No. 2015-2207-C2

THE STATE OF TEXAS,	)	**54TH DISTRICT COURT**
	)	
Plaintiff,	)	**McLENNAN COUNTY, TEXAS**
	)	
v.	)	
	)	
MATTHEW ALAN CLENDENNEN,	)	
	)	
Defendant.	)	
	)	

POST-HEARING MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISQUALIFY MCLENNAN COUNTY DISTRICT ATTORNEY'S OFFICE AND APPOINT AN ATTORNEY *PRO TEM*

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I. FACTUAL BACKGROUND FROM HEARING

A. The Generally Consistent Testimony of the Police Witnesses

During the August 8, 2015 hearing, the testimony of the police witnesses (Chief Brent Stroman, Assistant Chief Robert Lanning, Detective V.R. Price, Jr., Detective Manual Chavez and Detective Michael Alston) were generally consistent and helped paint an accurate picture of what occurred on May 17, 2015.

Because Stroman was out of town on May 17, 2015, Lanning was the acting police chief. Tr. at 83. Neither Lanning, Price nor the other two Waco assistant police chiefs believed all Bandidos, Cossacks and their support club members should be arrested. Tr. at 196-97. Consequently, a plan was developed to transport the motorcyclists from Twin Peaks to the Waco Convention Center in order for them to be interviewed as witnesses and then the motorcyclists would be transported to various local police stations to be released.[1]

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[1]Tr. at 13 (Price: Q. So at some point they were considered witnesses? A. That was my understanding, yes ma'am.);

Tr. at 24 (Price: Q. Okay. And you realized they weren't being *mirandized* because they were only being treated as witnesses, correct? A. That's correct.);

Tr. at 193 (Lanning: A....The original intention was to detain them and identify them. If there weren't [outstanding warrants], they were going to be released. That process was already started when I got there.);

Tr. at 55 (Alston: Q. Okay. They were transported either to the police department at Lacy-Lakeview or another police department to be released. A. That was my understanding, yes. Q. Okay. And then you go on to say "released before a decision had been made by District Attorney that he wanted everybody arrested," correct? A. Yes. Q. Okay. And when you say

Nevertheless, McLennan County District Attorney Abel Reina did not like this plan at all and did not like the decision that Lanning was making not to arrest all of the Bandidos, Cossacks and their support club members. Indeed, Mr. Reyna wanted *all* motorcyclists present at Twin Peaks arrested regardless of club membership.[2] Mr. Lanning's testimony was very elucidating on these course of events:

> Q. Did Mr. Reyna advocate for their arrest when you were discussing this with him?
>
> A. I saw that as his recommendation.
>
> Q. Okay. If Chief Stroman said he advocated for their arrest, you wouldn't disagree with that, would you?
>
> A. No.
>
> Q. And so, based on this, that they should be arrested or this advocacy for arrest, that's when you said to Chief Stroman, we're getting a recommendation from the elected District Attorney that *we do something differently than we're already doing*; is that a fair statement?
>
> A. Yes.
>
> Q. Okay. Different being originally you were arresting them --

"he," are you referring to Abelino Reyna, the elected District Attorney of McLennan County? A. Yes.).

[2]Tr. at 196 (Lanning: A. [Mr. Reyna] initially said he felt *all* of the bikers wearing colors should be charged....But that was- but that was refined to bikers that were either Cossacks, Bandidos or could be shown as an affiliate.).

releasing them and now Abel Reyna gets his hands on it and says, no, they should be arrested, correct?

A. I think that was his recommendation.

Q. Okay. Well, you used the word "should." At least, I heard you use the word "should." Is that –

A. Should.

Q. Should be arrested?

A. Yes.

Q. Okay.

A. His recommendation was that they *should* be charged.

Q. Okay.

A. If they were wearing colors or -- if they were either the Bandidos, Cossacks, or an affiliate support club.

Q. And based on -- based on him recommending that these bikers should be arrested, what took place?

A. I originally consulted with the other two assistant chiefs and Sergeant Price to get their opinion.

Q. And what was their opinion?

A. *They did not agree* with the decision to arrest them.

Q. Any law enforcement official agree with the decision to arrest them?

A. I don't know.

Q. Well, let's talk about you. Did you agree with the decision?

A. *Not in my position as acting chief.*

Q. Okay. Did -- who else did you say you talked -- the other two assistant chiefs, did any of them agree with the decision?

A. *No, sir.*

Q. Okay. And Mr. Price I think you said you talked to. Did he agree with the decision?

A. *No, sir.*

* * * *

A. Well, when it first came up, I told Mr. Reyna that if the decision was mine, that *we were not going to make the arrests*. I didn't feel comfortable doing that as the acting chief. And he asked that I call the Chief. And he said, if you're not going to make it, will you call the Chief and see what his opinion is.

Tr. 196-97, 202.

