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IN THE CIRCUIT COURT
IN AND FOR THE TENTH JUDICIAL CIRCUIT
JEFFERSON COUNTY, ALABAMA
CRIMINAL DIVISION

STATE OF ALABAMA,)
) Plaintiff,)
VS.) CASE NO.:
ONIS TREY GLENN,) CC 2018-4025
) Defendant,)
and)
SCOTT PHILLIPS,) CC 2018-4026
) Defendant.)

C A P T I O N

The above entitled matter came on to be heard
before the Honorable Judge Stephen Wallace, Room 405
Criminal Justice Center, 801 North Richard Arrington, Jr.
Boulevard, Birmingham, Alabama, 35203, on the 8th day of
May, 2019. Rhonda F. Meadows, CCR, Official Court
Reporter.

I N D E X

ON BEHALF OF THE STATE:

Ms. Cynthia Raulston, Attorney at Law

ON BEHALF OF DEFENDANT ONIS TREY GLENN:

Mr. William Athanas, Mr. Miles M. Hart, and
Mr. Jess Nix, Attorneys at Law

ON BEHALF OF DEFENDANT SCOTT PHILLIPS:

Mr. Ben Espy and Mr. Joe Espy, Attorneys at Law

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1 5-8-19

2 P R O C E E D I N G S

3 THE COURT: We are here in CC-18-4025 and 4026,
4 State of Alabama versus Trey Glenn and Scott Phillips. We
5 are here on a couple of motions, and I hope everybody got
6 the import of what I was trying to discuss. I really
7 wanted to elucidate and get some guidance from the parties
8 on some of the legal issues. If there is a later point
9 where we need to take evidence, we can do that, but I am
10 not -- I need some clarification, I think from the
11 parties, as to the law, and I -- the briefings are
12 excellent, but I think it would help me to sort of hone in
13 on some of the issues. And so I wasn't prepared to take
14 any testimony. I really just wanted to sort of hone in on
15 what the legal issues are, first, and see if we are all in
16 agreement on what the law is, and then move to if there is
17 some dispute about the facts. Why don't we have
18 everybody -- I see a few familiar faces, but if you could
19 tell me who you represent. Mr. Espy?

20 MR. ESPY: Sure. Ben Espy for Scott Phillips.

21 MR. NIX: Jess Nix for Trey Glenn.

22 THE COURT: Okay.

23 MR. HART: Matt Hart for Trey Glenn.

24 THE COURT: All right.

25 MR. ATHANAS: Bill Athanas for Trey Glenn.

1 THE COURT: Nice to see you.

2 MR. ESPY: Joe Espy for Scott Phillips.

3 THE COURT: All right.

4 MS. RAULSTON: Cynthia Raulston for the State.

5 THE COURT: Well, that's the question; which
6 state?

7 MS. RAULSTON: The State of Alabama, Jefferson
8 County District Attorney's Office.

9 THE COURT: All right. So, I got your -- and I
10 sort of put together a few questions, to try to hone in on
11 this. Who is going to be principally arguing -- let's
12 start with the motion to dismiss, based on the failure to
13 sort of follow the due process requirements in the Ethics
14 Act. Who is going to principally argue that?

15 MR. BEN ESPY: I'm going to argue for Phillips,
16 Judge.

17 THE COURT: Okay.

18 MR. HART: I'm going to argue for Mr. Glenn, Your
19 Honor.

20 MR. ESPY: And, Your Honor, if I can move over
21 here. I can't see you.

22 THE COURT: Yeah, by all means. Okay, so, help
23 me with this, Mr. Hart and Mr. Espy. Put aside all the
24 facts. Can the D.A. appoint Ms. Raulston, from the Ethics
25 Commission, to come prosecute something locally, here in

1 Jefferson County or some other county? Put aside the
2 facts. Can Mike Anderton or Danny Carr do that? Can he do
3 that?

4 MR. HART: Your Honor -- Matt Hart for Mr. Glenn
5 -- I'm not sure he can put aside all the facts, because I
6 think under certain circumstances --

7 THE COURT: I get that. But just if -- put aside
8 that. Let's put it to the side a moment. Can the D.A., if
9 they receive a complaint, say "Can't handle this. I need
10 the Ethics Commission, and Ms. Raulston, or whoever, to
11 come up here and prosecute this thing"? Can a D.A. do
12 that?

13 MR. HART: I don't think a D.A. can do that if he
14 does not intend -- he or she does not intend to pursue the
15 case. They can ask for assistance.

16 THE COURT: So what does "pursue" mean, though?

17 MR. HART: Indict and prosecute the case. If
18 they decline the case, I don't think they have any
19 authority whatsoever to do that.

20 THE COURT: By "decline," what do you mean?

21 MR. HART: Decide not to open a matter and pursue
22 it; investigate, draw the indictment up, speak with law
23 enforcement people, gather facts, and go to Grand Jury.
24 If they decide not to do that, the way they do on any case
25 that might come in, for factual reasons, resource reasons,

1 conflict issues, many many other things, if they do not
2 open a matter, they cannot authorize the Ethics Commission
3 to come in and prosecute a case under the authority of the
4 D.A.

5 THE COURT: Is it your belief, based on the law,
6 that they have to be sitting with Ms. Raulston throughout
7 the course of the entire proceeding, from the indictment
8 through trial?

9 MR. HART: I don't think they have to sit with
10 Ms. Raulston for every moment, indictment through trial,
11 no.

12 THE COURT: Okay. What if they are making a
13 determination that they are not prosecuting, not based on
14 the merits, but simply because they don't have the
15 staffing to do it? Can they then refer that to the Ethics
16 Commission?

17 MR. HART: I do not believe the D.A. can receive
18 assistance from the Ethics Commission in cases that they
19 are not pursuing, they are not open in their office to do
20 it. They have to have an open matter and be pursuing the
21 prosecution in order to receive the Ethics' assistance.

22 THE COURT: Well, what if they start to pursue
23 it, and then just sort of run out of steam and then try to
24 turn it over to the Ethics Commission?

25 MR. HART: I don't think they can turn it over to

1 the Ethics Commission. They can ask for assistance in
2 their case, if they are running out of steam. I'm not
3 sure exactly what the Court means by that.

4 THE COURT: Well, in this case, you have a
5 unique -- we'll get to the facts, but you have a unique
6 set of facts. All this came right on the eve of an
7 election and a transition from one D.A. to the other. And
8 so that complicates, I think, a little bit about this,
9 because we don't have the continuity of the same people
10 involved. But it's your position under the law that -- and
11 put aside the facts -- they have to sort of pursue this
12 matter and can't just say "Well, we have put some facts
13 down. Now you go handle it."

14 MR. HART: The Ethics Commission is limited,
15 strictly limited, in how it can perform by the statute
16 that creates the Commission. The D.A. cannot, by request,
17 expand their statute. The D.A. can, under the provisions
18 of the statute, under certain conditions, request the
19 assistance from the Ethics Commission. But he cannot
20 expand the law to authorize them, and limits them, with
21 positive legal authority, to pursue law enforcement with
22 the D.A. or with anyone else.

23 THE COURT: So if Danny Carr were sitting here
24 next to Ms. Raulston, would that mean y'all wouldn't have
25 standing to sort of pursue this motion to dismiss?

1 MR. HART: No, it doesn't mean that at all. We
2 would have standing to pursue it, because they didn't
3 follow the correct procedure through the Ethics
4 Commission.

5 THE COURT: Let's say Mike Anderton said
6 "Absolutely let's pursue it. I'm going to give you five
7 D.A.'s to do it, Ms. Raulston," and then Danny Carr came
8 on board and said "Absolutely we are going to pursue it.
9 I'm going to give y'all the resources." Does that sort of
10 negate your argument then?

11 MR. HART: I don't think so, Your Honor. I mean,
12 they can't -- if they're, on their initiative, going to
13 the Ethics Commission, under the provisions that are
14 clearly set forth in the statute that created the
15 Commission, then they can receive help as it is set forth
16 in the statute. And that simply says "If we receive a
17 request from a D.A., under certain conditions -- two or
18 three ways -- then we can respond and provide it." They
19 cannot solicit. And it's very clear.

20 THE COURT: Wait. Who can't solicit?

21 MR. HART: The Ethics Commission can't solicit --

22 THE COURT: Yeah.

23 MR. HART: -- cases to D.A.'s, and ask them to
24 institute them, and do that kind of thing, under their
25 statute, once the complaint is in the portal of the Ethics

1 Commission.

2 THE COURT: But, no, I'm suggesting what if
3 Mr. Anderton said "Absolutely, not only am I referring you
4 this, Ethics Commission, but I intend on being right there
5 shoulder to shoulder with you, prosecuting it." Certainly
6 they can do that.

7 MR. HART: Are you saying -- you say if
8 Mr. Anderton said to "them." You mean to the Ethics
9 Commission?

10 THE COURT: Yeah, that "I am referring this. I
11 need some help, but I will be there shoulder to shoulder
12 with you, to pursue this and prosecute this matter."

13 MR. HART: I think if he was pursuing the case
14 and was willing to pursue like you are talking about,
15 "We'll be there shoulder to shoulder," then, yes, I think
16 he can do that, under the statute.

17 THE COURT: Okay.

18 MR. HART: It is a fact-specific issue. I know
19 the Court doesn't want to get into that, but --

20 THE COURT: No, we are going to get to it.

21 MR. HART: Yes, sir.

22 THE COURT: So you are saying -- your criticism
23 is more of the nature, or the lack of assistance the local
24 D.A. has offered, and that -- I guess you are saying, in
25 effect, that Ms. Raulston is -- this is a sort of legal

1 fiction that she -- this was referred to her. Is that
2 what you are saying?

3 MR. HART: It is an absolutely fiction. It's not
4 true.

5 THE COURT: Okay.

6 MR. HART: Now -- and the thing about it is, one
7 of the restrictions -- the main restriction, really -- in
8 the statute that established the Ethics Commission, the
9 legislature limits them what they can do with a complaint.
10 There are three portals --

11 THE COURT: Sure. I understand that.

12 MR. HART: -- that somebody with a complaint can
13 use to get their case prosecuted.

14 THE COURT: I understand that. Totally
15 understand that.

16 MR. HART: Okay. If it goes to the Ethics
17 Commission portal, it must comply with the due process
18 requirements through that portal. They can't decide --
19 somebody in the Ethics can't decide, Ms. Raulston or
20 anyone else, "Okay, I have received this as a member of
21 the Ethics Commission staff. That's why it was brought to
22 me. Now I'm going to step over in the other portal with
23 the D.A., who doesn't have a case, who has declined it,
24 who is not pursuing it, and not standing shoulder to
25 shoulder, to say 'Let me solicit you.' They can receive a

1 request from an active D.A., but they can't take it from
2 their portal and go solicit the D.A. to do something he
3 hasn't.

4 THE COURT: Okay. So your criticism, at least on
5 that point, is more about the manner of how this was done
6 than whether a D.A., in good faith, can seek some
7 assistance from the Ethics Commission when the complaint
8 originates with the D.A.

