
70 Haynes Street, 3rd Floor
Marietta, Georgia 30090

RE: Death Investigation of Ahmaud Arbery, Glynn County

Dear Ms. Holmes:

Per our conversation, enclosed is an Administrative Order appointing you or your designee District Attorney Pro Tempore in the above-styled matter. This appointment is being made pursuant to O.C.G.A. §15-18-5(a) upon the initial disqualification of Jackie Johnson, District Attorney, Brunswick Judicial Circuit and subsequent disqualification of District Attorney Pro Tempore Tom Durden.

As indicated in the statute, it does not appear that you will be entitled to additional compensation over and above expenses.

Under the terms of O.C.G.A. § 15-18-5(d), please serve a copy of this appointment on any opposing attorney who might be retained.

Thank you for accepting this appointment. Of course, should you have any questions, please do not hesitate to contact me.

Sincerely,

CHRISTOPHER M. CARR
Attorney General

CMC/kc
Enclosure

cc: Hon. Jackie L. Johnson, District Attorney, Brunswick Judicial Circuit
Hon. Stephen G. Scarlett, Sr., Chief Judge, Brunswick Judicial Circuit
Hon. Peter J. Skandalakis, Prosecuting Attorneys' Council of Georgia



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ADMINISTRATIVE ORDER

BY THE ATTORNEY GENERAL:

ORDERED: That under the authority contained in O.C.G.A. § 15-18-5, Joyette M. Holmes, District Attorney, Cobb Judicial Circuit or her designee, is hereby appointed to act as District Attorney Pro Tempore, Brunswick Judicial Circuit, to prosecute in the name of the State the following case, to wit: Death Investigation of Ahmaud Arbery, Glynn County and pursuant to O.C.G.A. § 15-18-5 (c) shall receive no additional compensation for such services except that actual expenses incurred shall be reimbursed by Glynn County at the same rate as provided for district attorneys in O.C.G.A. § 15-18-12.

This 11 day of May, 2020.


CHRISTOPHER M. CARR, ATTORNEY GENERAL