Later, during a phone call between Reyna and Stroman, Reyna told Stroman that he wanted everybody arrested despite the opinion of each and every assistant police chief on the scene and Reyna advocated Stroman to authorize their arrest even though Stroman was on the East Coast with his family and not on the scene.[3]

[3]Tr. at 95 (Stroman: A. I received a phone call later that day or that evening from Assistant Chief Lanning. And he told me that he had conversations with the District Attorney and that the District Attorney–I don't remember the exact words he said. But something to the effect that – I felt like it was to the effect the he was *wanting everyone arrested*.);

Tr. at 96 (Stroman: A. It was a pretty short conversation. And basically [Reyna] said that – because I asked about what people were telling me as far as him advocating or wanting –

Reyna also told Stroman what he was observing at the Twin Peaks scene in order to justify his advocacy for the arrests.[4] Stroman eventually acquiesced and ordered the arrest of the motorcyclists although he did not know if they are being arrested for jaywalking or some other offense.[5] As Stroman explained during his testimony:

> Q. Okay. So you had nothing to do with determining the charge that this should, you know, be prosecuted as an Engaging in Organized Criminal Activity charge?
>
> A. I did not know that information until I got back in town on Monday.
>
> Q. Okay. So you had no knowledge of any facts that would support a charge like that?
>
> A. That's correct.

Tr. 98 In sum, when referring to Reyna's push to arrest on May 17, 2015, all the police officer witnesses used terms such as Reyna "wanting," "advocating," and

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wanting the arrests.);

Tr. at 101 (Stroman: Q. It was clear to you that Mr. Reyna was – even though Mr. Reyna couldn't put the handcuffs on people, it was clear to you that he wanted your department to arrest all these people? A. That's what I –that was what was presented to me.);

[4]Tr. at 142 (Reyna: Q. Well, in other words, you discussed some of - being on the scene there, you discussed some of your observations with Chief Stroman? A. Yes.).

[5]Tr. at 104 (Stroman: Q. But at that point, you didn't know whether they were going to be engaged– charged with arresting- Engaging in Organized Criminal Activity or jaywalking? A. That's correct.).

"recommend[ing]" the arrest of all Bandidos, Cossacks and their support club members. Tr. at 95-96, 101, 197.

At some point, the District Attorney's office set the criteria upon which motorcyclists would be arrested.[6] Then a "fill-in-the-name" arrest warrant affidavit was drafted by Mark Parker, Sterling Harmon, Gabe Price, Michael Jarrett and Reyna; all of the District Attorney's Office. Tr. at 163. The District Attorney's office wanted the affidavit to be signed by Manuel Chavez.[7] Chavez had no role whatsoever in providing the information in the affidavit or drafting the affidavit and was provided at least some of the information contained in the affidavit from Parker himself.[8] As Chavez testified:

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[6]Tr. at 19 (Price: Q. And who set out that criteria? A. The District Attorney's Office.);

Tr. at 21 (Price: Q. So based on the information the District Attorney was giving that determined how the investigators would proceed on the case? A. Yes, ma'am....).

[7]Tr. at 45 (Price: A. The only information I had was the D.A.'s Office had drafted the affidavit. They gave me the criteria that we should look for in order to get names to the on-call investigator. Detective Chavez was the on-call investigator. The affidavit specified that an investigator from Special Crimes would sign it. He was *their choice* because he was the on-call investigator.).

[8]Tr. at 86 (Chavez: Q. But you got the information from Mark Parker? A. Yes, sir. Q. And if it turned out that information was false, you're going to turn around and say, don't blame me, blame Mark Parker because he gave me the information; is that a fair statement? A. I signed the affidavit. So, I mean – Q. I understand you signed the affidavit. A. I'll take I'll take blame–where blame is needed. But, you know – Q. Okay. Well let me ask you this. If that information turns out not to be true, who's to blame? A. The officers that – that were able to give me the information *and Mark Parker*.);

Tr. at 87 (Chavez: Q. And so to circle back. You would blame Mark Parker if that information is incorrect because he's the one that gave it to you. You don't know where Mark

> Q. Okay. So in a usual case, I would call Manuel Chavez as a witness and say, you know, where did you get this information, why did you do this based on the information. That's what happens in a usual case.
>
> A. Yes, sir.
>
> Q. In this particular case, I'd have to call the District Attorney as a witness?
>
> A. Yes, sir.

Tr. at 91.[9] Indeed, as explained by Mr. Chavez:

> Q. You were given the probable cause to arrest Matthew Clendennen by Mr. Parker of the District Attorney's office?
>
> A. Yes, sir.

Tr. at 67-68.

After the affidavit was put in final form, it was shown to Chavez for the first time and he was told to sign it if it was accurate. Tr. at 89, 224. Although Chavez would not normally sign an affidavit alleging facts as if they were in his personal knowledge when they were not, he agreed to do so on this occasion.[10] Moreover,

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Parker got it from? A. Correct.).

[9]Similarly, Detective Price testified that he assumed that if witnesses were needed to be called "to explain the justifications for these arrests" the witnesses would be from the District Attorney's Office. Tr. at 129.

[10]Tr. at 69 (Chavez: Q. When you do not have personal knowledge of the information that you're swearing to is true, I assume it's your practice to put in there that this is not within your personal knowledge, you're being given this information by other individuals; is that a fair

during the process, the District Attorney's office provided the police "false information."[11] Chavez admitted that "[t]here's questions that involved facts and the probable cause that no one else can answer besides the District Attorney and his subordinates" despite the fact that he was the one who actually signed the affidavit Tr. at 88.