9 MR. HART: Sure.

10 THE COURT: Okay.

11 MR. HART: Sure. If the D.A. has something he
12 wants to do, he can do it.

13 THE COURT: Okay.

14 MR. HART: He or she.

15 THE COURT: Mr. Espy, I see you trying to stand
16 up.

17 MR. ESPY: Well, I don't want to get ahead of the
18 factual scenario.

19 THE COURT: I'm going to get there.

20 MR. ESPY: And I am not trying -- and I think I
21 understand. You are taking the facts out of it for a
22 moment and talking about --

23 THE COURT: Yeah.

24 MR. ESPY: -- can the D.A. do certain things.

25 THE COURT: Yes, just do it.

1 MR. ESPY: Let me say this. I agree with what
2 Mr. Hart has said. I would add an extra component to it,
3 though.

4 THE COURT: Okay.

5 MR. ESPY: If a request is made up to the
6 Commission, that's who it's made to; the Commission,
7 right?

8 THE COURT: Right.

9 MR. ESPY: That's what the statute says.

10 THE COURT: Right.

11 MR. ESPY: So the extra element I would add is
12 that the Commission then must vote to provide assistance.

13 THE COURT: Yeah, I understand that.

14 MR. ESPY: Okay, I want to make sure that we
15 don't get lost in the -- and, again, we are not at the
16 facts, but assuming that a D.A. requests assistance from
17 the Commission, if you look at the statute, whether or not
18 they have to participate is permissive on the part of the
19 Commission, right? The Commission doesn't have to come
20 down here and provide aid. It says they may, if
21 requested.

22 THE COURT: True. But does the D.A. have to give
23 Ms. Raulston access to the Grand Jury?

24 MR. ESPY: No.

25 THE COURT: I don't think so, either. I don't

1 think so, either.

2 MR. HART: And Your Honor --

3 THE COURT: And, so, didn't they, by allowing
4 that to happen, in essence sort of defer that to her?
5 Because they didn't have to give her access, did they?

6 MR. ESPY: No, he didn't have to give her
7 access. He -- let me say this. I don't think anybody
8 disputes that Mr. Anderson acquiesced in the request that
9 was made to him.

10 THE COURT: Okay.

11 MR. ESPY: I'm not disputing that at all.

12 THE COURT: Yeah.

13 MR. ESPY: I mean, if we are going to take the
14 word "request" and interpret the way Ms. Raulston
15 interprets it, that you acquiesce when something is
16 requested of you, he certainly did that. He gave her
17 Grand Jury time, and she came down here to insinuate
18 herself in the case. But that's a very far cry from -- if
19 I request you to come down here, I don't think there is
20 anything that stops me from allowing you to participate in
21 the Grand Jury, if, if, the Commission has voted to allow
22 you to come down here, --

23 THE COURT: Sure.

24 MR. ESPY: -- and I sent the request that way.
25 And I think that's what Mr. Hart is saying, too. It's

1 about direction. And I think it's also about intention.

2 THE COURT: Okay. I got --

3 MR. HART: Some --

4 THE COURT: I think I understand.

5 MR. HART: I'm sorry. Do you want me to --

6 THE COURT: No, let me move on to the next point.

7 MR. HART: Okay.

8 THE COURT: I'm going to give you a second,

9 Ms. Raulston.

10 MS. RAULSTON: Okay.

11 THE COURT: I'm trying to establish a couple of
12 things. I think we actually established something, at
13 least for me.

14 MS. RAULSTON: I just want to correct one point
15 Mr. Espy made, and I will come back to it.

16 THE COURT: Okay. The second this is, even if
17 you are right that this should have gone through the
18 Commission and, you know, this is a legal fiction that
19 Ms. Raulston has created, does that require a dismissal?
20 I have the one case in front of me, the ex parte E.J.M..
21 Is there any other case law on that point, about -- and
22 that's a pretty interesting case. But is there anything
23 other than the E.J.M. case that requires me, if y'all are
24 correct, and they mishandled this, and it should have
25 gone -- there should have been a formal complaint, an

1 opportunity for due process to pursue that with the Ethics
2 Commission, does that require a dismissal here?

3 MR. HART: I think it does, Your Honor.

4 THE COURT: Is there any other case, other than
5 the E.J.M. case?

6 MR. HART: I'm unaware of a case in Alabama where
7 this has happened.

8 THE COURT: Okay.

9 MR. HART: And, so, no, not to my knowledge.

10 THE COURT: Okay.

11 MR. HART: Now, there are all kinds of cases, and
12 the defense asserts in their response, as their main
13 point, that 13.2 doesn't authorize this, which is really a
14 defect in charge rule. Under Rule 15, double jeopardy,
15 selective prosecution, many other things, can be
16 addressed.

17 THE COURT: Sure. And we are going to get to
18 that.

19 MR. HART: So the -- certainly the law of the
20 land -- I think there are federal cases when your due
21 process rights are denied you, and law enforcement folks
22 move forward without the positive legal authority -- and
23 we have those rules so the people are treated equally and
24 not cheated by the system. And Mr. Glenn and the other
25 defendant here, they had a right to appear before that

1 Commission when that information came in to them. That's
2 how Ms. Raulston got it. Okay, they had a right to appear
3 before that Commission with a lawyer, knowing the charges,
4 and try to persuade them not to refer it. And they have
5 overruled their staff before, so that is a very
6 substantive issue that was denied in this case.

7 THE COURT: But in the E.J.M. case, that was a
8 situation where the Commission had all of the knowledge,
9 and the A.G. had no knowledge. That's not the situation
10 here. Y'all -- I mean, we can at least agree both
11 Mr. Anderton and the D.A.'s office had some knowledge, and
12 you are claiming Ms. Raulston had some knowledge, before
13 pursuing and following up on the case. Would you agree
14 with that?

15 MR. HART: Mr. Anderton had very minimal
16 knowledge, when Ms. -- according to the affidavits that
17 are in the record, when Ms. Raulston talked to him, she
18 didn't realize that he had had that previous discussion
19 with his staff, who brought it to him, when he declined,
20 and was telling him the details of the case and selling
21 him on the case. He said "Oh, well, that's bad. If they
22 did that, that's bad."

23 THE COURT: Why is selling him on the case -- is
24 that wrong?

25 MR. HART: No, not selling him the -- there is

1 nothing wrong with pursuing a case.

2 THE COURT: Right.

3 MR. HART: She cannot take it from the portal
4 where it is required to go to the Commission, whatever
5 would allow a member of the staff, any member of the
6 Ethics Commission staff, to do, upon receiving complaint
7 material --

8 THE COURT: Okay.

9 MR. HART: -- from someone, is to decide, you
10 know, "Hmm, you know, do I want to take this to the
11 Commission, who might not want to do this case, or do I
12 want to take it over to the other portal that I don't work
13 in or function for, and cannot, without a request, do I
14 want to go over there pro actively and generate the D.A.,
15 acting through his authority, and then say 'request,' you
16 cheat -- the Ethics Commission is nullified. And they can
17 do that in every single case.

18 THE COURT: Okay. I think I got a handle on
19 where we are. Let's move to the facts for just a moment.
20 Is there any dispute that the first complaint originated
21 in the D.A.'s office? Is there -- before -- I don't know
22 the exact date. I can pull it up. What's the date? Can
23 you help me, Ms. Raulston?

24 MS. RAULSTON: It is August --

25 MR. ESPY: August 27

1 MS. RAULSTON: -- 27.

2 MR. HART: August 27 was the day they met with
3 the D.A.

4 THE COURT: Do y'all have any evidence that
5 Ms. Raulston was pursuing this before August 27th?

6 MR. HART: No, we actually have evidence, at
7 least from the affidavits, that she was not.

8 THE COURT: Okay. And, I mean, so we can at least
9 agree that the first, whatever you want to call it --
10 there might be a disagreement about that -- but the
11 complaint was first made to the District Attorney's Office,
12 not the Ethics Commission. Can we all agree on that?

13 MR. HART: The first --

14 MR. ESPY: I think we agree with that, Your
15 Honor.

16 THE COURT: Okay.

17 MR. HART: Certainly. The first attempt by the
18 GASP people and the folks who brought this was with the
19 D.A.

20 THE COURT: And I would agree with you, it
21 certainly would be a problem if that originated first with
22 Ms. Raulston, thirty days before. Without a doubt, that
23 would be a serious problem. Okay, so we have established
24 that. I'm looking at the letter that -- let me find it --
25 that Mr. Anderton signed. Are you -- tell me, is it your

1 position that that letter doesn't statutorily refer the
2 matter to her, or are you saying that that letter is just
3 a sham?

4 MR. HART: The letter is a sham, Your Honor. I
5 mean, I -- it just is. He didn't know how to write it. His
6 own affidavit says he was unfamiliar with some of the
7 requirements. Ms. Raulston called him up, and she was only
8 able to call him up because she had received, by that
9 point in time, the information through the complaint
10 channel of the Ethics Commission.

11 THE COURT: But assuming he had the intent to, I
12 guess he had the knowledge of, he can write that letter,
13 and it can have statutory import to refer it to her,
14 correct?

15 MR. HART: I don't think he can, under those
16 conditions. Those conditions he cannot -- they can only
17 act with a request. Now, if they can act with a --

18 THE COURT: Is the letter not a request?

19 MR. HART: Well, if we get down to the English
20 language, Your Honor, --

21 THE COURT: Sure.

22 MR. HART: -- if they solicited requests -- is in
23 fact a request, and an Ethics staff member can do that,
24 the code is meaningless. And so -- and he declined the
25 case at that point. They had no open file, and it was a

1 month later.

2 MR. ESPY: I think we are back at my --

3 THE COURT: I'm going to give you a chance, after
4 Mr. Espy.

5 MR. ESPY: I think we are back at my acquiesce
6 argument I had earlier, Your Honor. I mean, that letter
7 is him acquiescing --

8 THE COURT: But why should I ignore the letter?
9 Why should I -- I mean --

10 MR. ESPY: Sure.

11 THE COURT: -- it's a letter written by a lawyer,
12 that is the District Attorney of Jefferson County, --

13 MR. ESPY: Sure.

14 THE COURT: -- and I'm supposed to import that he
15 didn't know what was going on, and Ms. Raulston was sort
16 of manipulating him? I mean, how can I get to that point?
17 Shouldn't the D.A. know what he is doing?

18 MR. HART: All D.A.'s should know what they are
19 doing, Judge. I won't -- I don't want to shock the Court
20 or anything --

21 THE COURT: I mean, I have to sort of say "Well,
22 he didn't really -- forget that letter."

23 MR. ESPY: Sure.

24 THE COURT: "He didn't know what he was doing."

25 MR. ESPY: Let me say it this way.

1 THE COURT: Yeah.

2 MR. ESPY: The -- again, I don't won't to get
3 ahead of where you are, Your Honor, but I think it
4 requires -- and I'm not going to get into facts, but let's
5 just talk a little bit about the what the law is, right?
6 The Ethics Act creates the Ethics Commission, says what
7 they can do. It's a -- you know, you are a creature of
8 the legislation.

9 THE COURT: Yeah.

10 MR. ESPY: You can do what the creator says you
11 can do. That's what the cases say, right?

12 THE COURT: Y'all are saying that she, in
13 essence, really violated the spirit of what that is for.

14 MR. HART: No.

15 MR. ESPY: I don't -- no, Your Honor. What I'm
16 saying -- let me say it this way, and I will say it as
17 quickly as I can --

18 THE COURT: That you couldn't have a -- you
19 couldn't have an Ethics Commission calling up D.A.'s all
20 the time, saying "I have got this great case," and "just
21 refer it to me."

22 MR. ESPY: Absolutely.

23 THE COURT: "And that way, I don't have to go
24 through that Ethics Commission."

25 MR. ESPY: Right.

1 THE COURT: I get that.

2 MR. ESPY: That's right. Because here is how --
3 if you look at the law, right, the law has both an active
4 component and a passive component.

5 THE COURT: Right.

6 MR. ESPY: Right? Active: "You shall do this,
7 you shall do that, you shall help with this." It's a very
8 active component what they should do. There is also this
9 passive component, which is, you are out there and a
10 request is made, you should be passive in that regard.
11 It's passive, and like I said earlier, permissive. Right?
12 So it's passive. You are there. Whatever mechanism they
13 choose to ask for help -- and we can disagree about when
14 or when they can't, but let's say you can. They ask for
15 help, okay?

