

IN THE COUNTY COURT OF HINDS COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

PLAINTIFF

VS.

CAUSE NO. 25CO1:16-cr-00624

ROBERT SHULER SMITH

DEFENDANT

MOTION TO DISQUALIFY DEFENSE COUNSEL

COMES NOW, the Plaintiff, the State of Mississippi, by and through the Office of the Attorney General, and moves this honorable Court to disqualify defense counsel, Jim Waide, from representing the defendant in this matter. In support of its motion, the State of Mississippi would show the Court the following:

1. Attorney Jim Waide entered his appearance as counsel of record for the defendant, Robert Shuler Smith (“Smith”), in this action on June 29, 2016. *See* Dkt. No. 5.

2. On the very next day, June 30, 2016, the State of Mississippi, through Special Assistant Attorney General Larry G. Baker, wrote Attorney Waide a letter advising him of the State’s view that since he may be a witness in this case, that he could be disqualified from representing Smith pursuant to Rule 3.7 of the Mississippi Rules of Professional Conduct. *See* Exhibit A.

3. In a telephone conversation with Special Assistant Attorney General Robert G. Anderson on July 1, 2016, Mr. Waide was again advised of the State's view that he is a likely witness in this case and could be disqualified from representing Smith. Notwithstanding the State's statement of its position that Waide is a likely witness in this case, he has filed a number of motions on behalf of Smith. *See* Dkt. Nos. 6, 7, 14 and 15.

4. The State is mindful of that fact that the issue of disqualification should be raised in a timely manner so as to avoid any suggestion that the State has waived the issue of disqualification. *See Colson v. Johnson*, 764 So.2d 438 (Miss. 2000). At this point in time, there have been no hearings in this Court and none of the motions on file have been taken up by the Court as yet. For that reason, the State of Mississippi now urges the Court to disqualify Jim Waide from representing Smith further in this case.

5. The basis for disqualification is set forth plainly in Rule 3.7 of the *Mississippi Rules of Professional Conduct*, which states in relevant part:

Rule 3.7. Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case, or

(3) disqualification of the lawyer would work substantial hardship on the client.

6. Even before the *Mississippi Rules of Professional Conduct* were adopted, the Mississippi Supreme Court had ruled that if an attorney or prosecutor is aware before trial that he will be a necessary witness, he should withdraw. See Adams v. State, 202 Miss. 68, 78, 30 So.2d 593, 598 (Miss. 1947). In the later case of Pearson v. Parsons, 541 So.2d 447 (Miss. 1989), the Mississippi Supreme Court – interpreting and applying Rule 3.7 – pointed out that “[t]he rationale of the rule rests on the premise that there exists of conflict of interest when an advocate is asked to be a witness.” *Id.* at 451. Additionally, the Supreme Court stated that “the most important and compelling rationale for this Court’s adoption of this rule is that the rule protects the distinction between advocacy and testimony and protects the integrity of the adversary system.” *Id.* at 452.

7. While there are some instances where a lawyer may not be disqualified if he is not “likely to be a necessary witness” or the evidence sought from him is available from another source, this is not such a case. See Horaist v. Doctor’s Hosp. Of Opelousas, 255 F.3d 261, 267 (5th Cir. 2001). In this case, the State has brought charges alleging that Smith, while acting in his capacity as District Attorney, willfully and unlawfully consulted, advised and counseled Christopher Butler, a defendant who had been charged with

embezzlement and wire fraud in the First Judicial District of Hinds County, Mississippi. *See* Affidavit, Dkt. No. 1. Smith was arrested on the charges filed in this case on June 22, 2016. As part of its case-in-chief in this matter, the State intends to offer evidence that Smith had one or more conversations with Attorney Jim Waide regarding Smith's attempts to assist Christopher Butler in connection with the pending charges against Butler. For example, in one recorded conversation between Smith and a confidential informant, Smith stated the following: "So we got Jim Waide . . ." and "he [Waide] came down here straight from New Orleans when I called him. . . ." In a further discussion with the confidential informant about Waide, Smith stated "Oh, we going to get him [Butler] free now between me and Waide and all that, and then Dennis is doing his thing on the other one." During another recorded conversation, Smith receives a call and states, "Hey! How you doing, Jim?" This conversation lasts for over 15 minutes. After the call, Smith tell the confidential informant, "That was Jim Waide." Smith later tells the confidential informant, "he said we have injunctive and declaratory relief."

8. As these excerpts plainly reflect, Smith sought to have Waide represent Butler in a pending case, although Butler already had counsel. Since the Christopher Butler case is a central matter in the State's case against Smith, Waide will be a necessary witness in the State's case against

his client, Smith. While other witnesses might be called to testify about Smith's involvement in the Butler case, the State will put in issue the question whether Smith sought to engage Waide to represent Butler and, in that respect, Waide's testimony is necessary to this prosecution and renders Waide disqualified under Rule 3.7. *Compare* Liberty Mutual Insurance Company v. Tedford, 644 S.Supp.2d 753, 767 (N.D.Miss. 2009).

9. The Court has a duty, just as the State of Mississippi does, to assure that Smith receives a fair trial and to assure that his selected attorney is free from conflicts that might impact on his client's trial. Since Waide will be a witness in this case, he cannot separate his role of advocate for Smith from his role as witness – regardless of whether his testimony is favorable or adverse to Smith. Tedford, *supra*, at 767. For that reason, Rule 3.7 mandates that Waide be disqualified from representing Smith in this case.

WHEREFORE, premises considered, the State respectfully requests that this Court rule that Attorney Jim Waide is disqualified from representing the defendant in this case.

THIS the 12th day of August, 2016.

Respectfully submitted,

JIM HOOD, MISSISSIPPI
ATTORNEY GENERAL

s/Robert G. Anderson

BY: Robert G. Anderson
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CERTIFICATE OF SERVICE

I, Robert G. Anderson, hereby certify that I have this day filed the above and foregoing Motion to Disqualify Defense Counsel with the Clerk of Court, utilizing the Court's electronic case filing system, which sent notification to the Jim Waide, Attorney for the Defendant, Robert Shuler Smith, at his usual e-mail address of waide@waidelaw.com.

THIS the 12th day of August, 2016.

s/ Robert G. Anderson
Robert G. Anderson
Special Assistant Attorney General
MS Bar No. 1589