B. The Inconsistent Testimony of Elected District Attorney Abel Reyna

Of course, this Court has an opportunity to observe the testimony of Abel Reyna during the August 8, 2016 hearing. Reyna leaned over the witness stand, was combative in his testimony, was often non-responsive in his testimony and often made gratuitous remarks[12] in his testimony.[13] Most importantly, Reyna's

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statement? A. Yes, sir. Q. Okay. But this particular affidavit when you say the Waco Police Department was fired upon by the Bandidos and/or Cossacks, you don't put in that you were given that information by anybody else, correct? A. No, sir. *Q. You put it in there as if it's in your personal knowledge. A. Yes, sir. Q. And in fact as we sit here today, we just established that even today you don't know that to be true? A. That's correct...* Q. Okay. And so, when you – when you signed your name to this affidavit under penalty of perjury, you were apply – you were relying upon what Mark Parker of the District Attorney's Office told you? A. That and what I gathered from my investigation through other agencies that were there at the time.).

[11]Tr. 27 (Price: Q. But, in fact, you were given this false information by the District Attorney's Office. A. Yes, sir....).

[12]*See, e.g.,* Tr. at 170 (Reyna: A. I don't -- I don't care if you take food out of my son's mouth. I'm going to do the right thing. And a threat of a federal lawsuit or the threat of lawsuits in general is not going to have an affect on that decision. And it's the right thing to do. And as far as, you know, whether I'm exposed or what have you, I'm not worried about the federal lawsuit. I've read the lawsuits attached to your motion. The allegations are just inaccurate and false. So I'm not worried about your federal lawsuits. I'm really not.)

[13]*Gaggero v. Yura*, 2009 WL 2916759, *6 (Cal. App. 2009) ("The trial court found that plaintiff had 'credibility issues,' explaining that '[w]hile being questioned by his own attorney on

testimony was often self-serving and directly contradicted the testimony of the police witnesses.

1. Circumstances Surrounding the Arrest Warrant Affidavit

For example, at the August 8, 2016 hearing, Reyna testified that he gave very specific instructions to Detective Chavez on May 17, 2015 regarding the fill-in-the-name arrest warrants. Nevertheless, Detective Chavez testified that he never even saw Mr. Reyna that night!

A. Reyna

> Q. Prior to the affidavit being given to Mr. Chavez or Detective Chavez to sign, did you allow him to have any input?
>
> A. Absolutely. Absolutely. And a lot of the input -- that's what I was telling you about the hole from communication. There was a gap in communication between what was going on at Twin Peaks and what was going on at the convention center. And I remember getting the affidavit and it was, I believe, a draft somewhat of it. And I remember the draft made its way to Manny Diaz -- I mean, Manny Chavez. And Manny said something like -- to the effect of, this looks good. *But I, at that point in time, I cautioned him and told him, Manny, you need to read every single line and word in this affidavit and if you cannot*

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direct examination, [plaintiff] gave straightforward answers. On cross-examination by opposing counsel, [p]laintiff] was combative, evasive, non-responsive, and was impeached by his deposition testimony many times. He gave answers at trial that directly conflicted with his testimony at trial. He argued with opposing counsel and commented on his questions. At times during cross-examination, he was angry, red-faced and raised his voice at opposing counsel.'"); *David v. Our Lady of Lake Hops. Inc.* 857 So.2d 529, 533 (La. App. 2003) ("[T]he trial court specifically found Dr. Holden not to be a credible witness based on the gratuitous statements rife throughout his testimony."); *Webb v. TECO Barge Line, Inc.* 2012 WL 780851, *19 (S.D. Ill. 2012) ("The court always finds it very difficult to attach credibility to a witness that is as evasive and combative as a witness....")

swear to it, then you need to go back out there and get on the phone and call the people at Twin Peaks and make for sure that you can swear to everything in this affidavit. And I -- I told him that and I stressed it to him. And he says, no, okay, I will. And I said, that's a draft. We're working on it. You better make sure that you can swear to everything in that affidavit. And you need to go back out there and talk to the people at Twin Peaks. You need to talk to the people that had the intel leading up to it, the people that were -- that were sitting out there watching these guys try to kill each other. You need to know every single bit of it. And he said, I will, I will.

* * * *

Q. But just -- and I think you were fairly, but I just want to make sure I understand it. It's your testimony that [Detective Chavez] was allowed to review a affidavit before being given the final affidavit to sign?

A. They had written an affidavit.... And so, he had that draft or he was right there and I just remember him making the comment or saying something to the effect of, looks good to me or it's good or something. *And that's when I backed up and said, that's not going to work. We -- you need to make sure that you can swear to everything when this affidavit is complete.*

Tr. at 163-65.

B. Chavez

Q. Okay. Did you read over a draft or a final copy?

A. It was the final copy.

Q. And do you ever recall Mr. Reyna saying words to the effect, now, Mr. Chavez, you need to make sure that everything in here is true and I need you to call people and make sure it's true before you sign your name because you're signing your name? Did any conversation like that take place?

A. I never spoke to Mr. Reyna that night.

Tr. at 224. Moreover, Chavez testified he was *not* present when the affidavit was being prepared by the District Attorney's Office. Tr. at 89.

2. Role Played By Reyna on May 17, 2015

During his testimony, Reyna also made repeated attempts to downplay his role in the May 17, 2015 decision to arrest 177 motorcyclists on fill-in-the-name warrants. Indeed, Reyna repeatedly testified that he merely played a supporting role.