16 THE COURT: Yeah.

17 MR. ESPY: Right? When they ask for help, then
18 they are asking for help, like I said earlier, from the
19 Commission, and the Commission has to decide whether or
20 not it wants to waste it's resources in Jefferson County,
21 particularly in light of the -- that it has a complaint of
22 its own, right? It's not like there is no complaint. I
23 mean, I think it's a pretty reasonable argument to make
24 that if five members of the Commission were asked "Should
25 I go to Jefferson County, they are allowed to vote on

1 it?" three of them very easily could have said "Why would
2 we waste our resources in Jefferson County? You had the
3 complaint here. We are not going to send three
4 investigators and our lawyer, our only lawyer, all the way
5 down to Jefferson County. You have a job to do here."

6 THE COURT: I understand.

7 MR. ESPY: Right? You see what I'm saying? So I
8 think our problem, my problem is, they did not act
9 passively. She was active in her role in attempting to
10 get that case. That is what she did. She called with the
11 intention --

12 THE COURT: And that's what y'all are saying
13 under the facts.

14 MR. ESPY: Well -- right. You have to sort of
15 get to the facts, what Mr. Hart keeps saying. But I think
16 the law -- I mean, if you look at what the lawyer for the
17 Ethics Commission is supposed to do, right? I mean there
18 is a section in the code that says exactly what she can
19 and can't --

20 MR. HART: Your Honor --

21 THE COURT: Hold on. Let me just say this. And
22 when I finish, let me give Ms. Raulston an opportunity to
23 speak. All I'm saying is, we'll get into the facts, --

24 MR. ESPY: Sure. Sure.

25 THE COURT: -- but I have to, when we get into

1 the facts, I sort of have to disregard that letter and
2 look behind the four corners of that. And Ms. Raulston,
3 what did you -- let me give you an opportunity to
4 address --

5 MS. RAULSTON: Very briefly.

6 THE COURT: Okay.

7 MS. RAULSTON: I just want to point out a couple
8 of things. Mr. Espy has said several times the Commission
9 must vote in order to permit my participation in a
10 prosecution, upon request by a D.A.. That is not
11 accurate. There is nowhere in our code that requires a
12 vote. And it very clearly in our code identifies when a
13 vote is required; for instance, for a referral, et
14 cetera. I just want to clear that up for the record.
15 Additionally, to the -- to answer your question that was
16 very clear in the beginning, can a D.A. appoint the Ethics
17 Commission general counsel, or a lawyer with the Ethics
18 Commission, to prosecute a case in their jurisdiction, and
19 the answer is unequivocally yes.

20 THE COURT: Right.

21 MS. RAULSTON: There is nothing about the code
22 section --

23 THE COURT: And I think they agree with you. I
24 think they are saying that this is -- this process has
25 been torqued somewhat.

1 MS. RAULSTON: I don't disagree. I'm not -- I'm
2 not -- I don't disagree that they would -- I'm just trying
3 to answer your question clearly. I don't disagree with
4 you, --

5 THE COURT: Agree.

6 MS. RAULSTON: -- that they argue that this has
7 been --

8 THE COURT: -- this has been torqued and
9 manipulated.

10 MS. RAULSTON: Right. I'm just saying clearly
11 the D.A. --

12 THE COURT: Hold on, Mr. Hart. Hold on.

13 MR. HART: I'm sorry, Judge.

14 THE COURT: Y'all have done most of the talking.

15 MS. RAULSTON: These are my very first words.
16 The D.A. or the A.G. can request my assistance, and I can
17 prosecute that with or without their assistance.
18 Typically, obviously, it would be done with assistance
19 from that D.A.'s office, but as -- for other reasons, as
20 you have alluded to, that is not happening. But the --
21 but, yes, that is appropriate. That's all I want to say
22 right now, and when we get into the facts, we'll discuss
23 that.

24 MR. ESPY: Your Honor --

25 MR. HART: If I may, if I may, Your Honor --

1 THE COURT: All right, go ahead, Mr. Hart.

2 MR. HART: I want to illuminate something that --
3 in Exhibit C to the --

4 THE COURT: Which one?

5 MR. HART: -- to the Lewis affidavit. There is
6 the original complaint communication, the initiation of
7 communication from the complainant to the Ethics
8 Commission. It's dated 2-18 -- no, that's wrong. That's
9 my date -- September 6, 2018. And it says "Cynthia, I
10 would like an opportunity to share with you and discuss
11 information regarding Scott Phillips and his possible
12 violation of Alabama Ethics Law during service on the
13 Environmental Management Commission." And I'm paraphrasing
14 here. I'm not going to read all -- "cannot do it as soon
15 as I want to, because of deadlines. Perhaps the attached
16 will pique your interest." And there were some materials
17 attached to the time line and other things. Now, her
18 response illuminates her understanding of the restrictions
19 on her activity as a member of the Ethics Commission
20 staff.

21 THE COURT: I agree with you. And she says "You
22 need to file an ethics complaint."

23 MR. HART: Yes.

24 THE COURT: And if we were here in a vacuum, and
25 there was nothing that had preceded that, then I would

1 totally agree that she couldn't then call up the D.A.'s
2 office and say, "Hey, just heard from them. What is going
3 on? You know, we need to get on this," you know, without
4 them having any knowledge of it.

5 MR. HART: Sure. If she can receive complaints
6 through complainants like this, and put it over in the
7 D.A. portal, this is the only way she knew it, is when
8 they called her.

9 MS. RAULSTON: I didn't --

10 THE COURT: Well, hold on just a second. I think
11 the affidavit -- I don't know that's true. But I think it
12 also could show good faith that she told them, instead of
13 "Yeah, let's all get in a big group and talk about it,"
14 "You need to file a formal complaint." As an officer of
15 the Court, I guess they chose not to do that.

16 MS. RAULSTON: In my response brief, I have
17 articulated that after that email --

18 THE COURT: -- where you said "You can file a
19 formal ethics complaint."

20 MS. RAULSTON: Yes, and I had put in my brief
21 that beyond that, what -- anything that happened with the
22 Ethics Commission, beyond that, is protected by Grand Jury
23 secrecy.

24 THE COURT: Right.

25 MS. RAULSTON: And so I ask to disclose that in

1 ex parte, and en camera, if that were requested of me.

2 MR. HART: Standing here today, Your Honor, we
3 don't know if there is a complaint up there or not. We
4 don't know if they filed one or not.

5 THE COURT: You haven't represented that there
6 is, or is not?

7 MS. RAULSTON: No, I have not.

8 THE COURT: What is the problem with representing
9 that in a pro-- I understand you couldn't tell a member of
10 the public, but --

11 MS. RAULSTON: I can't --

12 THE COURT: -- why can't you tell the Court?

13 MS. RAULSTON: Unless the Court orders me to tell
14 you, I can't tell the Court, because it's protected under
15 625(4)(c). It's Grand Jury. It's just as if we were in
16 the middle of a Grand Jury, or anything that happens --

17 THE COURT: Just a complaint --

18 MS. RAULSTON: Yes.

19 THE COURT: -- being filed?

20 MS. RAULSTON: Yes, sir.

21 THE COURT: Okay. Well, I would order you to let
22 me know, either way, if there was a formal complaint made.

23 MS. RAULSTON: Okay, yes, there was.

24 THE COURT: Okay. All right. Well, then we
25 probably need to, at some point, discuss that further.

1 MS. RAULSTON: Uh-huh (affirmative).

2 MR. HART: And our point being, Your Honor -- and
3 this is an assumption on our point, but now confirmed --
4 when a complaint is made to the Ethics Commission, that
5 must travel a certain way. It must meet certain
6 procedural requirements. The Ethics Commission does not
7 have the authority --

8 THE COURT: Sure. Hold on a second. With that
9 being said, does that then prevent you from coming up
10 here, if they legitimately referred that to you, if there
11 is a simultaneous ethics complaint made? If there is a
12 simultaneous ethics complaint made with the Ethics
13 Commission, and let's assume -- I think it's fair to
14 assume there was a -- there was a meeting with these
15 individuals with the D.A.'s office.

16 MS. RAULSTON: Yes.

17 THE COURT: Does the fact that you have sort of
18 two lines running, does that negate you going forward with
19 the Ethics component, in pursuing it that way?

20 MS. RAULSTON: No.

21 THE COURT: Okay.

22 MS. RAULSTON: And I --

23 THE COURT: And why not?

24 MS. RAULSTON: Well, it doesn't prohibit me from
25 doing it, but let me tell you about -- I mean, regarding

1 efficiency, it would not make sense for --

2 THE COURT: Well, explain it to me.

3 MS. RAULSTON: Okay. So, a D.A. has a complaint

4 --

5 THE COURT: Right.

6 MS. RAULSTON: -- in their office. Somebody
7 papers everybody, they sent it to a Special Prosecutions
8 Division, and the A.G.'s Office, they send it to the D.A.,
9 and send it to Ethics. If everybody has got it, it
10 doesn't make sense for three agencies to be doing the same
11 work.

12 THE COURT: Okay.

13 MS. RAULSTON: Because my referral, any referral
14 coming from the Commission would either go to the D.A. or
15 the A.G..

16 THE COURT: Okay.

17 MS. RAULSTON: And in this circumstance, would
18 likely call up the D.A.. And so you can travel parallel
19 tracks, but it doesn't make sense --

20 THE COURT: And one doesn't knock out the other.

21 MS. RAULSTON: No, sir. And as regard to due
22 process -- that's been brought up several times, and I
23 know that we are trying to stay on point, and not -- I
24 want to do that. But with regard to due process, the due
25 process that they are discussing is regarding the ethics

1 complaint and how the ethics complaint is handled within
2 our agency, --

3 THE COURT: Right.

4 MS. RAULSTON: -- because we are an independent
5 agency, and we are not elected, and so we are governed by
6 the -- as he said, the legislature authority that we have
7 been given. But the due -- the defendants have not been
8 -- have not suffered from a lack of due process because
9 they are in the criminal justice system, which is due
10 process in its own right.

11 THE COURT: But they say that they would get all
12 that due process at the Ethics Commission, where they
13 could go argue and talk to all those people.

14 MS. RAULSTON: That's --

15 THE COURT: What about all that?

16 MS. RAULSTON: The due process that is protected
17 Constitutionally is their due process in a criminal
18 court. The due process that they are going to get at the
19 Ethics Commission is frankly that they are apprized of
20 what essentially would be a Grand Jury hearing; you know,
21 the executive session where a case would be presented, and
22 they could get discovery. But that's -- I mean, that --
23 other than that, every due process right that they have
24 and given to them by the Constitution is protected in the
25 criminal justice system.

1 MR. HART: Your Honor, if I may --

2 THE COURT: Sure.

3 MR. HART: This is statutory. I mean, it's not
4 a -- the Constitution didn't establish these due process
5 procedures here. The Alabama legislature did. And they
6 thought it was so important, that in Section 35-25-4(d),
7 where they set forth the procedure for the Commission to
8 utilize, when they receive a complaint, --

9 THE COURT: Yeah, --

10 MR. HART: -- the very last sentence --

11 THE COURT: -- I agree with you on the
12 procedure. The question is what the relief should be and
13 how you connect that to a Constitutional wrong, --

14 MR. HART: Well --

15 THE COURT: -- and does it require an absolute
16 dismissal here, if you -- if you are able to prove that,
17 you know, they didn't follow those procedural, I guess,
18 safeguards in this case, --

19 MR. HART: I think it does, Your Honor.

20 THE COURT: -- does that require a dismissal?

21 MR. HART: I think E.J.M. makes that clear.

22 E.J.M. is not identical.

23 THE COURT: I think it's a little
24 distinguishable.

25 MR. HART: It is distinguishable on some points,

1 but the poisonous tree was unacceptable to them, and the
2 impact on the potential defendant was unacceptable to the
3 court, and it's unacceptable here. The legislature was
4 very clear about what they wanted with the complaints
5 that came through here. And the only way that
6 Mr. Anderton -- if Mr. Anderton had initiated some of
7 this, we might be in a different posture, as far as two
8 tracks. There wasn't two tracks. Mr. Anderton was off
9 track when this occurred, and that is not in dispute.

10 MS. RAULSTON: If I can respond to that briefly.
11 The due process that protects the defendants -- or the
12 respondents, as we call them -- but the due process that
13 is protected for the respondents is that the Commission
14 doesn't act capriciously or arbitrarily by referring
15 somebody to the D.A.'s office before the respondent is
16 afforded due process in the Ethics Commission process. In
17 this scenario, the D.A.'s office already had it,
18 independent of the Ethics Commission, or independent of
19 any knowledge that the Ethics Commission had. It had
20 already gone to the D.A.'s office. So the due process
21 protection is about the Commission not referring something
22 without providing due process in our process, but it had
23 already been referred to a prosecutor by the complainant
24 before we ever knew anything about it.

25 MR. HART: The D.A. had it, Your Honor, and had

1 declined it. There was nothing --

2 MS. RAULSTON: That's --

3 MR. HART: -- open in their system. At that
4 point in time, E.J.M. was -- is pretty darn --

5 THE COURT: I think that's a point in dispute. And
6 again, I almost have to -- to agree with you, I have to
7 totally ignore Mr. Anderton's letter.

8 MR. ESPY: I don't know about that, Your Honor.
9 I mean, what he is saying is, and I think -- I think this
10 is beyond dispute. If Ms. Raulston doesn't call
11 Mr. Anderton, none of us are here. That is beyond
12 dispute. I don't know --

13 THE COURT: But is there something wrong with one
14 lawyer calling another about "Are you going to pursue this
15 or not?"

16 MR. ESPY: Well, look, I have tried to avoid this
17 (indiscernible) view setup thing that Mr. Hart is getting
18 into, even though I agree a hundred percent.

19 THE COURT: I mean, is there something wrong with
20 saying, "Look, you know, I understand that you have got a
21 complaint there. Somebody came to see you. Are y'all
22 going to pursue it or not?"

23 MR. ESPY: Well, yeah, of course there is, Your
24 Honor. She has a complaint with the Ethics Commission, and
25 she has a job to do at the Ethics Commission. Look --

1 THE COURT: Hold on. Do they have to put up a
2 Chinese drywall between each other?

3 MR. ESPY: Well, let's -- let's consider this,
4 Your Honor. When Ms. Raulston --

5 MR. HART: After the complaint, yes.

6 MR. ESPY: Yeah. Absolutely. When Ms. Raulston
7 made the phone call, when she made the phone call to
8 Mr. Anderton, what did she know as a matter of fact? What
9 did she know? GASP met with her and told her that they
10 were not going to pursue the case, that the District
11 Attorney was not going to pursue the case. And based on
12 her own affidavit, the District Attorney of Jefferson
13 County had shut down it's White Collar Crime and
14 Public Corruption Division.

15 THE COURT: Well, that was like --

16 MR. ESPY: Not only did they decline it. They
17 were never going to pursue this case.

18 THE COURT: But that was, like, two years ago.

19 MR. ESPY: Right.

20 THE COURT: They had already shut it down.

21 MR. ESPY: They shut it down for two years. They
22 weren't going to pursue it, when she called -- look, the
23 most ridiculous thing in this entire case is that
24 Ms. Raulston claims to have called the District Attorney's
25 Office to find out if they were going to pursue the

1 claims. She knew that they weren't going to pursue the
2 claims. It was a fact. She didn't -- she called to
3 insinuate herself --

4 THE COURT: But what evidence do you have that
5 that is not true?

6 MR. ESPY: Because she knew they weren't going to
7 prosecute the case. They had sent them to her. That's why
8 they went to her.

9 MR. HART: Harry's affidavit.

10 MR. ESPY: Yeah. I mean, Harry's affidavit is
11 crystal clear, "We weren't going to do anything. We told
12 them to go see the Ethics Commission or the Attorney
13 General. We are not going be involved."

14 MR. HART: Or --

15 THE COURT: All right, let me hear from
16 Ms. Raulston, on that limited point.

17 MS. RAULSTON: Yes, sir. "Declined" I do not
18 think is the proper word to use. They had not declined
19 the case. They had simply said they did not have the staff
20 to handle it, which, as the Court knows, I am intimately
21 familiar with, in this specific office, about the lack of
22 substantive investigators, which is why --

23 THE COURT: So what is your position --

24 MS. RAULSTON: That --

25 THE COURT: -- of what -- why they are not seated

1 next to you right here?

2 MS. RAULSTON: My position is that I think they
3 are under staffed with lawyers. My understanding --

4 THE COURT: Let's start from there. Their
5 position is, is that they had no intent to ever pursue
6 this.

7 MS. RAULSTON: Whose position? Their's.

8 THE COURT: Mr. Espy, Mr. Hart's position, they
9 had no intent to pursue this, and that's the problem. What
10 is your position as to why they are not seated here with
11 you, prosecuting, ongoingly, this process?

12 MS. RAULSTON: The only reason they were not
13 pursuing it was the lack of the investigative staff and
14 the lack of local investigative enforcement agencies to
15 investigate these particular facts.

16 THE COURT: Are you claiming that they never
17 reached the merits of whether to pursue it, --

18 MS. RAULSTON: No, I --

19 THE COURT: -- or they had reached the merits and
20 simply didn't have the staff to pursue it?

21 MS. RAULSTON: They reached the merits and did
22 not have the staff to pursue it.

23 THE COURT: Okay. Well, their position, of
24 course, is they reached the merits, and "We are not going
25 to handle this."

1 MS. RAULSTON: And this is not -- that is not
2 reflected in the evidence in Drew Herring's affidavit. I
3 will say this. Mr. Hart pointed out that when I had a
4 conversation with Mr. Anderton, I did not know that Drew
5 had gone to Mike and said --

6 THE COURT: Is this in your affidavit that you
7 filed?

8 MS. RAULSTON: Yes.

9 THE COURT: Okay.

10 MS. RAULSTON: Yes. I'm sorry, that's what he
11 referred to. I am not presenting any additional evidence
12 right now.

13 THE COURT: All right.

14 MS. RAULSTON: Okay. But I did not know that.
15 That came -- when Drew submitted his affidavit is when
16 that was revealed, and as I -- and as in -- it was just as
17 easily true, which is what I believed, that Drew had this
18 case come in, walked in the door, and he was like, "Wow,
19 that is much larger than anything we can deal with. Our
20 process servers, these investigators, cannot do anything
21 with this. It is not likely something Birmingham Major
22 Fraud would be interesting in pursuing, or has necessarily
23 the skill set to do." And he could have sent Haley, the
24 complainants, out the door that moment. But he did not do
25 that. What he did was he went to Mike to say, "Hey, got

1 this case. It's a lot. What do you want to do with it?"
2 So I think they had reached -- Drew had reached the merits
3 of the case, had gone to Mike to see what he -- how he
4 wanted to deal with it, and Mike said, in Drew's
5 affidavit, says "We don't have the investigators to deal
6 with this. Send it to Ethics, send it to the A.G., they
7 have got the staff to deal with it." I cannot comment -- I
8 mean, I don't know at that point -- you know, I know the
9 D.A.'s office is under staffed with attorneys, but I will
10 say that I was brought on to help. My role certainly was
11 to assist in presentation to the Grand Jury, and that was
12 my understanding until, truly, the day of Grand Jury.

13 THE COURT: Okay.

14 MR. HART: Your Honor, that is a massive
15 expansion of Mr. Herring's affidavit. I want to point
16 that out. There is nothing in his affidavit where he says
17 "Oh, I came to the conclusion this was a big case and we
18 needed to do it." He said --

19 THE COURT: I agree. He doesn't say that.

20 MS. RAULSTON: That's the inference.

21 MR. HART: Also --

22 MS. RAULSTON: That was the inference why it went
23 to Mike.

24 THE COURT: Yeah, I understand. I get the
25 inference.

1 MR. HART: Well, I mean, when we use his name and
2 say this is -- "we thought," I just want to be clear about
3 it. Also, when the D.A. declined it, they have got
4 procedural issues. They file -- they open matters in
5 their system and that type of thing when they open a case
6 at all. And that -- I don't believe that was done in this
7 case. They also said "You can go to the Ethics
8 Commission."

9 THE COURT: But do you know that it wasn't done
10 in this case?

11 MR. HART: Well, I can't testify here, Judge. I
12 don't think that I can testify.

13 THE COURT: Well, I mean, is there something in
14 the record?

15 MR. HART: There is nothing in the record, at
16 this point, about it not being open.

17 THE COURT: Okay.

18 MR. HART: We have interviewed people and talked
19 to them, and I have a good faith basis for telling you
20 that, as an officer of the Court, but I'm not offering it
21 as evidence for my client.

22 THE COURT: All right.

23 MR. HART: But I will say this. The other thing
24 they said, "You can go to the A.G." There has been
25 nothing said here about whether they went to the A.G. or

1 not. Maybe the A.G. said "Hey, you have got a statutory
2 problem. We are not getting involved in that." There
3 could have been a number of things. It wasn't just the
4 Ethics Commission.

5 MS. RAULSTON: That is also subject to Grand
6 Jury, Judge. And if you order me, I will release that.

7 THE COURT: Yes.

8 MS. RAULSTON: They did send it to the A.G.. They
9 sent it to the attention of Matt Hart, with the Special
10 Prosecutions Division.

11 THE COURT: Okay. Well, I'll let you --

12 MR. HART: Well --

13 THE COURT: -- litigate that issue.

14 MR. HART: Your Honor, I think more recently --

15 THE COURT: I can only deal with so much at one
16 time.

17 MR. HART: Since we filed the motion to dismiss,
18 Your Honor, there may have been some more meetings with
19 the Attorney General's Office, where they solicited
20 Mr. Marshall. "Would you guys get in on this?" And maybe
21 they were declined and told "You have a statutory issue.
22 We aren't doing that." And I think that needs exploring.
23 If the D.A. says "Go to Ethics or the A.G., that would
24 indicate, certainly, and Ethics staff member, investigator
25 or lawyer would have reason to pause if they were told by

1 the Attorney General, who is responsible for the -- as a
2 chief law enforcement officer of the state, say "No, you
3 have got a problem with that."

4 THE COURT: Well, I mean, are you representing
5 that, Mr. Hart?

6 MR. HART: No, Your Honor. I'm saying it needs
7 to be explored. If we are going to explore these other
8 things, it needs to be filled out.

9 THE COURT: But do you know the answer to that
10 question?

11 MR. HART: I don't, Your Honor. I can't testify
12 to the answer to that question.

13 THE COURT: Okay. Well, I'm willing to put this
14 aside and move to the motion to dismiss based on -- I
15 think the vindictive prosecution. Who is going to argue
16 that?

17 MR. ATHANAS: I am, Judge.

18 THE COURT: Okay, go right ahead.

19 MR. ATHANAS: So, I don't want to rehash what is
20 in the pleading. I know you read those. I want to be
21 efficient here and just sort of set the context for what
22 we have suggested; that this motion be held in abeyance
23 pending some resolution on the statutory safeguards.

24 THE COURT: That's why I started with that first.

25 MR. ATHANAS: Correct. And we would reiterate

1 that position here, but I think there are two really
2 important things to focus in on this issue. The first is,
3 we said in our initial filing that the State committed a
4 crime here; they violated the Grand Jury Secrecy Act.