> Q. Using your definition of "advocating," your definition, did you advocate for their arrest?
>
> A. I don't know that I did that, Mr. Broden, because he felt after listening to all of the evidence that there was sufficient evidence to make that call. *And I told him that I would support him in his decision.* And I do.
>
> * * * *
>
> Q. And your communication with Chief Stroman, he actually asked for help that evening; is that right?
>
> A. That's -- yes, sir. I recall that, yes.

Tr. at 159, 180. This testimony by Reyna is directly contradicted by the testimony of Stroman, Lanning and Chavez as quoted above.

II. GENERAL LAW ON DISQUALIFICATION

As noted in Mr. Clendennen's initial motion to disqualify, it is well established law in Texas that, although it is normally up to a district attorney to initiate his own recusal, a trial court may disqualify a prosecutor when the disqualification is based on a conflict of interest that rises to the level of a due process violation. *State of Tex. ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 927 (Tex. Crim. App. 1994); *In re Goodman*, 210 S.W.3d 805, 807-08 (Tex. App. – Texarkana 2006) "For example, if a prosecutor has a financial stake in the outcome of a prosecution, the conflict between that interest and the duties of the public office *clearly presents constitutional concerns*." *In re Guerra*, 235 S.W.2d 392, 430-31 (Tex. App. – Corpus Christi 2007) (emphasis added).

Likewise, if a prosecutor may be called as a witness at a trial on the merits, due process may require a court to disqualify the prosecutor from prosecuting the case. *Id*. at 432. Indeed, counsel may be disqualified from a case when the opposing party can demonstrate actual prejudice resulting from opposing counsel's service in the dual role of advocate-witness. *Gonzalez v. State*, 117 S.W.3d 831, 837 (Tex. Crim. App. 2003).

It is important to note that Mr. Clendennen is not required to show *both* that Reyna or members of the District Attorney's Office are fact witnesses *and* that

Reyna has a conflict of interest based on his financial stake in the case. Either one, if it rises to the level of due process violation would require recusal.

III. THE AUGUST 8, 2016 HEARING ESTABLISHES THAT MEMBERS OF THE MCLENNAN COUNTY DISTRICT ATTORNEY'S OFFICE ARE POTENTIAL WITNESSES IN THIS CASE

A. Introduction

It first must be noted that this morass is not a problem of Matthew Clendennen's making. This is a problem of Abel Reyna's making. In an act of political opportunism, Reyna chose to assert himself and his assistants as potential witnesses by advocating for the arrest of 177 motorcyclists and drafting the arrest warrant affidavits with no input from the affiant. In cases such as this, a New York court summarized it best:

> We hold today that where the defendant, prior to trial, makes a significant showing that the prosecutor's prior investigative or prosecutorial conduct will be a material issue at the trial, the prosecutor should be recused. Where no such showing is made, however, a conviction will be reversed only when the defendant demonstrates a substantial likelihood that prejudice resulted from the prosecutor's participation in the trial.

People v. Paperno, 429 N.E.2d 797, 798 (NY 1971). Against this background it is helpful to note several established principles of law.

First, a defendant has a constitutional right to introduce evidence supporting his theory of defense before a jury. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

For example, in *Coleman v. State*, 545 S.W.2d 831, 832 (Tex. Crim. App. 1977), the Texas Court of Criminal Appeals held a Defendant has a right to present evidence to support his defensive theory. There, the defendant wanted to present evidence that the Killeen Police Department had a grudge against him and, essentially, that the Killeen Police Department conspired to prosecute an innocent man. *Id*. at 832-34. The Court of Criminal Appeals held it was error for the trial court to deny the defendant the right to put on evidence in support of this conspiracy defense. *Id*. at 835.

Second, evidence regarding the course of an investigation, how a person became a suspect in a particular crime and the circumstances surrounding his arrest is clearly admissible at trial. *See, e.g., Green v. State*, 287 S.W.3d 277, 283 (Tex. App.– Houst.[1st] 2009) (course of investigation); *Dinkins v. State*, 894 S.W.2d 330, 347 (Tex. Crim. App. 1995) (how a defendant became a suspect in a particular crime); *Courtet v. State*, 792 S.W.2d 106, 107 (Tex. Ap. 1990) (circumstances surrounding defendant's arrest).

Third, Tex. Code Crim. P. Art. 38.23 provides that "[n]o evidence obtained by an officer ... in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted against the accused on the trial of any criminal case." When an

issue exists as to whether the evidence was obtained illegally, the jury must be instructed that "if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of [Article 38.23], then ... the jury shall disregard such evidence so obtained." *Id.*

Fourth, it is well understood that a defendant has wide latitude in challenging the credibility of law enforcement investigators who investigate his case and testify at trial. *See Blair v. State*, 511 S.W.2d 277, 279 (Tex. Crim. App. 1974).

B. Reyna and Parker and Necessary Witnesses

In light of the foregoing principles, designed to insure a defendant a fair trial, the testimony of Reyna and Parker will be necessary at trial with regard to several issues.