5 THE COURT: Sure. And you are sort of using that
6 as a basis of circumstantial evidence that this is
7 vindictive and selective.

8 MR. ATHANAS: It is. But I think it's more
9 important than that; that it has broader meaning than
10 that. First of all, the State did not respond to that at
11 all. They ignored it. They pretended as though we never
12 even brought it up.

13 THE COURT: Brought what up? Just --

14 MR. ATHANAS: The fact that we said they violated
15 the Grand Jury Secrecy Act, when they issued a press
16 release.

17 THE COURT: I think that is important. Would you
18 address that issue? And help me with that, Mr -- yeah,
19 help me with that. What are you alleging that they did?

20 MR. ATHANAS: Sure. He was indicted on November
21 9. Mr. Glenn was indicted on November 9.

22 THE COURT: Okay.

23 MR. ATHANAS: On November 13th, the A.G.'s Office
24 issued a press release, which they have since taken down
25 from their web site.

1 THE COURT: Wait. Who put up --

2 MR. ATHANAS: The Ethics Commission. Thank you.
3 The Ethics Commission issued a press release.

4 THE COURT: And what day was that?

5 MR. ATHANAS: That was November 13th. There was
6 also an article in AL.com, which we have cited at page 10,
7 note four of our pleading.

8 THE COURT: Okay, so that comes out.

9 MR. ATHANAS: Right.

10 THE COURT: So, what is your allegation?

11 MR. ATHANAS: So, the statute is very clear,
12 12-16-210, you cannot disclose the fact of an indictment
13 has been filed before arrest or bail. Neither one of
14 those things happened. They were in such a rush to
15 celebrate this, that --

16 THE COURT: When was he -- when was your client
17 booked?

18 MR. ATHANAS: November 15th. He was placed on
19 bond, Judge.

20 THE COURT: Okay. And what is your response to
21 that? They are alleging that there was some rush and that
22 the Ethics Commission, I guess, put out some press
23 release, prior to Mr. Glenn being served, apprised of it,
24 and I guess turning himself in to make bail. What is the
25 response to that?

1 MS. RAULSTON: The response, honestly, is, I think
2 it would probably be irresponsible to respond with the
3 facts behind that, because the statute he is discussing is
4 a criminal statute. And so I have not responded to it
5 because if there is some allegation, we can address that;
6 some criminal complaint filed, we can address that. But --

7 MR. HART: I'm sorry, is that an assertion of the
8 Fifth Amendment privilege?

9 MS. RAULSTON: No, I'm just saying that that's
10 why -- come on. That's why I have not addressed it, is
11 because I don't -- first of all, I don't think it's
12 relevant to the vindictive and selective prosecution,
13 because the facts underlying this prosecution are -- there
14 is clear probable cause for Trey Glenn, while there is not
15 for the other two.

16 THE COURT: I'm putting aside that. I'm just
17 dealing with just -- I have never dealt with this
18 situation, so I'm -- it's a matter of first impression for
19 me. Is there a requirement that before -- put aside the
20 Ethics Commission. Danny Carr can say "We are pursuing
21 this case." Does that individual have to be served and
22 booked before he can go on air and start talking about an
23 indictment?

24 MS. RAULSTON: Do you have the language of the
25 statute?

1 MR. ATHANAS: Yeah.

2 MS. RAULSTON: And --

3 THE COURT: I mean, is that y'all's position?

4 MS. RAULSTON: And what I will say is, also, --

5 MR. HART: That's the law.

6 MS. RAULSTON: -- the violation of this is --

7 THE COURT: So it's okay as long as he has been
8 served with it and I guess he has made bond and he is
9 out.

10 MS. RAULSTON: And -- well, Judge, and at the end
11 of the day, there are numerous times that before an
12 indictment comes out, that a defendant is called and said,
13 "Hey, do you want to turn yourself in?" before the
14 indictment is served on them. And that happens in this
15 courthouse, that happens --

16 THE COURT: Is there any case law on this point,
17 where a -- just listen to me -- where a D.A. or A.G. or
18 Ethics Commission puts out some press release, and the
19 individual has not yet been served, and that is determined
20 to be violative of the law? Is there some case I can look
21 at?

22 MR. ATHANAS: None than we have located, Judge.

23 THE COURT: Okay.

24 MS. RAULSTON: Again, any violation of this would
25 have been violated by the D.A., by D.A.'s across the

1 state, by Matt Hart, I believe himself, in prosecutions.

2 THE COURT: Well, let's leave him out.

3 MS. RAULSTON: I'm just saying by the Attorney
4 General --

5 MR. HART: (Indiscernible -- several speaking)
6 the record, well, I'm sorry.

7 MS. RAULSTON: By the Attorney General's office.
8 No. By the Attorney General's Office, I'm just saying,
9 and maybe the judge or somebody in the audience, when the
10 D.A. says "Hey, you know, I'm going to let this guy turn
11 themselves in before the Sheriff's Office, Warrant Detail,
12 goes to their business, and/or to their home, or pulls
13 them over in their car," that D.A.'s all over allow them
14 to turn themselves in.

15 THE COURT: I think your position is, that's the
16 law -- let me try to frame it --

17 MR. HART: Your Honor, if I may.

18 THE COURT: Hold on a second, Mr. Hart. Let me
19 think for a second -- that that's the law, but that's not
20 necessarily what the law was intended to police, or people
21 giving people notice of "you have a right to turn yourself
22 in," that type of thing. Is that what you are saying?

23 MS. RAULSTON: I'm saying the practice is that
24 there a lots of -- there are people who don't follow this
25 on a regular basis, and choose not to, as a practice.

1 THE COURT: And that there is not really any case
2 law on point.

3 MS. RAULSTON: There is no enforcement of this
4 that I -- I mean, I don't know of any. I haven't gone and
5 searched it out.

6 THE COURT: Okay.

7 MS. RAULSTON: But, I just --

8 THE COURT: Okay. Is that why you didn't address
9 it?

10 MS. RAULSTON: Yes, sir.

11 THE COURT: Okay. All right, Mr. Hart, go right
12 ahead.

13 MR. HART: Your Honor, the statute, which is
14 12-16-210, doesn't cover defendants. It doesn't. It
15 covers any judge, --

16 THE COURT: Uh-huh (affirmative).

17 MR. HART: -- District Attorney, clerk, other
18 officer of the Court, or grand juror who discloses the
19 facts. The defendant is free to call anybody up, and this
20 would not impact the defendant at all, and say, "if you
21 are going to indict me, I would like to come turn myself
22 in."

23 THE COURT: Yeah.

24 MR. HART: And there is no -- this wasn't just
25 talking about and disclosing. This was a press release.

1 It has been in force before, I want to say for the record,
2 --

3 THE COURT: Sure.

4 MR. HART: -- not to be snitty, I never violated
5 that statute ever.

6 THE COURT: Right.

7 MR. HART: And we counsel and coach our staff on
8 how not to do that, just as a matter of professionalism
9 and competence. And I know there has been no evidence put
10 on that D.A.'s in the state routinely violate that. I'm
11 unaware of that, and I have been doing this, in this
12 field, for twenty-some-odd years.

13 THE COURT: So you are saying that every time
14 there was a press release, the person had already been
15 booked in --

16 MR. HART: Absolutely, Your Honor.

17 THE COURT: -- and had either made bond or --

18 MR. HART: And I know D.A.'s around the State who
19 have little notes on their thing "Not to be disclosed
20 until," because they write the press release ahead of
21 time, within their staff, you know, without disclose-- and
22 doesn't disclose to anyone.

23 THE COURT: Even if the individual was out of
24 state and they haven't been able --

25 MR. HART: Absolutely.

1 THE COURT: -- to serve it?

2 MR. HART: Yes, Your Honor.

3 THE COURT: Okay.

4 MR. HART: And I do know of enforcement in the --
5 I know of defendants who have accused prosecutors -- one
6 prosecutor who is now a federal judge down in the Southern
7 District of Alabama -- was accused of not hiding the
8 indictment well enough in the courthouse, walking around
9 so people could look at it, and therefore violating the
10 statute, and so forth. It has been pursued on a couple or
11 three occasions, but people do not -- there is no evidence
12 indicating it's routinely violated.

13 THE COURT: Is there anything -- is there any
14 case law that points to that it requires some dismissal,
15 if that is violated, --

16 MR. HART: No.

17 THE COURT: -- as you are suggesting here?

18 MR. HART: No, Your Honor.

19 MS. RAULSTON: And I wasn't addressing press
20 releases. I was just talking about the plain language of
21 the statute, --

22 THE COURT: Okay.

23 MS. RAULSTON: -- in practice.

24 THE COURT: All right, go ahead, Mr. Athanas.

25 MR. ATHANAS: Thank you, Judge. And just to

1 clarify, they had two opportunities to make those
2 arguments. What happened here is they ignored it and hoped
3 you would, too. That's why we never heard anything about
4 it.

5 THE COURT: All right.

6 MR. ATHANAS: There is another problem. The press
7 release that they issued, they are subject to the rules of
8 professional conduct, as we all are, and that requires a
9 clear disclaimer, "This is simply an allegation. The
10 defendant is presumed to be not guilty." That is not in
11 there, either. We raised that point. To make clear, we
12 don't seek dismissal on these grounds, Judge. We are not
13 saying because the press release isn't perfect, the case
14 has to be dismissed. That would be ridiculous. But the
15 problem is, it's indicative of a deeper fundamental flaw
16 in how this process worked it's way through.

17 THE COURT: And other evidence that you say is
18 circumstantial to their intent.

19 MR. ATHANAS: Yes, and I'm going to show you how
20 it does that, Judge, as we --

21 THE COURT: Okay.

22 MR. ATHANAS: -- move forward with another
23 significant problem in their filing, which is the key case
24 here, on the relief that we have sought, is Armstrong.
25 That's the Supreme Court case from 1996.

1 THE COURT: And what is the impermissible basis
2 that you claim that they are using.

3 MR. ATHANAS: Right. So in their filing, Judge,
4 --

5 THE COURT: Because it's my understanding race,
6 religion, --

7 MR. ATHANAS: -- we said political status.

8 THE COURT: Okay.

9 MR. ATHANAS: His status as a political
10 appointee. But I think what's --

11 THE COURT: Has that been recognized as a --

12 MR. ATHANAS: It has. We have cited the --

13 (Indiscernible - both talking)

14 THE COURT: -- purpose?

15 MR. ATHANAS: It has. We have cited the
16 authorities in the --

17 THE COURT: By being a political appointee, or
18 being of one party or another?

19 MR. ATHANAS: It's political affiliation.

20 THE COURT: Okay. Political -- now, I did see
21 political affiliation. All right, go ahead.

22 MR. ATHANAS: But I think what is, I guess, most
23 troubling in this context is, in the government's -- the
24 State's filing, Judge, they refer to the standard that
25 should be applied, not specifically in the context of

1 Armstrong, but what needs to be shown. So at page three
2 they talk about the fact that, you know, we are not
3 entitled to the relief we seek because the prosecution is
4 only required to show that the, quote, "selection process
5 actually rested upon some valid ground," end quote, if the
6 party relying on this defense can, quote, "first make a
7 showing of a strong inference of discriminatory
8 prosecution exists." And what that does, Judge, what that
9 says right there, is there is a threshold requirement.
10 There is a prerequisite to get this information, right?
11 "Must first make a showing that a strong inference of
12 discriminatory prosecution exists." They cite Associated
13 Industries, which is a case from 1975, obviously predates
14 Armstrong. More troubling, though, is that they quote
15 from Associated Industries. Associated Industries doesn't
16 say "first." That's added in. Now, I don't think
17 Ms. Raulston did that deliberately, but it's wrong.

18 THE COURT: Okay.

19 MR. ATHANAS: And the suggestion that Associated
20 Industries creates that threshold requirement before we
21 would be entitled to move forward and get discovery is
22 incorrect.

23 THE COURT: But what evidence do you have that
24 this is based on a political affiliation?

25 MR. ATHANAS: So, it's laid out in a couple of

1 ways, right? We talk about the way that he is contrasted
2 or similarly situated to the others who were associated
3 with that -- the business.

4 THE COURT: Sure.

5 MR. ATHANAS: All four.

6 THE COURT: But, I mean, there is no evidence
7 that others -- and by "the others," you mean the other
8 people in that business.

9 MR. ATHANAS: The other two, right.

10 THE COURT: Right. And I think she responds
11 basically her reasoning, but, I mean, if you are sort of
12 pinning it down on political affiliation, don't you have
13 to show some sort of similarly-situated democrats that
14 were just sort of let go and they didn't pursue that?

15 MR. ATHANAS: I think that's part of what we have
16 to show, but there is a step before that, Judge, which is
17 you are moving to the merits, which is what they are
18 moving to.

19 THE COURT: Okay.

20 MR. ATHANAS: Right? That's beside us. That's
21 not what -- what we have asked is, we have to show, under
22 Armstrong, some evidence. And "some" means any.

23 THE COURT: Okay.

24 MR. ATHANAS: And they have skipped past that
25 and, in fact, said "No, no, no, what you have to show is a

1 strong inference before you get anything." And that's not
2 an accurate characterization of the law or Associated
3 Industries. What we are saying is the law that controls
4 here is the Supreme Court's decision in Armstrong from
5 1996, which says some evidence. We believe we have
6 established some evidence in our pleas.

7 THE COURT: And I understand you make those
8 claims based on how this -- you claim treated differently,
9 --

10 MR. ATHANAS: Yes.

11 THE COURT: -- should have gone to the Ethics
12 Commission, but don't you have to show some evidence that
13 it's related to politics, --

14 MR. ATHANAS: Yes.

15 THE COURT: -- and political affiliation? I
16 understand that you are saying they have handled this very
17 poorly, and it was -- and they misused the process, but
18 don't you have to show that it's still -- there is some
19 evidence of that it's based on a political affiliation?

20 MR. ATHANAS: Yeah, and I think we have shown
21 that. Ultimately, what --

22 THE COURT: Tell me what that evidence is.

23 MR. ATHANAS: Right. It's the connection of he is
24 the only one in that business who is so politically
25 affiliated, who has that status as a presidentially-

1 appointed official.

2 THE COURT: What about Mr. Phillips?

3 MR. ATHANAS: Mr. Phillips is not subject to this
4 motion because's he's a public official. He has not
5 raised this. And what we are saying is --

6 THE COURT: But, I mean, they charged
7 Mr. Phillips.

8 MR. ATHANAS: They did charge Mr. Phillips.

9 THE COURT: Right. He is -- I don't know
10 Mr. Phillips' background. Mr. Espy, please correct me if
11 I'm wrong. He was on, I think, the ADEM board. Is that
12 right?

13 MS. RAULSTON: Alabama Environmental Management
14 Commission, yes, sir.

15 THE COURT: Yeah.

16 MR. ATHANAS: Public commission. He's a public
17 official. It was clear. The comparators, for our sake,
18 Judge, are the other two owners of that business, --

19 THE COURT: Okay.

20 MR. ATHANAS: -- who were not charged. That's
21 the relevant comparator, is who is similarly situated who
22 is not charged. And he -- the others in that business are
23 similarly situated, and they have an ownership stake, they
24 share in the revenues that are received from the building,
25 they are involved in the services that are provided there,

1 involved in submitting the bills, they are involved in
2 getting the money that comes out. We have three guys who
3 are not public officials, who are all similarly situated.
4 Only one of them gets indicted. And we believe that's
5 some evidence. We are not saying it's conclusive, but
6 that's some evidence of a discriminatory purpose.

7 THE COURT: Okay. And I read your brief. I
8 understand that you make the point that the contract with
9 the law firm was signed -- was it signed just by
10 Mr. Phillips?

11 MS. RAULSTON: No, Mr. Glenn is the principle and
12 Scott Phillips signed as a witness.

13 THE COURT: Okay. And you lay out, I think,
14 several reasons why he was more, I guess, the target in
15 this, as opposed to those two other individuals.

16 MS. RAULSTON: Yes, sir, the two other individuals
17 had very tangential involvement with this, and there is
18 testimony from -- and I'm not sure if that was included in
19 my response, so I won't include it here, but there's
20 testimony from Bill Vaughn, in the federal trial, that
21 (indiscernible) as well. And Mr. Athanas continues to
22 make the argument there is some evidence presented. The
23 some evidence gets you over the burden of me explaining
24 why I charged this person. And based on the Court's
25 order, I went ahead and responded why I charged this

1 person.

2 THE COURT: You did.

3 MS. RAULSTON: And so, him reaching the burden,
4 whatever burden he says is applicable, is irrelevant,
5 because I've already told the Court why I charged him, or
6 why -- yeah. If you need something further from me --

7 THE COURT: He is saying that they have at least
8 reached that threshold, and I guess he is requesting some
9 discovery on that point. Is that --

10 MR. ATHANAS: Yes, absolutely, Judge. That is
11 what some evidence gets you; discovery.

12 MS. RAULSTON: The interesting problem with that
13 is --

14 THE COURT: Why are they not due some discovery
15 to pursue this? Tell me why they are not.

16 MS. RAULSTON: Well, they can have it, but it's
17 really proving a negative.

18 THE COURT: What do you mean?

19 MS. RAULSTON: Proving a negative with the lack
20 of the other two individuals' involvement. I have to
21 prove a negative. Like, they are not -- they are not
22 involved. There may be one interaction or two interactions
23 over email, but they are not involved in the ongoing
24 management of this contract. The only involvement that
25 one of the other partners had was invoicing. So there was

1 not an effort on the part of the two of them to conceal
2 Scott Phillips' participation in this contract from ADEM,
3 from AEMC. He -- they were not complicit in the same way
4 that Trey Glenn was. They simply weren't. There just
5 isn't probable cause. And so providing discovery, which
6 will be, frankly, the discovery that is in this case
7 generally, I can't prove a negative, if I'm -- it's the
8 lack of involvement.

9 THE COURT: What is -- what is the discovery --
10 I mean, from where I sit, and I have read through many of
11 the materials that she has just mentioned, she makes an
12 argument as to why she pursued this case. I have read
13 through a number of memos and the other items. What
14 further discovery would you need, that you don't already
15 have, at least in front of you?

16 MR. ATHANAS: We see, and we have laid out in the
17 filings, Judge, --

18 THE COURT: And I'm looking at it.

19 MR. ATHANAS: -- some fairly detailed celebrating
20 by the folks at GASP, regarding this indictment and
21 claiming credit for it. We believe that we are entitled to
22 discovery by the communications that GASP had with the
23 Ethics Commission. What information did they provide?
24 What sort of discussion was there about the need to get a
25 high profile target here? And did that impact at all the

1 charging decisions that were made, particularly where we
2 have similarly-situated comparators? We have two other
3 individuals in the same business. Was that part of the
4 evaluation process that they went through, in deciding who
5 to charge?

6 THE COURT: Would there be anything wrong with
7 GASP communicating with the Ethics Commission?

8 MR. ATHANAS: No, I don't think there is anything
9 wrong. I think there is a whole lot wrong with the Ethics
10 Commission being dictated in it's decision making, or,
11 frankly, being impacted by what GASP suggested.

12 THE COURT: What evidence do you have that GASP
13 is running the train here and driving the train?

14 MR. ATHANAS: GASP celebrating. And I can give
15 you the quote, Judge.

16 THE COURT: No, I mean, I read it. I read the
17 tweet, I guess, or a Facebook post, whatever it was.

18 MR. ATHANAS: Yeah. They say "We did this."

19 THE COURT: And what is your response to that?

20 MS. RAULSTON: GASP'S reaction or lack of
21 reaction to any of this is completely irrelevant to any of
22 the charging or legal decisions made in this case. I --
23 it's just irrelevant, and never even known by me until
24 this motion was filed. That had nothing to do with the
25 consideration, and, frankly, the evidence that has already

1 been supplied in this -- the response brief, and in the
2 discovery that they have gotten at this point from those
3 who have been subpoenaed is the discovery that there is,
4 with regard to the participation or lack -- actually lack
5 of participation by the other two partners at EMC. But
6 GASP had no bearing on -- what they did or did not feel
7 about any of this is irrelevant to the charging
8 decisions.

9 THE COURT: Why is that relevant?

10 MR. ATHANAS: I just want to take a step back
11 here. I think it is relevant to the extent it impacted
12 the normal process; that GASP had in it's radar one
13 particular individual that they were going after. And so
14 the -- I know you have the document there, Judge, but page
15 8, the tweet is, "Just so y'all know, GASP made this
16 possible. We were the ones whose presentation was shared
17 by Glenn and Phillips. We paid for the exhibits in PACER
18 so we could piece this story together. We did the legwork
19 and the organizing."

20 THE COURT: Help me out. Who is the citizen that
21 brought the complaint, again?

22 MR. HART: GASP.

23 MR. ATHANAS: It's GASP.

24 MS. RAULSTON: It's --

25 THE COURT: Let me -- let me ask the question.

1 MR. ATHANAS: Sure.

2 THE COURT: Is Tom Ludder the name?

3 MS. RAULSTON: Yes, are you ordering me to release
4 the name of the --

5 THE COURT: No. It's in there.

6 MS. RAULSTON: Oh, oh, okay. Yeah, I had not
7 released it. I just --

8 THE COURT: Who is Tom Ludder?

9 MS. RAULSTON: David Ludder.

10 THE COURT: David Ludder. I'm sorry.

11 MS. RAULSTON: He is an attorney in Florida. He
12 is an environmental attorney in Florida.

13 THE COURT: Okay. Is he affiliated with GASP?

14 MR. ATHANAS: Yes. He is their attorney.

15 MS. RAULSTON: He -- yeah, he does work -- I
16 think he does work for -- just environmental groups
17 generally, but, yes, he does work for GASP, and Haley
18 Lewis is their other lawyer.

19 THE COURT: And the two people that came to the
20 D.A.'s office was Mr. Ludder and -- who was the other
21 individual?

22 MS. RAULSTON: Haley Lewis -- Colson.

23 THE COURT: Okay. Okay. Anything else on that
24 point?

25 MR. ATHANAS: No, Judge. Thank you.

1 THE COURT: Mr. Espy, are y'all -- so, you filed
2 a motion to dismiss based on not following those
3 procedural safeguards. Were there any other motions that
4 you filed to dismiss, other than that one?

5 MR. ESPY: We had filed a motion to dismiss based
6 on multiplicity grounds, counts five through fifteen, I
7 believe, Your Honor.

8 THE COURT: I thought we dealt with that, did we
9 not?

10 MR. ESPY: We filed that. Miss Raulston filed a
11 more definite statement.

12 THE COURT: Correct.

13 MR. ESPY: We then filed another one related to
14 the superseding indictment and the -- what she filed on
15 that.

16 THE COURT: Okay.

17 MR. ESPY: Let me say this about that, Your
18 Honor, and make sure it's related to this.

19 THE COURT: Okay.

20 MR. ESPY: We stand on what we filed on that. I
21 think if you look, our position would be -- that the only
22 thing I would ask Your Honor to look at, when you are
23 thinking about that motion, is -- this is Heywood versus
24 State. It's actually a fairly lengthy opinion, but there
25 is a very -- about page seventeen, eighteen, nineteen,

1 towards the back -- and you don't even need to look at it
2 now. You can look at it later, Your Honor, but basically
3 it's a claim where a former insurance commissioner had an
4 ethics violation, and they also charged him with two
5 counts of perjury. And part of fight that broke out --
6 like I said, later in the opinion, they should have only
7 charged him with one count of perjury.