First, Reyna's testimony is essential for the jury to understand the course of the investigation in this case. As noted above, before Reyna attempted to substitute his judgement for the combined judgments of Acting Chief Lanning, Detective Price and the other two assistant chiefs on the scene, motorcyclists in Mr. Clenndennen's position were simply considered to be witnesses who would be questioned and released. Tr. at 196-97, 202. Again, this "question and release" plan was developed from the considered judgment of professional law

enforcement officials with decades of experience until Reyna went over their head to advocate for the arrest of all Bandidos, Cossacks and their support club members. Tr. at 95, 96, 101, 196-97, 202. In part, Reyna based this advocacy on what he was observing at the scene. Tr. at 142. Moreover, he communicated these percipient observations to Stroman who was over 1,000 miles from the scene. Tr. at 142. Thus, Reyna would be the key witness, if not the only witness, to explain what he observed that caused him to disregard the law enforcement officials on the scene, go over their head, and advocate for the arrest of individuals in Mr. Clenndennen's position. In other words, Reyna is the key witness to testify to the 180 degree change in the course of the investigation, how Mr. Clenndennen's role changed in the blink of an eye from witness to suspect, and the circumstances surrounding Mr. Clenndennen's arrest. If there is any doubt about this, one need only look at the testimony of Detective Price:

> Q. So based on the information the District Attorney was given *that determined how the investigators would proceed on the case*?
>
> A. Yes, ma'am.

Tr. at 27.

Second, as note above, Detective Chavez, the lead investigator in this case, testified that he could *not* answer various questions and they would have to be directed to Mark Parker:

> Q. Okay. So in a usual case, I would call Manuel Chavez as a witness and say, you know, where did you get this information, why did you do this based on the information. That's what happens in a usual case.
>
> A. Yes, sir.
>
> *Q. In this particular case, I'd have to call the District Attorney as a witness?*
>
> *A. Yes, sir.*

Tr. at 91. Detective Price, Chavez's supervisor, gave similar testimony:

> Q. Okay. And if -- if a witness needed to be called to explain the justification for these arrests, that would have to be the D.A., correct?
>
> A. I would –
>
> Q. And others from the D.A.'s office?
>
> A. I would assume so, yes, ma'am

Tr. at 129.

Third, it may become necessary for Mr. Clendennen to question Chavez's credibility as the lead investigator on this case and the "author" of the arrest warrant affidavit. This would almost assuredly be done through the testimony of Reyna and Parker. Both testified to an elaborate conservation that Reyna allegedly had with Chavez in connection with the preparation of the arrest warrant affidavit. Tr. at 163-65, 236, 239. Chavez said flat out that, not only did this conversation not occur, but he did not even see Reyna that evening. Tr. at 89, 224.

It would be hard to argue that, in light of the elaborate conversation Reyna claims he had with Chavez regarding the affidavit, Chavez could simply be mistaken about not having talked to or seen Reyna that night. Therefore, if the testimony of Reyna and Parker is correct, a reasonable person would be forced to conclude that the lead investigator in this case, Manuel Chavez, has lied under oath regarding a portion of his investigation in this case. Obviously, that would be an area that Mr. Clenndennen would explore at any trial and it would be up to a jury to judge the credibility of Reyna and his assistant compared to the credibility of Chavez.

Fourth, there is an absolute need for the testimony of Mark Parker on any suppression issues that might be submitted to the jury pursuant to Tex. R. App. P. Art. 38.23. Indeed, Parker's testimony is crucial to any "fruit of the poisonous tree" analysis.

> •Law enforcement officials did not initially *mirandize* the motorcyclists because they did not believe the motorcyclists to be "in custody." Tr. at 24-25, 217-18. On the other hand, Parker testified that it appeared that the motorcyclists were, in fact, in custody when they were being questioned without *Miranda* warnings. Tr. at 232-34. This contradictory testimony creates a fact issue.
>
> •Parker will admit that the "fill-in-the-name" arrest warrant affidavits he wrote contain the fruits of these interrogations. Tr. at 238-39.
>
> •Seizures made incident to arrest such as cuts and cell phones are fruit of those arrest warrants.

Likewise, Chavez states he did not have personal knowledge of many of the

"facts" Parker included in the arrest warrant affidavit and that he was told these were "facts" by Parker. Thus, only Parker can testify as to how false claims, such as the false claim that the Cossacks Motorcycle Club was listed in the DPS Gang Database, came to be in the sworn affidavit. Chavez made this crystal clear in this testimony:

> Q. There's questions that involve facts and the probable cause that no one else can answer besides the District Attorney and his subordinates, correct?
>
> A. That's correct, yes, ma'am.

Tr. at 88. If it is determined that the facts included by Parker and given to Chavez are not true, any fruit flowing from the arrest warrant would be subject to suppression.

Finally, in line with the reasoning by the Court of Criminal Appeals in *Coleman*, Mr. Clenndennen will likely assert that his prosecution is motivated by Reyna's self-interest and that Mr. Reyna has created the State's theory of criminality based on conjecture and incredibly weak evidence. Just as it was error not to allow Coleman to present his theory of defense that his prosecution was motivated by police amicus, Reyna's testimony will be needed to establish that Mr. Clenndennen's prosecution is motivated by Reyna's self-interest.

IV. WITHOUT QUESTION ABEL REYNA HAS A PERSONAL AND FINANCIAL INTEREST IN THE CASE THAT "CLEARLY PRESENTS CONSTITUTIONAL CONCERNS."