8 THE COURT: Right.

9 MR. ESPY: And that's addressed in there. I
10 think the law that addresses those two counts, the Court
11 says "It just should have been one, and here is why."

12 THE COURT: Was that at the motion for judgment
13 of acquittal phase, though, or was that pretrial?

14 MR. ESPY: It was the judgment of acquittal, I
15 think.

16 THE COURT: Yeah. There was some evidence.

17 MR. ESPY: What they say ultimately is -- look at
18 the -- if what you are -- the guy lies twice, right? But
19 what you are proving, to say he lied twice, is the same
20 thing.

21 THE COURT: Sure. I get that.

22 MR. ESPY: So you have got to pick. So that's --

23 THE COURT: But that was dealt with at the --
24 after some evidence was heard.

25 MR. ESPY: That's correct, Your Honor.

1 THE COURT: Okay.

2 MR. ESPY: Anyway, that's how we would address
3 that, Your Honor.

4 THE COURT: Okay. Very good. Other than the two
5 motions we dealt with, are there any other motions to
6 dismiss that I have missed?

7 MR. HART: No more motions to dismiss, Your
8 Honor.

9 THE COURT: Okay. I think -- and please correct
10 me if I'm wrong -- I think, as a threshold question, I
11 need to get to the motions to dismiss based on the failure
12 to follow the statutory safeguards. Decide that, decide
13 should there be a further evidentiary hearing, before I
14 hear sort of these other issues. So that is sort of where
15 my focus is. And then, assuming there is some ruling on
16 that, then I would proceed to these other matters. Is
17 that -- would y'all agree?

18 MR. HART: Your Honor, I agree, with one
19 exception.

20 THE COURT: Sure.

21 MR. HART: The motion to strike we believe needs
22 to be heard, because if these affidavits are stricken,
23 then the Court is not going to be consider them when they
24 are coming to the decision on the statutory safeguards
25 motion to dismiss.

1 THE COURT: Sure. Well, I'm going to deny your
2 motion to strike. I think, as I said at the outset here,
3 it was helpful to me to get some further clarification on
4 some matters. Also, y'all pointed out in your second
5 brief that she went from the first person to the third
6 person. I actually thought it was better that there is an
7 affidavit in the record, as opposed to her making
8 representations in a brief. That's my position. So --

9 MR. HART: We don't disagree, Your Honor.

10 THE COURT: Maybe she should have done it in the
11 first part, but I'm glad that the record is sort of clean,
12 now that everybody has sort of filed an affidavit.

13 MR. HART: Very well, Your Honor. We would ask
14 permission of the Court to file our cert reply, if you are
15 going to allow that. And it's very short. I think we said
16 ten pages or less. It probably won't that be much.

17 THE COURT: Well -- you know, Mr. Hart, that is
18 fine, but what is it that you are hoping to accomplish,
19 --

20 MR. HART: Well --

21 THE COURT: -- that we haven't discussed here?
22 What is it that you think would be helpful?

23 MR. HART: Well, there is one thing, Judge, and I
24 didn't want to get into it, because I think we are ahead
25 some, but I'm happy --

1 THE COURT: Just as to the procedural
2 safeguards. Just as to that issue.

3 MR. HART: Right. Well, one thing is this. We
4 have an affidavit in there from Mr. Albritton, the
5 Executive Director of the Ethics Commission.

6 THE COURT: Agreed. I saw that, and I think that
7 was in response to -- y'all got an affidavit from
8 Mr. Sumner, who was the previous Ethics Commissioner.

9 MR. HART: Your Honor, if I may --

10 THE COURT: Okay.

11 MR. HART: We went and got --

12 THE COURT: I'm not criticizing that. I'm just
13 saying that was probably a response to that.

14 MR. HART: There is no doubt it was a response.

15 THE COURT: Right.

16 MR. HART: He says "I disagree with Mr. Sumner."
17 And what Mr. Albritton does -- and I think it is
18 (indiscernible), or going to have to be sorted at some
19 point --

20 THE COURT: Okay.

21 MR. HART: He cannot step out of his shoes
22 practicing law, with a limited license, in a commission --
23 for the Ethics Commission. He has statutory duties for
24 compliance, including in this case.

25 THE COURT: But didn't -- and I -- didn't a

1 previous commissioner testify in a jury trial?

2 MR. HART: On a different issue.

3 THE COURT: Okay.

4 MR. HART: There is a statutory allowance for
5 staff on the Ethics Commission to testify in ethics cases,
6 such as Mr. Fitch's case, which is the law of the land on
7 that issue, and in Mr. Wilder's case.

8 THE COURT: Why would that be different -- why
9 would live testimony be different than an affidavit?

10 MR. HART: Because they are not talking about
11 their own conduct. They are talking to a jury in those
12 cases about whether or not a certain set of facts are
13 covered by the ethics law. They are not offering to the
14 Court -- I could offer now -- I will be glad to offer my
15 resume as an expert and tell you everything I have done is
16 great.

17 THE COURT: Well, let me say this. I see what you
18 are saying; self-serving.

19 MR. HART: Not just that.

20 THE COURT: Okay.

21 MR. HART: Not just that. What are you going to
22 do, whether it's -- what are we going to do when we have a
23 proceeding, and Mr. Albritton comes in, and the Court
24 invokes The Rule, like we always do in criminal cases, and
25 everybody gets up and leaves, Mr. Sumner is not leaving,

1 he is an expert. He is going to watch every bit of it.

2 THE COURT: Right.

3 MR. HART: Mr. Albritton, can he stay and watch
4 as an expert? I mean, that's what it is. He says "It is
5 my opinion."

6 THE COURT: Well, I -- can we worry about that
7 later?

8 MR. HART: We could, but I think you should weigh
9 that --

10 THE COURT: Okay.

11 MR. HART: -- when you look at the affidavit. He
12 is saying to the Court, as an expert, "I have looked at
13 what we have done, and it's fine."

14 THE COURT: I hear you. I hear you.

15 MR. HART: So I think it should be honestly
16 stricken, Judge. I don't think that he can do that."

17 THE COURT: Well, to be frank, though -- and I
18 felt like this when I read Mr. Sumner's affidavit -- in a
19 way I felt like it invaded what I'm here to do. Why do
20 you need me, if you have got these people to tell me that
21 they followed strictly the safeguards or they didn't
22 follow the safeguards?

23 MR. HART: I'm glad --

24 THE COURT: What am I here for?

25 MR. HART: Thank you, Judge.

1 THE COURT: Doesn't that invade the province of
2 what I'm here to decide?

3 MR. HART: I think, to some degree, it does. And
4 I think you can disregard all of that. You do not need
5 that. And I have always thought frankly, and I have said
6 this before -- not that I'm quoted on the record
7 anywhere --

8 THE COURT: It would just be a battle of experts.

9 MR. HART: Even in the prosecution of these
10 things -- I was about to say, we have got an expert. He
11 is called a judge. If you are offering a legal question,
12 that's the judge's job. So, the law allows it.
13 Mr. Sumner's experience and his perspective is valuable,
14 his expertise is valuable, on educating the Court. The
15 Court said the Court wanted to be educated.

16 THE COURT: Agreed.

17 MR. HART: And that was our purpose.

18 THE COURT: Well, I will tell you this. I will
19 not -- Mr. Albritton's opinion of what should happen next,
20 how Judge Wallace should rule, that will have no impact
21 here. I think that is a legal decision that needs to be
22 made by a judge. If there is something that -- he gets to
23 some of the facts we have been disputing, I think that's
24 relevant that "On such and such date, I talked to
25 Mr. Anderton," I think that's fine. But I -- but frankly,

1 it wasn't that important to me, one way or the other.

2 MR. HART: Very well, Judge.

3 THE COURT: Okay. Did you want to say
4 something?

5 MS. RAULSTON: You are not striking the evidence,
6 the affidavit.

7 THE COURT: I'm not striking the affidavit, but
8 I can tell you that I'm not going to put a lot of emphasis
9 on that, because I think that's the whole reason you have
10 a judge. Otherwise, you wouldn't need a judge.

11 MR. HART: Your Honor, if I may, we'd still like
12 to file a cert reply, with something you don't need to put
13 so much emphasis on, but --

14 THE COURT: Okay.

15 MR. HART: If we may.

16 THE COURT: You may, Mr -- Mr. Hubbard. That's
17 fine.

18 (Laughter)

19 THE COURT: That was a mistake. That was --
20 Mr. Hart, that was a total mistake. I wasn't trying to
21 be -- for the record, I wasn't trying to be funny. I was
22 thinking about that case, and I misstated that.

23 MR. HART: Very well, Your Honor.

24 THE COURT: I did not mean it. Yes, by all means,
25 please, Mr. Hart.

1 MR. HART: Thank you, Judge.

2 THE COURT: You may do that. But in that case,
3 Mr. Hubbard's case, it was my understanding that he did
4 testify as -- the Ethics Commissioner did testify as an
5 expert witness.

6 MR. HART: He did, as to whether or not the
7 activity of the defendant, Mr. Hubbard, was covered --

8 THE COURT: Okay.

9 MR. HART: -- under the Alabama Ethics Law.

10 THE COURT: Okay. All right.

11 MS. RAULSTON: Can I ask one question?

12 THE COURT: Sure. But I'll allow him to file
13 that.

14 MS. RAULSTON: Yes. You are satisfied that -- and
15 one thing I wanted to point out about 36-25-4(I) -- that
16 is the -- one of the sections that gives the D.A.'s and
17 A.G. authority to ask -- to request the Commission to
18 assist them --

19 THE COURT: Yes.

20 MS. RAULSTON: -- appropriately (indiscernible).
21 You are satisfied, I believe, that the D.A. or the A.G. is
22 permitted to ask for that assistance and that the Ethics
23 Commission to provide it. If not, I can -- I just wanted
24 to make --

25 THE COURT: Yeah, I am satisfied with that.

1 MS. RAULSTON: Okay.

2 THE COURT: Is Mr. Hart satisfied?

3 MS. RAULSTON: And let me say this, too.

4 THE COURT: Is Mr. Espy satisfied?

5 MS. RAULSTON: No.

6 MR. ESPY: I don't want to step over her, but I
7 will, if it's all right. Look, we are not satisfied with
8 that. I go back to what I said.

9 THE COURT: What did you say, again? Say it one
10 more time.

11 MS. RAULSTON: What I want to say is about 4(I).
12 There is two sections that --

13 THE COURT: There are.

14 MS. RAULSTON: Okay. 4(I) is pre referral.

15 THE COURT: Right.

16 MS. RAULSTON: Not only is it pre referral, but
17 there are circumstances where, if we do not address a
18 complaint within 180 days, we lose jurisdiction.

19 THE COURT: Right. I saw that.

20 MS. RAULSTON: 4(I) says no matter if you have
21 lost jurisdiction, we -- D.A. or A.G. can still come to
22 you and ask you to take appropriate legal action --

23 THE COURT: Okay.

24 MS. RAULSTON: -- with or without jurisdiction,
25 with or without a complaint pending.

1 THE COURT: Okay.

2 MS. RAULSTON: They can ask us for help. I just
3 want to point that out.

4 THE COURT: I guess I didn't put a lot of
5 importance on that, because that's not procedurally how we
6 got here.

7 MS. RAULSTON: It isn't, but I think it is
8 important to -- for the intent of the legislature about
9 how broad --

10 THE COURT: I hear you.

11 MS. RAULSTON: -- the request of a D.A. or A.G.
12 is, with respect to asking counsel for the Ethics
13 Commission to assist.

14 THE COURT: Fair enough.

15 MR. HART: Your Honor, I -- those statutes are
16 residual sections made to clarify that the D.A.'s and A.G.
17 are not impacted by the restrictions that are in the
18 statute that creates the Ethics Commission. It really
19 illuminates that there are only certain ways the Ethics
20 Commission can move forward with criminal information.

21 MR. ESPY: You know, I thought, Your Honor, that
22 I really hated being on the opposite side as Mr. Hart.

23 (Laughter)

24 MR. ESPY: I'm starting to think that being on
25 the same side might be just as problematic. I am kidding.

1 MR. HART: That's a pot and a kettle, Judge.

2 (Laughter)

3 MR. ESPY: Let me say this, Your Honor. Without
4 digging back through what you can and can't do, I will --
5 I said this earlier, and then Ms. Raulston took issue with
6 it. I will say it again. What a D.A. can do, and the
7 Court can interpret and decide how they can, and should
8 and shouldn't. What they can do is request from the
9 Commission.

10 THE COURT: Yeah, I hear you.

11 MR. ESPY: And the only possible way to read that
12 statute is there has to be Commission action to approve
13 what they did. Five people have to decide "Yeah" --

14 THE COURT: Not Ms. Raulston.

15 MR. ESPY: Not Ms. Raulston. She cannot. Look,
16 it makes no sense to read the statute to say that the
17 lawyer for the Ethics Commission can unilaterally make a
18 decision to do something. It says "the Commission." And
19 the only way a commission of five people can act, the only
20 way those five people can decide what to do, is to take a
21 vote and the majority rules, period.

22 THE COURT: What's your position --

23 MR. ESPY: That's it.

24 THE COURT: What's your position on that?

25 MR. ESPY: It's the only way the statute makes

1 sense.

2 MS. RAULSTON: My response might not be as
3 emotional as Mr. Esby's, but it is that that is frankly an
4 unworkable solution to the Commission to work of the staff
5 of the Commission. "The Commission" is used as a
6 collective noun throughout our act.

7 THE COURT: I hear you.

8 MS. RAULSTON: And it says, for instance -- and I
9 won't go on and on, I promise, but, you know, "The
10 Commission will do all of the following: Make
11 investigations with respect to statements filed,
12 complaints filed." The five commissioners are not voting
13 every time we get a complaint in, about whether or not to
14 investigate that complaint. The staff makes that decision
15 and then proceeds based on the evidence that is presented
16 in the complaint. The Commission does not micro manage our
17 staff. The director manages the staff. And furthermore,
18 every time the Commission is expected to vote, the
19 statutes say that the Commission is required to vote. And
20 he says that the Commission staff cannot act without the
21 Commission voting. 27(c), the other authority saying the
22 D.A. and A.G. can ask for help, it says "They shall," --
23 "The Commission shall assist." The Commission is never
24 going to come up here and try a case. It's always going
25 to be the general counsel or a lawyer. So --

1 MR. ESPY: That is not what 27(c) says at all.
2 27(c) is not a "Shall" statute. It's just a permissive
3 --

4 MS. RAULSTON: It's "shall."

5 MR. ESPY: It says "The Commission shall provide
6 any and all appropriate assistance to such District
7 Attorney," one to whom something has already been
8 referred. That's what "such District Attorney" means.

9 MR. HART: That's right.

10 (Indiscernible - several speaking at once)

11 MR. ESPY: -- by the majority vote of the
12 Commission.

13 MS. RAULSTON: That "they shall help." I am just
14 saying they are --

15 MR. ESPY: Right. By "such District Attorney."

16 MS. RAULSTON: They are not having a separate
17 vote about whether or not the general counsel is going to
18 help.

19 THE COURT: Okay, I see the source of -- I see
20 the dispute.

21 MS. RAULSTON: Okay.

22 THE COURT: I got the dispute. There is no
23 agreement there.

24 MR. ESPY: There is no agreement. And I would
25 ask Your Honor, without -- I don't want to beat this dead

1 horse any more than I have already beaten it. But if you
2 would look at 36-25-3, where there is a specific section
3 about what the attorney for the Commission can do, if you
4 look at that, it says very clearly that one-hundred
5 percent of her time is to be dedicated to Commission
6 business. The entire -- everything she does has to be
7 commissioned business. That's what it says. So, the only
8 way for her --

9 THE COURT: What if she wants to do other
10 things?

11 (Laughter)

12 MR. ESPY: Well, look, look, if she wants to come
13 down here and work in this county and try a case in this
14 district, then she has to have approval of the Commission
15 to do so, or she is not on Commission business. By being
16 here without a vote of the Commission, she is violating
17 her statutory duty under 3, that -- period. So I would add
18 -- I don't want to beat -- I know we are trying to wrap it
19 up. I would ask the Court to look at that section as to
20 what she's allowed to do and what she is not. She is
21 outside of her statutory authority because she does not
22 have the approval of the Commission to be here.

23 THE COURT: If the matter went back to the
24 Commission, would -- does that -- does filing something
25 with the Ethics Commission toll the statute of

1 limitations?

2 MS. RAULSTON: No.

3 MR. HART: Your Honor, if I may make another
4 slight point, on a slightly different --

5 THE COURT: Before do you that, let me say this.
6 Are there any other cases, other than -- well, we got
7 Mr. White here, for the -- is it the E.N.J.?

8 MR. HART: E.J.M.

9 THE COURT: E.J.M. Are there any other cases
10 other than the E.J.M.?

11 MR. HART: E.J.M. is a -- in my -- I'm not
12 certain, Your Honor.

13 THE COURT: Was that --

14 MR. HART: I don't want to give you an answer
15 that --

16 THE COURT: Was the issue litigated, Mr. Hart, in
17 the Hubbard trial, of whether -- did that go through the
18 Ethics Commission, or did that go straight to the A.G.?
19 Was that issue ever litigated?

20 MR. HART: Not in that trial, Your Honor.

21 THE COURT: Okay. Did it go to the Ethics
22 Commission first?

23 MR. HART: No, Your Honor.

24 THE COURT: Okay, it went straight to the A.G.
25 Okay, I'm just trying -- the only reason I ask that, I was

1 just trying to see if there was any litigation on that
2 point, --

3 MS. RAULSTON: And E.J.M. is the only case law on
4 point in Alabama.

5 THE COURT: Okay -- if that was litigated
6 somewhere else. Okay. What were you going to say,
7 Mr. Hart?

8 MR. HART: Your Honor, I just wanted to point
9 out, and I will be quick about it, all the activity we are
10 talking about, in a practical matter, when you are talking
11 about due process and due process rights, the whole reason
12 they exist throughout the history of our country is so the
13 police, and prosecutors, and the government, and the state
14 follow the rules and treat people fairly, not just have a
15 statute. Like, I have been in places around the world
16 where they have lots of statutes, and nobody gets the
17 benefit of them.

18 THE COURT: Right.

19 MR. HART: Due process is an important issue for
20 us. And when you are looking at what police officers, or
21 investigators, or prosecutors do -- meet people, and talk
22 to them, and coordinate cases, and sharing information,
23 that's what they do. That's part of what they do. It's
24 an important part of what they do. They can't function
25 without doing that. And when the legislature restricted

1 the activity of the Ethics Commission, they were very
2 specific about it with the due process, and they give
3 statutorily -- not from the U.S. Constitution. The
4 Alabama legislature gave statutory extra protections.
5 That's what these are. They are entitled to extra
6 protections, not just the grand jury. They are going to
7 get that, anyway, following the process. But they are
8 entitled to go before that Commission and have the
9 material, be represented, if they desire to, and discuss
10 with that Commission and try to persuade that Commission.
11 And that's a very substantive point here. And it's the
12 things that --

13 THE COURT: But even if they convinced the
14 Commission, could the complainant not go to the A.G.'s
15 office --

16 MR. HART: Certainly.

17 THE COURT: -- and the D.A.'s office and say "I
18 don't trust that Commission. I want you to get involved"?

19 MR. HART: Certainly. But the Commission staff
20 can't do it.

21 THE COURT: Okay.

22 MR. HART: Now, certainly that complainant can
23 say -- and they do --

24 THE COURT: Yeah.

25 MR. HART: -- say "You know what, those guys are

1 lazy bums over there, and they wouldn't do it," or "They
2 are no good," or whatever.

3 THE COURT: Right.

4 MR. HART: "And you, Mr. A.G. or Mr. D.A., get on
5 this. This is your job." And then the D.A. or the A.G.
6 can execute their mission, as they should, as they see
7 fit. But the Commission staff cannot then take that
8 complaint and go do that, when it's in the portal of the
9 Ethics Commission.

10 THE COURT: Okay.

11 MS. RAULSTON: In E.J.M. --

12 THE COURT: The closing statements.

13 MS. RAULSTON: Yes, the closing -- in E.J.M., the
14 critical factor was that the independent prosecutorial
15 authority, the A.G., could not "un know" what the Ethics
16 Commission had divulged to them that was confidential
17 information. There is nothing for the D.A. in this case
18 to un know. They knew everything that had ever come to
19 us. So, the due process, they were already in the system.
20 And the due process of the criminal justice system was
21 protecting them, and it is still protecting them, and has
22 protected them. The due process provided for in the
23 statute regarding the Ethics Commission behavior, it's not
24 violated because there was no disclosure of confidential
25 information. There was no initiation, or self-generation,

1 or referral of a complaint that the D.A. never knew
2 about. They already had the information. That is what
3 this due process is, in the Ethics Commission statutes, is
4 meant to protect. It is divulging confidential information
5 and acting outside of those parameters. And that is not
6 what happened in this case.

7 MR. HART: I just want to address specifically
8 E.J.M., Judge.

9 THE COURT: Sure, Mr. Hart.

10 MR. HART: At 107 and 108, Section C, which is
11 both of those, they talk about the complaint process --

12 THE COURT: Uh-huh (affirmative).

13 MR. HART: -- and what they must follow
14 substantively; what must be done, what the Ethics
15 Commission must do on self-generated complaints. They go
16 all through the procedural requirements. They are clearly
17 inextricably bound with the -- with the other activity in
18 E.J.M., and they got rid of the case because it was fruit
19 of a poisonous tree. Any indication from E.J.M., this
20 certainly is a substantive issue. These defendants were
21 denied what the statutes of the State of Alabama clearly
22 provide to them, because staff members of a state agency
23 -- bureaucrats, prosecutors, whoever, decided they wanted
24 to do it a certain way. And if they can do that, they can
25 do it every time and this statute is meaningless, and it

1 can't be interpreted that way.

2 THE COURT: All right. Anything further?

3 MS. RAULSTON: No, Judge.

4 MR. ESPY: No, Your Honor.

5 THE COURT: All right, thank you very much. I
6 appreciate it. Again, I apologize for being late.

7 (End of proceedings)

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C E R T I F I C A T E

STATE OF ALABAMA)

JEFFERSON COUNTY)

I, Rhonda F. Meadows, CCR, Official Court Reporter of the State of Alabama, Tenth Judicial Circuit, do hereby certify that I recorded by means of stenotype the foregoing matter at the time and place stated in the caption hereof, that later the matter was reduced to computer print, and that the foregoing pages contain a full, true and correct transcript of the events on said occasion.

I further certify that I am neither of counsel nor of kin to the parties of said cause, nor in any manner interested in the result thereof.

S/L

Rhonda F. Meadows, CCR
Official Court Reporter

ABCR License #166

(My commision expires 9-30-19)