It is undisputed that Abel Reyna is being sued in his individual capacity by Mr. Clendennen and approximately fifteen other motorcyclists for civil rights violations under 42 U.S.C. § 1983. *See* Defense Exhibit 6 and Tr. at 131. In addition, it is expected that many other motorcyclists will file similar law suits. Tr. at 175. It should be noted that the basis of the lawsuits are that the motorcyclists were subject to false arrest in violation of the United States Constitution. *See* Defense Exhibit 6 at 1 ("This is a civil rights action brought pursuant to 42 U.S.C. §1983 arising from the unlawful arrests that occurred in Waco, Texas on May 17,2015.").

A. Introduction

It should be immediately obvious that Reyna has a personal financial interest in the criminal cases. Indeed, it was immediately apparent to the federal judge overseeing the civil rights cases pending in the United States District Court for the Western District of Texas against Reyna:

> THE COURT: I don't think it's going to take long. The law's very clear.
>
> If you've got an interest in the case -- you know, I tried two cases with Racehorse Haynes. I've had the civil liability, I had the criminal

> liability, and on the first day of trial, he disqualified the district attorney and the police officers because he had caused some -- they were being sued. Now, they were being sued by the special prosecutor. So he had a pecuniary interest. But these people have a substantial interest. They're being sued in their personal as well as official capacities....

See Attachment A (June 3, 2016 hearing in *Bucy v. Stroman, et. al.*). While Judge Sparks observations are, just that, observations, they make Reyna's fight to remain on these cases particularly curious. Indeed, in the event there were convictions against the various motorcyclists, they all would ultimately have the right to petition to the United States District Court for the Western District of Texas for writs of habeas corpus pursuant to 28 U.S.C. § 2254. In the event a federal judge in the Western District concluded there was a conflict rising to a due process violation by allowing Reyna's office to prosecute these cases, new trials would have to be ordered and an untold amount of dollars and court time would have been completely wasted.

On the other hand, there is absolutely no credence to the observations made by Reyna's personal attorney, Thomas Brandt, predicting the fall of the criminal justice system nationwide in the event this motion is granted. Indeed, for a district attorney to show up at a crime scene and advocate for the arrest of 177 people when the acting police chief and two assistant police chiefs do not believe they should be arrested is likely a once-in-a-lifetime occurrence.

Thus, in most every case around the nation, a prosecutor will still have absolute immunity from being sued civilly and a criminal court can quickly dispose of any attempt to disqualify a prosecutor. *See, e.g., Lux v. Commonwealth*, 484 S.E.2d 145 (Va. App. 1997) (Prosecutor's absolute immunity from liability in defendant's federal civil rights suit prevented actual conflict of interest requiring disqualification of prosecutor based upon the defendant's filing of suit).[14] Here, however and as discussed below, it is clear under federal law that Reyna enjoys no such absolute immunity. Therefore, the concept of absolute immunity does *not* exist to shield Reyna from potential civil liability and, consequently, does *not* shield him from disqualification.

B. It Is Clear under Federal Law That Reyna Does Not Have Absolute Immunity in the Civil Rights Cases

It is true that a prosecutor enjoys absolute immunity for acts he commits that are an integral part to the judicial process, or acts which are intimately associated with the judicial phase of the criminal process. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). Nevertheless, the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit have long held that a prosecutor who

[14] *Id*. at 150 ("*Because the dismissal of the § 1983 action on immunity grounds was assured*, the Commonwealth's attorney had no personal interest in the lawsuit that might interfere with his decision to recommend either a partial or total revocation of appellant's suspended jail sentence." (emphasis added)).

involves himself in the investigative phase of the cause prior to a determination of probable cause is not entitled to absolute, prosecutorial immunity. *See, e.g.*, *Kalina v. Fletcher,* 522 U.S. 118 (1997); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) (*Buckley* III); *Burns v. Reed*, 500 U.S. 478 (1991); *Loupe v. O'Bannon*, 824 F.3d 534 (5th Cir. 2016); *Hoog-Watson v. Guadalupe County*, 591 F.3d 431 (5th Cir. 2009); *Cousin v. Small*, 325 F.3d 627 (5th Cir. 2003).

For example, in *Burns*, police identified Ms. Burns as a suspect in a murder case. *Burns*, 500 U.S. at 481. As a result, police decided to interview Ms. Burns under hypnosis. *Id*. "They became concerned, however, that hypnosis might be an unacceptable investigative technique, and therefore sought the advice of the Chief Deputy Prosecutor, respondent Richard Reed. [Reed, the prosecutor,] told the officers that they could proceed with the hypnosis." *Id*. The Supreme Court held that Reed did *not* enjoy absolute immunity from liability for damages under § 1983 for the giving of legal advice to police as there was no historical or common-law support for extending absolute immunity to such a case. *Id*. at 492-96.

Earlier this year, the Fifth Circuit dealt with a case in which an assistant district attorney ordered a sheriff's deputy to arrest a person. *Loupe*, 824 F.3d at 536. The Court held that the assistant district attorney was not entitled to qualified

immunity for her actions. *Id*. at 540 ("Ordering a warrantless arrest is not intimately associated with the judicial phase of the criminal process; it is conduct outside the judicial process and therefore is not protected by absolute immunity."). Even more analogous to the instant case is a case from the United States Court of Appeals from the Ninth Circuit. In that case, the Ninth Circuit observed:

> **Wilenchik is also not entitled to absolute immunity in connection with *ordering or advising* those making the arrests.** Neither are prosecutorial functions. In *Burns*, the Supreme Court held that giving legal advice to police, including advice as to whether there is probable cause to arrest a suspect, is not a function protected by absolute immunity. 500 U.S. at 493–96, 111 S.Ct. 1934; *accord Ewing v. City of Stockton*, 588 F.3d 1218, 1233–34 (9th Cir.2009). The mere rendering of legal advice is not so closely connected to the judicial process that litigation concerning that advice would interfere with it. *Burn*s, 500 U.S. at 493–94, 111 S.Ct. 1934. Further, "it is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice." *Id*. at 495, 111 S.Ct. 1934. Thus, to the extent that Wilenchik counseled police about the propriety of the arrests, he is not entitled to absolute immunity for the consequences.

Lacey v. Maricopa Cty., 693 F.3d 896, 914 (9th Cir. 2012) (emphasis added). *See also Holden v. Sticher,* 427 Fed. Appx. 749 (11th Cir. 2011) (Prosecutor was not entitled to absolute immunity from arrestee's § 1983 suit for *giving legal advice to the police on how to fill out affidavits for arrest against arrestee*.).

In the instant case, the credible testimony appears to be that Reyna "want[ed]," "advocat[ed]," and "recommended" the arrest of all Bandidos,

Cossacks and their support club members. Tr. at 95-96, 101, 197. Nevertheless, even accepting Reyna's own testimony- that he advised[15] police on the arrest of Mr. Clendennen and the other 176 motorcyclists- he does *not* enjoy the typical absolute immunity in the underlying civil cases which would generally cause a court to dismiss any motion to disqualify. *Lux v.* 484 S.E.2d at 150.

C. Reyna Has Limited If Any Insurance Coverage for Damages Awarded Against Him in the Civil Rights Cases

At that August 18, 2016 hearing, Abel Reyna gave evasive testimony regarding what indemnification, if any, he might have for attorney fees related to the civil rights lawsuits (including Mr. Clendennen's lawsuit) and any compensatory or punitive judgments entered against him in those suits. Often he deferred to his attorney to answer the question, but the attorney then claimed attorney-client privilege and refused to answer the questions Reyna suggested he should be asked. Nevertheless, during his testimony, Reyna referred to a policy from the Texas Association of Counties (TAC) which he claimed would provide up to $500,000 in coverage. Tr. at 132, 136. Reyna also testified that he believed the taxpayers of McLennan County would pick up the rest:

> Q. Okay. So if there was a judgment against you for five-million dollars, if my understanding -- if I'm following you, McLennan

[15]Tr. at 156 (Reyna: Q. I'm using the word Chief Stroman used. Did you advocate for the arrest of these groups? A. I *advised* him that there was sufficient evidence.).

County taxpayers would pick up the other 400 -- $4,500,000.00?

A. That's my understanding.

Tr. at 137.

Now that the policy has been produced, it would *not* appear that the TAC policy does not provide *any* coverage to Reyna. First, Reyna, as the district attorney is not covered under the general terms of the Public Officials Coverage Policy. *See* Main Policy at 8 ("The district attorney is not a Member."). Therefore, any coverage would be under the Public Official Optional Coverage Policy endorsement. *See* Defense Exhibit 11. Under that policy, claims for "malicious prosecution" are covered. Nevertheless, Mr. Clendennen's Section 1983 claim sounds in false arrest and not malicious prosecution and, returning to the main policy, it appears TAC distinguishes between the two.[16] Moreover, the optional District Attorney endorsement is arguably limited to official capacity lawsuits. *See* Defense Exhibit 11 at 1. In sum, it does not appear that the TAC policy covers false arrests claims brought against Reyna in his individual capacity.

In any event, even if the TAC optional District Attorney endorsement did provide coverage to Reyna, it is limited to $500,000 "per claim" and $1,000,000 in

[16] *Compare* Main Policy at 5 (Providing coverage for "malicious prosecution" claims) *with* Defense Exhibit 12 at 11 (not providing coverage for "false arrest" claims").

the aggregate.[17] Moreover, under the policy "[c]laims based on or arising out of the same or related acts, omissions or events involving one or more Members shall be considered a single Claim and only one deductible and one Limits of Liability shall be applicable to the Claim." In other words, $500,000 is the limit the TAC will pay in relation to *all* the civil suits arising out of Reyna's participation in the Twin Peaks incident.

Finally, despite Reyna's testimony, it has now been established that the McLennan County commissioners, on behalf of the McLennan County taxpayers, have entered into *no agreement* to indemnify Reyna above and beyond any coverage he is entitled to under the TAC policy. In sum, Reyna is limited to $500,000 coverage, *at most*, for any damages awarded against him as a result of his actions at Twin Peaks. In light of the damages suffered by Mr. Clendennen and the other motorcyclists as a result of Reyna's actions, the $500,000 TAC coverage, even if applicable, would be a mere drop in the bucket.

D. Reyna's Financial Interest Presents Constitutional Concerns Requiring his Disqualification

While Mr. Clendennen is not required to prove that Reyna has taken actions

[17] *See* Defense Exhibit 11 at 1 ("The Limits of Liability are inclusive of a Claim against the county attorney, a district attorney, an assistant county attorney, an assistant district attorney, or other employee of the county attorney or district attorney for malicious prosecution subject to a sublimit not to exceed $500,000 per Claim and $1,000,000 in the Aggregate.").

based on his financial interests and must establish only that he has a financial interest in the outcome of the case, the proof that Reyna is acting with financial interests in mind appears evident. Indeed, it is submitted that no right minded prosecutor would have sought an indictment against Mr. Clendennen in this case given that there is a video showing Mr. Clendennen sauntering along the Twin Peaks patio when the violence is taking place outside the patio and which then shows Mr. Clendennen running inside the restaurant when the shooting began. Likewise, Mr. Clendennen had no criminal history and the only "weapon" he possessed was a small pocket knife that was a Christmas present from his parents.

Nevertheless, Reyna *did* seek an indictment in this case. Moreover, given the time devoted to presenting the motorcyclists' cases to the grand jury (less than five minutes per defendant) it is sadly obvious that Reyna did not present any of Mr. Clendenenn's exculpatory evidence to the grand jury. Likewise, Reyna's office refused a request by Mr. Clendennen's counsel to allow counsel to appear before the grand jury and make a presentation on behalf of Mr. Clendennen. Simply put, the grand jury proceeding amounted to nothing more than a rubber stamping of Reyna's absurd theory of prosecution in this case. The only logical explanation for seeking an indictment against Mr. Clendennen was to give Reyna cover from the lawsuits which he knew were on the horizon. Lest there be any

doubt, the only explanation for Reyna rushing an indictment and then requesting a year long delay in trials was so that he could use the existence of the indictments for his own financial self-preservation. Indeed, Reyna is now using the grand jury indictments in the federal civil rights cases in an attempt to avoid responsibility for his civil rights violations.

If there was any other proof needed, one can look at Reyna's own admissions. As the Court knows, the Twin Peaks cases were presented to the grand jury in two waves. At the time of the first wave, Mr. Clendennen was the *only* member of the Scimitar Motorcycle Club that had filed a lawsuit against Reyna. Not coincidentally, he was then the *only* Scimitar indicted during the first wave. Tr. at 133-34. While other Scimitars were indicted in the second wave, it appears that Reyna's actions in indicting only Mr. Clendennen in the first round was to send a message.

In the end, it is anticipated that Mr. Reyna will ultimately be held jointly and severally liable to Mr. Clendennen for a significant money judgment unless Reyna is somehow able to secure Mr. Clendennen's conviction in this case. Simply put, Reyna's career and financial well-being are in jeopardy because of his flagrant disregard of well-settled constitutional law.[18] Nevertheless, if Reyna is

[18]The Fourth Amendment decisions clearly prohibit the use of open-ended or general warrants, such as the "fill-in-the-name" warrants prepared by the District Attorney's Office in

somehow able to obtain a conviction in this case, he reduces his personal financial exposure for the false arrest he "want[ed]," "advocat[ed]," and "recommended."

Of course, as part of a self-serving and repeated mantra Abel Reyna wants people to know that he will do "the right thing" regardless of the federal lawsuit even if it takes food out of the mouths of his family. Nevertheless, all the Court need decide is whether Reyna does, in fact, have a financial interest in prosecuting these cases. Moreover and to be frank, in light of the fact that Reyna is prosecuting Mr. Clendennen and taking food out of the mouths of Mr. Clendennen's children when video evidence clearly establishes his innocence, Mr. Clendennen has zero confidence that Reyna will do "the right thing" in his case. The proof is in the pudding![19]

V. CONCLUSION

A fair minded prosecutor should not want so desperately to be involved in prosecuting a case that he leaves claw marks on the case when it is suggested he

this case. *See, e.g., Maryland v. Pringle*, 540 U.S. 366, 371 (2003) ("...the belief of guilt must be particularized with respect to the person to be searched or seized."); *Merchant v. Bauer*, 677 F.3d 656, 666 (4th Cir. 2012) ("The Supreme Court has emphasized that '[w]here the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person.'"); *U.S. v. Guzman*, SA-13- CR-89-DAE (W.D. Tex. 2013); *Dinler v. City of New York*, 2012 WL 4513352 *6 (S.D.N.Y 2012) ("The Fourth Amendment does not recognize guilty by association.").

[19]The State has pointed out that a few of the motorcyclists that have filed suit against Reyna remain unindicted. Nevertheless, as Reyna has been quick to point out, any idea that the charges against them have been dismissed is "sadly inaccurate." *See* Attachment B. Indeed, Reyna has let it be known that his investigation is "ongoing" and that additional indictments can be issued at any time by "any McLennan County grand jury." *Id*.

step aside. Here, the hearing held in this matter establishes that members of the Mclennan County District Attorney's Office are potential witnesses in this case and that Reyna has a financial interest in obtaining a conviction against Mr. Clendennen at all costs.

Meanwhile, all Mr. Clendennen wants is simply to be afforded his due process rights under the United States Constitution and Texas Constitution and have his case prosecuted by an unbiased prosecutor who did not talk reluctant police into arresting him. Mr. Clendennen deserves that, the McLennan County taxpayers deserve that, and the criminal justice system as a whole deserves that.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, F. Clinton Broden, do hereby certify that, on this 19th day of October, 2016, I caused a copy of the foregoing document to be served on to be served by email on: Brandon Luce at brandon@lucefirm.com.

F. Clinton Broden